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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAMES DOUGLAS SHAW, Defendant and Appellant.	F054698 (Consolidated Super. Ct. Nos. BF118941A & BF119693A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Leanne Le Mon, Deputy Attorneys General, for Plaintiff and Respondent.

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*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, only the Factual and Procedural Histories, parts I and V.A. of the Discussion, and the Disposition are certified for publication.

PROCEDURAL HISTORY

Appellant James Douglas Shaw was charged in case No. BF118941A with three counts of child molestation in violation of Penal Code[1] sections 647.6, subdivision (c)(2), and 288, subdivision (a), against two victims, B.M. and A.B. It was also alleged that Shaw had suffered three prior convictions in 1985 within the meaning of section 667, subdivisions (c) through (j), and section 1170.12, subdivisions (a) through (e). Count two was alleged as a serious felony within the meaning of section 1192.7, subdivision (c)(6).

In case No. BF119693A, Shaw was charged with three additional counts of child molestation in violation of section 647.6, subdivision (c)(2), and section 288, subdivision (a), involving a different victim, B.B. It was also alleged that Shaw had suffered three prior convictions within the meaning of section 667, subdivisions (c) through (j), and section 1170.12, subdivisions (a) through (e), and that the three 1985 convictions were serious felonies within the meaning of section 667, subdivision (a). A multiple-victim enhancement pursuant to section 667.61, subdivision (c), was also alleged. Counts one and two were alleged as serious felonies within the meaning of section 1192.7, subdivision (c)(6).

The court ordered the two cases consolidated for trial. The consolidated information charged as follows:

Count	Allegations	Offense	Victim	Dates
1	*§ 647.6, subd. (c)(2)* 6 Strikes (§ 667, subds. (c)- (j) & § 1170.12, subds. (a)- (e))	Annoying/ molesting w/prior 288	B.M.	12/16/05- 1/14/06
2	*§ 288, subd. (a)* Serious felony (§ 1192.7, subd. (c)(6)); 6 Strikes (§ 667, subds. (c)- (j) & § 1170.12,	Lewd and lascivious act, child under 14	A.B.	2/01/06- 6/01/06

[1]All further statutory references are to the Penal Code unless otherwise noted.

	subds. (a)- (e)); 3 prior serious felonies (§ 667, subd. (a))			
3	§ *647.6, subd. (c)(2)* 6 Strikes (§ 667, subds. (c)- (j) & § 1170.12, subds. (a)- (e))	Annoying/ molesting w/prior 288 of child under 14	A.B.	2/01/06- 6/01/06
4	*§ 288, subd. (a)* Serious felony (§ 1192.7, subd. (c)(6)); multiple victim (§ 667.61, subd. (c)); § 667.61, subd. (e)(5)); 6 Strikes (§ 667, subds. (c)- (j) & § 1170.12, subds. (a)- (e)); 6 prior serious felonies (§ 667, subd. (a))	Lewd and lascivious act, child under 14	B.B	2/1/03- 2/28/03
5	*§ 288, subd. (a)* Serious felony (§ 1192.7, subd. (c)(6)); multiple victim (§ 667.61, subd. (c); § 667.61, subd. (e)(5)); 6 Strikes (§ 667, subds. (c)- (j) & § 1170.12, subds. (a)- (e)); 6 prior serious felonies (§ 667, subd. (a))	Lewd and lascivious act, child under 14	B.B.	3/01/03- 6/12/04
6	*§ 288, subd. (c)(1)* 6 Strikes (§ 667, subds. (c)- (j) & § 1170.12, subds. (a)- (e)); 6 prior serious felonies (§ 667, subd. (a))	Lewd and lascivious act, child under 14	B.B.	6/13/04- 6/12/05

The case was tried to a jury, which found Shaw guilty as charged on all counts and found the multiple-victim allegations true. In a bifurcated proceeding, Shaw admitted the prior-conviction allegations. He was sentenced to two consecutive terms of 45 years to life on counts four and five and to three consecutive terms of 25 years to life on counts one, two and six, plus a consecutive 20-year determinate term for the prior convictions. The term imposed on count three was stayed pursuant to section 654. The court awarded Shaw a total of 299 days of custody credit for time served.

FACTUAL HISTORY

In 1985, Shaw was convicted in three separate counts of molesting a nine-year-old fourth grader whom he was babysitting. The victim, A.J., testified at trial that Shaw pushed her on the bed and put his hand down her pants and digitally penetrated her vagina. Shaw told A.J. not to tell her parents or they would not love her anymore. In 1996, Shaw molested A.S., a relative, who was around 14 or 15 years old. This molest was not reported to authorities but was handled within the family. In 2007, Shaw was charged with molesting three additional victims, A.B., B.B., and B.M. The three girls ranged in age from 8 to 16 years.

A.B. testified that when she was eight, she was alone with Shaw in the bedroom. Shaw pushed her against the bed and when she fell back, Shaw moved his private parts in a circle between her legs. She said he kept trying to move them toward her, almost pushed them on her and then brushed his private parts against her vaginal area. A.B. said Shaw asked her if it "felt good." A.B. was afraid and pushed Shaw away and ran out of the room. A.B. reported the molestation to her mother a couple of months later after watching a television show about sexual predators. A.B.'s mother confronted Shaw, but he denied this ever happened. At trial, he testified the two of them were just playing around, roughhousing.

B.M. was friends with Shaw's stepdaughters. Between December 2005 and January 1, 2006, when B.M. was 16 years old, Shaw took B.M. with him to a ranch for a day of horseback riding. B.M. thought Shaw's family would be with him, but when he picked her up, he was alone. On the ride to the ranch, Shaw made B.M. uncomfortable by asking her if she was a virgin and by telling her she should lose her virginity to an older man. After they rode for two to three hours in the company of the ranch's owner, Shaw took B.M. home. On the ride home, Shaw asked B.M. for a hug. He pulled her to the center of the front seat and kissed her. He put his arm around her, moved his hand to her breast and began rubbing it. When she pushed his hand away, he told her to stop

fighting. He also moved his hand up and down her inner thigh, rubbing it. B.M. asked him to stop, but Shaw told her he knew it felt good and that they could pull over anytime.

B.M. told her mother what had happened after seeing a television show about a girl her age going through the same thing. B.M.'s mother, Theresa M., contacted police. The two of them worked with the police to record conversations with Shaw in which they confronted him. In these conversations, Shaw ultimately admitted that he had molested B.M. Two of the recorded interactions were played for the jury at trial, a taped phone conversation between Shaw and B.M. and a videotaped meeting between Shaw, B.M., and her mother.

B.B. was Shaw's stepdaughter's good friend. She was 12 when Shaw first molested her. The molestation occurred when they were alone in a trailer at the ranch or in Shaw's truck or in B.B.'s house. Although B.B. could not remember specific dates, she testified that Shaw touched her breasts, inner thighs, and vaginal area, both over and under her clothes. She testified that he digitally penetrated her a number of times, although not often. She said Shaw often took her to school. It was during these times that Shaw molested B.B. Shaw told B.B. that if she told anyone, people would hate her. After B.B.'s father learned of the allegations made by A.B. and B.M., he asked B.B. a number of times whether she had been touched inappropriately. Since B.B. was embarrassed and was afraid she would lose her friendship with Shaw's stepdaughter, she initially denied any inappropriate contact. Finally, after Shaw had been arrested on the other charges, B.B. told police what had happened.

Carol W., a cousin of Shaw's wife, testified about an incident that occurred between her and Shaw in 1999. She was an adult at the time. Shaw came to visit and said Carol needed a massage. She was not interested, but Shaw followed her to the bedroom and pushed her down on the bed. He began rubbing her legs, thighs, and vaginal area. He demanded a kiss and would not let her go. Finally, he left. Carol W. eventually informed police.

Shaw testified in his own behalf. He denied any inappropriate touching of the three victims, although he admitted the prior convictions.

DISCUSSION

I. Statute of limitations, counts I & VI

Shaw was charged in count one with a felony violation of section 647.6, subdivision (c)(2), annoying or molesting a child under the age of 18 and having been previously convicted of a violation of section 288, subdivision (a). The statute provides that a person found to have violated this section "shall be punished by imprisonment in the state prison for two, four, or six years." (§ 647.6, subd. (c)(2).) The offense was alleged to have occurred between December 16, 2005 and January 14, 2006. Prosecution began on April 30, 2007. Shaw contends that count one is barred by the one-year statute of limitations generally applicable to misdemeanor offenses, because section 647.6, subdivision (c)(2), does not change the underlying misdemeanor offense, it only enhances the sentence for recidivists. Shaw claims, "one should look to the conduct underlying the conviction to determine the applicable statute of limitations, without considering sentence enhancements due to recidivism."

Shaw relies on section 805, subdivision (a), which provides that "[a]n offense is deemed punishable by the maximum punishment prescribed by statute for the offense, regardless of the punishment actually sought or imposed. Any enhancement of punishment prescribed by statute shall be disregarded in determining the maximum punishment prescribed by statute for an offense." (§ 805, subd. (a).) He also relies on case authority holding that sentence-elevating enhancements are not elements of the underlying offense. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 478 (*Bouzas*); *People v. Turner* (2005) 134 Cal.App.4th 1591 (*Turner*); *People v. Whitten* (1994) 22 Cal.App.4th 1761, 1765 (*Whitten*); *People v. Coronado* (1995) 12 Cal.4th 145, 152; *People v. Merkley* (1996) 51 Cal.App.4th 472, 476.)

This issue, the appropriate statute of limitations to be applied to section 647.6, subdivision (c)(2), has been addressed by two other appellate courts in *People v. San Nicolas* (1986) 185 Cal.App.3d 403 (*San Nicolas*), which addressed the issue in the context of section 647a, the statutory precursor to section 647.6, subdivision (c)(2), and *People v. McSherry* (2006) 143 Cal.App.4th 598 (*McSherry*). Both courts concluded that when a defendant is charged with felony child annoyance or molestation as a recidivist, the appropriate statute of limitations is the three-year felony statute of limitations. We conclude these cases are persuasive and follow their lead.

The court in *San Nicolas* noted that a violation of former section 647a was defined statutorily as an offense with variable punishments according to the criminal history of the defendant. The court also observed that the prior conviction required for the maximum penalty did not work as an enhancement, i.e., an additional term of imprisonment added to a base term, but instead converted what would otherwise be a misdemeanor into a felony offense with a greatly increased maximum penalty. (*San Nicolas, supra,* 185 Cal.App.3d at p. 407.) The court pointed out that to construe section 805 as the defendant in *San Nicolas* contends (and Shaw here) would lead to absurd results. "Such interpretation would erode the distinction between enhancements and elements of an offense in certain hybrid offenses. In effect, it would establish the same period of limitation for the prosecution of felonies and misdemeanors in those instances in which an offender's criminal history dictates the degree of the crime. That consequence surely could not have been intended by the Legislature and cannot be permitted. [Citation.]" (*San Nicolas, supra,* at p. 408.)

McSherry, a more recent decision, adopted the reasoning of *San Nicolas*, enhancing the analysis with a reference to the legislative history of subsequent changes to the law. The *McSherry* court looked directly at the language of the statute, which expressly provides for a maximum sentence of six years. Under section 805, subdivision (a), the applicable statute of limitations is determined by the maximum

punishment proscribed. A literal reading of the governing statutes supports a finding that the applicable statute of limitation is three years. (*McSherry*, *supra,* 143 Cal.App.4th at pp. 603-604.) Next, the *McSherry* court noted that, "given the *San Nicolas* result in 1986, application of the misdemeanor statute of limitations in this case would run afoul of the rule of statutory construction that recognizes that where statutory language has been construed judicially, and the Legislature thereafter amends the statute but leaves the construed language intact, it is presumed the Legislature was aware of the prior construction and adopted it. [Citations.]" (*Id.* at p. 603.)

The court explained that section 647.6, subdivision (c)(2), is a subsequent statute on a similar subject that uses substantially similar language to the statute construed by *San Nicolas*.

> "At the time of *San Nicolas*, section 802, subdivision (b), provided prosecution for a misdemeanor violation of former section 647a committed upon a minor under the age of 11 years, could be commenced within two years after commission of the offense. (Stats. 1985, ch. 1172, § 2, p. 3957.) In 1991, the Legislature amended section 802, subdivision (b), to increase the applicable age of the child from 11 years to 14 years and to add an express reference to section 647.6. (Stats. 1991, ch. 129, § 1, p. 1328.) [¶] The Legislature amended section 802, subdivision (b), again in 2002 to increase the limitation period for a violation of section 647.6 when the victim was under the age of 14 years from two to three years. (Stats. 2002, ch. 828, § 2.) By effecting these amendments without disturbing the judicial construction of the limitations period applicable to a violation of the precursor of section 647.6, subdivision (c)(2), the Legislature indicated its intent to adopt the *San Nicolas* result that the applicable statute of limitations for that offense is three years. [Citation.]" (*McSherry*, *supra,* 143 Cal.App.4th at pp. 603-604.)

McSherry also noted that the legislative committee reports prepared in conjunction with the 2002 amendments to section 802, subdivision (b), state that the statute of limitations for child annoyance with a prior conviction was *three years or more*. (*McSherry*, *supra,* 143 Cal.App.4th at p. 604; see Assem. Com. on Public Safety, Analysis of Assem. Bill No. 2499 (2001-2002 Reg. Sess.) as introduced on Feb. 21,

2002, p. 7 [applicable statute of limitations is three years for repeat offenders]; Sen. Com. on Public Safety, Analysis of Assem. Bill No. 2499 (2001-2002 Reg. Sess.) as amended June 27, 2002, p. J [under current law, person previously convicted of child annoying as misdemeanor is punishable as felony for second or subsequent conviction; applicable statutes of limitations for these felony offenses is three years or more, depending upon penalty term].) This history reflects a legislative intention that the offense described in section 647.6, subdivision (c)(2), be subject to the three-year felony statute of limitations.

McSherry distinguishes *Turner*, *supra,* 134 Cal.App.4th 1591, a case Shaw claims supports his position that the recidivist provision of section 647.6, subdivision (c)(2), is an enhancement and not part of the underlying offense for purposes of section 805. *McSherry* notes that the defendant in *Turner* was charged with residential robbery, which generally must be prosecuted within three years. Since a Three Strikes prior-conviction allegation subjected the defendant to a maximum term of 25 years to life in state prison, the trial court in *Turner* applied the never-expiring statute of limitations provided in section 799, which sets the statute of limitations for those offenses prescribing life terms. The appellate court in *Turner* reversed on the ground that the Three Strikes law is an alternative sentencing scheme, which should not govern the maximum punishment prescribed for the offense for purposes of determining the applicable statute of limitations. (*McSherry*, *supra,* 143 Cal.App.4th at p. 603.) *McSherry* accurately concluded that section 647.6 does not involve an alternative sentencing scheme.

The remaining cases cited by Shaw do not require a different outcome. First, as with *Turner*, none of them are directly on point. In *Whitten*, *supra,* 22 Cal.App.4th at page 1764, we held that it was improper to use a prior section 288 conviction to aggravate a sentence when it was also used to elevate a violation of section 647.6 to a felony conviction, a classic dual use of facts analysis. This is not the issue before us now. In *Whitten*, we noted that the prior-conviction component of section 647.6,

subdivision (c)(2), was not an element of the offense and cited *Bouzas, supra,* 53 Cal.3d 467.

In *Bouzas*, the court considered whether the prior-conviction allegation found in section 666 (petty theft with a prior) was an *element* of the offense so that it had to be proved to the trier of fact in open court preventing the defendant from removing the prior conviction from the jury by stipulating to its existence. (*Bouzas, supra,* 53 Cal.3d at pp. 470-471.) The *Bouzas* court concluded it was not, describing the prior-conviction component of the offense as a "sentencing factor." (*Id*. at p. 480.) The court in *People v. Merkley, supra,* 51 Cal.App.4th 472, 476, reached the same result when considering the same issue. None of these cases address the issue here. We have no problem with the holdings in each of these cases and do not believe a legal conclusion that the prior-conviction allegation is not an element of the offense precludes a finding that a sentence-elevating enhancement provision such as found in section 647.6, subdivision (c)(2), should be considered when setting the maximum punishment prescribed by statute for purposes of section 805, subdivision (a).

People v. Coronado, supra, 12 Cal.4th 145, another case cited by Shaw, supports our conclusion. In this case, the defendant argued that his prior conviction could not be used both to elevate his conviction to a felony under former Vehicle Code section 23175 (added by Stats. 1983, ch. 637, § 3, repealed by Stats. 1998, ch. 118, § 41 eff. July 1, 1999), a statute operating similar to section 647.6, subdivision (c)(2), and to enhance his sentence pursuant to section 667.5, subdivision (b). The court concluded, however, that the prior conviction could be used for both purposes, which it found distinct. (*People v. Coronado, supra,* 12 Cal.4th at p. 153.) The court's decision to allow dual use of the prior in this context is consistent with our conclusion that these sentence-enhancing factors are neither enhancements nor elements of the offense and may be considered for purposes of calculating the statute-of-limitations period under section 805.

We also reject Shaw's equal protection argument. In order to prove a violation of equal protection, the proponent of the argument must prove he or she is similarly situated with one treated differently under the statute. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 [first inquiry in equal protection claims is whether state has adopted classification affecting two or more similarly situated groups in unequal manner].) A person who annoys or molests a child, and has done so in the past, is not similarly situated to one who has committed the same offense but has never before done so. (See *People v. Coronado, supra,* 12 Cal.4th at p. 153 [one who has before been convicted of same offense is more blameworthy offender].)

Shaw also contends that count six (§ 288, subd. (c)(1), committed against B.B.) was time barred because the earliest date in the range of time alleged for the conduct fell outside the applicable statute-of-limitations period. All parties agree the prior statute of limitations on count six would have expired on June 13, 2007, and prosecution did not begin until June 27, 2007. The Attorney General, however, has pointed out that the statute-of-limitations period for a violation of section 288 was extended to anytime prior to the victim's 28th birthday before the statute of limitations expired in this case. (§ 801.1, subd. (a), amended by Stats. 2005, ch. 479, § 2; see also *Stogner v. California* (2003) 539 U.S. 607, 618-619 [if limitations period extended before current period expires, no constitutional violation].) Shaw concedes this is correct. We accept the concession.

II. Sufficiency of the evidence—counts two and three

Shaw contends that there was insufficient evidence to support the conviction on count two, lewd and lascivious conduct, and count three, annoying and molesting a child. The counts arise out of the conduct, which occurred between Shaw and eight-year-old A.B. on some unknown date.

The standard of appellate review is settled when a defendant claims there is insufficient evidence to support a jury verdict: The appellate court reviews the whole

record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value from which a trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) Before a judgment will be reversed on the grounds that there is insufficient evidence to support a jury's determination of guilt, it must appear that "upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

To uphold a conviction of a section 288, subdivision (a), offense, there must be substantial evidence satisfying the following elements: (1) the defendant touched a child under the age of 14, (2) with the specific intent of arousing or gratifying the sexual desires of the defendant or the child. (*People v. Imler* (1992) 9 Cal.App.4th 1178, 1181-1182.) A.B. testified that, while alone in a bedroom with Shaw, Shaw pushed her onto the bed so that her legs were separated and hanging over the bed. A.B. said that Shaw stood between her legs and "went in circles," moving his private parts towards her, and "almost pushed on me." She said he did not touch her with his hands, but he continued to move in circles, "trying to move them [his private area and waist] towards me." When asked specifically whether he ever brushed his private area up to her vaginal area, A.B. answered "yes." A.B. was a very credible witness, despite her young age. Her testimony alone is sufficient to establish the touching element of the offense. She also told her mother that Shaw had "touched" her inappropriately. The jury was free to conclude the "brush" was a touch given the circumstances.

There is also sufficient evidence to support a conclusion that Shaw touched A.B. with the specific intent to arouse or gratify himself and/or A.B. Shaw asked A.B. whether "it felt good." The jury was free to draw the inference that this comment referred to sexual gratification, particularly given the context and Shaw's past history, even though Shaw now claims he was simply asking whether it felt good to dance. His alleged usage of the phrase in this context was awkward and it is not surprising the jury

rejected it. In any event, we cannot say no reasonable juror could have concluded that Shaw was making a sexual reference when he used the phrase.

For the same reasons, we conclude count three is supported by substantial evidence. Shaw claims his conduct was not objectively offensive nor did it suggest abnormal sexual interest in a child. These are the elements of a section 647.6, subdivision (a), offense. (*People v. Lopez* (1998) 19 Cal.4th 282, 289.) The jury could reasonably conclude that Shaw's conduct with A.B. could be objectively and unhesitatingly viewed as irritating or disturbing to a child and prompted by an abnormal sexual interest in children. Given the context of the acts in question, an objective observer would not view Shaw's conduct as "an uncle doing a silly dance, clowning to amuse his eight-year-old niece."

We also see no merit in Shaw's claim that the verdict is flawed because A.B. could not establish exactly when the offense occurred. Shaw claims that A.B. could not name a day or month and therefore could not set the general time period in which the acts occurred. A.B. testified that the incident occurred when she was in the third grade and was eight years old. This is sufficient. A victim's testimony establishing the type of conduct involved, its frequency, and that the conduct occurred during the limitation period is sufficient. "Nothing more is required to establish the substantiality of the victim's testimony in child molestation cases." (*People v. Jones* (1990) 51 Cal.3d 294, 316.)

III. Consolidation

Shaw contends that the trial court abused its discretion when it ordered case No. BF118941 (the case involving B.M. and A.B.) joined for trial with case No. BF119693 (the case involving B.B.).

Joint trials are permitted and "broadly allowed" by section 954. (*People v. Soper* (2009) 45 Cal.4th 759, 772.) The requirements for consolidation were met here because each count in the two cases alleged the same class of crime. (See *People v. Ochoa* (1998)

19 Cal.4th 353, 409.) When a defendant seeks to sever cases properly joined or objects to consolidation, the trial court is to consider "(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case." (*People v. Mendoza* (2000) 24 Cal.4th 130, 161.)

We will reverse a trial court's order on the question of consolidation only if the trial court's ruling falls outside the bounds of reason. (*People v. Ramirez* (2006) 39 Cal.4th 398, 439.) We must also determine whether, even if consolidation were correct, the joint trial actually resulted in gross unfairness, amounting to a denial of due process. (*People v. Arias* (1996) 13 Cal.4th 92, 127.)

In this case, because of the similarity of the acts committed against similarly situated victims, the evidence of each of the offenses charged in both cases would have been cross-admissible under Evidence Code section 1101 to show intent, plan, or common scheme. (*People v. Soper*, *supra*, 45 Cal.4th at p. 776.) Both cases involved similar acts of molestation of young girls and, as a result, no single one was likely to unusually inflame the jury against Shaw with respect to any of the others. The cases were supported by essentially the same evidence—a complaining witness who was credible at trial and who reported amazingly similar acts without prior knowledge (or in B.B.'s case, detailed knowledge) of each others' claims or of Shaw's prior convictions.

Shaw claims that both cases were weak, the B.M. and A.B. case because it involved only "borderline" conduct, and the B.B. case because, although it involved more serious conduct, it consisted of generic complaints and not specific testimony by the complaining victim. We disagree. Each of these cases standing alone would have been fairly strong. The victims were articulate despite their young ages and, although not

exact in detail, sufficiently specific in their description of the acts committed. Evidence of Shaw's similar prior convictions was admissible in both cases. There was no abuse of discretion and no due process violation occurred. (*People v. Bean* (1988) 46 Cal.3d 919, 938-940 [no due process violation where defendant does not demonstrate reasonable probability that joint trial affected jury's verdict].)

IV. Evidentiary issues

A. Cross-examination regarding Shaw's earlier denial

At trial, the prosecutor offered into evidence a recorded conversation between B.M. and Shaw and a videotaped meeting between B.M., Shaw, and B.M.'s mother, Theresa M. At trial, there was evidence of other conversations with Shaw, but their content was not introduced. Shaw attempted to cross-examine both Theresa M. and B.M about what Shaw said during the earlier conversations. The prosecutor objected and the trial court sustained the objections, ruling that defense counsel could not ask about what Shaw said in the earlier conversations. Shaw claims that the trial court erred when it prevented him from cross-examining B.M. and Theresa M. on what was said during the earlier calls. He argues that the evidence was admissible under Evidence Code section 356 and that he should have been able to show the jury his theory of the case, i.e., that he originally denied the allegations made by B.M. and only admitted them after Theresa M. told him that B.M. was suicidal and that Theresa M. would call the police if he did not.

Evidence Code section 356 permits introduction of otherwise hearsay statements, which are part of the "whole" of the conversation (on the same subject) when necessary for the understanding of or to give context to the other parts of the conversation. (*People v. Lewis* (2008) 43 Cal.4th 415, 458; *People v. Breaux* (1991) 1 Cal.4th 281, 302.) He claims this evidence established that his admissions were coerced and that he had a federal constitutional right to present evidence to help the jury determine what weight his admission should be given. (See *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691

[evidence surrounding making of confession bears on its credibility and is highly relevant for jury's consideration on question of guilt].)

Even if Shaw should have been allowed to cross-examine B.M. and Theresa M. about the earlier conversations, an issue we do not decide, there is no prejudice. Since the confrontation clause or due process error alleged, if found, would be federal constitutional error, we have evaluated prejudice under the *Chapman v. California* (1967) 386 U.S. 18 standard.

Theresa M. testified that when she first called Shaw, she told him she knew what he had done to her daughter, but that Shaw said he did not know what she was talking about. She testified that, after his denial, Theresa M. told Shaw that she would call the police if he did not agree to talk with B.M. and tell her this was not her fault. According to Theresa's testimony, it was only then that Shaw agreed to talk with B.M., but he was "very reluctant." In the recorded conversation between Shaw and B.M., Shaw is very hesitant to claim responsibility for the acts B.M. alleged he had committed and repeatedly inquired into how B.M was doing. During that same conversation, B.M. states that Shaw completely denied any inappropriate behavior when she first confronted him. B.M. herself tells Shaw a number of times that she is having trouble dealing with things, that she needs to be able to recover and to move forward, and that she can only do so if Shaw is "just honest" with her.

The jury also saw the videotaped meeting between Theresa M. and Shaw in which Theresa M. asks Shaw to speak with B.M. because B.M. is despondent, upset, and ashamed. Theresa M. tells Shaw that she has found a bottle of pills in B.M.'s bedroom and is concerned. Theresa specifically asks Shaw if he remembers when B.M. tried to call him a couple of months earlier and Shaw "just kinda blew her off." Theresa M. told Shaw that B.M. "felt like you were denying it." In the video, Shaw talks directly to B.M. and says "if you're having any thoughts about doing things to yourself, this prayer should have killed that. You have no reason to feel guilty honey, none. You have no reason to

be ashamed, none, none at all." Finally, Shaw himself testified that Theresa M. called and told him that B.M. was trying to kill herself and was going crazy. Shaw testified that he admitted to the alleged offenses because he did not want Theresa M. to go to the police and because he wanted to help B.M. This evidence unquestionably presents the issue to the jury and supports Shaw's contention that he admitted molesting B.M. only after being told B.M. might be suicidal and after being threatened with law enforcement if he did not agree to help her.

In any event, this defense strategy pales in light of the overwhelming strength of the evidence, particularly the testimony of the three victims. Further, Shaw, with his past, would have known the serious impact of a feigned admission. His claim that he feigned his admission is not credible and, not surprisingly, was rejected by the jury. Any error was harmless beyond a reasonable doubt.

B. Inability to cross-examine Theresa M.

In a related argument, Shaw contends that the trial court denied him the right to confront Theresa M. when it prevented cross-examination about the exact words he used when he admitted to her in an unrecorded phone conversation that he had molested B.M. (See *People v. Gutierrez* (1982) 137 Cal.App.3d 542, 546 [defendant entitled to cross-examine on actual words used in making out-of-court admission].) The trial court sustained the prosecutor's objection to the questioning on hearsay grounds. The Attorney General concedes that it was error to prevent Shaw from cross-examining Theresa M., but argues there was no prejudice. We agree.

Theresa M. testified on direct examination that Shaw admitted he had touched B.M.'s breast and between her legs and that he had kissed her. Although Shaw was not allowed to cross-examine Theresa M. on the exact words used, her testimony is consistent with the recorded conversation between Theresa M. and Shaw where Shaw states, "I touched her boobs sometime" and "I had my [hand] between her leg[s] like this and I was patting on her thigh." In this same conversation, Shaw admits that he "kissed

[B.M.] on the cheek" and "I kissed her on the mouth." Theresa M.'s summary of Shaw's statement is so close in content to the words the jury actually heard Shaw use later in his recorded conversation, we see no prejudice to Shaw in his inability to cross-examine about the actual words used in the earlier conversation. Applying the *Chapman* standard of review, we conclude that, in light of the overall strength of the evidence against Shaw, any error was harmless beyond a reasonable doubt.

C. Miscellaneous evidentiary rulings

Shaw challenges three additional trial court evidentiary rulings. We reject all three and conclude there is no abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718 [on appeal, trial court's decision to admit or exclude evidence is reviewed for abuse of discretion].)

According to Shaw, B.B. came to the jail with Shaw's stepdaughter and, while there, told Shaw she would help him "fight this." B.B. claims that she was accompanying her friend to provide support during a visit to Shaw's jail cell. The prosecutor objected on hearsay grounds, and the court sustained the objection. Shaw contends that the statement was offered to attack B.B.'s credibility on the theory that a victim would not willingly assist her molester. If this was the true purpose of the proffered statement, Shaw had to have been seeking admission of the out-of-court statement to prove the truth of the matter asserted, e.g., that B.B. was willing to help Shaw. This is the classic definition of hearsay and the court properly sustained the objection. (Evid. Code, § 1200, subd. (a).) Even if we accepted Shaw's argument that the statement was not hearsay but merely circumstantial evidence of B.B.'s feelings toward Shaw at the time, we would conclude there was no prejudice in excluding the evidence. B.B's testimony was strong. The similarity between Shaw's molestation of B.B. and of his other victims was marked. Given the context of the alleged statement, it is unlikely the jury would have found B.B.'s statement to be a proper basis to reject her testimony, even had they believed she made the statement as Shaw alleges.

Shaw also argues that he should have been allowed to testify that B.B. had been "kicked off the [school] bus," because the evidence would explain why he gave an unrelated young girl rides to school. The trial court excluded the information, finding that it was irrelevant and that it was based on hearsay and not personal knowledge.

There was no foundation laid for how Shaw knew that B.B. had been kicked off the bus. Although the trial court cut off defense counsel when the objection was argued before the jury, at the next recess, when the issue resurfaced, defense counsel failed to place an offer of proof on the record that a proper foundation could be made. In order to preserve an evidentiary objection for appeal, counsel must present an offer of proof. (Evid. Code, § 354, subd. (a).)

Additionally, even if admissible and relevant to explain why Shaw was giving B.B. a ride to school, we would conclude that Shaw suffered no prejudice. B.B. was Shaw's stepdaughter's good friend. She was a constant presence in the Shaw household. B.B. testified that, some of the time, Shaw took both girls to school. Although the jury might consider this unwise given Shaw's prior convictions, it is unlikely that his failure to explain that B.B. needed the ride would have affected the jury's verdict in any way.

Lastly, we reject Shaw's claim that he was prejudiced when the trial court excluded evidence that B.B. "was influenced by child molester posters." Shaw also claims that he should have been allowed to testify that B.B.'s father called him and confronted him about the posters. We reject both arguments concluding that, whether erroneously excluded or not, this evidence would not have influenced the jury's verdict under any standard of review. B.B. testified she knew that fliers about Shaw had been posted at a riding stable, but that she had not seen them. She also testified that, after Shaw was arrested on the other cases, her father asked her a number of times whether Shaw had ever touched her inappropriately. She repeatedly said no. B.B. admitted that she knew Shaw had been arrested for molesting B.M. and A.B. before she reported her molestation. She also admitted she knew he had molested A.J.

In light of this evidence, the jury clearly understood that B.B. came forward, in part because the other victims had come forward and that she knew Shaw had a history of molestation before she reported him. The jury nonetheless found B.B. credible and, therefore, rejected Shaw's theory that knowledge about Shaw's past and pressure from her father influenced B.B. It is highly unlikely that more detailed information about what the posters said or what B.B.'s father told Shaw about the posters would have made a difference in the way the jury evaluated this evidence.

In a related argument, Shaw claims that the trial court erred in overruling his objection to a statement made by the prosecutor during closing argument. During argument, the prosecutor told the jury that "[*s*]*ome* of [the victims] did know about the defendant's past (italics added)," but then went on to say that all three of the victims, including B.B., had not known, even though B.B. did know. The trial court overruled defense counsel's objection and stated, "I'll allow the jury to make those final factual calls. This is in the realm of the evidence." In the rebuttal argument, the prosecutor again told the jury there was no evidence that any of the victims knew about Shaw's past or about the fliers. This again was wrong. We believe the jury would have readily seen this as a mistake and discounted the argument, given B.B.'s clear testimony that she *did* know something about Shaw's past when she reported her abuse and certainly knew that two others had recently made claims that Shaw had molested them. The court told the jury they were the final arbitrators of fact, and the jury was instructed that the argument of counsel was not evidence.

Finally in this category, we reject Shaw's claim that the cumulative effect of these alleged errors prejudiced him. There were few errors, and the ones we have identified were small and rendered insignificant, individually and collectively, given the strength of the evidence.

V. Instructional error allegations

A. Elements of section 647.6, subdivision (c)(2)

Shaw argues that the trial court erred when it instructed the jury that it must find that Shaw's conduct was motivated by "an unnatural or abnormal sexual interest in *the child* (italics added)," instead of referencing the protected class as a group, children. He claims that, because section 647.6 protects children as a class, an unnatural or abnormal sexual interest in any one particular child is not encompassed by the statute's prohibition. As we understand his argument, particularly in light of his analogy to hate crime offenses, Shaw argues that B.M.'s status as a child may not have been the motivating factor for the offense. In a hate crime case, the prosecution must prove that the offense was committed because of the perpetrator's racial, religious, or other specified bias. (*In re. M.S.* (1995) 10 Cal.4th 698, 717-718.) Shaw argues that the standard instruction given, Judicial Council of California Criminal Jury Instructions (2006-2007) (CALCRIM) No. 1122, fails to inform the jury that the offense is only committed if an unnatural or abnormal sexual interest in children in general is the motivating factor for the offense. He also argues that evidence that he assaulted an adult female suggests his offense against B.M., who was 16 and according to Shaw "close to adulthood," was not motivated by a sexual interest in children.

We disagree. First, Shaw has pointed to no authority to support his assertion that the standard instruction is flawed as written. CALCRIM No. 1122 states that the jury must find that the defendant's conduct was motivated by an unnatural or abnormal sexual interest in the child victim. The statute does not merely protect children as a class; it protects "any child" in the State of California from being annoyed or molested by an adult motivated by an unnatural or abnormal sexual interest. (§ 647.6, subd. (a)(1).) Shaw's analogy to hate crimes breaks down here because there can be no *normal* sexual interest in any child and it is the sexual interest in the child that is the focus of the statute's intent.

The case authority Shaw relies upon does not support his novel position. *In re Gladys R.* (1970) 1 Cal.3d 855, 867-868, reiterates that the primary purpose of the statute[2] is to protect children from interference by sexual offenders. The issue the court decided was whether the words "annoy" and "molest" as used in the statute required a sexual motivation at all, and not whether the sexual-interest reference is directed toward a group rather than an individual. The passage cited by Shaw in his brief does not originate in *Gladys R.*, but is quoted from *People v. Pallares* (1952) 112 Cal.App.2d Supp. 895, 901. The issue in *Pallares* was similar to the issue in *Gladys R.* and does not define the scope of the sexual interest, but addresses whether the words "annoy" or "molest" were unconstitutionally vague as used in the statute. The entire *Pallares* quote is as follows:

> "When the words annoy or molest are used in reference to offenses against children, there is a connotation of abnormal sexual motivation on the part of the offender. Although no specific intent is prescribed as an element of this particular offense, a reading of the section as a whole in the light of the evident purpose of this and similar legislation enacted in this state indicates that the acts forbidden are those motivated by an unnatural or abnormal sexual interest or intent with respect to children." (*People v. Pallares, supra*, 112 Cal.App.2d Supp. at p. 901.)

The term "children" in the latter part of the quote reflects the use of the term "children" in the first part of the quote, which refers to the victims of the crime, not the nature of the abnormal or unnatural sexual interest. The statute defines the victim it seeks to protect as "any child." (§ 647.6, subd. (a)(1).) The quote could have just as easily been written as follows:

> "When the words annoy or molest are used in reference to offenses against a child, there is a connotation of abnormal sexual motivation on the part of the offender. Although no specific intent is prescribed as an element of this particular offense, a reading of the section as a whole in the light of the evident purpose of this and similar legislation enacted in this state

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[2]The statute in question was former section 647a, which we have already observed is the precursor to section 647.6.

> indicates that the acts forbidden are those motivated by an unnatural or abnormal sexual interest or intent with respect to a child." (*People v. Pallares, supra*, 112 Cal.App.2d Supp. at p. 901, as modified.)

The term "children" was not used in either *Pallares* or *Gladys R.* as defining the scope of the abnormal sexual interest, but in defining the class of victims. The statutory language and intent is clear. A defendant may not in any way annoy or molest a child in order to satisfy his or her own abnormal or unnatural sexual interest. To hold that a defendant might lawfully annoy or molest a child motivated by an abnormal sexual interest toward that child alone is not only ludicrous, but defeats the express statutory purpose of protecting *any child* in this state against sexual offenses.

Even if the mens rea required for a conviction of section 647.6, subdivision (c)(2), required the jury to find that Shaw's acts were motivated by an unnatural or abnormal sexual interest toward children generally and not any one particular child, any error was harmless beyond a reasonable doubt. The evidence overwhelmingly established that Shaw had molested at least three children in 1985 and that he had recently molested three additional victims, all children of various ages. There could be no question that Shaw's abnormal sexual interest extended beyond B.M. to children generally, even in light of the evidence that Shaw had once sexually assaulted an adult woman. B.M. was a minor. Shaw knew this and his conversations with her after the assault acknowledge her youth and innocence. The distinction between "child" and "children" in this case is a distinction without a difference.

B. Unanimity

Shaw also contends that the trial court erred in giving CALCRIM No. 3501 relating to counts five and six instead of CALCRIM No. 3500. Shaw argues that CALCRIM No. 3501[3] does not correctly state the law because it refers to the acts that

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[3]The two instructions read as follows:

have been alleged rather than the acts described by the victim, comparing the language of the instruction to the discussion in *People v. Jones, supra,* 51 Cal.3d at pp. 321-322. *Jones* addresses the unanimity problem created when a child victim can only give generic testimony and cannot differentiate multiple acts. Shaw also contends that CALCRIM No. 3501 should not have been given because B.B.'s testimony supporting counts five and six was not "truly generic."

We need not address either of these two contentions because we conclude that any error is harmless beyond a reasonable doubt. B.B. testified that Shaw touched her inappropriately three to four times a week, between February 2003 and March 2007. The acts included touching her breasts, vagina, and digitally penetrating her seven to eight times. She explained that the touching occurred usually in Shaw's truck, or in the morning when he would come pick her up for school. Shaw would sometimes come into her house uninvited, and because her father left for work early, B.B. was alone. When

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"The defendant is charged with _____ [in Count _____] [sometime during the period of _____ to _____]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed." (CALCRIM No. 3500.)

"The defendant is charged with _____ [in Count[s] _____] sometime during the period of _____ to _____. [¶] The People have presented evidence of more than one act to prove that the defendant committed (this/these) offense[s]. You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed [for each offense]; [¶] OR [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period [and have proved that the defendant committed at least the number of offenses charged]." (CALCRIM No. 3501.)

pushed to identify a specific incident, B.B. remembered one occasion when Shaw followed her down the hallway and pushed her up against the wall and touched her breasts. She also remembered a time when she was in the trailer taking a break when Shaw began rubbing her inner thighs. She admitted that most of the touching was over her clothing, although a few times she was touched under her clothing. She could not remember dates. She also testified that nothing ever happened when she was visiting at the Shaw house.

Shaw has offered no defense applicable to one alleged act that was not applicable to the other alleged acts. (See *People v. Gordon* (1985) 165 Cal.App.3d 839, 855-856 [defendant raised separate defenses to two offenses at issue], disapproved on other grounds in *People v. Frazer* (1999) 21 Cal.4th 737.) Contrary to Shaw's assertion, there is nothing in B.B.'s testimony that renders one part of her testimony more believable than another. If the jury believed B.B., which their verdict indicates they did, there is no reasonable likelihood the jury did not agree on all counts relating to B.B. Therefore, nothing supports a conclusion that the jury would have reached a different verdict had CALCRIM No. 3500 been given instead of CALCRIM No. 3501. Any error was harmless beyond a reasonable doubt.

VI. Conduct credit

Shaw contends that he is entitled to an additional day of conduct credit. The trial court awarded the proper 261 days for actual time served, but did not correctly calculate the amount of credit due pursuant to section 2933.1. Shaw was awarded 38 days of credit, but as the Attorney General concedes, Shaw was entitled to 39 days' credit. (*People v. Ramos* (1996) 50 Cal.App.4th 810, 815-816.)

DISPOSITION

The judgment is affirmed. Shaw is awarded an additional day of conduct credit. The trial court shall prepare an amended abstract of judgment and distribute it to the appropriate authorities.

_____
Wiseman, Acting P.J.

WE CONCUR:

_____
Dawson, J.

_____
Hill, J.