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CERTIFIED FOR PARTIAL PUBLICATION[*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOHN STUART MOSES, Defendant and Appellant.	G044482 (Super. Ct. No. 09CF0367) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed as modified.

Wallin & Klarich and Stephen D. Klarich for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Daniel Rogers, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of the Statement of Facts and Procedural History, and parts I and II of the Discussion.

SUMMARY OF CONCLUSIONS, HOLDING, AND REASON FOR PUBLICATION

Defendant John Stuart Moses was convicted of a single count of violating Penal Code section 288, subdivision (a). He challenges his conviction, and many of the probation conditions imposed by the trial court. We conclude substantial evidence showed defendant acted with the specific intent to gratify his own or the victim's sexual desires, and the trial court did not err in modifying the standard jury instruction on unanimity.

We hold that several of the probation conditions are unconstitutionally overbroad because they fail to adequately inform defendant whether his conduct will comply with the probation conditions. We direct the trial court to modify those probation conditions to include a knowledge requirement, and to strike certain other probation conditions. We publish this portion of the opinion because each of the probation conditions we are directing the trial court to modify or strike is part of a four-page, preprinted form of probation conditions used in the Orange County Superior Court, apparently since 2003, entitled "Superior Court of California, County of Orange Sex Offender Terms and Conditions of Probation–Addendum." The superior court should modify that form to comply with constitutional mandates and to avoid further repetitive, successful challenges to its probation conditions.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In December 2007, then 13-year-old C.C. began communicating with defendant, then 23 years old, via a Web site called VampireFreaks. Her age was listed as 18 on her VampireFreaks and MySpace.com profiles, which defendant saw. About a week after they first exchanged online messages, defendant and C. met at a library near her home, where they hugged, and talked for about an hour. C. told defendant she was 18 years old; when defendant said she looked "really young," she told him "baby faces ran in the family."

The second time defendant and C. met, they sat together in the backseat of defendant's car. They took photographs of themselves kissing, embracing, and "making out."

Defendant and C. met for the final time on December 8, 2007. They sat together in the backseat of defendant's car, which was parked in a dark parking lot, for one or two hours; they kissed and made out, and C. testified she performed oral sex on defendant. Although they tried to engage in sexual intercourse, according to C., they were unable to do so because defendant could not maintain an erection.

C.'s mother found out about the relationship after discovering "very explicit sex conversations" between her daughter and defendant on C.'s computer, and finding the pictures of C. and defendant. C.'s mother confronted her daughter, who initially denied it, but then said she loved defendant, and admitted engaging in sexual activity with him. C.'s mother called defendant, who, she testified, admitted he and C. had engaged in oral sex and sexual intercourse in the backseat of his car, and that he threw the condom he had used out of the car window.

Defendant testified that he believed C. was 18 years old. According to defendant, he and C. only met twice, and the only physical contact between them was the hugging and kissing in the backseat of his car, which had been captured on camera. Defendant admitted he and C. had French kissed, but claimed they did not engage in any sexual activity, and that C. had never seen or touched his penis.

Defendant was charged with three counts of committing a lewd act on a child under 14 years of age (Pen. Code, § 288, subd. (a)); the information alleged that, with respect to count 3, defendant engaged in substantial sexual conduct with a child under 14 years of age (*id.*, § 1203.066, subd. (a)(8)). A jury found defendant not guilty of two counts of committing a lewd act, and deadlocked on count 3. A second jury found defendant guilty of count 3, but found the substantial sexual conduct allegation not true.

The trial court suspended imposition of sentence, and placed defendant on three years' probation, with conditions. Defendant timely appealed.

DISCUSSION

I.

WAS THERE SUBSTANTIAL EVIDENCE SUPPORTING DEFENDANT'S CONVICTION FOR COMMITTING A LEWD OR LASCIVIOUS ACT ON A CHILD UNDER THE AGE OF 14?

Defendant argues there was insufficient evidence to support the jury's finding that he acted with the specific intent to gratify the sexual desires of himself or of C., which is an element of the crime of committing a lewd or lascivious act.[1] "'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if "'upon no hypothesis whatever is there sufficient substantial evidence to support'" the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"'[Penal Code S]ection 288 is violated by 'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child.' [Citation.] 'Because intent can seldom be proved by direct evidence, it

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[1] "[A]ny person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ." (Pen. Code, § 288, subd. (a).)

may be inferred from the circumstances. [Citations.]' [Citation.]" (*People v. Mullens* (2004) 119 Cal.App.4th 648, 662.)

We conclude that evidence of making out and French kissing for an extended period of time in the backseat of a car parked in a dark parking lot is sufficient to prove the intent to gratify sexual desires necessary to violate Penal Code section 288, subdivision (a). As another appellate court explained: "Defendant gave Melinda a 'French kiss' on the mouth and touched her breasts by placing his hand under her shirt. This conduct is quintessentially lewd and lascivious and blatantly betrays defendant's intent to gratify his own sexual desires." (*People v. Guardado* (1995) 40 Cal.App.4th 757, 762.) C. testified that on December 8, 2007, she and defendant kissed and made out in the backseat of defendant's car. Defendant testified the two were in the backseat of his car for a couple of hours that day, and were French kissing and making out for some part of that time. Intent to gratify sexual urges may certainly be inferred from the admitted act of French kissing and otherwise making out in the backseat of a car parked in a dark parking lot for more than one hour.[2]

II.

DID THE TRIAL COURT ERR IN INSTRUCTING THE JURY REGARDING UNANIMITY?

The trial court instructed the jury with a modified version of CALCRIM No. 3500, as follows (with the modification in italics): "The defendant is charged with committing a lewd or lascivious act on a child under 14 years old *during their last encounter on or about December 8, 2007*.[3] The People have presented evidence of more

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[2] Because the jury rendered a not true finding on the allegation of substantial sexual conduct, we have not considered C.'s testimony regarding oral sex or attempted sexual intercourse in determining whether there was substantial evidence of intent.

[3] CALCRIM No. 3500 authorizes the use of either of the following phrases in place of the italicized language: "in Count __" or "sometime during the period of ____ to _____."

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 committed." (Italics added.)

The Attorney General argues that defendant forfeited the right to challenge that instruction on appeal because he did not object to the instruction in the trial court. The trial court specifically asked defendant's trial counsel if he agreed with the modified language of CALCRIM No. 3500; counsel responded, "[t]hat's fine." Defendant has therefore forfeited his appellate challenge to that instruction. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 122.)

Defendant argues, however, that this court may still review the issue because the allegedly erroneous instruction affected his substantial rights. (Pen. Code, § 1259.) Because the right to have all elements of an offense proven beyond a reasonable doubt is a substantial right (*People v. Johnson* (2004) 119 Cal.App.4th 976, 985), defendant contends we can and should review this issue on appeal. Without conceding the merit of defendant's argument, we will address the issue, if only to avoid the inevitable claim of ineffective assistance of counsel.

Defendant argues that the instruction, as given, "required the jury to accept or presume as an undisputed fact that the photographs were taken during [C.]'s last encounter with [defendant] despite her own testimony that the photos were not taken during their last meeting on December 8, 2007." We review the record to determine "whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." (*People v. Smithey* (1999) 20 Cal.4th 936, 963.)

We conclude there is no reasonable likelihood that the jury understood CALCRIM No. 3500, as modified by the trial court, to direct a finding that the photographs of C. and defendant hugging and kissing were taken on December 8, 2007. The instruction only told the jury that it must agree on one lewd or lascivious act

committed by defendant on December 8, 2007, when the evidence could support a finding of multiple lewd or lascivious acts committed by defendant on that date, including attempted intercourse, oral copulation, and French kissing, and when evidence had been presented of allegedly lewd or lascivious acts occurring on other days.

Defendant suggests the prejudicial effect of the modified instruction was exacerbated by the prosecutor's closing argument that the photographs were taken on December 8, 2007, and that they proved defendant had violated Penal Code section 288, subdivision (a). The prosecutor argued: "What's interesting about these photos, the defendant denied almost everything except what he couldn't deny. He had to admit these photos because that's the evidence. That's them engaging in [a] lewd act on a child under 14. That is the definition of what the defendant is charged with, touching with a sexual intent of someone under 14 years old. That's the case right there, ladies and gentlemen. Those are the three elements proven. [¶] The defendant denied everything else practically. 'Oh, I didn't engage in sex. I didn't engage in oral sex. I didn't do anything, I just kissed her for about a five-minute period and our tongues touched. We made out.' That's what he had to admit to because the pictures don't lie. And both [C.] and the defendant agree on that point, that they were making out in the back seat of his car, hanging out there for several hours in an empty parking lot in the City of Orange late at night."

The prosecutor did argue that the photographs were taken on December 8, 2007, which is a reasonable inference based on the conflicting testimony of C. and defendant regarding how many times they met and at which of their meetings the photographs were taken. C. testified the same type of contact with defendant shown in the photographs—making out in the backseat of defendant's car—also occurred on December 8, 2007, before the two engaged in oral sex and attempted to have sexual intercourse. Defendant himself testified the photographs were taken on December 8, 2007. Therefore, the prosecutor's argument was not prejudicial.

III.

SHOULD CERTAIN PROBATION CONDITIONS BE MODIFIED OR STRICKEN?

Defendant challenges a number of the probation conditions imposed.[4] Without conceding any of the conditions are constitutionally improper, the Attorney General agrees that many of the modifications in language requested by defendant are appropriate, and that two of the conditions imposed should be stricken. As set forth in the disposition, we direct the trial court to add a knowledge requirement to many of its standard probation conditions, and to strike other conditions.

A. *Probation Condition No. 22*

As imposed, probation condition No. 22 reads: "Do not own, use, or possess any form of sexually explicit movies, videos, material, or devices unless recommended by the therapist and approved by the probation officer. Do not frequent any establishment where such items are viewed or sold, and do not utilize any sexually oriented telephone services." Defendant argues this probation condition is unconstitutionally vague because it fails to inform him in advance whether his conduct comports with or violates his probation. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890; *In re Victor L.* (2010) 182 Cal.App.4th 902, 913.) The Attorney General agrees that the condition should be modified to include a knowledge requirement. We direct the trial court to modify the condition to explicitly include such a knowledge requirement.

Defendant also asks that the term "devices" be stricken from the probation condition, because the word "devices" in the context of sexually explicit material is

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[4] Defendant acknowledges that he did not object to the imposition of any of those probation conditions in the trial court, but argues he is nevertheless permitted to challenge probation conditions as unconstitutionally vague and overbroad when the challenge involves a pure question of law and the unconstitutionality may be remedied without reference to the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887.) The Attorney General does not contest defendant's right to challenge the probation conditions on appeal.

vague. We disagree. The phrase "sexually explicit . . . devices" is not so imprecise that defendant will be unable to determine whether he is in compliance with the terms of his probation. (See *People v. Turner* (2007) 155 Cal.App.4th 1432, 1437 [prohibition on possession of "'sexually stimulating/oriented material'" was not vague or overbroad].)

B. *Probation Condition No. 24*

Probation condition No. 24 reads: "Do not associate with minors or frequent places where minors congregate, including but not limited to: schoolyards, parks, amusement parks, concerts, playgrounds, swimming pools, and arcades, unless in the company of a responsible adult over the age of 21 who is approved by the probation officer or court, knows of your offense(s), and is willing to monitor your behavior." Defendant argues this probation condition, too, is unconstitutionally vague because it lacks a knowledge requirement; the Attorney General agrees. We direct the trial court to modify this condition to include a knowledge requirement.

Defendant also argues this probation condition is unconstitutionally vague because it does not define the word "minor," and because other probation conditions refer to persons under the age of 18. Defendant contends the use of different terms will lead to confusion. The Legislature has repeatedly defined the term "minor" as a person under 18 years of age. (See Pen. Code, §§ 243.4, subd. (g)(6), 261.5, subd. (a), 272, subd. (a)(2), 313, subd. (g); Fam. Code, § 6500; Welf. & Inst. Code, § 101, subd. (b).) We conclude the probation condition is not vague in this respect. We would encourage the trial court, however, to conform the terms used in its probation conditions, and to use either references to "minors" or references to "persons under the age of 18," but not both, to avoid challenges such as this in the future.

C. *Probation Condition Nos. 6 and 29*

Probation condition No. 6 provides: "Do not be an employee of, nor participate in, nor reside in or at, nor derive any money or other form of consideration

from any modeling, escort, massage, or sauna operation or business, or any outcall operation or business, or any acupressure or acupuncture operation or business." Probation condition No. 29 provides: "Do not reside with any person under the age of eighteen, including but not limited to your natural children, stepchildren, or any child with whom you have a parenting, guardianship or supervisory relationship, unless approved in advance and in writing by your probation officer." Defendant argues both of these probation conditions are unconstitutionally vague because they lack a knowledge requirement; the Attorney General again agrees. We direct the trial court to modify these conditions to include a knowledge requirement.

D. *Probation Condition No. 30*

Probation condition No. 30 reads: "Do not date or marry anyone who has children under the age of eighteen, unless approved in advance and in writing by the probation officer." Defendant argues this probation condition is unconstitutionally vague because it, too, lacks a knowledge requirement. The Attorney General again agrees that a knowledge requirement should be a part of this probation condition. We, too, agree, and direct the trial court to modify the condition accordingly.

Defendant also argues this probation condition is unconstitutionally overbroad because it violates his constitutional right to marry (*Loving v. Virginia* (1967) 388 U.S. 1, 12), without being narrowly tailored to meet the goals of public safety and rehabilitation of defendant (*People v. Smith* (2007) 152 Cal.App.4th 1245, 1250; *In re White* (1979) 97 Cal.App.3d 141, 146). Defendant asks that the condition be modified to include language "regulating a review of the probation officer's denial of [defendant]'s request to get married to someone who has children under the age of eighteen." (The Attorney General does not address this argument.) Because the probation condition, as written, violates the right to marry, we direct the trial court to strike the phrase "or marry" from probation condition No. 30.

E. *Probation Condition Nos. 3 and 11*

Probation condition Nos. 3 and 11 provide, respectively, "[a]s a pedestrian, do not be in contact with occupants in vehicles of any city in Orange County," and "[w]hile in a vehicle on a public street or highway, do not be in contact with pedestrians." Defendant contends these probation conditions impermissibly interfere with his freedom of movement. (*In re White*, *supra*, 97 Cal.App.3d at pp. 148-149.)

Defendant also argues imposition of these probation conditions will lead to absurd results, such as being unable to take public transportation due to an inability to communicate with a bus driver, or the inability to provide necessary insurance information if defendant is involved in an automobile accident.

The Attorney General agrees that these probation conditions should be stricken. These probation conditions are overly broad, as they prohibit otherwise legal activities and have no relationship to the crime of which defendant was convicted. (*People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 41-42.) We direct the trial court to strike probation condition Nos. 3 and 11.

F. *Probation Condition Nos. 8 and 9*

Probation condition Nos. 8 and 9 prohibit hitchhiking: "Do not hitchhike and do not accept rides from any motorist on any street, highway, or other place open to the public," and "[d]o not pick up hitchhikers or otherwise give rides to pedestrians." As with probation condition Nos. 3 and 11, defendant argues probation condition Nos. 8 and 9 interfere with his freedom of movement, and prohibit otherwise legal conduct. Courts of this state have held that probation conditions proscribing hitchhiking are not unconstitutionally overbroad. (See *In re White*, *supra*, 97 Cal.App.3d at pp. 147, 151.) More importantly, these probation conditions are tailored to prevent further violations by defendant. Given the nature of the crime for which defendant was convicted, it is

reasonable to restrict him from opportunities to be in a car alone with a minor; preventing defendant from hitchhiking or giving rides to hitchhikers furthers this goal.

G. *A Probation Condition Imposed Orally But Not Included in the Minute Order Must Be Added.*

Defendant notes that the trial court orally imposed a probation condition that he "not associate with persons known to you to [be] parolees, convicted felons, users or sellers of illegal drugs or otherwise disapproved by probation." This condition is not reflected in the court's minute order. At defendant's request, we direct the trial court to correct the minute order to conform with the oral pronouncement of judgment (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2), and we further direct the trial court to modify the language of this probation condition to include persons defendant knows *or reasonably should know* to be within the classification of those with whom his association is prohibited.

H. *The Standard Probation Conditions Should Be Modified.*

All of the challenged probation conditions were drawn directly from a four-page form entitled "Superior Court of California, County of Orange Sex Offender Terms and Conditions of Probation–Addendum"; the footer on the form identifies it as a "Mandatory Local Form" and states it was revised "6/5/03," more than eight years ago. The Superior Court of the State of California for the County of Orange should modify the standard probation condition form to comply with constitutional mandates. Particularly with respect to terms and conditions that require a knowledge element, it has unfortunately become routine for us to address the need for modification of the probation conditions on appeal.

In *People v. Patel* (2011) 196 Cal.App.4th 956, 960, the Court of Appeal, Third Appellate District, expressed its frustration with such routine challenges to probation conditions lacking a knowledge requirement: "In the interests of fiscal and

judicial economy, we are compelled to address the repetitive nature of this appellate issue. Since at least 1993, appellate courts have issued opinions consistently holding that conditions of probation must include scienter requirements to prevent the conditions from being overbroad. [Citations.] However, with dismaying regularity, we still must revisit the issue in orders of probation, either at the request of counsel or on our own initiative. The latter in particular is a drain on the public fisc that could be avoided if the probation departments at fault would take greater care in drafting proposed probation orders. [¶] We recognize that [*In re*] *Victor L.*, *supra*, 182 Cal.App.4th at page 913 and [*People v.*] *Garcia* [(1993)] 19 Cal.App.4th [97,] 102 rejected the People's argument that modification was unnecessary because scienter was a necessary implication, given that probation violations must be willful (*Garcia* merely asserting the 'importance' of protecting constitutional rights, and *Victor L.* expressing concern with leaving a probationer otherwise subject to an 'arbitrary or mean-spirited' probation officer's abuse). However, there is now a substantial uncontradicted body of case law establishing, as a matter of law, that a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter. As with contracts generally, this should be considered a part of the conditions of probation '"just as if [this was] expressly referred to and incorporated."' [Citation.] We also do not discern how addressing this *specific* issue on a repetitive case-by-case basis is likely to dissuade a probation officer inclined to act in bad faith from finding some *other* basis for harassing an innocent probationer. As a result, we reject the conclusions reached in *Victor L.* and *Garcia*, and now give notice of our intent to henceforth no longer entertain this issue on appeal, whether at the request of counsel or on our own initiative. We construe every probation condition proscribing a probationer's presence, possession, association, or similar action to require the action be undertaken knowingly. It will no longer be necessary to seek a modification of a probation order that fails to expressly include such a scienter requirement."

While we, too, could declare that a knowledge requirement shall be read into all probation conditions, we instead choose to modify and strike certain challenged probation conditions in this case and by this opinion state that the superior court should revise its standard probation conditions form to meet constitutional requirements.

DISPOSITION

We direct the trial court to modify its minute order and defendant's probation conditions as follows:

1. Strike probation condition No. 3.

2. Modify probation condition No. 6 to read: "Do not be an employee of, nor participate in, nor reside in or at, nor derive any money or other form of consideration from what you know or reasonably should know to be any modeling, escort, massage, or sauna operation or business, or any outcall operation or business, or any acupressure or acupuncture operation or business."

3. Strike probation condition No. 11.

4. Modify probation condition No. 22 to read: "Do not own, use, or possess any form of sexually explicit movies, videos, material, or devices unless recommended by the therapist and approved by the probation officer. Do not frequent any establishment where you know or reasonably should know such items are viewed or sold, and do not utilize any telephone services you know or reasonably should know to be sexually oriented."

5. Modify probation condition No. 24 to read: "Do not associate with any persons you know or reasonably should know to be minors, or frequent places where you know or reasonably should know minors congregate, including but not limited to: schoolyards, parks, amusement parks, concerts, playgrounds, swimming pools, and arcades, unless in the company of a responsible adult over the age of 21 who is approved

by the probation officer or court, knows of your offense(s), and is willing to monitor your behavior."

6. Modify probation condition No. 29 to read: "Do not reside with any person you know or reasonably should know to be under the age of 18, including, but not limited to, your natural children, stepchildren, or any child with whom you have a parenting, guardianship, or supervisory relationship, unless approved in advance and in writing by your probation officer."

7. Modify probation condition No. 30 to read: "Do not date anyone who you know or reasonably should know has children under the age of 18, unless approved in advance and in writing by the probation officer."

We further direct the trial court to modify its minute order to include the following probation condition: "You are not to associate with persons you know or reasonably should know to be parolees, convicted felons, users or sellers of illegal drugs, or otherwise disapproved by the probation officer."

All other probation conditions shall remain. As so modified, the judgment is affirmed.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.