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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MARK DOUGLAS STRONG, Defendant and Appellant.	C064081 (Super. Ct. No. 09F02260)

Defendant Mark Douglas Strong appeals his convictions for multiple sex offenses. He contends: (1) the trial court erred in denying his motion to exclude his confession under *Miranda v. Arizona* (1966) 384 U.S.436 [16 L.Ed.2d 694] (*Miranda*); (2) the trial court prevented him from presenting a defense by sustaining an objection to a cross-examination question; and, (3) there is not substantial evidence to support his conviction of lewd and lascivious conduct against one of the children. We disagree and affirm.

RELEVANT FACTUAL BACKGROUND

Between August 8, 2008, and March 9, 2009, defendant babysat his friend's, Heather and Richard, 5-year old children, F. and O. In mid-March 2009, while defendant was watching the children, Heather returned home early and found defendant in F.'s bedroom, kneeling down, leaning over her. Startled, defendant jumped up and said F. had been crying and he was consoling her. F. denied she had been crying. Heather told Richard she did not want defendant babysitting the children any more.

About a week later, Heather noticed F. "dry humping" a stuffed animal. When Heather asked F. about it, she answered she had a "naughty secret." She appeared scared, worried and hesitant to talk, but told Heather that defendant had touched her genitals, made her orally copulate him, and touch and lick his penis. She said this had been happening since school started and had happened 10 times. Heather then spoke to O. O. was also scared, but said defendant had exposed his penis and tried to make O. touch it and on another occasion defendant had touched O.'s genitals.

During his investigation, Sacramento City Police Officer Galliano interviewed F., O. and defendant. F. told Officer Galliano that defendant made both her and O. touch his penis. She also said she had licked defendant's penis more than once. O. reported that on defendant's demand, he had touched and licked defendant's penis and defendant had touched O.'s genitals through his pants.

About two weeks later, F. and O. were interviewed by a specialist in interviewing child sexual assault victims (SAFE). F. reported every time defendant came over, he tried to get her to suck and lick his penis. The last time he came over, they were watching television and he exposed himself to her and told her to open her mouth. When she refused, he tried to put it into her mouth. On another occasion, he came in to her bedroom, took out his penis and told her to open her mouth. She refused, and he tried to put it in her mouth. This time, his penis touched the outside of her mouth. F. also described the look and feel of defendant's penis. O. initially denied anything improper occurred. Later, he said that defendant had touched his penis once.

Officer Galliano recorded his interview of defendant. During the interview, defendant said the children had seen his penis because he had gone to the bathroom with the door open. He initially denied harming the children, touching them or asking them to touch or lick his penis. Later, he admitted his penis was exposed twice and F. touched it on her own. He admitted he let that happen twice, even though he knew it was wrong, and admitted he got an erection. He then admitted there had been three incidents involving F. He also admitted he had asked her if she had ever licked a penis, but denied asking her to lick his.

At trial, F. testified that defendant showed her his penis, asked her to touch it with her mouth and touched it to her lips, between one and five times. She denied ever touching his penis

with her hand, or putting it in her mouth and denied he had ever asked her to lick it. She denied telling the police she had licked his penis or that she had ever felt his penis. O. denied any inappropriate contact between defendant and himself. He denied ever seeing defendant's penis, being asked to touch or lick it and denied being touched by defendant.

Dr. Urquiza testified as an expert in Child Sexual Abuse Accommodation Syndrome (CSAAS). He testified that the components of CSAAS are secrecy, helplessness, entrapment/accommodation, delayed/unconvincing reporting and retraction.

Defendant testified on his own behalf. Defendant testified he suffered from bipolar disorder and post traumatic stress disorder. He continued to deny anything sexual or inappropriate happened with O. As to F., he testified while he was reading to her, she touched his crotch. He removed her hand, but she put it back and squeezed his crotch. A few days later, while they were watching television she again put her hand on his crotch. Unbeknownst to him, at the time, his zipper was broken and his underwear was exposed. Defendant was concerned by her behavior, but did not say anything to F.'s parents, because he was worried about their reaction, particularly as he had seen Richard be violent. A few days later when he was reaching for something on a shelf, F. grabbed him around the waist and her face went into his crotch. He demanded to know what was going on and asked her if she had ever licked a penis, because that appeared to be what she was trying to do to him. He did not call Child Protective

Services because he was concerned about Richard's temper. Defendant denied ever exposing his penis to the children, asking F. to suck his penis, putting his penis in or near F.'s mouth, and telling F. or O. to touch or lick his penis. Several character witnesses also testified on defendant's behalf.

PROCEDURAL BACKGROUND

Defendant was charged with two counts of oral copulation with F. (Pen. Code,[1] §§ 288.7, subd. (b), 289; counts 1 & 2), attempted oral copulation with F. (§§ 664, 288.7,subd. (b), 289; count 3), two counts of committing a lewd or lascivious act with F. (§ 288, subd. (a); counts 4 & 5), attempted commission of a lewd or lascivious act with F. (§§ 664, 288, subd. (a); count 6), oral copulation with O. (§ 288.7, subd. (b), 289; count 7) and two counts of committing a lewd or lascivious act with O. (§ 288, subd. (a); counts 8 & 9.) It was further alleged defendant had committed the offenses against multiple victims. (§ 667.61, subd. (e)(5).)

Defendant made a motion in limine to exclude his statements to Officer Galliano, based on *Miranda*. Following an Evidence Code section 402 hearing, the court denied the motion.

Following a jury trial, defendant was found guilty of counts 1-6 and count 9 and the multiple victim enhancement was found true. Defendant was found not guilty on count 8, and the

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[1] Undesignated statutory references are to the Penal Code.

jury was unable to reach a verdict on count 7. Accordingly, count 7 was dismissed.

Defendant was sentenced to a determinate term of seven years on count 3, two consecutive terms of 15 years-to-life for counts 1 and 9. On counts two four and five, defendant was sentenced to concurrent 15 years-to-life terms and a three year concurrent term on count 6. Various fines and fees were imposed, including a $10,000 restitution fund fine.

DISCUSSION

I

Defendant contends the trial court erred in denying his motion to exclude the statements he made to Officer Galliano. He argues he did not voluntarily waive his right to counsel during the interview, as Galliano prevented him from invoking that right by interrupting him. We disagree.

Background

Defendant was arrested and interrogated by Officer Galliano on March 20, 2009. The interrogation was audio taped. Galliano was the only officer present and was dressed in plain clothes. Although defendant was in custody, he was not handcuffed. The interview lasted approximately 30 minutes. Officer Galliano advised defendant of his *Miranda* rights, defendant indicated he understood those rights and implicitly waived them.

Defendant initially denied any wrongdoing. Galliano left the room and pretended to view a nanny cam. When he returned, he told defendant that DNA test results were in and established his guilt. Defendant then acknowledged F. liked to “snuggle and

cuddle." The nanny cam and the DNA tests were ruses to encourage defendant to confess.

Approximately eight minutes into the interrogation, as Galliano continued pressing defendant, defendant stated "Perhaps I should retain a lawyer." Because defendant said this softly and while hunched over, Galliano thought defendant was talking to himself and his statement about counsel was ambiguous.

Galliano left the room for about five minutes, to give defendant an opportunity to consider whether he wanted counsel. To clarify defendant's meaning, when he returned, Galliano readvised defendant of his right to an attorney and that one would be provided for him if he could not afford one. Defendant interrupted Galliano, and said "Um, I don't know." Galliano responded by telling defendant not to interrupt him, "reminding him of his manners" and continuing to tell defendant he needed to hear defendant's side of the story. It did not appear to Galliano that defendant had been trying to invoke his *Miranda* rights at that time.

The interrogation continued for approximately another 17 minutes. Defendant did not mention an attorney again. He ultimately admitted he had exposed his penis to F. a couple of times and she had touched it three times in the last month. He got an erection after she touched his penis, but he did not ejaculate in front of her. He denied ever having her lick his penis, although he admitted asking her if she had ever licked a penis. He admitted he told F. not to tell her parents, because he felt guilty. He continued to deny anything happened with O.

Prior to trial, defendant moved to exclude these statements, claiming they were obtained in violation of his *Miranda* rights and the court conducted an Evidence Code section 402 hearing on the matter. Defendant acknowledged that since he did not invoke his *Miranda* rights after the first advisement, he had impliedly waived them. However, he argued his statements were not voluntary, as he had been compelled to make them through “police intimidation, coercion or deception,” in that “Galliano explicitly promised [defendant] that he would walk out of the interrogation room with his head held high if he confessed."[2] He also argued that “as soon as [defendant] attempted to invoke his right to an attorney, Officer Galliano immediately told him to be quiet and let him finish. [Defendant] never again attempted to invoke his right to an attorney, but became upset and distraught in the face of additional questioning.”

Galliano testified at the Evidence Code section 402 hearing on the motion and the court listened to the audiotape of the interrogation. The court found there were no overly coercive, deceptive or intimidating tactics used by Galliano. The court found defendant’s initial statement regarding a lawyer was not an unequivocal invocation of his right to an attorney. The court also found defendant’s claimed attempted invocation, when he interrupted Galliano while he was rereading defendant his

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[2] Defendant does not renew this claim on appeal, accordingly the facts relevant to that claim are not recounted.

rights, was not an attempted assertion of rights. Rather, defendant "[was clearly] thinking about his rights, but it's also clear he is debating among his options in trying to decide whether he should talk or whether he should not talk. He doesn't invoke his rights. Subsequently, in fact, he continues to talk afterwards." Accordingly, the court denied the motion.

Analysis

"'In reviewing *Miranda* issues on appeal, we accept the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained.' (*People v. Smith* (2007) 40 Cal.4th 483, 502.)" (*People v. Martinez* (2010) 47 Cal.4th 911, 949.) "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' . . . ." (*Colorado v. Connelly* (1986) 479 U.S. 157, 167 [93 L.Ed.2d 473, 484].) But, the ultimate question in determining whether a confession is voluntary, is whether the defendant's free will was overcome by coercive police activity. (*People v. Williams* (2010) 49 Cal.4th 405, 436; see also *People v. Massie* (1998) 19 Cal.4th 550, 576; *Lynumn v. Illinois* (1963) 372 U.S. 528, 534 [9 L.Ed.2d 922, 926].) Such coercive activity may come in the form of threats, violence, direct or implied promises, or the exertion of improper influence. (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

Defendant does not argue that the coercive activity here came in the form of threats, violence, promises or the exertion of improper influence. Rather, he acknowledges he never made "an unambiguous or unequivocal request for counsel after initially waiving" his *Miranda* rights, but argues that is because he was prevented from doing so by Galliano. Specifically, he contends that "Galliano intentionally cut [defendant] off so that he could not invoke his right. . . [¶] In short, Galliano prevented [defendant] from invoking his right to counsel by making it clear that any attempt to invoke would be overridden and ignored." Defendant contends under these circumstances his waiver of his right to counsel was not voluntary. We disagree with defendant's view of the record and find no error in the denial of the motion to exclude his statements.

Defendant notes he has found no cases that support his argument, but claims "it is self-evident that a waiver cannot be voluntary if it was blocked by the police."[3] We do not agree that this case represents a situation in which the police intentionally blocked an attempted assertion of rights.

The trial court found defendant's statement "Um, I don't know" was not an attempted assertion or the beginning of an assertion of rights. Rather, the statement was a reflection that defendant was "thinking about his rights", "debating among

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[3] We presume defendant meant to argue that a waiver cannot be voluntary if the invocation of rights is blocked by the police.

his options in trying to decide whether he should talk or whether he should not talk." Based on our review of the transcript and Officer Galliano's testimony, we find substantial evidence supports the trial court's conclusion.

Furthermore, we cannot agree that Galliano's actions prevented defendant from invoking his rights or that, under these circumstances, Galliano's response made "it clear that any attempt to invoke would be overridden and ignored."

Defendant initially made an ambiguous statement when he said "Perhaps I should retain a lawyer." Galliano stopped the interview, to give defendant a chance to consider whether he wanted an attorney and returned five minutes later to clarify whether defendant wanted counsel. He began to readvise defendant of his right to counsel when defendant interrupted him and said "Um, I don't know." Galliano then told defendant not to interrupt him and continued the interrogation. Given the ambiguity of the request, coming after a knowing and voluntary waiver, neither statement made by defendant required Galliano to seek clarification or stop the interrogation. (*Davis v. United States* (1994) 512 U.S. 452, 459-462, [129 L.Ed.2d 362, 371-373]; *People v. Williams, supra,* 49 Cal.4th at pp. 432-433.) Thus, the one time defendant actually mentioned an attorney, Galliano did more than required of him under the law, stopped questioning defendant, gave him time to think about the matter and readvised him of his rights. Galliano's response was not, on its face, threatening or improperly influential. It was not the sort of response which would ordinarily be sufficient to overcome a

person's will, and there was no evidence that defendant's will was actually “overborne” by virtue of Galliano’s actions. Accordingly, we cannot find that Galliano’s response to defendant’s statement rendered his waiver of rights involuntary. The trial court properly denied the motion to exclude.

II

Defendant next contends the trial court erred in prohibiting him from cross-examining Galliano about defendant’s interest in retaining an attorney, in that it infringed on his ability to have a meaningful opportunity to present his defense; that is, to challenge the reliability of his confession at trial. It did not.

Background

During cross-examination of Galliano, defense counsel asked “Now at one point . . . [defendant] started to talk about retaining an attorney, correct?” The prosecutor objected on the grounds of relevance and an off the record sidebar conference was held. The objection was sustained. The court then allowed counsel to continue with a thorough cross-examination of Galliano on the circumstances surrounding the confession, including: Galliano’s background and experience in interrogations; the physical environment of the interrogation room; and, Galliano’s interrogation tactics and techniques, such as building a rapport with the suspect, being confrontational with the suspect, taking breaks, employing ruses, and perpetuating deceptions. Defense counsel emphasized the numerous times Galliano interrupted defendant throughout the

interrogation. Defense counsel also explored defendant's emotional state during the interrogation.

Defendant also testified about the circumstances under which he confessed, including his mental condition at the time, his emotional state in the interrogation room, his confusion during the interrogation, and the physical environment of the room. He also explained what he had intended by his statements, the meaning of which was confused when Galliano kept interrupting him.

In addition to this evidence of the circumstances surrounding the confession, the court admitted as exhibits both the transcript and the audio recording of the confession. The transcript and recording reflect that defendant mentioned retaining an attorney and the responses that followed.

Analysis

Relying on *Crane v. Kentucky* (1986) 476 U.S. 683, [90 L.Ed.2d 636] (*Crane*), defendant contends the trial court's error in sustaining the objection to cross-examination of Galliano on the issue of defendant mentioning retaining an attorney infringed on his ability to have a meaningful opportunity to present his defense, specifically, to challenge the reliability of his confession at trial. He further argues the trial court's "ruling reflects a misunderstanding between a confession's voluntariness, a decision for the court, and its reliability, a decision for the jury." Neither argument is persuasive.

Crane was a murder case which rested largely on the confession of a 16-year-old boy under oppressive circumstances.

The defense wanted to challenge the reliability of the confession utilizing internal inconsistencies and the circumstances under which the confession was obtained. Finding the circumstances surrounding the confession were relevant only to the issue of voluntariness, the trial court excluded all evidence on that point. (*Crane, supra,* 476 U.S. at pp. 686-687, [90 L.Ed.2d at pp. 642-643].) Reversing, the United States Supreme Court made clear "the requirement that the court make a pretrial *voluntariness* determination does not undercut the defendant's traditional prerogative to challenge the confession's *reliability* during the course of the trial." (*Id.* at p. 688 [at p. 643].) The Court went on, "the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be 'insufficiently corroborated or otherwise . . . unworthy of belief.'" (*Id.* at pp. 688-689, [90 L.Ed.2d at p. 644].) Accordingly, the Court found a "blanket exclusion" of evidence related to the circumstances of the confession is error because it deprives the defendant of a meaningful opportunity to present a complete defense. (*Id*. at pp. 690-691 [at p. 645].)

Unlike in *Crane*, in this case, there was no blanket exclusion of the circumstances surrounding the confession. To the contrary, defense counsel thoroughly explored the

circumstances surrounding the interrogation on both cross-examination of Galliano and direct examination of defendant. This exploration included Galliano's experience, the techniques and tactics he used, the physical environment of the room, and defendant's mental and emotional condition. Moreover, the transcript and recording of the interrogation itself were introduced into evidence. These reflected the specific statement made by defendant regarding an attorney and Galliano's responses. Thus, the very evidence defendant sought to get before the jury through cross-examination of Galliano, the circumstances surrounding his purported invocation of his right to an attorney was, in fact, before the jury.

Contrary to defendant's claim that the trial court misunderstood the distinction between a confession's voluntariness and its reliability, the record before us does not reveal any such misunderstanding. The discussion regarding the objection was off the record. It is defendant's burden, as the appellant, to affirmatively demonstrate error on the record. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) He has not met this burden. Moreover, as noted above, the issue of the confession's reliability was thoroughly explored and put before the jury. This suggests the trial court was fully aware of the distinction between voluntariness and reliability.

Defense counsel argued extensively that his client's confession should be disregarded as the product of a police officer's lies and psychological manipulation of a man suffering from posttraumatic stress disorder, manic depression and

bipolar. The jury was provided with ample evidence of the circumstances surrounding the confession, including the transcript and audio recordings, which contained the very information defendant now complains the jury did not have. On this record, defendant was in no way precluded from challenging the reliability of his statements to the police and no prejudice could have arisen from any error in sustaining the objection to his cross-examination.

III

Defendant next contends his conviction for lewd and lascivious conduct against O. (count 9) must be reversed for insufficient evidence. Specifically, he argues reversal is required because there was insufficient evidence that he "committed the act upon which the jury was instructed, and because he was convicted of an act upon which the jury was not instructed." Although he positions his argument as a sufficiency of the evidence claim, defendant's claim, in fact, comes down to a claim that the jury was misinstructed. While defendant is correct, the jury was misinstructed, the correct information and the verdict forms make clear that the jury made the findings necessary to support the conviction. Accordingly, the real issue is whether the erroneous instruction vitiates the conviction where the verdict form and the charging document were correct. It does not.

Background

As to O., defendant was charged with one count of oral copulation (count 7) and two counts of committing a lewd and

lascivious act (counts 8 and 9). Count 8 was described in the information as defendant causing the victim to place his hand on defendant's penis and count 9 was described as defendant touching O.'s penis. The instructions on committing a lewd and lascivious act stated, "To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant willfully caused a child to touch his own body, the defendant's body, or the body of someone else either on the bare skin or through the clothing; 2. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child; and 3. The child was under the age of 14 years at the time of the act." The instruction as given erroneously did not state that defendant could be convicted of lewd and lascivious conduct against O. based on defendant touching O.'s penis.

Analysis

Defendant relies on *People v. Curtin* (1994) 22 Cal.App.4th 528, 531 (*Curtin*) and *People v. Beasley* (2003) 105 Cal.App.4th 1078 (*Beasley*) to support his claim that reversal of a conviction is required if the defendant is found guilty on the wrong theory. *Curtin* and *Beasley* are distinguishable from this case.

In *Curtin*, the defendant was charged with grand theft and convicted of grand theft on a theory of larceny by trick or device. At the time, the various theft offenses had been consolidated into a single statute, but the elements remained distinct. (*Curtin, supra,* 22 Cal.App.4th at p. 531.) On

appeal, defendant argued his conviction could not stand because the evidence was insufficient to establish a theft by trick or device on that theory. He argued that the crime committed was theft by false pretenses. (*Id*., at pp. 530-531.) In reversing the conviction, the court stated "While a general verdict of guilt may be sustained on evidence establishing any one of the consolidated theft offenses [citation], the offense shown by the evidence must be one on which the jury was instructed and thus could have reached its verdict. [Citation.] Thus, in this case, if the elements of theft by trick were not proven, the conviction cannot be affirmed on the ground the evidence showed defendant's guilt of false pretenses, *which has additional required substantive elements, as well as a special corroboration requirement*, upon which the jury was not instructed." (*Id.* at p. 531, italics added.) That is, "*Curtin* reversed a theft conviction because the instruction as to larceny by trick required the presence of evidence which did not exist in the record, and there was insufficient evidence of corroboration to sustain the conviction on a theory of false pretenses." (*People v. Counts* (1995) 31 Cal.App.4th 785, 791.) Furthermore, even if there had been "sufficient evidence in the record to support the additional elements required for theft by false pretenses, the jury was not instructed on the latter offense and therefore had no occasion to determine if the additional elements had been proved beyond a reasonable doubt." (*People v. Beaver* (2010) 186 Cal.App.4th 107, 125.)

In *Beasley*, after hitting the victim with a broomstick, and punching and kicking her head and back, the defendant was charged with and convicted of violating section 245, subdivision (a)(1), assault with a deadly weapon or by means likely to cause great bodily injury. (*Beasley, supra,* 105 Cal.App.4th at pp. 1086-1087.) Hands and feet do not constitute deadly weapons and the jury was not instructed on assault by means likely to cause great bodily injury. Accordingly, the conviction had to rest on whether the broomstick constituted a deadly weapon. (*Id*. at p. 1087.) However, the record did not contain evidence supporting a finding that the broomstick was a deadly weapon. The broomstick was not shown to the jury. There were no photographs of the broomstick, no evidence of its composition, weight, or rigidity. Neither the stick itself nor photographs of it were introduced in evidence. Because the jury had no evidence as to the broomstick before it, it could not have determined that a broomstick was a deadly weapon. Accordingly, there was insufficient evidence to support the conviction.

In both *Curtin* and *Beasley* the defendants were charged under statutes that included multiple offenses with distinct elements. The juries were instructed, however, only on one of the offenses contained within the statute. While the evidence in the record might have supported a conviction on the other offenses within the statute, because of the lack of instruction, the jury had no occasion to consider them, and there was no indication in the record that the jury had considered them.

Here, defendant was charged under a statute which includes only one offense, lewd and lascivious conduct with a child. This offense is committed "by 'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." (*People v. Martinez* (1995) 11 Cal.4th 434, 452.) This is the offense for which defendant was convicted. A jury finding that defendant touched O.'s penis with the intent to sexually arouse defendant would support defendant's conviction under section 288, subdivision (a). (*Id.*, at pp. 444-45.)

Unlike *Curtin* and *Beasley,* in this case, there was evidence to support the conviction. More specifically, there was evidence that defendant committed this offense by touching O.'s genitals. O. told both Heather, Officer Galliano and the SAFE interviewer that defendant had touched his genitals. Furthermore, the record indicates the jury actually considered this evidence and found it true beyond a reasonable doubt. The information specifically alleged defendant touched O.'s genitals. Both the prosecutor and defense counsel's closing arguments discussed the offense including defendant touching O.'s genitals. The jury verdict form for count nine specifically reflected a finding by the jury that defendant had touched O.'s genitals. Accordingly, in this case the jury had both evidence supporting the claim that defendant touched O.'s genitals *and* occasion to determine the issue. This distinction removes the instant case from the holdings of *Beasely* and *Curtin*.

The error here is not a substantial evidence error, but an instructional error. Although the instruction given as to count nine was clearly flawed, we find the error was not prejudicial.

Instructions omitting or misdescribing an element of an offense are subject to harmless error analysis under the test of *Chapman*.[4] (See *People v. Flood* (1998) 18 Cal.4th 470, 503–507.) Under this test, the question for the reviewing court is "not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] . . . Harmless-error review looks . . . to the basis on which 'the jury *actually* rested its verdict.' [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [124 L.Ed.2d 182, 189]; see also *In re Lucero* (2011) 200 Cal.App.4th 38, 48.) "If other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary . . . [then], the erroneous . . . instruction was harmless." (*People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1204-05; see also *California v. Roy* (1996) 519 U.S. 2, 7, [136 L.Ed.2d 266, 272].)

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[4] *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

By way of the information, evidence, argument and verdict forms, the question of whether defendant touched O.'s genitals was put squarely before the jury to determine. The verdict form makes clear the jury found beyond a reasonable doubt defendant committed that act. There is no reasonable doubt that the jury considered the issue and made the necessary findings to support the verdict. Accordingly, the verdict in this case was unattributable to the instructional error and the error was harmless.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

ROBIE, J.