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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

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THE PEOPLE,

Plaintiff and Respondent,

v.

CARLTON FARNSWORTH HAMMONDS,

Defendant and Appellant.

C068904

(Super. Ct. No.  
09SCR06019)

Defendant Carlton Farnsworth Hammonds was convicted of three felony counts of lewd acts on a 14-year-old minor and one misdemeanor count of annoying or molesting a minor. The trial court sentenced him to three years eight months in prison and imposed various fines and fees, including a \$500 fine under Penal Code section 288, subdivision (e).<sup>1</sup>

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

Defendant asserts the following contentions on appeal:

(1) the misdemeanor conviction for annoying or molesting a minor must be reversed because it is barred by the statute of limitations, it was an uncharged lesser related offense that violates defendant's due process right to notice, and the trial court made an improper judicial comment regarding the charge;

(2) the trial court erred in its instruction regarding uncharged conduct; and

(3) the fine imposed under section 288, subdivision (e), must be stricken.

We conclude (1) the misdemeanor conviction for annoying or molesting a minor must be reversed because it is barred by the one-year statute of limitations; (2) any error in instructing on uncharged conduct was harmless; and (3) the \$500 fine imposed under section 288, subdivision (e), must be stricken.

#### BACKGROUND

Defendant was a pastor at Willows Baptist Church and a real estate agent in Willows, California. Defendant and his wife also ran a small K-12 school attached to the church called the Willows Baptist Academy. Defendant was the principal and teacher at the school.

D.C. and her family joined the Willows Baptist Church when D.C. was four years old. She attended the church school. When she was 10, defendant started hugging her. As she got older, he gave her lingering hugs, sometimes touching, grabbing or squeezing her buttocks.

Once when she was 14, D.C. stayed the night at the home of defendant and his wife. After defendant's wife went to bed, defendant went into another bedroom where D.C. was lying in bed. Defendant sat on the bed and told D.C. she was beautiful and he loved her. He ran his hand slowly up her leg and touched her breasts. D.C. got up, went to the bathroom, and got into the shower. Defendant entered the bathroom, drew back the shower curtain and touched her breasts. D.C. tried to leave the shower but defendant grabbed her arm and pushed her back in. Defendant removed his clothes and got in the shower with D.C. He caressed her breasts and put his finger in her vagina. At trial, D.C. also testified that defendant briefly inserted his penis into her vagina, something she had not mentioned before.

Several years later, D.C. went to defendant's house to confront him. He denied doing anything to her and later obtained a restraining order against her.

N.L. was 22 years old at the time of trial. When she was 15 years old, she attended defendant's church school and also attended church services every Wednesday and Sunday. In addition, she did clerical work for defendant at his real estate office. One day as she was leaving the real estate office, defendant grabbed her hand, told her he had something to show her, and pulled her into a dark back room. Defendant hugged her and kissed her neck and lips. She pushed him away. She told her mother and sister what happened but did not report the incident to law enforcement for years.

M.L. was a witness to alleged uncharged acts committed by defendant. She was 17 years old at the time of trial. She attended the church school but left when she was 14 years old because defendant's conduct made her feel uncomfortable. Defendant's conduct included lingering hugs behind closed doors and giving gifts such as jewelry.

K.L. was also a witness to alleged uncharged acts committed by defendant. She was 18 years old at the time of trial. She attended the church school from fourth grade through ninth grade. As she grew older, defendant began giving her lingering hugs when she was alone with him, sometimes shutting and locking his office door behind him. In addition, he sometimes offered to reduce her homework if she would rub his neck. K.L. grew uncomfortable with defendant's behavior.

A police officer interviewed defendant on April 3, 2008. Defendant admitted hugging his accusers when they were alone with him, but he denied any sexual contact.

Defendant testified on his own behalf. He handled discipline at the school until 2009, sometimes behind closed doors, but never locked the door when alone with a student. He sometimes gave jewelry to female students (handmade by a church member) and gave pocket knives or candy to male students. He gave students handshakes and hugs and told them he loved them, but he did not touch their buttocks.

Defendant admitted hugging N.L. but denied pulling her into a back room, touching her buttocks, or trying to kiss her.<sup>2</sup> He also admitted occasionally hugging M.L., but denied hugging her for romantic or sexual reasons or touching her buttocks. Defendant denied touching K.L. for any sexual purpose. K.L. sometimes volunteered to rub his neck and his wife's neck.

According to defendant, D.C. was a bully as a child, then became more troublesome around the time she turned 12. After she reached that age, he hugged her only once or twice because she was very standoffish. He never touched her buttocks or tried to kiss her. Defendant said his shower stall was very small. He said he was five feet seven inches tall and weighed about 255 pounds.

According to defendant, D.C. came to his home on Father's Day 2009 and demanded to know why he "did this" to her. Defendant said, "What are you talking about?" then went inside and called 911. D.C. threatened to burn down his church, beat up his daughter and wife, and "'F' up" their lives. When defendant and his wife subsequently received a threatening phone call late at night, he obtained a restraining order against D.C.

An information charged defendant with three felony counts of lewd acts on a 14-year-old minor, D.C. (Pen. Code, § 288, subd. (c)(1); counts I, II and III), and one count of sexual

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<sup>2</sup> N.L.'s mother testified on rebuttal that after her daughter told her parents about defendant's actions toward her, they confronted defendant. He denied doing anything wrong, but kept his hands over his face and would not look them in the eye.

battery by restraint on N.L. (§ 243.4, subd. (a); count IV). During trial, after the People rested, defendant moved successfully under section 1118.1 to dismiss count IV. Over defense objection, however, the trial court allowed the People to file a first amended information which added count V as a replacement, a misdemeanor charge of annoying or molesting a minor, N.L. (§ 647.6, subd. (a)(1); count V).

A jury convicted defendant on the three felony counts of lewd acts on a 14-year-old minor, D.C. (counts I, II and III) and the misdemeanor count of annoying or molesting a minor, N.L. (count V). The trial court sentenced defendant to an aggregate prison term of three years eight months, consisting of two years (the middle term) on count I, eight months consecutive on count II, eight months consecutive on count III, and four months consecutive on count V. The trial court also imposed various fines and fees, including a \$500 fine under section 288, subdivision (e).

#### DISCUSSION

##### I

Defendant contends his conviction on the misdemeanor count (count V) for annoying or molesting a minor, N.L., must be reversed because it is barred by the statute of limitations. The Attorney General agrees and we do, too.

Although defendant's objection in the trial court to the addition of count V was not based on the statute of limitations, the statute of limitations can be raised at any time. (*People v. Williams* (1999) 21 Cal.4th 335, 341.) As a misdemeanor

offense, section 647.6, subdivision (a)(1) has a one-year statute of limitations.<sup>3</sup> (§ 802, subd. (a); *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1309.) Because the alleged offense occurred on March 9, 2004, and the amended information was filed September 29, 2010, the offense was time-barred.

Accordingly, the conviction for annoying or molesting a minor (count V) must be reversed, and we need not address defendant's additional arguments seeking reversal of his conviction on that count.

## II

Defendant further contends the trial court erred in instructing the jury regarding uncharged misconduct. We conclude any error was harmless.

The trial court verbally instructed the jury with the following modified version of CALCRIM No. 375:

"The People presented evidence that the defendant committed another offense of touching the buttocks of [K.L.] that is not charged in this case. You may consider this evidence only if the People have proved, by a preponderance of the evidence, that the defendant, in fact, committed the uncharged offense.

"Proof by a preponderance of the evidence is different proof than the burden of proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

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<sup>3</sup> If the victim is under the age of 14 years, the statute of limitations is three years. (§ 802, subd. (b).)

If the People have not met this burden you must disregard this evidence entirely.

"If you decide that the defendant committed the uncharged offenses, you may but are not required to consider that evidence for the limited purposes of deciding whether or not the defendant was the person who committed the offenses alleged in this case and/or the defendant acted with the intent of sexual gratification required to prove the offenses alleged in this case and/or the defendant had a motive to commit the offense alleged in this case and/or the defendant knew it was wrong to touch a child's buttocks or other sexual organ when he allegedly acted -- as he allegedly acted in this case and/or the defendant had a plan or a scheme to commit the offenses alleged in the case or in evaluating this evidence consider the similarity or lack of similarity between the uncharged offenses and the charged offenses.

"Do not consider this evidence for any other purpose. Do not conclude from this evidence that the defendant had a bad character or is disposed to commit crimes.

"If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove that the defendant is guilty of each count in this Information. The People must still prove each charge beyond a reasonable doubt."

Defendant asserts the trial court erred by instructing the jury that it could consider the uncharged acts evidence to prove

"whether or not the defendant was the person who committed the offenses alleged in this case" because identity was not at issue. We agree the trial court should not have so instructed. "Evidence of identity is admissible [under Evidence Code section 1101, subdivision (b)] where it is conceded or assumed that the charged offense was committed by someone, in order to prove that the defendant was the perpetrator." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2; italics omitted.) Here, defendant denied that any offenses were committed. Thus the uncharged acts evidence was not admissible to prove identity.<sup>4</sup>

Moreover, defendant argues it was error to instruct the jury that it could consider the uncharged acts to decide whether defendant "knew it was wrong to touch a child's buttocks or other sexual organ [as] he allegedly acted . . . in this case." According to defendant, section 288, subdivision (c)(1) does not require proof that defendant knew what he did was wrong. In

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<sup>4</sup> The Bench Notes to CALCRIM No. 375 state: "The court must instruct the jury on what issue the evidence has been admitted to prove and delete reference to all other potential theories of relevance. [Citations.] Select the appropriate grounds from options A through H [i.e., the list of factors potentially applicable under Evidence Code section 1101, subdivision (b)] and delete all grounds that do not apply." (CALCRIM No. 375 (2012) p. 156.)

Although it is true that a defendant puts all the elements of the crime in dispute by pleading not guilty (*People v. Ewoldt, supra*, 7 Cal.4th at p. 400, fn. 4), this does not mean that the jury should be instructed to consider uncharged acts evidence for purposes that are irrelevant under Evidence Code section 1101, subdivision (b).

addition, defendant never said he touched the victims' buttocks and did not know it was wrong.

We agree the trial court should not have instructed the jury that the uncharged conduct could be used to decide whether defendant knew touching the victims' buttocks or sexual organs was wrong. Defendant's defense was that he did not do the charged acts. He never claimed that he committed the acts but did not know they were wrong.

Nonetheless, even if it was error to give certain portions of the instruction, we conclude the error was harmless. The jury was also instructed that it should not apply any instruction that did not fit the facts as it found them, and we presume the jury followed that instruction. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)<sup>5</sup> Moreover, the jury was instructed not to conclude from the uncharged conduct evidence that defendant had a bad character or was disposed to commit crimes, and the jury was further instructed that the uncharged conduct evidence was not sufficient by itself to prove that the defendant was guilty of the charged crimes. The jury was instructed that the People had to prove each charge beyond a reasonable doubt. Again, we assume the jury followed these instructions.

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<sup>5</sup> Defendant asserts the jury would have had no way of knowing the instruction was inapplicable. If defendant were correct, then we would have to reject the presumption stated in *People v. Holt, supra*, 15 Cal.4th at page 662. Absent affirmative evidence in the record that the jury considered and relied on inapplicable instructions, we must follow that presumption.

This case ultimately came down to a credibility contest between defendant and the victims of the charged crimes. The jury believed the victims. Under the circumstances, any error in the instruction on uncharged conduct was harmless.

### III

In addition, defendant contends the \$500 fine imposed under section 288, subdivision (e) must be stricken. The Attorney General agrees and so do we.

Section 288, subdivision (e), provides: "Upon the conviction of any person for a violation of subdivision (a) or (b), the court may, in addition to any other penalty or fine imposed, order the defendant to pay an additional fine not to exceed ten thousand dollars (\$10,000)." But defendant was not convicted of any violation of section 288, subdivision (a) or (b). He was convicted of violating section 288, subdivision (c)(1), which is not covered by subdivision (e). Therefore, the \$500 fine imposed under section 288, subdivision (e) was unauthorized.

### DISPOSITION

Defendant's misdemeanor conviction for annoying or molesting a minor is reversed, count V of the first amended information (incorrectly identified in the abstract of judgment as count 4) is dismissed (see § 1260), and defendant's sentence is reduced by four months. In addition, the \$500 fine under section 288, subdivision (e) is stricken. The judgment is affirmed as modified. The trial court is directed to prepare an amended abstract of judgment reflecting the judgment as modified

and to forward a certified copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation.

\_\_\_\_\_ MAURO \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ NICHOLSON \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ BUTZ \_\_\_\_\_, J.