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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re KEVIN C., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN C.,

Defendant and Appellant.

F068760

(Super. Ct. Nos. 13CEJ600417-1,  
13CEJ600417-1A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Timothy A. Kams, Judge.

Courtney M. Selan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Kelly E. LeBel, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Detjen, J. and Peña, J.

The court adjudged appellant Kevin C. a ward of the court (Welf. & Inst. Code, § 602)<sup>1</sup> after it sustained allegations in one petition charging appellant with battery (Pen. Code, § 242) and allegations in a second petition charging appellant with two counts of annoying or molesting a child (Pen. Code, § 647.6, subd. (a)).

On appeal, appellant contends: (1) the court erred when it found that appellant was not entitled to assert that he acted in self-defense; (2) the evidence is insufficient to sustain the two counts of annoying or molesting a child; and (3) the court erred in setting appellant's maximum term of physical confinement (MTPC). We will find merit to appellant's last contention and modify the judgment by striking the MTPC. As modified, we will affirm.

## **FACTS**

### ***The Battery Offense***

In April 2013, appellant and B.N. attended the Phoenix Secondary Academy in Fresno. At the jurisdictional hearing, B.N. testified that on April 26, 2013, he and appellant argued while playing basketball at the school. After school, B.N. rode home on the same bus as appellant and they both got off at the same stop. Appellant then got into a truck and left. Approximately 10 minutes later, as B.N. was walking home, the truck carrying appellant "came from the side," and appellant got out and hit B.N. from behind on the right cheek, hard enough to leave a bruise. Appellant got back in the truck and left. B.N. went home and told his father, who reported the matter to Fresno Police Officer David Standley, the resource officer at the school.

Appellant testified that in April 2013, he and B.N argued on the basketball court. After school they both rode the same bus. After getting off the bus, appellant was walking home through an alley when B.N. approached him and said, "What up? I thought we were supposed to fight." Appellant responded, "Oh, oh well, let's do it."

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

B.N. then walked up to appellant and appellant punched him on the right side of his ribs and B.N. kicked appellant on the front of his left shin. Appellant testified he hit B.N. first because B.N. was approaching him and appellant thought B.N. was going to attack him.

### ***The Annoying or Molesting a Child Offenses***

At appellant's jurisdictional hearing, A.J. testified that the previous school year she and appellant were in the same classes at Phoenix Secondary Academy. On May 29, 2013, at approximately 2:00 p.m., she arrived to her history class with appellant and they went to sit at a desk that was made for two people. As A.J. was about to sit on her seat, appellant put his hand on her chair with his index finger pointing up. A.J. sat on appellant's hand and felt his index finger penetrate half way up between her buttocks. A.J. got mad, jumped up quickly, and started yelling at appellant, who was laughing. A.J. then went to sit where A.L. was sitting and A.L. went to sit in A.J.'s seat next to appellant. When A.L. bent down to tie his shoe, appellant grabbed A.L. by the back of his neck, pulled A.L.'s head, face first, down on appellant's lap, and moved it up and down as appellant made moaning sounds. A.J. was sent out of the room for yelling at appellant. Appellant was sent out of the room a few minutes later.

A.J. later told her mother what had happened and the next day her mother went to complain at the school office.

A.J. was offended and disgusted by appellant's conduct towards her. After this incident, A.J. did not wear her short cheerleading skirt to school on game or event days because she did not want anyone touching her or "doing something stupid."

A.L. testified that after appellant sat down next to him, appellant grabbed the back of A.L.'s head and moved it up and down while making moaning sounds and pretending that A.L. was giving appellant oral sex. A.L.'s face, however, did not touch appellant's lap. A.L. called out for the classroom teacher but the teacher was outside, by the door of the classroom, speaking with another teacher. When the classroom teacher came into the

room, appellant let A.L. go and began laughing. A.L. then moved to another seat. A.L. felt humiliated and embarrassed by the incident.

Officer Standley testified that he spoke with A.L. about the incident two days after it occurred and that A.L. was embarrassed to discuss it with him. He also spoke with appellant and appellant told him that he only grabbed A.L. in a headlock. Appellant denied making any moaning sounds. With respect to A.J., appellant said that all he did was put his hand on her seat to let her know that he did not want her to sit there. A.J. sat on his hand and immediately got up and yelled at him.<sup>2</sup>

## DISCUSSION

### *The Battery Offense*

After hearing argument from counsel, the court stated it found the allegations of both petitions were proven beyond a reasonable doubt. It then stated:

“Also, in regards to the ... [petition charging appellant with battery], counsel indicated that we shouldn’t believe [B.N.] over [appellant]. In fact, you don’t really have to believe [B.N.] over [appellant] because [appellant’s] testimony in and of itself is essentially sufficient to prove the charge. He stated that he thought that [B.N.] was going to do something, so he punched him first. I think under the circumstances of this case the law does not allow someone to do that, some type of anticipatory blow.”

Appellant appears to contend, based on this statement, that the court did not determine the truth of B.N.’s statement that appellant struck him from behind because it found appellant’s statement, that he struck the first blow in anticipation of B.N. striking appellant, sufficient to sustain the battery charge. He further contends that a person who in good faith perceives a threat of violence may stand his ground and defend himself even if that means striking the first blow. Thus, according to appellant, the court erred when it

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<sup>2</sup> The petition charging appellant with misdemeanor battery was filed on May 22, 2013. The petition charging appellant with two counts of annoying or molesting a child was filed on July 17, 2013. The jurisdictional hearing on both petitions was held on November 18, 2013. Petitioner and the victims in each case were 13 years old when the incidents underlying each petition occurred.

found he was not entitled to defend himself against the threat he perceived from B.N. Appellant, in effect, challenges the sufficiency of the evidence to sustain the court’s true finding that he committed the charged battery offense.

“When the sufficiency of the evidence supporting a criminal conviction is challenged on appeal, ‘the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact would find the defendant guilty beyond a reasonable doubt.’ [Citations.]

“The question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.] The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. [Citation.] This standard of review is equally applicable to proceedings adjudicated pursuant to section 602 of the Welfare and Institutions Code.” (*In re Jesse L.* (1990) 221 Cal.App.3d 161, 165.)

“It has long been established, both in tort and criminal law, that “the least touching” may constitute battery. In other words, *force* against the person is enough, it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark.” (*People v. Rocha* (1971) 3 Cal.3d 893, 899-900, fn. 12.) “Thus, ‘[a]ny harmful or offensive touching constitutes an unlawful use of force or violence’ for purposes of Penal Code section 242.” (*James v. State of California* (2014) 229 Cal.App.4th 130, 137-138, citing *People v. Martinez* (1970) 3 Cal.App.3d 886, 889.) “[T]he only legal justification of battery is self-defense.” (*People v. Mayes* (1968) 262 Cal.App.2d 195, 197-198.) Further, a person threatened with an attack that justifies the exercise of the right of self-defense need not retreat and in exercising his right of self-defense may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge. (*People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1346.)

The testimony of one witness is enough to sustain a juvenile adjudication. (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 830.)

Here, B.N. testified that as he walked home, appellant came up from behind and struck him without provocation on the cheek once. Thus, the record contains substantial evidence that supports the court's adjudication of appellant for battery.

In reaching this conclusion, we reject appellant's contention that the court did not determine the truth of B.N.'s statement that appellant struck him from behind. Prior to stating that it did not have to believe B.N. over appellant, the court had already announced that it found the allegations of both petitions true. Further, during closing arguments, defense counsel argued that there was no reason to believe B.N. over appellant. Thus, in making the statement quoted above, the court was merely responding to defense counsel's argument that it should believe appellant over B.N. by stating as an alternative basis for sustaining the battery charge, i.e., that appellant's own testimony was sufficient to sustain the battery charge.

In any event, the evidence is sufficient to sustain appellant's adjudication for battery, even assuming the court credited appellant's testimony over B.N.'s testimony, albeit not for the reason stated by the court. A defendant may use whatever force is reasonably necessary to prevent an injury or unlawful touching. (*People v. Clark* (2011) 201 Cal.App.4th 235, 250.) Thus, if, as appellant testified, he struck B.N. because he reasonably believed B.N. was about to strike him, ordinarily he would be entitled to assert a claim of self-defense to the charge that he battered B.N. However, under appellant's version of events, appellant and B.N. engaged in mutual combat, which precluded appellant from asserting that he struck B.N. in self-defense.

“‘[M]utual combat’ conditionally bars the participants from pleading self-defense if either is prosecuted for assaulting the other.” (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1043.) “‘[M]utual combat’ consists of fighting by mutual intention or consent, as most clearly reflected in an express or implied *agreement* to fight. The agreement need not have all the characteristics of a legally binding contract; indeed, it necessarily lacks at least one such characteristic: a lawful object. But there must be evidence from which the

[factfinder] could reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose.*” (*Id.* at pp. 1046-1047.)

Here, according to appellant’s testimony, there was a mutual agreement between appellant and B.N to fight each other, i.e., to engage in mutual combat. Thus, under appellant’s version of events, as a mutual combatant he was precluded from asserting a claim of self-defense. Accordingly, even assuming the court credited appellant’s testimony over B.N.’s testimony, the evidence is sufficient to sustain the court’s adjudication for battery. (*People v. Zapien* (1993) 4 Cal.4th 929, 976 [a ruling or decision, itself correct in law, will not be disturbed on appeal merely because it was given for a wrong reason if the ruling or decision is correct upon any theory of the law applicable to the case].)

### ***The Child Annoyance and Molestation Adjudications***

Penal Code section 647.6, subdivision (a)(1) makes it a misdemeanor when a person, “annoys or molests any child under 18 years of age.”

“Section 647.6, subdivision (a) does not require a touching, ‘but does require (1) conduct a “normal person would unhesitatingly be irritated by” [citation], and (2) conduct “motivated by an unnatural or abnormal sexual interest” in the victim [citation].’ The ‘words “annoy” and “molest” ... are synonymous and generally refer to conduct designed to disturb, irritate, offend, injure, or at least tend to injure, another person. [Citation.] ... [¶] “Annoy” and “molest” ordinarily relate to offenses against children, with a connotation of abnormal sexual motivation. The forbidden annoyance or molestation is not concerned with the child’s state of mind, but rather refers to the defendant’s objectionable acts that constitute the offense. [Citation.] [¶] Accordingly, to determine whether the defendant’s conduct would unhesitatingly irritate or disturb a normal person, we employ an *objective* test not dependent on whether the child was in fact irritated or disturbed. [Citations.]’ [Citation.]

“Although no specific intent is required, section 647.6, subdivision (a)(1), does require that the acts be “motivated by an unnatural or abnormal sexual interest or intent with respect to children.” [Citations; *People v. Shaw* (2009) 177 Cal.App.4th 92, 103 ... [“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”].) Our Supreme Court has also explained

the primary purpose of the statute: The ““protection of children from interference by sexual offenders, and the apprehension, segregation and punishment of the latter.””” ( *People v. Brandao* (2012) 203 Cal.App.4th 436, 440-441, fn. omitted.)

Here, appellant engaged in conduct that the juvenile court could reasonably find was conduct that a “normal person would unhesitatingly be irritated by” when he placed his hand on A.J.’s seat with his index finger pointed up so that she would sit on it and when he grabbed A.L. by the neck and simulated that A.L. was performing oral sex on him. The court could also reasonably find from the age of the victims, the patent sexual nature of appellant’s conduct, the classroom setting in which the conduct occurred, and the fact that it involved two egregious acts of sexual misconduct against two victims, that appellant was motivated to commit these acts by an unnatural or abnormal sexual interest in children.

Appellant contends the victims each testified that they had witnessed and that they understood that students in general engaged in sexually themed joking, teasing and roughhousing on a somewhat regular basis. Thus, he contends that his conduct “while irksome and objectionable, was not driven by an actual sexual desire ... [because] it was nothing out of the ordinary in terms of the sometimes misguided codes of behavior common to a middle school campus.” He also cites several cases in which the defendant’s conduct allegedly was more egregious than his conduct<sup>3</sup> to contend that his conduct did not rise to the level of the defendant in those cases, especially considering the roughhousing the victims regularly experienced in school. Thus, according to appellant, “it cannot be said that the evidence presented in appellant’s case rose to the level of

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<sup>3</sup> See for example, *People v. Thompson* (1988) 206 Cal.App.3d 459 [the defendant drove around a neighborhood following a twelve-year-old girl on a bike who was attempting to elude the defendant]; *People v. Kongs* (1994) 30 Cal.App.4th 1741 [the defendant took pictures of young girls in sexually explicit poses]; *People v. Phillips* (1995) 188 Cal.App.4th 1383 [the defendant parked outside a high school when the school day was over and masturbated in a way that students who passed by would see him].)

substantial evidence” that supports appellant’s adjudication for annoying or molesting a minor. We disagree.

Appellant did not present any evidence to support his contention that sexual horseplay was common among students at the victims’ school. Further, the victims did not testify that students at the school regularly engaged in sexual horseplay similar to appellant’s sexual conduct toward the victims. A.J. testified only that she had seen appellant and A.L. joking around before and that on two or three occasions after school she had seen students simulating oral sex or joking about it. A.L. testified that the only horseplay of a sexual nature he was aware of was when someone would spank a female student’s buttocks. Thus, the record does not support appellant’s contention that horseplay of a sexual nature was rampant at the school.

Further, that the defendants’ conduct in the cases cited may have been more egregious than appellant’s conduct does not mean that appellant’s conduct did not annoy or molest the victims within the meaning of Penal Code section 647.6, subdivision (a), given that appellant’s conduct otherwise satisfies the elements of that offense. Thus, we conclude that substantial evidence supports appellant’s adjudication for annoying or molesting a child.

### ***Appellant’s Maximum Term of Confinement***

On December 13, 2013, the court ordered appellant to attend the Day Reporting Center for a period of 180 days, to serve the first 30 days on the electronic monitor, and to reside in the home of a parent or guardian. The court also set appellant’s MTPC at one year six months.

Appellant contends the court erred in calculating his MTPC because he was not committed to a secure placement. Respondent concedes and we agree.

Section 726 generally deals with “the maximum term of confinement in juvenile wardship cases.” (*In re Sean W.* (2005) 127 Cal.App.4th 1177, 1187.) Subdivision (c) of section 726 (section 726(c)) “requires the juvenile court to specify that the minor may not

be confined for a period in excess of the maximum term of imprisonment which could be imposed on an adult convicted of the offense that brought the minor under the jurisdiction of the juvenile court. By its express terms, however, section 726(c) applies only “[i]f the minor is removed from the physical custody of his or her parent or guardian.” (*In re Ali A.* (2006) 139 Cal.App.4th 569, 573 (*Ali A.*)) Where, as here, a minor is not removed from the physical custody of his parent or guardian, section 726(c) “does not apply, ... the juvenile court [is] not required by [section 726(c)] to include a maximum term of confinement in its dispositional order” (*Ali A., supra*, at p. 573), and the setting of an MTPC “is of no legal effect” (*id.* at p. 574). Accordingly, we agree with the parties that the juvenile court erred when it set an MTPC of one year six months. (*Ibid.; In re Matthew A.* (2008) 165 Cal.App.4th 537, 541 (*Matthew A.*))

We believe appellant is entitled to a dispositional order free of potentially confusing, legally ineffective directives, and that the practice of improperly declaring an MTPC should be discouraged. (*Matthew A., supra*, 165 Cal.App.4th at p. 541.) Therefore, we will strike the MTPC. (*Ibid.*)

### **DISPOSITION**

The maximum term of physical confinement of one year six months declared by the court is stricken. As modified, the judgment is affirmed.