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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR MISAEL ORELLANA,

Defendant and Appellant.

G046500

(Super. Ct. No. 11CF2205)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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A jury convicted defendant Oscar Misael Orellana of annoying or molesting a child under 18 years of age, a misdemeanor (Pen. Code, § 647.6, subd. (a)(1); all statutory references are to this code). Orellana appealed and we appointed counsel to represent him. Counsel filed a brief setting forth a statement of the case, but advised this court he found no issues to support an appeal. We provided Orellana 30 days to file his own written argument, but he has not responded. After conducting an independent review of the record under *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

The information charged Orellana with two counts of committing lewd and lascivious acts on a child under 14 years of age (§ 288, subd. (a)), one count of misdemeanor child annoyance (§ 647.6, subd. (a)(1)), and alleged he committed the section 288 offenses against more than one victim (§ 1203.066, subd. (a)(7)).

At trial, S.G. testified that in May 2010, Orellana, her mother's friend, took her shopping. S.G., then 12 years old, felt comfortable around Orellana because he was effeminate and she believed he was gay. When they returned to his apartment, he asked her to model a bra and bathing suit she had purchased. Orellana "didn't want [her] to have any bottoms on so [she] wrapped [herself in] a towel," but he "told [her] to take the towel off, and [she] didn't want to, so he started calling [her] names." She asked him to take her home. On the way, he touched her with his finger on her leg and "traced around [her] and went up [her] side and around [her] breast." She cursed at him, pushed his hand away, and told him to stop. He threatened to tell her mother she was bisexual. He put his hand between her legs so that his pinky rested against her vagina.

The following Monday, Orellana picked S.G. up and took her to his apartment. He drank beer and became intoxicated. He told her before she decided whether she was bisexual, she should try masturbation, stating it was "really fun." The defense impeached S.G. with inconsistencies in her accounts of the incidents to a school counselor and others. S.G.'s mother testified she had concerns about S.G.'s sexuality and discussed them with Orellana. She wanted her girls to spend time with him because he

was very open, could broach any subject, and seemed like someone the girls could confide in.

In November 2011, the jury acquitted Orellana of committing lewd acts (§ 288, subd. (a)),<sup>1</sup> but convicted him of misdemeanor child annoyance (§ 647.6, subd. (a)(1)). In December 2011, the trial court sentenced Orellana to a year in jail, which he had served awaiting trial. The court notified Orellana of his lifetime obligation to register as a sex offender as a consequence of the child annoyance conviction (§ 647.6, subd. (a)(1)).

Orellana's appellate lawyer identifies two potential issues for our consideration: (1) whether sufficient evidence supports Orellana's conviction for annoying a minor (§ 647.6, subd. (a)(1)); and (2) whether the sex offender registration requirement violates Orellana's constitutional right to equal protection of the laws.

#### *Sufficiency of the Evidence*

On appeal, the reviewing court must view the evidence in the light most favorable to the judgment. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) It is the trier of fact's exclusive province to assess witness credibility and to weigh and resolve conflicts in the evidence. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330 (*Sanchez*)). We therefore presume the existence of every fact reasonably inferred from the evidence in support of the judgment. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) The test is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. (*Ibid.*; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) In other words, reversal is not warranted even though the circumstances could be reconciled with a contrary finding. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) Thus, a defendant attacking the sufficiency of the evidence "bears an enormous burden." (*Sanchez*, at p. 330.)

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<sup>1</sup> The jury also found Orellana not guilty of committing lewd acts against his daughter, M.S.

Section 647.6, subdivision (a)(1) provides that “[e]very person who annoys or molests any child under 18 years of age shall be punished by a fine not exceeding five thousand dollars (\$5,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.” Section 647.6, subdivision (a)(1) is violated when (1) the defendant engages in conduct directed at a child under the age of 18; (2) the defendant’s conduct would unhesitatingly disturb, irritate, offend, or injure a normal person; and (3) the defendant’s conduct was motivated by an unnatural or abnormal sexual interest in the child. (See *People v. Lopez* (1998) 19 Cal.4th 282, 289-290; CALCRIM No. 1122.)

S.G. testified Orellana took her shopping, and when they returned to his apartment, he asked her to model a bra and a bathing suit she had purchased. S.G. had wrapped herself in a towel because Orellana did not want her to wear bottoms. He told her to drop the towel, but she refused, and he called her names. Later, as he drove her home, he touched her with his finger on her leg, side, and around her left breast. He also put his hand on the clothing between her legs so that his pinky rested against her crotch. A week or so later, Orellana took S.G. to his apartment, asked whether she was bisexual, and told her she should try masturbation, stating it was “really fun.”

Here, the jury could reasonably conclude Orellana’s conduct on the three occasions would unhesitatingly irritate or offend the average person, and that an abnormal sexual interest in young girls motivated his behavior. Substantial evidence supports the conviction. (*People v. Kongs* (1994) 30 Cal.App.4th 1741 [the defendant photographed clothed young girls with their legs spread apart, focusing his camera on the area below their waists]; *People v. Monroe* (1985) 168 Cal.App.3d 1205 [touched a minor’s genitals through her clothing].)

#### *Sex Offender Registration*

In *People v. Brandao* (2012) 203 Cal.App.4th 436 (*Brandao*), the court held mandatory sex offender registration for a misdemeanor violation of section 647.6

(see §§ 290, subd. (c), 290.46, subds. (e)(1) & (e)(2)(B)) does not violate a defendant's right to equal protection of the laws. The court explained that "to be convicted under section 647.6, subdivision (a), a defendant's objective conduct would need to have "unhesitatingly irritated or disturbed a reasonable person had it been directed at that person regardless of the defendant's intent." (Brandao, at p. 445.) This feature distinguished the offense from those "which do not include this requirement and which all involve voluntary conduct between two willing parties." (Ibid.; see People v. Hofsheier (2006) 37 Cal.4th 1185 (Hofsheier).) Brandao also observed "another key difference between the voluntary sex offenses examined in Hofsheier-type cases and section 647.6, subdivision (a), in that the latter statute is limited . . . to offenders whose conduct, in addition to being objectively irritating and disturbing, is motivated by an unnatural or abnormal sexual interest in children. [Citation.] Thus, while section 647.6 does not have a specific intent requirement, the requirement that the conduct be motivated by an unnatural or abnormal sexual interest in children further differentiates it from Hofsheier and other cases involving voluntary sexual offenses." (Brandao, at pp. 445-446.) It is "the unique motivational requirement that sets this statute apart" from voluntary felony sex offenses. (Id. at p. 448.) The court also noted "the statute . . . encompasses the youngest of minors as well as perpetrators who are much older than their victims." (Id. at p. 446.) We agree with Brandao "defendants convicted of annoying or molesting a child are simply not similarly situated to those convicted of Hofsheier-type offenses. Hence, the difference in treatment between the two groups is neither arbitrary nor irrational." (Id. at p. 448.)

Finally, we note the Legislature does permit misdemeanor offenders to request exclusion from the Megan's Law Internet Web site (§ 290.46, subd. (e)), and offenders convicted of misdemeanor violations of section 647.6 may be relieved of the registration requirement if they have obtained a certificate of rehabilitation. (§§ 290.5, subds. (a)(1) & (b)(2), 4852.03.) Orellana expressed concern in the trial court relating to

the immigration consequences of his conviction. We note in passing that at least one federal court has held an alien's misdemeanor conviction under section 647.6 does not constitute a deportable offense. (*U.S. v. Pallares-Galan* (9th Cir. 2004) 359 F.3d 1088, 1101-1102.)

### III

#### DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P.J.

THOMPSON, J.