

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO NAVARRO HERNANDEZ,

Defendant and Appellant.

G048743

(Super. Ct. No. 12CF0128)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Dorsey Conley, Judge. Affirmed.

John N. Aquilina, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

A jury convicted defendant Sergio Navarro Hernandez of three counts of lewd and lascivious conduct with a child under the age of 14 years old. (Pen. Code, § 288, subd. (a) (§ 288(a)).)<sup>1</sup> The court sentenced him to a prison term of three years on count 1 and concurrent three-year terms on counts 2 and 3. Defendant filed a timely appeal.

On appeal defendant contends the trial court erred by instructing the jury with CALCRIM No. 370, which states the prosecution is not required to prove the defendant had a motive to commit the charged crime. Defendant argues motive is an essential element of the offense of lewd and lascivious conduct with a child, because section 288(a) requires the specific intent of “arousing . . . the lust, passions or sexual desires of that person or the child.” We hold motive is not an essential element of the section 288(a) offense and therefore affirm the judgment.

## FACTS

Defendant molested his eldest daughter, (Daughter), when she was between the ages of six and 12 years old. Daughter testified defendant touched her inappropriately on several separate occasions. First, when she was six years old, defendant entered his bedroom, where she was lying down, and touched her breasts for a few seconds. Second, when Daughter was between the ages of nine and 11, defendant told her to go to her room, take off her clothes, and tell him when she was naked. After Daughter did so, defendant entered her room in his underwear, removed his underwear, and got into bed with her. Third, also when Daughter was between the ages of nine and 11, defendant summoned her to the living room, where he was lying on the couch watching television, and told her to lay down on him. Her buttocks were directly on top

---

<sup>1</sup>

All statutory references are to the Penal Code.

of his erect penis, and he proceeded to put his hand under her shirt and fondled her nipples. Fourth, when Daughter was repeating sixth grade for the second time, defendant walked up behind her when she was wet from the shower or pool and fondled her nipples.

Although Daughter's mother asked her a few times whether defendant had touched her, Daughter did not disclose the molestation because she was afraid of her mother and did not trust her. Daughter first disclosed the touching in the fall of 2011 to her then 12-year-old sister (Sister). Daughter became concerned defendant was molesting Sister and asked Sister if she wanted Daughter to call child protective services on her behalf. Before phoning child protective services, Daughter discussed defendant's conduct with her mother and defendant himself. Daughter then reported defendant's molestation of Sister to authorities on November 4, 2011.

About one month later, on December 2, 2011, defendant went to a police station and told the detective, who had interviewed Daughter and Sister, that he needed to get something off his chest. During the interview, defendant admitted to touching Sister when she was six years old. Defendant also admitted to inappropriately touching Daughter's breasts and buttocks when she was between the ages of six and 12 years old.

After the interview, defendant wrote two statements in which he admitted he touched Daughter four or five times when she was between the ages of six and 12 years old. He also admitted his actions constituted a serious crime, but contended his wrongful actions were never sexual or forced.

Two weeks later, on December 16, 2011, the police had Daughter make a covert recorded call to defendant. During the phone call, defendant admitted to touching Daughter, but denied a couple of the specific instances. He denied being in bed with Daughter, being naked with her, and having sex with her.

At trial, defendant testified on his own behalf. He denied entering the victim's bedroom to "do anything" and denied touching her breasts, defendant also claimed he never touched her sexually. He said his admissions during the covert

telephone call were made under threat by Daughter, and she told him what to say in the call. Sister testified she was never touched inappropriately by defendant. She stated she was also threatened by Daughter when she told the police defendant had touched her.

## DISCUSSION

Defendant contends motive is an element of a section 288(a) offense, and by instructing the jury that the prosecution was not required to prove motive, the trial court reduced the prosecutor's burden of proof and denied defendant a fair trial.

A trial court bears a *sua sponte* duty to instruct the jury on the elements of an offense. (*People v. Flood* (1998) 18 Cal.4th 470, 479-480.) "The prosecution has the burden of proving beyond a reasonable doubt each element of the charged offense." (*People v. Cole* (2004) 33 Cal.4th 1158, 1208.) "An instructional error relieving the prosecution of its burden violates the defendant's rights under both the United States and California Constitutions." (*Ibid.*) "An appellate court reviews the wording of a jury instruction de novo and assesses whether the instruction accurately states the law." (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1574.)

The relevant portion of the section 288(a) instruction, CALCRIM No. 1110, requires the People to prove the "defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the child." The trial court also instructed the jury with CALCRIM No. 370, which states: "The People are not required to prove that the defendant had a motive to commit (any of the crimes/the crime) charged. In reaching your verdict you may, however, consider whether the defendant had a motive."

Defendant argues motive is an element of a section 288(a) offense, relying on *People v. Martinez* (1995) 11 Cal.4th 434 (*Martinez*). In *Martinez*, our Supreme Court rejected the defendant's contention section 288(a) requires "an inherently lewd" touching, and instead held the statute "is violated by 'any touching' of an underage child committed with the intent to sexually arouse either the defendant or the child." (*Martinez*, at p. 442.) Defendant contends *Martinez*, in discussing the type of conduct necessary for a section 288(a) violation, used the terms "motive" and "intent" interchangeably to signify the purpose of the touching. This is true. *Martinez* used the terms, "sexual motivation" and "sexually motivated," as synonyms for the requisite sexual intent or purpose for a section 288(a) offense. (*Martinez*, at pp. 438, 443 & fn. 7, 444, 446, 447 & fn. 14, 450 & fn. 16, 451 & fn. 17.)

But in legal terms, the concepts of motive and intent are not synonymous; rather, they are separate and distinct mental states. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) "Motive describes the reason a person chooses to commit a crime. The reason, however, is different than a required mental state such as intent or malice." (*Ibid.*) Thus, in the aftermath of *Martinez*, our Supreme Court has consistently listed intent as an element of a section 288(a) offense, but not motive. (*People v. Shockley* (2013) 58 Cal.4th 400, 404; *People v. Lopez* (1998) 19 Cal.4th 282, 289.)

Here, the trial court properly instructed the jury that the "People must prove not only that the defendant did the acts charged, but also that he acted with a particular intent." And the court also explained that, though the People are not required to prove motive, motive may be a factor tending to show guilt or absence of guilt. Thus, the trial court correctly instructed the jury as to the elements of section 288(a).

If defendant believed the jury was likely to be confused about the legal concepts of “motive” and “intent,” he should have asked the court for a clarification or modification of CALCRIM No. 370. Defendant’s briefs do not state that he did so nor does the record reflect he did. By failing to do so, he has forfeited the claim. (*People v. Valdez* (2004) 32 Cal.4th 73, 113 [defendant may not “complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete”].)<sup>2</sup>

Defendant also relies on *People v. Maurer* (1995) 32 Cal.App.4th 1121, which reversed the defendant’s conviction of misdemeanor child annoyance under section 647.6. (*Maurer*, at p. 1125.) In *Maurer*, the trial court instructed the jury that motive was *not* an element of the charged crime. (*Ibid.*) The trial court further instructed the jury that section 647.6 requires the defendant’s conduct to be “motivated by an unnatural or abnormal sexual interest in” the victim. (*Maurer*, at p. 1125.) The Court of Appeal concluded “the trial court erred in providing these conflicting instructions on this mental state element.” (*Ibid.*) The appellate court explained: “It is generally true that motive is not an element of a criminal offense. [Citations.] But the offense of section 647.6 is a strange beast” because it has been judicially construed to include *motive as an element*. (*Maurer*, at p. 1126.)

---

<sup>2</sup>

In his reply brief, defendant raises the new argument that he is *not* asserting motive is an element of section 288(a), but rather that CALCRIM No. 370 confused the jurors. Not only has defendant forfeited this claim (as discussed above), but by raising it in his reply brief he has rendered it incognizable. (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1295.) Moreover, the prosecutor’s closing statement reinforced to the jury that the People were required to prove defendant’s sexual intent, i.e., that he did the touching “in order to sexually gratify himself.”

Here, in contrast, since motive is not an element of section 288(a), the trial court properly instructed the jury with CALCRIM No. 370. There was no error.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.