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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. BRIAN ERIC WARNER, Defendant and Appellant.	C038245 (Sup.Ct. No. 99F08985)

APPEAL from a judgment of the Superior Court of Sacramento County, Roland L. Candee, Judge. Reversed with directions.

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

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Patrick J. Whalen, Janet E. Neeley and Stan Cross, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant of three counts of a lewd and lascivious act upon a child under the age of 14 (Pen. Code, § 288, subd. (a)), and found true the allegation that he had a

prior conviction for child molestation in Nebraska, that was a serious felony (Pen. Code, § 667, subd. (a), § 667, subds. (b)-(i), § 1170.12) and qualified him as a habitual sexual offender (Pen. Code, § 667.71, subds. (c)(4) & (d)). The trial court sentenced him to three consecutive terms of 25 years to life plus 5 years.

On appeal, defendant contends his counsel was ineffective in failing to object to hearsay to prove the corpus delicti and in failing to move to exclude the victim's testimony. He contends there was instructional error in giving CALJIC Nos. 2.50.01, 2.20.1 and 17.41.1. Finally, he contends the enhancements under Penal Code sections 667 and 667.71 must be reversed because his Nebraska conviction did not have the specific intent requirement of Penal Code section 288.

In our prior opinion we found no ineffective assistance of counsel and no instructional error. While we found defendant's Nebraska conviction is not a qualifying prior under the habitual sexual offender law (Pen. Code, § 667.71), we found it does constitute a serious felony for purposes of the five-year enhancement of Penal Code section 667, subdivision (a) and the Three Strikes law (Pen. Code, § 667, subds. (b)-(i); § 1170.12). We remanded for resentencing.

The Supreme Court granted review. The high court remanded the matter to this court to reconsider whether defendant's prior conviction in Nebraska qualified as a serious felony. We recognize there is a difference in the victim's age requirements between the statutory schemes in Nebraska and California.

Nebraska Revised Statutes section 28-320.01 penalizes sexual assault on a child 14 years of age or younger, while a serious felony under California law includes a "lewd or lascivious act on a child under the age of 14 years." (Pen. Code, § 1192.7, subd. (c)(6).) In determining whether an out-of-state conviction qualifies as a serious felony, however, we may go beyond the least adjudicated elements of the offense and consider the entire record of conviction. (*People v. Myers* (1993) 5 Cal.4th 1193.) Here, the record of conviction shows the victim in the Nebraska case was four years old, so the conviction qualifies as a serious felony.

While this case was under submission, the United States Supreme Court decided *Crawford v. Washington* (2004) 541 U.S. __ [158 L.Ed.2d 177] (*Crawford*), which held the confrontation clause prohibits the admission of an out-of-court statement that is testimonial in nature unless the declarant is unavailable and defendant had a prior opportunity for cross-examination. We requested supplemental briefing on whether *Crawford* had any effect on the admissibility of the hearsay evidence used to prove the corpus delicti. We conclude that because the declarant was available at trial for cross-examination, there was no violation of the confrontation clause.

We again remand for resentencing.

FACTS

C.H. (mother) was married to defendant. They lived with mother's two daughters, five-year-old C. and three-year-old S. (the minor). One day, when mother returned from shopping with

C., defendant was watching television and the minor was on the floor playing. After mother greeted the minor, the minor responded, "Daddy touched my vagina today." Defendant denied it and said the minor was lying and made it up. He continued to deny it and became defensive.

Mother called Child Protective Services two days later. Defendant moved out the next day. The minor was interviewed by a multi-disciplinary interview center (MDIC) specialist. In the interview, the minor said defendant touched her private and her butt. When asked if defendant touched her one time or more than one time, the minor responded, "[l]ot of more times." On pictures of an unclothed girl, the minor pointed out and circled where defendant touched her. Detective Jennifer Hutchins gave mother a recorder and told her to make a pretext call, to try to get defendant to confess. Mother had a conversation with defendant at her home. Defendant first denied he did anything. When mother pushed him, he cried and admitted the molestation. He said he put the minor on the couch, pulled down her shorts, laid her across his lap, and touched her vagina. Mother did not have the recorder yet, so she did not record this conversation.

She got the recorder and called defendant at work. He verified touching the minor on the vagina. Mother played the tape for Detective Hutchins so she would arrest defendant.

Detective Hutchins interviewed defendant. After first denying any inappropriate behavior, defendant admitted he touched the minor three times, each about one month apart.

At trial, the minor, then four years old, did not see defendant in the courtroom. The minor testified she did not like defendant as he did something bad to her. She also testified defendant touched her private one time. The touching occurred in her mom's room; both her mom and sister were home. The minor could not recall telling anyone about the touching. She did not remember being interviewed about defendant touching her.

The trial court raised the issue of whether the corpus delicti had been established as to more than one incident. Although in the interview the minor said it happened many times, the interview was couched in terms of one incident. The prosecutor argued the corpus delicti had been established. The minor said defendant touched her private and her butt, lots of times, so that established at least four touchings.

The trial court denied defendant's motion to dismiss, finding there was sufficient evidence beyond defendant's admissions and statements to find three acts. The court later denied defendant's motion for a new trial based on insufficient evidence.

DISCUSSION

I

"The corpus delicti, the body or elements of the crime, must be established by the prosecution independently of and without considering the extrajudicial statements, confessions or admissions of the defendant. [Citations.] The elements of the corpus delicti -- (1) the injury or loss or harm, and (2) the

criminal agency that has caused that injury, loss or harm -- need only be proven by a reasonable probability or, in other words, by slight or prima facie proof. [Citations.]" (*Jones v. Superior Court* (1979) 96 Cal.App.3d 390, 393.)

The only evidence establishing three acts of lewd conduct, other than defendant's statements, came from the interview of the minor. Defendant contends this interview was inadmissible hearsay.[1] Defendant contends he was denied effective assistance of counsel because counsel failed to object to hearsay evidence to prove the corpus delicti. (See *People v. Moreno* (1987) 188 Cal.App.3d 1179, 1191 [ineffective assistance of counsel to fail to challenge hearsay used to establish corpus delicti].)

In his opening brief defendant ignores that the tape was offered under an exception to the hearsay rule. The People moved to introduce the tape under Evidence Code section 1360. Section 1360 allows a court to admit a child's otherwise inadmissible hearsay statement describing an act of child abuse upon that child provided three conditions are met: (1) the court finds that the time, content, and circumstances of the statement provides sufficient indicia of reliability; (2) the child testifies or there is corroborating evidence of the

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[1] While defendant states he "does not agree" that the tape establishes three touchings, he does not properly contend the tape is insufficient to establish the corpus delicti. (Cal. Rules of Court, rule 14(a)(1)(B) ["Each brief must: [¶] . . . [¶] state each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority"].)

hearsay statement; and (3) the proponent of the statement gives adequate notice of its intent to use the statement.[2]

In response defendant moved to require the People to produce the procedures and protocol of the MDIC interview at an

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[2] Evidence Code section 1360 provides:

"(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:

"(1) The statement is not otherwise admissible by statute or court rule.

"(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.

"(3) the child either:

"(A) Testifies at the proceedings.

"(B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.

"(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

"(c) For purposes of this section, 'child abuse' means an act proscribed by Section 273a, 273d, or 288.5 of the Penal Code, or any of the acts described in Section 11165.1 of the Penal Code, and 'child neglect' means any of the acts described in Section 11165.2 of the Penal Code."

Evidence Code section 402 hearing to ensure validity. The court put aside the issue until the 402 hearing to determine if the minor was competent to testify. After the court found the minor competent to testify, it returned to the defense motion. Defense counsel indicated he was inquiring of county counsel about the protocol. The tape of the interview was later played at trial without an objection from the defense.

In his reply brief, defendant recognizes the hearsay exception of Evidence Code section 1360. He contends the trial court failed to make the required finding of reliability under that section and no such finding could be made. He refines his contention: counsel was ineffective in failing to object to the tape as inadmissible hearsay because it did not meet the reliability requirement of Evidence Code section 1360.

Section 1360 is too new to be considered a firmly rooted hearsay exception and therefore must satisfy the "'particularized guarantees of trustworthiness'" under the confrontation clause." (*People v. Eccleston* (2001) 89 Cal.App.4th 436, 445.) In *Idaho v. Wright* (1990) 497 U.S. 805 [111 L.Ed.2d 638], the Supreme Court identified a number of factors that relate to whether a child's hearsay statements about child abuse are reliable. These factors include the spontaneity and consistent repetition of the statement, the child's mental state, the use of terminology unexpected of a child of that age, and the lack of motive to fabricate. (*Id.* at pp. 821-822.) These factors are not exclusive and "courts have

considerable leeway in their consideration of appropriate factors." (*Id.* at p. 822.)

The record does not reveal whether the trial court made an explicit finding that the minor's statements on the tape were reliable. There was, however, no objection to the tape. Ordinarily, the failure to object to hearsay makes the statements competent for purposes of appellate review. (*People v. Moreno, supra*, 188 Cal.App.3d at p. 1191.) Thus, we consider whether a finding of reliability could be made over a defense objection; in other words, we determine whether counsel was ineffective in failing to object to the tape on the basis that the time, content, and circumstances of the minor's statements do not provide sufficient indicia of reliability.

The interview began with interview specialist Margo Macklin asking the minor her name, age, and about her family. Macklin then tested the minor on colors and the placement of blocks. Macklin determined the minor knew the difference between the truth and a lie and said they were going to talk about true things. Macklin asked the minor if she knew why she was there and the minor said because "Mommy wants me to see you." The minor said, "Mommy said I -- I need to be shy. I need to tell you Mommy a secret."

Macklin explained she talked to kids about things going on with them and whether anyone hurt them or touched them where they should not be touched. She asked if anything like that happened to the minor and the minor responded, "Daddy did, and Daddy lied to Mommy." In response to the question "what did

Daddy do?" The minor said "Daddy -- Daddy touched me in my private. . . . And I said, 'Stop,' and Daddy didn't stop." Macklin asked where this occurred and the minor said she was outside and Daddy was naked outside. Her friends laughed. She then recounted another incident where she punched or bumped a boy. The minor said defendant touched her "lot of more times." She was on the bed and Daddy took her clothes off and touched her. Mommy said to put her clothes back on and "Daddy lied to Mommy." The minor then described defendant touching her under her clothes, inside her private and her butt. The minor again said everyone laughed. She said people saw the touching. She did not know who the people were; they were dangerous and big people like adults.

The minor identified on a picture where defendant touched her. She called her private a vagina and her butt a "bootie." Macklin asked if anyone was home when Daddy touched her and the minor said she was by herself. When asked where the others were, the minor said Mommy was at work and "All of us [were] gone. . . . Everyone went bye-bye." The minor said defendant did not say anything when he touched her. "Mommy said, 'Pull your pants up.' Said, If 'you don't pull your pants up, I'll spank you.'" Then the interview ended.

Defendant contends the minor's statements on the tape lack all credibility because they were not coherent and were inconsistent with what she testified to and what she told her mother. He contends it is not credible that the minor was molested in the presence of other people as she said. He argues

evidence cannot be admissible under Evidence Code section 1360 where it is characterized by material that was clearly imagined.

The factors of spontaneous and consistent statements support a finding of reliability. The minor told Macklin defendant touched her private in response to a nonleading question: "What did Daddy do?" Throughout the interview the minor maintained the story that defendant touched her. The statement was consistent with the minor's earlier spontaneous statement to her mother that defendant touched her vagina. Indeed, had defendant challenged the reliability of the minor's interview, it is possible the People could have produced additional evidence of consistent statements. In his interview, defendant told Detective Hutchins that "the doctor talked to [the minor], and she's giving the same story."

Two other factors identified in *Idaho v. Wright, supra,* 497 U.S. 805 [111 L.Ed.2d 638] support a finding of reliability. While the minor did not use terminology unexpected of a child her age -- her mother testified she taught the minor the word vagina -- one would not expect a three-year-old to be familiar with the fondling activity the minor described. There was no evidence of any motive for the minor to fabricate the story. Mother testified the minor loved defendant.

The record presents a more mixed picture on the issue of the minor's mental state. On the one hand, she was able to respond to Macklin's questions directly and was capable of rational conversation. The court found her competent to testify, a proper consideration in determining reliability.

(*People v. Eccleston, supra*, 89 Cal.App.4th at pp. 446-447.) When Macklin pressed for more details about the molestation, however, the minor's answers became more fantastic. She said that people saw it and laughed; the people were dangerous and big. She claimed her mother told her to put her clothes back on. Defendant relies on these statements to show a lack of reliability. The determination of reliability is to be made "from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." (*Idaho v. Wright, supra*, 497 U.S. 805, 820 [111 L.Ed.2d 638, 655-656].) Taken as a whole, the minor's statements are reliable when she is describing where and how defendant touched her. It is only when pressed for more details about where the molestation occurred that her answers become confusing, perhaps reflecting her embarrassment and her mother's responses to subsequent acting out.[3] Since the record supports the necessary reliability for admission under Evidence Code section 1360, there was no ineffective assistance of counsel in failing to object to admission of the tape.

II

Evidence Code section 1360 permits the introduction of otherwise inadmissible hearsay provided the trial court makes a

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[3] At sentencing mother reported the minor now played the "nasty game;" she touched other children's vaginas and penises and rubbed against them.

finding of reliability. In *Crawford, supra*, 541 U.S. ___ [158 L.Ed.2d 177], the Supreme Court held a finding of reliability is not a substitute for confrontation. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." (*Id.* at p. __ [158 L.Ed.2d at p. 199].) The court held that hearsay evidence that is testimonial in nature may be admitted only where the declarant is unavailable and defendant had a prior opportunity for cross-examination. (*Id.* at p. ___ [158 L.Ed.2d at p. 203].)

A new rule for the conduct of criminal prosecutions is applied retroactively to all cases pending on review or not yet final, even if the new rule presents a "clear break" with the past. (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328 [93 L.Ed.2d 649, 661].) We requested supplemental briefing on whether it was error under *Crawford, supra,* 541 U.S. at p. ___ [158 L.Ed.2d 177] to admit the hearsay evidence of the interview.

The *Crawford* court declined to provide a comprehensive definition of testimonial statements. Whatever else the term "testimonial" covers, "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Crawford v. Washington, supra*, 541 U.S. at p. ___ [158 L.Ed.2d at p. 203].) In discussing the scope of testimonial statements, *Crawford* stated the principal evil at which the confrontation clause was

directed was the use of ex parte examinations as evidence against the accused. (*Id.* at p. ___ [158 L.Ed.2d at p. 192].) The court cited various formulations of the core class of testimonial statements: "'*ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,'" "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,'" "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Id.* at p. __ [158 L.Ed.2d at p. 193].)

The Attorney General contends the minor's statement in the MDIC interview was not testimonial, arguing *Crawford* supports a narrow view of testimonial. The Attorney General urges that testimonial statements are limited to formal statements akin to a solemn declaration made to establish or prove a fact that are made to government officials who are acting to advance a criminal investigation or prosecution.[4]

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[4] In his supplemental brief, the Attorney General couches his discussion of the interview in terms of its admissibility under Evidence Code section 1228, which permits the introduction of a child's statement describing sexual abuse that is included in a law enforcement report to establish the elements of a crime to which defendant confessed provided the court makes certain findings. Here, the interview was admitted pursuant to Evidence

The Attorney General contends the interview was not a testimonial statement because it was intended to serve a broader purpose than advancing the police investigation. The Attorney General requests this court take judicial notice of a report of the Attorney General's Office describing the training of child interview specialists and a job announcement for the position. We grant the request for judicial notice. (Evid. Code, § 452, subds. (c) & (h).) These materials indicate the interview is designed to reduce trauma to the child and to ensure that children in need of services are identified and referred appropriately.

Although the MDIC interview is not intended solely as an investigative tool for criminal prosecutions, that is one of its purposes. The report provided by the Attorney General indicates an advisory committee determined that "specially trained child interview specialists should be used to conduct comprehensive interviews of children once a criminal or dependency investigation was determined to be warranted." Law enforcement was involved in the training of the specialists. Here, Detective Hutchins observed the interview and it was reasonably expected the interview would be used prosecutorially and at trial, as it was. The MDIC interview is similar to a police

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Code section 1360. We express no opinion as to the admissibility under *Crawford* of a statement under Evidence Code section 1228.

interrogation and we find it is a testimonial statement under *Crawford*.

In *Crawford*, the court made clear "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." (*Crawford, supra,* 541 U.S. at p. ___, fn. 9 [158 L.Ed.2d at pp. 197-198, fn. 9].) Here, the victim was present at trial, but she did not defend or explain her statements in the interview. She testified she did not remember being interviewed and so was not cross-examined about the interview.

Defendant contends the confrontation clause was not satisfied because the minor was not subject to cross-examination on the out-of-court statement. Defendant relies on *State v. Rohrich* (1997) 132 Wash.2d 472. At issue in *Rohrich* was whether a child testifies for purposes of the child hearsay statute, RCW 9A.44.120(2)(a), where the child is called to the stand but is not asked and does not answer any questions relating to the occurrences alleged in the hearsay. (*Id.* at p. 474.) RCW 9A.44.120(2)(a) is similar to Evidence Code section 1360; it permits the admission of a statement of a child under the age of ten describing any act of sexual contact if the court finds the statement has sufficient indicia of reliability and the child either testifies or is unavailable. (*Id.* at pp. 475-476.) After reviewing the purpose of the confrontation clause, the

Washington Supreme Court held that "testifies" under this statute means the child gives live, in-court testimony describing the acts of sexual contact to be offered as hearsay. (*Id.* at p. 482.) Because the child did not testify, defendant's conviction was reversed. (*Ibid.*)

Defendant contends the same definition of "testifies" should be applied under Evidence Code section 1360. He contends the minor did not testify here because she was not questioned about her out-of-court statement and at trial she testified to only one touching whereas in the interview she said defendant touched her "[l]ot of more times." We find *State v. Rohrich, supra,* 132 Wash.2d 472 distinguishable. There the child did not testify at all about the alleged crimes. Here, while the minor did not testify about her out-of-court statement, she did testify about the alleged child molestation. After the minor stated she did not remember the interview, neither the prosecution nor the defense questioned her about it. That she could not recall her prior statement was without constitutional significance, as we explain below. Nor was it necessary that her testimony mirror her prior statement. In *State v. Clark* (1999) 139 Wash.2d 152, the Washington Supreme Court found no confrontation clause violation where the child testified at trial and recanted her earlier statements accusing defendant of child molestation.

In stating there was no confrontation clause problem if the declarant testified at trial, the *Crawford* court cited to *California v. Green* (1970) 399 U.S. 149 [26 L.Ed.2d 489].

(*Crawford, supra*, 541 U.S. at p. ___, fn. 9 [158 L.Ed.2d at p. 197, fn. 9].) In *Green*, the court held the confrontation clause is not violated by the admission of out-of-court statements where the declarant is present to testify and submit to cross-examination. (*Id.* at p. 162 [26 L.Ed.2d 489, 499].) In *Green*, the prosecution introduced prior statements of a witness that identified defendant as his drug supplier. At trial the witness claimed he was uncertain where he obtained the drugs because he was on LSD at the time. (*Id.* at p. 152 [26 L.Ed.2d at p. 493].) The court declined to address whether the lapse of memory of the witness so affected defendant's right to cross-examination as to make a difference in the confrontation clause analysis. (*Id.* at pp. 168-169 [26 L.Ed.2d 489, 503].) In a concurring opinion, Justice Harlan did address the issue. He concluded: "The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence." (*Id.* at p. 188 [26 L.Ed.2d at p. 514].)

Justice Harlan's view was adopted by the high court in *United States v. Owens* (1988) 484 U.S. 554, 559 [98 L.Ed.2d 951, 957]. In *Owens*, defendant was charged with assault with intent to commit murder on a correctional officer. The officer suffered memory loss from the beating. During an interview with an agent from the FBI, the officer was able to name defendant as his attacker. At trial, however, while he remembered

identifying defendant, the officer could not recall seeing his attacker. (*Id.* at p. 556 [98 L.Ed.2d at p. 955].) The court held the admission of his prior out-of-court statement and the officer's lack of memory did not result in a violation of the confrontation clause. "'[T]he Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."' [Citations.]" (*Id.* at p. 559 [98 L.Ed.2d at p. 957], original italics.) The court found that even where the witness could not remember the prior statement or the circumstances the statement described, the defense still had opportunities for effective cross-examination, including the very fact of the witness's poor memory. (*Id.* at pp. 558-559.) Where a witness professes a total inability to recall either the crime or her prior statements, thus narrowing the practical scope of cross-examination, her presence at trial gives the jury an opportunity to assess her demeanor and determine whether any credibility should be given to her testimony or to her prior statements. "This was all the constitutional right to confrontation required. [Citations.]" (*People v. Perez* (2000) 82 Cal.App.4th 760, 766.)

Here, the minor could recall some of the actual molestation and was subject to cross-examination. We recognize that cross-examination of a forgetful child poses different, and perhaps more difficult, challenges than cross-examination of a forgetful adult. As the court in *U.S. v. Spotted War Bonnet* (8th Cir. 1991) 933 F.2d 1471, 1474, recognized, some children may be too

young or too frightened to be subject to a thorough direct or cross-examination and the child's physical presence alone would not satisfy the confrontation clause. In such a case, the child is, for all practical purposes, unavailable. (*United States v. Dorian* (8th Cir. 1986) 803 F.2d 1439, 1446-1447.) Where the child witness is not available for meaningful cross-examination, the defense may move to strike any testimony of the child. (See *People v. Brock* (1985) 38 Cal.3d 180, 197 [error to admit preliminary hearing testimony where witness' medical condition precluded meaningful cross-examination].)

Because the minor was present at trial and subject to cross-examination, there was no violation of the confrontation clause in the admission of the interview.

III

Prior to the minor's testimony, the trial court held a hearing under Evidence Code section 402 to determine whether she was competent to testify. The court found she was capable of expressing herself and capable of understanding the importance of telling the truth. (Evid. Code, § 701, subd. (a)(2).) The court ruled she was not disqualified from testifying.

Defendant contends counsel was ineffective in failing to move to exclude the minor's testimony on the ground that she was unable to perceive and recollect the events as to which she testified. He argues that the minor's inability to perceive if defendant was in the courtroom, her recollection of only one instance of molestation, her testimony that it occurred in a different location than her mother testified to, her inability

to recall if defendant lived with them, and her lack of any recollection of giving the interview, show that she could not perceive, recollect and communicate events.

Under the current evidentiary system, a person is disqualified as a witness only if he is incapable of expressing himself or is incapable of understanding the duty to tell the truth. (Evid. Code, § 701, subd. (a)(2).) The trial court made findings on these issues as to the minor and defendant does not dispute them. Even though a witness is not disqualified, his testimony on a particular matter is inadmissible unless the witness has personal knowledge of that matter. (Evid. Code, § 702, subd. (a).) "Under the Evidence Code, the capacity to perceive and recollect particular events is subsumed within the issue of personal knowledge, and is thus determined 'in a different manner' from the capacity to communicate or to understand the duty of truth. [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 573.) A court may exclude the testimony of a witness for lack of personal knowledge "*only if no jury could reasonably find* that he has such knowledge." (*Ibid.* Original italics.) The capacity to perceive and recollect is a condition for the admission of testimony on a certain matter instead of a condition of competency to be a witness. If there is evidence that the witness has those capacities, whether the witness in fact perceived and does recollect is left to the trier of fact. (*Id.* at pp. 573-574.)

A motion to exclude the minor's testimony would be successful only if no jury could reasonably find she had

personal knowledge of the facts to which she testified. While the minor had no personal knowledge of her interview or any statements she made to anyone about the molestation, she did not testify to these facts other than to state she did not recall them. She did testify defendant touched her private one time at home and her testimony was based on personal knowledge. She testified it really happened, she remembered it, and it happened before her baby sister was born. While her details of the incident varied from other evidence, it was for the jury to decide whether the minor's recollections were accurate.

Since a motion to exclude the minor's testimony would not have been successful, counsel was not ineffective in failing to make such a motion.

IV

Defendant contends the trial court erred in instructing the jury in the language of the 1999 version of CALJIC No. 2.50.01. Defendant contends the instruction diluted the requirement that the jury find every fact necessary for conviction beyond a reasonable doubt. The California Supreme Court rejected this contention in *People v. Reliford* (2003) 29 Cal.4th 1007.

V

Pursuant to CALJIC No. 2.20.1 (6th ed. 1996), the trial court instructed the jury as follows: "In evaluating the testimony of a child you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. A child, because of age and level of cognitive

development, may perform differently than an adult as a witness, but that does not mean that a child is any more or less believable than an adult. You should not discount or distrust -- distrust the testimony of a child solely because he or she is a child. [¶] 'Cognitive' means the child's ability to perceive, to understand, to remember, and to communicate any matter about which the witness has knowledge."[5]

Defendant contends it was error to give this instruction. He claims the instruction unfairly enhanced the minor's credibility and invaded the jury's province to determine credibility. As defendant recognizes, the instruction has been repeatedly upheld against these challenges. (*People v. Jones* (1992) 10 Cal.App.4th 1566, 1572-1573; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1393 (*Gilbert*); *People v. Harlan* (1990) 222 Cal.App.3d 439, 455-456 (*Harlan*).) The instruction reflects the modern view that rejects traditional notions regarding unreliability of child witnesses, their untruthfulness, susceptibility to leading questions, or inability to recall prior events accurately. (*People v. Jones* (1990) 51 Cal.3d 294, 315.)

We agree with *Jones, supra,* 51 Cal.3d 294, *Gilbert, supra,* 5 Cal.App.4th 1372, and *Harlan, supra,* 222 Cal.App.3d 439, and reject defendant's contention that the instruction unduly enhanced the minor's credibility or took the issue of her

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[5] Under Penal Code section 1127f, this instruction is required in a criminal proceeding in which a child 10 years old or younger testified upon the request of a party.

credibility from the jury. The instruction is directed at how to evaluate a child's testimony. While it told the jury that a child witness may perform differently than an adult, that difference "does not mean that the child is any more or less credible a witness than an adult." The jury was not to discount a child's testimony solely because he or she was a child, but was invited to consider the child's age and cognitive development in assessing the child's credibility. There was no error in giving CALJIC No. 2.20.1.

VI

In a final claim of instructional error, defendant contends the court should not have given CALJIC No. 17.41.1. That instruction tells the jury: "The integrity of a trial requires that the jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of that situation." Defendant contends the instruction improperly compromises the private nature of jury deliberations. The Supreme Court rejected that contention in *People v. Engelman* (2002) 28 Cal.4th 436.

VII

The information alleged defendant was a habitual sexual offender within the meaning of Penal Code section 667.71, that he had a conviction in Nebraska for sexual assault on a child, a

serious felony under Penal Code section 667, subdivision (a), and that due to that conviction he came within the Three Strikes law. The jury found true the allegation that defendant had a conviction in Nebraska for sexual assault of a child. This prior conviction was used to enhance his sentence by five years under Penal Code section 667, subdivision (a), and to find he was an habitual sexual offender subject to a sentence of 25 years to life on each count.

Defendant contends these enhancements must be reversed because the Nebraska conviction does not contain all the elements of Penal Code section 288; specifically, it has no specific intent requirement that the act be done "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires" of the defendant or the victim.

The record revealed defendant was convicted by a plea of no contest to violating Nebraska Revised Statutes, section 28-320.01, sexual assault of a child. That section provides: "A person commits sexual assault of a child if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older." (Neb. Rev. Stat., § 28-320.01, subd. (1).) For purposes of this statute, "sexual contact" is defined as "the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the

immediate area of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party." (Neb. Rev. Stat., § 28-318, subd. (5).)

"In proving sexual contact, defined in subsection (5) of § 28-318, the State need not prove sexual arousal or gratification, but only circumstances which could be construed as being for such a purpose. [Citations.]" (*State v. Osborn* (1992) 490 N.W.2d 160, 167 [241 Neb. 424, 433].)

The requirements for a qualifying prior conviction vary under the different statutes. To qualify as an enhancement under Penal Code section 667, subdivision (a), the out-of-state conviction must be "of any offense committed in another jurisdiction which includes all of the elements of any serious felony." (Pen. Code, § 667, subd. (a)(1).) A qualifying strike prior "shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7." (Pen. Code, § 667, subd. (d)(2); § 1170.12, subd. (b)(2).) A qualifying prior offense for a habitual sexual offender is "[a]n offense committed in another jurisdiction that has all the elements of an offense specified in paragraphs (1) to (13), inclusive, of this subdivision." (Pen. Code, § 667.71, subd. (c)(14).)

While both defendant and the Attorney General assume the Nebraska statute must contain all the elements of Penal Code section 288, subdivision (a), that is true only as to the habitual sexual offender law, which specifies a violation of section 288, subdivision (a) as a qualifying prior. (Pen. Code, § 667.71, subd. (c)(4).) The qualifying prior for the five-year enhancement is any serious felony. (Pen. Code § 667, subd. (a).) A qualifying strike prior is any serious or violent felony. (Pen. Code, § 667, subd. (d)(2); § 1170.12, subd. (b)(2).) A serious felony includes a "lewd or lascivious act on a child under the age of 14 years." (Pen. Code, § 1192.7, subd. (c)(6).) This language is not limited to violations of Penal Code section 288, but broadens its scope to all lewd acts upon children. (*People v. Murphy* (2001) 25 Cal.4th 136, 143.)

Penal Code section 288, subdivision (a) provides: "Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years." Thus, section 288, subdivision (a) has a specific intent requirement. (*People v. Fox* (2001) 93 Cal.App.4th 394, 396-397.)

Defendant is correct that the Nebraska statute does not have the same specific intent requirement as Penal Code section

288, subdivision (a). Under the Nebraska statute the test is objective -- whether the proscribed conduct could be reasonably construed as being for the purpose of sexual arousal or gratification. Under Penal Code section 288, subdivision (a), the test is subjective; defendant must have the intent to arouse, appeal to or gratify the lust, passions, or sexual desires. Since the Nebraska statute does not contain an element of Penal Code section 288, subdivision (a), it is not a qualifying prior under the habitual sexual offender statute, Penal Code section 667.71.

To be a serious felony, however, the Nebraska prior need not contain the same elements as Penal Code section 288, subdivision (a); it need only be a "lewd or lascivious act on a child under the age of 14 years." (Pen. Code, § 1192.7, subd. (c)(6).) In *People v. Murphy, supra*, 25 Cal.4th 136, at pages 141-149, the Supreme Court found oral copulation with a child was unquestionably a lewd act and so qualified as a serious felony, even though it was a general intent crime. The court explained the purpose of section 288 by distinguishing between acts that are inherently lewd and lascivious in the moral sense and acts that are not inherently lewd and lascivious but may be punished under section 288. "[A]lthough 'children are routinely cuddled, disrobed, stroked, examined, and groomed as part of a normal and healthy upbringing,' these 'intimate acts may also be undertaken for the purpose of sexual arousal. Thus, depending upon the actor's motivation, innocent or sexual, such behavior may fall within or without the protective purposes of section

288.' [Citation.]" (*Id.* at p. 146.) Some conduct is lewd or lascivious, regardless of the motivation, because it is inherently harmful. For example, sodomy on a child is a lewd act, whether the motivation is sexual or sadistic. (*Id.* at pp. 147-148.) A serious felony includes conduct that is lewd in the moral sense, even if it does not fall within Penal Code section 288, subdivision (a). (*Id.* at pp. 141-149.)

Relying on *People v. Murphy*, *supra,* 25 Cal.4th 136, the court in *People v. Fox, supra,* 93 Cal.App.4th 394, found an Oregon conviction for second degree rape, defined as sexual intercourse with a minor under the age of 14, was a serious felony, even though there was no specific intent requirement. The court concluded that sexual intercourse with a child under the age of 14 was "always harmful, always improper, and always a lewd and lascivious act regardless of the perpetrator's intent." (*Id.* at p. 399.)

To qualify as a serious felony, a lewd or lascivious act on a child under 14 years of age must be lewd or lascivious under the common and ordinary meaning of those words. (*People v. Murphy, supra*, 25 Cal.4th at p. 143.) Penal Code section 288, subdivision (a) may be violated by "'any touching'" with a lewd intent. (*People v.* Martinez (1995) 11 Cal.4th 434, 442.) The Nebraska statute is more limited, proscribing only intentional touching of the intimate parts of a minor, over or under clothes, or causing the minor to so touch the defendant. Further, the sexual contact includes "only such conduct which can be reasonably construed as being for the purpose of sexual

arousal or gratification of either party." (Neb. Rev. Stat., § 28-318, subd. (5).) Since the minor would reasonably construe the touching as sexual, it would always be harmful and improper. We conclude a violation of this statute is a lewd or lascivious act under Penal Code section 1192.7, subdivision (c)(6) and therefore a serious felony. Thus, both the five-year enhancement of Penal Code section 667, subdivision (a) and the three strikes sentencing scheme apply.

On remand, the California Supreme Court directed this court "to reconsider whether a conviction under Nebraska Revised Statutes, section 28-320.01, as interpreted by *State v. Carlson* (1986) 394 N.W.2d 669 and other Nebraska cases, is sufficient to prove a 'lewd or lascivious act on a child under the age of 14 years,' whether defendant's conviction under Nebraska Revised Statutes, section 28-320.01 was for an offense that includes all of the elements of a felony under California law, and, if not, whether an act which does not constitute a felony under California law can qualify as a serious felony under Penal Code sections 667, subdivision (d)(2), 1170.12, subdivision (b)(2), and 1192.7, subdivision (c)(6)."[6]

In *State v. Carlson, supra*, 394 N.W.2d 669 [223 Neb. 874], the Supreme Court of Nebraska interpreted the phrase "fourteen years of age or younger" as used in Nebraska Revised Statutes,

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[6] Under rule 13(b) of the California Rules of Court, the parties could have filed supplemental briefs on the matter raised by the order transferring the cause to this court. Neither party filed a supplemental brief.

section 29-320.01. It held the phrase "designated persons whose age is less than or under 14 years, and also designates persons who have reached and passed their 14th birthday but have not reached their 15th birthday." (*Id.* at p. 674.)

State v. Carlson, supra, 394 N.Wd.2d 669 [223 Neb. 874] calls our attention to a difference between Nebraska Revised Statutes, section 28-320.01 and the definition of a serious felony in California under Penal Code section 1192.7, subdivision (c)(6), based on a lewd or lascivious act on a child. The Nebraska statute applies when the child is 14 years of age or younger; the California statute requires the child be "under the age of 14." (Pen. Code, § 1192.7, subd. (c)(6).) On its face therefore, Nebraska Revised Statutes, section 28-320.01 would appear not to qualify as a serious felony under either Penal Code section 667, subdivision (a) or the Three Strikes law because it does not "include[] all the elements" of a serious felony.

In determining whether an out-of-state conviction qualifies as a serious felony, however, we are not limited to consideration of the least adjudicated elements of the offense. Instead, "the trier of fact may consider the entire record of the proceedings leading to imposition of judgment on the prior conviction to determine whether the offense of which defendant was previously convicted involved conduct which satisfies all of the elements of the comparable California serious felony." (*People v. Myers, supra*, 5 Cal.4th 1193, 1195.)

Here, the record of conviction was presented in People's Exhibit 4. The first document in that record is the information. The information sets forth both the date of the alleged offense (on or about February 1, 1996 through April 14, 1996) and the victim's birth date (July 22, 1991). Thus, the record of conviction shows that the victim was under 14 years of age; she was four years old. Accordingly, "the offense of which defendant was previously convicted involved conduct which satisfies all of the elements of the comparable California serious felony." (*People v. Myers*, *supra*, 5 Cal.4th 1193, 1195.)

DISPOSITION

The finding that defendant is a habitual sexual offender under Penal Code section 667.71 is reversed. His convictions for three counts of Penal Code section 288, subdivision (a), and the finding that he has a prior serious felony are affirmed. The matter is remanded for resentencing.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

DAVIS, J.