Filed 7/30/03 P. v. Warner CA3

NOT TO BE PUBLISHED

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)

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 five 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 section 667 and 667.71 must be reversed because his Nebraska conviction did not have the specific intent requirement of Penal Code section 288.

We find no ineffective assistance of counsel and no instructional error. While we find that defendant's Nebraska conviction is not a qualifying prior under the habitual sexual offender law (Pen. Code, § 667.71), 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 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 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 got defensive.

Mother called Child Protective Services two days later. Defendant moved out the next day. The minor was interviewed by

a 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 house. 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 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.

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

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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"].)

[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 an act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child

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

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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."

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" standard 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 p. 446.) 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 the 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

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).) 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

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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.

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).) 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 privates 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.

III

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.

Defendant objects to the portion of the instruction that reads: "If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type

sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. The weight and significance of this evidence, if any, are for you to decide."

This revised version of CALJIC No. 2.50.01 was approved in dictum in *People v. Falsetta* (1999) 21 Cal.4th 903, 924. We agree with *People v. Hill* (2001) 86 Cal.App.4th 273, at page 277, that the *Falsetta* dictum "provides guidance to us" as to the validity of the instruction. We believe "'it is improbable that the California Supreme Court would suggest that an instruction "adequately sets forth the controlling principles" for considering other crimes evidence, and then find that same instruction to be constitutionally defective.'" (*Id.* at p. 278, quoting *People v. Brown* (2000) 77 Cal.App.4th 1324, 1335-1336.) There was no error in giving CALJIC No. 2.50.1.

IV

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."[4]

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; *People v. Harlan* (1990) 222 Cal.App.3d 439, 455-456.) 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 credibility from the jury. The instruction is directed at how

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[4] 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.

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.

V

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.

VI

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 of 1943 section 28-320.01 upon a child under the age of 14. 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).) 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 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. We remand the case for resentencing.

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.