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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAMES HERMAN WHITEHURST, Defendant and Appellant.	B151901 (Super. Ct. No. BA203309)

APPEAL from a judgment of the Superior Court of Los Angeles County, James M. Ideman, Judge. Reversed and remanded.

Victor J. Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Ana R. Duarte and Betty B. Chim, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant James Herman Whitehurst was convicted by a jury of committing three lewd and lascivious acts upon his wife's 10-year-old daughter. He appeals from judgment granting him probation, contending that the judgment must be reversed due to instructional error. For reasons explained in this opinion, we reverse the judgment and remand for retrial.

FACTUAL SUMMARY

The evidence, briefly recounted in the light most favorable to the judgment proved that on the morning of May 27, 2000, appellant walked into the living room of his apartment and found his 10-year-old stepdaughter Danielle lying on the couch in her pajamas. He lay down behind her and rubbed her buttocks through her clothing for about 30 seconds, until Danielle got up and left the room.

The next day the same thing happened except that this time appellant rubbed Danielle's buttocks underneath her panties, and then moved his hand forward to rub her vagina. Again, Danielle got up from the couch and left the room.

On June 2, 2000, appellant accosted Danielle as she lay on her mother's bed. Appellant, who was wearing only boxer shorts, touched Danielle's buttocks with his hand and his penis. When Danielle's younger brother entered the room, appellant went into the bathroom. When he returned, appellant said to Danielle, "When you wear shorts they get in the way." Appellant asked Danielle to go into the bathroom with him, but she refused.

DISCUSSION

I

Pursuant to Evidence Code section 1108, and over appellant's objection, the court allowed 20-year-old prosecution witness Rosie Houston to testify that when

she was 10 years old, appellant sexually assaulted her on two occasions when she was babysitting for Danielle's mother.

The court instructed the jury concerning this testimony, in the words of CALJIC 2.50.01, as modified in 1999, as follows: "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in the case. [¶] 'Sexual offense' means a crime under the Law of a state . . . of the United States that involves any of the following: Including any conduct made criminal by Penal Code section 288(A). The elements of this crime are set forth elsewhere in these instructions. [¶] 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 a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. The weight and significance of the evidence, if any, are for you to decide. [¶] Unless you are otherwise instructed, you must not consider this evidence for any other purpose, and that's the only purpose for which you are to consider it."

The trial court followed this instruction with an instruction on preponderance of the evidence, after which it stated: "[P]reponderance of the evidence is the rule applying to the incident involving Rosie. The test for the defendant's guilt of this case is proof beyond a reasonable doubt which I will now read to you."

In *People v. Reliford*, previously reported at 93 Cal.App.4th 973, we held that the that the version of CALJIC 2.50.01 given in this case (the 1999 modification) did not clearly delineate for the jury how it should use the lesser standard of proof for the inference of propensity, but the greater beyond-a-reasonable-doubt standard

for determining guilt. We concluded the prejudicial effect of this ambiguous instruction should be determined by asking, after consideration of the context of the instructions as a whole and the trial record, whether there was a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) The California Supreme Court granted a petition for review in that case in February 2002, identifying the issues as "(1) whether CALJIC 2.50.01 (1999 rev.) correctly instructs on the burden of proof where evidence of prior sexual offenses is admitted under Evidence Code section 1108; and (2) if not, whether the error is subject to review for harmless error and the applicable standard of review." (Judicial Council of California, News Release, February 20, 2002.)

Until the Court decides these issues, we shall continue to resolve them as we did in *Reliford*. The problem with the instruction arises from the words, "and did commit." These three words, in context, allowed the jury to infer that appellant committed the charged crimes simply because a preponderance of evidence proved he had the disposition to do so. This is inference is at odds with the constitutional requirement that appellant's guilt be proved beyond a reasonable doubt. Therefore, we turn to the issue of prejudice, to determine whether, in light of the entire record, there was a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution.

The erroneous instruction was given to the jury after closing arguments in which both sides focused on the credibility of Danielle's accusations and appellant's testimonial denial of those accusations. The prosecutor wove the evidence of the prior and current crimes together, arguing that "history had repeated itself." She argued: "[In] these cases it just comes down to who do you believe and was the defendant in any way credible when he claimed, one, he couldn't remember molesting Rosie; and when he claimed, two, he didn't touch Danielle." She

expressed her hope that the jury would believe Danielle "because Rosie flew here and has shown you who he [the defendant] is." She relied heavily on the similarities between the incidents, pointing out repeatedly that each victim was 10 years old, each was abused in a home when children, but no adults, were present, one act with each victim was interrupted by another child, each victim was rubbed and fondled by appellant , and each victim was accused by appellant of lying about what happened. She described the incident with Rosie as "corroboration" of the crimes charged against appellant in this case. She referred to the fact that appellant was not prosecuted for what he did to Rosie, arguing: "These cases are very tough because usually it is just a child's word against the abuser, that's what the abusers count on, that's why so many abusers target children. That's why eight years ago he targeted Rosie, that's how last time it worked out. This time it won't. Because this time you're not just left with one little kid and an adult, you have a lot more to go on."

Defense counsel countered these arguments, in part, by pointing out that although the jury could consider the incident with Rosie, "that in and of itself is not sufficient for you to convict him, that you must look at what the evidence is as to the present charges and decide whether or not the people have proved these charges beyond a reasonable doubt." He argued that Danielle had reason to invent her accusations because appellant had been "arbitrary and harsh to Danielle at times[.]" He closed with the plea, "So I urge you to follow the law to not convict James because he may have committed – and there's certainly more evidence that he committed the act eight years ago than there is in the present act. Beyond a reasonable doubt is a very high standard and suspicion doesn't come close to that standard."

The court's instructions to the jury included not only the 1999 revision of CALJIC 2.50.1, but also the instructions which are standard in every criminal trial, including the presumption of innocence, the people's burden of proving appellant's

guilt beyond a reasonable doubt, and the admonition to consider the instructions as a whole and in light of all others.

Considering all of these matters, we cannot determine whether the jury reached its verdicts because it concluded appellant's guilt was proved beyond a reasonable doubt, or whether it took the constitutionally impermissible shortcut allowed by the 1999 revision of CALJIC 2.50.1. Therefore, we are unable to conclude there is no reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. (*Estelle v. McGuire, supra,* 502 U.S. 62, 72.)

Given this conclusion, we need not reach appellant's contention that the court also erred in instructing the jury in the words of CALJIC 17.41.1. Under the holding of *People v. Engelman* (2002) 28 Cal.4th 436, that instruction may not be given upon remand.

DISPOSITION

For the foregoing reasons, the judgment is reversed and the matter is remanded for retrial.

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HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.