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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JAIME VARGAS SOTO,

Defendant and Appellant.

Sixth Appellate District, No. H030475
Santa Clara County Superior Court No. EE504317
The Honorable Aaron M. Persky, Judge

PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JAIME VARGAS SOTO,** Defendant and Appellant.

Respondent respectfully petitions for review of the decision of the Court of Appeal for the Sixth Appellate District. The decision, which is attached as Exhibit A, is unpublished. The Court of Appeal filed its decision on September 9, 2008. No rehearing was sought. This petition is timely. (Cal. Rules of Court, rule 8.500(e).)

ISSUE PRESENTED

Is lack of consent an element of Penal Code section 288, subdivision (b), such that the appellant was entitled to an instruction on actual consent as a defense to a charge of lewd act by use of force, violence, duress, menace or fear on a child under the age of 14 years?

STATEMENT OF THE CASE

Appellant was charged with lewd act on a minor (Pen. Code, § 288, subd. (a); count 3), and lewd act on a minor by the use of force, violence, duress, menace or fear of immediate bodily injury (Pen. Code, § 288, subd. (b)(1); counts 1, 2, & 4). (2 CT 219-223.)

The Court of Appeal summarized the pertinent facts as follows.

Count 1

Defendant, 19 years old, lived with the family of his cousin, 13-year-old C. Doe. On certain occasions in the home, defendant would kiss, rub, and "talk dirty" to C. C. believed that defendant wanted to have a sexual relationship with her. She was "grossed out" but did not tell anyone. C.'s mother kicked defendant out of the house after seeing him trying to kiss C. Six months later, C. saw defendant driving by as she was entering her school grounds. She was angry with defendant because he was secretly going out with her 13-year-old best friend, A. She motioned towards defendant so as to talk with him. Defendant drove around the corner into the school parking lot, stopped the car, exited, and met C. They talked for five minutes. In the conversation, defendant denied going out with A. The lie made C. angry. When C. tried to leave, defendant grabbed her arms to stop her. At some point, C. left for her class. The school principal, however, summoned her to his office because he had heard from his secretary that C. had been with a man in the parking lot. In the office, C. admitted being with "a friend" but did not reveal defendant's name. She told the principal either that defendant had kissed her or that they had kissed previously. The principal told her that he would telephone her mother. He called C.'s mother and learned defendant's identity. When C. left the office, she used a cell phone and told defendant that the principal had been asking about him. Defendant told C. not to reveal his name. A police officer arrived at the school, and the principal summoned C. from class to speak to the officer about the incident. C. eventually revealed to the officer defendant's name, phone number, and workplace. She also told the officer that defendant had grabbed, hugged, and French kissed her while she tried to push herself away. A couple of days later, C. told another officer the same thing, adding that defendant had rubbed her thigh and she could feel that his penis was hard as he was holding himself against her. At trial, C. testified that she had lied to the officers because she was angry at defendant for ignoring her and paying attention to A.; she denied that "any of those things [had] happen[ed]"; she added that she was worried about what was going to happen to defendant because she still cared about him as a friend.

Count 2

When talking to the second officer, C. described an

incident that had occurred a week previously. She related that, when defendant was driving her to school, he stopped the car, "put the seat down," kissed her, got on top of her, "humped" her, and locked the door when she tried to get out. At trial, C. testified that she had lied to the officer because she was angry at defendant. She also testified that the seats in defendant's car did not recline.

Count 3

When defendant was living with C.'s family, he met C.'s friend and neighbor, 11-year-old R. Doe. At some point, R. told C. that she thought defendant was nice and gave C. her phone number so as to give to defendant. One evening, R. entered the apartment laundry room. Defendant was there. They talked. Defendant then hugged and kissed R. He took her hand and placed it between his legs. He told her that he wanted to have sex with her. R. pushed away from defendant and told him that she did not want to do that. Later, defendant telephoned R. and told her that he wanted to have sex with her.

Count 4

When defendant was living with C.'s family, he telephoned R. and told her that C. wished to talk with her. R. went to C.'s apartment but only defendant was present. After the two talked in a bedroom, defendant played a movie that displayed two women kissing. R. asked defendant to turn off the movie. After defendant did so, he produced a condom and told R. that he wanted to have sex with her. R. declined and told defendant to throw the condom in the trash. Defendant did so. R. started to leave and tripped onto the bed. She either fell on defendant or defendant got on top of her. Defendant hugged R., and R. hugged defendant. R. got up to leave but tripped again onto the bed. Defendant pulled R. and hugged and kissed her. He was not holding onto her hard. At some point, he tried to touch R. between her legs but R. grabbed his hands so he would not grab her. He grabbed R.'s hand and put it between his legs. He took off his pants to his boxer shorts after R. declined to keep her hand between his legs. R. told defendant that she had to leave because his aunt and her mother might come home. She did not tell defendant that she did not want to be "doing those things" because she was afraid defendant would get upset and do something to her another time. R. left the apartment after

> spending an hour and a half inside. Later, R. told C. that she had had sex with defendant. But R. testified that what she had told C. was untrue. She explained that she had so told C. because she was upset.

(Maj. Opn. at pp. 2-4.)

The prosecutor argued to the jury that it could find appellant guilty of aggravated child molestation by finding he used force or duress. (Maj. Opn. at p. 4.) The court instructed the jury, pursuant to CALCRIM No. 1111, that "[i]t is not a defense that the child may have consented to the act." (Aug RT-B 20; see also Aug RT-A 13.)[1/] The jury found appellant guilty on all four counts. (2 CT 250-259.)

A divided panel of the Sixth District Court of Appeal upheld appellant's challenge to the aggravated lewd acts charged in counts 1, 2, and 4. The majority held the instruction that a minor's consent to the act is not a defense to that crime "deprived [appellant] of a valid defense." (Maj. Opn. at p. 6.) The court cited *People v. Cicero* (1984) 157 Cal.App.3d 463, which held that by requiring the use of force, violence, duress, menace or fear for a conviction of aggravated child molestation, the Legislature implicitly required that the molestation be committed "against the will" of the child. (Maj. Opn. at pp. 7-10.) Following *Cicero*, the majority opinion concluded that, because "the will of the victim [must be] overcome," consent of the child is necessarily a defense to the charge. (Maj. Opn. at p. 10.) The court found the instructional error in informing the jury that consent was not a defense was prejudicial, warranting reversal of the aggravated molestation counts. (Maj. Opn. at pp. 10-12.)

Justice Mihara, in a concurring and dissenting opinion, disagreed. He observed that in 1981, the Legislature specifically deleted from Penal Code

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1. Citations to "Aug RT-A" and "Aug RT-B" refer to the two volumes of augmented reporter's transcript filed February 23, 2007, labeled "Addendum A" and "Addendum B" respectively.

section 288, subdivision (b) the requirement that the crime of aggravated child molestation must be committed "against the will" of the child. (Conc. & Dis. Opn. at p. 9.) Justice Mihara concluded that the use of force or duress must be viewed objectively as actions by the defendant that elevate the severity of the crime, irrespective of the child's actual consent. Thus, consent of the child to the sexual act is not a defense. (Conc. & Dis. Opn. at pp. 9-10.) Justice Mihara also rejected the majority's finding of prejudice. Finding no evidence of consent in the trial record, he found harmless the instruction that consent is not a defense. (Conc. & Dis. Opn. at pp. 9-10.)

REASON FOR GRANTING REVIEW

REVIEW IS REQUIRED TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEAL ON CONSENT AS A DEFENSE TO AGGRAVATED CHILD MOLESTATION UNDER PENAL CODE SECTION 288, SUBDIVISION (B)

The profound disagreement between the majority and dissenting justices in the opinion below highlights the conflict that exists among the Courts of Appeal concerning consent as a defense to aggravated child molestation under Penal Code section 288, subdivision (b).

That disagreement did not always exist. California courts once spoke in one voice on this point. A quarter century ago, the generally prevailing rule was noted by this Court in *People v. Olsen* (1984) 36 Cal.3d 638 (*Olsen*). Quoting *People v. Toliver* (1969) 270 Cal.App.2d 492, 469, this Court recited the familiar proposition that "'[a] violation of section 288 does not involve consent of any sort.'" (*Olsen*, *supra*, 36 Cal.3d at p. 645.)

People v. Cicero, *supra*, 157 Cal.App.3d 463, a split decision by the Court of Appeal for the Third District, was the first to suggest that consent could be a defense to aggravated child molestation. The majority in *Cicero* departed from the general principle stated in *Olsen* by concluding that the Legislature intended to incorporate consent as a defense to section 288, subdivision (b) charges. It found such an intent from the Legislature's decision to require as an element of the crime that the defendant use "force, violence, duress, menace, or fear of immediate and unlawful bodily injury." (*People v. Cicero*, *supra*, 157 Cal.App.3d at pp. 475-483; Pen. Code, § 288, subd. (b)(1).)

Cicero analogized forcible child molestation to forcible rape, noting that the gravamen of the latter offense was a violation of the will of the victim. (*People v. Cicero*, *supra*, 157 Cal.App.3d at pp. 485-486.) The appellate court

there concluded that the gravamen of aggravated child molestation likewise rested on a violation of the victim's will. (*Ibid.*) *Cicero* recognized that the Legislature expressly included the requirement that the crime be "accomplished against a person's will" in the forcible rape statute, Penal Code section 261, subdivision (a)(1), and that it had deleted the same language from section 288, subdivision (b). (*Id.* at p. 476.) Nevertheless, the court decided that the force or duress element of the aggravated child molestation statute should be interpreted as force or duress used to overcome the will of the child, and held that the child's consent is therefore a defense to section 288, subdivision (b). (*Id.* at pp. 476-481.) The court in *Cicero* qualified its conclusion in one respect. It stated that consent was not a defense where the child suffers actual harm from the use of force. (*Id.* at pp. 474, 484-485.)

The dissent in *Cicero* rejected the majority's view that a child's consent negates the existence of force or duress in section 288, subdivision (b) cases. The dissenting justice wrote that the opinion of the majority

> writes back into the subdivision precisely what the Legislature wrote out of the subdivision, so that the majority may in turn rest the conviction on the question of "knowing consent." I believe the Legislature simply recognized the lewd act in subdivision (a) need not be against the will, and thus, it need not be in the use of force under subdivision (b). In fact, under the plain language of the statute, the act in subdivision (b) can be committed *with* knowing consent and still be a violation of the subdivision, if force is used. Force is limited to something the *perpetrator* applies; it is independent of the actions or thoughts of the under-14 year old victim.

(*Id.* at pp. 487-488 (dis. opn. of Regan, J.).)

Subsequently, in *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158, a panel of the Sixth District Court of Appeal disagreed with the majority opinion in *Cicero*. *Quinones* instead adopts the reasoning of the dissent in *Cicero*. (See *ibid.*) The court in *Quinones*, however, limited its endorsement of the *Cicero* dissent to cases involving force. It did not take the same view

with respect to cases of "'duress,' 'menace' or 'threat of great bodily harm.'" (*Ibid.*) In other words, it viewed consent as a defense to all but one means of committing an aggravated lewd act.

Not long afterward the conflict among the Courts of Appeal on this question deepened. In *People v. Cardenas* (1994) 21 Cal.App.4th 927, Division Four of the Second District rejected the *Cicero* majority in toto. That court restated the original rule:

> Consent, or a reasonable good faith belief in the age of a child to give consent, are not defenses to crimes charged under Penal Code section 288. (*People v. Olsen* (1984) 36 Cal.3d 638, 647-648.) Therefore, consent is not an issue whether it be fraudulently obtained or freely given. The only issue is whether the actions of appellant relating to [the child victim] fell within the terms of section 288, subdivision (b).

(*Id.* at p. 937, fn. 7.)

A few months after *Cardenas*, another panel of the Sixth District created an intradistrict conflict on the same issue. (*People v. Bolander* (1994) 23 Cal.App.4th 155, 161-162.) That panel endorsed the *Cicero* majority's holding. Specifically, it held that a child's consent is a defense to section 288, subdivision (b), because the requirement of force, violence, duress, menace, or fear means that the defendant must overcome the will of the child. (*Id.* at pp. 161-162.) *Bolander* itself was a split decision. The dissenting justice sided with the dissent in *Cicero*. (*Id.* at pp. 162-163 (dis. opn. of Mihara, J.).) The *Bolander* dissent concluded that the *Cicero* majority had erred in its analysis of the plain language of section 288, subdivision (b) and had improperly disregarded the Legislature's elimination of the "against the will" language from the lewd act statute. (*Ibid.*)

The fundamental tension between these conflicting lines of authority is manifested in the current CALCRIM instruction defining aggravated lewd acts on a child. (CALCRIM No. 1111, Lewd or Lascivious Act: By Force or Fear

(Pen. Code, § 288(b)(1).) CALCRIM No. 1111 includes as part of the instruction a bracketed sentence directing the jury: "It is not a defense that the child may have consented to the act." The use notes for CALCRIM No. 1111 acknowledges the existing split in authority:

> ***Defenses—Instructional Duty***
>
> There is disagreement as to whether knowing consent by a minor is an affirmative defense to a lewd act accomplished by force. (See *People v. Cicero* (1984) 157 Cal.App.3d 465, 484–485 [204 Cal.Rptr. 582] [when no physical harm, knowing consent of minor is an affirmative defense]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158 [249 Cal.Rptr. 435] [lewd act need not be against will of victim, following dissent in *Cicero*, *supra*, 157 Cal.App.3d at pp. 487–488 [204 Cal.Rptr. 582], dis. opn. of Regan, Acting P.J.]; *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta].) The bracketed paragraph that begins with "It is not a defense that the child" may be given on request if there is evidence of consent and the court concludes that consent is not a defense to a charge under section 288(b)(1). If the court concludes that consent is a defense and there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See consent defense instructions in CALCRIM No. 1000, Rape or Spousal Rape by Force, Fear, or Threats.)

In the present case, the trial court gave the bracketed portion of the instruction. It concluded that the child's consent is not a defense. That decision was deemed error by the Court of Appeal in this case.

Review is necessary to resolve the existing conflict in authority. This Court's intervention is necessary in order to eliminate a potential instructional trap over consent lurking in every trial of an aggravated child molestation prosecution under Penal Code section 288, subdivision (b).

This Court should expressly reject the *Cicero* holding—and the holding of the majority below—that consent of a child under the age of 14 is a defense to a charge of lewd acts when the defendant uses force or duress.

Cicero's analysis was flawed from the start. It departed from the rule

recited in *Olsen* by relying on an inapt analogy to the forcible rape statute:

> It seems both logical and fair to us that if the will and sexuality of an adult woman are protected by the Penal Code, then the will and sexuality of children deserve no lesser protection. Accordingly, both logic and fairness compel the conclusion that "force" in subdivision (b) must reasonably be given the same established meaning it has achieved in the law of rape: "force" should be defined as a method of obtaining a child's participation in a lewd act in violation of a child's will and not exclusively as a means of causing physical harm to the child.

(*People v. Cicero*, *supra*, 157 Cal.App.3d at pp. 475-476.)

There is a fundamental flaw in this reasoning. The gravamen of child molestation is clearly not the protection of the *will* of the child, i.e. the right of the child to have sex as he or she chooses and sees fit. The gravamen of that offense is instead, quite simply, the protection of the *innocence* of the child, irrespective of the child's will. The distinction is exemplified by the fact that consent is not a defense to Penal Code section 288, subdivision (a), the crime of non-forcible lewd acts on a child. (See *People v. Olsen*, *supra*, 36 Cal.3d at pp. 645-646; *People v. Toliver*, *supra*, 270 Cal.App.2d at p. 469.)

The difference between the crimes of rape and lewd act on a child on this central point is a good deal more than theoretical. It is explicit in the statutory language for those offenses. The Legislature specified that rape is committed "against a person's will," whereas the Legislature specifically removed that same language from section 288, subdivision (b). Hence, it is not just the gravamen of the offenses that differ, the actual language of the statutes concerning the elemental nature of the victim's will to the crimes differs too. It is elemental to rape and not to lewd act on a child. Thus, rape cannot provide a valid analogy for evaluation of the force or duress requirement of section 288, subdivision (b).

Cicero's overall approach to the force, violence, duress, menace or threat

component that aggravates the crime of child molestation in section 288, subdivision (b), is unsound. The distinction between an aggravated lewd act (section 288, subdivision (b)) and a non-aggravated lewd act (section 288, subdivision (a)) does not turn on the victim failing to give consent to, or having his or her will overborne by, the force exerted by the defendant in the former crime. The distinction turns on whether the defendant aggravates his act by force, violence, duress, or threats. The defendant's use of force or duress must be examined objectively, not subjectively on the basis of its impact on the child's will to engage in lewd acts. Thus, the focus of section 288, subdivision (b), like section 288, subdivision (a), is the severity of the defendant's conduct, not of the victimized child's decisionmaking.[2/]

As the dissent below put it:

> While a perpetrator may not *need* to utilize actual or implied threats to coerce the participation of a willing victim in a lewd act, the perpetrator nevertheless may in fact utilize such threats either gratuitously or due to his or her unawareness of the child victim's actual consent. Notably, duress is defined in terms of the objective impact of the perpetrator's conduct on a "reasonable person," rather than in terms of the subjective impact on the actual victim. As is true with force, the child victim's actual consent does not eliminate the fact that the perpetrator utilizes duress in the commission of the lewd act, and does not reduce the perpetrator's culpability or eliminate the penal consequences that attach due to the perpetrator's conduct.

(Dis. Opn. at p. 20.)

As in *Cicero*, the majority below found consent a viable defense by improperly focusing on the state of mind and will of the victim. It instead

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2. See CALCRIM No. 1111, which provides: "Duress means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child and (his/her) relationship to the defendant."

should have focused upon the objective conduct of the defendant in committing the lewd acts. The latter is the legislative measure of the defendant's culpability. The child's understanding of the act or the child's willingness to engage in the conduct is not.

This Court should grant review to resolve the conflict in the decisions of the Courts of Appeal and to declare that consent of a child under the age of 14 is not a defense to the commission of a lewd act under section 288, subdivision (b). To avoid future confusion, this Court should hold consent irrelevant regardless of whether the case involves force or duress or any of the other means of committing that crime.

As pointed out by the dissent, the majority's prejudice analysis is also flawed. (Dis. Opn. at p. 20.) There was no evidence of consent. (Dis. Opn. at p. 20.) C. gave conflicting accounts of the events. She indicated either that the incidents were forcible and non-consensual or that they did not occur at all. R. consistently maintained that the molestations were not consensual. Appellant did not testify. (Dis. Opn. at p. 20.) Thus, the instruction given below that consent is not a defense to the crime is necessarily harmless. The appellate court, however, relied on the inconsistent nature of C.'s testimony to speculate about the possibility of a third alternative wherein she might have consented to appellant's lewd acts. (Maj. Opn. at pp. 11-12.) This speculation is without support in the record. The court also utilized R.'s statement that she was initially attracted to appellant weeks before the incident in count four to speculate, contrary to her trial testimony, that she may have consented to the lewd act. (Maj. Opn. at pp. 11-12.)

Review should granted to resolve the split in authority regarding whether consent is a defense. Additionally, if it is necessary to reach the question, this Court should correct the majority's analysis of prejudice and hold any instructional error on a consent defense was harmless in this case.

CONCLUSION

Accordingly, respondent respectfully requests that the petition for review be granted.

Dated: October 14, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3928 words.

Dated: October 14, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

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EXHIBIT A

Filed 9/9/08 P. v. Soto CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAIME VARGAS SOTO, Defendant and Appellant.	H030475 (Santa Clara County Super. Ct. No. EE504317)

A jury convicted defendant Jaime Vargas Soto of three counts of lewd conduct upon a child under 14 by means of force, violence, duress, menace, or fear (counts 1, 2, and 4) and one count of lewd conduct upon a child under 14 (count 3). It also found true special allegations for purposes of probation ineligibility that defendant had committed (1) counts 1, 2, and 4 by means of force, violence, duress, menace, or fear, and (2) the sex offenses against more than one victim. The trial court sentenced defendant to 12 years in prison (consecutive three-year terms). On appeal, defendant principally contends that the trial court erred by instructing the jury in the optional language of CALCRIM No. 1111 (consent is not a defense to lewd conduct upon a child under 14 by means of force, etc.). He secondarily contends that (1) the prosecutor engaged in misconduct during opening statement by referring to inadmissible admissions, (2) he received ineffective assistance of counsel because counsel failed to request a limiting instruction as to certain hearsay evidence, (3) the prosecutor engaged in several instances of misconduct during argument,

(4) the trial court erred by instructing the jury in the language of CALCRIM No. 1191 (evidence of uncharged sex offense), and (5) the trial court erred by instructing the jury in the language of CALCRIM No. 362 (consciousness of guilt). We agree with defendant's principal contention. We also agree that the error requires a reversal for retrial of counts 1, 2, and 4. We address defendant's secondary contentions in the context of count 3 and reject them.

BACKGROUND

Count 1

Defendant, 19 years old, lived with the family of his cousin, 13-year-old C. Doe. On certain occasions in the home, defendant would kiss, rub, and "talk dirty" to C. C. believed that defendant wanted to have a sexual relationship with her. She was "grossed out" but did not tell anyone. C.'s mother kicked defendant out of the house after seeing him trying to kiss C. Six months later, C. saw defendant driving by as she was entering her school grounds. She was angry with defendant because he was secretly going out with her 13-year-old best friend, A. She motioned towards defendant so as to talk with him. Defendant drove around the corner into the school parking lot, stopped the car, exited, and met C. They talked for five minutes. In the conversation, defendant denied going out with A. The lie made C. angry. When C. tried to leave, defendant grabbed her arms to stop her. At some point, C. left for her class. The school principal, however, summoned her to his office because he had heard from his secretary that C. had been with a man in the parking lot. In the office, C. admitted being with "a friend" but did not reveal defendant's name. She told the principal either that defendant had kissed her or that they had kissed previously. The principal told her that he would telephone her mother. He called C.'s mother and learned defendant's identity. When C. left the office, she used a cell phone and told defendant that the principal had been asking about him. Defendant told C. not to reveal his name. A police officer arrived at the school, and the principal summoned C. from class to speak to the officer about the incident. C.

eventually revealed to the officer defendant's name, phone number, and workplace. She also told the officer that defendant had grabbed, hugged, and French kissed her while she tried to push herself away. A couple of days later, C. told another officer the same thing, adding that defendant had rubbed her thigh and she could feel that his penis was hard as he was holding himself against her. At trial, C. testified that she had lied to the officers because she was angry at defendant for ignoring her and paying attention to A.; she denied that "any of those things [had] happen[ed]"; she added that she was worried about what was going to happen to defendant because she still cared about him as a friend.

Count 2

When talking to the second officer, C. described an incident that had occurred a week previously. She related that, when defendant was driving her to school, he stopped the car, "put the seat down," kissed her, got on top of her, "humped" her, and locked the door when she tried to get out. At trial, C. testified that she had lied to the officer because she was angry at defendant. She also testified that the seats in defendant's car did not recline.

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Count 4

When defendant was living with C.'s family, he telephoned R. and told her that C. wished to talk with her. R. went to C.'s apartment but only defendant was present. After the two talked in a bedroom, defendant played a movie that displayed two women kissing.

R. asked defendant to turn off the movie. After defendant did so, he produced a condom and told R. that he wanted to have sex with her. R. declined and told defendant to throw the condom in the trash. Defendant did so. R. started to leave and tripped onto the bed. She either fell on defendant or defendant got on top of her. Defendant hugged R., and R. hugged defendant. R. got up to leave but tripped again onto the bed. Defendant pulled R. and hugged and kissed her. He was not holding onto her hard. At some point, he tried to touch R. between her legs but R. grabbed his hands so he would not grab her. He grabbed R.'s hand and put it between his legs. He took off his pants to his boxer shorts after R. declined to keep her hand between his legs. R. told defendant that she had to leave because his aunt and her mother might come home. She did not tell defendant that she did not want to be "doing those things" because she was afraid defendant would get upset and do something to her another time. R. left the apartment after spending an hour and a half inside. Later, R. told C. that she had had sex with defendant. But R. testified that what she had told C. was untrue. She explained that she had so told C. because she was upset.

CALCRIM NO. 1111

In discussing the elements of counts 1, 2, and 4 during her argument to the jury, the prosecutor explained as to force, violence, duress, menace, or fear that "You don't have to find all of them, just one of them is enough. It's also enough if some jurors find force and some jurors find duress, but you all unanimously agree that it was accomplished [by one or the other]." She continued by stating the following: "Consent is not a defense. It is not a defense that one or both of the girls wanted to do it or wanted to be with the defendant when this happened. Because he's the adult in the equation." As to the facts of count 1, the prosecutor argued that defendant had committed the school-yard incident by force and duress. As to force, she urged that defendant had grabbed C. as C. tried to get away. As to duress, she stressed that defendant had been in a position of trust that he abused by threatening to tell C.'s mother that C. had a boyfriend unless C. kissed him,

showering C. with attention and gifts, frightening C. by throwing rocks at C.'s window in an effort to convince C. to let him inside the home after he had moved. As to the facts of count 2, the prosecutor argued that defendant had committed the car incident by force and duress. As to force, she urged that defendant had climbed on top of C. and prevented C. from exiting by locking the doors. As to duress, she relied on the "same factors that applied in Count One." As to the facts of count 4, the prosecutor argued that defendant had committed the apartment incident by force and duress. As to force, she pointed out that defendant held R. and pulled R. as she got up to leave. As to duress, she stressed that defendant again used flattery and a position of trust to cultivate a relationship with R. As to the special allegation regarding force, etc., she stated: "And the force or fear allegation is just a repetition of the same definitions that are in Count One, Two and Four. And, again, that's the force or fear or duress or menace or threat."

Defendant argued that, as to C., "there was no force, no threats, no duress." He explained that C.'s testimony about the school-yard incident was that he merely had grabbed her. And he denied that he was cultivating a relationship with C. given that the two were relatives. But he essentially urged that C. should not be believed because she had told inconsistent stories and the police did not verify the stories she had told them by, for example, examining his car to see if the seat reclined. He discredited C.'s statements that she was scared by pointing out that she was the one who had motioned for defendant to stop in the school yard. He urged: "She is the one who told him to go around, around the building. She wasn't scared. And she wasn't scared because this didn't happen." Defendant argued as to R.: "No force. No duress. No threat. No menace. No fear. None of it was there. She tripped on a wire, a cable." He discredited R.'s statements that she was scared by pointing out that she had spent an hour and a half with him and had hugged him as she began to leave.

The trial court instructed the jury in the language of CALCRIM No. 1111 as follows: "To prove that the defendant is guilty of [counts 1, 2, and 4], the People must

prove that: [¶] 1A, the defendant willfully touched any part of a child's body either on the bare skin or through the clothing; [¶] Or, [¶] 1B, the defendant willfully caused a child to touch her own body, the defendant's body, or the body of someone else either on the bare skin or through the clothing; [¶] 2, in committing the act, the defendant used force, violence, duress, menace or fear of immediate and unlawful bodily injury to the child or someone else; [¶] 3, the defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of himself or the child; [¶] And, [¶] 4, the child was under the age of 14 years at the time of the act. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend[s] to break the law, hurt someone else, or gain any advantage. [¶] Actually arousing, appealing to, or gratifying the lust, passions or sexual desires of the perpetrator or child is not required for lewd or lascivious conduct. [¶] The force used must be substantially different from or substantially greater than the force needed to accomplish the act itself. [¶] Duress means a direct or implied threat of force, violence, danger, hardship or retribution that causes a reasonable person to do or submit to something that he or she would not otherwise do or submit to. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child, and her relationship to the defendant. [¶] Retribution is a form of payback or revenge. [¶] An act is accomplished by fear if the child is actually and reasonably afraid. [¶] *It is not a defense that the child may have consented to the act.*" (Italics added.)[1]

The jury's verdict did not specify on which basis (force or duress) it found defendant guilty of counts 1, 2, and 4.

Defendant contends that the above-emphasized, bracketed language of CALCRIM No. 1111 deprived him of a valid defense. We agree.

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[1] The emphasized language is bracketed in CALCRIM's published instructions.

Penal Code section 288, subdivision (a),[2] makes criminal any lewd act upon or with a child under the age of 14 with the intent of arousing the sexual desires of the defendant or the child. Subdivision (b)(1) makes criminal the commission of such acts accomplished "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury . . . ."

People v. Cicero (1984) 157 Cal.App.3d 465 (*Cicero*), considered the "force" requirement in the context of section 288, former subdivision (b). Section 288, subdivisions (a) and (b), drew a "distinction between those lewd acts that are committed by force and those that are not." (*Cicero*, *supra*, at p. 473.) Section 288, subdivision (a), criminalized all lewd acts committed with a child under the age of 14 with the requisite intent. (*Cicero*, *supra*, at p. 472; *People v. Griffin* (2004) 33 Cal.4th 1015, 1026 [discussing *Cicero*].) Section 288, former subdivision (b), on the other hand, provided for harsher penalties for the same acts when accomplished by force, violence, duress, menace, or threat of great bodily harm. (*Cicero*, *supra*, at pp. 472-473.) *Cicero* concluded that the Legislature must have intended a distinction between the two types of conduct. In order to effectuate the statutory scheme, *Cicero* reasoned that the "force" required to commit a forcible lewd act under subdivision (b) must be substantially different from, or substantially greater than, the physical force inherently necessary to commit the lewd act itself. (*Cicero*, *supra*, at pp. 473-474; see also *People v. Griffin*, *supra*, 33 Cal.4th at p. 1027; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13.)

Cicero opined that this standard is clearly met when the child victim suffers injury, even if no other force is shown. As *Cicero* explained, "We presume all would agree that one who inflicts physical harm on a child in the commission of a lewd act is properly convicted of a violation of subdivision (b) 'by use of force.' " (*Cicero*, *supra*, 157 Cal.App.3d at p. 474.) *Cicero* summarized the relevant principles thusly: "Where a

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[2] Further unspecified statutory references are to the Penal Code.

defendant uses physical force to commit a lewd act upon a child under the age of 14, and the child suffers physical harm as a consequence, the defendant has committed a lewd act 'by use of force' under subdivision (b). Consent is no defense. Where no physical harm to the child has occurred, the prosecution has the burden of proving (1) that the defendant used physical force substantially different from or substantially in excess of that required for the lewd act and (2) that the lewd act was accomplished against the will of the victim. . . . [I]t is an affirmative defense that the victim knowingly consented to the lewd act." (*Id.* at pp. 484-485.)

In concluding that the "Legislature did not intend to eliminate from [section 288,] subdivision (b) the requirement that a lewd act be undertaken against the will of the victim where the victim suffers no physical harm," (*Cicero*, *supra*, 157 Cal.App.3d at p. 480) the *Cicero* court acknowledged that this proposition was somewhat at odds with a 1981 amendment, which deleted language from section 288, subdivision (b), that required that the act be "against the will of the victim." But it reasoned that the purpose of the 1981 amendment "was to make clear that the prosecution need not prove resistance by the [victim]." (*Cicero*, *supra*, at p. 480.)

This court has adopted the *Cicero* explanation of "force" in lewd touching cases. (*People v. Bolander* (1994) 23 Cal.App.4th 155, 158-159 (*Bolander*); *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1381; *People v. Senior* (1992) 3 Cal.App.4th 765, 774 (*Senior*); *People v. Schulz* (1992) 2 Cal.App.4th 999, 1004 (*Schulz*); *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158 (*Quinones*); but see Mihara, J., concurring in *Bolander*, *supra*, at p. 164.) The California Supreme Court has implicitly approved this description in a rape case. (See *In re John Z.* (2003) 29 Cal.4th 756, 763.)

In *Bolander*, we discredited "dicta" in both *Schulz* and *Senior*. We stated: "[I]n light of convincing criticisms set forth in [*People v.*] *Babcock* [(1993) 14 Cal.App.4th 383] and [*People v.*] *Neel* [(1993) 19 Cal.App.4th 1784], we respectfully disagree with the interpretation of the 'force' requirement of section 288, subdivision (b) discussed in

Schulz and *Senior*." (*Bolander*, *supra*, 23 Cal.App.4th at pp. 160-161.)[3] We continued: "We instead join those courts which have held that '[i]n subdivision (b), the element of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person is intended as a requirement that the lewd act be undertaken without the consent of the victim. [Citation.] As used in that subdivision, "force" means "physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself." [Citations.]' [Citation.] Applying this standard to the facts at hand, we conclude that defendant's acts of overcoming the victim's resistance to having his pants pulled down, bending the victim over, and pulling the victim's waist towards him constitute force within the meaning of subdivision (b) 'in that defendant applied force in order to accomplish the lewd act[] without the victim's consent.' " (*Id.* at p. 161.)

Bolander implicitly disagrees with *Quinones*, *supra*, 202 Cal.App.3d 1154, in which another panel of this court had disagreed with the majority opinion in *Cicero* and adopted the reasoning of the dissent in that case. In essence, *Quinones* reasons that "force" is something the perpetrator applies and, thus, can be committed even with consent. (See also *Bolander*, *supra*, 23 Cal.App.4th at p. 163 (conc. opn. of Mihara, J.) ["Once lack of consent was eliminated as an element of the prosecution's case, it was not reborn as a part of the definition of force . . . consent or lack thereof is simply immaterial"].)

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[3] In *Schulz*, we had stated that "[w]e do not regard as constituting 'force' the evidence that defendant grabbed the victim's arm and held her while fondling her" (*Schulz*, *supra*, 2 Cal.App.4th at p. 1004), while, in *Senior*, we had stated that we did "not regard as constituting 'force' the evidence that defendant pulled the victim back when she tried to pull away from the oral copulations . . . ." (*Senior*, *supra*, 3 Cal.App.4th at p. 774.)

The Judicial Advisory Committee on Criminal Jury Instructions states in its "Bench Notes" to CALCRIM No. 1111 the following: "There is disagreement as to whether knowing consent by a minor is an affirmative defense to a lewd act accomplished by force. [Citing *Cicero*, *Quinones*, and dicta in *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7.]" It then advises trial courts to either give upon request the bracketed consent-is-not-a-defense language of CALCRIM No. 1111 if there is evidence of consent (and the trial court concludes that consent is not a defense) or give sua sponte consent instructions found in CALCRIM No. 1000 (rape or spousal rape by force, fear, or threats) if there is evidence of consent (and the trial court concludes that consent is a defense).

We need not jump into this fray. The People did not limit their lewd-act theories to force. They also relied on duress. "[A] conviction based on 'duress,' . . . necessarily implies that the 'will of the victim' has been overcome." (*Quinones*, *supra*, 202 Cal.App.3d at p. 1158.) It follows that, whether characterized as a substantive element or affirmative defense, the concept of consent is a defense to a section 288, subdivision (b)(1), charge if the People rely on duress.[4]

Here, the trial court told the jury that consent was not a defense though the People were relying on duress. This was error and deprived defendant of a defense. A defendant has a constitutional right to have the jury determine every material issue presented by the evidence. (*People v. Flood* (1998) 18 Cal.4th 470, 480.)

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[4] The People criticize *Cicero* for ambiguity as to whether consent is an element of the prosecution's case or an affirmative defense. But, as a practical matter, the issue of consent is both an element and a defense where duress is relied upon. Since duress implies that the will of the victim has been overcome, the People must show beyond a reasonable doubt that sex acts were performed against the victim's will, that is without consent. The defendant in such a case attacks the consent element by arguing that the sex acts were consensual.

Defendant argues that the error is reversible per se or, alternatively, prejudicial under the standard applicable to federal constitutional error. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)[5]

The California Supreme Court has suggested that a prejudicial-error test applies when an instruction erroneously states that a defense is not a defense. (*People v. Salas* (2006) 37 Cal.4th 967, 983, fn. 8, 984, fn. 9.) But it has not yet determined the applicable test. (*Ibid.*) We conclude that the trial court's error was prejudicial under either test. (*Ante*, fn. 5.)

Here, the People and the trial court implicitly recognized that evidence of consent existed by telling the jury that consent was not a defense. Indeed, evidence supports that C. had been annoyed by defendant's lack of attention toward her and jealous of his relationship with her friend but cared about him nevertheless; it supports that C. initiated the school-yard incident, was reluctant to identify defendant as the person with her in the school yard, and warned defendant that he was under scrutiny because of the school-yard incident; it supports that the car incident occurred when C. accepted a ride to school from defendant after he had moved from C.'s home because of his sexualized behavior toward C.; and it supports that R. was attracted to defendant and remained with him during the

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[5] Generally speaking, to the extent that a criminal defendant's appeal raises federal constitutional claims, courts apply the *Chapman* rule and examine the record to determine whether any error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at pp. 23-24; *People v. McClary* (1977) 20 Cal.3d 218, 230, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509, fn. 17.) To the extent that the appeal rests on other grounds, the *Watson* standard is generally employed. (*People v. Watson* (1956) 46 Cal.2d 818, 836-838; *People v. Flood*, *supra*, 18 Cal.4th at p. 490; *People v. Cahill*, *supra*, at p. 492 [*Watson* "represents the harmless-error test generally applicable under current California law"].) Under *Watson*, reversal is warranted only on a determination that it is reasonably probable that defendant would have obtained a more favorable result in the absence of any error. (*People v. Watson*, *supra*, at pp. 836-838.)

apartment incident for an hour and a half after discovering the ruse that brought her to the apartment.

The People do not convince us otherwise. Their argument is that, if consent is a defense to a lewd act upon a child by force, then the jury could have rested its verdict upon duress for which substantial evidence exists. But, as we have pointed out, consent is a defense to a lewd act upon a child by duress and the trial court's error prevented defendant from arguing the point. The People also urge that the jury's finding on the special allegation demonstrates that the verdict would have been the same in the absence of the error. They rely upon that the jury was not given the consent-is-not-a-defense instruction as to the special allegation. We are not convinced given that the prosecutor argued that the special allegation was a "repetition of the same definitions that are in Count One, Two and Four."

PROSECUTORIAL MISCONDUCT DURING OPENING STATEMENT

At a hiatus during jury selection, the trial court heard defendant's motion to suppress statements he made to the police. It took the matter under submission and ordered that "neither party should discuss the content or circumstances of the statements." It had not yet made a ruling when the prosecutor began her opening statement and referenced defendant's post-arrest police interview. The prosecutor went on as follows: "And during that interview, he made numerous admissions about his involvement with these girls. He made numerous –" At this point the trial court interrupted the statement and conducted a bench conference. During a later break from testimony, the prosecutor recounted the explanation that she had given at the bench conference: "I had it as a prepared opening. I had no--when I represented to the Court that I didn't intend to refer to it until the decision was made, that was a truthful representation to the Court. I'm mortified by the fact that I then just sort of got rolling, if you will, on my opening. And I reviewed it over lunch, and it just didn't occur to me, as I was looking over it for accuracy, that that portion needed to be excised. And I had forgotten to make a note to

myself to take it out of my opening. [¶] I apologize profusely. It was not willful. But I did forget that that ruling was pending and that, rightfully so, we shouldn't mention it in our opening until that ruling had come down from the Court." Defendant then moved for a mistrial "based on [the prosecutor's] inclusion of those statements." He acknowledged that the prosecutor had made an honest mistake. But he urged that, if the trial court granted the motion to suppress, "Jurors would be questioning whether those admissions were made and what would have been said." The trial court explained that it had not yet ruled on the motion to suppress because of its complexity and invited further briefing on that matter and on whether a mistrial was justified in the event the motion was granted. The next morning, the trial court granted the motion to suppress and heard arguments on defendant's mistrial motion. Defendant repeated that "My move for a mistrial basically comes as a result of what the jury may perceive or what the jury may want now that we have a ruling from the Court. Is the jury going to expect [defendant] to testify. Is the jury going to expect [the interviewing detective] to testify. If [the detective] is not going to testify, the comments made by [the prosecutor] yesterday in terms of [the detective] talking about these statements is going to leave the jury wondering what the statement was or what those admissions were, especially given the comment that these admissions were in relation to these two girls. [¶] I'm not exactly sure. Normally I think I would cover it with a request for an admonishment, but I'm not sure that an admonishment in this case would be enough. . . . But if he were to be convicted because the jury felt they didn't have all the information based on no testimony from the detective or from [defendant] given the comments that were made, I think is significant prejudice. [¶] Again, I'm not sure that an admonition would be able to cure that, and that's basically why I would move for a mistrial. [¶] . . . [¶] [Y]ou can't unring the bell. It's already been rung. Jurors have heard there are admissions out there made to the detectives and those detectives are going to come in and talk about them." The prosecutor countered that "it is only a one-sentence mention and it was very general . . . [All] . . . it amounted to was that

the defendant made admissions about his involvement with the girls." She continued that it was undisputed that "there was involvement by the defendant with the girls. That's not even being denied by either of them. So it doesn't necessarily even present to the jury an idea that, hey, I thought we were going to hear the defendant admitted [*sic*] he was sexually contacting these girls or sexually involved with these girls." The trial court denied defendant's motion. It explained: "I find, after reviewing the text of the statements made by the prosecutor in opening statement, that they are sufficiently generic and to the extent that it will not be--there will not be so much prejudice that could not be cured by instruction. As [the prosecutor] has pointed out, the--I've already given the jurors pre-instruction to the effect that what the attorneys say is not evidence. [¶] With respect to the opening statement and in CALCRIM [No.] 104, which I read to the jury, part of that says nothing that the attorneys say is evidence in their open[ing] statements and closing arguments, the attorneys will discuss the case but their remarks are not evidence, only the witnesses' answers are evidence." The trial court then asked defendant whether he desired to request an additional admonition. Defendant replied that "I may request an admonition." During a later part of the trial, defendant related the following: "The only other thing that I should go ahead and clarify now is, given the motion for a mistrial based on the opening statements, after reviewing the jury instructions this weekend, I think that the jury instructions themselves can serve as an admonition just because there are and it is repeated a couple times that opening statements are not evidence. And looking at how the evidence came in, there were statements made by my client that came in via the cousin, which could potentially be the ones that [the prosecutor] or perceive to be the ones that [the prosecutor] was referring to. [¶] So I'm not going to submit an admonition for the Court. I think that, given the jury instructions, should serve as sufficient notice that opening statements and anything that's said then is not evidence."

Defendant contends that the prosecutor engaged in misconduct by referencing "admissions" about "his involvement" with the victims. He alternatively urges that he received ineffective assistance of counsel because counsel did not request a specific admonition as to the prosecutor's references. There is no merit to these claims.

It is misconduct for a prosecutor to mischaracterize the evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 823.) But a reversal requires more. "[O]nly misconduct that prejudices a defendant requires reversal [citation], and a timely admonition from the court generally cures any harm." (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.) " 'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.)

In our context, the most damaging meaning from the prosecutor's statement is that defendant admitted to the detective the charged offenses or other sex acts with the victims. Defendant, however, has not carried his burden to show a reasonable likelihood that the jury construed the statement in this manner. This follows because the most damaging meaning must be inferred while the least damaging meaning is literal. The statement does not say that defendant confessed or admitted to sex acts with the victims. The statement says that defendant made admissions about his involvement with the victims. Since it was undisputed that defendant was involved with the victims, the statement literally conveys that defendant admitted what was undisputed. That the detective did not ultimately testify about the admissions does not affect this point. And the jury might just as easily have construed the detective's failure to testify against the prosecutor (broken promise of proof) rather than for the prosecutor (nonevidential admission).

Moreover, in the context of defendant's mistrial motion, the trial court pointed out and defendant acknowledged that the jury was and would be repeatedly informed that opening statements were not evidentiary. " 'A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith.' [Citations.] It is only in the exceptional case that 'the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions.' " (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.) We presume that the trial court's instructions cured the potential prejudice from the prosecutor's, at most, ambiguous remark.

Defendant's ineffective assistance of counsel claim is patently without merit. The record is clear that trial counsel carefully considered whether to request a customized admonition and rejected that choice because of the existing instructions and evidence tying defendant's "involvement" to the prosecutor's opening statement. Underlying trial counsel's choice is the concept that requesting a customized admonition, whether at the time the prosecutor made the remark or a later time, might call the jury's attention to an otherwise brief, forgettable, and ambiguous remark. The record demonstrates a sound tactical decision. (*People v. Jones* (1997) 15 Cal.4th 119, 182 [in order to succeed on a claim of ineffective assistance of counsel, the record must negate the possibility that counsel's decision resulted from an informed tactical choice within the range of reasonable competence], overruled on other grounds in *People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1.)

INEFFECTIVE ASSISTANCE OF COUNSEL

C. testified several times that she knew defendant was dating A. because A. had told her so. C.'s 26-year-old brother, I., testified that he told defendant that, "if he kept hanging around with these young girls and had sex with them, he would find himself in jail." I. explained that he knew that defendant had young girlfriends because "friends told [him]."

Defendant points out that the evidence from C. and I. to the effect that each knew he was dating young girls is hearsay. He acknowledges that such evidence can fall outside the hearsay rule if it is admitted for a purpose other than the truth of the matter asserted. He further acknowledges that the dating-young-girls testimony is arguably admissible to explain C.'s behavior during the school-yard incident and I.'s admonishment against hanging around and having sex with young girls. He contends, however, that he received ineffective assistance of counsel because counsel failed to request an instruction limiting the purpose of the dating-young-girls testimony.[6] He acknowledges that the trial court instructed the jury in the language of CALCRIM No. 303 (limited purpose evidence in general), but urges that no instruction tied in the dating-young-girls testimony to the limited-purpose concept. He argues that he was prejudiced because, if admitted for the truth, the testimony can lead to the inference that he had committed uncharged sex acts against young girls or was predisposed to do so. He bolsters this point by referencing the prosecutor's remark during closing argument: "We know he likes to hang around young girls. . . . We know he was with [A.]." We reject defendant's claim.

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) That right "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*Ibid.*)

"To establish constitutionally inadequate representation, a defendant must demonstrate that (1) counsel's representation was deficient, i.e., it fell below an objective

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[6] The People misconstrue defendant's argument and make much of whether trial counsel had a tactical reason for failing to make a hearsay objection to the dating-young-girls testimony. Though this theme may lurk in the issue raised, it is not presented and, as mentioned, defendant concedes the limited admissibility of the testimony.

standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1058; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-696 [(*Strickland*)].) 'When a defendant on appeal makes a claim that his counsel was ineffective, the appellate court must consider whether the record contains any explanation for the challenged aspects of representation provided by counsel. "If the record sheds no light on why counsel acted or failed to act in the manner challenged, 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' [citation], the contention must be rejected." ' " (*People v. Samayoa* (1997) 15 Cal.4th 795, 845.)

Defendant bears a burden that is difficult to carry on direct appeal. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) Our review is highly deferential; we must make every effort to avoid the distorting effects of hindsight and to evaluate the challenged conduct from counsel's perspective at the time. (*In re Jones* (1996) 13 Cal.4th 552, 561; *Strickland*, *supra*, 466 U.S. at p. 689.) A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. (*Strickland*, *supra*, at p. 689; *People v. Hart* (1999) 20 Cal.4th 546.) The burden is to establish the claim not as a matter of speculation but as a matter of demonstrable reality. (*People v. Garrison* (1966) 246 Cal.App.2d 343, 356.)

What defendant overlooks is that the dating-young-girls testimony was admissible, albeit for a limited purpose, and both C. and I. also testified that they had never seen defendant with young girls. Thus, trial counsel could have reasoned that (1) the truth feature of the dating-young-girls testimony was muted by the witnesses' admitted lack of first-hand knowledge, and (2) a customized limiting instruction (telling the jury that the dating-young-girls testimony should not be accepted as evidence that defendant was dating young girls) would only highlight the testimony. It is true that the prosecutor

highlighted the testimony in argument. But, again, trial counsel could have reasonably elected against provoking a sure-fire highlight by requesting a limiting instruction in the hope that the prosecutor would (1) overlook an arguably tangential point, or (2) make the point briefly (as she did). Defendant simply fails to carry the heavy burden to prevail on this type of claim.

PROSECUTORIAL MISCONDUCT DURING ARGUMENT

Defendant contends that the prosecutor engaged in misconduct during argument by (1) misstating the law so as to imply that he had a duty to offer evidence to create a reasonable doubt of his guilt, (2) misstating the law by telling the jury that it could not consider the lesser included offenses unless it first acquitted of the charged offenses, (3) mischaracterizing the evidence by telling the jury that C.'s family coerced C. to lie in court, and (4) mischaracterizing the evidence by telling the jury that he had demonstrated consciousness of guilt by making false statements when he was arrested.

We reject the point on procedural grounds. To preserve a misconduct claim a defendant must make a timely objection and request an admonition; only if an objection would have been futile and admonition would not have cured the harm is the misconduct claim preserved for review. (*People v. Cook* (2006) 39 Cal.4th 566, 598.) In the absence of timely objection, the claim is forfeited. (*Ibid.*; see also *People v. Noguera* (1992) 4 Cal.4th 599, 638-639.)

Here, defendant concedes that he did not object and request admonitions. He claims that admonitions would not have cured the harm, but we disagree. It is conceivable that, if asked, the trial court could have admonished the jury to disregard the prosecutor's supposed misstatements of the law and follow the instructions for the applicable law; and it is conceivable that, if asked, the trial court could have admonished the jury to disregard the prosecutor's supposed evidentiary mischaracterizations and rely on the evidence, rather than the prosecutor's statements, for the facts. Had defendant so

requested, we would be in a position to review the effect of a grant or denial of the request.

Defendant's alternate claim of ineffective assistance of counsel fails because he does not show prejudice from counsel's failure to object, i.e., he has not established a reasonable probability of a more favorable verdict if defense counsel had objected to the prosecutor's remarks. (*Strickland*, *supra*, 466 U.S. at p. 697 [when an ineffective assistance of counsel claim can be resolved on lack of prejudice, a reviewing court need not determine whether counsel's performance was deficient].)

At the threshold, we disregard defendant's second and third points. That the prosecutor may have misstated the law about considering lesser included offenses implicates counts 1, 2, and 4, the aggravated lewd-act counts that we are remanding for retrial. Defendant acknowledges this by making no argument that the prosecutor's supposed misconduct was prejudicial as to count 3, which is the nonaggravated lewd-act count. Similarly, that the prosecutor may have mischaracterized the facts about the reasons why C.'s testimony was inconsistent with her police statements, implicates counts 1 and 2, which involve victim C. Defendant acknowledges this by making no argument that the prosecutor's supposed misconduct was prejudicial as to count 3, which involves victim R.

As to defendant's first point, we decline to recount the details of the prosecutor's assailed remarks because defendant summarizes the remarks as follows: "The prosecutor's closing argument implied that the defendant had some duty to offer proof sufficient to create a reasonable doubt." Assuming that some of the prosecutor's statements can be construed as improperly shifting the burden of proof to defendant, the question is whether trial counsel's failure to object was prejudicial which, in turn, depends upon whether the prosecutor's statements were prejudicial. But this question is determined "[i]n the context of the whole argument and the instructions." (*People v. Marshall* (1996) 13 Cal.4th 799, 831.)

The instructions are particularly significant because " '[t]he crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.' " (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) Thus, "[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8; see also *People v. Smith* (2005) 35 Cal.4th 334, 372.)

Here, the trial court properly instructed the jury on the prosecution's burden of proving defendant's guilt beyond a reasonable doubt (CALCRIM No. 220) and the prosecutor herself argued that "The most important instruction in your packet is [CALCRIM] No. 220. That's the burden in this case. It's beyond a reasonable doubt. It's the highest in the system as well it should be because we're talking about someone's liberty and criminal charges." The trial court also advised the jurors in the language of CALCRIM No. 200 that they must accept and follow the law as stated by the court and "If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." Defendant's point that the jury might have construed from the prosecutor's argument that a reasonable doubt must be based on evidence is therefore without merit. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1238 [CALCRIM No. 220 does not tell the jury that reasonable doubt must arise from evidence but instead tells the self-evident principle that the determination of a defendant's culpability beyond a reasonable doubt must be based on the evidence].) Defendant also emphatically informed the jury in his argument that the People had the burden of proof. Defendant argued: "[Defendant] is presumed innocent until all 12 of you have agreed that the charges have been proved, if they have been proved, beyond a reasonable doubt. And that's the standard. [¶] You have the jury instruction that [the prosecutor] mentioned. Review that. It tells you what the burden is." In light of the instructions given by the court and the argument of the prosecutor and defense counsel, which accurately placed the burden of

proving defendant's guilt on the People, we conclude that defense counsel's failure to object to prosecutorial comments in closing argument was not prejudicial because there is no " ' "reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' " (*People v. Carter* (2005) 36 Cal.4th 1215, 1263.)

As to defendant's fourth point, the People agree that the prosecutor misstated the evidence by mentioning that defendant gave false information to a police officer.[7] The mention, however, was brief and in association with several statements more about the law than the facts. The prosecutor stated: "False statements, motive and flight. This is additional evidence that you have that was presented to you that goes towards finding him guilty and supports what [C.] and [R.] have accounted happened to them. False statements. You may consider the defendant's false statements as it relates to his guilt. You may find that he was aware of his guilt of the crime when he made these statements. The statements that this is addressing is when he's contacted by [the detective] and he lies about who he is, he gives him false information about who he is."[8]

In short, the false-information mention was momentary and not developed or emphasized. In any event, as we have recounted, the trial court instructed the jury in the language of CALCRIM No. 104 to the effect that nothing the attorneys say in argument is

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[7] At the hearing on defendant's motion to suppress, the detective testified that defendant gave a false identity when arrested. When the detective testified at trial, however, this point was not brought out.

[8] The prosecutor also mentioned the point in passing, joined to an argument that defendant showed consciousness of guilt by fleeing and hiding. The prosecutor stated: "And then the last thing, his flight, may show that he was aware of his guilt. Just before giving the false information to the police officer, he was found hidden under some clothes crouching in a closet with a small child who wasn't saying a peep out in the bedroom. That's more information for you to consider towards his guilt. Again, this was after [the detective] had talked to the girls and after he had started asking around of his family members to try to find the defendant, and he was found in the closet hiding."

evidence, that only the witnesses' answers are evidence. Indeed, these circumstances convince us that defense counsel's failure to object or seek a sidebar conference was because the supposed misconduct and any potential prejudice are more apparent than real, more arguable on appeal than actual at trial. There is no reasonable likelihood that the jury construed or applied the false-information remark in an objectionable fashion.

CALCRIM NO. 1191

Defendant contends the trial court committed prejudicial error by instructing the jurors in the language of CALCRIM No. 1191, which concerns evidence of uncharged sex offenses offered as circumstantial evidence to prove predisposition. He argues that the instruction unconstitutionally "allow[s] the jury to infer by a preponderance of the evidence that [he] was likely to have committed the charged offenses." There is no merit to this claim.

In *People v. Cromp* (2007) 153 Cal.App.4th 476, the court rejected a similar challenge to CALCRIM No. 1191, relying on *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1015, which had likewise rejected a challenge to the substantially similar language of CALJIC No. 2.50.01. "[T]here is no material difference in the manner in which each of the instructions allows the jury to conclude from the prior conduct evidence that the defendant was disposed to commit sexual offenses and, therefore, likely committed the current offenses. CALCRIM No. 1191, as given here, cautions the jury that it is not required to draw these conclusions and, in any event, such a conclusion is insufficient, alone, to support a conviction. Based on *Reliford*, we therefore reject defendant's contention that the instruction violated his due process rights." (*People v. Cromp*, *supra*, 153 Cal.App.4th at p. 480; see also *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87 ["The version of CALJIC No. 2.50.01 considered in *Reliford* is similar in all material respects to Judicial Council of California Criminal Jury Instructions (2006) CALCRIM No. 1191 (which was given here) in its explanation of the law on permissive inferences and the burden of proof"].) We similarly reject defendant's challenge. We are in no

position to reconsider the Supreme Court's holding in *Reliford*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

We observe that CALCRIM No. 1191 is even more restrictive than its CALJIC predecessors because it expressly advises the jury that evidence of another sexual offense "is not sufficient by itself to prove that the defendant is guilty of [the charged offenses]. The People must still prove each [element of each offense] beyond a reasonable doubt."

Defendant secondarily argues that giving CALCRIM No. 1191 is "improper where the prior offenses are offered as proof of charged crimes." He urges that the evidence of his sexual interactions with victim C. when he lived with her family is admissible as both propensity evidence and evidence on the substantive element of duress. He reasons that, as a matter of due process, propensity evidence must be excludable under Evidence Code section 352 (risk of undue prejudice outweighs probative value) but cannot be excluded if the same evidence proves a substantive element. He also argues that the jury should not be charged with performing the "mental gymnastics" necessary to first make a preponderance-of-evidence determination that he committed prior sex offenses for purposes of propensity and second make a beyond-a-reasonable-doubt determination that he committed the same offenses for purposes of duress.

The difficulty with defendant's argument is that defendant never raised it in the trial court either by (1) objecting to the admission in evidence of his sexual interactions with victim C., (2) objecting to the prosecutor's dual use of the evidence in argument, (3) objecting to CALCRIM No. 1191, or (4) requesting a limiting instruction pinpointing the "mental gymnastics" required by CALCRIM No. 1191 when applied to the facts. Given that the argument pertains only to counts 1 and 2 as to victim C., we pass the matter without consideration. Defendant is free to make and develop the point on retrial.

CALCRIM NO. 362

The trial court instructed the jury in the language of CALCRIM No. 362 as follows: "If the defendant made a false or misleading statement relating to the charged

crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

Defendant contends the trial court erred by giving the instruction because there was no evidence to support it. He reiterates that the detective testified about the false information at the suppression hearing but not at trial and that the prosecutor nevertheless argued the point.

But the instruction itself is conditional. It applies only "if" the jury concludes that defendant made a false or misleading statement. As we have mentioned, the trial court instructed the jury on what is and what is not evidential. We presume that the jury generally understood and followed CALCRIM No. 362 and the other instructions. (*People v. Delgado*, *supra*, 5 Cal.4th at p. 331.)

CUMULATIVE ERROR

Defendant asserts the cumulative effect of the aforementioned errors requires reversal of all his convictions. We disagree. As discussed above, defendant's secondary claims either fail on the merits or are harmless and, as for the harmless errors, "the whole of them did not outweigh the sum of their parts." (*People v. Roberts* (1992) 2 Cal.4th 271, 326.)

The parties agree that the abstract incorrectly states that defendant committed count 3 in 2005 rather than 2004. The retrial will generate a new abstract, and the parties are free to assure that the new abstract is accurate.

DISPOSITION

The judgment is reversed. The matter is remanded for a retrial of counts 1, 2, and 4. Upon a verdict, the trial court shall pronounce judgment consistent with the verdict and extant conviction of count 3.

Premo, J.

I CONCUR:

Rushing, P.J.

Mihara, J., Concurring and Dissenting.

The majority opinion concludes that the trial court prejudicially erred in instructing the jury that consent is not a defense to lewd conduct by force or duress. Lack of consent is not a statutory element of this offense, and the victim's consent is not inherently inconsistent with the perpetrator's application of force or duress. While, as a factual matter, it may not be *necessary* for a perpetrator to apply force or duress to commit a lewd act on a consenting child victim, a perpetrator who actually uses force or duress to commit a lewd act is guilty of committing a lewd act by force or duress notwithstanding the child victim's consent. I would find no error in the trial court's instruction. In addition, since there was no evidence presented at trial that either child victim consented to a lewd act, and defendant never even intimated that he was defending on the basis of consent, the majority opinion's conclusion that defendant was prejudiced by this instruction is highly questionable. Since I agree with the majority opinion's conclusion that there were no other prejudicial errors, I would affirm the judgment.

I. Evidence Presented At Trial

Defendant is C.'s first cousin, and he resided with her and her family for a period of time. While defendant lived with them, he gave C. gifts for her birthday and Christmas. The allegations that led to the current charges arose after an incident occurred at C.'s school in May 2005, when C. was 12 years old. Although C. made extensive statements inculpating defendant to the police about that incident and other prior incidents, C. testified at trial that these statements to the police were false and no lewd conduct had occurred.

A school employee testified at trial that she saw C. talking to a man in a car at the school. She thought this was suspicious, and she reported the incident to the principal. The principal then made contact with C. The principal testified at trial that C. told him

that defendant had kissed her or that defendant had kissed her before. C. testified that, after she spoke with the principal, she telephoned defendant to tell him that the principal had been asking about him. Defendant told her not to tell anyone his name.[1]

The principal contacted the police. C. was initially reluctant to speak with the female police officer who came to the school, but she ultimately spoke to the officer for 30 minutes and provided the officer with defendant's name, telephone number and workplace. The police officer testified at trial that C. told her that defendant "called to her and hugged her, grabbed her around the waist, and pulled her towards him, and proceeded to French kiss her" in the school parking lot. Their tongues touched during the kiss. C. told the officer that she did not want to kiss defendant, and she tried to shove him away. C. pulled away from defendant, and he grabbed her and pulled her closer. At that point, the principal called to C., and she pushed defendant away.

C. also told the female police officer that defendant had kissed her that way in the past and rubbed her back and buttocks. Sometimes she would push herself away from him. Defendant would also "talk dirty" to her. "[S]he believed that he wanted to have a sexual relationship with her, and she told [the police officer] . . . that she was grossed out . . . ."

C. spoke to a male police officer a few days later. The male police officer testified that, when he asked her about "French kissing," she told him that defendant "was going to tell my mom stuff . . . if I didn't kiss him." She said that defendant threatened to tell her mother that she had a boyfriend if she did not kiss him. He also "would, like, pinch me on the back and stuff." C. also told the male police officer that her mother had seen defendant kissing her, and had blamed her because she "thought I wanted him to do it . . .

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[1] C. told the police that during this conversation defendant threatened to "do something" to her if she told anyone of his presence.

." Eventually, her mother understood, and she asked defendant to move out. C. told the police officer that defendant had come back after moving out and banged on the window of her bedroom with a rock. He said "I'll never give you a last kiss." C. told the police officer that, a week before the school incident, there was an incident in defendant's car. Defendant "humped" her and touched her, and he locked the car door when she tried to get out.

C.'s adult brother testified at trial that he had told defendant that "if he kept hanging around with these young girls and had sex with them, he would find himself in jail."

At trial, C. denied that any kissing or other intimate contact had occurred between her and defendant. She testified that the May 2005 school incident was initiated by her. She wanted to talk to defendant because she was mad at him. He had stopped talking to her after he started "going out with" her 13-year-old best friend A. A. had told C. that A. was dating defendant. C. testified that she and defendant merely talked in the school parking lot, and perhaps hugged.[2] When she tried to leave, defendant grabbed her arms so that she would not leave. The bell rang, the principal called to C., and she left defendant.

C. admitted telling the police that defendant had hugged and kissed her "with an open mouth" during the school incident. She also admitted telling the police that defendant "rubbed [her] thigh and [she] could feel that his penis was hard as he was holding [and rubbing] himself against [her]" during the school incident. C. also admitted that she had told the police about an incident, a week or two prior to the school incident, when defendant had been driving her to school in his car. She told the police that

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[2] C. testified that they hugged, but then she denied that defendant put his arms around her.

defendant reclined her seat, got on top of her, and kissed her. He also "hump[ed]" her and touched her "butt." C. described "humping" as when defendant "put his thing, on mine, but with clothes . . . ." Defendant also touched her stomach, and tried to touch her breasts. When she tried to open the car door to leave, he locked the door. She told the police "that I didn't want him to do it."

C. also admitted that she told the police about another prior incident during which defendant pushed her down on a bed, "humped" her, and she "felt his thing and it felt nasty, but he was holding me so tight I couldn't do anything." C. told the police that defendant had started out by hugging her and kissing her on the cheek. Then he had progressed beyond that. C. told the police that she would push him away and tell him to stop, and he would hold her tight and kiss her. C. told the police that her mother had kicked defendant out of their home after seeing him kissing and rubbing C. After being kicked out, defendant banged on her window with a rock, which made her fearful that the window would break, and defendant said "I'll never give you a last kiss." C. testified that she had told the police that defendant had told her aunt and others, including "people at school" "that it was all [her] fault, that he didn't do anything wrong . . . ."

Although she admitted at trial making all of these statements to the police, C. testified that these statements were untrue, and she made these statements only because she was mad at defendant for ignoring her.

C. and R. were friends, and R. lived in an apartment next door to the apartment where defendant was living with C.'s family. R. testified at trial about her encounters with defendant. One day, R. and defendant met and had a conversation as they stood in the doorways of their apartments. She told him that she was "going to turn 12," and he told her she was pretty. R. gave her phone number to C. and asked C. to give it to defendant. She did this because she thought defendant was "nice" and "good looking."

A few days after meeting defendant, R. encountered defendant in the apartment complex's laundry room. They talked for a few minutes, and defendant "suddenly

hugged" R. and kissed her. R. said "what are you doing?" She tried to push away from him, and told him "I don't want to do that." Defendant tried to touch R.'s chest. She did not want him to do that, so she told him not to and removed his hand from her body. Defendant took her hand and put it between his legs on his groin. R. could feel that his groin was "very hard." She did not want to have her hand there, and she pulled her hand away and told him that she did not want to touch him there. Defendant told R. that he wanted to have sex with her. R. said no because they were "just friends." During the laundry room incident, defendant did not threaten R. in any way. Two hours after the laundry room incident, defendant called R. on the telephone and again said that he wanted to have sex with her.

About a week later, defendant called R. on the telephone and told her to come over to C.'s apartment because C. wanted to talk to her. R. arrived at the apartment and found defendant there alone. R. went into defendant's bedroom and spent some time talking to him. Defendant put on a movie in which two women were kissing each other. R. told him to turn off the movie, and he did. Defendant took a condom out of his pocket and said "look at this condom." R. told him to throw it in the trash, and he did. Defendant said he wanted to have sex with R. She told him that she did not want to have sex.

R. told defendant that she had to leave. However, she tripped on a cable and fell onto defendant, who was lying on the bed. Defendant hugged her. She hugged defendant back, and he kissed her. Then R. told him to leave her alone as she needed to leave. She hugged defendant, who was sitting on the bed, goodbye. He hugged her and pulled her onto the bed.[3] When she was on top of him, defendant tried to grab her between her legs. She grabbed his hand and pulled it away. He also tried to pull down her pants, but she told him no. Defendant grabbed R.'s hand and put it in between his legs. His groin was

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[3] During one of the two hugging incidents, defendant was on top of R.

hard. R. did not want him to put her hand there. After a few seconds, R. pulled her hand away. Defendant wanted R. to pull his pants down, but she refused. He pulled his pants down, but did not pull down his boxers. R. was afraid that defendant would get upset and "do something to me" if she told him that she did not want to do these things. Eventually, R. got up and left the apartment. She had been in the apartment for about an hour and a half. R. never spoke to defendant again. R. testified that she felt bad for defendant that he had been arrested.

A police officer testified that he had difficulty locating defendant. The police officer talked to C.'s adult brother who told the officer that he had seen defendant with girls C.'s age or younger and had "advised him that having any kind of a romantic relationship with women of that age would be against the law and he can get himself in a whole bunch of trouble." Defendant told C.'s brother that he "didn't care, that the young girls were fun." The police officer eventually located defendant hiding in a closet of an apartment with clothes draped over him.

II. Procedural Facts

Defendant was charged with one count of lewd conduct (Pen. Code, § 288, subd. (a)) on R., one count of lewd conduct by force or duress (Pen. Code, § 288, subd. (b)(1)) on R., and two counts of lewd conduct by force or duress (Pen. Code, § 288, subd. (b)(1)) on C. It was further alleged that he had committed the three latter offenses by force or duress (Pen. Code, § 1203.066, subd. (a)(1)) and against more than one person (Pen. Code, § 1203.066, subd. (a)(7)).

The court pre-instructed the jury with CALCRIM No. 1111, including the sentence which states "[i]t is not a defense that the child may have consented to the act." The defense presented no evidence at trial. At the conclusion of the trial, the jury was again instructed with CALCRIM No. 1111, and each juror was provided with a copy of this jury instruction. CALCRIM No. 1111, which was entitled "Lewd or Lascivious Act on a

Child By Force or Fear," described the four elements of the offense: the child was under 14 years old; there was a touching either of or by the child, caused by the defendant; the defendant had the requisite specific intent; and "in committing the act, the defendant used force, violence, duress, menace or fear of immediate and unlawful bodily injury to the child or someone else." The instruction specified that "[t]he force used must be substantially different from or substantially greater than the force needed to accomplish the act itself."

CALCRIM No. 1111 also defined duress. "Duress means a direct or implied threat of force, violence, danger, hardship or retribution that causes a reasonable person to do or submit to something that he or she would not otherwise do or submit to. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child, and her relationship to the defendant. [¶] Retribution is a form of payback or revenge." The instruction stated that "[a]n act is accomplished by fear if the child is actually and reasonably afraid." The final sentence of the instruction read: "It is not a defense that the child may have consented to the act."

Near the beginning of her argument to the jury, the prosecutor, after going over the elements of the offenses, said: "Consent is not a defense. It is not a defense that one or both of the girls wanted to do it or wanted to be with the defendant when this happened. Because he's the adult in the equation." The prosecutor never explicitly mentioned consent again. The prosecutor argued both force and duress. The prosecutor made the following argument to the jury regarding C.'s state of mind when she encountered defendant in the school parking lot. "She saw someone that she knew was now involved with a different girl than her and she saw an opportunity to kind of get that contact going again. She wasn't mad at him. She wanted to see him. She wanted to talk to him."

Defendant's trial counsel argued that the alleged school incident lewd conduct "didn't happen" and did not involve force as C. had merely said there was "a grabbing of the arms." He conceded that the car incident was forcible, if it occurred, but he argued

that C.'s testimony was not credible. Defendant's trial counsel argued that R.'s testimony also was not credible and was inconsistent. He contended that the incident in the apartment did not involve force or duress because the hugging occurred only because R. tripped and fell on defendant. Defendant's trial counsel asserted that there was reasonable doubt as to all the charges and asked the jury to acquit defendant.

The jury deliberated for less than 50 minutes before finding defendant guilty of all four counts as charged, and finding the Penal Code section 1203.066 allegations true. Defendant was committed to state prison for a term of 12 years.

III. Analysis

The majority opinion concludes that the trial court prejudicially erred in instructing the jury that "[i]t is not a defense that the child may have consented to the [lewd] act." The majority opinion reasons that this instruction deprived defendant of a defense to the prosecution's contention that the offenses were committed by duress. I cannot agree. The majority opinion declines to consider whether consent is a defense to a charge of lewd conduct by *force*, assumes that consent is defense to a charge of lewd conduct by *duress*, ignores the fact that there was no evidence whatsoever of consent at trial, and fails to acknowledge that defendant never gave the slightest indication that consent played any role in his defense. I would conclude that the trial court did not prejudicially err in giving this instruction.

Lack of consent is not a statutory *element* of this offense. The offense proscribed by Penal Code section 288, subdivision (b)(1) is a lewd act committed "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . ." (Pen. Code, § 288, subd. (b)(1).) The court properly instructed the jury that it was an element of these offenses that defendant "in committing the act, . . . used force, violence, duress, menace or fear of immediate and unlawful bodily injury to the child or someone else." The jury was not instructed, and defendant does not claim

that it should have been instructed, that lack of consent is a necessary element of lewd conduct by force or duress.

Defendant contends that consent is *inherently inconsistent* with the perpetrator's use of force or duress and therefore consent is a defense to the force or duress element of the offense. A perpetrator's use of force is *not* inherently inconsistent with the victim's actual consent. "A defendant uses 'force' [in committing a section 288, subdivision (b)(1) offense] if the prohibited act is facilitated by the defendant's use of physical violence, compulsion or constraint against the victim other than, or in addition to, the physical contact which is inherent in the prohibited act." (*People v. Bolander* (1994) 23 Cal.App.4th 155, 163 (Mihara, J., concurring) (*Bolander*).) Here, the jury was properly instructed that "[t]he force used must be substantially different from or substantially greater than the force needed to accomplish the act itself." While the fact that the victim actually consents to a lewd act might render the use of force unnecessary, the victim's actual consent does not eliminate the fact that the defendant actually uses violence, compulsion or constraint in the commission of the lewd act, nor does the victim's consent diminish the defendant's culpability or immunize the defendant from suffering the penal consequences that arise from a forcible lewd act. "Once lack of consent was eliminated [by the Legislature's 1981 amendment of the statute] as an element of the prosecution's case, it was not reborn as a part of the definition of force. Lack of consent is not an element of the offense prohibited by section 288, subdivision (b), and the victim's consent is not an affirmative defense to such a charge. The victim's consent or lack thereof is simply immaterial." (*Bolander*, at p. 163.) The perpetrator may use force because he or she is not aware that the victim is willing, or may engage in gratuitous violence notwithstanding the victim's willing compliance.

The perpetrator's utilization of duress is also not inherently inconsistent with the child victim's actual consent. "Duress has been defined as a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a *reasonable person of*

ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted. . . . [D]uress involves psychological coercion. Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. . . . Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim [are] relevant to the existence of duress." (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1319-1320 (*Espinoza*), internal quotation marks omitted, italics added.) "Duress cannot be established unless there is evidence that 'the victim['s] participation was impelled, at least partly, by an implied threat . . . .'" (*Espinoza*, at p. 1321.)

While a perpetrator may not *need* to utilize actual or implied threats to coerce the participation of a willing victim in a lewd act, the perpetrator nevertheless may in fact utilize such threats either gratuitously or due to his or her unawareness of the child victim's actual consent. Notably, duress is defined in terms of the objective impact of the perpetrator's conduct on a "reasonable person," rather than in terms of the subjective impact on the actual victim. As is true with force, the child victim's actual consent does not eliminate the fact that the perpetrator utilizes duress in the commission of the lewd act, and does not reduce the perpetrator's culpability or eliminate the penal consequences that attach due to the perpetrator's conduct.

As neither force nor duress is inherently inconsistent with consent, the premise for defendant's contention is absent. Because consent is neither an element of the offense nor an affirmative defense, the trial court did not err in instructing the jury that the victim's consent is not a defense.

Nor is there any merit to the majority opinion's prejudice analysis. Not the slightest evidence of consent was introduced at trial. Both C. and R. confirmed that they *did not consent* to the lewd acts. C. never asserted that she kissed defendant or allowed

him intimate contact with her in the school parking lot or in his car due to his threats. She claimed that defendant's physical force overcame her resistance on both occasions. R. did not testify that she acquiesced to the lewd conduct in the apartment. Instead, she testified that her fear of defendant and his forceful conduct motivated her resistance and led her to leave the apartment soon after defendant commenced the lewd acts. Defendant did not testify at trial or introduce any evidence. His trial counsel never intimated or suggested that either girl consented to a lewd act or that defendant's defense was premised on consent. Under these circumstances, there is no reasonable possibility that the trial court's instruction that consent is not a defense in any way "contribute[d] to the jury's verdict." (*People v. Lamas* (2007) 42 Cal.4th 516, 526.)

Consequently, I would affirm the judgment.

Mihara, J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Jaime Vargas Soto*** No.: _____

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 15, 2008, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 15, 2008, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature

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