IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	Case No. S220247
	)	
v.	)	
	)	
LEE HOANG ROBINSON,	)	
	)	
Defendant and Appellant.	)	
	)	

Fourth Appellate District, Division Three, No. G048155
Orange County Superior Court, No. 11WF0857

APPELLANT'S OPENING BRIEF ON THE MERITS

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The Honorable JAMES A. STOTLER, Judge Presiding

APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUE PRESENTED FOR BRIEFING

"Is misdemeanor sexual battery (Pen. Code, 243.4, subd. (e)(1)) a lesser included offense of sexual battery by fraudulent representation (Pen. Code, § 243.4, subd. (c))?"

STATEMENT OF THE CASE

Appellant, LEE HOANG ROBINSON, was charged in a nine count information with eight counts of sexual battery by fraud (counts one, two, and four through nine; Pen. Code, sect. 243.4, subd. (c)), and a one count of sexual penetration by force (count three, Pen. Code, sect. 289, subd. (a)(1).) (C.T. p. 118.)

A jury convicted appellant as charged on counts one through nine. (C.T. pp. 214-222.)

On January 18, 2013, appellant was sentenced to a prison term of twelve years, as follows: the court chose count one as the principle term, and imposed the middle of three years; a full consecutive term of six years was imposed on county three; consecutive terms of one year (one-third the middle term) each were imposed on counts four, six, and eight. Concurrent terms of three years were imposed on counts two, five, seven, and nine. (C.T. p. 297.)

On March 14, 2013, appellant filed a timely Notice of Appeal. (C.T. p. 300; Pen. Code, § 1237, subd. (a).)

STATEMENT OF FACTS

A. Prosecution Case-Counts One, Two, and Three.

On March 10, 2010, Trang T. was at the Target store on Brookhurst, when appellant approached Trang and told that he owned the nearby Queen Beauty Salon and that he was scheduled to train students to do facials, but the model did not show up. Appellant offered to pay Trang $40.00 if she would serve as a model for a facial and a full body massage. (1 R.T. pp. 211-212.)

Trang arrived at the salon ten minutes before 6:00 p.m. Appellant greeted her and led her to a room in the back. Appellant gave her a robe, told her to get undressed, and left the room. (1 R.T. pp. 213, 215.) Trang did not think anything unusual, as she had had facials and full body massages in the past. (1 R.T. p. 215.)

Appellant returned to the massage room, told Trang that the students had not yet arrived, and asked her to lie down on the massage table; when she had done this, appellant covered her eyes. (1 R.T. p. 216.) A short time later, Trang heard murmurings and doors slamming shut, so she assumed that she and appellant were alone in the salon. (1 R.T. p. 217.)

Appellant put some oil on his hands and massaged Trang's face for a few minutes, then massaged her arms for a short time, and then massaged her feet and legs up to her knees. Appellant then removed the blanket and robe which had been covering her, exposing her breasts. Trang asked what

appellant was doing. Appellant said that this was "standard procedure" and that Trang should not worry and should "just relax." (1 R.T. pp. 218-219.) Trang became fearful because no students had arrived and she was alone with appellant. (1 R.T. pp. 219-220.)

Appellant continued massaging Trang's breasts, assuring her that his clients loved it when he did this. (1 R.T. p. 220.) Appellant worked his way down Trang's body, and put his hands inside her panties onto the surface area of her vagina. (1 R.T. pp. 220-221.) After having Trang turn over onto her stomach, he continued to massage her starting on her neck, and going down her back to her butt. Appellant again put his hand inside Trang's panties, and this time put a finger inside Trang's vagina. (1 R.T. pp. 222-223.) Trang did not verbally protest as she was afraid as she was alone and appellant was bigger than she was. (1 R.T. p. 222.)

When Trang insisted that she had to leave, appellant started to end the massage. (1 R.T. p. 225.) As he wiped the massage oil off Trang's body, he again touched her vagina. (1 R.T. p. 226-227.) At that point Trang had enough, got up, grabbed her clothes and left. (1 R.T. pp. 227-228.)

B. <u>Prosecution Case-Counts Four and Five</u>.

In July of 2010, Odette M. worked in a Pizza Hut which was in the same shopping center as Queen Beauty Salon. (1 R.T. pp. 254-255.)

Sometime during the morning of July 17, 2010, Odette walked into the Salon to buy a hair product. Appellant, whom Odette had met a few days earlier in the shopping center's parking lot, asked her if she could come back the next evening to serve as a model for a facial. (1 R.T. pp. 258-259.)

At 9:00 that evening, Odette returned after making a pizza delivery, and ran into appellant in the parking lot. Appellant suggested that she come over for a demonstration as Odette had mentioned that she had sensitive skin when they had discussed her serving as a facial model. (1 R.T. pp. 259-261.)

After clocking out at work, Odette returned to the Queen Beauty; nobody other than appellant was present as the salon had closed for the day. (1 R.T. p. 262-263.) Appellant escorted Odette to a back massage room, told her to take off her clothes and put on a robe, and he left the room. When appellant returned, he had her lie down face up and covered her eyes. (1 R.T. p. 264.) Appellant told Odette that he was using an excellent oil, and started on her arms and legs. When Odette objected to appellant massaging her feet, he immediately stopped. (1 R.T. p. 266.) He then opened Odette's robe and grabbed her nipples; she said "no" and appellant said it was a normal of his massage and she should relax. Odette kept repeating that she wasn't comfortable, and started to feel angry and "pissed off." (1 R.T. pp. 267-268, 270-271.)

As appellant continued the massage, appellant put his hands inside

Odette's panties. She repeatedly said "Please don't do it" and "Please stop. It's uncomfortable." Appellant simply responded that Odette should "relax" and "It's okay. I do this all the time." (2 R.T. pp. 281-282.) He touched her entire public area, but did not penetrate Odette's vagina. (2 R.T. p. 283.) She did not just leave because she was afraid appellant had a weapon and did not know if anyone else was in the building. (2 R.T. p. 290.)

Eventually, appellant wiped the oil off Odette's body and removed the facial mask. Odette got dressed and left after giving appellant her phone number which appellant asked for so he could arrangements for the facial demonstration the following day. (2 R.T. pp. 291-292, 295-296.) Odette went to the police less than a week after the incident; she did not immediately report the incident because she was afraid, and because she was embarrassed. (2 R.T. pp. 297, 300.) Odette filed a lawsuit against appellant, seeking $2,500,000.00 in damages. (2 R.T. p. 301.)

C. <u>Prosecution Case-Counts Six, Seven, Eight and Nine</u>

Dianna N. was working as a sales clerk at West Drug Pharmacy; she met appellant when he came into the store to make a payment on his telephone bill. (1 R.T. pp. 92, 96.) Appellant told Dianna that he worked at a beauty salon and offered her a free facial to treat her acne. He told her that students from a nearly beauty college would be there to observe. (1 R.T. p.

97.) That evening Dianna spoke with her mother and her sister, Christine N. about the offer and they agreed they would go together. (1 R.T. pp. 98, 152.)

When the family arrived at the salon, appellant offered to give Christine a facial as well. (1 R.T. pp. 115, 154.) Appellant directed the sisters to the facial room and left them after asking them to change into the robes. (1 R.T. pp. 115, 154-156.) Their mother stayed in the waiting room and watched a movie. (1 R.T. p. 132.) Both sisters removed their shirts and bras, but did not remove their pants. (1 R.T. pp. 116-117, 155-156.) Appellant first gave Dianna a facial, and after placing a clay mask over her face left the room for a few moments. (1 R.T. p. 120.)

When he returned, he told the sister that he would also give them "European massages" in addition to the facials. (1 R.T. pp. 119-120.) Appellant massaged Dianna's arms and breast area, and he then said he was going to unbutton her pants so he could massage her thighs. (1 R.T. pp. 120, 148.) Appellant pulled Dianna's pants down to mid-thigh level, and massaged her thighs. Dianna did not say anything as she was wearing a facial mask and because she trusted appellant. (1 R.T. p. 122-123.) Appellant then rubbed Dianna's vaginal area for a minute or two. He then moved to Christine, who was unable to see appellant massaging Dianna. (1 R.T. pp. 123-124, 159.)

Appellant massaged Christine, first working on her arms, stomach, and breasts; he did not touch her nipples but did massage the areas "around the

outer areas" of them. (1 R.T. pp. 159-161.) When appellant started to unbutton Christine's pants, she put a hand on his to stop him because she "didn't feel comfortable." (1 R.T. p. 161.) Appellant reassured Christine that he regularly did this as part of a massage, and that she should not worry. Christine removed her hands, and appellant unbuttoned her pants and pulled them and her underpants to her thighs. (1 R.T. pp. 162-164.) When appellant tried to put his finger inside Christine's vagina, she stopped him by removing his hand and pulling her underwear back up. Appellant continued to massage Christine's arms and breasts. (1 R.T. pp. 166-167.)

While they were in the salon, Dianna did not say anything because she was "fearful of what would happen" if she warned her sister. (1 R.T. p. 125.) After they left the salon, the sisters discussed with each other what had occurred, but did not discuss the details and did not say anything to their mother. (1 R.T. pp. 125, 173.)

A month or two afterward Dianna told her older sister, Kim, about what had happened. At Kim's urging, Dianna and Christine went to the police in August. (1 R.T. pp. 127, 174, 194, 197.)

Appellant told police that he did not do full body massages, only facials. He also told police that the women he gave facials to removed only their outer top clothing, but left on their bras. (2 R.T. pp. 325-326.)

ARGUMENT

I. MISDEMEANOR SEXUAL BATTERY IS NOT A LESSER INCLUDED OFFENSE OF SEXUAL BATTERY BY FRAUDULENT REPRESENTATION. THUS, THE JUDGMENT WITH RESPECT TO COUNT ONE, TWO, FOUR AND FIVE MUST BE REVERSED, NOT REDUCED TO MISDEMEANORS.

As pertinent to the issue in this case, an uncharged crime is included as a lesser offense to the charged offense when, as a matter of law and considered in the abstract, the greater offense cannot be committed without committing the lesser offense. (*People v. St. Martin* (1970) 1 Cal.3d 524, 536; *People v. Wolcott* (1983) 34 Cal.3d 92, 98; *People v. Steele* (2000) 83 Cal.App.4th 212, 218.) Appellant contends that under this test misdemeanor sexual battery, in violation of Penal Code section 243, subdivision (e)(1), is not a lesser included offense of felony sexual battery by fraudulent representation, in violation of Penal Code section 243.4, subdivision (c).

In pertinent part, subdivision (c) of section 243.4 provides that a person is guilty of felonious sexual battery by (1) touching an intimate part of another, (2) for the purpose of sexual arousal, gratification or abuse, and (3) the victim is unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose." By contrast, subdivision (e)(1) of section 243.4, is a misdemeanor. This subdivision is violated if the perpetrator (1) touches an intimate part of

another, (2) for the purpose of sexual arousal, gratification or abuse, and (3) the touching is "against the will of the person touched." Thus, if "unconscious of the nature of the act due to fraudulent misrepresentation" is the same as "against the will of the person touched" subdivision (e)(1) is a lesser included offense to subdivision (c). As explained below, appellant contends that the Court of Appeal erred in finding such equivalency. Thus, the judgment with respect to counts one, two, four and five must be reversed and dismissed, not merely reduced to misdemeanors.

Appellant was charged with eight counts of sexual battery by fraudulent representation. Each of the four victims was named in two counts. (C.T. pp. 118-120.) With respect to two of the victims, Dianna and her sister, Christina (counts six through nine), the Court of Appeal upheld the convictions because they believed the fraudulent misrepresentations made by appellant to induce them to show up at his studio and allowed appellant to touch them in a sexual manner because they believed that the touching served a professional purpose as set forth in Penal Code section 243.4, subdivision (c). (Slip opn., pp. 9-10.) These counts are not at issue here.

By contrast, with respect to the victims in counts one, two, four and five (Trang and Odette), the Court of Appeal found that they did not believe that appellant was acting for a professional purpose. (Slip opn., pp. 10-11.) In reducing the charge to misdemeanor sexual battery, Penal Code section 243.4,

subdivision (e)(1), the Court of Appeal found that "fraud in the inducement" is "a form of coercion that vitiates the victim's alleged consent... ." The court then equated "against the person's will" with lack of consent, and modified the verdicts in count one, two, four and five. In doing so, appellant contends the court erred.

As acknowledged in the Court of Appeal opinion (Slip opn., p. 12), there is a split of authority as to whether Penal Code section 243.4, subdivision (e)(1) is a lesser included offense of section 243.4, subdivision (c). In *People v. Babaali* (2009) 171 Cal.App.4th 982 (hereinafter *Babaali),* a majority of the Court found that 243, subdivision (e)(1), is not a lesser included offense of 243.4, subdivision (c). The dissent would hold that it was not. (*Id,* at p. 12.) In addition, the Court in *People v. Smith* (2010) 191 Cal.App.4th 199 (hereinafter *Smith*), unanimously held that subdivision (e)(1) was a lesser included offense of subdivision (c).

Both *Babaali* and Smith acknowledge that lack of consent is an element of the misdemeanor offense of sexual battery, Penal Code section 243.4, subdivision (e)(1). (*Babaali, supra,* 171 Cal.App.4th at p. 995; *Smith, supra,* 191 Cal.App.4th at p. 206.) The opinions in *Babaali* and *Smith* differ with respect to the question of whether or not lack of consent is also an element of sexual battery by fraudulent representation, Penal Code section 243.4, subdivision (c). Appellant contends that the majority opinion in *Babaali* is

better reasoned and should be followed.

In *Babaali, supra,* 171 Cal.App.4th 982, the defendant was a medical doctor who hired the victim as his receptionist. The day after she was hired, the defendant had the victim come into the examination room, and told her that he wanted to show her how to perform various medical functions. After showing the victim how to draw blood from a patient, he told her he would show her how to operate the electrocardiogram (EKG) machine. The defendant had her take off her top and bra, and put on a medical gown so that the opening was in front. After the victim complied with the defendant's request that she lie down on the examining table, the victim told the defendant that she had been experiencing pain around her breast and stomach. The defendant than hooked up the EKG wires around her breasts and ankle, but did not seem to know what he was doing. When the victim covered her breasts with the gown, the defendant opened it; he pinched her nipples, saying he was checking for breast cancer and secretions. The defendant unzipped and pulled down the victims pants and placed his hand inside her underwear, touching her vagina. Appellant eventually told the victim to get up and get dressed. She went back to work that afternoon, and reported the defendant to the police the next day. (*Id,* at pp. 989-990.)

The defendant was convicted of one count of sexual battery by fraudulent representation (Pen. Code, sect. 243.4, subd. (c)) and one count of

attempted sexual battery by fraudulent representation (Pen. Code sects. 664/243.4, subdivision (c)). (*Id*, at p. 993.) On the defendant's motion for a new trial, the court modified the verdicts to "what it believed to be the lesser included offenses of sexual battery (sect. 243.4, subd. (e)(1)) and attempted sexual battery (sects. 664/243.4, subd. (e)(1))." (*Id*, at p. 987.) The Court of Appeal reversed this finding and dismissed the allegations, holding that misdemeanor sexual battery was not a lesser included offense to sexual battery by fraudulent representation. (*Ibid.*)

The *Babaali* decision reasoned that the essence of the crime of sexual battery by fraud was the *fraudulent inducement* to obtain the victim's consent by false pretenses. (*Id*, at pp. 987-988.) By contrast, sexual battery requires that the touching be "against the will" of the victim. (*Id*, at p. 989.) The *Babaali* opinion then applied the standard test for determining whether or not one offense is a lesser to another. (*Id*, at p. 994.) The court concluded that the two statutes in question had two elements in common, that of (1) a touching of an intimate part of another and (2) that the touching be for sexual gratification or arousal. However, the *Babaali* opinion noted that subdivision (e)(1) requires that the touching be "against the will" of the victim, while subdivision (c) requires that the victim be "unconscious of the nature of the touching," not "against the will." (*Id*, at p. 995.)

The *Babaali* opinion first noted "fraud in the factum" has always been

held to negate consent; by contrast, "the general common law rule is that fraud in the inducement does not vitiate consent because the victim agreed knowing the true nature of the act to be performed." (*Id,* at p. 988.)

The *Babaali* opinion noted that the use of the word *unconscious* in subdivision (c) does not have the "ordinary or colloquial meaning;" rather in this subdivision the word *unconscious* means that the victim was tricked into submitting to the touching. The Court held that "committing an intimate touching when the victim 'at the time unconscious of the nature of the act'" due to fraud is not the same as "committing a touching 'against the (victim's) will.'" Instead, the Court held that as used in section 243, subdivision (c), the word "unconscious" means that the victim was tricked "into submitting based upon the fraudulent representation that "the touching served a professional purpose." While the fraud rendered the victim "unconscious" of the true nature of the touching, it did not result in the touch being against the victim's will.

By contrast, *Babaali* noted that "against the will" is synonymous with "without the victim's consent." Thus, the *Babaali* opinion concludes that subdivision (e)(1) is not a lesser included offense to subdivision (c), as subdivision (e)(1) of section 243.4 requires that the touching be without the victim's consent, an element absent from subdivision (c) of the same section. (*Id,* at pp. 995-996.)

Below, the Court of Appeal relied strongly on the dissenting opinion of Justice Manell in *Babaali.* (Slip opn., pp. 12-13.) Justice Manella reasoned that a sexual battery pursuant to subdivision (e)(1) is "against the will" of a person; against the person's will is defined as without the person's consent. (*Id*, at p. 1001.) Justice Manella then noted that section 243.4, subdivision (c), requires that the person be "unconscious of the nature of the act" and consent requires that a person be aware of the nature of the act. Thus, according to Justice Manella's dissent, if the person is unaware of the nature of the act, the person cannot consent. (*Id*, at pp. 1001-1002.)

In addition to relying on Justice Manella's dissent in *Babaali,* the Court of Appeal below relied on the decision in *People v. Smith, supra,* 191 Cal.App.4th 199. (Slip opn. p. 13.) While the decision in *Smith* disagreed with the holding in *Babaali,* the *Smith* case is not directly on point. In *Smith,* the defendant was convicted, *inter alia*, of sexual battery in violation of subdivision (e)(1) of Penal Code section 243.4. On appeal, the defendant contended that this charge had to be reversed; he claimed that the victim was unconscious due to drug and alcohol intoxication, and as such the element of this crime requiring that the act be "against the victim's will" was inapplicable. (*Id,* at pp. 201, 205-209.) The *Smith* opinion pointedly disagreed with the majority opinion in *Babaali,* and found that a person who is "unconscious" due to intoxication cannot give consent. (*Id*, at pp. 208-209.)

Appellant contends that the majority opinion in *Babaali* is better reasoned than the dissent and the decision in *Smith*, and should be followed by this Court. Neither *Smith* nor the dissent in *Babaali* mentions the long history of the difference between fraud in the inducement and fraud in fact in sex crimes cases. A review of these cases leads to the conclusion that the majority opinion in *Babaali* was correct.

A case very close to being on all fours with the instant matter is *People v. Studemann* (2007) 156 Cal.App.4th 1. In *Studemann*, the defendant was convicted of rape by a foreign object on an unconscious person (Pen. Code, § 289, subd. (d)(3)) and oral copulation of an unconscious person (Pen. Code, § 288a, subd. (f)(3)). (*Id*, at p. 4.) The facts leading to these charges were that the defendant met the victim at a swap meet at which the defendant was offering massages. Based on the massage she received at the swap meet, the victim made an appointment for a massage at the defendant's place of business. (*Ibid.*) When she arrived at the defendant's place of business, appellant told her to remove her clothes, except for her underwear. During the course of a two hour massage, the defendant massaged her breasts and nipples, then her abdomen, and finally he lowered her panties and twice inserted his finger into her vagina. The defendant then orally copulated the victim, at which point she told him to stop. The defendant complied, apologized, and left the room. (*Id*, at p. 5.) The next day the victim went to

the police; during a cold call made under police supervision, the defendant admitted that he digitally penetrated and orally copulated the victim, apologized, and stated that his conduct was inappropriate. (*Ibid.*)

The Court of Appeal reversed the convictions. (*Id,* at p. 9.) The Court reasoned that the statutes in question, as alleged, made illegal a "proscribed sexual act on a victim who "is at the time unconscious of the nature of the act... ." (*Id*, at pp. 5-6.) Both statutes provided that "unconscious(ness) of the nature of the act" could be based, inter alia, on the victim not being aware of the "essential characteristics of the act due to the perpetrator's fraud in fact." (*Id*, at p. 6.) The *Stuedemann* opinion pointed out that "fraudulent misrepresentations to induce the victim to consent to the proscribed act ordinarily does not vitiate the consent to supply the required element of nonconsent." (*Id*, at p. 6.)

Here, an element of misdemeanor battery, Penal Code section 243, subdivision (e), is lack of consent. (*People v. Babaali, supra,* 171 Cal.App.4th at p. 995.) This element is lacking in sexual battery by fraudulent representation, Penal Code section 243, subdivision (c). (*Ibid.*) As such, misdemeanor sexual battery is not a lesser included offense to sexual battery by fraudulent representation, and the Court of Appeal erred in reducing the verdicts for counts one, two, four, and five. (*People v. People v. St. Martin, supra,* 1 Cal.3d 524, 536; *People v. Wolcott, supra,* 34 Cal.3d 92, 98; *People v.*

Steele, supra, 83 Cal.App.4th 212, 218.)

In *Boro v. Superior Court* (1985) 163 Cal.App.3d 1224, the trial court denied the defendant's Penal Code section 995 motion to dismiss a charge of rape in violation of subdivision (4) of Penal Code section 261. This subdivision provided that rape was committed if there was an act of sexual intercourse "accomplished with a person not the spouse of the perpetrator ... where a person is at the time unconscious of the nature of the act... ."

The evidence at the preliminary hearing established that the victim received a telephone call from a person who identified himself as Dr. Stevens. "Dr. Stevens" stated that results of the victim's blood test showed that she had contracted a highly dangerous disease. "Dr. Stevens" told the victim that there were two ways to treat the disease. One treatment option was a painful surgical procedure, described in graphic detail, that would cost $9,000.00. The other was to have sexual intercourse with an anonymous donor who had been injected with a serum that would cure the disease; this alternative would cost $4,500.00. The victim "chose" the serum by sexual intercourse alternative; she went to a hotel as directed and the defendant, posing as the "donor," had sexual intercourse with her. (*Id*, at p. 1226.)

The People contended that the victim was "unconscious of the nature of the act" because she believed she was engaging in sexual intercourse solely as medical treatment. The defendant argued that the victim was clearly aware

of the "nature" of the act and her motivation in engaging in the sexual act was not relevant. (*Id,* at p. 1227.) As pertinent to the resolution of this issue, the *Boro* opinion discussed the different way the courts have treated "fraud in the factum" and "fraud in the inducement." Relying on *Perkins and Boyce*, Criminal Law (3rd ed. 1982) chapter 9, page 1079, the *Boro* opinion described "fraud in the factum" as a "deception caus(ing) a misunderstanding as to the fact itself" and described "fraud in the inducement" as a "deception relat(ing) not to the thing done but merely to some collateral matter." (*Boro v. Superior Court, supra,* 163 Cal.App.3d at p. 1228.)

The *Boro* opinion enjoined the prosecution as requested by the defendant, holding that fraud in the inducement does not negate consent. (*Id,* at p. 1231.)

In *People v. Pham* (2009) 180 Cal.App.4th 919, the Court explained that the 1992 amendments to various sex crime statutes, including Penal Code section 243.4, subdivision (c), criminalized fraud in the inducement because of the difficulty of securing convictions under circumstances identical to those in this matter. In other words, a new crime was necessary to criminalization of sexual acts where "lack of consent" was absent where the victim was fraudulently induced to "consent" to the act, because lack of consent was not found in these cases. Thus, section 243.4, subdivision (e)(1) is not a lesser included offense to section 243.4, subdivision (c), as the enactment of (c) was

necessary to criminalize that which was not covered by subdivision (e)(1).

Finally, an examination of the decision in *People v. Morales* (2013) 212 Cal.App.4th 583 (hereinafter *Morales*), is helpful in reaching a resolution of this issue. In *Morales*, the defendant entered the dark bedroom of the victim after her boyfriend left and, without disclosing his identity, had sexual intercourse with her. The defendant was convicted of rape pursuant to Penal Code section 261, subdivision (a)(4). (*Id*, at p. 586.) The prosecutor argued that the defendant could be convicted if the jury found that the victim was "unconscious" because she either was (1) asleep or (2) because she was unaware of the essential characteristics of the act because the defendant had deceived her into believing that he was her boyfriend. The *Morales* opinion held that the theory that the victim was asleep was a proper legal argument, but that the second theory was an incorrect theory of law. The Court thus reversed the conviction, as that it could not discern from the record which theory the jury had relied upon. (*Ibid.*)

In reversing the conviction, the *Morales* opinion discussed the "distinction between fraud in the inducement and fraud in the fact... ." *(Id,* at p. 591.) According to *Morales*, and as argued by appellant herein, fraud in the fact occurs when the defendant obtains the consent of another person to do one act and does another, while fraud in the inducement occurs when the defendant makes misrepresentations to obtain another's consent and does

exactly what he said he would do. (*Id*, at 595.) In language particularly relevant to the resolution of the issue in this case, the *Morales* opinion notes that when dealing with fraud in the inducement "courts have historically been reluctant to impose criminal liability on the defendant since the victim consented to the particular act performed, albeit under false pretenses. (*Ibid.*)

The *Morales* opinion then moved to the area of statutory interpretation. Relying on *People v. Pieters* (1991) 52 Cal.3d 894, 898-899, the *Morales* opinion reasoned that the main purpose of interpretation of statutes is to effectuate the intention of the legislature. In striving to reach that goal, the legislature does not treat each statute in isolation; rather, each statute must be construed considering the entire legislative scheme of which it is a part.

Here, subdivisions (a), (b), (d) of section 243.4 feloniously punishes the sexual battery of another under specified circumstances when the battery is done "against the will" of the person touched. This language is also used in the misdemeanor under subdivision (e)(1) of this section, but not under subdivision (c). If the legislature intended that the words "unconscious of the nature of the act" to be the equivalent of the words "against the will" they would have used these words. As such, read in context of the entire statute, subdivision (c) of section 243.4 can not be interpreted in such a way as to allow subdivision (e)(1) to be found to be a lesser included offense.

CONCLUSION

Based on the foregoing, the judgment on counts one, two, four and five should be reversed and dismissed, not simply reduced to misdemeanor violations of Penal Code section 243.4, subdivision (e)(1).

Dated: February 9, 2015

Respectfully submitted,

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Attorney for Appellant

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CERTIFICATE OF COMPLIANCE

I, Leonard J. Klaif, appointed counsel for LEE HOANG ROBINSON, hereby certify that I prepared the foregoing Appellant's Opening Brief on a computer using Microsoft Word, and that the word count generated for this document is 5,167 words excluding the cover and tables.

Dated: February 9, 2015

Respectfully submitted,

LEONARD J. KLAIF
LEONARD J. KLAIF SBN 140937
Attorney for Appellant

PROOF OF SERVICE BY MAIL

Re: Lee Hoang Robinson, Court Of Appeal Case: G048155, Superior Court Case: 11WF0857

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 1235 Eleanor Ave., Rohnert Park CA. On February 9, 2015, I served a copy of the attached Appellant's Opening Brief (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

Office of the District Attorney

401 Civic Center Drive
Santa Ana, CA 92701

Charles Mulles, Esq.
P.O. Box 521
Nuevo, CA 92567

Lee Hoang Robinson; AN-5241
P.O. Box 9
Avenal, CA 93204

Hon. James A. Stotler; c/o Clerk of the Court

811 13th Street
Westminster, CA 92683

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 9th day of February, 2015.

Teresa C. Martinez
(Name of Declarant)

Teresa C. Martinez
(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Lee Hoang Robinson, Court Of Appeal Case: G048155, Superior Court Case: 11WF0857

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 1235 Eleanor Ave., Rohnert Park CA. On February 9, 2015 a PDF version of the Appellant's Opening Brief (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

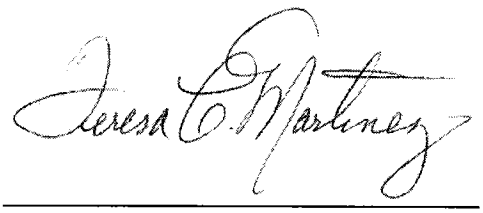
Appellate Defenders Inc. - Criminal
Lynelle Hee
San Diego, CA 92101
eservice-criminal@adi-sandiego.com

Court of Appeal, 4th District, Division 3
Clerk of the Court
Santa Ana, CA 92701

State of California Supreme Court
Supreme Court
San Francisco, CA 94102-4797

Office of the Attorney General
San Diego
San Diego, CA 92186-5266
ADIEService@doj.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 9th day of February, 2015 at 14:41 Pacific Time hour.



Teresa C. Martinez

(Name of Declarant)

(Signature of Declarant)