In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

LEE HOANG ROBINSON,

Defendant and Appellant.

Case No. S220247

Fourth Appellate District, Division Three, Case No. G048155
Orange County Superior Court, Case No. 11WF0857
Honorable James A. Stotler, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

This court limited review to the following issue:

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

INTRODUCTION

Appellant Lee Hoang Robinson lured four women into his salon under the guise that they would receive a free facial. After providing minimal facial services, appellant began massaging each woman. He then touched their breasts and vaginas, telling them this intimate touching was for the professional purpose of a "European massage." Two of the women, however, were not tricked by appellant's misrepresentation and demanded he cease touching them.

Appellant was charged by information with multiple counts of sexual battery by fraudulent representation and one count of sexual penetration with a foreign object. A jury convicted him of all counts. Appellant appealed. He admitted the touchings were for his own sexual gratification and claimed each victim was aware of his true intent; thus, there was insufficient evidence to support his convictions for sexual battery by fraudulent representation because the victims were not "unconscious" or unaware of his lewd intent as required by statute. The Court of Appeal agreed two of the victims had not been deceived by appellant's fraudulent representation and therefore there was insufficient evidence to support the convictions. However, instead of dismissing those convictions, the Court of Appeal reduced those counts to misdemeanor sexual battery as a lesser included offense of felony sexual battery by fraudulent representation.

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[1] Unless otherwise indicated, all future statutory references are to the Penal Code.

This court granted appellant's petition for review on the sole issue of whether misdemeanor sexual battery is a lesser included offense of felony sexual battery by fraudulent representation. The question should be answered in the affirmative. Misdemeanor sexual battery requires a sexual touching that is against the will of the victim. Sexual battery by fraudulent representation requires the victim to be "unconscious" of the perpetrator's true intent because the perpetrator fraudulently represented the touching served a professional purpose. The fraud required for this offense vitiates any consent the victim provided, and, therefore, there is no actual consent. When a sexual touching is done without consent, it is done against the victim's will. Accordingly, one cannot commit sexual battery by fraudulent representation without necessarily committing misdemeanor sexual battery.

STATEMENT OF THE CASE

A. Counts 6 through 9—Dianna N. and Christine N.

In December 2009, appellant approached 17-year-old Dianna N. at her work in a pharmacy store. He told her that he worked at a beauty salon and offered to give her a free facial in order to improve her acne. (1 RT 92-93, 97.) Appellant told Dianna the salon was closed for the evening, but stated he would re-open the salon to give her this free service. (1 RT 97.)

Dianna arrived home that evening and told her 18-year-old sister, Christine N., about appellant's offer. (1 RT 98, 151-152.) Both girls decided to go to appellant's salon, the Queen Beauty Salon, but had their mother accompany them because it was after the salon had closed to the public. (1 RT 132, 153-154.) When they arrived at the salon, appellant offered to give Christine a facial as well. (1 RT 115, 153-155.) Their mother remained in the lobby, while appellant escorted both Dianna and Christine down a hallway to a private room. (1 RT 103, 115, 132.) Appellant instructed both girls to change into robes and left the room.

Dianna and Christine removed their sweatshirts and bras, but left their jeans on, and put on a robe, which wrapped around their bodies. (1 RT 115-117, 156.) Appellant returned and asked the girls to lay on their backs on the two tables in the room. (1 RT 117, 133-134.) Appellant then placed a cloth over their eyes, washed their faces, and applied a facial cream that cakes and hardens as it dries. (1 RT 117-119, 158.)

Appellant left the room briefly, then returned and informed both women that he would give them a "European massage." (1 RT 120, 135, 159.) Both Dianna and Christine were unfamiliar with this type of massage. (1 RT 126, 159.) Appellant began massaging Dianna's arms for about a minute, and then touched the outer portions of her breasts for about 30 seconds. (1 RT 120-121.) He then informed her he was going to unbutton her pants so that he could massage her thighs. (1 RT 122.) Dianna did not respond because she believed appellant would do as he said and only massage her thighs. (1 RT 123.) Appellant unbuttoned her pants, lowered them midway down her thighs, but then placed his hands underneath her underwear and rubbed her vagina for about one to two minutes. (1 RT 122-124.) While Dianna was in shock and embarrassed, she was uncertain whether this was part of a European massage because she had never had that type of massage before. (1 RT 125-126.)

Like Dianna, Christine was not sure what a European massage entailed. (1 RT 184, 188.) Appellant began the massage by touching Christine's arms. (1 RT 160-161.) However, he then unwrapped her robe, and began touching the outer area of her breasts. (1RT 160-161.) As with Dianna, appellant started to unbutton Christine's pants, but Christine placed her hand over her pants, motioning appellant to stop. (1 RT 161, 189.) Appellant told Christine, "This is a European massage. I do this all the time for other girls. You know, this is just part of it all and don't worry." (1 RT 162-163, 187, 189.) Appellant then successfully unbuttoned

Christine's pants, moved them to her thigh area, and touched her vaginal area. (1 RT 163-164.) Appellant rubbed the top part of her vagina, and then offered Christine a bikini wax. (1 RT 165.) Appellant continued touching her and at one point inserted his finger into her vagina. (1 RT 165-166, 188, 190.) In response, Christine pulled appellant's hand away from her, and pulled up her underwear. (1 RT 166.) Appellant finished the massage by touching Christine's arms, her stomach, and breasts one more time. (1 RT 166.)

Appellant left the room. Both girls got dressed and left the salon with their mother. (1 RT 132, 154, 167.) Neither sister reported appellant's conduct to police until they spoke to their older sister Kim. (1 RT 127, 144, 174.) Kim encouraged both girls to go to the police after reading similar customer complaints on the internet. (1 RT 146, 194-195, 197-198, 207-208.) In the summer of 2010, both Christine and Dianna reported appellant's conduct to police. (1 RT 128, 174.)

B. Counts 1 through 3—Trang T.

In March 2010, 37-year-old Trang T. was shopping at Target when appellant approached her and asked her if she would be his model for a class at his beauty salon. He explained there were students who needed to learn how to give facials and massages. (1 RT 211-212.) Appellant told her the class was scheduled for that evening and that he would pay her $40 for her time. (1 RT 212.) Trang agreed to meet him at the salon at 6:00 p.m. (1 RT 213.)

Trang arrived at the Queen Beauty Salon around 5:50 p.m. (1 RT 213, 232.) She observed an individual cutting someone's hair and then saw appellant emerge from the back of the salon. (1 RT 214-215.) Appellant guided Trang to a room in the back of the salon. He then handed her a robe and asked her to get undressed and put the robe on. Appellant left the room. (1 RT 215.) Appellant's request did not appear unusual to Trang

because when she had previously received facials she was asked to change into a robe. (1 RT 215, 236.) A few minutes later, appellant reappeared and instructed Trang to lay face-up on the table in the room. He then placed two pieces of gauze over her eyes. (1 RT 216, 221.) Trang asked appellant where the students were; appellant responded that they had not yet arrived, but he was going to begin the facial. (1 RT 216.) Trang noticed that she no longer heard the people in the salon talking and that the front doors had slammed shut. (1 RT 217.)

Appellant placed lotion on Trang's face. (1 RT 217.) He then draped a blanket over her and began to rub oil on her arms. (1 RT 218.) Subsequently, appellant moved to Trang's feet and rubbed oil on them. When he removed the blanket he had just placed over her, Trang asked appellant what he was doing. Appellant responded, "Don't worry. Just relax." (1 RT 219, 243.) Appellant then opened her robe, leaving Trang fully exposed. Trang again asked him what he was doing; appellant told her this was standard procedure and to relax. (1 RT 219.) Trang became fearful as she realized she was alone with appellant in the salon and did not believe students were coming for a class. (1 RT 219-220.)

Appellant poured oil on Trang's chest and began to rub her breasts. As he did, appellant stated his other clients loved it when he rubbed their breasts and that this touching was completely normal. (1 RT 220.) Appellant moved to her navel area and then slipped his hands underneath Trang's underwear and touched the surface of her vagina. (1 RT 220-221.) Trang told appellant that she was uncomfortable with his actions and to stop immediately. Appellant began rubbing her thighs and legs. (1 RT 221.) He then instructed Trang to turn over so he could massage her back. Trang complied. Appellant poured oil on Trang's back and eventually began rubbing her buttocks. (1 RT 221.) Although she was frightened, Trang did not say anything to appellant because of his size and her belief

that she was alone with him in a salon with locked doors. (1 RT 222.) Appellant then rubbed her rectum area and transitioned to touching the inside of her vagina. (1 RT 222-223.) Trang again expressed her discomfort with appellant's actions. Appellant ignored her concerns and told her what he was doing was standard procedure. (1 RT 222-224.) Trang told appellant she was late for a class and needed to leave. (1 RT 224.) Appellant said the oil he had placed on her could damage her skin if he did not wipe it off. Appellant grabbed a towel and began to clean Trang's arms. However, appellant soon moved back to her vaginal area and requested Trang spread her legs. Trang would not, so appellant wiped her vagina and then asked Trang to turn over to her stomach so he could wipe the oil off her back. Trang complied. Appellant wiped her back, but then began wiping the towel over her buttocks and eventually inserted his finger into her vagina. Trang sat up, and again expressed his discomfort with appellant's actions. (1 RT 225-226, 245.)

Trang told appellant she needed to leave, but he stated that he needed to apply a substance to her skin so her skin would not "crack." (1 RT 227.) Trang told appellant no, but he insisted, instructing her to lay back down on the table, which she did. (1 RT 227.) Appellant poured oil on her arm, but then quickly moved to her vaginal area and once again placed his fingers inside her vagina. (1 RT 227-228.) Trang stood up, grabbed her clothes, put them on, and ran out of the room. On her way out of the salon, Trang noticed that no one was present, and the door was partially blocked by a stack of items, which she was forced to jump over to leave the salon. (1 RT 227-231, 238.)

Trang reported the incident to the Garden Grove Police Department. (1 RT 229-230; 2 RT 318-319.) The police interviewed appellant about the incident, but he denied any wrongdoing. (2 RT 319-320, 326.) When asked about his work practices, he claimed he only gave his clients facials,

not body massages. (2 RT 326.) He also told the police he had surveillance cameras set up at his salon. However, when the police asked to see the tapes, he told them the cameras had not been working for some time. (2 RT 323-325.)

C. Counts 4 through 5—Odette M.

Four months later, in July 2010, 24-year-old Odette M. entered appellant's beauty salon and asked about a particular product. (1 RT 253-255, 258-259, 299.) Appellant spoke to her and asked her if she could return the following day to be his model for a facial class. (1 RT 258-259.) Appellant informed Odette that he would not charge her for the facial. (1 RT 259.) Later that evening, around 9:00 p.m., Odette saw appellant in the parking lot outside his salon. (1 RT 261; 2 RT 272, 299.) Appellant asked her if she had time for him to try some products on her face before the class. (1 RT 261; 2 RT 274.) Odette agreed and returned to the salon with appellant. (1 RT 262.) She walked to a small room in the salon where appellant handed her a robe and instructed her to take off all her clothes except for her underwear. (1 RT 263-264; 2 RT 272, 275.) Appellant left the room, and Odette did as she was instructed. (1 RT 264; 2 RT 275.)

Appellant reappeared and told Odette to lay face-up on the massage bed. Appellant then covered her eyes and placed a facial cream on her face. (1 RT 264-265; 2 RT 275-276.) Appellant told Odette about a specific oil and began rubbing her arms and legs. (1 RT 265-266; 2 RT 277.) Appellant had not previously mentioned anything about providing a massage. (2 RT 277-278.) Appellant then opened the robe she was wearing, exposing her stomach area, and rubbed oil on this area. (2 RT 280.) Odette informed appellant that she was uncomfortable with him looking at her exposed body. Appellant told her she needed to relax. (2 RT 280-281.) Appellant then placed both of his hands underneath Odette's underwear and touched her skin. (2 RT 282.) Odette again expressed her

discomfort. Appellant ignored her protest and told her to relax because he did this often for his clients. (2 RT 282.) Appellant then touched Odette's pubic hair and almost touched her clitoris; Odette jumped up and told him, "Please stop." (2 RT 283, 312-313.) Appellant covered Odette and continued to massage her shoulders. However, appellant then opened her robe and exposed her breasts. (2 RT 285-286.) Odette again told appellant to stop and said she did not want him looking at her exposed body. (2 RT 286.) Appellant instructed Odette to "relax honey." (2 RT 287.)

Appellant then grabbed Odette's nipples and breasts with his hands. Odette pleaded with appellant to stop, but he continued to touch her and claimed that he did this all the time, even in front of his wife. (1 RT 268; 2 RT 289, 293, 310.) Appellant continued to touch Odette's breasts for almost a minute. He then covered her with a robe, grabbed a wet towel and began wiping the oil off her arms and legs. (2 RT 290-291.) Appellant then uncovered Odette's lower half, and even though she requested he stop, he wiped her with the wet towel there and also wiped the oil off of her breasts. (2 RT 291-293.) After appellant finally stopped, he instructed Odette to stay in the room for another 10 minutes because of the cream on her face. (2 RT 294.) When appellant left the room, Odette removed the covering on her eyes to confirm he had gone. However, she did not leave out of fear. Appellant returned 10 minutes later and wiped the cream from her face. He then asked Odette for her phone number to coordinate the following day's modeling schedule. Odette complied, thinking if she gave her phone number, she would be able to leave the salon. (2 RT 295-296.) Odette then got dressed and left the salon. (2 RT 297.) Odette did not contact the police until a week later because she was embarrassed and "felt stupid." (2 RT 298, 300.)

D. Procedural History

On December 7, 2011, the Orange County District Attorney filed an information charging appellant with eight counts of sexual battery by fraud (§ 243.4, subd. (c); counts 1-2, 4-9) and one count of sexual penetration by a foreign object by force (§ 289, subd. (a)(1); count 3). (CT 118-121.)

A jury found appellant guilty of all counts. (CT 214-222; 2 RT 442-446.) The trial court subsequently sentenced appellant to 12 years in prison. (CT 297-298; 2 RT 498-499.)

On appeal, appellant challenged the sufficiency of the evidence to support the sexual battery by fraudulent representation convictions, arguing there was insufficient evidence that the victims were unaware of his lewd intent. The Court of Appeal for the Fourth Appellate District affirmed the judgment for counts 3, and 6 though 9. However, the Court of Appeal found insufficient evidence to support counts 1, 2, 4, and 5, and reduced those counts to misdemeanor sexual battery. (Slip. Opn. at p. 9.)[2]

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[2] As to counts 1, 2, 4, and 5, respondent conceded below that there was insufficient evidence of "unconsciousness." However, based on a review of the record and the applicable statute, it appears that concession was unwarranted. There was sufficient evidence to support the jury's verdict because appellant completed the crime of sexual battery by fraudulent representation before either Trang or Odette became aware that the touching served a lewd intent. The reviewing court does "not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. [Citation.] The test on appeal is not whether we believe the evidence established the defendant's guilt beyond a reasonable doubt, but whether " ' "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' " (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13 [quoting *People v. Kelly* (1990) 51 Cal.3d 931, 956, and].) Here, the record supports that the jury rationally found all the elements of sexual battery by fraudulent representation were met. Trang and Odette came to appellant's salon for a facial. Appellant began massaging their bodies, and while both women testified they did not arrive at the salon expecting a massage, neither was cognizant before he

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In so doing, the Court of Appeal agreed with the reasoning in *People v. Smith* (2010) 191 Cal.App.4th 199, 205-209 (*Smith*), that misdemeanor sexual battery is a lesser included offense of sexual battery by fraudulent

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intimately touched them that his "massage" did not serve a professional purpose. Notably, the fraud inherent in appellant's offenses began the moment he spoke to any of the victims and convinced them to come to his salon for a free facial. Although the evidence revealed Trang was uncomfortable when appellant touched her breasts, appellant reassured her that this was part of the normal procedure. It was not until appellant touched Trang's vagina that the evidence revealed she did not believe his acts were for the purpose of a massage and she told him to stop. While Trang's recognition of appellant's true purpose certainly followed close in time to the second touching, and perhaps even very close in time or *nearly* simultaneously, the evidence reasonably suggests both touchings were already complete at the moment of recognition. The same is true for Odette. While Odette informed appellant she was uncomfortable with him looking at her exposed body, he reassured her that this was common practice and instructed her to relax. When he proceeded to touch the skin underneath Odette's panties with both hands, she voiced additional concern. However, appellant told her to relax and again reassured her that he did this often for his clients. It was not until appellant touched her pubic hair and almost touched her clitoris that she told him to stop. Accordingly, there was sufficient evidence to support that when appellant intimately touched both women and represented the touching served a professional purpose, both Trang and Odette were unconscious of the true nature of the touching until *after* the touchings had occurred. Before appellant touched an intimate part of both Trang and Odette, he claimed he was giving them a massage and his conduct was common practice. Not until he effectuated both intimate touchings did either woman tell appellant to stop. (1 RT 220-221, 267-282.) *People v. Lyu* (2012) 203 Cal.App.4th 1293 is not to the contrary. There, the defendant was charged with entirely different statutes (§§ 288a, subd. (f) & 289, subd. (d)), which mandated the victim was unaware that the act had even occurred. (*Id.* at p. 1299.) This restrictive language is not present in section 243.4, subdivision (c); it only provides, "the victim is *at the time* unconscious of the nature of the act..." That is true for all the victims in this case, and for the reasons set forth above, respondent's concession was inappropriate in this case.

representation, and disagreed with the contrary conclusion of the majority in *People v. Babaali* (2009) 171 Cal.App.4th 982 (*Babaali*). (Slip. Opn. at p. 9-10.)[3]

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[3] The Court of Appeal reduced counts 1, 2, 4, and 5 to misdemeanor sexual battery as a lesser included offense of sexual battery by fraudulent representation. However, under the facts of the present case, this is arguably an incorrect disposition because these counts should have been reduced to attempted sexual battery by fraudulent representation. "Attempts are only lesser included offenses if the sole distinction between the attempt and the completed offense is completion of the act constituting the crime. [Citation.] If the attempt requires a heightened mental state, as is the case with attempts of many general intent crimes, the attempt requires proof of an additional element and is therefore not a lesser included offense. [Citations.]" (*People v. Braslaw* (2015) 233 Cal. App. 4th 1239, 1248.) Here, the jury instruction for sexual battery by fraudulent representation provides "A person is *not conscious of the sexual nature of the act* if he or she is not aware of the essential characteristics of the act *because* the perpetrator fraudulently represented that the touching served a professional purpose when it did not." (CALCRIM No. 937; italics added.) It is the specific intent to induce consent to the touching that makes sexual battery by fraudulent representation a specific intent crime. Therefore, when a victim is not "unconscious" of the nature of the act, even though the defendant attempted to convince the victim the touching served a professional purpose, the defendant is still guilty of the lesser included offense of attempted sexual battery by fraudulent representation. And, *People v. Braslaw*, *supra*, 233 Cal.App.4th 1239, does not change the analysis. There, the defendant argued the trial court erred when it did not charge the jury with attempted rape of an unconscious person. The Court of Appeal found attempted rape of an unconscious person was not a lesser included offense of rape of an unconscious person because the latter is a general intent crime, and the former requires a specific intent to commit sexual intercourse against the will of the victim. (*Id.* at pp. 1248-1250.) Sexual battery by fraudulent representation, on the other hand, requires a specific intent to defraud. Therefore, attempted sexual battery by fraudulent representation is a lesser included offense of sexual battery by fraudulent representation. The law of attempted criminal threats is instructive. This court in *People v. Chandler* (2014) 60 Cal.4th 508, 518, held "that a statement that is intended as a threat, but ineffectual as such, may fall within the scope of an attempted criminal threat." This is so

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On September 24, 2014, this court granted appellant's petition for review, but limited the issue to whether misdemeanor sexual battery is a lesser included offense of felony sexual battery by fraudulent representation.

ARGUMENT

I. THE ELEMENT OF FRAUD IN SEXUAL BATTERY BY FRAUDULENT REPRESENTATION VITIATES ANY CONSENT AND THEREFORE THAT CRIME CANNOT BE COMMITTED WITHOUT NECESSARILY COMMITTING MISDEMEANOR SEXUAL BATTERY BASED ON A TOUCHING AGAINST THE VICTIM'S WILL

Appellant contends misdemeanor sexual battery is not a lesser included offense of sexual battery by fraudulent representation because the "unconscious of the nature of the act" due to fraudulent misrepresentation element required for the felony offense is not the same as the "against the will" element of misdemeanor sexual battery. Thus, appellant contends the felony can be committed without committing the misdemeanor. (ABOM 9-10, 21.) Not so. The language of the felony statute and the legislative history demonstrate it is the fraud that renders the victim "unconscious" that the act is for a sexual purpose. "Unconscious" is not used in its ordinary sense; rather, it is an unawareness of the true nature of the act due

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because the law of attempt does not require a showing that the intended act would be effective in completing the target crime. (*Chandler* at p. 516.) The same is true here. Where the defendant is unsuccessful in tricking the victim into consenting, the crime may still fall into the scope of attempted sexual battery by fraudulent representation because the intent to defraud is still present. Respondent recognizes that the question of attempted sexual battery by fraudulent representation is not included within the issue for which this court granted review. Consequently, respondent is not asking this court to address this issue at this time; however, it is worth noting this issue so not to mislead lower courts.

to the fraud. This "unconscious" state then negates any consent given, and without actual consent, any touching is done against the will. Therefore, the sexual touching accomplished in both misdemeanor sexual battery and sexual battery by fraudulent representation are against the will of the victim; thus, the felony cannot be committed without necessarily committing the misdemeanor. Indeed, the Court of Appeal below, the dissent in *Babaali*, and the *Smith* court found the same.

A. The Statutory Construction of Section 243.4, Subdivision (c), Demonstrates a Victim Is Rendered "Unconscious" Because of the Fraudulent Representation

When an appellate court finds that insufficient evidence supports the conviction for a greater offense, it may, in lieu of granting a new trial, modify the judgment of conviction to reflect a conviction for a lesser included offense. (*People v. Bailey* (2012) 54 Cal.4th 740, 748 (*Bailey*), quoting *People v. Navarro* (2007) 40 Cal.4th 668, 671.) Two tests apply in determining whether an uncharged offense is included within a charged offense for this purpose: the elements test and the accusatory pleading test. (*Bailey*, *supra*, 54 Cal.4th at p. 748.) Under the elements test, a reviewing court looks strictly at the statutory elements of the offenses, not to the facts of the case. (*People v. Ramirez* (2009) 45 Cal.4th 980, 985.) "The elements test is satisfied if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, such that all legal elements of the lesser offense are also elements of the greater." (*Bailey*, *supra*, 54 Cal.4th at p. 748.) Stated another way, "if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." (*Ibid.*; see also *People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) Under the accusatory pleading test, a court reviews "the information to determine whether the accusatory pleading describes the crime in such a way that if committed in the manner

described the lesser must necessarily be committed." (*People v. Wright* (1996) 52 Cal.App.4th 203, 208.)

Here, the information simply charged appellant in the statutory language of section 243.4, subdivision (c) (CT 118-120); thus, only the elements test is relevant here. (See *People v. Moussabeck* (2007) 157 Cal.App.4th 975, 981 [when the accusatory pleading describes the crime in its statutory language only the statutory elements test is relevant in determining if an uncharged crime is a lesser included offense of that charged].)

Whether misdemeanor sexual battery is a lesser included offense of sexual battery by fraudulent representation is ultimately a question of statutory construction. The goal of statutory construction is to ascertain and effectuate the Legislature's intent, by giving the words of the statute their usual and ordinary meaning and construing them in context. When the language of the statute is clear, courts need not go further. (*In re Lucas* (2012) 53 Cal.4th 839, 849; *People v. Anderson* (2010) 50 Cal.4th 19, 29.) However, "'[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.' [Citations.] Thus, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citation.]" (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1064-1065, citing *People v. Pieters* (1991) 52 Cal.3d 894, 898-899.)

Here, section 243.4, subdivision (e)(1), which defines misdemeanor sexual battery, provides in pertinent part:

> Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery...

Section 243.4, subdivision (c), the statute criminalizing sexual battery by fraudulent representation, provides:

> Any person who touches an intimate part of another person for the purposes of sexual arousal, sexual gratification, or sexual abuse, and the victim is at the time unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose, is guilty of sexual battery.

Appellant correctly notes that these crimes have two common elements: (1) the defendant touches an intimate part of the victim; and (2) the defendant acts for the specific purpose of sexual arousal or gratification. (ABOM 9-10; see also Slip Opn. at p. 9; *Babaali*, *supra*, 171 Cal.App.4th at p. 995.) The difference between the two statutes is that misdemeanor sexual battery requires the sexual touching to be against the victim's will, while sexual battery by fraudulent representation requires the victim to be "unconscious of the nature of the act." However, "unconscious" in section 243.4, subdivision (c), is not used in the ordinary or literal sense. (*People v. Pham* (2009) 180 Cal.App.4th 919, 928 (*Pham*).) "The unconsciousness requirement does not require proof the victim was totally and physically unconscious during the acts in question." (*Id.*) Instead, as the Legislature indicated in the statute itself, a victim is "unconscious of the nature of the act" when the "perpetrator fraudulently represented that the touching served a professional purpose." Thus, the "unconscious" element in section 243.4, subdivision (c), "simply requires proof the defendant tricked the victim into submitting to the touching on the pretext it served a professional purpose." (*Pham*, *supra*, 180 Cal.App.4th at p. 928.) Accordingly, "unconscious" here cannot be given its literal meaning. The Legislature intended an alternative definition when it included in the statute that a victim is "unconscious" due to the fraudulent representation.

The definition of fraud demonstrates how one is rendered "unconscious" because of a misrepresentation. Fraud is defined as "a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." (See Black's Law Dict. (10th ed. 2014), at p. 775, col. 1; see also Civil Code section 3294, subd. (c)(3).) The Legislature utilized the words "fraudulent representation" to indicate that it is the misrepresentation which makes the victim unaware or "unconscious" of the true nature of the act. The use of "fraudulent representation" reveals the legislative intent to criminalize those who accomplish a sexual touching by fraud.

To the extent the language in section 243.4, subdivision (c), is ambiguous, this court may consider "a variety of extrinsic aids, including the objects to be achieved, the evils to be remedied, legislative history, the statutory scheme of which the statute is a part, contemporaneous administrative construction, and questions of public policy" to ascertain the meaning of the statute. (*In re Lucas*, *supra*, 53 Cal.4th at p. 849.) The legislative history of section 243.4, subdivision (c), confirms that the evils to be remedied were those sexual offenses accomplished by a fraudulent representation in which it appears the victim gave consent.

Before 2002, the law distinguished between fraud in fact and fraud in the inducement in sex crime cases. "Fraud in the fact occurs when the defendant obtains the victim's consent to perform one act, but instead engages in another act. [Citations.] In that situation, consent is absent, and the defendant is guilty of sexual battery because the victim never agreed to the particular act complained of. [Citation.] [¶] By contrast, fraud in the inducement takes place when the defendant makes misrepresentations to the victim in order to get her consent for a particular act, and then proceeds to carry out that very act. [Citations.] In that situation, 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." (*Pham, supra*, 180 Cal.App.4th at p. 925.)

Courts long acknowledged the absurdity that occurred as a result of the non-criminalization of sexual offenses committed by fraud in the inducement. Notably, the concurring opinion in *Mathews v. Superior Court* (1981) 119 Cal.App.3d 309 (*Mathews*), highlighted that our society appeared to condone sexual offenses completed by fraud in the inducement because there were no statutes criminalizing such conduct. (*Id.* at p. 312 ["A society which has condoned meretricious relationships [Citation], should give serious consideration to specific delineation and punishment of conduct as offensive and outrageous as that of the defendant here."], conc. opn. of Paras, J.)

In response, the Legislature in 2002 enacted section 243.4, subdivision (c), as part of a comprehensive amendment to other sexual offenses. The Senate Committee on Public Safety analysis identified that this provision was necessary to expand the crime of sexual battery to include a narrow set of circumstances in which the victim is deemed unconscious of the nature of the offense because the victim is not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the act served a professional purpose. (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1421 (2001-2002 Reg. Sess.) April 16, 2002. p. 2.) In support of the amendment, the committee analysis cited a recent case in which the Court of Appeal found an X-ray technician could not be convicted of rape because the victims were aware of what the technician was doing and permitted it; thus, they "gave their consent" and therefore the defendant's actions did not fall within the statutory language. (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1421 (2001-2002 Reg. Sess.) April 16, 2002, p. 4.) Accordingly, the legislative history confirms the legislative

intent to both punish those perpetrators who use fraud in the inducement to trick the victims into consenting to the sexual acts, and also eliminate any criminal distinction between sexual offenses completed by fraud in the fact and fraud in the inducement. As a result, the 2002 amendment expanded the meaning of unconsciousness to include, as stated above, a narrow set of circumstances involving fraud in the inducement. (See S.B. 1421, Stat. 2002, ch. 302, pp. 952-953; *People v. Bautista* (2008) 163 Cal.App.4th 762, 773; *Pham*, *supra*, 180 Cal.App.4th at pp. 925-926.)

Hence, both the plain language and legislative history of section 243.4, subdivision (c), demonstrate that it is the fraud that renders the victim "unconscious" or unaware of the perpetrator's true intent. It therefore follows that this "unconscious" state negates any consent obtained.

B. Being "Unconscious" of the Nature of the Act Necessarily Negates the Victim's Consent

The same fraudulent misrepresentation that renders a victim unaware or "unconscious of the nature of the act" also vitiates any consent because the consent was not freely and actually given. As previously noted, fraud is "a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." (Black's Law Dict. (10th ed. 2014) at p. 775, col. 1.) "[C]onsent" requires "positive cooperation in an act or attitude as an exercise of free will." (*People v. King* (2010) 183 Cal.App.4th 1281, 1320, internal quotations omitted; *People v. Giardino* (2000) 82 Cal.App.4th 454, 459-460 (*Giardino*).) "To give consent, a 'person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.' [Citations.]" (*Giardino*, *supra*, 82 Cal.App.4th at p. 460.) Therefore, actual consent is consent "that is actually and freely given without any misapprehension of material fact."

(*Ibid.*; see also CALCRIM No. 938.) In accordance with the above, any misapprehension of a material fact, i.e., fraud, vitiates any consent given.

In *People v. Williams* (2013) 57 Cal.4th 776 (*Williams*), this court recently discussed the relationship between fraud and consent in the context of larceny by trick. Larceny by trick requires proof the defendant used fraud or deceit to obtain the owner's consent to possess his or her property. (CALCRIM No. 1805; § 484.) This court explained in *Williams* that larceny by trick is committed without actual consent of the owner because the fraud vitiates the consent. "Although a trespassory taking is not immediately evident when larceny occurs by trick because of the crime's fraudulent nature, English courts held that a property owner who is fraudulently induced to transfer possession of the property to another does not do so with free and genuine consent, so the one who thus fraudulently obtains possession commits a trespass.... [Citations.] .... Though the taking [in larceny] must be against the will of the owner or a trespass to his possession, still an actual trespass or actual violence is not necessary. Fraud may take the place of force.... In [cases of larceny by trick] the fraud vitiates the transaction, and the owner is deemed still to retain a constructive possession of the property. [Citations]." (*Williams*, *supra*, 57 Cal.4th at pp. 783-784, internal quotations omitted.) Therefore, while the owner of the property may have provided the defendant with consent to possess it, that consent is deemed meaningless because of the fraud.

The same is true here. Section 243.4, subdivision (c), is designed to deter fraud in the inducement in situations where the victim acquiesces to a sexual act under the guise it is part of a professional service. (Slip. Opn. at p. 7, citing *Pham*, *supra*, 180 Cal.App.4th at p. 926.) Consequently, any consent obtained as a result of the fraudulent inducement is not considered actual consent. It therefore follows that when one is "unconscious" or

unaware of the nature of the act due to the perpetrator's fraud, there is no consent.

Notably, the court in *People v. Ogunmola* (1987) 193 Cal.App.3d 274, 279 (*Ogunmola*) made the same connection between the phrase "unconscious of the nature of the act" (in subdivision (4) of Penal Code section 261, the statute defining rape) and consent. There, a jury convicted the defendant doctor, who had inserted his penis into the vagina of two patients during a pelvic exam, of rape of an unconscious person. (*Id.* at pp. 277-278.) On appeal, the defendant argued there was insufficient evidence to support his convictions because the evidence failed to show the victims were unconscious of the nature of the act at the moment of penetration. (*Id.* at p. 276.) The *Ogunmola* court noted that the outcome depended on the meaning of the phrase "unconsciousness of the nature of the act." The court determined that "unconsciousness is related to the issue of consent..." (*Id.* at p. 279; see also *Boro v. Superior Court* (1985) 163 Cal.App.3d 1224, 1228 (*Boro*); *People v. Stuedemann* (2007) 156 Cal.App.4th 1, 6 (*Stuedemann*).) The court then concluded, "[e]ach of the victims, who had consented to a pathological examination, with its concomitant manual and instrumental intrusions, was 'unconscious of the nature of the act' of sexual intercourse committed upon her by defendant, until the same was accomplished, and cannot be said to have consented thereto." (*Id.* at p. 281.) While the prosecution's theory in *Ogunmola* was based on fraud in the fact, the court's reasoning would apply with equal force to cases involving fraud in the inducement, because such a conclusion is consistent with the Legislature's goal in enacting section 243.4, subdivision (c). Indeed, the Legislature summarized the facts and holding of *Ogunmola* to demonstrate that fraud in the fact was currently criminalized, but fraud in the inducement was not. (See Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1421 (2001-2002 Reg. Sess.) April 16, 2002, p. 4.) Accordingly,

when a fraudulent representation renders one unaware or "unconscious" of the true nature of the act, there is no actual consent. When an act is committed without consent, that act is accomplished against the will.

C. Because Fraud Renders the Victim "Unconscious," There Is No Actual Consent; Without Actual Consent, Any Touching for a Sexual Purpose Is Necessarily Against the Will of the Victim

Courts have been clear that when there is no consent to a touching, that touching was committed against the victim's will. For example, "rape [is] sexual intercourse accomplished against a person's will. By definition, it is nonconsensual sexual intercourse." (*People v. Key* (1984) 153 Cal.App.3d 888, 895.) This is also shown by the jury instruction concerning misdemeanor sexual battery: "An act is done against a person's will if that person does not consent to the act. In order to consent, a person must act freely and voluntarily and know the nature of the act." (CALCRIM No. 938; see also *In re Shannon T.* (2006) 144 Cal.App.4th 618, 622; Slip Opn. at p. 9; *Smith*, *supra*, 191 Cal.App.4th at pp. 208-209; CALCRIM No. 1600, defining the elements of robbery ["An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act."], original italics.)

To this point, *Giardino*, *supra*, 82 Cal.App.4th 454, is likewise instructive. There, the defendant, who had been convicted of rape and oral copulation of an intoxicated person, claimed the trial court had erred when it failed to instruct the jury that lack of consent was an element of the charges. (*Id.* at pp. 458-459.) The *Giardino* court highlighted that, "[i]n the context of rape and other sexual assaults, 'consent' is defined as the 'positive cooperation in act or attitude pursuant to an exercise of free will.' (§ 261.6.) To give consent, a 'person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.'

[Citations.]" (*Giardino*, *supra*, 82 Cal.App.4th at pp. 459-460.) Thus, the court concluded that consent is actually and freely given when it is without any misapprehension of material fact. (*Id.* at p. 460.)

The *Giardino* court went on to state that, "in the context of rape, 'against the victim's will' is synonymous with 'without the victim's consent,' and the same is true when the victim is not aware of the true nature of the act or has been deceived into believing a material fact which prompted the victim to consent. (*Giardino*, *supra*, 82 Cal.App.4th at p. 460.) Therefore, there is no actual consent in those cases because the victim lacks " 'knowledge of the nature of the act or transaction.' " (*Ibid.*) Similarly here, in section 243.4, subdivision (c), the perpetrator deceives the victim by making a fraudulent representation. This fraudulent representation prevents the victim from knowing the true nature of the perpetrator's act, and therefore the victim cannot give actual consent. Because there is no actual consent, any act accomplished is necessarily done against the will of the victim. Accordingly, as the Court of Appeal below correctly concluded, misdemeanor sexual battery, which requires a sexual touching against the victim's will, is a lesser included offense of sexual battery by fraudulent representation. (Slip Opn. at p. 9.)

D. *Smith*, the Dissent in *Babaali*, and the Court of Appeal in This Case Correctly Concluded That Misdemeanor Sexual Battery Is a Lesser Included Offense of Sexual Battery by Fraudulent Representation; the *Babaali* Majority Erred in Reaching a Contrary Conclusion

As discussed earlier, there is split of authority within the Court of Appeal on the question of whether sexual battery is a lesser included offense of sexual battery by fraudulent representation. The majority in *Babaali* answered this question in the negative while the Court of Appeal in *Smith* and the present case answered it in the affirmative. As the following discussion shows, *Babaali* was wrongly decided; *Smith*, the dissent in

Babaali, and the Court of Appeal below were correct that misdemeanor sexual battery is a lesser included offense of sexual battery by fraudulent representation.

In *Babaali*, the defendant doctor pinched his receptionist's nipples, unfastened her pants, and touched her pubic hair, all under the guise of demonstrating how an electrocardiogram machine operates. (*Id.* at pp. 989-990.) The jury convicted the defendant of one count of sexual battery by fraudulent representation and one count of attempted sexual battery by fraudulent representation. The trial court held the jury's verdicts were contrary to law and modified both verdicts to reflect convictions of misdemeanor sexual battery and attempted misdemeanor sexual battery. (*Id.* at pp. 993-994.)

On appeal, the defendant contended misdemeanor sexual battery was not a lesser included offense of sexual battery by fraudulent representation. (*Babaali, supra*, 171 Cal.App.4th at p. 994.) The majority agreed. The majority held "unconscious" in the meaning of section 243.4, subdivision (c), does not have its ordinary or colloquial meaning, rather it means "that the defendant tricks the victim into submitting to the touching based upon the fraudulent representation that 'the touching served a professional purpose.'" (*Babaali, supra*, 171 Cal.App.4th at p. 996, quoting § 243.4, subd. (c).) Relying on *People v. Dancy* (2002) 102 Cal.App.4th 21 (*Dancy*), which involved the rape statute, the majority held, "lack of consent is not an element of sexual battery by fraudulent representation. The crime is committed because the defendant gains the victim's acquiescence to the intimate touching by fraudulently representing it has a professional purpose. This fraud renders the victim 'unconscious of the nature of the act.' [§ 243.4, subd. (c).]" (*Babaali, supra*, 171 Cal.App.4th at p. 997.) The majority then concluded that the sexual touching

effectuated by the fraud "is not the same as a defendant's intimate touching of a victim against her will or without her consent." (*Babaali* at p. 998.)

The above is a distinction without a difference. The defendant was successful in tricking the victim that the touching served a professional purpose because he misrepresented a material fact, and thus, there was no actual consent. As discussed above, and as Justice Manella correctly concluded in his dissent in *Babaali*, both statutes require an intimate touching for sexual gratification without the victim's consent. (*Babaali, supra*, 171 Cal.App.4th at p. 1001 (dis. opn. of Manella, J.).) "Because consent requires that the victim know the nature of the act, where the victim is unconscious of the nature of the act, she cannot consent." (*Id.*, citing 2 Witkin & Epstein, Cal. Criminal Law (3d. ed. 2000) Sex Offenses and Crimes Against Decency, § 15, p. 328.) And because "against the will of the victim" is synonymous with "without the victim's consent," misdemeanor sexual battery is a lesser included offense of sexual battery by fraudulent representation. (*Babaali, supra*, 171 Cal.App.4th at pp. 1001-1003 (dis. opn. of Manella, J.).)

Justice Manella also recognized that the majority's reliance on *Dancy, supra*, 102 Cal.App.4th 21 was misplaced. In *Dancy*, the defendant had sexual intercourse with the victim while she was physically unconscious. (*Id.* at p. 27.) Following his conviction for rape of an unconscious person, he appealed, claiming the trial court erred when it denied his request to instruct the jury concerning consent. (*Id.* at pp. 24, 34.) The defendant also argued that the statutory language of the crime necessarily implied the existence of a lack of consent element. (*Id.* at p. 34.) The court rejected his claims. It evaluated the subdivisions of the statute criminalizing rape, and found that because the Legislature included a lack of consent element in the other subdivisions defining rape, but failed to do so for rape of an unconscious person, the Legislature made an explicit choice not to require

proof of lack of consent where the victim was unconscious at the time of the rape. (*Dancy* at pp. 35-36.) Accordingly, the court held an instruction on consent is inapplicable because one who is unconscious is incapable of providing present or advanced consent. (*Id.* at p. 35-37.)

Justice Manella aptly pointed out that "the thrust of the court's decision in *Dancy* was the unremarkable proposition that one cannot consent in advance to being sexually assaulted against one's will. As the court recognized, there could be no 'advance consent' defense to a charge of rape of an unconscious person, since the woman's lack of consciousness absolutely precludes her from making her lack of consent known at the time of the act. [Citation.] Nothing in *Dancy* contradicts the proposition that sexual acts committed when the victim is unconscious—or, as here, unconscious of the nature of the act—are necessarily committed without the victim's consent, i.e., against her will." (*Babaali, supra*, 171 Cal.App.4th at p. 1002 (dis. opn. of Manella, J.).)

The *Smith* court and the Court of Appeal below agreed with Justice Manella. In *Smith*, the defendant, who had been convicted of sexual battery when he was caught on hotel video surveillance touching the intoxicated and incapacitated victim's breast, claimed his conviction should be reversed because there is no crime of sexual battery of an intoxicated or unconscious woman. (*Smith, supra*, 191 Cal.App.4th at pp. 201, 205-206.) Similar to appellant (ABOM 21), the defendant argued that when the Legislature intends to criminalize sexual behavior with a victim who is incapable of consenting, the Legislature does not describe the behavior in terms of being against the will of the victim. (*Smith, supra*, 191 Cal.App.4th at p. 206.) The *Smith* court rejected his claim. Just as with rape, the Legislature criminalizes nonconsensual sexual touching in several circumstances, including enacting a *catch-all provision* which " 'criminalizes as a misdemeanor only sexual touching when the 'touching is against the will of

the person touched.' " (*Smith* at p. 207.) The *Smith* court emphasized, "[i]t does not follow ... that just because the Legislature did not use similar language in defining the crime of sexual battery, the Legislature must not have intended to criminalize sexual touching of a person who is too intoxicated to consent to the touching or who is unconscious." (*Smith* at pp. 207-208.) Significantly, the court pointed out that a person who is too intoxicated to give consent cannot consent to a sexual touching, and therefore that sexual touching is necessarily against the will of that person. (*Id.* at p. 208.)

Moreover, the *Smith* court rejected the defendant's reliance on the majority opinion in *Babaali*. Instead, it agreed with Justice Manella. "[A] victim who is unconscious that she is being subjected to a *sexual* touching—that is, a touching 'for the specific purpose of sexual arousal, sexual gratification, or sexual abuse'—because 'the perpetrator fraudulently represented that the touching served a professional purpose,' has not consented to that sexual touching, and that touching is against the will of the victim just as much as if the victim were incapable of consenting or if the perpetrator were to accomplish the touching by force." (*Smith*, *supra*, 191 Cal.App.4th. at p. 209, original italics.) The conclusion reached by *Smith*, Justice Manella, and the Court of Appeal below should be followed because all correctly concluded that fraud vitiates any consent, therefore the touching is done against the victim's will, and misdemeanor sexual battery is a lesser included offense of sexual battery by fraudulent representation.

In support of the contrary, appellant argues the 2002 amendment was necessary to criminalize those who fraudulently induce others to consent to a sexual touching because "lack of consent" was absent in these cases. Therefore, he contends, misdemeanor sexual battery is not a lesser included offense of sexual battery by fraudulent representation because the 2002 amendment was needed to criminalize conduct not encompassed by

misdemeanor sexual battery. (ABOM 19-20.) Not so. The 2002 amendment closed a loophole for perpetrators to escape liability and clarified to the courts that in cases of fraudulent inducement, there is no actual consent because of the fraud. This modern approach highlighted that there was no longer a difference in the criminal distinction between fraudulent inducement and fraud in the fact, because fraud in the inducement is a form of coercion that vitiates the victim's alleged consent and renders the perpetrator criminally liable for the sexual offense. (Slip. Opn. at p. 10.) Appellant's argument fails because the 2002 amendment illuminated to the courts that sexual offenses accomplished by fraudulent inducement are without consent, and therefore against the will; thus, a misdemeanor sexual battery will always occur when sexual battery by fraudulent representation is committed. (Slip. Opn. at p. 10.)

For this same reason, appellant's reliance on *Boro*, *supra*, 163 Cal.App.3d 1224, and *People v. Morales* (2013) 212 Cal.App.4th 583 (*Morales*), is misplaced. (ABOM 16-21.) In *Boro*, the defendant, by phone, informed the victim he was a doctor and that she had a highly infectious disease. He stated that the only way to treat the disease was either: (1) undergo a painful and expensive surgical procedure; or (2) have sexual intercourse with an anonymous donor who had been injected with a serum which could cure the disease. The victim agreed to the second option, believing it was the only choice she had. (*Boro*, *supra*, 163 Cal.App.3d at p. 1226.) During intercourse, the victim believed she would die unless she consented to the sexual intercourse. (*Id.* at p. 1227.) The defendant sought a writ of prohibition to restrain prosecution for his conduct after the superior court denied his motion to dismiss the charge. The *Boro* court ruled in favor of the defendant because it determined there was no statute in place that criminalized rape by fraud in the inducement. (*Id.* at p. 1226, 1230.) It also noted that the Legislature could correct the

oversight if it chose to. (*Boro* at p. 1230) The Legislature not only corrected the oversight with the 2002 amendment, but also specifically cited *Boro* in support of enacting the amendment. (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1421 (2001-2002 Reg. Sess.) April 16, 2002. pp. 4-5.) Accordingly, the 1985 holding in *Boro* is no longer relevant in light of the 2002 amendment.

Morales, *supra*, 212 Cal.App.4th 583, also does not assist appellant. In *Morales*, the defendant was charged with rape of an unconscious person (§ 261, subd. (a)(4)(C)). The *Morales* court reversed the conviction based on a reading of the statute, which had not been amended since 1872, because the statute provided the victim must be married (where in that case the defendant impersonated the victim's boyfriend after he watched the boyfriend leave late at night). (*Morales*, *supra*, 212 Cal.App.4th at pp. 594-595.) Following this ruling, both the California Senate and State Assembly passed bills to address the issue. The new legislation expanded the statute to apply to defendants pretending to be someone known to the victim, regardless of marital status. (Assem. Amend. To Assem. Bill No. 65 (2013-2014 Reg. Sess.) June 25, 2013.) Moreover, the portion of the *Morales* decision on which appellant relies (ABOM 21), is the quotation from *Pham* (see ante) as to the past history of the law, which as noted was amended in 2002 to close the loophole that prevented punishment of defendants who commit fraud in the inducement. (*Morales*, *supra*, 212 Cal.App.4th at p. 591.) Accordingly, appellant's reliance on this case is misplaced.

Appellant additionally relies on *Stuedemann*, *supra*, 156 Cal.App.4th 1. (ABOM 16-17.) However, that case is readily distinguishable because the prosecution relied on the theory of fraud in the fact, and there was no discussion of whether misdemeanor sexual battery is a lesser included offense of sexual battery by fraudulent representation. There, while the

defendant massaged the victim, he orally copulated her and inserted his fingers into her vagina. The victim told him to stop. The defendant apologized and left the room. (*Stuedemann* at pp. 4-5.) The defendant was convicted of oral copulation and rape by a foreign object of an unconscious person. (*Id.* at p. 4.) On appeal, he argued there was insufficient evidence to support his convictions. (*Ibid.*) The Court of Appeal agreed because the People sought conviction based on the theory of fraud in the fact. (*Id.* at p. 6, 9.) The Court of Appeal evaluated the differences between fraud in the fact and fraud in the inducement, and found fraud in the fact has a limited operation. (*Id.* at p. 8.) Specifically, this theory permits the prosecution to seek conviction, even though the victim consented, because there is essentially no consent to begin with: " 'Consent that act X may be done is not consent that act Y be done, when act Y is the act complained of.' [Citation.]" (*Id.* at p. 8.) Therefore, the court found the victim had never consented or cooperated because of her ignorance of the true nature of the act. Rather, she recognized the sexual acts for what they were and expressed her nonconsent. (*Ibid.*) Hence, the *Stuedemann* court never addressed whether misdemeanor sexual battery is a lesser included offense of sexual battery by fraudulent representation; instead, the court simply found there was insufficient evidence to support the People's theory that the victim consented to the sexual touching because of fraud in the fact. (*Id.* at p. 9.)

As the language of the statutes, legislative history, and case law establish, a touching accomplished under both misdemeanor sexual battery and sexual battery by fraudulent representation is an act done against the victim's will. Accordingly, misdemeanor sexual battery is a lesser included offense of sexual battery by fraudulent representation.

CONCLUSION

Respondent respectfully requests this court reject appellant's arguments and affirm the judgment.

Dated: May 7, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,490 words.

Dated: May 7, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Lee Hoang Robinson** No.: **S220247**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On May 8, 2015, I served the attached ***RESPONDENT'S ANSWER BRIEF ON THE MERITS*** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, 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 May 8, 2015, at San Diego, California.

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