

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



SUPREME COURT  
FILED

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Deputy

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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**The Honorable JAMES A. STOTLER, Judge Presiding**

**APPELLANT'S REPLY 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))?”**

## **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.**

Respondent's argument, made in several different ways, boils down to the following: "against the will of the person touched" has the same meaning as "unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose." (See e.g., Resp. Brief, p. 15.) Respondent is incorrect.

The first phrase above is part of Penal Code section 243(e)(1), misdemeanor sexual battery. The second phrase is part of Penal Code section 243, subdivision (c)(1), felonious sexual battery by fraudulent inducement.

Respondent must make the argument that these two phrases have an identical meaning; otherwise the felony can be committed without committing the misdemeanor, and as appellant argues, therefore misdemeanor sexual battery is not a lesser included offense to felonious sexual battery by fraudulent inducement.

Appellant contends that the key to understanding why respondent's analysis is incorrect can be found in the last paragraph of page 16 through the middle of page 18 of the Respondent's Brief. Respondent argues that "Before

2002, the law distinguished between fraud in fact and fraud in the inducement in sex crime cases.” To the extent that respondent argues that after 2002, the law no longer distinguished between fraud in the fact and fraud in the inducement, respondent is incorrect. (See, e.g. *People v. Pham* (2009) 180 Cal.App.4<sup>th</sup> 919; *People v. Stuedemann* (2007) 156 Cal.App.4<sup>th</sup> 1.)

What changed in 2002, as respondent correctly points out, was the enactment of Penal Code section 243.4, subdivision (c), as part of a comprehensive amendment to several other sexual offenses. (Resp. Brief, p. 17.) Section 243.4, subdivision (c), however, did not eliminate the distinction between fraud in the fact and fraud in the inducement, or change the law that a touching following fraud in the inducement was not against the other person will or without that persons consent. Rather, this amendment simply criminalized fraud in the inducement along with the previously illegal sexual battery offenses, including in addition to fraud in the fact.

Respondent’s citation to the analysis of the Senate Committee on Public Safety supports appellant’s argument. (See, Resp. Brief, p. 17; Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1421 (2001-2002 Reg. Sess.) April 16, 2002, pp. 2, 4.) The amendment to the statute did not, as respondent contends expand the meaning of “unconsciousness.” Rather it expanded the circumstances under which a person could be convicted of sexual battery to include circumstances where a person’s consent was obtained by fraudulent

inducement.

*People v. Ogunmola* (2012) 193 Cal.App.3d 274, relied upon by respondent, is in fact not helpful to their position. (See, Resp. Brief, p. 20.) In *Ogunmola*, the Court upheld the defendant-physician's conviction for rape pursuant to Penal Code section 261, subdivision (4), which defines rape as an act of sexual intercourse where the victim is unconscious of the nature of the act. In *Ogunmola*, as in the instant matter, the defendant tricked the victim into giving consent by lying and convincing the victim that the act served a legitimate medical purpose. (*Id.* at p. 277-279.) Thus, in *Ogunmola*, the act was not against the will of the victim, rather it was with consent of the victim although the consent was obtained by fraudulent misrepresentation in the inducement. *People v. Ogunmola, supra*, thus does not stand for the proposition that not knowing the nature of the act due to fraudulent misrepresentation is the same as "against the will" or without a person's consent.

Similarly, the opinion in *People v. Giardino* (2000) 82 Cal.App.4<sup>th</sup> 454, also relied upon by respondent, is similarly not helpful to respondent's position. (See, Resp. Brief, p. 21.) In *Giardino*, the Court held that in rape and other sexual assaults, consent must be "freely given without any misapprehension of *material fact*." (*Id.* at p. 460; emphasis added.) This distinction between fraud in the fact and fraud in the inducement, recognized



in *Giardino*, is the basis of the majority opinion in *People v. Babaali* (2009) 171 Cal.App.4<sup>th</sup> 982, and cases underlying *Babaali* such as *People v. Pham, supra*, 180 Cal.App.4<sup>th</sup> 919. It is this distinction which is also the basis of appellant's claim that misdemeanor sexual battery in violation of Penal Code section 243.4, subdivision (e)(1), is not a lesser included offense to felonious sexual battery by fraudulent misrepresentation in violation of subdivision (c) of Penal Code section 243.4.

Finally, respondent argues that there was no consent because the fraud rendered the victims "unconscious" and as there was no consent any touching was against the victim's will, and therefore constitutes misdemeanor sexual battery. (Resp. Brief, pp. 21-22.) The problem with this portion of respondent's argument can be found in the first sentence: "Courts have been clear that when there is no consent to a touching, that touching was committed against the victim's will." What respondent ignores is that courts have long held that when there is consent to a touching resulting from fraud in the inducement, as is the case here, there is as a matter of law, consent. As the court in *People v. Stuedemann, supra*, 156 Cal.App.4<sup>th</sup> 1, 6, noted "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.)

As noted in *People v. Babaali, supra*, 171 Cal.App.4<sup>th</sup> 982, 988, "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.” Respondent’s argument, as well as the dissent in *Babaali*, essentially ignores the history of the disparate manner in which courts have treated these different frauds. (See also, *People v. Pham, supra*, 180 Cal.App.4<sup>th</sup> 919.)**

**As such and as more fully set forth in his Opening Brief, appellant contends that 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 and as more fully set forth in Appellant's Opening Brief On The Merits, 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: June 1, 2015**

**Respectfully submitted,**

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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 Reply Brief on a computer using Microsoft Word, and that the word count generated for this document is 1,280 words excluding the cover and tables.**

**Dated: June 1, 2015**

**Respectfully submitted,**

**LEONARD J. KLAIF**  
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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 June 1, 2015, I served a copy of the attached Reply Brief on the Merits (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:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 1st day of June, 2015.

Teresa C. Martinez  
(Name of Declarant)

  
(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 June 1, 2015 a PDF version of the Reply Brief on the Merits (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.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 1st day of June, 2015 at 14:22 Pacific Time hour.

Teresa C. Martinez  
(Name of Declarant)



(Signature of Declarant)