Filed 10/15/08; pub. order 11/10/08 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DALE THOMAS ANDERSON, Defendant and Appellant.	H031106 (Santa Clara County Super.Ct.No. CC509198)

Defendant Dale Thomas Anderson was convicted following a jury trial of one count of committing a lewd or lascivious act on a child of 14 or 15 years by a person at least 10 years older than that child (Pen. Code, § 288, subd. (c)(1), hereafter § 288(c)(1)),[1] and one count of misdemeanor battery (§§ 242/243, subd. (a)). The sex and battery crimes involved the babysitter of defendant's minor children. The court suspended imposition of sentence and placed defendant on probation with the condition that he serve six months in county jail. The court also ordered defendant to register as a sex offender pursuant to section 290.

Defendant contends that as a result of a misstatement of the law by the prosecution in argument concerning the element of intent required for the commission of a lewd act and the court's failure to give a curative instruction, he was deprived of due process. He

[1] All further statutory references are to the Penal Code unless otherwise stated.

contends further that he was denied equal protection by being subjected to mandatory registration as a sex offender under section 290.

We conclude that error was committed at the beginning of opening argument when the prosecutor misstated the law concerning the element of intent for the charged crimes. We find, however, that the prosecutorial error does not warrant reversal of the judgment. We further reject defendant's constitutional challenge to the requirement that he register as a sex offender. We therefore affirm the judgment.[2]

FACTUAL BACKGROUND[3]

I. *Prosecution Evidence*

A. *Testimony of Katie P.*

Katie P. was 17 years old (born in August 1989) and was a senior in high school at the time of the trial in September 2006. She lived about five blocks from defendant and his family. Katie's older sister was the babysitter for the Andersons' two young children for a while. Katie began babysitting for the Andersons when she was around 12. At that time, their daughter and son were approximately six and three years old, respectively. Katie's routine was to arrive at the Andersons' house at about 4:00 in the afternoon. Defendant's wife would typically talk to Katie when she arrived, but would then be

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[2] In his separate petition for writ of habeas corpus that we ordered to be considered with this appeal (*In re Dale Thomas Anderson on Habeas Corpus*, H032829), defendant raises factual material outside of the record at trial. He argues in the petition that the charges against him should be dismissed, or, alternatively, a new trial should be granted on the basis that the prosecutor, Stephen Moore, was suspended from the practice of law by the State of California due to his failure to pay bar dues, and that this suspension was in effect throughout the trial and through the time judgment was entered. We reject that separate challenge to the conviction. Accordingly, by separate order of this date, we deny the petition for writ of habeas corpus.

[3] We resolve factual conflicts in support of the verdict. (*People v. Holt* (1997) 15 Cal.4th 619, 667-668.)

occupied until after 7:00 giving flute lessons to students in an upstairs studio. Defendant usually arrived home from work at around 7:15 to 7:30.

Katie's duties included helping the daughter with homework, playing with the son, making the children's dinner with what defendant's wife had planned for the evening, and sometimes bathing the children and getting them ready for bed. She would also watch television with the children for the limited time they were allowed by their parents to do so.

Initially, Katie's interactions with defendant were "nothing out of the normal. He would come home, and he would talk to [her] for a little bit about school or [her] day, . . . how babysitting was, and . . . normally take [her] home around . . . 8:00." Their relationship changed in 2004. Defendant "started getting more . . . touchy-feely, . . . he would . . . put his hand on [her] arm and stuff like that . . . and then it got to be a little too much."

In July 2004 (when Katie was 14), she was in the master bedroom watching television with the two children. They were sitting at the foot of the bed and Katie was sitting up at the head of the bed. After defendant got home and Katie and the children went out to greet him, they resumed watching television. (Defendant's wife was upstairs in the studio.) Defendant came into the room, kneeled by the side of the bed and talked to her about the show and about babysitting. He put his hand on Katie's left leg and started moving it up her leg on her inner thigh. He played with the rim of her shorts and touched the rim of her underwear. (He did not put his hand under the underwear or touch her groin area during the incident.) He stopped when a commercial came on and the children turned around to play with Katie and him. Defendant put his hand back to Katie's shorts. "[H]e told [her she] was too young to be doing this, and [she] shouldn't

be doing it."[4] The collective amount of time that defendant touched Katie during the incident was about two minutes. He then took Katie by the hand out of the bedroom and into his son's room, looked at her, said, " '[S]hit,' " and walked out of the room.

Later, when he took Katie home, defendant said, " [']I don't mean to make you feel uncomfortable.[']" Katie felt "[s]cared and uncomfortable" on the ride home. When she got home, she took a shower and immediately went to bed. Katie did not tell anyone what had happened, including her mother, "[b]ecause [she] was scared that people wouldn't believe [her]."

Afterwards, Katie continued babysitting for the Andersons approximately once a week and on occasional Saturdays. Although defendant would occasionally touch her shoulder or stomach or backside, there was nothing that she felt was inappropriate after the first incident until about three or four months later when she was 15. Katie was sitting at the kitchen table with the two children. (Defendant's wife was upstairs in the studio.) Defendant sat at the table as well and used his feet to pull Katie's chair closer to him. When he did this, he put his hand on Katie's thigh (over her jeans). The children were unable to see this because defendant's hands were under the table. Katie tried to push herself away, but defendant then used his feet to pull her chair closer again. Defendant's hand got as high as "a little bit above [her] mid-thigh." It made her feel uncomfortable and upset. Defendant had his hand on Katie's thigh for about five minutes.

A third incident happened in May or June of 2005 (when Katie was still 15). She was upstairs in the play room watching television with the children. Katie was sitting on the couch and the children were lying on their stomachs on the floor. Defendant came

[4] Katie testified initially that defendant did not say anything while he played with the rim of her shorts and the rim of her underwear. She later testified that, after reading the police report summarizing her interview with the police, defendant "told [her she] was too young to be doing this, and [she] shouldn't be doing it."

into the room and sat next to Katie. He put his hand on her mid-thigh and "told [her] that if [she] were . . . older, . . . or if he [were] younger, then he would be trying to pursue [her]." He kept his hand on her thigh for about five minutes. It made her feel uncomfortable and awkward and she wanted to go home.

After Katie went home after the third incident, she told her mother that she did not want to babysit anymore. In response to her mother asking her why she felt that way, Katie "told her that [defendant] had sexually abused [her]." Her mother said that if she wanted to receive therapy, she would pay for it.

About four months later, Katie asked her mother if she could go to counseling "because of what happened with babysitting." The next day, Katie was called out of class to see the vice principal, who told her that Katie's mother had called about an incident involving babysitting and that a police officer wanted to talk to her about it. The officer then interviewed her.

B. *Testimony of Dora P.*

Dora P. is Katie's mother.[5] In late May 2005, Katie came home one night crying, and said "that she did not want to babysit for the Andersons anymore because of [defendant]." Dora told Katie that she would not have to babysit there anymore and that if she wanted to talk about it with her or someone else, Dora would make the arrangements. Dora then contacted defendant's wife and went over to the Andersons' home to talk to her.

In September 2005, while they were in the car, Katie told her mother that "she wanted counseling for sexual abuse" concerning defendant. Several days later, on September 14, Dora called Kaiser to make an appointment for counseling. After Dora

[5] We do not disclose Dora P.'s surname in order to protect the anonymity of Katie in these proceedings. We therefore refer to Katie's mother by her forename and mean no disrespect in so doing.

told the advice nurse that her daughter wanted sexual abuse counseling, the nurse initiated a conference call with the San Jose Police Department.

C. *Pretext Telephone Call*[6]

Detective Robert LaBarbera, a member of the San Jose Police Department's sexual assault unit, conducted a forensic interview of Katie. He arranged for Katie to make a pretext call[7] to defendant that was monitored and recorded by him. A recording of that conversation in the form of a CD was introduced into evidence and played for the jury. The following are relevant excerpts of that conversation:[8]

"[**Katie:**] . . . [W]hat happened has been on my mind a lot lately and I wanted to talk to you about it. [¶] . . . [¶] . . . I just wanted to know . . . what you're thinking about it, what's your take on it. [¶] . . . [¶] [**Defendant:**] It was definitely a difficult situation. [¶] [**Katie:**] But I want to know . . . how you're feeling about this? [¶] . . . [¶] [**Defendant:**] Well, I don't know. I guess I must have crossed the line with you and I really apologize for that. [¶] . . . [¶] [Maybe] I got mixed signals; [maybe] I was just not thinking straight. I don't know. I just—I worry about you more than anything. [¶]

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[6] Because the pretext call was relied on significantly by the prosecution and is important to the discussion of defendant's claim of error, we quote liberally from that conversation.

[7] Detective LaBarbera testified that a pretext call is a common investigative device where the alleged victim in a crime investigation at the direction of the police places a telephone call to a suspect. The call is recorded and a police officer listens in on the call. The officer explains to the alleged victim that he or she is attempting to elicit truthful responses from the suspect to questions posed by the alleged victim. Detective LaBarbera's practice in arranging a pretext call was to explain to the alleged victim certain specifics that he would like drawn out from the suspect, such as an apology or particular details relevant to the case. He would typically outline several main points (e.g., " 'apology,' " " '[p]olice,' " or " 'why' ") in large lettering that would be major themes for the alleged victim to cover in the conversation. Detective LaBarbera followed this practice in the instant pretext call.

[8] Immaterial conversation-fillers (e.g., "um," "uh," "you know," "I mean," "like," and repeated words) have been omitted without designating such omissions with ellipses.

[**Katie:**] What kind of mixed signals do you think you got? [¶] [**Defendant:**] . . . I was just worried about you getting the wrong impression and me being too friendly with you or something. I don't know. [¶] [**Katie:**] Well, if you were worried about that then why did you do it? . . . [¶] [**Defendant:**] Do what? [¶] [**Katie:**] You sexually abused me. [¶] [**Defendant:**] And—and how did I do that exactly? [¶] [**Katie:**] You put your hand up my shorts[. T]hat's violating my personal space. [¶] [**Defendant:**] Well, I know I touched the rim of your shorts and that was probably wrong for me to do that. [A]nd I definitely apologize for that 'cause I do think that may have crossed or at least edged the line a little bit and it was wrong for me to do that. . . . [¶] . . . [¶] [**Defendant:**] [I]t was inappropriate and . . . it didn't go any further than that, thank goodness. . . . [¶] [**Katie:**] Yeah. But it wasn't just the rim of my shorts, you had your hand under my shorts. [¶] [**Defendant:**] I don't remember touching you inappropriately beyond touching the rim of your shorts, your leg, yes, [maybe] on occasion, but nothing beyond that I recall."

"[**Katie:**] Why'd you do it? [¶] . . . [¶] [**Defendant:**] Well . . . that's hard to explain. I mean, you're certainly a very attractive young lady and I guess I was fighting that. I don't know if I have a better explanation. . . . [¶] [**Katie:**] So if you did it to me, how do I know there's no one else out there, you've done it to? There's other attractive women out there. . . . [¶] [**Defendant:**] The[re]'re a lot of other attractive women out there and frankly this has been an eye-opener for me[. A]nd frankly[,] I love my wife and I don't want to do anything to disrupt my marriage and my life with her. I've never had any sexual encounter with anyone other than my wife for the entire time I've been with her, . . . [¶] [**Katie:**] I was only 14 when you did it[. B]ut what made you do that if you're happy with your wife? [¶] [**Defendant:**] Well, that's actually my problem to deal with . . . . [¶] [**Katie:**] Well, you've involved me in that. It's become my problem as well. [¶] [**Defendant:**] Okay. Well, how are you doing with that? . . . [O]bviously, you're not comfortable with it. [¶] [**Katie:**] No. And my mom knows about it and she's not sure what I should do either. She's . . . not sure what I should do[,] and I don't know

what I should do either. [¶] [**Defendant:**] Well, I can't tell you what to do. I'm not going to do that. I'm very sorry for pushing the edge of that envelope with you. I was not intending to do anything that would hurt you, or me, or Francesca[,] or my kids[,] or your parents[,] or your sister[,] or anybody. [Y]ou know, I think I came too close to you. I got too close to you and . . . there was no craziness associated with it and there was no intention of doing anything that would hurt us further. I'm really embarrassed to a certain extent by it all and I just can't begin to apologize[. I]t was wrong and I know that. And . . . I would appreciate it if you can accept that apology and move ahead with your life. You have a life ahead of you. You're a nice person and a good kid and you've got a lot of things going for you and I'm the last one to want to mess that up[. A]nd I have a life[,] too[,] and I don't want to mess that up."

"[**Katie:**] [A]fter you had your hand on my leg and whatever, you took me into Jeffery's room[. W]hy? [¶] [**Defendant:**] Uh-huh. [¶] [**Katie:**] What [were] your intentions? Why did you do that? [¶] [**Defendant:**] Well, I think I made it clear there. I wanted you to tell me—I was actually, I think, looking for you to tell me that you were not interested. I had to convince myself that you were not interested in me[. A]nd it was hard for me to do, 'cause we were flirting, I guess, a little bit. [¶] [**Katie:**] How? [¶] [**Defendant:**] Well, I don't think it's necessarily appropriate for us to go into those details right now. I felt that we both flirted with each other. [¶] [**Katie:**] How? [¶] . . . [¶] [**Defendant:**] I'm not going to go into those details now. [¶] [**Katie:**] Why not? [¶] [**Defendant:**] Why do you need me to? [¶] [**Katie:**] Because I want to know what you took wrong that I did. How do you think I flirted with you? [¶] [**Defendant:**] Well, just like any girl flirts with a guy. . . . [Y]our smiles and your looks and your body language[. A]nd [maybe] it was not intentional on your part and I guess that's what I was trying to find out, . . . I got the impression that it was not[. T]hat was why I was asking you and I even asked you specifically to tell me. [¶] . . . [¶] [**Katie:**] [W]hen you took me into Jeffrey's room, all you said was, 'Shit,' and then you walked out. [¶] . . . [¶]

[**Defendant:**] That's not what I remember. [¶] [**Katie:**] What do you remember? . . . [¶] [**Defendant:**] I remember asking you if you were okay and if you would tell me if I was crossing the line, basically. [¶] [**Katie:**] And what do you remember me saying? [¶] [**Defendant:**] I don't think you said anything specifically. [¶] [**Katie:**] And you said you got the impression that I was uninterested. Why did you keep—even after that you would touch my leg and things and you would put your hand on my butt[. W]hy did you keep doing that if you knew that I . . . didn't want any of that? [¶] [**Defendant:**] Honestly[,] I guess in a way I was hoping you did. [B]ut I didn't really push it and there were many months and weeks in between and we jumped into a cordial situation. I'm sure I made you feel uncomfortable and I apologize for that. [¶] [**Katie:**] I was only 14. Do you really think that I would have wanted that? What did you want me to do? [¶] [**Defendant:**] What I wanted is irrelevant here. [¶] [**Katie:**] What did you want? Did you want me to have sex with you? [¶] [**Defendant:**] No. [¶] [**Katie:**] Then what did you want? [¶] [**Defendant:**] I think that's a little beyond what would be appropriate. [¶] [**Katie:**] Then what did you want? [¶] [**Defendant:**] I don't know, Katie. [O]bviously, it was not something that could happen. It's not appropriate, not just for the age situation, but for the fact that I'm married and all the ramifications that go along with that."

"[**Katie:**] [Y]ou owe me an explanation for what happened. [¶] [**Defendant:**] Okay, I'm trying to explain to you that . . . if anything[,] the best way to explain it is a fantasy. [¶] [**Katie:**] And what was in your fantasy. [¶] [**Defendant:**] Well, that's personal. [¶] [**Katie:**] You have involved me in it. What did you want from me? [¶] [**Defendant:**] Well, what I would want from you or what I would have wanted from you is different than what a fantasy entails. I—so, I guess what I wanted was the ability to have my fantasy. [¶] [**Katie:**] And what was your fantasy? [¶] [**Defendant:**] Well, again, that's personal[. T]hat's between me and myself and my conscience. . . ."

After defendant apologized again and continued to express reluctance, and after Katie continued to press for him to explain the "fantasy" in order to "help [her] to move

on with things," he asked her if she had had any real boyfriends. Katie responded that she had not but confirmed that she had a brother and, in response to defendant's question, agreed with his statement that "we're all sexual beings in this world." The conversation resumed: "[**Defendant:**] And we grow up and we get married. We fall in love and we have kids . . . and there's even a lot of variety in that. [¶] [**Katie:**] Um-hum. [¶] [**Defendant:**] Right. And some of it is a little bit crazy, if you ask me. You probably hear stories about how crazy people get. [¶] [**Katie:**] Um-hum. [¶] [**Defendant:** L]uckily, I'm not one of those but, I have a fairly decent appetite for women in general, let's say. I think they're beautiful creatures and they have beautiful bodies and it's more than just the sexual aspect but the intellectual aspect as well and that's stimulating—[¶] [**Katie:**] Um-hum. [¶] [**Defendant:**] —to me personally and I think that's stimulating to a lot of men in general. [¶] [**Katie:**] Um-hum. [¶] [**Defendant:**] And so you stimulated me and you—you made me feel young and vibrant and all that, so my fantasy kind of dealt with how would a young attractive smart girl like you be interested in an old fart like me[. S]o a lot of what my fantasy was—when I was 14 nobody like you would ever be interested in me. I grew up where I moved so much but I didn't have a lot of girls interested in me and I felt—and [maybe] I was convincing myself that I felt that you were interested in me and . . . [maybe] that was part of my fantasy. [¶] [**Katie:**] You wanted me to be interested in you? [¶] [**Defendant:**] Well, yeah . . . I could say that. [I]t's kind of silly, isn't it? [¶] [**Katie:**] Yeah. [¶] [**Defendant:**] And that's why I also knew that there was nothing that could ever come from that because I would not pursue it, which is the craziness of it. [A]nd that's why—one of the reasons why I was worried about you 'cause, heck, if you were interested then that would be even worse because I wouldn't pursue it. [¶] [**Katie:**] But you did pursue it. You kept touching me and doing things that you knew were inappropriate. [¶] [**Defendant:**] Yeah. And—I guess that—if it crossed over that line for you then I was wrong to do that and I think I was driven by that silly fantasy. [¶] [**Katie:**] So you thought that what you were doing wasn't crossing over the

line for me? [¶] [**Defendant:**] I wasn't sure most of the time and I convinced myself many times that it was so I would try not to. I don't know[. T]hat's kind of hard to explain. I mean, have I hurt you? I really need to know. [¶] [**Katie:**] Physically, no[. E]motionally, yeah, yes."

After defendant again apologized and said "it will be an experience that I will use to make sure that I don't even come close to crossing that line again" Katie asked what she should do next and whether she should contact the police. Defendant responded that he hoped that she didn't because many lives would be disrupted but that he could not tell her what she should do. After another apology by defendant, the conversation continued: "[**Defendant:**] . . . I'm glad I didn't take it any further. I'm very glad 'cause I am kind of a forceful person and you're a good person and I want you to know that I really didn't ever think anything was going to come of it. I was sure of that and again at the same time I felt attracted to you. [¶] [**Katie:**] And so you thought you would violate my personal space? [¶] [**Defendant:**] No. That's not at all what I was trying to do. I was trying to find out if you were interested in me. [¶] [**Katie:**] I was 14. [¶] [**Defendant:**] Okay, you were and [maybe] that's not an appropriate age for you to be aware of whether you're interested in someone like me or not and [maybe] it's inappropriate for me to try and find out. I think that's exactly what I'm apologizing for."

In response to Katie asking him why he had needed to find out if she were interested in him if he loved his wife, defendant explained that he had a good relationship with his wife but it was not perfect. Because of the stress and time pressures of having a young family, they did not have much intimate time together. The conversation continued: "[**Katie:**] So, you felt the need to find it elsewhere? [¶] [**Defendant:**] In my fantasies is where I find it[. A]nd that's the honest truth. [¶] [**Katie:**] And so you attempted to make those fantasies come true? [¶] [**Defendant:**] Not exactly. I attempted to make my fantasies more interesting, I guess, but never thought that I could, and would make them real cause I definitely think that's inappropriate. I mean, even if you were 24

or 34. [¶] [**Katie:**] Um-hum. [¶] [**Defendant:**] 'Cause I am committed to my wife for life and forsaking all others. I believe that . . . ."

Defendant again apologized, indicated that he hoped Katie would "decide to not pursue it," told her it was her choice, and asked her to forgive him. After defendant asked Katie what she thought about everything, the conversation resumed: "[**Katie:**]--I don't know what to think 'cause I can't explain what happened to myself 'cause I don't know what happened. [¶] [**Defendant:**] Well, in a lot of ways[,] nothing happened, but there was a lot of potential for things to have happened. . . . [Y]ou didn't do anything wrong. I think our friendship was a little bit more than it should have been and that was probably my doing. I don't know my fault. [*sic*] I certainly didn't discourage it and perhaps I should have. . . ." Defendant stated that what happened "was fairly innocent in nature 'cause I didn't ever really expect it to go anywhere, nor did I want it to . . . ." The call then concluded.

II. *Defense Witnesses*

A. *Testimony of Officer Mark Huiskens*

Officer Mark Huiskens of the San Jose Police Department wrote a report concerning defendant based upon an interview of Katie conducted on September 14, 2005, at the high school she attended. He was dispatched as a result of a report by Katie's mother of a sexual battery. The interview lasted approximately 45 minutes. The report that he prepared was based upon contemporaneous notes that he had taken; he was confident that he wrote down accurately what Katie had told him.

Katie reported to Officer Huiskens that in approximately July 2004, defendant had rubbed her legs with his hands, and that he had touched her vagina over her underwear. As defendant touched her, he told her that she was too young to be doing this. Katie said that afterwards, defendant led her into a bedroom, said " 'shit,' " and walked out. He took her home later and told her that he didn't want to make her feel uncomfortable. She told the officer that subsequent to July 2004, defendant had touched her arms, knees, and

shoulders. As a result of what Katie reported, Officer Huiskens referred the matter to the Department's sexual assault unit.

B. *Testimony of Other Babysitters*

Delores Williamson is a family friend of the Andersons who has known them since 1996. She was a babysitter for them for several years while she was a teenager. Defendant was "almost like another dad to [her]." Defendant gave her hugs as "any really close family friends would do," but he never did or said anything that was inappropriate or made her feel uncomfortable.

Christina Rice babysat for the Andersons once or twice a week for about three years while she was a teenager. Defendant was always nice to her and treated her as a daughter. They gave each other hugs in greeting or when she left for home. Occasionally, defendant patted her on the back and one time touched her leg as a way of saying that she was doing a good job, but she never felt that there was anything inappropriate in how he touched or hugged her. Christina thought that defendant was a great father.

Danielle Williams babysat for the Andersons one day a week for two years while she was in high school. During that time, defendant never touched her in a way that she felt was inappropriate. They hugged each other goodbye when Danielle left for the evening but "nothing [in]appropriate at all." Danielle felt that he was a very good father.

C. *Testimony of Dale Anderson*

Defendant has been employed as a software engineer for approximately 25 years. He was married to his wife, Francesca, in 1994, and they have two children, who were 10 and seven at the time of trial. Because defendant worked during the day and his wife (a professional musician) gave flute lessons in the afternoon, they had hired over the years a number of teenage girls to babysit their children. Katie was the only babysitter who had ever brought to defendant's attention that he had made her feel uncomfortable. No other

teenage girls—including Francesca's nieces and music students—had ever complained that defendant made them feel uncomfortable.

Katie was one of the Andersons' babysitters for approximately three years. Over time, Katie and defendant would discuss such things as her schoolwork, her camping trips or church activities, and, on a couple of occasions, her boyfriends. There would occasionally be physical contact between them, such as defendant putting his hand on Katie's shoulder or knee; he never perceived that that contact was anything out of the ordinary.

Defendant had a recollection of the first incident about which Katie testified that occurred in mid-2004. His children were in the master bedroom and came out to greet him when he came home from work. They then returned to the bedroom to watch television; both of them and Katie were sitting on the bed. Defendant came in and sat on the floor next to the bed. He touched the rim of Katie's shorts. He recalled that "it was a playful environment . . . [and t]here was some interaction going on with all four of us, and [that he] perhaps tugg[ed] a little bit playfully at the edge of her shorts." He testified that "I don't understand why or what the context was. It was brief. And that's all it was." He did not touch her underwear at any time. Defendant "sense[d] a brief recoil [from Katie]. It wasn't a huge thing." He sensed that he may have made her feel uncomfortable by "cross[ing] her personal boundary." Defendant did not touch Katie's shorts with the intent to arouse himself or her sexually.

He asked Katie to come with her to his son's room. She sat on the bed and he asked her if she were okay and "if there . . . was anything she was uncomfortable about." (He did this because he "tend[ed] to be a little bit handsy . . . in [his] friendships and relationship[s] with people, and [he] never sensed a problem with Katie about that, but this time she had a slight recoil, so [he] was just making sure everything was okay that [he] didn't do anything to offend her.") She replied that there wasn't anything wrong and

they went back into the master bedroom.[9] Katie continued to work for the Andersons for over a year afterwards.

Defendant had no recollection of the second incident that Katie described as occurring at the kitchen table. If he had ever touched or patted her leg, "it was never anything [other than] to say anything but thanks for a good job or, you know, attaboy or everything is okay. . . ." He denied ever touching Katie's thigh with any sexual intent.

Defendant recalled the third incident that Katie described on the last day that she babysat for the Andersons. He remembered putting his hand on her thigh while they were upstairs in the den; they were sitting on the couch watching television with defendant's children, who were in front of them on the floor. He had asked her whether the children had behaved themselves and they talked about other things. He believed that she mentioned "that there was a boy who was interested in her at school, and she didn't know how to deal with that and she wasn't sure what to do. She hadn't told her mom about it, and she told [him] at that time she wasn't allowed to date . . . ." He was trying to be supportive and believed that Katie had fairly low self-esteem and "had a tough situation at home with that topic . . . ." So he said something to the effect that if he were her age, he would be one of those boys interested in her and patted her leg at around mid-thigh. There was nothing sexual about the way he spoke to her, and there was nothing unusual about how he patted her leg. Katie did not seem to be taken aback by anything that he said or did.

After Katie stopped babysitting for the Andersons, Francesca was upset with defendant because she understood from Katie's mother that he was the reason Katie did not want to come back. Defendant called and spoke with Katie's father, said that "he

[9] On cross-examination, defendant agreed that what he told Katie during the pretext call—that he had taken her into his son's room to have her tell him that she was not interested because "[they] were flirting . . . a little bit, "—was significantly different from what he testified at trial actually happened.

[understood] there might be a problem with Katie, and [he was] calling to find out what that [was] and he explained that she didn't want to babysit anymore and that [defendant] made her feel uncomfortable." Defendant told the father that he was sorry if he had made Katie feel uncomfortable. He offered to apologize directly to Katie. Thereafter, defendant spent several weeks reflecting and attempting to determine what he might have done to make Katie feel uncomfortable. It was not until several months later when Katie telephoned him that he became aware that the problem Katie had with him involved touching.

Defendant was at work when he received the pretext call from Katie. He was surprised by her call and thought it was an opportunity for him to apologize for making her feel uncomfortable. He wanted not only to apologize to Katie, but also to have her accept that apology and for her to like him. He didn't want to hurt her, and he wanted her to feel good about herself because of his perception that she had low self-esteem. Defendant "wanted to give her some explanation that she would be happy with. Placate her in some way so that she would . . . move on . . . ."

When defendant used the phrase during the pretext call that he had "crossed the line" with her, he was referring to "crossing the line of a personal boundary . . . . There was, I guess, some other line way out there that has to do with a sexual boundary[—he] wasn't even thinking about that. [He] was figuring she was uncomfortable because [he] had made her feel uncomfortable because [he] crossed her personal boundary. That's what [he] had thought [he] was apologizing for." He used the word "fantasy" during the call to attempt to explain that he wanted Katie to like him and to receive accolades from her. He said that he "suppose[d] there was" flirtation between the two of them. He explained that he "enjoy[ed] intellectual banter" and conversations with people who are intelligent, and "[he] didn't have any real girlfriends when [he] was 14, [and] if [he] had been 14, Katie might have represented the type of person [he] would [have been] interested in."

Defendant was questioned extensively on cross-examination about the pretext call. His use of the phrase " 'mixed signals' at the beginning of the call"—before the time that she accused defendant of having sexually abused her—did not relate to any flirting; he was simply referring to an apology for having made her feel uncomfortable in some way because he may have been too friendly. His concept of possibly having been too friendly with Katie did not simply involve any touching but also concerned conversations that they had and, in general, "the friendship, the bond." Defendant testified that his use of the word "fantasy" during the call "was a very poor choice of words." He "had an idea that [they] had a close friendship, and there was no sexual fantasy, . . ." "[His] fantasy was about being young again," and Katie facilitated that by making him "feel more vibrant and alive." Defendant explained that he "was interested in her as a person. [He] enjoyed the conversations [they] had and her [i]ntellect, and [he] guess[es [he] was also looking for the attention. That made [him] feel good."

PROCEDURAL BACKGROUND

Defendant was charged by information filed April 21, 2006, with two felony sex offenses, namely the commission of lewd or lascivious acts on a child of 14 or 15 years in violation of section 288(c)(1). It was alleged that the two offenses occurred between July 1, 2004, and July 1, 2005.

On September 29, 2006, the jury convicted defendant on count 1, acquitted defendant on count 2, but found him guilty on the lesser-included offense of misdemeanor battery (§§ 242/243, subd. (a)). The court thereafter denied defendant's motion to reduce the count 1 conviction to a misdemeanor. It suspended imposition of sentence and ordered that defendant be placed on three-year probation on the condition that he serve six months in the county jail. He was also ordered to pay restitution to the victim and to register as a sex offender under section 290. Defendant filed a timely notice of appeal.

DISCUSSION

I. *Issues on Appeal*

Defendant raises two challenges on appeal:

1. The prosecution argued improperly—over defendant's objection—that proof of intent for present sexual gratification was not required to establish the commission of a lewd act under section 288(c)(1). The prosecution instead argued that it was sufficient if defendant intended by his actions that he achieve sexual gratification at some future time. Because this was a misstatement of the law (defendant argues), it was prejudicial error for the court to refuse defendant's request for a curative instruction.

2. The court erred by ordering defendant to register as a sex offender pursuant to section 290. Because (defendant argues) imposition of mandatory registration in this instance violated equal protection in that mandatory registration is not a consequence of sex offense convictions similar to the conviction here, the matter should be remanded to permit the trial court to exercise its discretion in deciding whether to order defendant to register as a sex offender.

II. *Claim of Prosecutorial Error*

A. *Background and Contentions*

Early in opening argument, the prosecution introduced the subject of specific intent as an element of the charged offenses. The prosecutor described the crime of a lewd and lascivious act in violation of section 288(c)(1) as nothing more complicated than "a guy touching a child for sexual purposes."[10] He tied the question of intent here to defendant's reference in the pretext call to "fantasy."

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[10] "Any person who commits an act described in [section 288,] subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. . . ." (§ 288(c)(1).) Subdivision (a) of section 288 provides: "Any person who willfully and lewdly commits (continued)

The critical prosecution argument on which defendant's claim of error is based was as follows: "[Y]ou're going to read it in your instructions as specific intent. . . . And again what we're focusing on is, did [defendant] have a specific mind-set when the touching occurred? It's got to arouse, appeal, gratify . . . [the] lust, passions or sexual desires of either the defendant or the child. It doesn't actually have to arouse them at the time, and that's going to be critical in our case, . . . You can't touch a child with a sexual purpose. You don't actually have to be literally sexually stimulated by it. [¶] It doesn't have to be a hand on a penis, for example, for there to be an intent. Okay. If it's going to be, for example, masturbatorial [*sic*] material later, if touching is going to somehow bring out a fantasy that will allow you to have some future sexual purpose, you can see he is touching a child for his lust, passions for sexual desire. [¶] What I want to make clear in talking about this[,] though some people think that specific intent to somehow be sexually aroused means it has to be at the time and it doesn't. Okay. Children have a shield."

At that point, defense counsel objected that the argument was "a mischaracterization of the law." After an unreported sidebar conference, the court overruled the objection, stating: "The objection [will be] overruled, and I will point out, Ladies and Gentlemen, this is argument. Later on I will be giving you specific instructions on what the law is . . . for you to read and consider the instructions and follow them. Counsel are permitted to comment upon their respective interpretations of what they believe the law is under the facts of this case and to urge upon you arguments in that regard, but it is still up to you finally to follow the law as given to you and decide what the law means as I give it to you. . . ."

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any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

The prosecution resumed argument on the same point. "What you will read in the instructions [is] it doesn't have to be arousal at the time. So does he have a purpose, intent, a desire to . . . somehow satisfy the lust, passions or sexual desires? Those can be at different times. [¶] I am touching a child because I get a stronger connection, makes me feel young and vibrant and that makes me more sexually fulfilled. That is simply enough. A purpose. When that shield is around that child—" Counsel for defendant again objected and requested a continuing objection. The court responded that it would "note [defense counsel's] continuing objections to the particular theory of the prosecution's case."

Prior to the court instructing the jury, defendant's counsel—responding to the prosecution's argument he claimed to have been improper—sought a special instruction that the specific intent required for the commission of a lewd or lascivious act was one that had to be present "at the time of the touching as opposed to sort of [a] down the road kind of thing." Defense counsel asserted that *People v. Martinez* (1995) 11 Cal.4th 434 (*Martinez*) required such an instruction in this instance because of the prosecution's claimed misstatement of the law. After deferring the discussion, the court ultimately ruled that the prosecution's "novel" argument "that one could have a touching where the intent was to get some sort of delayed sexual gratification[,] i.e.[,] it became [a part] of a fantasy that could later be acted out in private" was within the definition of the statute. Accordingly, it declined to modify the standard lewd act instruction (CALCRIM No. 1112) ultimately given to the jury.[11]

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[11] Consistently with CALCRIM No. 1112 (Judicial Council of Cal. Crim. Jury Instns. (2006) CALCRIM No. 1112), the court gave the following instruction: "Now, the defendant is charged in Count[s] 1 and 2 with a lewd or lascivious act on a 14- or 15-year-old child who was at least [10] years younger than the defendant. To prove that the defendant is guilty of this crime, the People must prove that, number one, the defendant willfully touched any part of a child's body either on the bare skin or through the clothing; two, that the defendant committed the act with the intent of arousing, appealing (continued)

Defendant contends that the prosecutor misstated the law during his opening argument in describing the specific intent required for a lewd act conviction under section 288(c)(1). The prosecutor argued "that an intent for present sexual gratification was not necessary[;] that it was enough if [defendant] intended sexual gratification in the future at a time different from the touching." Defendant asserts that under *Martinez*, *supra*, 11 Cal.4th 434, this was plainly an incorrect statement of the law. Despite objection by defense counsel, the court permitted the argument and refused a request by the defense for a curative instruction.

Defendant argues further that the prosecutor's misstatement of the law was misconduct. And (defendant asserts) the court's failure to clear up the confusion that would likely be present in the jury's mind concerning the intent element by giving a special instruction explaining that the intent for present sexual gratification was required constituted a violation of defendant's due process rights. Because (defendant argues) there is a reasonable likelihood that the jury applied the instruction addressing the intent element of the lewd act charges in a manner contrary to the law, the error was not harmless.

B. *Discussion of Claim of Error*

1. *Applicable law*

" 'It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is

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to[,] or gratifying the lust, passions[,] or sexual desires of either himself or the child; three, that the child was 14- or 15-years-old at the time of the act[;] and four, that when the defendant acted, the child was at least [10] years younger than the defendant. [¶] Now, if someone commits an act willfully, he or she does it willingly or on purpose, as opposed to accidentally[. I]t is not required that he or she intend to break the law, hurt someone else or gain any advantage. Actually arousing, appealing to[,] or gratifying the lust, passions[,] or sexual desires of the perpetrator or the child is not required."

also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets warranted by the evidence." ' [Citations.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 567-568.) But "[a] prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State. [Citation.] . . . [T]he prosecutor represents 'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' [Citation.] Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve. [Citations.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

The standards for reviewing a claim of prosecutorial error (oftentimes referred to as prosecutorial misconduct)[12] have been summarized by our high court as follows: "A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' [Citations.]" (*People v. Espinosa*, *supra*, 3 Cal.4th at p. 820.) Generally speaking, the defense must make a

[12] "We observe that the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

timely objection and a request for an admonition to cure any harm in order to preserve an appellate challenge based upon prosecutorial error. (*People v. Frye* (1998) 18 Cal.4th 894, 969.)

Error through prosecutorial conduct may take a number of forms, including misstating the law (*People v. Hill*, *supra*, 17 Cal.4th at pp. 829-830). And the conduct complained of need not be intentional, the court having made it clear that bad faith is no longer a requirement of a prosecutorial misconduct claim. (*Id.* at pp. 822-823.)

Where the claim involves the assertion that the prosecutor made improper comments before the jury, a determination of whether the error is prejudicial is based upon an inquiry of " ' . . . whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1001; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1205.) In this inquiry, the comments claimed to be objectionable must be considered in the context of the entire argument (*People v. Dennis* (1998) 17 Cal.4th 468, 522) to ascertain "how the remarks would, or could, have been understood by a reasonable juror. [Citations.]" (*People v. Benson* (1990) 52 Cal.3d 754, 793.) Thus, "we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye*, *supra*, 18 Cal.4th at p. 970.)

2. *Whether prosecutorial error occurred*

As noted, defendant claims that the prosecution's argument concerning the specific intent element of the charged crimes was a misstatement of the law under *Martinez*, *supra*, 11 Cal.4th 434, and therefore constituted misconduct. In that case, the issue the court addressed was whether, if the prosecution proved that the touching of an underage child was done with the requisite sexual intent, the character of the act committed needed to be necessarily "lewd" in order to sustain a conviction under section 288. (*Martinez*, *supra*, at p. 438.) The intermediate appellate court decided the question

in the affirmative (*ibid.*), concluding that instructional error occurred because the jury was not apprised that the touching required under section 288 must be lewd in character. (*Martinez, supra,* at p. 441.) The Supreme Court disagreed, concluding "that section 288 is violated by 'any touching' of an underage child committed with the intent to sexually arouse either the defendant or the child." (*Id.* at p. 442; see also *id.* at pp. 445, 449.) It noted, however, that the specific kind of touching was relevant to the trier of fact's determination, based upon all the circumstances, of whether the defendant performed the act with the requisite sexual intent. (*Id.* at p. 445.)

In the course of its discussion, the court explained that "the 'gist' of the [section 288] offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act. [Citation.]" (*Martinez, supra*, 11 Cal.4th at p. 444.) It noted that "throughout the statute's history, the cases have made clear that a 'touching' of the victim is required, and that sexual gratification must be *presently intended* at the time such 'touching' occurs." (*Ibid.*, italics added.) Elsewhere in the opinion in emphasizing that the specific sexual intent of the actor controlled, the court held that "[i]n all cases arising under the statute, the People are required to prove that the defendant touched the child in order to obtain *immediate* sexual gratification." (*Id.* at p. 452, italics added.) And in a footnote in which the court rejected the defendant's argument that the act committed must be lewd in nature by comparing section 288 to other proscribed sex crimes, it explained that "[n]one [of the other statutes cited by the defendant] require[s] both actual physical contact with the victim and a *present intent* to receive or give *immediate* sexual gratification. [Citations.]" (*Martinez, supra*, at p. 451, fn. 17, italics added.)

Our high court used similar language in a case that preceded *Martinez* to convey that the specific intent required to support a lewd act committed on a child in violation of section 288 was one in which the defendant "intended to give or receive *immediate* sexual gratification from that activity." (*People v. Mickle* (1991) 54 Cal.3d 140, 176,

italics added.) And the Supreme Court, citing *Martinez*, *supra*, 11 Cal.4th at pp. 444-452, reiterated that the elements of a forcible lewd act on a child consist of the physical touching of "an underage child . . . by means of force, violence, duress, or menace, *for the present and immediate purpose of sexually arousing or gratifying the toucher or the victim*." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1171, see also *People v. Lopez* (1998) 19 Cal.4th 282, 295, conc. opn. of Baxter, J. [evidence, including the defendant's own admission, showed that he touched the child victim "for the purpose of obtaining immediate sexual gratification"].)

Based upon the foregoing, we conclude that the specific intent element of a lewd and lascivious act on a child is one in which the defendant acts with "a present intent to receive or give immediate sexual gratification. [Citations.]" (*Martinez*, *supra*, 11 Cal.4th at p. 451, fn. 17.) In this regard, we reject the suggestion of the prosecution and trial court that the *Martinez* holding that the intended sexual gratification must be one that is "immediate" was merely dictum. The Supreme Court in *Martinez*, as well as in its prior and subsequent decisions noted above, has held clearly that the act by the defendant must be accompanied by the specific intent to immediately sexually gratify the defendant or the victim. Therefore, a violation of section 288 is not established where the evidence shows that there was no intent for present gratification when the touching occurred, but (as the trial court expressed it) merely "the intent . . . to get some sort of delayed sexual gratification[,] i.e. [,] . . . a fantasy that could later be acted out in private."

It remains for us to determine whether the prosecution, in fact, misstated the law by arguing, contrary to *Martinez*, that it was not required to prove that defendant intended to achieve immediate gratification at the time of the touching as long as some future gratification was intended. The Attorney General argues that, reading the prosecution's argument in context and in its entirety, there was no misstatement of the law. He asserts that the prosecutor correctly stated the law that, although intent to sexually arouse the defendant or the victim at the time of the touching is required, *actual* arousal need not be

accomplished. This is, of course, a correct statement of the law. (*People v. Bronson* (1924) 69 Cal.App. 83, 86.) We, however, disagree with the Attorney General's view that the prosecution here did not misstate the law.

It is clear that the prosecutor did properly tell the jury that actual sexual arousal was not required in finding defendant guilty of committing a lewd or lascivious act. In addressing the element of intent, he argued correctly that "[i]t doesn't actually have to arouse them at the time . . . . You don't actually have to be literally sexually stimulated by it." And the statement that immediately preceded the first defense objection—"though some people think that specific intent to somehow be sexually aroused means it has to be at that time and it doesn't"—was ambiguous. It could have meant either that actual arousal was not required—a proper argument—or that the intent at the time might be for the act to arouse the actor at some future date. (Cf. *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215 [noting that prosecutor's remark was ambiguous and could have been construed as proper comment on evidence or as improper attempt to absolve People's obligation to overcome reasonable doubt on all elements].) But there is no doubt that the prosecutor's argument sandwiched between these two statements was improper under *Martinez, supra*, 11 Cal.4th 434: "If it's going to be, for example, masturbatorial [*sic*] material later, if touching is going to somehow bring out a fantasy that will allow you to have some future sexual purpose, you can see he is touching a child for his lust, passions for sexual desire."

Further, after the court overruled defense counsel's initial objection, the prosecutor resumed his argument that included both correct and incorrect statements of the law: "What you will read in the instructions [is] it doesn't have to be arousal at the time. So does he have a purpose, intent, a desire to . . . somehow satisfy the lust, passions or sexual desires? Those can be at different times. [¶] I am touching a child because I get a stronger connection, makes me feel young and vibrant and that makes me more sexually fulfilled. That is simply enough. A purpose." We therefore conclude that the

prosecution's opening argument included a misstatement of the law. It remains for us to decide whether this prosecutorial error compels reversal.

3. *Whether error was harmless*

Although the prosecutor misstated the law during opening argument by suggesting, contra to *Martinez*, *supra*, 11 Cal.4th 434, that defendant need not have intended to sexually arouse himself or Katie at the time of the act if he had the intent to obtain delayed gratification at a later time, " '. . . the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1001, internal citations omitted.) After reviewing the comments in the context of the entirety of the prosecutor's argument (*People v. Dennis*, *supra*, 17 Cal.4th at p. 522) to determine how a reasonable juror could or would have understood them (*People v. Benson*, *supra*, 52 Cal.3d at p. 793), we find that the prosecutorial error was harmless.

The objectionable comments were very brief. They comprise only a few lines of a 31-page reporter's transcript of the prosecution's opening argument. Included in the opening argument was extensive discussion of the evidence from which the jury could reasonably infer that defendant had a sexual purpose at the time he touched Katie. This included Katie's testimony that defendant touched her on her bare thigh underneath her shorts, including touching the edge of her underwear. He argued, "Obviously[,] someone touching . . . outside of [Katie's] vagina along her underwear has a sexual purpose. It has a sexual connotation." The prosecutor argued further that defendant essentially confessed to the crime during the pretext call. He asserted (correctly) that defendant admitted the occurrence of two of the three incidents, and that only the extent and duration of the touchings were disputed. And he argued that Katie had presented credible and consistent testimony that the jury should accept; and, conversely, defendant's testimony, including his motive to fabricate and the inconsistencies with his statements during the pretext call, was not worthy of belief.

Moreover, any negative impact of the prosecution's initial comments in opening argument may have been mitigated to some degree by the trial judge's admonition during the argument—in response to defendant's objection—that the court would provide the jury with specific instructions on the law for it to consider and follow.[13] And in its instructions given after argument, the court—consistently with CALCRIM No. 200—stated that the jury was required to follow the law, and that if it believed the attorneys' comments conflicted with the court's instructions, it should follow the law as the court read it.

Further, any misstatement or ambiguity concerning the law that might have been created by the prosecutor's opening argument was countered by the argument of defense counsel. Towards the beginning of his argument, defense counsel indicated that the "prosecutor told you that the law was, that the sexual gratification, well that could be sometime later. It doesn't have to be at the time you touched the child. [¶] . . . [T]he California Supreme Court . . . states the cases have made it clear that a touching of the victim is required and that sexual gratification must be presently intended at the time the touching occurred, and for [the prosecutor] to get up there and say the law is something different, frankly scares me to death."

And in the prosecutor's closing argument, he himself clarified that the intent to arouse and the unlawful act needed to coincide. He argued: "I want to clear up the legal issue of specific intent. Look, if somehow I was insinuating that there doesn't have to be a connection, or the court will say a union or joint operation of the touching with some sexual intent, that's not what I am trying to say. What I am saying, it does have to be gratified at that moment and that's what the instruction will tell you. He has to have a

[13] The court gave an incorrect admonition that "[c]ounsel are permitted to comment upon their respective interpretations of what they believe the law is under the facts of this case . . . ." Nonetheless, the court did advise the jury that it was to follow the law as provided in the court's instructions.

purpose that's sexual. Okay. But he doesn't actually have to . . . masturbate[] or ejaculate or try to literally have the woman have some sexual pleasure at that moment. It just has to be sexual purpose or desire. That's all I am suggesting. Okay. [¶] He is fulfilling his sexual fantasies by touching her. That is his purpose and that's sufficient." These comments could have been reasonably construed as advising the jury to follow the law that in order to find defendant guilty of committing a lewd act on a child under section 288(c)(1), the jury was required to find that at the time of the touching, he had the present intent to arouse himself or Katie.

Moreover, the court properly instructed the jury concerning the elements of the offense of the commission of a lewd or lascivious act on a child in accordance with CALCRIM No. 1112. That instruction apprised the jury that the prosecution was required to prove that defendant willfully touched a part of Katie's body "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or [Katie] . . ." (See *Martinez, supra*, 11 Cal.4th at p. 442, fn. 5, 452.) The court also properly advised the jury that actual arousal, appeal to, or gratification of the lust, passions or sexual desires of defendant or Katie was not required to conclude that the offense had been committed. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502.) The court's instruction pursuant to CALCRIM No. 1112 cannot be fairly read as suggesting that the intent of defendant to arouse himself may occur at a time later than the commission of the willful act of touching the child.

We are mindful of our Supreme Court's admonition that "juries generally understand that counsel's assertions are the 'statements of advocates.' Thus, argument should 'not be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made. [Citations.]' [Citation.] '[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less

damaging interpretations.' [Citations.]" (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1224, fn. 21.) With this admonition in mind, when we view the challenged comments of the prosecutor in the context of his entire argument—taking into consideration defense counsel's argument, the court's advisement that it would instruct the jury on the law, the prosecutor's closing argument, and the instructions given by the court—we find the prosecutorial error harmless. Since the jury was properly instructed as to the elements of the charged offenses under section 288(c)(1), we are loath to assign prejudicial error to the trial court's refusal to give a special instruction at defense counsel's request that defendant's intent to arouse had to occur at the time of the lewd act.[14]

Based upon our review of the entire record, we cannot conclude that " 'there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " (*People v. Cunningham, supra,* 25 Cal.4th at p. 1001.) Accordingly, we reject defendant's contention that the judgment must be reversed due to prosecutorial error.

III. *Mandatory Registration as a Sex Offender*

As a consequence of his conviction of violating section 288(c)(1), defendant was ordered by the court to register as a sex offender pursuant to former section 290, which required that anyone convicted of certain sex offenses, including violations of section 288, register for life as a sex offender.[15] Relying on *People v. Hofsheier* (2006) 37

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[14] The fact that the court may not have expressly recognized that the prosecutor's argument—which it termed "novel"—was erroneous does not persuade us that the prosecutorial error, combined with the failure of the court to give a special instruction, was prejudicial. The court did not adopt the prosecution's "novel" theory, and, as mentioned, defense counsel rebutted it in argument and the prosecutor seemingly backed away from it in his closing argument.

[15] At the time defendant was sentenced, section 290 subdivision (a)(1)(A) provided: "Every person described in paragraph (2), for the rest of his or her life while residing in California . . . , shall be required to register." (See Stats. 2006, ch. 337, § 11, p. 2133.) Paragraph (2) listed 37 Penal Code sections and subdivisions, including section

(continued)

Cal.4th 1185 (*Hofsheier*), defendant contends that this was error. We conclude that defendant's suggestion that the holding of *Hofsheier* should be extended to the circumstances presented here is unwarranted; we therefore reject his claim of error.

In *Hofsheier*, the defendant pleaded guilty to a violation of section 288a, subdivision (b)(1). (*Hofsheier*, *supra*, 37 Cal.4th at p. 1192.)[16] The conduct underlying the conviction consisted of the defendant, a 22-year-old man, engaging in voluntary oral copulation with a 16-year-old girl. (*Hofsheier*, *supra*, at pp. 1192, 1193.) The Supreme Court contrasted the consequences of a conviction for a violation of section 288a, subdivision (b)(1), under which sex offender registration was mandatory, with those of a conviction of unlawful sexual intercourse with a minor under 18 in violation of section 261.5. (*Hofsheier*, *supra*, at pp. 1194-1196.) It noted that while registration under section 290 was not considered a form of punishment, "it imposes a 'substantial' and 'onerous' burden [citations]." (*Hofsheier*, *supra*, at p. 1197.) In addressing the defendant's equal protection challenge to mandatory registration, the court first determined whether the two groups—i.e., persons convicted of voluntary oral copulation with a minor (§ 288a) and those convicted of voluntary sexual intercourse with a minor (§ 261.5)—were similarly situated for purposes of the statute being challenged, concluding that they were. (*Hofsheier*, *supra*, at pp. 1199-1200.) Second, after noting that the defendant bore the burden of establishing that there was no rational basis for the distinction between the two groups insofar as sex offender registration was concerned (*id.*

288, the conviction of which offenses required sex offender registration. (See Stats. 2006, ch. 337, § 11, p. 2135.) Under the current version of the statute, a conviction under section 288 requires sex offender registration. (§ 290, subd. (c).)

[16] "Except as provided in Section 288, any person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year." (§ 288a, subd. (b)(1).)

at p. 1201), the court held "that the statutory distinction in section 290 requiring mandatory lifetime registration of all persons who, like [the] defendant here, were convicted of voluntary oral copulation with a minor of the age of 16 or 17, but not of someone convicted of voluntary sexual intercourse with a minor of the same age, violates the equal protection clauses of the federal and state Constitutions." (*Id.* at p. 1207, fn. omitted.) It therefore held that mandatory registration for a violation of section 288a, subdivision (b)(1) violated the constitutional guarantee of equal protection. (*Hofsheier*, *supra*, at pp. 1192-1193, 1207.) The court directed that the case be remanded to allow the trial court to determine whether to exercise its discretion to order registration under section 290, former subdivision (a)(2)(E). (*Hofsheier*, *supra*, at pp. 1208-1209.)

The holding in *Hofsheier* does not mandate a similar conclusion here. First, the Supreme Court's holding was limited to mandatory sex offender registration for violating section 288a, subdivision (b)(1). The high court made it clear repeatedly in its opinion that its analysis was limited to an equal protection challenge involving mandatory registration for one convicted of voluntary oral copulation with a minor 16 or 17 years old (§ 288a, subd. (b)(1)), as compared with discretionary registration for one convicted of voluntary sexual intercourse with a 16- or 17-year-old minor (§ 261.5). (See, e.g., *Hofsheier*, *supra*, 37 Cal.4th at pp. 1192, 1194, 1195, 1196, 1197, 1198, 1200, 1201, 1204, 1205, 1206, 1207.)

Second, the high court made it plain that its equal protection analysis was concerned with circumstances in which the act (i.e., oral copulation with a minor, prohibited by section 288a, subd. (b)(1)) is both voluntary and the victim is 16 or 17 years old. As the court explained: "In its present form, section 288a provides a graduated scale of punishment depending on the age of the parties and the presence or absence of force or other coercion. . . . Although section 288a[, subdivision] (b)(1) applies to all acts of oral copulation with a person under the age of 18, other provisions provide for greater punishment for involuntary acts and acts involving younger victims.

Thus, section 288a, subdivision (b)(2), provides that a person over 21 years of age who engages in oral copulation with someone younger than 16 years of age is guilty of a felony, and subdivision (c)(1) provides for still greater punishment—three to eight years' imprisonment—for anyone who engages in oral copulation with someone under the age of 14 who is more than 10 years younger than the defendant. Other subdivisions specify imprisonment of three to eight years for forcible or involuntary oral copulation. (§ 288a, subds. (c)(2) & (3), (f).) And section 288 provides that any lewd or lascivious act (including oral copulation) with a child under the age of 14 is a felony punishable by three to eight years' imprisonment. Consequently, section 288a[, subdivision] (b)(1) functions as the primary offense (as opposed to being a lesser included offense) in only two instances: (1) when, as here, the act of oral copulation is voluntary and the victim is 16 or 17 years old; and (2) when the act is voluntary, the victim is 14 or 15 years old, and the perpetrator is not over 21 years old. *We are concerned here with the validity of the mandatory registration requirement for the first category—voluntary acts of oral copulation when the victim is 16 or 17 years of age.*" (*Hofsheier*, *supra*, 37 Cal.4th at pp. 1194-1195, italics added.)

In this instance, we are dealing with mandatory registration based on a conviction under section 288(c)(1), i.e., committing a lewd act on a child who is 14 or 15 years old where the perpetrator is at least 10 years older than that child. Not only does that particular provision contain specific protection for minors of an age group younger than the victim involved in *Hofsheier*, it also (unlike § 288a) contains a specific intent requirement. And, unlike *Hofsheier*, there is no relevant similarly situated group for which mandatory registration is not required that may serve as the basis for an equal protection challenge here. An adult who is at least 10 years older than the victim who commits a sex offense of oral copulation on a 14- or 15-year-old minor victim may be charged with a violation of section 288(c)(1), just as defendant was charged in this case. Defendant's group, contrary to his argument here, is not similarly situated with those

convicted of voluntary copulation of a 16- or 17-year-old victim in violation of section 288a, subdivision (b)(1). Defendant's equal protection challenge thus fails because he cannot establish that he, by virtue of his section 288(c)(1) conviction and the mandatory registration resulting therefrom, is subjected to unequal treatment because there is a similarly situated group for which no such mandatory registration is a consequence of the sex offense conviction.

This conclusion is supported further by the *Hofsheier* court's discussion of *People v. Mills* (1978) 81 Cal.App.3d 171 (*Mills*), an earlier appellate decision that rejected a convicted sex offender's equal protection challenge. In *Mills*, the defendant, convicted of committing a lewd act on a child under the age of 14 in violation of former section 288, argued unsuccessfully that mandatory sex offender registration for that offense was unconstitutional because convictions of certain types of sex offenses were subject to sex offender registration while others were not. (*Mills*, *supra*, at pp. 180-181.) As explained by the *Hofsheier* court, "The Court of Appeal held that the Legislature could reasonably require all persons convicted of sexual offenses involving victims under the age of 14 to register without requiring all sex offenders to register. We agree with the Court of Appeal in *Mills* that the defendant there failed to show a denial of equal protection as to adults convicted of lewd acts with minors less than 14 years of age because all adults convicted of crimes requiring sexual acts with minors of that age were required to register. (See §§ 288, 288a, subd. (c), 290, [former] subd. (a)(2).) But *Mills* does not affect the decision in this case, for, in contrast to *Mills*, defendant here can point to similarly situated persons, those convicted of voluntary sexual intercourse with minors 16 to 17 years old, who are not required to register." (*Hofsheier, supra*, 37 Cal.4th at pp. 1202.) By parity of reasoning, the Legislature reasonably could conclude that persons convicted of sex offenses against minors over 14 and less than 16 years of age should be subjected to mandatory registration, while other persons (such as those discussed in

Hofsheier) convicted of sex offenses involving minors who are older (i.e., 16 or 17) should not have registration be a necessary consequence of their conviction.

Moreover, our rejection of defendant's equal protection challenge here is bolstered by a recent decision of the Second District Court of Appeal, Division Seven. In *People v. Manchel* (2008) 163 Cal.App.4th 1108 (*Manchel*), the defendant, citing *Hofsheier*, challenged the sex offender registration requirement that arose out of his conviction of oral copulation of a 15-year-old girl in violation of section 288a, subdivision (b)(2). (*Manchel*, *supra*, at p. 1110.) His conviction arose out of a plea bargain; he was initially charged, inter alia, with committing a lewd act on a 14- or 15-year-old minor more than 10 years younger than he in violation of section 288(c)(1), the crime defendant was convicted of here. (*Manchel*, *supra*, at pp. 1110-1111.) The court in *Manchel* rejected the defendant's equal protection challenge, declining the invitation to extend *Hofsheier*.

The court distinguished the case from *Hofsheier* on the bases that the defendant's victim was 15 (not 16, as in *Hofsheier*), and the defendant was convicted under section 288a, subdivision (b)(2) (rather than under § 288a, subd. (b)(1)). (*Manchel*, *supra*, 163 Cal.App.4th at p. 1112.) The application of section 288 impacted the *Manchel* court's equal protection analysis: "Both oral copulation and sexual intercourse are lewd or lascivious acts when committed by individuals of the ages and age disparities set forth in section 288. [Citations.] . . . If the child is 14 or 15 years, section 288 comes into play only if the perpetrator is at least 10 years older than the victim. In that event, section 288(c)(1) applies . . . . By the statute's terms, if the child is older than 15, or if the child is 14 or 15 and the perpetrator is not at least 10 years older, then the perpetrator cannot be prosecuted under section 288." (*Manchel*, *supra*, at p. 1113.)

The *Manchel* court concluded that the fact that all offenders convicted under section 288 were subjected to mandatory registration "fundamentally alters the equal protection analysis here." (*Manchel*, *supra*, 163 Cal.App.4th at p. 1114.) It held therefore that the reasoning of *Hofsheier* could not be employed to support the

defendant's constitutional challenge to the registration requirement: "This core element of the *Hofsheier* equal protection analysis—that if he had gone ahead and had intercourse with the victim he could not have been subjected to mandatory registration, but because he engaged in oral copulation he was—does not hold true for Manchel. Because Manchel's victim was 15 years old and he was at least 10 years older than she was, whether Manchel was subject to mandatory registration did not hinge on the distinction of whether the sexual conduct he engaged in with her was oral copulation or sexual intercourse. Either act constituted a lewd and lascivious act under section 288[(c)(1)] and subjected Manchel to mandatory lifetime registration as a sex offender. (§§ 288[(c)(1)]; 290, subd. (c).) In other words, in contrast to *Hofsheier*, *supra*, 37 Cal.4th 1185, here the nature of the sexual act was not determinative of whether Manchel was subject to mandatory registration: whether sexual intercourse or oral copulation took place, his conduct subjected him to mandatory registration under the Penal Code." (*Manchel*, *supra*, at p. 1114.)

Based upon the foregoing, we conclude that the reasoning of the Supreme Court in *Hofsheier* is inapposite here. Accordingly, we reject defendant's claim that mandatory registration as a consequence of his conviction under section 288(c)(1) is unconstitutional.

DISPOSITION

The judgment is affirmed.

Duffy, J.

WE CONCUR:

Mihara, Acting P.J.

McAdams, J.

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DALE THOMAS ANDERSON, Defendant and Appellant.	H031106 (Santa Clara County Super.Ct.No. CC509198) ORDER GRANTING PARTIAL PUBLICATION

Respondent has requested that our opinion, filed October 15, 2008, be certified for partial publication (as to pt. III of the Discussion). It appearing that a portion of our opinion meets the standards set forth in California Rules of Court, rule 8.1105(c)(2), therefore, the motion for partial publication is GRANTED. The opinion is ordered published in the Official Reports with the exception of the following: Factual Background, Part I (Prosecution Evidence) and Part II (Defense Witnesses); Discussion, Part I (Issues on Appeal), and Part II (Claim of Prosecutorial Error).

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DUFFY, J.

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MIHARA, ACTING P.J.

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MCADAMS, J.

Trial Court:	Santa Clara County Superior Court No. CC509198
Trial Judge:	Hon. Douglas A. Southard
Attorneysfor Defendant and Appellant:	J. Courtney Shevelson Law Offices of J. Courtney Shevelson
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People v. Anderson
No. H031106