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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MAURICIO ALFONSO MEJIA, Defendant and Appellant.	B193804 (Los Angeles County Super. Ct. No. VA091721)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael L. Schuur, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part, reversed in part and remanded.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts B-H of the Discussion.

Defendant and appellant Mauricio Alfonso Mejia was charged with committing nine counts of sexual abuse against his granddaughter, the victim in this appeal, when she was 13 to 14 years old. The jury found him guilty of eight of those charges: continuous sexual abuse of a child under 14 years of age in violation of Penal Code section 288.5, subdivision (a);[1] six counts of committing a lewd act on a child of 14 or 15 years of age in violation of section 288, subdivision (c); and forcible rape in violation of section 261, subdivision (a)(2). Defendant was sentenced to state prison for 24 years, consisting of the midterm of 12 years for the continuous sexual abuse as base term, with six consecutive sentences of eight months (one-third of the two-year midterm sentences) on the lewd act convictions, plus a full consecutive upper term sentence of eight years on the rape conviction.

In his timely appeal, defendant contends: (1) there was constitutionally insufficient evidence to support his convictions for continuous sexual abuse, two of the lewd act convictions (counts 2 and 4 concerning acts in September and October 2004) and the rape conviction; (2) as to the continuous sexual abuse offense, the trial court erred in giving the pattern jury instruction indicating the prosecution need not prove the offense occurred on exactly the date alleged; (3) the trial court erroneously failed to instruct on attempted rape as a lesser included offense of rape; (4) the trial court erroneously failed to instruct on lewd conduct as a lesser included offense of continuous sexual abuse; (5) the trial court abused its discretion in admitting evidence of uncharged sexual offenses by defendant against the victim's mother, which violated defendant's federal constitutional right to due process; (6) the prosecutor committed misconduct during her rebuttal argument by urging the jury to consider punishment; (7) the trial court improperly imposed a full consecutive upper term sentence for the rape conviction based on its erroneous understanding that such a term was mandatory under section 667.6, as that provision provided at the time defendant committed the relevant offenses;

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[1] All statutory references shall be to the Penal Code, unless stated otherwise.

and (8) the imposition of an upper term sentence for the rape conviction violated defendant's Sixth Amendment right to a jury trial under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

As we explain, defendant's challenges to the sufficiency of evidence supporting his continuous sexual abuse conviction (count 1), as well as his lewd act conviction for conduct in September 2004 (count 2), are well taken because there was no substantial evidence that the assaults occurred within the statutory time periods. There was, however, constitutionally sufficient evidence supporting his conviction for the October 2004 lewd act and the rape. Based on our reversal of count 1, we need not reach the two separate claims of instructional error concerning that offense. We find any error in failing to instruct on attempted rape as a lesser offense to be harmless beyond a reasonable doubt. There was no error or due process violation regarding the admission of uncharged sexual offenses. The claim of prosecutorial misconduct based on a comment during rebuttal argument was forfeited. Concerning the application of section 667.6 at sentencing, we accept the Attorney General's concession that remand is necessary to permit the trial court to resentence on the rape conviction under the law as it existed at the time of the offense. Finally, remand is also required on the *Blakely* issue because the trial court relied on aggravating factors that were not found by a jury to impose the upper term on the rape conviction.

STATEMENT OF FACTS

A. Prosecution Evidence

The victim was born on September 18, 1990, and was 15 years old at the time she testified. Defendant is her grandfather. The victim lived with her parents and brothers in Huntington Park. Defendant began sexually molesting the victim in 2004. The incidents occurred in her own home and in defendant's home in Los Angeles on weekday

afternoons when defendant watched her after school. The first incident occurred at home, when the victim was in eighth grade. She was in her bedroom reading her yearbook. Defendant entered the room and asked about the yearbook. The victim said that she was looking at it because she was getting ready to graduate from middle school. When she mentioned that her knee was hurting, defendant began massaging her raised knee—but "went lower and started touching [her] vagina" with his hand over her clothes. Before leaving, he told her "not to say anything."

The second instance of sexual abuse occurred one or two days later, at defendant's house. The victim was in the living room, watching television and petting the dog. Defendant began petting it too, but proceeded to rub the victim's vagina over her clothes. Defendant stopped when the victim's father arrived to pick her up. From that time until January of 2005, defendant would sexually molest her in a similar fashion "two or three days a week." The abusive incidents occurred "from June 2004 to January 2005." When defendant tried to reach his hand "inside" her pants, however, the victim would try to push him away. She did not tell anyone about defendant's conduct because she felt ashamed and because he had warned her not to—he told her that "it really wouldn't matter" if she reported it "[b]ecause nobody would believe [her]."

On an afternoon in January 2005, the victim was on her bed listening to music. She was wearing her school uniform, consisting of a white shirt and blue pants. Defendant opened her bedroom door, entered the room, closed the door behind him, and said hello. Suddenly, defendant climbed on top of the victim, pulled down her pants and underwear, and unzipped his pants. He put his knees between her legs and his penis in her vagina. She could not push him off. When he left the room, she felt dirty and took a shower. She did not tell her parents what defendant had done.

On cross-examination, the victim stated that defendant molested her approximately 10 times in 2004, while she was in eighth grade. She began ninth grade "around July" that year. That is, "between June and July" defendant molested her 10 times. The victim testified on redirect examination that during the 12-week period from

June through August defendant molested her more than three times. In September 2004, defendant molested her more than two times; he did the same in October. On recross-examination, the victim denied testifying that defendant did not molest her at all in October of 2004. Rather, he did so "about once." When defense counsel asked her to state the number of times defendant had molested her in October, the victim stated: "I don't really remember much of October."

Regarding the January 2005 rape incident, the victim testified that her legs had been together, but defendant "pulled them open" and "pushed [her] knees back," before penetrating her. The penetration was painful.

On October 4, 2005, the victim spoke to her friend Elisa at school. When Elisa confided that she had been molested when she was little, the victim told her that she "had a similar situation." After school, the victim went to Elisa's home and told her friend that defendant and her uncle had molested her. The victim explained that she was "tired of her life" and could not "take it any more" because defendant and her uncle sexually molested her—they had "sexual relationships with her." The victim did not want to return to her own house because defendant molested her there. Elisa advised the victim to speak up and tell people about the abuse because it would not stop until she did. The victim agreed and told Elisa's mother. Elisa's mother telephoned the victim's mother and told her what the victim had said. When the victim's mother arrived, the victim told her about the abuse. The victim's mother took her home and reported the matter to the police.

The victim's mother testified that defendant, her father, had molested her when she was six or seven years old. Whenever her mother was out of town, defendant would enter her bedroom and touch her vagina while she was in bed. He persisted despite her telling him "no." At the time, defendant told her to keep his behavior a secret or "he would kill [her] grandmother or hurt [her] mom." Defendant also molested her in the swimming pool while pretending to give swimming lessons and after giving her a bath. On occasion, he would penetrate her with his penis. The molestations continued until she

was 12 or 13 years old. They ended when she grabbed a pair of scissors and threatened to "chop his balls off" if he touched her again. She let him watch the victim because she thought he had "changed" and become "a different person."

B. Defense Evidence

The defense sought to challenge the victim's credibility about the sexual abuse. Defendant's 20-year-old daughter, Martha, testified that she lived in defendant's house during her teenage years. Defendant did not sexually molest her. She had a close relationship with the victim, who would typically confide her secrets to Martha. At the time of defendant's arrest, the victim told her that defendant did not "take her virginity" and "never penetrated" her. Martha was not aware her father engaged in any inappropriate conduct toward the victim.

DISCUSSION

A. Sufficiency of the Evidence Claims

Defendant contends there was constitutionally insufficient evidence to support his convictions for continuous sexual abuse (count 1), two of the lewd act convictions (counts 2 and 4), and the rape conviction (count 9). As to the continuous sexual abuse conviction, defendant argues there was no solid, credible evidence that three acts of molestation occurred over the three-month duration period required by section 288.5, subdivision (a). As to the lewd act conviction for conduct in September 2004 (count 2), defendant argues there was no solid, credible evidence the molestation occurred after the victim's 14th birthday, as alleged. As we explain, these two claims have merit. We reject, however, defendant's sufficiency of the evidence challenges to the lewd act conviction for conduct in October 2004 and to the rape conviction.

"'In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' [Citations.] We apply an identical standard under the California Constitution. [Citation.] 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.] The same standard also applies in cases in which the prosecution relies primarily on circumstantial evidence. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1175.)

We therefore review the record in the light most favorable to the prosecution to determine whether the challenged convictions are supported by substantial evidence, meaning "evidence which is reasonable, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) In contrast, "mere speculation cannot support a conviction. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 35.) "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young, supra,* 34 Cal.4th at p. 1181.)

Defendant was charged and convicted of continuous sexual abuse of the victim "on or between June 1, 2004 and September 17, 2004." Section 288.5, subdivision (a) provides: "Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, *not less than three months in duration,* engages in three or more acts of substantial sexual conduct *with a child under*

the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct, as defined in Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child . . . ." (Emphasis added.) Therefore, under the statute's plain terms, in addition to the requirement that the victim be less than 14 years old at the time of the offense, the prosecution must prove defendant committed the minimum number of proscribed acts within the specified time period. "Section 288.5 relates to 'continuous sexual abuse' and accordingly requires at least three acts of sexual misconduct with the child victim over at least three months to qualify for prosecution of persons who are either residing with, or have 'recurring access' to, the child." (*People v. Rodriguez* (2002) 28 Cal.4th 543, 550; *People v. Vasquez* (1996) 51 Cal.App.4th 1277, 1287 ["the language of section 288.5 indicates the statute is violated if the defendant (1) resided with, or had recurring access to, a child under fourteen, and (2) committed three or more acts of sexual molestation of the child, and (3) three or more months passed between the first and the last act of molestation"]; *People v. Whitham* (1995) 38 Cal.App.4th 1282, 1297 ["In the case of a defendant charged with violating section 288.5, the requirement of proof beyond a reasonable doubt [citation] means that each juror must find, beyond a reasonable doubt, that the defendant engaged in at least three acts of sexual abuse with the child victim within the prescribed time frame."].)[2]

Our task, therefore, is to determine whether the evidence below supported a reasonable inference that at least three months elapsed between the first and third time defendant sexually abused the victim before her 14th birthday on September 18, 2004. Presuming in support of the judgment the existence of every fact the trier of fact could

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[2] Consistent with the requirements of section 288.5, subdivision (b), the trial court gave Judicial Council of California Criminal Jury Instructions (2006) CALCRIM No. 1120, which included as an element that the jury must find "[t]hree or more months passed between the first and last acts."

reasonably deduce from the evidence, we find no reasonable, credible, solid evidence to support a nonspeculative inference that the three-month minimum time period element was satisfied. Construing the victim's testimony in the light most favorable to the People's case, the evidence showed defendant first abused her sometime in June 2004, when she was in eighth grade. There were 10 instances of abuse by defendant between June and the start of ninth grade sometime "around July" of that year. The victim also testified that during the 12-week period from June through August 2004, defendant molested her more than three times. In September of that year, defendant molested her at least twice. While on direct examination, the victim testified generally that defendant molested her "two or three days a week," but she clarified that defendant did not molest her every week within that time period.

Accordingly, the only reasonable inference permitted by the evidence was that defendant's abuse began sometime in June and continued to some date in September—but the jury could only speculate that the first incident occurred early enough in June to satisfy the 90-day requirement expiring on September 17, 2004. Indeed, there was no evidence as to when defendant abused her in September, including whether the abuse occurred before and/or after her birthday. As defendant correctly argues, although there was ample evidence that at least three sexual qualifying offenses occurred during the charging period, there was no substantial evidence that at least three months elapsed between the first and third offense committed against her as a 13-year-old.

The Attorney General argues section 288, subdivision (a) does not include a strict three-month minimum time period as an element of the offense, but that the statute should be read as merely requiring proof that an act of sexual abuse occurred in three successive months. Alternatively, the Attorney General argues we should construe the statute's three-month requirement as a mere "charging limitation," designed to prevent the prosecution from seeking multiple convictions for separate sexual offenses occurring within the period alleged for the section 288.5, subdivision (a) offense, but permitting a conviction for such continuous sexual abuse based on a minimum of three acts of sexual

abuse occurring *any time* within the time period alleged. As we explain, neither interpretation comports with the statute's plain meaning, as read in light of the legislative intent.

"In construing a statute, we look first to the statutory language." (*People v. Vasquez, supra*, 51 Cal.App.4th at p. 1284, citing *People v. Boyd* (1979) 24 Cal.3d 285, 294.) "The language is construed in the context of the statute as a whole and the overall statutory scheme, and we give 'significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose. [Citation.]' [Citations.] The intent of the law prevails over the letter of the law, and '"the letter will, if possible, be so read as to conform to the spirit of the act." [Citation.]' [Citation.]" (*People v. Canty* (2004) 32 Cal.4th 1266, 1276-1277.)

As our colleagues in Division 3 have explained: "The words and syntax of the statute set forth the following elements: the defendant (1) must have (a) resided with, *or* (b) had recurring access to, a minor less than fourteen years of age, *and* (2) must have engaged in three or more acts of substantial sexual conduct or lewd and lascivious conduct with the minor over a period of time not less than three months in duration. The requirement of a three-month period of time is grammatically attached to the requirement of three or more acts, not to the requirement of a shared residence or recurring access." (*People v. Vasquez, supra,* 51 Cal.App.4th at p. 1284 [holding section 288.5, subdivision (a) does not include as a necessary element three *continuous* months of access to the child victim].) Had the Legislature intended to define the relevant time period as a minimum of three acts occurring in three successive months, it would have made little sense, logically or grammatically, to employ the phrase "over a period of time, not less than three months in *duration*." (§ 288.5, subd. (a), emphasis added.)

Indeed, such an interpretation would deprive the word "duration" of its significance in relation to the legislative purpose. As our Supreme Court has pointed out: "The Legislature's accompanying statement of purpose declared that 'there is an immediate need for additional statutory protection for the most vulnerable among our

children, those of tender years, some of whom are being subjected to continuing sexual abuse by those commonly referred to as "resident child molesters." These molesters reside with, *or have recurring access to*, a child and repeatedly molest the child over a prolonged period of time but the child, because of age or the frequency of the molestations, or both, often is unable to distinguish one incident from another . . . , and as a consequence prosecutors are unable to . . . overcome . . . constitutional due process problems . . . ." [Citation.]" (*People v. Rodriguez, supra,* 28 Cal.4th at p. 546.) It has been recognized that "[t]he text of section 288.5 leaves no doubt the Legislature intended to create a course-of-conduct offense" (*People v. Whitham*, *supra,* 38 Cal.App.4th at p. 1295), with the course of conduct statutorily defined as "at least three acts of sexual abuse with the child victim within the prescribed time frame." (*Id.* at p. 1297.) An interpretation that ascribed the three-month time period to a mere "charging limitation" would be entirely inconsistent with the statute's overarching legislative aim, as it would permit a conviction for recurring conduct over a "prolonged period," based on three acts occurring in as short a period as a single day—as long as the acts happened sometime "within" the time period alleged. Thus, in keeping with the legislative aim of punishing a course of conduct over a *prolonged period*, it follows that the Legislature's use of the phrase "over a period of time, not less than three months in duration" in direct relation to the "three or more acts of substantial sexual conduct" was meant to set the minimum temporal scope of the proscribed course of conduct.

Contrary to the Attorney General's assertion, precedent recognizing that generic testimony of abuse can suffice to support a section 288.5 conviction, does not require a more liberal reading of the statute's three-month limitation. "'[E]ven generic testimony (e.g., an act of intercourse "once a month for three years") outlines a series of *specific*, albeit undifferentiated, incidents, *each* of which amounts to a separate offense, and *each* of which could support a separate criminal sanction.'" (*People v. Matute* (2002) 103 Cal.App.4th 1437, 1445, quoting *People v. Jones* (1990) 51 Cal.3d 294, 314.) As we have explained, the prosecution need not prove the exact dates of the predicate sexual

offenses in order to satisfy the three-month element. Rather, it must adduce sufficient evidence to support a reasonable inference that at least three months elapsed between the first and third sexual acts. Generic testimony is certainly capable of satisfying that requirement, as the hypothetical examples listed by the Supreme Court in *Jones* illustrate. Indeed, as the *Jones* court held, despite the general acceptance of such generic testimony, "the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period." (*People v. Jones, supra*, 51 Cal.3d at p. 316; *People v. Hord* (1993) 15 Cal.App.4th 711, 720.) That is, while generic testimony may suffice, it cannot be so vague that the trier of fact can only speculate as to whether the statutory elements have been satisfied.

A similar analysis applies to defendant's sufficiency of the evidence claim regarding count 2, his lewd act conviction for conduct in September 2004. It was alleged, and the jury found, defendant committed a lewd act on the victim on or between September 18 and 30, 2004, in violation of section 288, subdivision (c)(1), which requires that the victim be 14 or 15 years old at the time of the offense. As stated above, there was no evidence as to when defendant abused the victim in September—before and/or after her 14th birthday. As the evidence did not support a reasonable inference that the crime occurred when the victim was 14 years old, the conviction must be reversed.[3]

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[3] On our request, the parties submitted supplemental briefing on the question of whether the continuous sexual abuse conviction and the lewd act conviction for conduct in September 2004 should be reduced to simple battery under section 242 on the theory that battery is a lesser included offense (see § 1181, subd. (6)). On further consideration, we find such a reduction would be inappropriate as to either conviction because misdemeanor battery is subject to a one year statute of limitation (§ 802, subd. (a)). It is well established that the limitation of time applicable to an offense that is necessarily included within a greater offense is the limitation of time applicable to the lesser included offense, regardless of the limitation of time applicable to the greater offense. (§ 805,

We reject, however, defendant's sufficiency challenge to count 4, one of the two lewd act convictions for conduct in October 2004. Defendant asserts the victim's testimony concerning whether he molested her more than once in that month was so self-contradictory that it cannot be deemed sufficient evidence under the federal Constitution's due process standard. Reviewing the victim's testimony in context and applying the proper deferential standard of review, we find the contradictions in her testimony merely raised a credibility issue for the jury to resolve.

Consistent with federal due process concerns, our Supreme Court has repeatedly and consistently explained: "'"Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" . . . .' [Citation.]" (*People v. Barnes* (1986) 42 Cal.3d 284, 306, citing *People v. Thornton* (1974) 11 Cal.3d 738, 754, overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 685, fn. 12; *People v. Cantrell* (1992) 7 Cal.App.4th 523, 538.)

The victim's testimony provided the sole evidence concerning sexual abuse in October. She testified on cross-examination that defendant molested her more than two

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subd. (b); see *People v. Statum* (2002) 28 Cal.4th 682, 699.) Here, the lewd act conviction was alleged and found to have occurred outside the one year period. Regarding the continuous sexual abuse conviction, given the uncertainty of the date on which the lewd acts occurred, it would be impossible to find that one of them occurred within the time period.

times in that month. On recross-examination, defense counsel asserted that she had testified that defendant did not molest her at all in October of 2004. The victim denied that assertion, responding that she had said "about once." When defense counsel asked her to state the number of times defendant had molested her in October, the victim said, "I don't really remember much of October." Contrary to defendant's contention, the victim's statements on recross-examination did not amount to a clear recantation of her prior testimony. We hold a reasonable juror could have understood the victim's "about once" statement mainly as a refutation of counsel's assertion that she had previously denied suffering any sexual abuse in October. Similarly, when she stated she did not "remember much" about that month, a reasonable juror could have understood her as merely explaining that she could not recall the precise number of times she suffered abuse at defendant's hands during that month, which was consistent with her prior testimony that there had been at least two instances of abuse that month.

Accordingly, we find the contradictions in the victim's testimony did not render it impossible to believe or obviously false, but merely presented the jury with a credibility determination that is not reviewable on appeal. (See *People v. Barnes, supra,* 42 Cal.3d at p. 306; *People v. Cantrell, supra,* 7 Cal.App.4th at p. 538.) Defendant's reliance on two intermediate federal court opinions—*Mackett v. United States* (7th Cir. 1937) 90 F.2d 462 and *United States v. Kenyon* (8th Cir. 2007) 481 F.3d 1054—is misplaced. In the former case, the only evidence supporting an element of the underlying conviction had been provided by a witness who unambiguously admitted a lack of personal knowledge as to an essential fact. (*Mackett v. United States, supra,* 90 F.2d at p. 464.) In the latter case, all of the victim's testimony concerning the sexual assault was inherently ambiguous. (*United States v. Kenyon, supra,* 481 F.3d at p. 1068.) As we have explained, defendant's jurors had an evidentiary basis for finding the victim had personal knowledge that defendant committed two or more lewd acts upon her in October. In any event, we are not bound by the decisions of lower federal courts. (*People v. Avena* (1996) 13 Cal.4th 394, 431.)

In defendant's final sufficiency of the evidence challenge, he contends there was no substantial evidence of the force or duress element of his rape conviction. We disagree. The record contains reasonable, credible, and solid evidence that defendant accomplished the rape with sufficient force to support a finding of nonconsensual sexual intercourse.

As our Supreme Court instructs: "Rape is a general intent offense. [Citation.] Forcible rape is defined as 'an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [¶] . . . [¶] (2) [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.' (§ 261, subd. (a)(2).)" (*People v. Griffin* (2004) 33 Cal.4th 1015, 1022, fn. omitted (*Griffin*).) As used in the statute, "force" is defined in accordance with common usage. In a forcible rape prosecution, the kind of force necessary need *not* be substantially different or greater than the physical force normally inherent in an act of consensual sexual intercourse: "To the contrary, it has long been recognized that 'in order to establish force within the meaning of section 261, [former] subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim].' [Citation.]" (*Id.* at pp. 1023-1024.) In fact, the *Griffin* court reaffirmed that the kind of physical force applied is immaterial, and "'"'may consist in the taking of indecent liberties with a woman, or laying hold of and kissing her against her will.'"' [Citations.]" (*Id.* at p. 1024.)

It must also be understood that in 1980, the Legislature amended the rape statute to eliminate the victim resistance requirement. "[U]nder the modern rape statute, the jury no longer evaluates the element of force in terms of whether it physically prevents the victim from resisting or thwarting the attack." (*Griffin, supra,* 33 Cal.4th at p. 1025.) The Legislature's amendment was premised on the recognition that the "'fundamental wrong'" to be addressed by modern rape law is not the application of physical force that causes physical harm, but the guarding of "'a woman's will and the privacy of her

sexuality from an act of intercourse undertaken without her consent. . . .' [Citation.]" (*Ibid.*) Accordingly, under current law, the force element plays a supporting role, designed to insure that the act of intercourse was undertaken against a victim's will. (*Ibid.*) It follows that "the degree of force utilized is immaterial." (*Ibid.*) In sum, "[t]he gravamen of the crime of forcible rape is a sexual penetration *accomplished against the victim's will* by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury." (*Id.* at p. 1027.)

In this case, the evidence defendant used force to accomplish intercourse with the victim against her will was substantial and compelling. Viewing the evidence in the light most favorable to the prosecution, we note that defendant was the victim's grandfather and at least 40 years older than she. Defendant was also an authority figure for her, who helped raise her—and had dealt out corporal punishment to her when she was younger. He was also a large man. At all times in which he molested the victim, he was the only adult in the household. In the months leading up to the January 2005 incident, defendant had committed repeated acts of sexual abuse upon the victim, mainly involving his touching her vagina on top of her clothing. When defendant tried to reach his hand "inside" her pants, however, the victim would try to push him away; she consistently tried to stop him from touching her vagina underneath her clothes. Defendant warned the victim not to report the sexual abuse to anyone, telling her that "it really wouldn't matter" because nobody would believe her. Thus, the evidence showed at a minimum that prior to the rape incident, the victim did not welcome defendant's sexual advances and actively resisted his attempts to touch her genitalia directly.

As to the incident itself, defendant opened the victim's bedroom door and entered the room without permission. He closed the door behind him and almost immediately jumped on the bed and climbed on top of the victim, pulling down her pants and underwear, and unzipping his pants. Defendant pulled the victim's legs wide apart, pushed her knees back, and painfully penetrated her vagina with his penis. She tried to push him off, but could not. Under the circumstances, those acts support a reasonable

inference of violence to overcome her will. Moreover, we disagree with defendant's assertion that the victim remained entirely passive during the rape incident. Defendant erroneously supports his argument with a selection of the aspects of her testimony that support an inference that she offered no resistance because she was psychologically unable to move because she was "in total shock," while ignoring the contrary testimony. Applying the deferential standard proper to appellate review, however, we hold the evidence as a whole supports the reasonable inference that the victim tried to push defendant away, but was unsuccessful because defendant pinned her down on the bed—not merely that the victim was too frightened to move.

Contrary to defendant's primary argument, neither the surrounding circumstances nor the act of intercourse itself bore any reasonable indicia of consensual intercourse between two adults. (Cf. *Griffin*, *supra*, 33 Cal.4th at p. 1027.) Indeed, defendant's analogy to consenting adults is dubious, if not absurd, in light of defendant's status as the victim's grandfather and disciplinarian, along with the great disparity in age and size between the two, not to mention the victim's consistent efforts to push defendant away when he tried to touch her genitalia directly. The manner of defendant's repeated sexual assaults on the victim, including his warning her not to report the incidents bespeak psychological coercion, not normal sexual relations. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 15-16.)

In *Griffin*, the Supreme Court found sufficient evidence of the force element of rape in materially indistinguishable circumstances. The *Griffin* court found substantial evidence of force, despite the lack of evidence that the victim demonstrated any unwillingness to defendant's initial sexual advances or objected to defendant's conduct until after he had pinned her to the floor and penetrated her vagina. The reasoning in *Griffin* is dispositive here: "[The victim] had never previously encountered defendant's attempt to have intercourse with her, as this was his first attempt. The jury could reasonably infer that by pinning her arms to the floor, defendant was able to achieve penetration on the occasion in question without [the victim's] consent before she was

able to register her objection. The circumstance that defendant did not apply additional force to continue the intercourse after [the victim] objected does not eliminate his culpability for his initial penetration of [the victim] against her will by use of force. [¶] The evidence, taken as a whole and viewed in the light most favorable to the guilty verdict, is sufficient to support the conviction of forcible rape." (*Griffin, supra,* 33 Cal.4th at p. 1029.)

Here, as in *Griffin*, the onset of defendant's intercourse was sudden and unexpected, giving the victim little opportunity to object. Although the victim—unlike the victim in *Griffin*—did not offer direct testimony as to her lack of consent, there was ample evidence to support that reasonable inference. The victim had never welcomed or initiated any sexual contact with defendant. More significantly, she actively resisted defendant's repeated attempts to touch her genitalia under her clothes—and, during the rape incident, the victim tried to push defendant away. Under these circumstances, the jury could reasonably infer that defendant overcame the victim's lack of consent by his use of force in pulling down her pants and underwear, and pushing her legs wide apart and pulling her knees up. It would strain credulity to believe that the same girl who tried repeatedly to rebuff her grandfather's attempts to put his hand inside her underwear would suddenly consent to intercourse with her abuser.

Defendant's reliance on *People v. Espinoza* (2002) 95 Cal.App.4th 1287 to support his argument that there was insufficient evidence of duress is unavailing. Having found sufficient evidence that defendant used force to overcome the will of the victim to resist defendant's sexual attacks, we do not reach the question of whether the rape conviction was independently supportable under a duress theory. In any event, we find *Espinoza* wholly distinguishable. In *Espinoza*, there was no evidence of force in connection with any of the sexual offenses. At no time did the victim in *Espinoza* resist or object to defendant's acts of sexual molestation or attempted rape. Most significantly, during the attempted rape, the *Espinoza* defendant did not forcibly immobilize his victim to accomplish the penetration, but allowed the victim to move away to avoid being

penetrated. (*Id.* at p. 1293.) As a result, the only potentially viable prosecution theory in *Espinoza* was duress. (*Id.* at p. 1321.)

B. CALCRIM No. 207 Claim

As stated *ante*, given that we have found insufficient evidence to support defendant's continuous sexual abuse conviction, we do not address the issue of whether the trial court erred in giving the pattern instruction that the prosecution need not prove the offense occurred on the exact date alleged as to that offense.

C. Instructional Error Claim—Failure to Instruct on Attempted Rape as a Lesser Included Offense of Rape

Defendant contends the trial court erred prejudicially in failing to instruct sua sponte on attempted rape as a lesser included offense of rape, based on the testimony by Martha that the victim admitted to her that defendant did not penetrate her. We hold there was no substantial evidence to support an instruction on attempted rape, but if there were error, it was harmless under any standard.

Despite every opportunity to do so, defendant did not request an instruction on attempted rape. However, as our Supreme Court has made clear, "even absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 118 (*Birks*).) Attempted rape is a lesser included offense of rape. (*People v. Atkins* (2001) 25 Cal.4th 76, 88.) Defendant argues there was substantial evidence upon which the jury could find the penetration element of rape was not proved based on Martha's testimony as to the victim's admission.[4] As the parties agree, and the jury was instructed, a testifying

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[4] Rape requires "an act of sexual intercourse . . . ." (§ 261, subd. (a).) "Any sexual penetration, however slight, is sufficient to complete the crime." (§ 263.)

witness's prior inconsistent statement is admissible both for impeachment and as substantive evidence that the prior statement was true. (Evid. Code, § 1235; *People v. Hawthorne* (1992) 4 Cal.4th 43, 55, fn. 4.)

Our Supreme Court holds: "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]"' that the lesser offense, but not the greater, was committed." (*People v. Breverman* (1998) 19 Cal.4th 142, 162, quoting *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12; *People v. Carr* (1972) 8 Cal.3d 287, 294; see also *Birks, supra,* 19 Cal.4th at p. 118.)

Here, the argument that Martha's testimony amounted to evidence substantial enough to merit instruction on attempted rape is based upon a manifest misunderstanding of the purpose behind her testimony. At no time did the defense contend or even intimate that Martha's testimony had been offered for anything other than impeachment of the victim. Defendant's sole defense as to all counts was that the victim was lying about and inventing the allegations of sexual abuse—in other words, that no molestations had occurred. During both parties' arguments to the jury, Martha's testimony was discussed solely in the context of impeachment. The prosecution evidence of penetration was clear—the victim's testimony was detailed, plausible, and consistent. In contrast, defendant did not testify and the only defense witness was Martha, whose testimony provided no evidentiary support for an argument that defendant merely attempted, but did not complete, the charged rape.

As such, it is hardly surprising the trial court did not instruct sua sponte on attempted rape. From a tactical perspective, the defense had good reason to forgo making such a request. An argument that defendant committed attempted rape because he failed to achieve penetration would have been squarely at odds with the defense that

the victim had invented all the events of sexual abuse. Practically or legally speaking, the victim's prior inconsistent statement adduced through Martha was legally insufficient to support an instruction on attempted rape. On the other hand, as trial counsel apparently understood, Martha's testimony supported the argument that the victim was exaggerating or lying about defendant's conduct. In the absence of an instruction on attempted rape, the defense could use the victim's prior statement for its impeachment value without having to deal with an alternative defense theory that contradicted the primary one.

This analysis serves to eliminate any serious question as to whether the trial court was obligated to instruct on the lesser included offense, and further demonstrates that the failure to do so could not have amounted to reversible error.[5] "[T]he failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 165.) Thus, reversal is not required unless it appears "'reasonably probable'" the defendant would have obtained a more favorable result had the error not occurred. (*Id.* at p. 149.) On appeal, our review "focuses not on what a reasonable jury could do, but what such a jury is likely to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Id.* at p. 177, italics omitted.)

As explained above, the presence of an attempted rape instruction would have likely been disadvantageous to defendant because it would have seriously undercut the chosen defense theory. Moreover, absent testimony from defendant, the evidence of lack of penetration would have been negligible. Martha was an obviously biased witness, who admitted that the victim made the supposed admission about lack of penetration in

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[5] The Attorney General appears to concede instructional error, while contending that the error was harmless.

the context of whether she had retained her virginity. As the victim plausibly explained, she was reluctant to speak to Martha about defendant's conduct. When Martha asked her if defendant penetrated her, she did not answer. In explaining why she told Martha that she considered herself a virgin, the victim said it was because she had not consented to intercourse. Accordingly, we hold there is no reasonable probability that the failure to instruct on attempted rape affected the trial's outcome.

D. Instructional Error Claim—Failure to Instruct on Lewd Conduct as a Lesser Included Offense Continuous Sexual Abuse

Having found insufficient evidence to support defendant's continuous sexual abuse conviction, we do not address the contention that the trial court erroneously failed to instruct on lewd conduct as a lesser included offense of continuous sexual abuse.

E. Admission of Uncharged Sexual Offenses

Defendant contends the trial court abused its discretion in admitting the uncharged sexual offenses by defendant against the victim's mother—defendant's daughter—and, thereby, violated his federal constitutional right to due process. We disagree, finding no abuse of discretion or due process violation.

Evidence Code section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code s]ection 1101, if the evidence is not inadmissible pursuant to [Evidence Code s]ection 352." Evidence Code section 352, in turn, provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

In *People v. Falsetta* (1999) 21 Cal.4th 903, 914-917 (*Falsetta*), our Supreme Court held that recognition of the special class of evidence of a propensity to commit sexual offenses under Evidence Code section 1108 does not violate due process, particularly when the evidence is subject to the weighing process of Evidence Code section 352. Evidence Code section 1108 provides for admission of evidence of defendant's commission of another sex offense in a prosecution for enumerated sex offenses, including those charged in the instant case. Because evidence offered pursuant to Evidence Code section 1108 is subject to exclusion under Evidence Code section 352, evidence of other sexual offenses cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. (*Falsetta, supra*, 21 Cal.4th at pp. 916-920; *People v. Branch* (2001) 91 Cal.App.4th 274, 282 (*Branch*); *People v. Fitch* (1997) 55 Cal.App.4th 172, 183.)

"By reason of [Evidence Code] section 1108, trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under [Evidence Code] section 352. Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra*, 21 Cal.4th at pp. 916-917.)

At a pretrial hearing, the trial court considered defendant's objection to the admission of Evidence Code section 1108 evidence. At that time, the prosecution

planned to offer testimony by two of defendant's daughters—Melissa and the victim's mother—to the effect that defendant had sexually abused the latter from the time she was seven years old.[6] According to the prosecutor, the victim's mother was born in 1958, and defendant had admitted to inappropriately touching her. At that hearing, defendant's primary objection concerned the timeliness of the witness disclosures, a ground he does not raise on appeal.[7] Defendant, however, also objected on Evidence Code section 352 grounds, asserting the prosecution evidence concerned events that were "20 to 25 years old" and therefore unduly remote from the charged offenses. The defense argued further that this remoteness, coupled with the absence of any formal report of abuse, significantly increased the possibility of fabrication by the victim's mother.

The trial court, having found the evidence admissible under Evidence Code section 1108, undertook the Evidence Code section 352 analysis. On balance, the trial court found the anticipated evidence more probative than prejudicial. While the trial court's findings were not detailed, it is clear it found the prior misconduct to reflect a "similar plan" to that used against the victim. It also found the prior acts were not significantly more serious than those currently alleged.

At trial, over defendant's continuing objection on Evidence Code section 352 grounds, the victim's mother testified that defendant began molesting her when she was six or seven years old. Defendant molested the victim's mother whenever his wife was out of town. Typically, defendant would enter her bedroom and touch her vagina while she was in bed. He persisted despite her telling him, "no." Defendant told the victim's mother to keep his behavior a secret or "he would kill [her] grandmother or hurt [her] mom." Defendant also molested her in the swimming pool while pretending to give swimming lessons and after giving her a bath. The seriousness of the molestations

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[6] As no testimony from Melissa was offered at trial, we do not discuss the offer of proof or ruling concerning her testimony.

[7] The defense declined the trial court's offer of a continuance for the opportunity to investigate the prior uncharged sexual misconduct testimony.

increased as she grew older. By the time she was 12 or 13, he had penetrated her with his penis. The sexual abuse ended when she was in seventh grade, after the victim's mother confronted defendant and threatened him with a pair of scissors if he molested her again.

As we explain, the trial court's ruling was within the legitimate bounds of its discretion. Initially, defendant argues there was little probative value in the victim's mother's testimony because of the length of time that had passed between the time defendant abused his daughter and granddaughter. We disagree. "Remoteness of prior offenses relates to 'the question of predisposition to commit the charged sexual offenses.' [Citation.] In theory, a substantial gap between the prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses." (*Branch, supra,* 91 Cal.App.4th at p. 285.) "No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible. [Citation.]" (*Id.* at p. 284.) Courts have found previous sexual offenses that were 30 years old not to be so remote in time as to preclude admission. (*Id.* at pp. 284-285 [30-year gap between offenses was not remote]; *People v. Soto* (1998) 64 Cal.App.4th 966, 992 [passage of substantial number of years did not automatically render prior incidents prejudicial]; see also *People v. Waples, supra,* 79 Cal.App.4th at p. 1395 [15- to 22- year time gap was not remote].)

On appeal, defendant miscalculates a 40-year time lapse between the prior and current sexual abuse, based on the prosecutor's representation that the victim's mother was born in 1958 and the abuse began when she was seven years old. However, even assuming that defendant began abusing his daughter in 1965, the victim's mother testified that he continued doing so until she was 12 or 13 years old, which would be as late as 1971—meaning a difference of approximately 33 years, which closely mirrors the time periods found not unduly remote as a matter of law.

Additionally, the trial court did not abuse its discretion in ruling that any remoteness concerns were "balanced out" by significant similarities between the prior and the charged offense. (*Branch, supra,* 91 Cal.App.4th at p. 285 [30-year old prior

molestation admitted where both victims were relatives, living in defendant's home, and defendant lied to their caretakers to cover up the abuse].) Here, defendant took advantage of his position of authority as father and grandfather to molest both victims, primarily in their homes, whenever he was the sole adult supervising them. In both cases, he committed the abuse while other children were in the home. In both cases, defendant took advantage of innocent situations to fondle the girls' vaginas—drying off his daughter, massaging his granddaughter's hurt knee. He told his victims not to report his misconduct. The nature of his abuse against his daughter and granddaughter progressed from fondling their genitalia on top of their clothing, to under their clothing (or at least attempting to do so with the granddaughter victim), to intercourse in the victims' early teenage years. (See, e.g., *People v. Frazier* (2001) 89 Cal.App.4th 30, 41 (*Frazier*) [lack of remoteness found where the evidence showed the defendant had a pattern of molesting his young female relatives going back 20 years].)

We also agree with the trial court that the danger of undue prejudice was also lessened considerably because the prior uncharged sex offenses were not significantly more inflammatory than the current offenses. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 ["The testimony describing defendant's uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offenses."].)

The trial court was aware that the risk of juror confusion is potentially increased when uncharged offenses are introduced as evidence. As the court recognized in *Branch*: "If the prior offense did not result in a conviction, that fact increases the danger that the jury may wish to punish the defendant for the uncharged offenses and increases the likelihood of confusing the issues 'because the jury [has] to determine whether the uncharged offenses [in fact] occurred.' [Citation.]" (*Branch*, *supra*, 91 Cal.App.4th at p. 284.) "This risk, however, is counterbalanced by instructions on reasonable doubt, the necessity of proof as to each of the elements of a lewd act with a minor, and specifically that the jury 'must not convict the defendant of any crime with which he is not charged.'" (*Frazier*, *supra*, 89 Cal.App.4th at p. 42.) The trial court gave similar jury instructions,

specifically instructing on the elements of the charged offenses, reasonable doubt, and the proper use of evidence of prior sexual offenses. There is nothing in the record to indicate the jury was confused by the victim's mother's testimony (*Branch, supra,* 91 Cal.App.4th at p. 284), and we have no reason to believe the jury did not follow the trial court's instructions. Significantly, the jury was instructed that it could only consider the prior uncharged conduct if it found the conduct true by a preponderance of the evidence, and then only for the limited purpose of finding a disposition to commit sexual offenses. Such evidence would be only one factor weighing against defendant, and it would not be sufficient by itself to prove defendant's guilt. Finally, the uncharged prior conduct evidence took up a relatively short period of time, was not confusing in itself, and would have been easy for the jury to consider independently.

We conclude the trial court did not abuse its discretion in admitting the victim's mother's description of defendant's prior conduct.

F. Prosecutorial Misconduct Claim

Defendant argues the prosecutor committed misconduct during argument by urging the jury to consider punishment. Specifically, defendant points to a statement toward the end of the prosecutor's rebuttal argument in which she referenced the verdict forms and explained that the jury would not have to consider defendant's guilt for the lesser included offense of battery, if it found defendant guilty of the charged offense of rape. As an aside, she stated: "And frankly, if you find him not guilty I don't even want you to come back with a battery. Just come back not guilty." According to defendant, that statement amounted to an implicit direction for the jury to consider punishment by insinuating that the punishment for battery was so negligible as to be tantamount to an acquittal.

Initially, we hold defendant failed to preserve this claim for appeal by inexcusably failing to object and request an admonition below. Defendant concedes defense counsel

failed to object to the prosecutor's statement or ask the trial court to admonish the jury to disregard the alleged misconduct. Generally, such failures prevent appellate review of prosecutorial misconduct claims. (*People v. Valdez* (2004) 32 Cal.4th 73, 123 [claim of prosecutorial misconduct is forfeited where defendant did not object and an admonition could have cured any harm]; *People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*) ["'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' [Citation.]"]; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125.)

Defendant argues, however, that review of his prosecutorial misconduct claim is appropriate because an objection or admonition would have been futile, based on his assertion that the challenged statement injected prejudicial facts outside the record. We disagree. It is mere speculation to assert, as defendant does, that the jury would have understood the prosecutor as implying that the punishment for battery was trivial. The more likely inference was that the prosecution believed the evidence of rape and molestation was strong, and if the jury rejected the existence of molestation, the prosecution had no interest in a battery conviction. Any contention that the prosecutor's argument was akin to urging the jury to rely upon facts outside the record is without merit, as no such facts were mentioned or implied.

Assuming the validity of defendant's strained interpretation of the argument, there is no reason to conclude a timely admonition would have been ineffective. "[T]he futility exception to the rule requiring an objection and request for curative admonition is to be applied only in 'unusual circumstances.' (*People v. Hill, supra,* 17 Cal.4th at p. 821; *People v. Riel* (2000) 22 Cal.4th 1153, 1212-1213 [(*Riel*)].)" (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 237 (*Zambrano*).) In *Riel*, our California Supreme Court indicated that the futility exception should be reserved for "extreme case[s]" such as *Hill*, where defense counsel made a number of objections, but did not continually object to pervasive misconduct, and "the prosecutor's 'continual misconduct, coupled with the trial

court's failure to rein in her excesses, created a trial atmosphere so poisonous' that continual objections 'would have been futile and counterproductive to his client.' [Citations.]" (*Riel, supra*, 22 Cal.4th at p. 1212.) Defendant's case does not present unusual circumstances meriting application of the futility exception. The trial atmosphere was not poisoned by continual misconduct by the prosecutor—the prosecutor's statement was isolated, offhand, and would support an inference of misconduct only by a dubious chain of reasoning.

Defendant next argues that if review of his prosecutorial misconduct claim was forfeited by defense counsel's failure to object and to request an admonition, then defense counsel's assistance was constitutionally deficient. "'Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.' (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1126; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1003 [explaining that first component is established by demonstrating 'that counsel's performance did not meet the standard to be expected of a reasonably competent attorney'].)" (*People v. Foster* (2003) 111 Cal.App.4th 379, 383 (*Foster*).)

A reviewing court defers to counsel's reasonable tactical decisions when examining a claim of ineffective assistance of counsel (see *People v. Wright* (1990) 52 Cal.3d 367, 412), and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland v. Washington* (1984) 466 U.S. 668, 689.) "'Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his [or her] act or omission.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 980, quoting *People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

Here, defendant cannot make a viable showing as to either the performance or the prejudice prong of the Sixth Amendment. Given that only a tortuous line of reasoning would provide even colorable support for such an objection, defense counsel had no good reason to make one. Moreover, counsel cannot be faulted for choosing not to seek a special admonition that if the jury found him not guilty of the rape, it must give full consideration to the lesser included offense and find his client guilty of that offense if the evidence warranted it. In short, based on our prior analysis, it is clear there would have been no reasonable basis for believing such an objection would have been successful—and even if it had been, there is no reason to think it would have affected the trial's outcome.

G. Consecutive Sentencing Under Section 667.6

Defendant contends the trial court erred in imposing a full, separate, and consecutive term for the rape conviction, based on its mistaken understanding that section 667.6 made such sentencing mandatory. In fact, at the time defendant committed the offense, the trial court had discretion to impose such a consecutive sentence for the rape conviction. We accept the Attorney General's concession that remand is warranted to allow the court to exercise its discretion.

Here, the trial court identified the continuous sexual abuse offense as the base term, imposing the midterm of twelve years, plus consecutive midterm sentences of eight months on the six lewd convictions (finding them committed on separate occasions). As to the rape conviction, the trial court found aggravating circumstances warranted the upper term of eight years and imposed that term consecutively, based on the apparent misunderstanding that section 667.6 required it to do so.

As our Supreme Court has explained, section 667.6, "subdivisions (c) and (d) both authorize the sentencing court to impose a full, consecutive sentence for each [enumerated sex offense] conviction. However, while subdivision (c) permits full,

consecutive sentencing of each [enumerated sex offense] conviction on a discretionary basis, subdivision (d) mandates full, consecutive sentencing of [enumerated sex offense] convictions under the circumstances therein specified." (*People v. Jones* (1988) 46 Cal.3d 585, 595.) In 2005, when defendant committed the forcible rape against the victim, section 667.6, subdivision (c) provided that "[i]n lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation" of various enumerated offenses including forcible rape and continuous sexual abuse. The statute was subsequently amended, effective September 20, 2006, to provide that full, separate, and consecutive terms are mandatory "if the crimes involve separate victims or involve the same victim on separate occasions." (§ 667.6, subd. (d).)

The federal Constitution's ex post facto clause proscribes "changes in law that (1) retroactively alter the definition of a crime or (2) retroactively increase the punishment for criminal acts." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 640.) Indeed, the Penal Code itself makes its provisions prospective, absent an express declaration of retroactive application—which is not contained in section 667.6. (See § 3.) Accordingly, we remand the matter to permit the trial court to exercise its sentencing discretion under the statutory framework in effect at the time defendant committed his crimes.

H. Imposition of Upper Term for the Rape Conviction

As discussed in the previous section, defendant's sentence included a full upper term for his rape conviction. Upon imposing that sentence the trial court found in aggravation that defendant was a danger to society and his acts were particularly cruel because his offenses involved force and fear, and occurred on separate occasions. In mitigation, the court found no prior criminal record. Defendant contends the absence of a jury finding on those aggravating factors violated his right to a jury trial under *Blakely, supra,* 542 U.S. 296. Based on our Supreme Court's recent opinion in *People v. Black*

(2007) 41 Cal.4th 799 (*Black II*) and its companion case *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), we agree.

In *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*), a decision issued after sentencing in this matter, the United States Supreme Court held it improper to base an aggravated term under California's Determinate Sentencing Law on circumstances in aggravation that are not found true by the jury, with the exception of the fact of prior convictions. (*Id.* at p. ___ [127 S.Ct. at p. 868].) In *Sandoval, supra*, the California Supreme Court, citing *Chapman v. California* (1967) 386 U.S. 18, held that such errors are harmless if a reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Sandoval, supra*, 41 Cal.4th at p. 838.) This analysis requires us to determine "beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury . . . ." (*Id.* at p. 839.) As our Supreme Court explained in *Sandoval*, "to the extent a potential aggravating circumstance at issue in a particular case rests on a somewhat vague or subjective standard, it may be difficult for a reviewing court to conclude with confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court." (*Id.* at p. 840.)

That is the situation here as to the danger-to-society and cruelty aggravating factors found by the trial court. None was an element of the defendant's offenses, nor was any subject to a special jury finding. We are not confident that the jury, using the more rigorous beyond-a-reasonable-doubt standard, unquestionably would have reached the same conclusion when considering the aggravating factors on which the trial court relied. We conclude, therefore, that the error in this case was not harmless. Following *Sandoval*, we remand for resentencing. (*Sandoval, supra,* 41 Cal.4th at p. 846 ["we direct that sentencing proceedings to be held in cases that are remanded because the sentence imposed was determined to be erroneous under *Cunningham, supra,* 549 U.S. ___ [127 S.Ct. 856], are to be conducted in a manner consistent with the amendments to

the DSL adopted by the Legislature"].) We note section 1170, subdivision (b) was recently modified to provide that "[w]hen a judgment of imprisonment is to be imposed and the statute provides three possible terms, the choice of the appropriate term within the sound discretion of the court," but we express no opinion on how that discretion should be exercised.

DISPOSITION

The convictions on count 1 for continuous sexual abuse and on count 2 for committing a lewd act upon a child are reversed. The cause is remanded to the trial court for resentencing on the remaining counts, including discretionary sentencing under the applicable version of section 667.6, as well as section 1170, subdivision (b), as to defendant's rape conviction on count 9. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.