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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. PEDRO GUIDO, Defendant and Appellant.	C044284 (Super. Ct. No. 01F10210)

APPEAL from a judgment of the Superior Court of Sacramento County, James I. Morris, J. Affirmed as modified.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Stephen G. Herndon, Supervising Deputy Attorney General, and James Ching, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I through IV and parts VI through VIII of the Discussion.

Defendant Pedro Guido stands convicted by a jury of five counts of aggravated sexual assault of a child by rape (Pen. Code, § 269, subd. (a)(1); all unspecified statutory references are to the Penal Code), one count of aggravated sexual assault of a child by oral copulation (§ 269, subd. (a)(4)), and 10 counts of lewd acts with a child by force (§ 288, subd. (b)(1)). The trial court sentenced him to consecutive terms of 15 years to life for each of the sexual assault convictions and to consecutive terms of six years each for the 10 convictions of lewd acts with a child. His determinate term is thus 60 years and his indeterminate term is 90 years to life. He appeals claiming error in the instructions, cumulative error, and error under *Blakely v. Washington* (2004) 542 U.S. ___ [159 L.Ed.2d 403, 413-414] (*Blakely*).

Noting an error in the abstract, we affirm the judgment.

FACTS

The victim, M., is defendant's niece. At the time of trial in April 2003, M. was 13 years old. Her 14th birthday was in May 2003. At the time of trial defendant was 36 or 37 years old.

When M. was eight, her family, including her mother, her father, her maternal grandmother, her sister, her brother, and defendant, moved to a white house on Franklin Boulevard in Sacramento. During the time they lived in the white house, M. and her female cousin, who is a year younger than M., played "hide and go seek" with defendant. Defendant looked only for M. and tried to "touch" her when he found her. Specifically, when

defendant found M. he picked her up from behind and grabbed her breasts outside of her clothing as if he was hugging her.

When M. was "probably like nine" her family moved to a house on Harms Way. M., her parents, her sister, and her brothers lived in the house as did defendant. Both of M.'s parents worked at the time and defendant took care of M. when her parents were at work.

M. estimated that about three times a week while living on Harms Way, defendant would lie on his back on the couch in the living room with his legs on her lap. Defendant would cover the two of them with a burgundy blanket and take M.'s hand and place it on his penis outside of his clothing. The first time he grabbed her hand, defendant pressed it down and moved it around in his groin area so, she assumed, he could "feel something." On other occasions, defendant held her hand on his crotch and when she closed her hand or tried to pull it away, he placed her hand back where it had been and told her in Spanish to leave her hand where it was. The first time this occurred, M. could feel defendant's penis under his clothing but "it was just soft." In later incidents, "sometimes [defendant's penis] was hard, and sometimes it wasn't." Perhaps once a week defendant placed M.'s hand directly on his penis inside his clothing.

M. did not tell her parents about defendant's actions because, even though she did not like what he did, she did not know it was wrong, and because defendant took the place of her father when her father was not home and she was expected to obey him.

When M. was 11, her family moved to an apartment on East Parkway. While they lived there defendant returned to Mexico. Shortly after M. reached the age of 12 the family moved again, this time to an apartment on Sky Parkway where she lived with her mother, her father, her sister and her two brothers. Defendant returned from Mexico while the family lived on Sky Parkway although he lived with M.'s grandmother upon his return. By this time M., who was 11 or 12, had a boyfriend named Francisco who was, she thought, three years older than M., that is, 14 or 15 at the time they met.

When defendant returned from Mexico, M. was scared of him and she "knew something was going to go wrong" because of his attitude. She complained to her parents that defendant acted as if he owned her and went wherever she went. Despite her complaint, her parents said M. had to listen to defendant because he was her uncle and he would be babysitting with her.

By this time, M.'s mother had spoken to M. about sexual matters and M. knew that certain sexual conduct was wrong.

The family moved to a house on Lang Avenue when M. was 13. She continued to see Francisco and was engaging in sexual relations with him. Although her mother did not know about the intimate nature of M.'s relationship with Francisco, defendant discovered that M. and Francisco were sexually intimate. Defendant became angry. He told M. that if she was "doing it" with Francisco she had to "do it" with defendant too, because "that's what [she] wanted." She did not want to submit to

defendant but he threatened to tell her mother that M. and Francisco were engaging in sexual intercourse.

Ultimately, M. had sexual intercourse with defendant on five different occasions either at M.'s house or at her grandmother's house. On three occasions, M. had sexual intercourse with defendant on the couch in M.'s home and twice, at defendant's direction, they had sexual intercourse at defendant's mother's--M.'s grandmother's--house in her grandmother's bed. M. cried and tried to talk defendant out of it each time.

On one occasion, when it appeared to M. defendant had ejaculated, M. got up and put her clothes on and ran out of the house. Defendant later called M. and told her she had to "do it" again because she had not let him finish and that he wanted her to be with him until he was tired or until defendant said it was over.

On another occasion, defendant insisted that M. "put it in [her] mouth." She said she did not want to and that "it" was nasty so defendant put on a condom and put his penis in her mouth. This caused M. to want to vomit and she ran to the bathroom.

M. submitted to defendant's demands because of his continuing threats. Defendant threatened to kill Francisco and throw him in a river, he threatened to kill her family in front of her and then kill her and then himself. M. believed defendant's threats because he was always using drugs and was drunk. Moreover, M. saw defendant with a rifle and a gun and

there was always a knife around. He once took a gun out of his pocket and put it on a table and told M. he was going to kill M.'s mom with it. M. was afraid of him but never told her parents because she was afraid "he might kill them or kill me or something."

M. thinks that it was on December 26, 2001, that defendant and her grandmother were at her house and defendant told his mother that M. had been sexually intimate with Francisco and that defendant had also engaged in sexual conduct with M. When confronted by her grandmother, M. admitted having a sexual relationship with Francisco and, when her grandmother asked her whether or not it was true that M. and defendant had sexual relations, she told her grandmother that it was. Her grandmother began crying and she left M.'s house to return to her own "because we had some problems right after we talked." Her grandmother said that she wanted to keep the matter between defendant, M., and herself and did not want anybody to know. Her grandmother said she did not want to turn defendant into the police and that defendant would never do "that" to her again.

Later that day, either M.'s grandmother or M.'s sister W., called M. and told her to come to her grandmother's house. She did and there was further conversation; W. did not think it was "okay to be quiet" and said she was going to turn defendant in. Other family members began to arrive and then everyone knew what had been occurring.

On the second day of her trial testimony, M. initially stated an inability to recall any of the details of her sexual

activity with defendant. When pressed, she explained that after she testified on the first day, M. had to take her SAT-9 test at a testing center after which her grandmother gave her a ride home. They spoke about the trial and M.'s testimony and her grandmother told her she should "take some charges off" because "they were going to give [defendant] a lot of years." M. told her grandmother that she did not know what she was going to do until she returned to court but that she would not change what she had already said. M. explained that, if she changed her testimony, it would appear that she had been lying about the entire matter and she had not. Her grandmother talked to M. about her testimony "probably" once a month from February 2003 to the time of trial in April. The first time M.'s grandmother asked her to "take some of the charges off" her grandmother said she was planning on killing herself.

G. is M.'s father and defendant's brother-in-law. Defendant lived with G. and his family, including M., for three years at their residence on Harms Way. When G. and his wife both worked, they would sometimes leave M. with defendant. The family then moved to Lang Avenue and defendant would sometimes stay with them at that residence also.

On Christmas Day 2001, G.'s daughter W. returned to G.'s house crying after having been at her grandmother's house. W. would not tell G. what had upset her, so he went to M.'s grandmother's house where he found M.'s grandmother, the grandmother's brother, and defendant. They would not tell G. what was happening but did say that M. was in the bathroom. G.

found her there, scared, trembling, and crying, but she would not tell him what had occurred. M. finally said that she had engaged in sexual relations with defendant. G. confronted defendant about what M. had said and "he answered me yes, they had," but said it took place on only one occasion. Defendant's mother (M.'s grandmother) confirmed what defendant said. When M.'s mother arrived, G. told her what had occurred and she became hysterical. They called 911 and gave the information to the police when the police arrived.

G. said that he and his wife trusted defendant because he was his wife's favorite brother.

Defendant testified and admitted to three instances of sexual misconduct with M. After he discovered that M. was sexually intimate with Francisco, defendant threatened "to tell on them." Soon thereafter, M. came to him and offered to have sexual intercourse with defendant if he would not tell her mother about M.'s relationship with Francisco. Defendant could not get an erection on this occasion because he was using drugs "but she [touched] my penis."

On a second occasion a month later, M. was watching television while sitting on a bed. Defendant got onto the bed next to her and M. complained that her hand hurt and asked him to massage it. He placed her hand on his erect penis which was outside his pants and she rubbed it until he ejaculated.

On a third occasion in November 2001, M. called defendant to her home and asked him to bring her tacos. When he got there she was sitting in a chair and he leaned over her and "started

grabbing her breasts." M. said that he should close the door. He did, but forgot to lock it and W. walked in and "saw me bending over M.'s [bare] chest."

Defendant denied M.'s other allegations and said he did the things he admitted to at trial because, at the time of the encounters, he was under the influence of methamphetamine and alcohol.

On Christmas Day, defendant confessed these matters to his mother because "[he] wasn't happy with what had happened" and "[he] wanted all of that to end." Defendant was drunk and once M. started yelling that he had raped her after M.'s mother arrived at the house, he went outside and did not say anything further.

DISCUSSION

I

CALJIC No. 2.05--Efforts to Fabricate Evidence

Defendant first contends the trial court erred when it instructed the jury that the jury could consider whether defendant made an effort to procure false or fabricated evidence and, if he did, whether that effort showed a consciousness of guilt. The trial court instructed in the language of CALJIC No. 2.05 as follows: "If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized that effort.

"If you find defendant authorized the effort, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

This instruction no doubt contemplated the jury's consideration of defendant's mother's (M.'s grandmother's) efforts to convince M. not to testify forthrightly concerning the instances of sexual abuse M. suffered, that is, in M.'s words, to "take some charges off."

"While evidence of efforts by a defendant himself to prevent a witness from testifying are admissible against him, in order to make evidence of such efforts by another person admissible it must be established that this was done by the authorization of the defendant. [Citations.]" (*People v. Terry* (1962) 57 Cal.2d 538, 565-566.) The defendant's authorization may, and usually must, be proved by circumstantial evidence. (*People v. Kendall* (1952) 111 Cal.App.2d 204, 213.) Proof of a "mere opportunity" for a defendant to authorize a third person to attempt to influence a witness is insufficient. (*Terry*, *supra*, at p. 566.)

"Whether or not any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant is a question of law. Thus in order for a jury to be instructed that it can infer a consciousness of guilt from suppression of adverse evidence by a defendant, there must be some evidence in the record which, if believed by the jury, will

sufficiently support the suggested inference." (*People v. Hannon* (1977) 19 Cal.3d 588, 597.)

We reject defendant's assignment of error because there is at least "some evidence" in the record sufficient to support the inference that defendant attempted to influence M.'s testimony through his mother. (*People v. Hannon, supra,* 19 Cal.3d at p. 597.)

Defendant first admitted sexual relations with M. to his mother and he was present when his mother said she did not want anyone else to know of the matter and did not want to contact the police. From that defendant could naturally have drawn the conclusion his mother was sympathetic to any effort by defendant to avoid the penal consequences of his crimes and she would help in that effort. Further, when defendant's mother approached M. later, she stated an awareness that defendant faced imprisonment for "a lot of years," information that she might well have gained from defendant although admittedly she may have known that from other sources. When defendant's mother first approached M. about her testimony, defendant's mother said that if M. did not testify in a way that would benefit defendant, she would consider killing herself, a threat reminiscent of the threat defendant used with some success in his campaign to sexually molest M. In short, this is "some" evidence that defendant authorized his mother's approach to her granddaughter, his accuser. It was not error to allow the jury to decide whether defendant enlisted his mother's help to suppress M.'s testimony in his effort to avoid punishment for his acts and, if

so, whether the jury should infer from that a consciousness of guilt.

But even if instructing the jury pursuant to CALJIC No. 2.05 was error, it was not prejudicial. Although defendant has asserted, without argument or persuasive case authority, that we must find the error harmless beyond a reasonable doubt, we consider the argued error under the standard established by *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1471-1472.) We must determine whether it is "reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*Watson, supra,* at p. 836.)

We first observe that M.'s grandmother's attempts to influence M. in defendant's favor would have come before the jury in any event. M.'s responses to the questions put to her at the beginning of her second day of testimony were decidedly less forthright than her earlier testimony and the prosecution had a right to elicit information to explain why that was so. Further, a witness's fear of retaliation--even if it is a fear of familial ostracism--relates to a witness's credibility whether or not that fear was engineered by the defendant. (See *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.) The only question then is the effect of the challenged instruction.

Regardless of defendant's view of the matter, this was not a close case. M.'s testimony was compelling in its detail and its reasonableness and it was supported by defendant's admission of sexual relations (not just sexual contact as he later

admitted) with M. when confronted by M.'s father. In contrast, defendant's testimony suggesting 11- or 12-year-old M. was the sexual aggressor toward, and sought sexual intercourse with, her uncle and he merely allowed her to touch his penis once, masturbate him once, and then touched her breasts once strains belief. It is not reasonably probable defendant would have gained a more favorable result in the absence of the instruction.

II

CALJIC No. 2.20--Believability of Witnesses

Defendant next argues the trial court erred by deleting from CALJIC No. 2.20 consideration of past criminal conduct of a witness amounting to a misdemeanor as it bears on the witness's credibility. This is so, he says, because the jury should have been told that M.'s conduct, at the age of 12, in having sexual intercourse with Francisco when he was 15, made her guilty of a misdemeanor in violation of section 261.5, subdivision (b) and the jury should have been told M.'s credibility was to be judged against the backdrop of her crime. This argument need not detain us long.

Assuming without deciding that a 12-year-old may be convicted of a violation of section 261.5, subdivision (b) for having sexual intercourse with a boy not more than three years her senior (see *In re T.A.J.* (1998) 62 Cal.App.4th 1350, 1365; *In re Paul C.* (1990) 221 Cal.App.3d 43), one of the evidentiary

predicates for defendant's argument appears nowhere in the record.

M. testified that, at the time of trial, she was 13 and would turn 14 in May. The case having been tried in 2003, M. was therefore born in May 1989. She also testified that when she met Francisco she was 11 or 12 and he was "I think, three years older than me[,] [s]o 14 or 15."

Section 261.5, subdivision (b) provides: "Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older . . . than the perpetrator, is guilty of a misdemeanor."

In order for M. to have violated the statute, Francisco must have been three years or less older than M. The record does not establish that element of the suggested offense. Indeed, by M.'s testimony, if she was 11 or 12 when they met and he was "three years older" that is, 14 or 15, Francisco could have been very nearly four years older than M. at the time they were intimate. By way of example, if M. was 12 when she met Francisco and she met him on the day after her 12th birthday, Francisco would have been "15" when M. met him so long as Francisco had not reached his 16th birthday. If Francisco turned 16 one day after they met, Francisco would have been three years, 11 months and 28 days (in round figures) older than M. The record leaves open the possibility that Francisco was more than three years older than M., which would take M. out of the reach of the statute. There was no evidentiary basis for

the instruction defendant now says was required. Defendant's argument must therefore fail.

III

The Lesser Included Offense of a Violation of Section 261.5, Subdivision (d)

Defendant next contends that the trial court was under an obligation to instruct on its own motion "on the lesser included offense of section 261.5, subdivision (d)[,] unlawful sexual intercourse with a minor" as a lesser included offense of aggravated sexual assault by rape as alleged in counts one through five.

"A trial court must instruct on a lesser included offense, whether or not so requested, whenever there is evidence sufficient to deserve consideration by the jury, i.e., evidence from which a reasonable jury composed of reasonable persons could have concluded a lesser offense, rather than the charged crime, was committed." (*People v. Marshall* (1996) 13 Cal.4th 799, 846.)

We need not decide whether, given the accusatory pleading in this case, unlawful sexual intercourse was a lesser included offense of aggravated sexual assault by rape because there was no evidence from which a reasonable jury could have concluded that defendant was guilty of the lesser offense. M. testified that she had succumbed to defendant's demands for sexual intercourse on five separate occasions because of defendant's on-going threats to kill her family and others, including M.,

that is, she was the victim of forcible rape accomplished by threats. Defendant testified he had not engaged in sexual intercourse with M. and denied some, but not all, of the threats. He also said that M. instigated the sexual relationship in order for M. to avoid having her parents know of her relationship with Francisco.

For defendant to have been convicted of unlawful sexual intercourse, the jury would have had to believe him when he said he had not made the threats but disbelieve him when he said he had not had sexual intercourse with M. And the jury would have had to believe M. when she said she had engaged in sexual intercourse with defendant, but disbelieve her when she said she gave into his demands because of the threats. Such findings would have been beyond the reach of a reasonable jury. This was a credibility contest; a case where M. claimed she was raped and defendant denied sexual intercourse with her at all. M. was either raped or she was not. On this record, no reasonable jury would have found that defendant lied when he said there had been no acts of sexual intercourse but spoke truthfully when he denied the threats. The trial court did not have a sua sponte duty to instruct on unlawful sexual intercourse.

IV

The Definition of Duress

The jury was instructed in part as follows on the meaning of "duress" as that term is used in section 288, subdivision (b)(1): "The term 'duress' means a direct or implied threat of

force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed, or (2) acquiesce in an act to which one otherwise would not have submitted."

Defendant contends that the court erred in giving this instruction, because the Legislature has eliminated hardship as a basis for a finding of duress. After briefing was concluded in this matter, the California Supreme Court disagreed in *People v. Leal* (2004) 33 Cal.4th 999. The court, noting "the Legislature clearly stated that its deletion of the term 'hardship' from the definition of 'duress' applies only to the rape and spousal rape statutes" (*id.* at p. 1007), held the Legislature did not change the definition of duress as that word is defined for purposes of section 288, subdivision (b)(1). There was no error.

V

The Trial Court's Sua Sponte Duty to Define "Force"

As noted earlier, defendant stands convicted of five counts of aggravated sexual assault of a child by rape and one count of aggravated sexual assault of a child by forcible oral copulation. Defendant argues that the court erred in failing to define, on it own motion, the word "force" as that concept applies to the counts that alleged forcible rape and the additional count that alleged forcible oral copulation.

Regarding the five counts alleging aggravated sexual assault of a child in violation of section 269, subdivision

(a)(1) by forcible rape within the meaning of section 261, subdivision (a)(2), the essence of the crime is forcible rape.

After briefing was completed in this matter, the California Supreme Court held in *People v. Griffin* (2004) 33 Cal.4th 1015 (*Griffin*) that the Legislature did not intend the word "force," as that term is used in section 261, subdivision (a)(2) to have a specialized legal definition. The court observed that "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.) The court held the Legislature intended the term "force" to have a common usage meaning and there is no sua sponte duty on the part of the trial judge to define the term for the jury. (*Id.* at p. 1024.) In light of *Griffin,* as to the five counts that rested on a conviction of forcible rape, there was no error.

We turn then to the count that alleged aggravated sexual assault of a child by forcible oral copulation.

In *People v. Cicero* (1984) 157 Cal.App.3d 465, this court considered the meaning of the term "force" as it appears in section 288, former subdivision (b) (now subdivision (b)(1)) relating to sexual abuse of a child by force. The court held, where there has been no physical harm to the child, the word "force" as used in section 288, former subdivision (b) requires proof that a defendant used physical force "substantially

different from or substantially greater than that necessary to accomplish the lewd act itself." (*Cicero, supra,* at p. 474.)

After the court's decision in *Cicero*, a number of California cases held, or suggested, that the term "force" as it is used in statutes defining sexual offenses other than violations of section 288, subdivision (b)(1) requires proof that the defendant used physical force substantially different from or substantially greater than the force inherent in the sexual act itself. (See, e.g., *People v. Elam* (2001) 91 Cal.App.4th 298, 306 [assault with intent to commit forcible oral copulation]; *People v. Mom* (2000) 80 Cal.App.4th 1217, 1224 [rape in concert]; *People v. Senior* (1992) 3 Cal.App.4th 765, 774 [forcible oral copulation]; *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 153 [forcible rape].) Such decisions need to be reassessed in light of *Griffin*.

Restricting our discussion to the crime we consider here, forcible oral copulation, we must decide whether oral copulation committed by force in violation of section 288a, subdivision (c)(2) requires physical force substantially different from or substantially greater than that amount of force inherent in the act of oral copulation. If it does, the term "force" carries a specialized legal meaning and the court erred when it failed to instruct the jury, sua sponte, of that meaning. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52.)

As *Griffin* recognized, the term "force" as used by the Legislature in sexual offense statutes does not have a constant

meaning; the meaning changes depending on the crime to which the term is applied.

As *Griffin* found, unlike the crime of lewd and lascivious acts with a child accomplished by force, "[t]he element of force in forcible rape does not serve to differentiate between two forms of unlawful sexual contact." (*Griffin, supra,* 33 Cal.4th at p. 1027.) Rather, "[w]hen two adults engage in *consensual* sexual intercourse, with or without physical force greater than that normally required to accomplish an act of sexual intercourse, the forcible rape statute is not implicated. The 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. . . . [I]n a forcible rape prosecution the jury determines whether the use of force served to overcome the will of the victim to thwart or resist the attack, *not* whether the use of such force physically facilitated sexual penetration or prevented the victim from physically resisting her attacker." (*Ibid.*)

These concepts apply equally to the crime of forcible oral copulation. Consensual oral copulation, with or without physical force greater than that normally required to accomplish the act, is not unlawful except when accomplished under circumstances violative of section 288a. As with forcible rape, the gravamen of the crime of forcible oral copulation is a sexual act accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and

unlawful bodily injury. As with forcible rape, it is only when one participant in the act uses force to commit the act against the other person's will that an otherwise lawful act becomes unlawful.

Unlike sexual abuse of a child by use of force, a specialized definition of force is not necessary to the crime of forcible oral copulation because a different concept of force is not needed to distinguish between two crimes or to give substance to the Legislature's use of the term "force," such as it is in section 288, subdivision (b)(1).

We note, too, the statutory language, "accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury," is the same language that makes two otherwise lawful acts criminal.

In all, there is no reasoned basis to apply a different concept of the term "force" to forcible rape and forcible oral copulation and we hold oral copulation by force within the meaning of section 288a, subdivision (c)(2) is proven when a jury finds beyond a reasonable doubt that defendant accomplished an act of oral copulation by the use of force sufficient to overcome the victim's will. The term does not carry a specialized legal definition and the trial court was not required to give the jury a definition of the word "force." Thus, there was no error.

VI

Blakely Error

Defendant contends the trial court's decision to order the sentences for the crimes of which he was convicted to run consecutively violated defendant's right to a jury trial and denied him due process of law resulting in an unauthorized sentence. We disagree.

On count 11 of the information, the trial court sentenced defendant to state prison for the middle term of six years. The court sentenced defendant to the middle term of six years in state prison on counts 12 through 20 and ordered the sentence on each count to run "full and consecutive . . . to the others" pursuant to section 667.6, subdivision (d). With regard to counts one through six, defendant was ordered to serve an indeterminate term of 15 years to life on each count, with each term to be served consecutive to the others since each involved separate acts of violence or threats of violence. It is unclear whether defendant challenges the consecutive sentences imposed pursuant to section 667.6, subdivision (d) only or whether his challenge extends to each of the consecutive sentence determinations. We will assume the latter.

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and

proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra,* 542 U.S. at p. ___ [159 L.Ed.2d at pp. 413-414].)

Relying on *Apprendi* and *Blakely*, defendant claims the trial court erred in imposing consecutive sentences because the court relied upon facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence and, thus, due process of law.

Defendant's claim of error fails because the rule of *Apprendi* and *Blakely* does not apply to these consecutive sentencing schemes.

Section 669 imposes an affirmative duty on a sentencing court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) However, that section leaves this decision to the court's discretion. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or

concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Section 669 provides that upon the sentencing court's failure to determine whether multiple sentences shall run concurrently or consecutively, then the terms shall run concurrently. This provision reflects the Legislature's policy of "speedy dispatch and certainty" of criminal judgments and the sensible notion that a defendant should not be required to serve a sentence that has not been imposed by a court. (See *In re Calhoun, supra*, 17 Cal.3d at p. 82.) This provision does not relieve a sentencing court of the affirmative duty to determine whether sentences for multiple crimes should be served concurrently or consecutively. (*Ibid.*) And it does not create a presumption or other entitlement to concurrent sentencing. Under section 669, a defendant convicted of multiple offenses is entitled to the exercise of the sentencing court's discretion, but is not entitled to a particular result.

The sentencing court is required to state reasons for its sentencing choices, including a decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) This requirement ensures that the sentencing judge analyzes the problem and recognizes the grounds for the decision, assists meaningful appellate review, and enhances public confidence in the system by showing sentencing decisions are careful, reasoned, and equitable. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) But the requirement that reasons for a sentence choice be stated *does not create a presumption or*

entitlement to a particular result. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.)

Therefore, entrusting to trial courts the decision whether to impose concurrent or consecutive sentencing under section 669 is not precluded by the decision in *Blakely*. In this state, every person who commits multiple crimes knows that he or she is risking consecutive sentencing. While such a person has the right to the exercise of the trial court's discretion, the person does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely*, "that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra,* 542 U.S. at p. ___ [159 L.Ed.2d at p. 417].)

For these reasons, the consecutive sentences ordered with regard to counts one through six did not contravene the holding in *Blakely*. (See also *People v. Sykes* (2004) 120 Cal.App.4th 1331, 1343-1345.)

Regarding counts 11 through 20, consecutive sentencing is mandated by section 667.6, subdivision (d) where, as here, the crimes involve the same victim on separate occasions. "[S]ection 667.6 is an alternate sentencing scheme, not an enhancement. [Citation.] It does not increase the penalty beyond the prescribed statutory maximum. '*Apprendi* is relevant only where a judge-made factual determination increases the maximum statutory penalty for the particular crime . . . .' [Citation.] That did not happen here." (*People v. Vonner* (2004) 121 Cal.App.4th 801, 811.)

For the above reasons, defendant's sentence did not violate his right to a jury trial or due process of law.

VII

Cumulative Error

Finally, defendant contends that cumulative error in this trial amounted to prejudice. Since we have found no error, we need not address his final contention further.

VIII

The Abstract of Judgment

We note the abstract of judgment reflects defendant was convicted of a violation of section 269, subdivision (a)(1) as charged in count six. Count six charged a violation of 269, subdivision (a)(4). The abstract shall be amended accordingly.

DISPOSITION

The judgment is affirmed. The abstract of judgment shall be amended to reflect that count six was a violation of section 269, subdivision (a)(4). The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections.

HULL, J.

We concur:

MORRISON, Acting P.J.

BUTZ, J.