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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND FOSS, Defendant and Appellant.	C050992 (Super. Ct. No. 05F2345)

APPEAL from a judgment of the Superior Court of Shasta County, Jack H. Halpin, J. Affirmed.

Carol A. Navone, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez and Jamie A. Scheidegger, Deputy Attorneys General, for Plaintiff and Respondent.

In this child molestation case, we conclude that the trial court was not required to allow the defense to inquire into whether a witness who was involved in the reporting of the

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II through X.

molestation had a morbid fear of sexual matters. By this questioning, the defense hoped to establish that the witness, an adult female, had influenced the child to falsely report that the defendant had molested the child. We conclude the trial court did not abuse its discretion in preventing the defense from embarking on this line of questioning.

Years ago, courts deemed the testimony of victims of sexual crimes suspect, reflecting attitudes and assumptions that have since been disproved and discarded. Based on this change in attitudes, assumptions, and law concerning witnesses who have been victims of sexual crimes, we conclude the trial court did not abuse its discretion. We reach this result despite a 1964 Court of Appeal opinion that found error after the trial court prevented the defense from questioning a witness (the victim's mother) concerning whether she had a morbid fear of sexual matters.

In the unpublished portion of this opinion, we reject defendant's other claims of prejudicial error. Accordingly, we affirm.

PROCEDURE

The district attorney charged defendant in a first amended information with 11 counts of molestation crimes against Brittany, a child under the age of 14 and more than 10 years younger than defendant, as follows:

- Count 1: aggravated sexual assault of a child involving oral copulation (Pen. Code, § 269, subd. (a)(4));[1]
- Count 2: forcible lewd act on a child (§ 288, subd. (b));
- Count 3: forcible lewd act on a child (§ 288, subd. (b));
- Count 4: forcible lewd act on a child (§ 288, subd. (b));
- Count 5: aggravated sexual assault of a child involving oral copulation (§ 269, subd. (a)(4));
- Count 6: forcible lewd act on a child (§ 288, subd. (b));
- Count 7: aggravated sexual assault of a child involving sexual penetration (§ 269, subd. (a)(5));
- Count 8: aggravated sexual assault of a child involving sexual intercourse (§ 269, subd. (a)(1));
- Count 9: lewd act on a child (§ 288, subd. (a));
- Count 10: lewd act on a child (§ 288, subd. (a)); and
- Count 11: sexual penetration on a child (§ 289, subd. (j)).

A jury found defendant guilty as charged, except for count 10 as to which it found defendant guilty of the lesser included offense of misdemeanor battery. The trial court sentenced defendant to consecutive indeterminate state prison terms of 15 years to life on counts 1 and 5; concurrent indeterminate terms of 15 years to life on counts 7 and 8; a consecutive term of six

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[1] Hereafter, unspecified code citations are to the Penal Code. Since defendant committed his crimes, section 269, subdivision (a) has been amended in several ways. We here refer solely to the version of the statute existing in 2002, which was applicable to defendant's crimes.

years on count 3; and concurrent terms of six years on counts 2, 4, 6, 9, and 11. The total state prison term imposed was a determinate term of six years plus an indeterminate term of 30 years to life.

FACTS

Background

Brittany's natural father died before she was born, and her mother married defendant when Brittany was two years old. Brittany considered defendant to be her father and called him "Dad." Defendant and Brittany's mother had a child, Cameron, who was two years younger than Brittany. In 2002, when Brittany was 12 years old, her mother passed away, leaving Brittany in defendant's sole custody. They were living in Fresno.

Within just a few months after the death of Brittany's mother, defendant molested Brittany for the first time. Cameron was away at a friend's house, leaving Brittany and defendant in the house alone. Defendant told Brittany to come to his room because he wanted to talk about sex. The front door was locked. They went into defendant's bedroom, and defendant locked the bedroom door. Defendant told Brittany to take off her pants. She asked why, and defendant said it was because he needed to talk to her about sex and that he needed to show her. Brittany felt she could not argue with defendant. She asked why they could not just talk about it, and defendant said that they could not because it was hard for him. He did not know how. Defendant told Brittany that sex is what boys wanted and he did not want Brittany to end up having sex with one of them. After

Brittany's pants and underwear were off, defendant touched the outside of her vagina with his fingers, moving them around, for about 15 minutes. Defendant asked if it felt good, and Brittany replied that she did not know. Finally, defendant told Brittany to put her pants back on and told her she would not have to do that again. Defendant made Brittany promise not to tell anyone because they might think it was "weird" or they might "do something." Defendant told Brittany she could not leave because he was her father.

Defendant introduced Brittany and Cameron to a woman named Lisa Tennison. While visiting Tennison's house, Brittany and Cameron heard defendant and Tennison having sex. Defendant bought a motorcycle and left Brittany and Cameron with friends for a couple weeks while he went on a trip to Sturgis, South Dakota. Defendant returned from the trip with a woman named Brandi Nichols, who was 21 years old.

Soon after the Fresno molestation, which was not charged in this case, and just two weeks before Brittany turned 13, defendant and the children moved to Redding. Until defendant found a place for them to live, they stayed with defendant's stepfather. After residing there for about a week, they moved to a residence on Irene Street. At first, Nichols visited occasionally to clean the house, but eventually she moved in. Brittany liked Nichols, considering her as a big sister, but not a mother figure.

First Charged Incident -- Residence of Defendant's Stepfather

- *Count 1 -- Section 269, subdivision (a)(4) (Aggravated Sexual Assault of a Child (Oral Copulation))*
- *Count 2 -- Section 288, subdivision (b) (Forcible Lewd Act on a Child*

On one evening while defendant and the children were living with defendant's stepfather, Cameron and defendant's stepfather went to ride quads (all-terrain vehicles). This left Brittany and defendant alone at the house. Defendant told Brittany that he needed to talk to her about sex again. She protested that they had already talked about it and asked if they really needed to talk about it again. Defendant said they did, and he took her into her bedroom. Defendant locked the door and made Brittany "pinkie-promise" that she would not tell anyone. Defendant told Brittany to take off her pants, which she did because she did not know what else she could do. She felt like she could not say no because she felt he "overpowered" her and she could not say no to a parent. He told her to lay on the bed, and she did. She was taking off her underwear slowly when defendant intervened and pulled them down to her ankles. Defendant fondled Brittany's vagina with his fingers and then put his mouth on her vagina. After about 15 minutes, defendant said something about sperm, got off the bed, took off his pants and underwear, and rubbed his penis to make it hard. Defendant had Brittany touch his penis. He rubbed sperm on Brittany's stomach. When all of this was happening, Brittany just wanted

it to be over. Defendant told Brittany to put her pants on and go wash herself. Brittany did not tell anyone about the incident because she did not know whom to trust.

Second Charged Incident -- Irene Street Residence

- *Count 3 -- Section 288, subdivision (b) (Forcible Lewd Act on a Child)*
- *Count 4 -- Section 288, subdivision (b) (Forcible Lewd Act on a Child)*

Some time after defendant moved with Brittany and Cameron to the house on Irene Street, Cameron was away at a friend's house. Defendant locked the front door. Brittany could not remember if she and defendant were in her bedroom or defendant's bedroom. Defendant told Brittany to take off her pants and underwear and lie on the bed. She complied. Defendant opened Brittany's legs and fondled her vagina with his fingers. He then directed Brittany to do the same and "to feel the right spot." She touched herself for about five minutes while defendant watched. It made her feel "weird." Brittany told defendant she did not want to do it anymore. He said, "okay."

Third Charged Incident -- In the Closet

- *Count 5 -- Section 269, subdivision (a)(4) (Aggravated Sexual Assault of a Child (Oral Copulation))*
- *Count 6 -- Section 288, subdivision (b) (Forcible Lewd Act on a Child)*
- *Count 8 -- Section 269, subdivision (a)(1) (Aggravated Sexual Assault of a Child (Rape))*

About two or three months after the first incident in the Irene Street house, Brittany went to get shoes out of defendant's closet and found a dildo.[2] She asked Nichols, who had moved in by then, what it was used for. Nichols would not answer Brittany's question and later told defendant about the question. Soon after Brittany talked to Nichols about the dildo, Brittany and defendant were again alone in the house. Defendant told Brittany that he had heard she asked Nichols about the dildo. Defendant asked Brittany if she wanted to know about it, and Brittany said she did. Defendant took Brittany into his bedroom, locking the bedroom door, and into the closet, also locking the closet door. Defendant retrieved the dildo from some folded clothes and told Brittany to lie down on the floor and take off her pants and underwear. He knelt next to Brittany, holding the vibrating dildo. Brittany, on the floor with her pants and underwear pulled down, was startled and wanted to know what defendant was going to do. Defendant held

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2 Brittany referred to it as a "dildoy" in her testimony.

the dildo against Brittany's vagina. Stating that his mouth would work better, defendant put down the dildo and put his mouth on Brittany's vagina, moving his tongue around. Defendant took off his pants and put his penis on Brittany's vagina, "barely putting it in." Brittany told him she did not want him to do it because she was scared and did not want it to hurt.[3] Defendant stopped. Both Brittany and defendant were sweating so they left closet. Defendant had a cigarette.

Fourth Charged Incident -- Digital Penetration

- *Count 7 -- Section 269, subdivision (a)(5) (Aggravated Sexual Assault of a Child (Sexual Penetration))*

On an occasion that Brittany believed was different from the closet incident, defendant put his finger inside her vagina. It hurt her.

A "couple months" later, defendant told Brittany he needed to show her more about sex, she said, "No," and defendant replied, "Okay. I'm going to work now."

Fifth Charged Incident -- Defendant and Brittany Sleeping Together

- *Count 9 -- Section 288, subdivision (a) (Lewd Act on a Child)*

Defendant and Nichols had an argument, so she left the house. Cameron was also away at a friend's house, staying the

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[3] When the prosecutor asked a follow-up question about how far defendant inserted his penis in her vagina, Brittany replied: "Not even close. It was like right up to my vagina and I told him, no."

night. Defendant told Brittany to come sleep with him. She did not want to, but defendant said, "Come on, we never get to sleep in the same bed." During the night, defendant put his fingers down Brittany's pants, touching her vagina. When the telephone rang, Brittany took the opportunity to go get in her own bed.

Sixth Charged Incidents -- Horseplay

- *Count 10 -- Section 242 (Battery)*
- *Count 11 -- Section 289, subdivision (j) (Sexual Penetration on a Child)*

While they were living in Redding, defendant sometimes gave Brittany "wedgies," which Brittany described as pulling up her underwear until it hurt, depending upon how hard defendant pulled. Sometimes her underwear would get bundled up and go up her vagina. When they were roughhousing once, defendant inserted his finger into Brittany's anal opening.

Reporting of the Molestations

In the summer of 2003, after living in Redding for about one year, defendant moved with Nichols, Brittany, and Cameron to Florida. On October 2 of that year, defendant, Cameron, and Brittany were roughhousing in a bedroom. Defendant lay on Brittany, hurting her, so she slapped his face. Defendant became angry, told Cameron to leave the bedroom, locked the door, and told Brittany he was going to give her a spanking. Defendant told Brittany to pull down her pants and underwear. She followed defendant's directions. She was in her pajamas and was not wearing a bra. Defendant told Brittany to pull her top over her head. As Brittany stood there exposed, defendant sat

on the bed and stared at her. When she tried to pull her top back down, he pulled it back up over her head and told her to keep it there. Eventually, defendant told Brittany to put her clothes back on, and he left.

Brittany spoke to Nichols, who told Brittany she should not have slapped her father. Nichols explained to Brittany that she had found child pornography on defendant's computer and that Nichols's stepfather had molested her when she was young. Nichols expressed fear that defendant would have sex with Brittany. Nichols asked whether defendant had "done anything" to Brittany, and Brittany replied that he had.

Brittany and Nichols made a plan to leave the next day, and Nichols called her sister for assistance. Brittany and Nichols went to bed, but Nichols's sister called an abuse hotline. Chevelle Washington of the Florida Department of Children and Families responded to the call along with Officer Kevin McCollum of the Apopka Police Department. They arrived at defendant's residence at about midnight. After speaking with Nichols, they awakened Brittany at about 1:00 a.m. and questioned her. The interview lasted about 10 or 15 minutes. This was the only time Washington interviewed Brittany. The interview was to assess the risk. It was not a forensic interview. Officer McCollum interviewed Brittany for about an hour at the police department after they transported Brittany there. This interview was also not intended to be a detailed, comprehensive interview concerning everything that had happened to Brittany. It was

intended to get a basic idea of what law enforcement was required to do. Brittany signed a statement at 2:53 a.m.[4]

Brittany was taken to a group home, where she stayed for several weeks. During her stay at the group home, Brittany met a 17-year-old girl who described her sexual experiences to Brittany.

Brittany's Alleged Animosity for Defendant

Defendant attempted to establish that Brittany did not like him. Defense counsel asked Brittany whether, prior to her mother's death, she liked defendant. Brittany replied that she "didn't really dislike him." She later told an officer who interviewed her that she had not liked defendant since she was five years old and wished that her mother would have divorced him. Brittany believed defendant had been cheating on her mother before her mother died. Brittany also did not like the fact that defendant was dating two women, Tennison and Nichols, at the same time.

Around the time of the death of Brittany's mother, Kaiser Hospital paid a settlement for malpractice. Brittany's aunt told Brittany that defendant may have spent the money. Brittany was under the impression that defendant was going to withhold the money from her.

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[4] Brittany testified that the interview at the police department was about five hours long. The accuracy of her estimation of time is doubtful, given that she did not arrive at the police department until around 2:45 a.m., she signed a statement at 2:53 a.m., and she left the station for placement at a group home at about 3:45 a.m.

Defendant's Testimony

Defendant denied molesting Brittany. He testified that he never told her he was going to talk to her about sex or demonstrate it. He never orally copulated or touched her in any sexual way. One winter night, when the heater was not working, defendant made a fire in the fireplace and had Brittany sleep with him in a sleeping bag. He acknowledged giving Brittany "wedgies" but did not touch her bottom. He playfully bit her bottom at times when she had jeans on.

Defendant also testified that he and Nichols had discussed marriage. A week before the molestations were reported, defendant told Nichols that he would not marry her. They had a major fight.

DISCUSSION

I

Cross-examination of Brandi Nichols

Before trial, defendant filed a motion requesting that he "be permitted to explore the existence of a morbid fear of sexual matters, in particular child molestation, of Brandi Nichols . . . ." The purpose of this evidence, according to defendant, was to show that this alleged obsession led Nichols to influence Brittany to make her claims that defendant molested her. The trial court denied the motion. On appeal, defendant claims the denial of this motion violated his rights to cross-examine and present a defense. We conclude the evidence was properly excluded and the trial court did not violate defendant's rights to cross-examine and present a defense.

Defendant's motion in limine stated that Nichols told Brittany that she found child pornography on defendant's computer and that defendant had visited websites concerning fathers molesting their daughters. After revealing this information, Nichols then asked Brittany if she had been molested, and Brittany replied that she had. Nichols told Brittany that she, too, had been molested and told Brittany she would not let it happen to Brittany again. Nichols and Brittany made a plan to leave together, but the plan fell through when Brittany was taken into protective custody.

In support of his request to "explore the existence of [Nichols's] morbid fear of sexual matters, in particular child molestation," defendant quoted at length a 1964 Court of Appeal case reversing the denial of a motion for new trial because the trial court had prevented defendant from questioning the victim's mother concerning, in the words of the opinion, "advances made to her by various men." (*People v. Scholl* (1964) 225 Cal.App.2d 558, 562-564 (*Scholl*).) As he did in the trial court, defendant relies on *Scholl* in making his argument on appeal.

We conclude that *Scholl* does not accurately reflect current law and should not be followed for three reasons. First, the *Scholl* court made no attempt to apply the appropriate standard of review to the question of whether the questioning was properly limited. Second, the defense in *Scholl* apparently made no offer of proof concerning what evidence the attempted line of questioning would produce. And third, the assumptions and

reasoning underlying the *Scholl* court's conclusion are no longer valid because they are outdated and have been disproved in the cases and statutes to be discussed below.

People v. Scholl

In *Scholl*, the defendant was convicted of sexual offenses on an eight-year-old girl. (*Scholl, supra,* 225 Cal.App.2d at p. 560.) The victim's testimony was uncorroborated. (*Id.* at p. 561.) The defendant moved for a new trial, and the motion was denied. (*Id.* at p. 560.) On appeal from the order denying the new trial motion, the defendant argued, among other things, that the trial court erred by precluding him from asking the victim's mother whether the mother "had complained of advances made to her by various men." (*Id.* at p. 562.) Without mentioning the standard of review for exclusion of evidence or recounting any offer of proof by the defendant, the Court of Appeal concluded, "We think it was in error." (*Ibid.*)

The *Scholl* court based its finding of error on the unsupported apprehension that the victim's mother, whether because of malice or an "abnormal fear of and reaction to sexual relations," may have planted in the child a belief that the child had been molested. The court stated: "[S]uch cases usually involve . . . problems inherent in the testimony of a mother or other relative. Normally, it is from such a person that information of the alleged offense comes to the prosecution. But we know that, for some women, the normal concern for the welfare of their child may take an aggravated form. If the mother is abnormally oriented toward sexual

conduct, and has an abnormal fear of and reaction to sexual relations, she may, quite unconsciously, build up, in her own mind, a quite innocent act or caress into a grievous wrong. Young children are especially suggestible. The inquiries put by such a mother to her daughter may, themselves, implant into the child's mind ideas and details which existed only in the fears and fantasies of the adult. Once implanted, they become quite real in the mind of the child witness and are impervious to cross-examination." (*Scholl, supra,* 225 Cal.App.2d at p. 563.)

Standard of Review

Generally, "[a] trial court's decision to admit or exclude evidence is reviewable for abuse of discretion." (*People v. Vieira* (2005) 35 Cal.4th 264, 292.) More specifically, "[t]rial judges retain 'wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' [Citations.] A trial court's ruling to admit or exclude evidence offered for impeachment is reviewed for abuse of discretion and will be upheld unless the trial court 'exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 705 (*Ledesma*).)

The *Scholl* court made no mention of a standard of review and did not purport to apply the abuse of discretion standard.

Instead, it merely stated, "We think it was in error." (*Scholl, supra,* 225 Cal.App.2d at p. 562.)

Precedent that fails to apply the appropriate standard of review is of questionable value because it is little more than untethered personal opinion. In such a case, principles of law are discussed with no point of reference. They are not circumscribed by proper deference to the appellate standard of review.

An abuse of discretion standard requires the reviewing court to uphold the exclusion of evidence unless the reviewing court finds the trial court acted arbitrarily, capriciously, or in a patently absurd manner *and* that the exclusion of the evidence resulted in a *manifest* miscarriage of justice. (*Ledesma, supra*, 39 Cal.4th at p. 705.) The *Scholl* court made no such findings, but concluded, "it seems to us error to deny to the defendant a reasonable opportunity to explore the not impossible existence of such a morbid fear of sexual acts in the mind of the mother as to make the charge a creature of that morbidity." (*Scholl, supra*, 225 Cal.App.2d at p. 564.)

Perhaps prompted by the *Scholl* decision, defendant also fails to identify the proper standard of review in his opening brief. He quotes from a case of the United States Supreme Court concerning the right to cross-examine: "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the

facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' [Citation.]" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [89 L.Ed.2d 674, 684].) This quote does not answer the question of whether the evidence was properly excluded; it *asks* the question, stating that a constitutional violation occurs only if the prohibited cross-examination was "otherwise appropriate." As noted above, whether the cross-examination was appropriate and should have been allowed is subject to the abuse of discretion standard.

When an appellant fails to apply the appropriate standard of review, the argument lacks legal force. "Arguments should be tailored according to the applicable standard of appellate review." (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1388.) When they are not so tailored, the appellant fails to show error in the judgment. "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

Defendant's failure to apply the appropriate standard has resulted in his failure to establish, or even assert, that his motion to cross-examine Nichols was denied arbitrarily, capriciously, or in a patently absurd manner or that the denial resulted in a manifest miscarriage of justice. (See *Ledesma, supra,* 39 Cal.4th at p. 705.) Accordingly, his contention fails.

In any event, a contention that the trial court abused its discretion in denying defendant's request to inquire into whether Nichols had a morbid fear of sexual matters and child molestation would fail. As discussed below, the trial court's ruling was not an abuse of discretion because (1) defendant failed to make an adequate offer of proof and (2) the assumptions and reasoning underlying the *Scholl* opinion are outdated and have been disproved.

Offer of Proof

When a trial court denies a defendant's request to produce evidence, the defendant must make an offer of proof in order to preserve the issue for consideration on appeal. Evidence Code section 354 states the rule: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means . . . ."

Even if a question such as the one posed in *Scholl*, concerning whether the witness (the victim's mother) had complained of advances by various men, is posed on cross-examination and the trial court prevents the defense from delving into the issue, the defendant must still make an offer of proof to preserve the issue for consideration on appeal,

unless the issue was within the scope of the direct examination. Normally, if the trial court excludes evidence on cross-examination, no offer of proof is necessary to preserve the issue for consideration on appeal. (Evid. Code, § 354, subd. (c).) However, "[c]ross-examination is limited to the scope of the direct examination. (Evid. Code, § 773.)" (*Nienhouse v. Superior Court* (1996) 42 Cal.App.4th 83, 93.) If the evidence the defendant seeks to elicit on cross-examination is not within the scope of the direct examination, an offer of proof is required to preserve the issue. (*Ibid.*)

"'"Before an appellate court can knowledgeably rule upon an evidentiary issue presented, it must have an adequate record before it to determine if an error was made." [Citation.]' [Citation.] 'The offer of proof exists for the benefit of the appellate court. The offer of proof serves to inform the appellate court of the nature of the evidence that the trial court refused to receive in evidence. . . . The function of an offer of proof is to lay an adequate record for appellate review. . . .' [Citation.]" (*Nienhouse v. Superior Court, supra,* 42 Cal.App.4th at pp. 93-94.)

In *Scholl*, there is no indication that the question concerning whether the victim's mother had complained of advances by various men was within the scope of the direct examination. Most likely it was not, since the *Scholl* court recounted no testimony on the subject from the direct examination. Instead, the *Scholl* court appears to have speculated concerning what testimony might have been elicited by

the question and what bearing the answer might have had on the witness's credibility. This mode of review is simply too speculative to be reliable and practical. Accordingly, *Scholl* is further weakened as legal authority because it does not account for the requirement that an offer of proof be made in order to preserve the issue for consideration on appeal.

Because defendant was unspecific and made only the most speculative offer of proof in support of his request to inquire into whether Nichols had a morbid fear of sexual matters and child molestation, he cannot establish, on appeal, that the trial court's denial of his request was an abuse of discretion. Defendant's motion stated that he wished to question Nichols "to establish that [Nichols's] morbid fear of sexual matters, (including such fear of particular child molestation [*sic*]), and the charges are a creature of that morbid fear." "An offer of proof should give the trial court an opportunity to change or clarify its ruling and in the event of appeal would provide the reviewing court with the means of determining error and assessing prejudice. [Citation.] To accomplish these purposes an offer of proof must be specific. It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued. [Citations.]." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.)

Here, defendant did not give a specific offer of proof of evidence to be produced. His offer was conclusory and concerned only the area of questioning. It did no more than speculate as to what might be proven, reciting the "morbid fear" language

from *Scholl*. This speculation and lack of specificity was inadequate to preserve the issue for consideration on appeal.

Modern Approach

Even if the *Scholl* decision reflected attitudes and assumptions acceptable in its era concerning the questioning of witnesses other than a complaining witness in a sex crime case, those attitudes and assumptions have changed, rendering the *Scholl* opinion archaic. Just as the testimony of victims of sexual crimes is no longer deemed inherently suspect, we conclude the testimony of a non-complaining witness in a sex crime case who may have been a victim herself of unwanted sexual attention or advances, likewise should not be inherently distrusted.

The California Supreme Court used the archaic view in deciding a case in 1966 involving whether a trial court should allow the defense to obtain an involuntary psychiatric evaluation of the complaining witness to impeach that witness's credibility. (*Ballard v. Superior Court* (1966) 64 Cal.2d 159 (*Ballard*).) In *Ballard*, the court relied on "prominent psychiatrists" who "explained that a woman or a girl may falsely accuse a person of a sex crime as a result of a mental condition that transforms into fantasy a wishful biological urge. Such a charge may likewise flow from an aggressive tendency directed to the person accused or from a childish desire for notoriety. [Citations.]" (*Id.* at p. 172.) The *Ballard* court noted the "trend" of allowing the defense to delve into evidence of mental and emotional instability of the complaining witness to impeach

her. It wrote of the "danger of psychotically induced charges." (*Id.* at p. 173.) The court therefore established a rule authorizing trial judges to order a complaining witness to submit to involuntary psychiatric examinations if the complaining witness's claims have little or no corroboration. Evidence from a psychiatric examination performed under these circumstances could be used to impeach the credibility of the complaining witness. If a complaining witness refused to be examined, the defense could comment to the jury on this refusal. (*Id.* at pp. 176-177.)

Although *Ballard* discussed only the complaining witness and did not mention evidence concerning claims of sexual offenses adduced from witnesses other than the complaining witness, the same speculative assumptions and faulty reasoning as that found in *Scholl* were used. In fact, the *Ballard* court cited, with apparent approval, though without comment, the decision in *Scholl*. (*Ballard, supra,* 64 Cal.2d at p. 174.)

Two years after its decision in *Ballard*, the Supreme Court decided *People v. Russel* (1968) 69 Cal.2d 187, in which the court held it was an abuse of discretion to exclude testimony by a psychiatrist who had examined the complaining witness in a sex offense. The *Russel* court held that the trial court should have admitted the psychiatric testimony on the issue of the credibility of the complaining witness: "[H]aving in mind the rationale and objective of *Ballard* and the danger in sex offense cases that the charge may rest on the credibility of the child as against the bare denial of the defendant, we think that the

legal discretion of the judge should be exercised liberally in favor of the defendant. [Citation.]" (*Id.* at p. 198.)

The assumptions and reasoning of *Ballard* and *Russel* have now been rejected: "The distrust of complaining witnesses in sex offense cases that formed the foundation for *Ballard* and *Russel* was based on antiquated beliefs that have since been disproved and discarded. Both the Legislature and the California Supreme Court have modernized the law's treatment of sex offense victims. A trial court's discretion to order a psychiatric examination of a complaining witness in a sex offense case was eliminated by the Legislature in 1980. (*People v. Castro* (1994) 30 Cal.App.4th 390, 397.) Subsequently, in *People v. Barnes* (1986) 42 Cal.3d 284, the California Supreme Court declared that '[t]he [1980] amendment of section 261, subdivision (2) [deleting the resistance requirement], acknowledges that previous expectational disparities, which singled out the credibility of rape complainants as suspect, have no place in a modern system of jurisprudence.' (*Barnes*, at p. 302.) More recently, the California Supreme Court has recognized that the 1980 legislative prohibition on psychiatric examinations of complaining witnesses in sex crime cases 'overruled' the 'line of authority' established by *Ballard* and *Russel*. 'As defendant notes, earlier cases indicated a trial court should grant a defense motion for a psychiatric examination of the complaining witness in a sex-crime case where psychiatric evidence appeared necessary to assist the trier of fact in assessing the witness's *credibility*. (E.g., *People v.*

Russel[, *supra*,] 69 Cal.2d 187, 193 . . . ; [*Ballard, supra,*] 64 Cal.2d 159, 171-177 . . . [noting, however, the general rule against impeachment by psychiatric evidence]; *People v. Duncan* (1981) 115 Cal.App.3d 418, 426-427 [finding no abuse of discretion in denial of defense motion].) But the Legislature overruled this line of authority in 1980 by adopting Penal Code section 1112, which forbids courts from ordering psychiatric examinations of victims or complaining witnesses in sex-crime cases in order to assess their credibility.' (*People v. Anderson* (2001) 25 Cal.4th 543, 575.)" (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1311-1312 (*Espinoza*), italics in original.)

Because *Scholl* relied on the same assumptions and reasoning as *Ballard* and *Russel*, it no longer has binding or persuasive value. Based on the possibility that the mother of the complaining witness, to whom the complaining witness had first reported the molestation, may have suffered from an abnormal orientation toward sexual conduct, *Scholl* stated that the defendant should have been allowed to attempt to impeach the mother with the question concerning whether she had complained of advances made by various men. The law no longer recognizes a distrust of the testimony of someone based on having been a victim of unwanted sexual advances. Accordingly, the speculation that Nichols may have had a "morbid fear" of sexual matters, and based on that fear influenced Brittany, did not justify the defense's attempt to question her concerning that matter of speculation. The trial court did not abuse its

discretion in denying the motion to question Nichols concerning a "morbid fear of sexual matters, (including such fear of particular child molestation [*sic*]) . . . ."

Because the trial court's order denying defendant's motion to question Nichols on the matters discussed was not an abuse of discretion, the court did not violate defendant's rights to cross-examine or present a defense. "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.'" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

II

Sufficiency of Duress Evidence

Defendant asserts there was insufficient evidence of duress to sustain the convictions in counts 1 through 8. He contends the trial court erred by denying his motion pursuant to section 1118.1 at the end of the prosecution's case-in-chief based on lack of evidence of duress. We conclude the evidence was sufficient to sustain the convictions in counts 1 through 8 and that the trial court did not err in denying defendant's section 1118.1 motion.[5]

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[5] Section 1118.1 states: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted,

Counts 1 through 8 each alleged a crime committed by "force, violence, duress, menace . . . ." (§§ 269, subd. (a)(4) [counts 1 & 5]; 288, subd. (b) [counts 2, 3, 4 & 6]; 269, subd. (a)(5) [count 7]; 269, subd. (a)(1) [count 8].) In argument to the jury, the prosecutor focused solely on defendant's use of duress. Although proof of any of the means -- force, violence, duress, menace, or fear of immediate and unlawful bodily injury -- is adequate, regardless of whether the prosecution relied on only one, we will focus on duress because we conclude the evidence of this means was sufficient.

"In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, '"whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." [Citations.] 'Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point.' [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213.) "We review independently a trial court's ruling under section 1118.1 that the evidence is sufficient to support a conviction. [Citations.]" (*Id.* at p. 1213.)

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the defendant may offer evidence without first having reserved that right."

"'Duress' as used in this context 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.' [Citations.] 'The total circumstances, including the age of the victim, and [her] relationship to defendant are factors to be considered in appraising the existence of duress.' [Citation.] Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family. [Citations.]" (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13-14.) "'Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to the existence of duress. [Citation.]" (*People v. Senior* (1992) 3 Cal.App.4th 765, 775.)

Background

Because we must consider the totality of the circumstances presented by the prosecution's case-in-chief in determining whether the trial court properly denied defendant's section 1118.1 motion, we start with some background that has some bearing on whether defendant's actions amounted to duress.

Defendant was effectively Brittany's stepfather, the only father she knew. Her mother died when she was 12 years old, so

defendant became her only parent. She was dependent on him. After the death of Brittany's mother and before they moved to Redding, defendant molested her, telling her that he was showing her about sex. Brittany, who was small of stature, much smaller than defendant, did not want him to show her and asked him why they could not just talk. He insisted on showing her, and she felt she could not argue with him. Before molesting her, defendant locked the front door and the bedroom door, isolating her. After defendant fondled Brittany, he told her to put her pants back on and told her she would not have to do that again. He made Brittany promise not to tell anyone because "they might think that was weird, or they might do something."

From this experience, Brittany learned that she could not talk defendant out of molesting her, she had no protection from defendant, and she could not tell anyone. If she told others about the molestation, they would think it was "weird" or they "might do something," which, to a young person living with her only parent, was ominous.

First Charged Incident -- Counts 1 and 2

After moving with Brittany to Redding, defendant again told Brittany that they must talk about sex, while they were home alone, this time at the residence of defendant's stepfather. Brittany tried to talk defendant out of it, but he insisted, locking the door. Defendant told Brittany to take off her pants. Brittany complied because she felt that he "overpowered" her and she could not say no to a parent. Defendant made Brittany "pinkie-promise" that she "couldn't tell anyone." He

told her to lie on the bed. She did. When she was taking off her underwear too slowly, defendant pulled them down to her ankles. He then used his fingers and his mouth on her vagina, rubbed his penis and had Brittany touch it, ejaculated, and rubbed the seminal fluid on Brittany's stomach.

The evidence of duress was sufficient to sustain the convictions as to counts 1 (aggravated sexual assault of a child involving oral copulation) and 2 (forcible lewd act on a child). While there was no direct threat of force, violence, danger, hardship or retribution, reasonable inferences support a finding of an indirect threat of hardship and retribution for four reasons. First, Brittany was dependant on defendant for the necessities of life, having only recently lost her mother. Second, from her upbringing, Brittany believed she could not say no to her parent. We can reasonably infer that defendant knew his orders, including these depraved requests, would have the desired effect on Brittany. Third, Brittany did not want to engage in the acts but only did so because of defendant's insistence. And fourth, defendant's warning to Brittany not to tell anyone because they might think it was "weird" or they might "do something" and his insistence that she promise not to tell anyone communicated to Brittany that she could not rely on others to avoid defendant's molestations. Duress was sufficiently shown.

Second Charged Incident -- Counts 3 and 4

By the time of the second charged incident, in the Irene Street residence in Redding, defendant had established a pattern

of duress, insisting on performing the acts on Brittany even though she did not want him to. Defendant and Brittany were alone in the house. Defendant locked the door and told Brittany to take off her pants and underwear and get on the bed. She obeyed defendant's orders. Brittany had her legs together, and defendant spread them apart. Defendant used his fingers to touch Brittany's vagina and directed her to touch herself. She obeyed, but finally said she did not want to.

Considering the prior circumstances and the pattern that defendant had established with Brittany, the evidence was sufficient to establish duress during the second charged incident with respect to counts 3 and 4 (forcible lewd acts on a child). Brittany did not want to engage in the acts but did so because of defendant's position of authority over her, his establishment of a pattern of molestations, his insistence that she engage in the acts despite her remonstrances, his isolation of Brittany, and his warnings to her not to tell anyone.

Third Charged Incident -- Counts 5, 6, and 8

During the third incident, the one in the closet, defendant continued the patterns he had established in the prior incidents. After hearing of Brittany's question about the dildo, defendant waited until he and Brittany were alone in the home. He isolated Brittany by locking the bedroom door and the closet door. He told Brittany to lie on the floor and take off her pants and underwear. Alarmed, Brittany asked what defendant was doing. Defendant touched Brittany's vagina with the

vibrating dildo and then with his mouth. He also put his penis in her vagina.

With respect to counts 5 (aggravated sexual assault of a child involving oral copulation), 6 (forcible lewd act on a child), and 8 (aggravated sexual assault of a child involving sexual intercourse), defendant's actions again amounted to duress under the totality of the circumstances, including defendant's relationship with Brittany and his prior actions. Brittany continued to look to defendant as her only parent for the necessities of life. The warnings had been given, the promise to keep quiet made. Brittany's alarm at defendant's actions did not stop him.

Fourth Charged Incident -- Count 7

Although we have less evidence concerning the fourth incident, exactly when it occurred and where, it was around the time of the third incident. Defendant put his finger inside Brittany's vagina. In doing so, he hurt Brittany. This incident is subject to a reasonable inference that defendant accomplished the act by duress. There is no evidence Brittany ever wanted defendant to engage in these acts, and she was always under the pressures discussed above, having to do with defendant's position of authority, his provision for her welfare, and his warnings not to tell others. Accordingly, as with the other three charged incidents, the evidence was sufficient to find duress during the fourth incident as charged in count 7 (aggravated sexual assault on a child involving sexual penetration).

Defendant's Arguments

Relying on (1) a precedent concerning duress and (2) some of the circumstances involved in the incidents discussed above, defendant argues we should conclude the evidence of duress was not sufficient. We find the argument unconvincing because the case defendant cites is distinguishable on the facts and the evidence, construed in the light most favorable to the judgment in this case, supports the finding of duress.

Defendant relies on *Espinoza, supra,* 95 Cal.App.4th 1287, a child molestation case in which the Court of Appeal found the evidence of duress was insufficient to sustain a conviction. We conclude that the evidence here provided details of duress not found in *Espinoza*.

The defendant in *Espinoza* was convicted of forcible lewd conduct (§ 288, subd. (b)) and attempted forcible rape (§§ 261, subd. (a)(2); 664), both requiring a finding that the act was accomplished by means of "force, violence, duress, menace, or fear of immediate and unlawful bodily injury." The prosecutor relied solely on duress. (*Espinoza, supra*, 95 Cal.App.4th at pp. 1291, 1318-1319.) The victim was the defendant's 12-year-old daughter who was in special education classes at school. On five occasions, the defendant entered the victim's bedroom at night and molested her. The victim did nothing because she was too frightened. She did not report the molests because she was afraid the defendant "'would come and do something.'" (*Id.* at pp. 1292-1293.) Arguing that the defendant used duress in committing the acts, the prosecutor listed for circumstances in

support of such a finding: "(1) defendant was older than [the victim], (2) defendant was much larger than [the victim], (3) [the victim] had not lived with defendant for many years, (4) he was her natural father and (5) she was scared of him." (*Id.* at p. 1319.) The trial court found that "duress was supported by [the victim's] dependence on defendant, the size and age disparities, her limited intellectual level and her fear of defendant." (*Ibid.*)

On appeal, the *Espinoza* court disagreed with the trial court that the evidence was sufficient to find duress. It explained: "The only way that we could say that defendant's lewd act on [the victim] and attempt at intercourse with [the victim] were accomplished by duress is if the mere fact that he was [the victim's] father and larger than her combined with her fear and limited intellectual level were sufficient to establish that the acts were accomplished by duress. What is missing here is the '"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."' [Citation.] Duress cannot be established unless there is evidence that 'the victim['s] participation was impelled, at least partly, by an implied threat . . . .' [Citation.] No evidence was adduced that defendant's lewd act and attempt at intercourse were accompanied by any 'direct or implied threat' of any kind. While it was clear that [the victim] was afraid of

defendant, no evidence was introduced to show that this fear was based on anything defendant had done other than to continue to molest her. It would be circular reasoning to find that her fear of molestation established that the molestation was accomplished by duress based on an implied threat of molestation." (*Espinoza, supra*, 95 Cal.App.4th at p. 1321.)

The crucial fact that distinguishes this case from *Espinoza* is that there was a direct or implied threat in two forms: (1) defendant's statements when he previously molested her and (2) his actions in accomplishing the acts despite Brittany's demonstrated unwillingness. When defendant molested Brittany before they moved to Redding, he told her that she could not tell anyone because there would be consequences. Someone might think it was "weird" or might do "something." The jury could reasonably infer that, when defendant later molested Brittany, she submitted rather than resisting or getting help because defendant or someone else might do "something" to her. The prior statements, isolation, and molestation also convinced Brittany that she was powerless to resist. (See *People v. Senior, supra,* 3 Cal.App.4th at p. 775 [continued exploitation as evidence of duress].) During the first charged incident, Brittany demonstrated her reticence by acting slowly to pull down her underwear. Defendant intervened and pulled them to her ankles. By this, defendant communicated to Brittany that, if she did not cooperate (or cooperate quickly enough), he would use force to accomplish the acts. For these two reasons,

Espinoza is distinguishable and does not support defendant's argument that he did not use duress.

Defendant also argues there are facts that make a finding of duress unreasonable. We conclude that these facts do not render the evidence insufficient.

Defendant focuses on the following evidence: (1) Brittany did not testify she cooperated with defendant because of perceived threats, (2) in the second and third charged incidents defendant stopped when Brittany asked him to, and (3) Brittany was about 13 years old and did not have limited mental capacity. None of this evidence calls into doubt the jury's verdict.

A statement from the victim that she cooperated only because of perceived threats is unnecessary to a finding of duress. Even if a victim testified that she did not cooperate based on direct or implied threats, a jury can still find duress if the evidence is otherwise sufficient. (*People v. Cochran, supra,* 103 Cal.App.4th at p. 14.)

While there was some evidence that defendant stopped when Brittany asked him to, there was also evidence that he insisted on performing the acts despite Brittany's attempt to talk him out of it.

And finally, that Brittany was about 13 years old and did not have limited mental capacity are facts defendant could argue to the jury, but they are not facts that prevent us, as a matter of law, from finding sufficient evidence of duress.

Therefore, we conclude the trial court properly denied defendant's motion for acquittal pursuant to section 1118.1.

Sufficiency of All Evidence

Defendant also contends the evidence, overall, was insufficient to find duress. The only additional evidence of duress presented after the close of the prosecution's case-in-chief was Nichols's testimony, during prosecution rebuttal, concerning what Brittany told her. When Nichols asked Brittany if defendant had molested her, Brittany broke down and stated that she did not tell Nichols before because she had no proof and Nichols would not believe her. Brittany also said defendant told her Nichols would leave and things would get worse.

This additional testimony does not change our conclusions concerning the sufficiency of the evidence. Accordingly, the evidence was sufficient to sustain the verdict.

III

Admission of Prior Consistent Statements

Defendant asserts in his opening brief and in a supplemental brief that the trial court erred by admitting evidence of Brittany's prior consistent statements to rehabilitate her credibility after the defense had elicited evidence of prior inconsistent statements. We conclude the trial court did not abuse its discretion in admitting the prior consistent statements because case law allows such admission, even if the statements did not fall within the scope of prior consistent statements made admissible by statute.

As defendant, again, fails to acknowledge in his opening brief and his supplemental opening brief, admission of evidence is subject to the discretion of the trial court, and we will not

reverse unless an abuse of discretion is established. (*People v. Vieira, supra,* 35 Cal.4th at p. 292.)[6]

During the prosecution's case-in-chief, Brittany testified concerning the facts recounted above, stating that defendant committed numerous molestations on her. On cross-examination, the defense questioned Brittany about the interview conducted by Chevelle Washington of the Florida Department of Social Services on October 3, 2003, the night she was taken into protective custody. The interview took place in Brittany's bedroom when she was awakened at about 1:00 a.m. Brittany did not relate during that interview some of the details she later recounted in an interview in California and as a witness at trial. For example, she did not state, during the October 3, 2003 interview, that defendant had touched her vagina with his fingers, that he had touched her with his penis, or that there was an incident with a dildo.

A. *Opening Brief Argument*

The prosecution called as a witness Officer Todd Rowen of the Redding Police Department to rehabilitate Brittany's credibility with statements she made before trial that were consistent with her testimony. He conducted an interview with Brittany on April 15, 2005, in preparation for defendant's preliminary hearing. During that interview, she recounted the

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[6] In his supplemental reply brief, defendant concedes that his admissibility argument is reviewed only for abuse of discretion.

incidents concerning which she later testified at trial. Defendant objected to the testimony as hearsay, and the trial court sustained the objection. Later, the prosecution submitted points and authorities citing case law that we discuss below. The trial court changed its ruling to allow Officer Rowen's testimony concerning Brittany's prior consistent statements.

As the trial court noted when it first sustained defendant's objection to admission of Brittany's prior consistent statement, Evidence Code sections 1236 and 791 provide for admissibility of prior consistent statements. Evidence Code section 1236 states: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791." And Evidence Code section 791 states: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] . . . [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

These statutes do not make Brittany's prior consistent statements to Officer Rowen admissible. There was evidence that Brittany did not like defendant for several reasons: (1) Brittany believed defendant had cheated on her mother before

she died, (2) she did not like defendant's dating habits, and (3) she thought defendant might withhold from her the malpractice settlement.[7] Assuming this evidence sufficiently established that Brittany did not like defendant and therefore had a motive to lie in order to cause him trouble, Brittany's motive to lie arose before her October 3, 2003, interview in Florida, during which Brittany did not relate all of the details of the molestations. Therefore, on its face, Evidence Code sections 1236 and 791, subdivision (b), did not authorize admission of Brittany's later statement to Officer Rowen because that subdivision authorizes only those statements made "before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

This does not end the analysis, however, because case law provides an exception to the rule that the prior consistent statement must have been made before the motive to lie arose. The exception applies when the witness's statement that the defense seeks to use to exculpate the defendant is exculpatory only because the witness failed to make an inculpatory statement about the defendant in a situation in which it would have been

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[7] There was also evidence that Brittany did not dislike defendant. We need not resolve this factual debate for two reasons: (1) the trial court relied on the cases that we discuss in resolving the issue, not on a factual determination of whether Brittany disliked defendant and (2) our resolution of the issue on the factual terms proposed by defendant on appeal renders unnecessary an attempt on appeal to resolve the factual issue of whether Brittany disliked defendant.

natural to make the inculpatory statement. Referred to in the cases as "negative evidence," this failure to inculpate, which the defendant may argue is exculpatory, may be rebutted with evidence that the witness later contradicted the prior silence by making statements inculpating the defendant. (*People v. Williams* (2002) 102 Cal.App.4th 995, 1011-1012.)

The Court of Appeal, in *People v. Williams, supra,* 102 Cal.App.4th at pages 1011 through 1012, explained the application of this exception to the timing requirement in Evidence Code section 791, subdivision (b): "In *People v. Gentry* (1969) 270 Cal.App.2d 462, the court articulated an exception to the Evidence Code section 791 requirement that the prior consistent statement must have been made before an improper motive is alleged to have arisen. (*People v. Gentry, supra*, at p. 473.) 'Different considerations come into play when a charge of recent fabrication is made by negative evidence that the witness did not speak of the matter before when it would have been natural to speak,' and the witness's silence is alleged to be inconsistent with trial testimony. (*Ibid.*) In this scenario, the evidence of the consistent statement becomes proper because '"the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story."' (*Ibid.*; see also *People v. Manson* (1976) 61 Cal.App.3d 102, 143.)" (Italics in original.)

This exception to the requirement that the prior consistent statement must have been made before any bias or motive to lie

arose is also applicable here. The defense sought to impeach Brittany with her prior silence concerning some of the elements of the molestations. The prosecution's use of Officer Rowen's testimony was admissible to rehabilitate Brittany's credibility from the implication arising from her prior silence.

B. *Supplemental Brief Argument*

In his supplemental brief, defendant further asserts that the trial court's admission of Washington's testimony recounting Brittany's statements on October 3, 2003, the night Brittany was taken from defendant's custody, was improper. We disagree.

The prosecution called Washington to testify. When the prosecutor asked Washington about what Brittany had told her concerning what happened between her and defendant in Florida, the defense objected based on the hearsay rule. The trial court overruled the objection. Washington answered, recounting the incident in which defendant had Brittany pull her pants down and pull her shirt over her head. The prosecutor then asked what Brittany had said about what happened to her in California. The defense again objected based on the hearsay rule. In response, the court addressed the jury:

"Well, this is hearsay. Generally speaking, ladies and gentlemen, hearsay is not admissible. There's almost as many exceptions as there are rules. One of the exceptions is a prior consistent statement, and I assume that's what's being looked into here. [¶] Last week, I ruled that prior consistent statements at some other time [referring to Officer Rowen's testimony], a much later time, was not admissible, at least at

that stage of the proceedings. However, this -- and it was not admissible because it was made apparently quite a bit after the original report, what we call the disclosure. [¶] These statements apparently were made at the very time of disclosure. And for that reason, I think they are admissible. Because apparently, any disclosure that was made occurred, either at the time that the victim -- alleged victim talked to this witness or maybe at the time the alleged victim talked to [Nichols]. But both of those events were almost at the same time. So, I'm going to permit it."

Washington testified that her first interview of Brittany took place at 1:00 a.m. in Brittany's bedroom when Brittany was awakened. The interview was meant only to assess the situation and was not a forensic interview. Brittany was emotional, and she was afraid she would be in trouble after Washington left. When Washington asked about abuse allegations, Brittany became quiet and distant. Concerning her question to Brittany about the California incidents, Washington testified:

"The child told me that her father, who she refers to as Ray Foss, also has told her that he needed to speak with her about sex and that he had come into her bedroom in California and showed [her] his penis. The child stated that he told her that when you have sex, the penis becomes excited and that that's how it looks, referring to an aroused penis. [¶] The child stated that her father would make her pull down her pants and underwear and lick her vagina with his tongue. She stated that she had to lay [*sic*] on her back, and it happened about

five times in California. [¶] She stated that it started when she was twelve years old and after her mom died. The child stated she was scared to tell anybody because he told her that their talks was [*sic*] personal and private and that he scared her into not telling anyone. [¶] She also stated she was made to sleep in the bed with Ray."

Defendant claims the trial court erred by admitting this evidence because (1) it was not a prior consistent statement and (2) it did not fall within the prior consistent statement exception to the hearsay rule.

By noting numerous details Brittany left out of her statement to Washington but later revealed at trial, defendant complains that Brittany's statement to Washington was not consistent with her trial testimony. He argues that the statement to Washington "was not consistent with her testimony in that it did not include the bulk of sexual conduct claimed at trial and asserted a greater number of incidents of oral copulation than was claimed at trial." This argument fails because the trial court's determination that Brittany's prior statement and her trial testimony were consistent was not an abuse of discretion. Although many details were left out of the interview with Washington, the substance was the same.

Defendant's assertion that the statement to Washington was not made admissible by the prior consistent statement exception to the hearsay rule is also without merit. As noted above, the prior consistent statement is admissible to rehabilitate a witness who was silent in a situation in which it would have

been natural to speak. During the defense's cross-examination of Brittany concerning her statement to Washington, the defense inquired about some of the specifics of her later statements and Brittany testified she did not tell Washington of those specifics. The prosecution, therefore, was entitled to rehabilitate Brittany's credibility by establishing the circumstances and the actual statement.

The defense's questioning of Brittany concerning her interview with Washington on the night she was taken from defendant's residence, asking her whether she had told Washington about numerous specifics which Brittany only later recounted, implied that Brittany's statement to Washington was inconsistent with her later testimony. The prosecution introduced testimony from Washington to show that, even though it was lacking in details, Brittany's statement to Washington was not inconsistent with Brittany's trial testimony. In this sense, Washington's testimony was of a prior consistent statement and the trial court did not abuse its discretion by admitting it for the same reasons discussed above -- that is, it went to explain prior silence at a time when it would have been natural to tell about the molestations.

Because we conclude the trial court did not abuse its discretion in admitting Washington's testimony concerning Brittany's prior statement, we need not consider defendant's further contentions that (1) defense counsel was deficient for not objecting to (a) Washington's testimony on the grounds that it was not a prior consistent statement and (b) the trial

court’s explanation to the jury concerning the admissibility of the evidence and (2) errors in admitting the evidence discussed in this section contributed to cumulative error, thus violating defendant’s right to a fair trial.

IV

Evidence of Prior Drug Use and Bad Acts

Defendant contends the prosecutor committed misconduct by failing to prevent a witness from mentioning defendant’s drug use, despite the court’s direction to instruct witnesses not to mention defendant’s drug use. He also contends that, even if there was no prosecutorial misconduct, evidence of his drug use violated his right to a fair trial. We conclude (1) the record does not support the prosecutorial misconduct contention and (2) defendant’s fair trial rights were not violated.

Before trial, defendant moved for an order requiring the prosecution to advise its witnesses not to mention defendant’s drinking habits or drug usage. The court granted the motion.

Nichols testified during the prosecution’s rebuttal. On cross-examination, defense counsel asked her whether she had told her grandparents that defendant murdered his best friend (Brittany’s father), married his best friend’s wife (Brittany’s mother), then murdered her. Nichols denied it, stating that she had told her grandfather that she “wondered” whether defendant had been involved in the death of Brittany’s father. On redirect examination, the prosecutor asked Nichols what gave her the impression defendant had been involved in the death of Brittany’s father. She replied: “[Defendant] and I used to

party and -- and there was one night that we were just hanging out. We had been doing cocaine that evening and he had made the comment to me about how him and Richard [Brittany's father] used to, I guess, transport illegal substances and that he had had some issues about that. We were on drugs, so I can't really tell you exactly word for word. But he had said that he didn't treat Tammy [Brittany's mother] very well, and he didn't like the way that those things were going, and wasn't it kind of nice the way that things worked out, that he died and he got to be with Tammy." Defense counsel did not object.

A. *Prosecutorial Misconduct*

The contention that the prosecutor committed misconduct is without merit for two reasons: (1) defendant did not preserve the issue for consideration on appeal by objecting and (2) this record is insufficient to find misconduct.

To preserve for consideration on appeal a claim of prosecutorial misconduct based on the testimony of a witness, a defendant must object to the testimony. (*People v. Harrison* (2005) 35 Cal.4th 208, 241.) Defendant did not object; therefore, he has not preserved the issue of prosecutorial misconduct relating to Nichols's testimony.

Defendant claims there was no need to make an objection because it would have been futile and an admonition to the jury would have not cured the harm. (See *People v. Hill* (1998) 17 Cal.4th 800, 820 [no objection necessary if futile or curative admonition ineffective].) This exception to the objection requirement does not apply here. Defendant could have objected

and requested the court to admonish the jury. This was a tangential issue. Accordingly, we presume the jury would have followed any admonition given.

In any event, the record discloses no prosecutorial misconduct. Nichols may have made the statements concerning defendant's drug usage in spite of an instruction from the prosecutor not to mention it. Defendant asserts: "The fact that the witness not only spoke of [defendant] using cocaine but also claimed that [defendant] transported drugs and the fact that the prosecutor did not make a record in her own defense strongly suggests that the prosecutor did not instruct the witness about the court's rulings." This is speculation, at best, not evidence of misconduct.

B. *Defendant's Fair Trial Rights*

Defendant's contention that Nichols's testimony violated his fair trial rights, even if volunteered and not the result of prosecutorial misconduct, is also without merit. Although a volunteered answer can rise to the level of violation of a defendant's fair trial rights, no such violation occurred here. (See *People v. Williams* (1997) 16 Cal.4th 153, 211 [volunteered statement can be prejudicial].) Instead, the evidence called into question Nichols's credibility and related only to a tangential issue. As noted above, the mention of drug use and transportation was in response to the prosecutor's question concerning an issue defense counsel had raised -- that is, whether Nichols had reported to her grandparents that defendant had been involved in the death of Brittany's father.

Apparently, defense counsel was attempting to impeach Nichols by showing that she actively sought to discredit defendant with baseless allegations and by showing that she made extreme claims. Her answer to the prosecutor's questions could be seen as further impeachment. Defense counsel likely did not object because, although Nichols mentioned defendant's purported drug use and transportation, her testimony cast her in a poor light too. Thus, it was not prejudicial to defendant.

V

Prosecutorial Misconduct and Effective Assistance of Counsel

Defendant contends that the prosecutor committed prejudicial misconduct by (1) asking a witness, Chevelle Washington, an improper question, (2) making factual misstatements during closing argument, and (3) vouching for Brittany's credibility during closing argument. We conclude the prosecution did not commit prejudicial misconduct in its questioning of Washington. We also conclude defendant failed to preserve the second and third issues (misstatements and vouching in closing argument) because he did not object to those statements.

Anticipating our determination that he did not preserve the two contentions of prosecutorial misconduct during closing argument because he failed to object, defendant asserts the failure to object constituted ineffective assistance of counsel. We conclude trial counsel was not deficient for not objecting.

A. *Prosecutorial Misconduct*

1. *Improper Questioning*

Defendant asserts the prosecutor improperly asked Washington, the worker from the Florida Department of Children and Families, whether she had any indication during the interview with Brittany that Brittany was lying. We conclude that the prosecutor's question was not prejudicial and, therefore, we need not determine whether it constituted misconduct.

Questioning by a prosecutor can constitute prosecutorial misconduct. (*People v. Wagner* (1975) 13 Cal.3d 612, 619-620.) To justify reversal, such misconduct must be prejudicial -- that is, "the acts of misconduct are such as to have contributed materially to the verdict." (*Id.* at p. 621.)

Before trial, defendant made a motion for an order prohibiting the prosecution to ask any expert for an opinion concerning the truthfulness of Brittany's allegations of abuse. The trial court granted the motion.

During the prosecution's case-in-chief, defense counsel cross-examined Washington concerning whether Brittany had expressed dislike for defendant for various reasons, such as his dating other women while her mother was dying. On redirect examination, the prosecutor asked Washington: "Did you get any indication that -- from her, her demeanor or anything that night, that what she was saying, that she was making it up?" Defense counsel objected to the question as "[i]mproper opinion testimony," and the court sustained the objection.

Concerning prejudice, defendant asserts this question "convey[ed] to the jury that the prosecutor knew that Ms. Washington did, in fact, believe Brittany." This assertion is nothing more than speculation. The court instructed the jury not to guess concerning the answer to any question to which an objection was sustained and that it must not assume as true any insinuation suggested by a question. The question was isolated and not so egregious that the jury could not follow the court's instructions. (See *People v. Wagner, supra,* 13 Cal.3d at p. 621 [reversing because of prosecutor's repeated insinuations from questions about defendant's past].) Because we conclude the questioning did not materially contribute to the verdict and was therefore not prejudicial, we need not determine whether the prosecutor committed misconduct by asking the question.

2. *Closing Argument*

Defendant's contention of prosecutorial misconduct during the prosecutor's closing argument focuses on (1) 12 purported misstatements of the facts, which we discuss in detail below, and (2) vouching for Brittany's credibility. As defendant concedes, however, he did not object to any of these instances of alleged prosecutorial misconduct. Defendant did not preserve these issues for consideration on appeal because he failed to object and ask the trial court to admonish the jury. (*People v. Hill, supra,* 17 Cal.4th at p. 820.)

B. *Ineffective Assistance of Counsel*

To prevail on a claim of ineffective assistance of counsel, "defendant must show both: (1) that counsel's performance was

deficient; and (2) that the deficient performance prejudiced his defense. [Citations.] To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. [Citations.] A reasonable probability is '"a probability sufficient to undermine confidence in the outcome."' [Citations.]" (*People v. Davis* (2005) 36 Cal.4th 510, 551.) "'"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" [Citation.] . . . "[C]ourts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation].'" (*People v. Hinton* (2006) 37 Cal.4th 839, 876.) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we must affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there could be no satisfactory explanation for counsel's conduct. (*People v. Gray* (2005) 37 Cal.4th 168, 207.)

With respect, specifically, to claims of ineffective assistance of counsel arising from failure to object to comments during the prosecutor's closing argument, defense counsel's failure to object is not deficient representation if counsel had a sound tactical reason for not objecting. (*People v. Welch* (1999) 20 Cal.4th 701, 764.) "Failure to object rarely constitutes constitutionally ineffective legal

representation . . . ." (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) We do not reverse simply because a prosecutor's comments constituted misconduct. Instead, we reverse only if the defendant establishes from the record on appeal that (1) there was no sound tactical reason not to object, (2) an objection would have been sustained, and (3) if defense counsel had objected, there is a reasonable probability the result of the proceeding would have been different.

Although we will discuss the comments made by the prosecutor during closing argument, we note from the outset that, although defendant argues these comments constituted prosecutorial misconduct, he makes no attempt to discuss whether, in each instance, there were sound tactical reasons not to object. Instead, he states generally: "In the instant case, there could be no rational, tactical reason for failing to object to the many instances of misconduct in closing argument." After this general statement, defendant reviews the issues at trial, such as Brittany's credibility, but he does not discuss each instance of purported ineffective assistance of counsel separately. Because establishing that there was no sound tactical reason not to object is a necessary element of this type of claim of ineffective assistance of counsel, defendant fails to establish ineffective assistance of counsel.

Even assuming defendant adequately argued that there were no sound tactical reasons not to object to the purported misconduct, we conclude that defense counsel's failure to object to the comments that defendant now contends constituted

misconduct was not deficient and did not amount to ineffective assistance of counsel.

1. *Misstatements of Fact*

The 12 comments in the prosecutor's closing argument that defendant contends constituted misconduct can be placed into two groups: (1) comments by the prosecutor that did not constitute significant factual misstatements and (2) comments that were not misstatements of fact, at all.

a. Insignificant Factual Misstatements

The first group includes misstatements by the prosecutor that defense counsel could have let pass without objection because they were insignificant in nature. The jury would have recognized the misstatement as a trivial mistake, and the misstatement did not relate directly to the elements of the charged crimes or the contested issues in the case. Tactically, defense counsel could have decided that either (1) he could correct the misstatement in his closing argument, (2) the jury would recognize the comment as a misstatement, or (3) the misstatement was so insignificant that an objection, though proper, would have been equally insignificant.

The following comments fall into this first group:

- The prosecutor stated that defendant left Brittany and her brother at home alone to go to a baseball game and to a club "within a month" after Brittany's mother died. Instead of "within a month," the appropriate time period was about five weeks after the death of Brittany's mother.

- The prosecutor stated that defendant orally copulated Brittany in Fresno, but noted that the conduct in Fresno was not charged. Brittany's testimony concerning defendant's molestation of her in Fresno did not include oral copulation.
- The prosecutor stated that, during the first charged incident, defendant and Brittany were alone in the residence. Defendant took Brittany into his room and locked the bedroom door, had a conversation with her about sex, had her pull off her underwear and lie on the bed, used his own hands on the outside of Brittany's vagina, and had her touch her own vagina. The prosecutor argued that Brittany's recall of the details indicated her veracity. The prosecutor got two of the details wrong. Brittany could not remember whether the incident occurred in defendant's bedroom or hers. And she did not remember seeing a door locked. Defendant also contends the prosecutor was wrong about (1) the conversation concerning sex and (2) that defendant used his hands. However, these statements were reasonable inferences from Brittany's testimony that (1) defendant instructed her how to use her fingers and (2) defendant used his fingers.
- Implying that Brittany and Nichols did not conspire to fabricate evidence, the prosecutor stated that, at the time of trial, Brittany and Nichols had not spoken to each other for three years. It appears it had been less than two years since they had contact.

- The prosecutor stated that Brittany testified that she did not want to be shown how the dildo worked. Although Brittany testified she wanted to know what the dildo was and was surprised when defendant had her take off her pants and underwear, she did not say she did not want to be shown how the dildo worked.
- The prosecutor stated that, during the third charged incident, defendant put his fingers inside Brittany's vagina. Although Brittany testified that defendant put his fingers in her vagina, she did not specify when it happened and thought it was on a different day.
- The prosecutor stated that defendant, "in all of these cases," would tell Brittany he wanted to talk about sex. On only two occasions did defendant tell Brittany he wanted to talk about sex, but he used the ruse of teaching her about sex.
- The prosecutor stated that defendant orally copulated Brittany five times in California, including in Fresno, at the residence of defendant's stepfather, and three times at the Irene Street residence. The record reflects no oral copulation in Fresno and only once each at the stepfather's residence and the Irene Street residence.

b. Comments that were not Misstatements

The second group of statements that defendant contends constituted misconduct were not misstatements:

- The prosecutor stated that defendant left Brittany and her brother alone while he went to Sturgis, South Dakota on a

motorcycle trip. Defendant asserts the children were not alone but stayed with family friends. In context, however, it is clear that the prosecutor was arguing that defendant left Brittany and her brother at a time when he should have been there for them, not that they were unsupervised.

- The prosecutor stated that Officer Rowen "testified, telling you that, yes, when I interviewed her, she was consistent with trial. We went through each of the things and he said, yeah, she told me that. Yes, she told me that. She has been consistent throughout this entire process." Defendant contends that the prosecutor did not go through all of Brittany's allegations of molestation because the prosecutor did not ask Officer Rowen whether she mentioned that defendant had Brittany touch herself and whether defendant touched Brittany with his penis. However, this was a matter of argument concerning whether Brittany's testimony was consistent with her trial testimony. It was within the realm of reasonable argument.
- The prosecutor stated that Brittany testified that defendant "had always made -- made her promise not to tell anybody." Defendant asserts the evidence did not show that he always made Brittany promise not to tell. The problem with this assertion is that the record of the prosecutor's argument is ambiguous. It appears to indicate a pause such that it may have come across to the jury that the prosecutor said "always made," but then corrected herself

and said “made.” Since the record is ambiguous, it does not support defendant’s assertion.

- The prosecutor stated that Brittany “felt like [defendant] overpowered her and she couldn’t say no to a parent.” Defendant contends the record does not support this statement. To the contrary, Brittany testified that she “felt like he overpowered me” and she “couldn’t really say no to a parent.”[8]

c. Counsel was not Deficient

With respect to defendant’s claims of ineffective assistance of counsel based on counsel’s failure to object to misstatements the prosecutor made during closing argument, we conclude that some comments were not misstatements but instead proper argument and others were insignificant enough that there may have been sound tactical reasons not to object. The conclusion of the Supreme Court in a case in which the defendant urged the court to reverse based on trial counsel’s failure to object to misstatements by the prosecutor during closing argument is also applicable here: “‘The record reveals no explanation for defense counsel’s failure to object, and the question would thus be cognizable only on habeas corpus as part of a claim of ineffective assistance of counsel. [Citation.] The matter is not properly before us here. [Fn. omitted.]’ [Citation.] We also observe that, in light of the evidence in

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[8] Defendant withdrew this assertion in his reply brief.

this case, it is not reasonably probable that counsel's failure to object to prosecutorial misstatements affected the guilt verdict. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 521-522.)

2. *Vouching*

Also couched in terms of ineffective assistance of counsel because there was no objection is defendant's contention that the prosecutor vouched for Brittany's credibility. We reject this contention because there was no improper vouching.

"The general rule is that improper vouching for the strength of the prosecution's case '"involves an attempt to bolster a witness by reference to facts outside the record."' [Citation.] Thus, it is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it. [Citations.] Specifically, a prosecutor's reference to his or her own experience, comparing a defendant's case negatively to others the prosecutor knows about or has tried, is improper. [Citation.] Nor may prosecutors offer their personal opinions when they are based solely on their experience or on other facts outside the record. [Citations.] [¶] It is not, however, misconduct to ask the jury to believe the prosecution's version of events as drawn from the evidence. Closing argument in a criminal trial is nothing more than a request, albeit usually lengthy and presented in narrative form, to believe each party's interpretation, proved or logically inferred from the evidence,

of the events that led to the trial. It is not misconduct for a party to make explicit what is implicit in every closing argument . . . ." (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207.)

Defendant contends the following three short comments and one long passage constituted improper vouching for Brittany's credibility:

- "She's telling you only what happened to her."
- "This is a little girl who is trying to tell you what happened to her."
- "She was sitting up there trying to tell you the best that she could remember . . . ."
- "What [doubt] is reasonable? Also, when you consider her testimony, consider the fact that it's hard -- I'm sure it's very hard for anyone who is a victim of molestation to -- to even disclose it. I'm sure there's people who go their entire life that never disclose it. And if they do disclose it, it's something that they don't want to spend every day thinking about. [¶] This is something that they're going to try to forget the details of. It's not something that they want to think about. It's not something that they want to talk about. So, to put the burden on a child to have explained everything in detail the very first night when she was confronted. To sit down with strangers where she has the pressure of her father still in the house and give all these details. It's just not reasonable."

The first three comments were nothing more than comments on Brittany's testimony and demeanor. It is an unreasonable stretch to read them as implying that the prosecutor knew more than the jury and was therefore telling the jury something not brought out in the evidence.

The fourth comment consists of common sense. Contrary to defendant's contention that it constituted "unsworn testimony regarding the effects of child molestation," the comment was within the realm of everyday knowledge and understanding.

Accordingly, the prosecutor did not improperly vouch for Brittany's credibility, and trial counsel was not deficient for not objecting.

VI

Instructions on Elements of Crimes

Defendant contends the trial court erred in instructing the jury because the court did not inform the jury of the elements of violations of section 269, subdivision (a). We conclude, however, that, even assuming error for the purpose of argument, any error in instructing the jury concerning the elements of the violations of section 269, subdivision (a) charged in this case was harmless.

Section 269, subdivision (a), applicable at the time defendant committed these crimes, proscribed sexual assaults on a child: "Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated sexual assault of a child." (Stats. 1993-94, 1st Ex. Sess., ch. 48, § 1, p.

8761.) The statute then listed five acts that constituted aggravated sexual assault under those age-defined circumstances. Only three of the five acts are relevant here:

(1) "[a] violation of paragraph (2) of subdivision (a) of Section 261" (subd. (a)(1) [rape]);

(2) "[o]ral copulation, in violation of Section 288a, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person" (subd. (a)(4)); and

(3) "[a] violation of subdivision (a) of Section 289" (subd. (a)(5) [sexual penetration]). (Stats. 1993-94, 1st Ex. Sess., ch. 48, § 1, p.8761.)

Defendant does not dispute whether the age-defined circumstances were present in this case. Instead, he contends the trial court failed to identify for the jury the elements of the three acts -- rape, oral copulation, and sexual penetration -- listed in section 269, subdivision (a) as violations of the statute. We will discuss separately each of the three underlying acts and the trial court's instructions concerning those acts, but, first, we summarize the law concerning the trial court's duty to instruct on the elements of a crime and the definition of terms.

A trial court must instruct the jury concerning all principles of law "necessary for the jury's understanding of the case." (*People v. Mayfield* (1997) 14 Cal.4th 668, 773.) This duty includes instruction on the elements of the charged offenses. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.)

"Although trial courts, generally, have a duty to define technical terms that have meanings peculiar to the law, there is no duty to clarify, amplify, or otherwise instruct on commonly understood words or terms used in statutes or jury instructions. 'When a word or phrase "'is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request.'" [Citations.] A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning. [Citation.]' [Citation.]" (*People v. Griffin* (2004) 33 Cal.4th 1015, 1022-1023, italics in original.) In *Griffin*, for example, the Supreme Court held that the word "force" in the rape statute was not intended to have a specialized legal meaning. The court therefore held that there was no obligation to define that term for the jury. (*Id.* at pp. 1022-1028.)

A. *Oral Copulation -- Counts 1 and 5*

Section 269, subdivision (a)(4) designated "[o]ral copulation, in violation of Section 288a, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person" as an act constituting aggravated sexual assault under the age-defined circumstances of the statute. (Stats. 1993-94, 1st Ex. Sess., ch. 48, § 1, p. 8761.) Section 288a, subdivision (a), unchanged since the crimes in this case, defines "oral copulation" as "the act of copulating the mouth of one person with the sexual organ

or anus of another person." Defendant was charged and convicted in counts 1 and 5 with a violation of section 269, subdivision (a)(4).

Concerning section 269, subdivision (a)(4), the trial court instructed the jury as follows: "In order to commit this crime, each of the following elements must be proved. A person committed oral copulation of a child by force, violence, duress, menace, or fear of immediately -- immediate bodily injury on the victim. The alleged victim -- two, the alleged victim was under 14 years of age. And three, the alleged victim was ten years or more younger than the perpetrator of the acts." The court did not define for the jury the term "oral copulation" and did not give a standard jury instruction associated with section 288a.

Defendant asserts that the trial court erred by not giving an instruction concerning the elements of the crime of oral copulation. He claims the trial court should have given the standard jury instruction concerning oral copulation, CALJIC No. 10.46, which states: "'Oral copulation' is the act of copulating the mouth of one person with the sexual organ or anus of another person. [¶] Any contact, however, slight, between the mouth of one person and the sexual organ or anus of another person constitutes 'oral copulation.' Penetration of the mouth, sexual organ or anus is not required."

Although defendant raises an interesting theoretical question concerning whether the trial court must further define "oral copulation" under these circumstances, we need not answer it because, regardless of the answer, we find there is no

prejudice to defendant. We conclude that (1) the instructions did not constitute structural error, requiring reversal per se and (2) any error was harmless beyond a reasonable doubt.

"[A]lthough most trial errors . . . are subject to harmless error analysis [citation], *some* errors -- those amounting to a 'structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself' [citation] -- are reversible per se, without inquiry into prejudice." (*People v. Stewart* (2004) 33 Cal.4th 425, 462, italics in original.) Defendant contends, without citing precedent, that the lack of instructions concerning the term "oral copulation" was structural error requiring reversal per se. To the contrary, "failure to instruct the jury on an element of the offense, is subject to harmless error analysis under *Chapman v. California* [(1967) 386 U.S. 18 [17 L.Ed.2d 705]], i.e., whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict. [Citation.]" (*People v. Magee* (2003) 107 Cal.App.4th 188, 194.)[9]

When instructing the jury concerning aggravated sexual assault based on oral copulation, the trial court did not merely recite a code section to the jury without telling the jury what it is the code section prohibits. The trial court's instruction, even if deficient, was harmless beyond a reasonable

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[9] Although we will not repeat it, this analysis rejecting defendant's structural error argument also applies to the other two contentions of instructional error discussed in this part of the discussion.

doubt because (1) the term "oral copulation" does not have a peculiar legal definition, (2) the prosecutor told the jury that these counts involved "oral sex," and (3) the evidence was clear that defendant's mouth touched Brittany's vagina on two occasions.

Therefore, not defining the term "oral copulation," assuming it was error, was harmless beyond a reasonable doubt.

B. *Sexual Penetration -- Count 7*

Section 269, subdivision (a)(5) designated "[a] violation of subdivision (a) of Section 289" as an act constituting aggravated sexual assault under the age-defined circumstances of the statute. Section 289, subdivision (a)(1), unchanged since the crimes in this case, proscribes "sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . ." Subdivision (k)(1) of the same statute defines "sexual penetration" as "the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object."

Defendant was charged and convicted in count 7 with a violation of section 269, subdivision (a)(5).[10]

Concerning section 269, subdivision (a)(5), the trial court instructed the jury as follows: "In order to commit this crime, each of the following elements must be proved. One, a person committed an act of sexual penetration of a child by force, violence, duress, menace, or fear of immediately -- of immediate bodily injury on the victim. Two, the alleged victim was under 14 years of age, and three, the alleged victim was ten or more years younger than the perpetrator of the acts."

"Sexual penetration" does not have a definition peculiar to the law. "Penetration" is more than just surface contact. The prosecutor argued that this crime occurred when defendant put his finger inside Brittany's vagina. The instruction, as given, was not misleading. Any error was harmless beyond a reasonable doubt.

C. *Rape -- Count 8*

Section 269, subdivision (a)(1) designated "[a] violation of paragraph (2) of subdivision (a) of Section 261" as an act constituting aggravated sexual assault under the age-defined circumstances of the statute. (Stats. 1993-94, 1st Ex. Sess.,

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[10] Although count 7 in the amended information alleged a violation of subdivision (a)(5) of section 269, count 7 in the verdict forms was mislabeled as a violation of subdivision (a)(4), instead of (a)(5), of section 269. Defendant makes no contention of error in this regard, and the judgment properly reflected a conviction on this count pursuant to subdivision (a)(5).

ch. 48, § 1, p. 8761.) Section 261, subdivision (a), unchanged since the crimes in this case, proscribes "sexual intercourse accomplished with a person not the spouse of the perpetrator" and paragraph (2) of subdivision (a) includes such sexual intercourse accomplished by duress, among other ways. Defendant was charged and convicted in count 8 with a violation of section 269, subdivision (a)(1).[11]

Concerning section 269, subdivision (a)(1), the trial court instructed the jury as follows: "In order to commit this crime, the following elements must be proved. One, a person committed an act of sexual intercourse with a child by force, violence, duress, menace, or fear of immediately [*sic*] bodily injury on the victim. Two, the alleged victim was under 14 years of age. And three, the alleged victim was ten or more years younger than the perpetrator of the act or acts."

"Sexual intercourse" is a term that requires no further definition. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1138.) And there is no dispute that defendant was not Brittany's spouse. Therefore, any error in not instructing further on the elements of rape was harmless beyond a reasonable doubt.

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[11] Although count 8 in the amended information alleged a violation of subdivision (a)(1) of section 269, count 8 in the verdict forms was mislabeled as a violation of subdivision (a)(4), instead of (a)(1), of section 269. Defendant makes no contention of error in this regard, and the judgment properly reflected a conviction on this count pursuant to subdivision (a)(1).

VII

Instruction on Lesser Included Offense

Defendant asserts that the four counts of aggravated sexual assault of a child (counts 1, 5, 7, and 8) must be reversed because the trial court did not instruct, sua sponte, on lesser-included offenses. We conclude that, as to one count, the trial court did not err, and, as to the remaining counts, any error was harmless.

"A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial. [Citations.] This sua sponte obligation extends to lesser included offenses if the evidence 'raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. [Citations.]' [Citations.]" (*People v. Lopez* (1998) 19 Cal.4th 282, 287-288.) In order to trigger the trial court's duty to instruct on lesser included offenses, there must be substantial evidence that raises a question as to whether an element of the greater offense has been satisfied. (*People v. Barton* (1995) 12 Cal.4th 186, 194-195.) However, if the evidence shows that a defendant is either guilty of the crime charged or not guilty of any crime at all, "the jury need not be instructed on any lesser included offense." (*Id*. at p. 196, fn. 5.) A defendant must show a reasonable probability of prejudice from a breach of this duty in order to obtain a reversal of the conviction. (*People v. Breverman* (1998) 19 Cal.4th 142, 178 (*Breverman*).)

Defendant’s contention therefore raises three questions, all of which must be answered affirmatively to require reversal: (1) did the trial court fail to instruct the jury on lesser included offenses as to counts 1, 5, 7, and 8?; (2) if so, did the evidence support instructions on the lesser included offenses?; and (3) if so, is it reasonably probable that defendant would have obtained a more favorable result if the trial court had instructed on the lesser included offense?

A. *Lesser-included Offenses*

“We employ two alternative tests to determine whether a lesser offense is necessarily included in a greater offense. Under the elements test, we look to see if all the legal elements of the lesser crime are included in the definition of the greater crime, such that the greater cannot be committed without committing the lesser. Under the accusatory pleading test, by contrast, we look not to official definitions, but to whether the accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime. (*People v. Lopez*, *supra*, 19 Cal.4th at pp. 288-289.)” (*People v. Moon* (2005) 37 Cal.4th 1, 25-27.)

Although defendant does not expressly state that he is applying only the elements test, he does not cite the accusatory pleading test. He relies only on the statutes defining the crimes. We will do the same, applying the elements test.

1. *Oral Copulation -- Counts 1 and 5*

Defendant was convicted in counts 1 and 5 of a violation of section 269, subdivision (a)(4). He contends the trial court should have instructed the jury concerning section 288a, subdivision (c)(1), as a lesser included offense. We agree that section 288a, subdivision (c)(1) is a lesser included offense of section 269, subdivision (a)(4).

The elements of a section 269, subdivision (a)(4) violation were, at the time of defendant's crime:

(1) the child was under 14 years of age and 10 or more years younger than the defendant;[12]

(2) the defendant engaged in an act of oral copulation with the child; and

(3) the act was accomplished by means of duress.[13] (Stats. 1993-94, 1st Ex. Sess., ch. 48, § 1, p. 8761.)

The elements of a section 288a, subdivision (c)(1) violation are:

(1) the child was under 14 years of age and 10 or more years younger than the defendant; and

(2) the defendant engaged in an act of oral copulation with the child.

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[12] The Legislature has since substituted "seven or more years younger" for "ten or more years younger." (Stats. 2006, ch. 337, § 6.)

[13] For simplicity, we have omitted other means of accomplishing the act not relevant here. The same is true in the discussion of the other counts, below.

Therefore, all of the elements of a section 288a, subdivision (c)(1) are included in a violation of section 269, subdivision (a)(4). The only additional element in section 269, subdivision (a)(4), as relevant here, is duress.

2. *Sexual Penetration -- Count 8*

Defendant was convicted in count 8 of a violation of section 269, subdivision (a)(5). Defendant contends the trial court should have instructed the jury concerning section 289, subdivision (j), as a lesser included offense. We agree that section 289, subdivision (j) is a lesser included offense of section 269, subdivision (a)(5).

The elements of a section 269, subdivision (a)(5) violation were, at the time of defendant's crime:

(1) the child was under 14 years of age and 10 or more years younger than the defendant;

(2) the defendant engaged in an act of sexual penetration with the child; and

(3) the act was accomplished by means of duress. (Stats. 1993-94, 1st Ex. Sess., ch. 48, § 1, p. 8761.)

The elements of a section 289, subdivision (j) violation are:

(1) the child was under 14 years of age and 10 or more years younger than the defendant and

(2) the defendant engaged in an act of sexual penetration with the child.

Therefore, all of the elements of a section 289, subdivision (j) violation are included in a violation of section

269, subdivision (a)(5). The only additional element in section 269, subdivision (a)(5), as relevant here, is duress.

3. *Rape -- Count 8*

Defendant was convicted in count 8 of a violation of former section 269, subdivision (a)(1). Defendant contends the trial court should have instructed the jury concerning section 288, subdivision (a), as a lesser included offense. We disagree that section 288, subdivision (a) is a lesser included offense of section 269, subdivision (a)(1).

The elements of a section 269, subdivision (a)(1) violation were, at the time of defendant's crime:

(1) the child was under 14 years of age and 10 or more years younger than the defendant;

(2) the defendant engaged in an act of sexual intercourse with the child; and

(3) the act was accomplished by means of duress. (Stats. 1993-94, 1st Ex. Sess., ch. 48, § 1, p. 8761.)

The elements of a section 288, subdivision (a) violation[14] are:

(1) the child was under 14 years of age;

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[14] Section 288, subdivision (a) states: "Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

(2) the defendant committed a lewd or lascivious act on the child; and

(3) the act was committed with intent to arouse or gratify.

As seen from this comparison, the asserted lesser included offense has an additional element not present in a violation of section 269, subdivision (a)(1) -- that is, the purported lesser included offense requires an intent to arouse or gratify. Defendant contends, however, that sexual intent is inherent in a rape because, unlike when a parent gives a child a bath or a doctor does an examination touching the child's vagina digitally and without intent to arouse or gratify, there is no similar innocent reason to insert an erect penis into the child's vagina. As support, defendant cites to Supreme Court precedent stating that attempted rape, a specific intent crime, is a lesser included offense of rape, a general intent crime. (See *People v. Atkins* (2001) 25 Cal.4th 76, 88 [stating that attempted rape is lesser included offense of rape, but not considering whether instruction on lesser included is necessary]; *People v. Osband* (1996) 13 Cal.4th 622, 685 [stating that rape general intent instruction is consistent with specific intent felony murder based on rape instruction].)

Defendant's reasoning is flawed because, although sexual intent may be inherent in a rape, (1) such intent is not necessarily the same as the intent defined in section 288, subdivision (a), and (2) intent is not something that the jury must consider when determining whether a defendant violated section 269, subdivision (a)(1). The intent defined in section

288, subdivision (a) is “the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.” On the other hand, the intent involved in rape is an amorphous, undefined general sexual intent inherent in the crime. If the jury had determined that defendant did not violate section 269, subdivision (a)(1), it would have had to add an element to determine whether defendant committed the purported lesser included offense. For these reasons, we reject defendant’s contention that section 288, subdivision (a) is a lesser included offense of section 269, subdivision (a)(1).

B. *Substantial Evidence Supporting Instructions*

Having decided that the crimes alleged in counts 1, 5, and 7 have lesser included offenses under the elements test concerning which the trial court did not instruct, we must determine whether there was substantial evidence that raised a question as to whether an element of the greater offense has been satisfied. (*People v. Barton, supra,* 12 Cal.4th at pp. 194-195.) We conclude such evidence was present.

In counts 1, 5, and 7, the only element that differed in the lesser included offense was the absence of the duress element. As noted above, duress was a contested issue at trial. As noted in part II, above, there was some evidence to which defendant could point in arguing that the molestations were not accomplished by duress. For example, Brittany did not testify she cooperated with defendant because of duress. Though we found there was sufficient evidence of duress, that conclusion was reached by drawing inferences in favor of the judgment. We

therefore conclude the trial court should have instructed the jury concerning lesser included offenses as to counts 1, 5, and 7.

C. *Prejudice*

While the trial court erred by not instructing on lesser included offenses as to counts 1, 5, and 7, it is not reasonably probable defendant would have obtained a more favorable result had the court given the instructions. The failure to instruct did not, therefore, result in a miscarriage of justice. (Cal. Const., art. VI, § 13; *Breverman, supra,* 19 Cal.4th at p. 178; *People v. Watson* (1956) 46 Cal.2d 818, 836.)[15]

At trial, defendant contended that he did not commit the molestations, not that he committed them without duress. He denied the molestations on the witness stand. And defense counsel argued only that the jury should not believe Brittany that defendant had molested her. Judging by the verdicts, it is apparent that the jury credited Brittany's testimony.

From our discussion of the evidence, above, it is apparent the jury would not have found defendant not guilty of counts 1,

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[15] Defendant contends that, because he argues that the failure to instruct on lesser included offenses deprived him of his Fifth, Sixth, and Fourteenth Amendment right to have the jury determine all factual issues relating to the charges, we must use the harmless beyond a reasonable doubt standard (*Chapman v. California, supra,* 386 U.S. 18) in determining prejudice. To the contrary, as the California Supreme Court has held, error in failing to instruct concerning lesser included offenses is reviewed under the state *Watson* standard. (*Breverman, supra,* 19 Cal.4th at p. 178.)

5, and 7 even had there been instructions on the lesser included crimes. These were only three of eight counts as to which the jury found duress. The jury found duress in five counts under circumstances in which there was no error in failing to instruct on lesser included offenses. There was no evidence Brittany ever wanted defendant to engage in these acts, and she was always under the pressures discussed above, having to do with defendant's position of authority, his provision for her welfare, his insistence that Brittany engage in the acts, and his warnings not to tell others. Thus, we cannot conclude it is reasonably probable defendant would have obtained a more favorable result if the trial court had instructed on the lesser included offenses as to counts 1, 5, and 7.

VIII

CALJIC No. 2.62

Defendant contends the trial court erred by instructing the jury that it could draw inferences against defendant if he failed to explain or deny facts within his knowledge. The court used CALJIC No. 2.62.[16] We conclude that the instruction, though given in error, was harmless.

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[16] As given, the instruction states:

"In this case, the defendant has testified to certain matters. If you find that the defendant failed to explain or deny any evidence against him introduced by the Prosecution, which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that, among the inferences that may be reasonably be [*sic*] drawn therefrom, those unfavorable to the

If a defendant denies the charges, CALJIC No. 2.62 should not be given merely because the defendant's story contradicts the prosecution's evidence. "[A] contradiction does not equate to a failure to explain or deny." (*People v. Kondor* (1988) 200 Cal.App.3d 52, 57.) "However, if the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible, the inquiry whether he reasonably should have known about circumstances claimed to be outside his knowledge is a credibility question for resolution by the jury. [Citation.]" (*People v. Mask* (1986) 188 Cal.App.3d 450, 455.) If the defendant has not been asked a question requiring him to explain or deny the evidence, the instruction is unauthorized. (*Ibid.*)

In his opening brief, defendant asserted that the instruction should not have been given because he denied or explained all of the crucial evidence against him of which he could be expected to have knowledge. The Attorney General responded that defendant did not explain (1) all of Brittany's accusations, instead just making a blanket denial; (2) the incident during which he made Brittany sleep with him and

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defendant are the more probable.

"The failure of a defendant to deny or explain evidence against him does not by itself warrant an inference of guilt, nor does it relieve the Prosecution of its burden of proving every essential element of the crimes and the guilt of the defendant beyond a reasonable doubt. If the defendant does not have the knowledge that he would need to deny or explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain this evidence."

molested her during the night; and (3) Nichols's testimony that the defendant would not let Brittany lock the door to the bathroom when she showered or dressed.

Defendant asserts that his blanket denials concerning the molestations did not support the instruction. We agree. Although Brittany gave detailed accounts of what happened, defendant denied that any of it happened. (*People v. Kondor, supra,* 200 Cal.App.3d at p. 57 [denial does not justify instruction].)

Concerning the incident during which defendant had Brittany sleep with him, defendant testified that he had Brittany sleep with him in a sleeping bag in front of the fireplace because the heater was not working. Again, this was an explanation and therefore did not justify giving the instruction.

Nichols testified that defendant would not allow Brittany to lock the bathroom door while she was dressing or showering. However, the Attorney General does not provide a citation to the reporter's transcript where defendant was asked to explain this behavior. Because defendant was not asked to explain the behavior, the evidence that he engaged in the behavior did not justify the instruction. (*People v. Mask, supra,* 188 Cal.App.3d at p. 455.)

Accordingly, we see nothing in the record authorizing the trial court to give CALJIC No. 2.62, instructing the jury that it could draw inferences against defendant if he failed to explain or deny certain evidence against him. Nonetheless, the error was harmless.

It is not "reasonably probable a more favorable result would have been reached had the instruction been omitted." (*People v. Kondor, supra,* 200 Cal.App.3d at p. 57.) "CALJIC No. 2.62 does not direct the jury to draw an adverse inference. It applies only if the jury finds that the defendant failed to explain or deny evidence. It contains other portions favorable to the defense (suggesting when it would be unreasonable to draw the inference; and cautioning that the failure to deny or explain evidence does not create a presumption of guilt, or by itself warrant an inference of guilt, nor relieve the prosecution of the burden of proving every essential element of the crime beyond a reasonable doubt.)" (*People v. Ballard* (1991) 1 Cal.App.4th 752, 756.) The text of CALJIC No. 2.62 itself protects against any potential prejudice by instructing that "[t]he failure of a defendant to deny or explain evidence against him does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime[s] and the guilt of the defendant beyond a reasonable doubt." (*See* CALJIC No. 2.62.) Any potential prejudice was reduced further by the court's instruction pursuant to CALJIC No. 17.31, telling the jury to disregard any instruction that applies to facts the jury determined did not exist. (*People v. Saddler* (1979) 24 Cal.3d 671, 684.)

Defendant contends generally that this case turned on the credibility of Brittany and defendant and that giving CALJIC No. 2.62 "tipped the balance against [defendant] in this credibility

contest." As noted, the instruction itself protected against such prejudice. Accordingly, although the court erred by instructing the jury pursuant to CALJIC No. 2.62, the error was harmless.

IX

Mandatory Consecutive Sentencing

Defendant argues that the trial court erred by imposing mandatory consecutive sentences for the section 269 convictions, pursuant to section 667.6, subdivision (d). In doing so, he invites us to disagree with *People v. Jimenez* (2000) 80 Cal.App.4th 286, which he claims was wrongly decided. We decline and therefore reject his contention.

At the time of sentencing, subdivision (d) of section 667.6 provided that a full, separate, and consecutive term be served for rape, oral copulation, and sexual penetration, among other crimes. *Jimenez* held that, because the crimes listed in subdivision (e) of section 667.6 are included in the definition of section 269, violations of section 269 are subject to the mandatory consecutive sentencing provisions of section 667.6, subdivision (d). (*People v. Jimenez, supra,* 80 Cal.App.4th at pp. 291-292.)

We are under no obligation to reconsider established precedent. Defendant cites no intervening change in the law justifying such reconsideration or calling into doubt the correctness of *Jimenez*. Accordingly, we reject defendant's contention.

X

Cumulative Error

Defendant contends the errors, though harmless when considered separately, were prejudicial in their cumulative effect. Although we have identified some instructional errors, these errors, even taken together, were not prejudicial. Thus, defendant's cumulative error contention is without merit.

DISPOSITION

The judgment is affirmed. (*CERTIFIED FOR PARTIAL PUBLICATION*.)

NICHOLSON, Acting P.J.

We concur:

BUTZ, J.

CANTIL-SAKAUYE, J.