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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. LADD DOUGLAS WIIDANEN, Defendant and Appellant.	C065804 (Super. Ct. No. 6295169)

APPEAL from a judgment of the Superior Court of Placer County, J. Richard Couzens, Judge. (Retired Judge of the Placer Sup. Court, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Hokans and Sally Espinoza, Deputies Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and rule 8.1110, this opinion is certified for publication with the exception of parts II through VII of the Discussion.

After a New Year's Eve house party involving a lot of drinking, defendant Ladd Douglass Wiidanen went into a bedroom where an acquaintance, John Doe, was sleeping and orally copulated him. Defendant was interviewed by police a few hours after the crime and gave false statements about what had happened. Following a trial where the defense was consent, a jury found defendant guilty of orally copulating an unconscious person.

In the published portion of this case, we hold that the trial court erred in instructing the jury with both the consciousness of guilt instruction (CALCRIM No. 362) and an unmodified version of the voluntary intoxication instruction (CALCRIM No. 3426). Unmodified, the voluntary intoxication instruction allowed the jury to consider defendant's voluntary intoxication *only* in deciding whether defendant knew the victim was unconscious during the oral copulation. This limitation erroneously prohibited the jury from considering evidence of defendant's voluntary intoxication in determining whether defendant made false or misleading statements relating to the oral copulation *knowing* the statements were false or intending to mislead. As we explain, however, the error here[1] was harmless.

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[1] An appropriate "use instruction" would prevent a recurrence of this error.

FACTUAL AND PROCEDURAL BACKGROUND

A

The Prosecution's Case

Defendant and Doe were at a New Year's Eve house party in December 2007. Doe had known defendant for about four months, as defendant would sometimes hang out at the house (which was two doors down from defendant's house) when Doe was visiting friends there. That night, Doe had come to the party around 7:00 or 8:00 p.m. with his girlfriend, J. and his brother. Defendant came around 10:00 p.m. The partygoers talked and played darts and pool.

Almost all the partygoers were drinking alcohol and most were intoxicated. Doe started feeling intoxicated around 12:00 or 12:30 a.m. Defendant was drinking beer. J. drank to the point of "slight[] intoxicat[ion]."

Sometime after midnight, the partygoers "decided that it was late." Around 2:00 or 3:00 a.m., J. went to sleep in the guest bedroom. Defendant, Doe, and Doe's brother stayed awake talking in the garage. Doe followed J. to bed around 5:00 or 5:30 a.m. By that time, Doe thought everyone had left the party or gone to bed. As was his practice, he went to sleep naked. The room was completely dark.

Doe awoke to "fe[eling] a wet mouth around [his] [penis]."[2] Doe thought it was J., but when he reached down he felt a beard.

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[2] Doe believed the time was "[a]round 7:00. 7:30-ish. I do recall that because it was when the sun was coming up."

Doe "pushed [the man's] face away." Then the man "reached up and started using his hand." Doe "grabbed his arm and threw it away."

"[T]he figure [then] kind of crawl[ed] to the door and then got up and . . . walked down the hall." It was at this point Doe recognized the figure as defendant. J. woke up, and Doe told her what had happened. Doe put on his "boxers" and confronted defendant, who was sitting at the kitchen table. Doe yelled at defendant, "'Why the fuck were you doing that?'" Defendant responded, "'I don't know what you're talking about. I didn't do anything.'" Doe pushed defendant a few times.

Doe's brother woke up and told defendant to leave. Defendant stood there for a little while saying, "'I didn't do anything. I didn't do anything.'" Defendant's brother told defendant to leave a few more times, and defendant eventually complied. Doe called police and told them what happened.

Rocklin Police Officer Jerrold Seawell was dispatched to the house at 7:30 a.m.[3] Doe told the officer defendant was the culprit, so the officer went to defendant's house. Officer Seawell talked to defendant in his front yard with none of his family present. When the officer told defendant, "there w[ere] allegations that he did oral copulation on the victim and [the officer] wanted to get his side of the story," defendant responded "he was intoxicated and could not remember." He had

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[3] Doe testified it took police "about a half hour to an hour" to respond.

had approximately 24 beers from noon on New Year's Eve until 2:00 a.m. the next day. Defendant then rode with Officer Seawell to the police station for "further investigation."

At the police station, Rocklin Police Detective Chris Spurgeon interviewed defendant. A videotape of that interview was played for the jury. Defendant said he was "brought in" because "they said I orally copulated somebody." Defendant said he did not do it and was totally sure of that. He left the party around 2:00 a.m. He had no idea who was accusing him. The detective told him Doe was accusing him of, "basically [Doe] woke up and saw that you were giving him head in there." Defendant said, "no" and "I didn't know where his room was." Defendant did not get into an argument with anybody that night and was not in any of the bedrooms. Everybody was kind of going off to bed, so he left. He did not come back after he left the party at 2:00 a.m. The detective then told defendant that Doe and his brother were accusing defendant of being there in the morning when Doe confronted him in the kitchen and the brother asked him to leave. The detective asked if those people were lying. Defendant replied, "Well . . . ." He continued saying he "had a lot to drink last night. . . . [¶] So if I came back I came back. I -- I don't remember going back there. I might have gone back for another beer, but no I went home." He denied being "totally wasted drunk to the world." He was aware of his surroundings and would "[a]bsolutely" know if he had been in somebody's bedroom and was "100%" sure he was not in any of the bedrooms. He did not give "head" to anybody there. He may have

come back to the house to get a beer, but if he had come back, he did not come back and "hang out" at the house or do "anything" "they" said he did. He did not remember whether Doe's brother told him to leave the house, because he was drunk. He did not remember the conversation with Doe's brother because he was drunk. It could have been possible he got into an argument with somebody but he was "[a]bsolutely" sure he did not "suck[] his dick." He "[a]bsolutely" was not so drunk that he "thought maybe [his] wife was there" and he "got[] [Doe] by mistake." He had no sexual contact with anybody in that house. He was absolutely sure "this could not have been hey I was drunk and I was horny. . . ."

After the interview, Detective Spurgeon asked defendant for a DNA sample, which defendant provided by swabbing the inside of his cheek with a Q-tip. The detective then asked for and received a similar sample from Doe. He also asked for and received swab samples from Doe's penis shaft and penis tip.

The DNA swabs were analyzed by a criminalist at the Department of Justice. Defendant's DNA was on both swabs taken from Doe's penis. A presumptive test for an enzyme in saliva came back positive and showed a high level of the enzyme on the penis shaft swab and a moderate level on the penis tip swab.

B

The Defense

Defendant's wife attended the neighbor's New Year's Eve party for 30 to 45 minutes. She did not have anything to drink and returned home by 11:00 p.m. She had a party at their own

house with "children and family." Defendant "left after the countdown to go back to [the neighbor's] party." Defendant was back in bed by the time she woke up for the day, which was 6:30 a.m.

Rocklin Patrol Sergeant Thomas Dwyer administered a preliminary alcohol screen to defendant at approximately 9:30 a.m. on January 1, 2008. Defendant's reading was a blood-alcohol level of .22 percent. At around 10:00 a.m., he administered the same screen to Doe, whose reading was .17.

In March 2010, an investigator from the Placer County District Attorney's Office interviewed J. "She did not discuss during that interview that it was [Doe's] habit or custom to sleep naked. She did not discuss during that interview that she planned to spend the night at [the house were the party was taking place] on 12/31/07."

C

Elements Of Orally Copulating An Unconscious Person

Defendant was charged with orally copulating an unconscious person. (Pen. Code, § 288a, subd. (a).) The elements of the crime are: (1) the defendant committed an act of oral copulation with another person; (2) the other person was unable to resist because he was unconscious of the nature of the act; and (3) the defendant knew that the other person was unable to resist because he was unconscious of the nature of the act.

D

Theories Of The Case At Trial

The People's theory of the case during closing argument was defendant orally copulated Doe while Doe was sleeping and defendant selectively lied to police to prevent police from inculpating him in the crime.

Defense counsel's theory of the case during closing argument was the oral copulation was consensual. Defendant lied to the police about not having oral sex with Doe because defendant was a married heterosexual man. Defense counsel also argued the jury could find defendant not guilty if it found that because of defendant's voluntary intoxication, he was not aware Doe was unconscious at the time defendant orally copulated him.

E

Verdict And Judgment

The jury found defendant guilty of oral copulation of an unconscious person. The trial court suspended imposition of sentence and placed him on three years' probation.

F

The Appeal

Defendant appeals from the guilty verdict and resulting judgment. He raises arguments relating to the evidence, the instructions, prosecutorial misconduct, and the composition of the jury. He also claims cumulative prejudicial error. We find the court made two instructional errors but conclude they had no effect on the verdict.

DISCUSSION

I

The Court Erred In Giving The Consciousness Of Guilt Instruction (CALCRIM No. 362) With An Unmodified Version Of The Voluntary Intoxication Instruction (CALCRIM No. 3426), But The Error Was Harmless

Defendant contends the court erred when it gave the consciousness of guilt instruction (CALCRIM No. 362)[4] with the voluntary intoxication instruction (CALCRIM No. 3426).[5]

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[4] CALCRIM No. 362 was given as follows:

"If the defendant made a false or misleading statement relating to the charged crime, knowing that the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt.

"If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

[5] CALCRIM No. 3426 was given as follows:

"You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant had the knowledge that the victim was unconscious of the act at the time of its occurrence.

"A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drugs, drink, or other substance knowing it could produce an intoxicating effect or willingly assuming the risk of that effect.

"You may not consider evidence of voluntary intoxication for any other purpose. If you conclude beyond a reasonable doubt the People have proved all of the elements of the crime,

Specifically, defendant contends the voluntary intoxication instruction with the consciousness of guilt instruction erroneously prohibited the jury from using his voluntary intoxication to rebut the People's evidence of his consciousness of guilt, based on the People's claim he made false or misleading statements relating to the oral copulation, *knowing* the statements were false or intending to mislead. He argues the instructions together created an "irrational permissive inference" in violation of due process.

Defendant is correct to the extent he claims the court erred in giving these instructions together in this case. CALCRIM No. 362 allowed the jury to infer defendant's consciousness of guilt if the jury found that defendant made false or misleading statements about the crime, knowing the statements were false or intending to mislead. CALCRIM No. 3426, however, prohibited the jury from considering that those false or misleading statements were made without knowledge they were false or misleading because defendant was intoxicated at the time he made those statements. This is because CALCRIM No. 3426 prohibited the jury from considering defendant's voluntary intoxication for any purpose other than to decide whether he had the knowledge the victim was unconscious of the oral copulation at the time it occurred.

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the mere fact that the defendant was voluntarily intoxicated is not a defense to the crime."

This prohibition was error because a defendant's false or misleading statements made when he was intoxicated may not be probative of the defendant's veracity, if the jury believed the defendant was too intoxicated to know his statements were false or misleading. "'[I]ntoxication has obvious relevance to the question of awareness, familiarity, understanding and the ability to recognize and comprehend.'" (*People v. Reyes* (1997) 52 Cal.App.4th 975, 983 (*Reyes*).) Here, for example, defendant made various statements to police a few hours after the incident that were false, even under defendant's theory of the case at trial. He repeatedly told police he did not orally copulate anybody at the party. If the jury believed that defendant made false statements such as these to police, it should have been allowed to consider whether he was intoxicated at the time he made those false statements and whether his intoxication prevented him from knowing those statements were false. If the jury so believed, those statements would not have been probative of defendant's consciousness of guilt.

While we find error, defendant takes his argument one step further. He claims CALCRIM No. 362 and CALCRIM No. 3426 together created an "irrational permissive inference" in violation of due process. "A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify *in light of the proven facts before the jury*." (*Francis v. Franklin* (1985) 471 U.S. 307, 314-315 [85 L.Ed.2d 344, 353-354], italics added.)

There was no due process violation here, because the "suggested conclusion," i.e., defendant was aware of his guilt when he made the false statements, was reasonable "in light of the proven facts before the jury." The People proved that defendant's DNA, most likely from his saliva, was found on Doe's penis.[6] "[E]mbrac[ing]" that the "DNA evidence [w]as irrefutable," defense counsel then argued to the jury the oral copulation was consensual. Therefore, defendant's statements to police that he did not orally copulate anybody at the party were false.[7] It was not reasonable that defendant made these false statements due to his intoxication (and therefore without knowledge they were false) because, as pointed out by the prosecutor during closing argument, defendant selectively remembered certain things about what allegedly happened at the party that, if believed, would exculpate him (i.e., he did not orally copulate anybody) but claimed a hazy memory about other facts (i.e., whether he returned to the house that night) that would not necessarily inculpate or exculpate him. That

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[6] On appeal, defendant asserts defendant's DNA could have ended up on Doe's penis because they were playing darts and pool together. "Thus, if [Doe] had [defendant]'s DNA on [Doe's] hands, because he handled objects [defendant] may have touched, [defendant]'s DNA could have been transferred from [Doe]'s hand to his penis during urination." These assertions are unsupported by the record.

[7] During closing argument, defense counsel admitted that defendant's statements about not having oral sex that night were false, but argued it was "obvious" why he lied, i.e., because he was a heterosexual married man.

defendant had the ability to fake a clear memory about events that exculpated him and to fake a hazy memory about neutral facts suggested defendant knew how to contrive even while allegedly drunk. Therefore, the permissive inference, i.e., defendant was aware of his guilt when he made the false statements, was reasonable, and the court did not violate defendant's due process rights by giving these instructions.

For the same reason the instructions did not violate due process, the error in giving these instructions was harmless under the state law standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 837. Namely, it was not "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Id.* at p. 836.)

II

The Trial Court's In Limine Ruling Excluding Evidence Of Defendant's Intoxication As A Defense To The Charged Crime Was Correct

Defendant contends an in limine ruling erroneously prevented him from introducing "all available evidence" on his own voluntary intoxication to negate the element that he knew Doe was unable to resist because was Doe unconscious. Defendant claims the error violated his due process right to present a complete defense.[8]

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[8] In making this argument, defendant acknowledges the trial court instructed the jury it could consider evidence of his

In support of his argument, defendant cites case law that voluntary intoxication is relevant to knowledge on "'the question of awareness, familiarity, understanding and the ability to recognize and comprehend.'" (*Reyes*, *supra*, 52 Cal.App.4th at p. 983.) And defendant points out that in *Reyes*, the trial court erroneously disallowed expert testimony to show how drug intoxication affected the defendant's knowledge that certain property was stolen. (*Reyes*, at pp. 982, 985-986.) The appellate court in *Reyes* reversed as follows: "'[t]he defendant's evidence of intoxication can no longer be proffered as a defense to a crime but rather is proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt. In such a case the defendant is attempting to relate his evidence of intoxication to an element of the crime.'" (*Reyes*, at p. 985, quoting *People v. Saille* (1991) 54 Cal.3d 1103, 1120.) *Reyes* was cited with approval by our Supreme Court when it held that a jury may consider evidence of a defendant's voluntary intoxication as to both knowledge and intent of all charges in a case where the defendant's alleged guilt was premised on aiding and abetting liability. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1118, 1131.)

The problem with defendant's argument is not the law on which it is based, but rather, his premise that the trial

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intoxication "in deciding whether the defendant had the knowledge that the victim was unconscious of the act at the time of its occurrence."

court's in limine ruling precluded him from introducing evidence on his own intoxication as it related to his ability to perceive whether Doe was unconscious at the time he was orally copulating Doe. As we will show below, while the trial court's ruling correctly excluded evidence of defendant's intoxication as a defense to the crime, it specifically allowed evidence of defendant's intoxication on the issue of defendant's ability to perceive. That was the correct ruling. To explain, we detail the background behind the court's in limine ruling and then the court's ruling itself.

The People filed a trial brief containing their in limine motions. In the "anticipated witnesses" section of the brief, the People stated "[t]o date, the only witness the defense has indicated [it] will call is Jeffery Zeh[]nder of Drug Detection Laboratories. However, the defense has not provided any discovery related to Mr.Ze[hnd]er's testimony other than his name, and to say that he will testify to the general effects of alcohol on the human body." In the "preclusion of defense witnesses/evidence" section of the brief, the People moved to "exclude any defense witness (but for the defendant) from testifying" because they had received no discovery as to any potential witnesses.[9] In the "unavailable defenses" section of

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[9] The People cited Penal Code section 1054.3, subdivision (a), which states that the defense shall disclose to the prosecuting attorney, "The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the

the brief, the People stated "[t]he defendant may seek to present defenses in the following two categories: [v]oluntary [i]ntoxication, and/or [u]nconsciousness. However, neither are available defenses for the charged offense." In support, the People cited, among other things, Penal Code section 22, which prohibits evidence of voluntary intoxication "to negate the capacity to form any mental states for the crimes charged" except to show "whether or not the defendant actually formed a required specific intent." (Pen. Code, § 22, subds. (a) & (b).)[10]

The court and parties addressed the in limine motions in court.

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statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial."

[10] Penal Code section 22, provides in pertinent part as follows:

"(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

"(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought."

As to the motion to exclude any defense witnesses including Zehnder, defense counsel, "object[ed] to any ruling on this issue at this time. We don't know exactly who we are going to call at all during the case." "And as it applies to any of the lab testing or anything like that, we don't have to share our defense at this point. And I don't know where this case is going, and I do not know what the victim is going to say. [¶] . . . We don't know where he's going to be in terms of his intoxication, his consent . . . ."

The court stated it disagreed with defense counsel's argument "[a]s to the experts." "The whole purpose of [the] discovery requirement is to prevent, particular experts, who are retained to come in here at the last second and without any particular notice . . . . [¶] Now, I am not going to make a final ruling. I will wait until we get to that point in the case if we do. But I will tell you, you will have a very high burden to overcome in order to get expert testimony in at this juncture without having had it previously disclosed."

As to the motion to preclude the defense of voluntary intoxication or unconsciousness, the prosecutor stated that depending on how the court ruled, he thought it "would affect probably our scheduling with regarding [*sic*] to Mr. Zehnder testifying because . . . his testimony would only go to either of these two defenses that . . . were unavailable."

Defense counsel "ask[ed] that we litigate the matters of the unavailability or availability of the [d]efense at the end of the trial." He then added the following, "And to say that

Zehnder can only testify as to [defendant]'s sobriety would paint half of a picture for the jury. [¶] Mr. Zehnder will also testify to the sobriety of John Doe. John Doe was .18 multiple hours after the event. And a person's ability to recall an event and to articulate how that event occurred is specifically affected by alcohol. If Mr. -- if John Doe is a .18 when he's tested and he's probably a .22 or .24 at the time the alleged act occurs, the jury is entitled to know what [*sic*] that intoxication affected him. [¶] And that is the centerpiece of the defense, your Honor, that these -- that he doesn't recall exactly what happened in the bedroom between he and [defendant] if that is how we pursue the defense . . . . [¶] But to say that Zehnder's testimony only goes to voluntary intoxication of [defendant] is inappropriate. It's just not . . . [defendant] or Mr. Doe that we're talking about. Everybody at the party drank. The amount of alcohol these people consumed will shock the jury. And they are entitled to know that these people, like for instance, John Doe had 15 to 20 drinks in him. And I was trying to recall an event. [¶] [The prosecutor] has to prove that John Doe was unconscious and not aware of the act. His level of intoxication directly relates to that. He doesn't just get to say, 'I was passed out' and not be challenged on that, and we are entitled to that. His credibility is the centerpiece of their case that he was unconscious. And we are entitled to present that by Zehnder."

The court ruled as follows: "I agree with the Prosecution's premise that *voluntary intoxication will not work*

as a defense in this case, so I will not permit any questions of Mr. Zehnder that would go to that issue nor will I allow any argument on that issue. [¶] *However, Mr. Zehnder is appropriate to assess everybody's ability to perceive and recollect, and that would be appropriate*."[11] (Italics added.)

The trial court's ruling here was exactly what was mandated by case law defendant himself cites. Specifically, a "defendant's evidence of intoxication can no longer be proffered as a defense to a crime" (*People v. Saille*, *supra*, 54 Cal.3d at p. 1120), but it can be proffered to raise a doubt on an element of a crime such as knowledge (*Reyes*, *supra*, 52 Cal.App.4th at p. 985), i.e., the defendant's "ability to perceive." Therefore, there was no error, constitutional or otherwise, in the court's ruling.

III

The Court Erred In Instructing Pursuant To CALCRIM No. 250 Instead Of CALCRIM No. 251, But The Error Was Harmless

Defendant contends the trial court erred by instructing on the concurrence of act and general intent (CALCRIM No. 250), rather than instructing on the concurrence of act and specific intent (CALCRIM No. 251). We agree the trial court erred, but

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[11] Zehnder was never called as a witness. Before the defense was about to put on its case and out the presence of the jury, the court stated, "I believe there is a stipulation they are going to present on Mr. Zehnder's testimony and then we are done." Defense counsel responded, "There is no Zehnder, so Zehnder is out."

find the error harmless because the point was covered by other instructions given to the jury.

The trial court instructed pursuant to CALCRIM No. 250 as follows:

"The crime charged in this case requires proof of the union or joint operation of act and wrongful intent. For you to find a person guilty of the crime in this case, that person must not only have committed the prohibited act but must also do so with wrongful intent.

"A person acts with wrongful intent when he or she intentionally does a prohibited act. However, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime."

When a charged crime requires a specific mental state such as knowledge, the trial court "**must not**" instruct the jury with CALCRIM No. 250. (Bench Note to CALCRIM No. 250 (2011) p. 67.) The trial court must instead instruct pursuant to CALCRIM No. 251. (Bench Note to CALCRIM No. 251 (2011) p. 70.) CALCRIM No. 251 would have told the jury defendant must not only intentionally commit the prohibited act, but must do so with a specific intent and/or mental state. The act and the specific intent and/or mental state required are explained in the instruction for that crime. Here, because the crime of oral copulation of an unconscious person had a knowledge requirement, the court erred in instructing with CALCRIM No. 250.

Despite defendant's argument that the error implicated his constitutional rights, the correct standard of review is for us

to assess whether there was "a reasonable probability of an effect on the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 220.) Such a probability does not appear if other instructions "substantially covered the concurrence of act and 'specific intent.'" (*Ibid*.)

The other instructions substantially covered the concurrence of act and specific intent. The trial court instructed pursuant to CALCRIM No. 225 as follows: "The People must prove not only that the defendant did the acts charged but also that he acted with a particular mental state. The instruction for the crime explains the mental state required." In turn, the court instructed the elements of the offense included, "the defendant knew that the other person was unable to resist because he was unconscious of the nature of the act."

Defendant's argument is not so much that the other instructions did not cover the missing instruction, but that CALCRIM 250 "eliminated the knowledge element of the offense" and did not "'alert the jury that . . . the defendant must have that specific intent or mental state at the same time he performs the acts necessary for the crime.'" Defendant's arguments get him nowhere.

CALCRIM No. 250 did not eliminate the knowledge requirement. CALCRIM No. 250 makes no mention of a knowledge requirement. The reference in the instruction to there being no requirement that defendant "intend to break the law" (which defendant contends eliminated the knowledge requirement) goes to

the idea knowledge of the wrongfulness of one's conduct is not necessary.

And, as to defendant's argument regarding timing, while CALCRIM No. 250 did not expressly state the intent and mental state must exist simultaneously, the jury was instructed pursuant to CALCRIM No. 3426 that a defendant's voluntary intoxication was relevant "in deciding whether the defendant had the knowledge that the victim was unconscious of the act *at the time of its occurrence*." (Italic added.)

Thus, reading the instructions as a whole, they contained what defendant contends was missing. Specifically, the jury was told the following: "the instruction for the crime explains the mental state required"; to find defendant guilty, it had to find "defendant knew that the other person was unable to resist because he was unconscious of the nature of the act"; and defendant's voluntary intoxication was relevant in deciding whether defendant had the knowledge Doe was unconscious of the act "at the time of its occurrence."

IV

There Was No Error In Refusing Instructions On The Allegedly Lesser Included Offenses Of Assault And Battery

Defendant contends the court erred in refusing to instruct on assault and battery as lesser included offenses to oral copulation of an unconscious person. His claim is based on what he sees as the "People's failure to unambiguously establish the unconsciousness element of the offense." Specifically, he argues "there was little or no evidence that the act began

before [Doe] gained consciousness." He further argues "there was little or no evidence that [he] had actual, subjective knowledge that John Doe was unconscious at the moment oral copulation occurred, and there was substantial evidence that he was highly intoxicated at the time." As we explain, the court correctly did not give instructions on lesser included offenses because there was no substantial evidence to support them.

The trial court must instruct on all theories of a lesser included offense "which find substantial support in the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support. . . . [¶] [T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense." (*Ibid.*) We do not address whether these offenses were lesser included because even if they were, there was no substantial evidence defendant was guilty of these lesser offenses but not the greater.

Contrary to defendant's argument that "there was little or no evidence that the act began before [Doe] gained consciousness," the testimony unambiguously established Doe was asleep when it began. During his direct examination testimony, Doe testified he was "passed out before the incident happened."[12] He explained "the incident" was defendant "going down on [him]."

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12 Defendant fails to mention this testimony.

When the prosecutor asked, "What specifically did you feel?" Doe answered he "felt a wet mouth around his [penis]." The prosecutor asked, "[w]ere you awake prior to feeling that feeling?" Doe responded, "No, sir." Cross-examination confirmed Doe awoke to being orally copulated. Defense counsel asked, "When you say you woke up, you said that [defendant']s mouth was on your penis; correct?" Doe replied, "Correct."

Also contrary to defendant's argument that "there was little or no evidence that [defendant] had actual, subjective knowledge that John Doe was unconscious at the moment oral copulation occurred, and there was substantial evidence that he was highly intoxicated at the time," there was strong circumstantial evidence defendant knew. Defendant chose to orally copulate Doe when he had easy access to commit the crime, i.e., while everybody including the victim was asleep. The partygoers had decided it was late and had either left the party or retired to bed. Defendant went inside a bedroom where two people previously had entered for the purpose of sleeping. Doe described his state as being "passed out." Doe testified he did not know how long the oral copulation had been going on before he became aware of it. This evidence strongly suggested defendant picked a situation where he knew his victim was sleeping because he knew it was the only way he was able to accomplish the act. Defendant's intoxication, while it may have been helpful if the evidence was consistent with him having difficulty perceiving, i.e., having difficulty being able to tell whether Doe was asleep, it was not helpful to him here.

Within minutes of the oral copulation, defendant was able to perceive well enough to lie to Doe and his brother about committing the act. Moreover, the testimony of those witnesses did not indicate defendant's mental state was such that he had difficulty perceiving around the time of the incident. These facts distinguish cases cited by defendant that a lesser included instruction is appropriate where knowledge is an element of the offense and there was sufficient evidence of intoxication. (See, e.g., *People v. Wright* (1996) 52 Cal.App.4th 203, 209 [the Attorney General conceded there was substantial evidence of the defendants' intoxication at the time of the charged offenses and this would, if believed, negate the specific intent to steal necessary for robbery]; *People v. Masters* (1982) 134 Cal.App.3d 509, 518 [where the victim testified the defendant was intoxicated and staggering when the defendant robbed her and was in that same state during a later robbery, lesser included instructions were appropriate as to those counts].)

V

The Prosecutor Did Not Commit Misconduct,
So Trial Counsel Was Not Ineffective For Failing To Object

Defendant contends the prosecutor committed misconduct in closing by arguing facts outside the record (which were false), and trial counsel was ineffective for failing to object. According to defendant, the alleged misconduct was, "insinuat[ing] that data from the National Weather Service

showed that sunrise was close to 6:30 [a].m., when no such data was in evidence . . . ."

Defendant's characterization of the prosecutor's argument is inaccurate. The argument defendant finds fault with was as follows: "[D]id the argument [where Doe confronted defendant in the kitchen] occur? Yes. *Did it occur right about the time of sun up? That's what everybody testified to. That evidence wasn't admitted from the National Weather Service what time the sun comes up on January 1, 200[8], which is probably pretty close to the time the defendant's wife indicated, at 6:30 when she saw the defendant in bed.* [¶] And it was consistent with the fact that right after the confrontation in the kitchen occurred the defendant was told to go home. That's probably where he went was home to bed. But people saw him there engaging in this argument."[13] (Italics added.)

The prosecutor did not insinuate that data from the National Weather Service showed sunrise was close to 6:30 a.m. Rather, the prosecutor plainly admitted he did *not* have data from the National Weather Service on the time of the sunrise. The prosecutor also acknowledged in argument prior to the complained-of passage that the witnesses he called were "gauging" the time of the incident and argument in the kitchen by "what the sun was like," they estimated it was about 7:00

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[13] We granted defendant's request for judicial notice that according to the United States Naval Observatory Web site data for January 1, 2008, twilight in Rocklin began at 6:53 a.m. and sunrise was at 7:23 a.m.

a.m. and nobody was looking at a clock when these things were happening.[14]

To the extent there was no testimony the sun rose "pretty close to . . . 6:30," a defense objection based on prosecutorial misconduct would have failed. That an isolated phrase about one fact -- the timing of sunrise -- *could* be interpreted as arguing evidence outside the record was not misconduct because it did not involve a pattern of conduct so egregious nor did it involve the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury, which is required for a claim of prosecutorial misconduct. (*People v. Navarette* (2003) 30 Cal.4th 458, 506.) Contrary to defendant's argument here, the timing of the oral copulation and resulting argument were not critical to his defense. At trial, his defense was not that defendant had an alibi and therefore did not orally copulate defendant. Rather, it was the oral sex was consensual.

VI

Defendant Has Forfeited His Constitutional Challenge To The Court's Refusal To Remove The Alternate Juror

Defendant contends the court violated his constitutional right to an impartial jury and to fully confront the witnesses

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[14] Doe testified on direct examination the incident occurred "[a]round 7:00. 7:30-ish. I do recall that because it was when the sun was coming up." Doe's brother testified he heard the argument when "it was just starting to get light . . . . It was just starting to get dawn." Doe's girlfriend testified she could not remember the time of the argument, but "[t]he sun was just coming up."

against him when the court refused to remove an alternate juror who recognized J. was her son's current girlfriend. Defendant's contention on appeal is very specific. He claims the alternate juror's presence on the panel "gave [J.] a self-serving motive to color her testimony to minimize any wrongdoing or embarrassing conduct on her part, and to show cooperation with authorities, so as not to spoil her image in front of what could be her future mother-in-law." Defendant claims he "could not fully explore the effect that this bias had on her testimony in cross[-]examination without the risk of alienating [the alternate juror] as well as the entire jury panel. In this manner, [he] was denied his Sixth Amendment right to fully confront his accuser, [J.]"

Defendant's contention is forfeited. When the issue of removing the alternate juror arose at trial, defense counsel's argument as to why the alternate should be removed was as follows: "I just feel like we are up on a high wire without a net with a juror -- with [JUROR NO. 1128988]. Because she does know [J.] [¶] [J.] is a critical witness in the case and it's just fraught with danger. I just think that there [a]re so many things that could go wrong. She is an alternate. And I will submit it."

On appeal, defendant wants to treat this nonspecific argument as something it was not -- a specific constitutional claim that focuses more on J.'s bias than on the alternate juror's bias. We will not permit him to do this. Defendant has forfeited this argument on appeal. (*People v. Burgener* (2003)

29 Cal.4th 833, 869; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14.)

VII

There Was No Cumulative Prejudicial Error

Defendant contends cumulative errors here require reversal because they rose to a level of a due process violation resulting in an unfair trial. Not so. We have found two instructional errors. The first was harmless because it was not reasonable defendant made false statements due to his intoxication (and therefore without knowledge they were false). The second was harmless because the contents of the instruction that should have been given were covered by other instructions. Both errors, therefore, had no effect on the jury. Zero plus zero still equals zero.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

NICHOLSON, J.