S220247

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
	) S _____
Plaintiff and Respondent,	)
	) 4th Crim. G048155
v.	)
	) Sup. Ct. No. 11WF0857
LEE HOANG ROBINSON,	)
	)
Defendant and Appellant.	)
	)

APPEAL FROM THE SUPERIOR COURT
OF ORANGE COUNTY

Honorable JAMES A. STOTLER, Judge Presiding

APPELLANT'S PETITION FOR REVIEW

LEONARD J. KLAIF
State Bar No. 140937
P.O. Box 1657
Ojai, California 93024
(805) 640-9659
(805) 640-9679 FAX
ljkesq@roadrunner.com

Attorney for Appellant
By appointment of the Court of
Appeal under the Appellate
Defenders, Inc. independent case system

SUPREME COURT
FILED

JUL 29 2014

Frank A. McGuire Clerk

Deputy

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PETITION FOR REVIEW

TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

Pursuant to Rule 8.500, subdivision (a), of the California Rules of Court, appellant, LEE HOANG ROBINSON, respectfully requests that this Court review the opinion of the Court of Appeal, Fourth Appellate District, Division Three, affirming the judgment. The opinion was certified for publication and can be found at 227 Cal.App.4th 387. A copy of the Court of Appeal opinion, filed June 24, 2014, is attached hereto as Exhibit A. A Petition for Rehearing was not filed.

Review is sought pursuant to Rule 8.500, subdivision (b), of the California Rules of Court, to settle important questions of law and to insure uniformity of decision.

ISSUES PRESENT FOR REVIEW

Appellant was convicted, inter alia, of eight counts of sexual battery by fraud (counts one, two, and four through nine), in violation of Penal Code section 243.4, subdivision (c).

The Court of Appeal affirmed the judgment with respect to counts six, seven, eight, and nine. The Court modified the judgment with respect to counts one, two, four, and five by reducing said convictions to misdemeanor sexual battery in violation of Penal Code section 243.4, subdivision (e)(1).

The issues presented for review are:

1) whether misdemeanor sexual battery is a lesser included offense to sexual battery by fraud allowing the modification of the judgment with respect to counts one, two, four, and five; and

2) whether the evidence with respect to counts six, seven, eight, and nine was sufficient to sustain the judgment with respect to these counts, and whether a conviction based upon the evidence presented violates appellant's federal constitutional right to due process.

NECESSITY OF REVIEW

1) There is a split of authority among the Courts of Appeal on the question of whether or not misdemeanor sexual battery, in violation of subdivision (e)(1) of Penal Code section 243.4, is a lesser included offense to sexual battery by fraud, in violation of subdivision (c) of section 243.4. (See, *People v. Babaali* (2009) 171 Cal.App.4th 982 and *People v. Smith* (2010) 191 Cal.App.4th 199.)

Review should be granted to settle this question of law.

2) The question of whether or not the evidence was sufficient to sustain the judgment with respect to counts six through nine presents the issue of the interpretation and application of Penal Code section 243.4, subdivision (c).

STATEMENT OF THE CASE

Appellant, LEE HOANG ROBINSON, was charged in a nine count information with eight counts of sexual battery by fraud (counts one, two, and four through nine; Pen. Code, sect. 243.4, subd. (c)), and a one count of sexual penetration by force (count three, Pen. Code, sect. 289, subd. (a)(1).) (C.T. p. 118.)

A jury convicted appellant as charged on counts one through nine. (C.T. pp. 214-222.)

On January 18, 2013, appellant was sentenced to a prison term of twelve years, as follows: the court chose count one as the principle term, and imposed the middle of three years; a full consecutive term of six years was imposed on county three; consecutive terms of one year (one-third the middle term) each were imposed on counts four, six, and eight. Concurrent terms of three years were imposed on counts two, five, seven, and nine. (C.T. p. 297.)

On March 14, 2013, appellant filed a timely Notice of Appeal. (C.T. p. 300; Pen. Code, § 1237, subd. (a).)

The Court of Appeal modified the judgment by reducing the convictions on counts one, two, four, and five to misdemeanors, in violation of subdivision (e)(1) of Penal Code section 243.4, and remanding for a new sentencing hearing. (Slip opn, p. 4.)

STATEMENT OF FACTS

A. Prosecution Case-Counts One, Two, and Three.

On March 10, 2010, Trang T. was at the Target store on Brookhurst, when appellant approached Trang and told that he owned the nearby Queen Beauty Salon and that he was scheduled to train students to do facials, but the model did not show up. Appellant offered to pay Trang $40.00 if she would serve as a model for a facial and a full body massage. (1 R.T. pp. 211-212.)

Trang arrived at the salon ten minutes before 6:00 p.m. Appellant greeted her and led her to a room in the back. Appellant gave her a robe, told her to get undressed, and left the room. (1 R.T. pp. 213, 215.) Trang did not think anything unusual, as she had had facials and full body massages in the past. (1 R.T. p. 215.)

Appellant returned to the massage room, told Trang that the students had not yet arrived, and asked her to lie down on the massage table; when she had done this, appellant covered her eyes. (1 R.T. p. 216.) A short time later, Trang heard murmurings and doors slamming shut, so she assumed that she and appellant were alone in the salon. (1 R.T. p. 217.)

Appellant put some oil on his hands and massaged Trang's face for a few minutes, then massaged her arms for a short time, and then massaged her feet and legs up to her knees. Appellant then removed the blanket and robe which had been covering her, exposing her breasts. Trang asked what

appellant was doing. Appellant said that this was "standard procedure" and that Trang should not worry and should "just relax." (1 R.T. pp. 218-219.) Trang became fearful because no students had arrived and she was alone with appellant. (1 R.T. pp. 219-220.)

Appellant continued massaging Trang's breasts, assuring her that his clients loved it when he did this. (1 R.T. p. 220.) Appellant worked his way down Trang's body, and put his hands inside her panties onto the surface area of her vagina. (1 R.T. pp. 220-221.) After having Trang turn over onto her stomach, he continued to massage her starting on her neck, and going down her back to her butt. Appellant again put his hand inside Trang's panties, and this time put a finger inside Trang's vagina. (1 R.T. pp. 222-223.) Trang did not verbally protest as she was afraid as she was alone and appellant was bigger than she was. (1 R.T. p. 222.)

When Trang insisted that she had to leave, appellant started to end the massage. (1 R.T. p. 225.) As he wiped the massage oil off Trang's body, he again touched her vagina. (1 R.T. p. 226-227.) At that point Trang had enough, got up, grabbed her clothes and left. (1 R.T. pp. 227-228.)

B. <u>Prosecution Case-Counts Four and Five</u>.

In July of 2010, Odette M. worked in a Pizza Hut which was in the same shopping center as Queen Beauty Salon. (1 R.T. pp. 254-255.)

Sometime during the morning of July 17, 2010, Odette walked into the Salon to buy a hair product. Appellant, whom Odette had met a few days earlier in the shopping center's parking lot, asked her if she could come back the next evening to serve as a model for a facial. (1 R.T. pp. 258-259.)

At 9:00 that evening, Odette returned after making a pizza delivery, and ran into appellant in the parking lot. Appellant suggested that she come over for a demonstration as Odette had mentioned that she had sensitive skin when they had discussed her serving as a facial model. (1 R.T. pp. 259-261.)

After clocking out at work, Odette returned to the Queen Beauty; nobody other than appellant was present as the salon had closed for the day. (1 R.T. p. 262-263.) Appellant escorted Odette to a back massage room, told her to take off her clothes and put on a robe, and he left the room. When appellant returned, he had her lie down face up and covered her eyes. (1 R.T. p. 264.) Appellant told Odette that he was using an excellent oil, and started on her arms and legs. When Odette objected to appellant massaging her feet, he immediately stopped. (1 R.T. p. 266.) He then opened Odette's robe and grabbed her nipples; she said "no" and appellant said it was a normal of his massage and she should relax. Odette kept repeating that she wasn't comfortable, and started to feel angry and "pissed off." (1 R.T. pp. 267-268, 270-271.)

As appellant continued the massage, appellant put his hands inside

Odette's panties. She repeatedly said "Please don't do it" and "Please stop. It's uncomfortable." Appellant simply responded that Odette should "relax" and "It's okay. I do this all the time." (2 R.T. pp. 281-282.) He touched her entire public area, but did not penetrate Odette's vagina. (2 R.T. p. 283.) She did not just leave because she was afraid appellant had a weapon and did not know if anyone else was in the building. (2 R.T. p. 290.)

Eventually, appellant wiped the oil off Odette's body and removed the facial mask. Odette got dressed and left after giving appellant her phone number which appellant asked for so he could arrangements for the facial demonstration the following day. (2 R.T. pp. 291-292, 295-296.) Odette went to the police less than a week after the incident; she did not immediately report the incident because she was afraid, and because she was embarrassed. (2 R.T. pp. 297, 300.) Odette filed a lawsuit against appellant, seeking $2,500,000.00 in damages. (2 R.T. p. 301.)

C. <u>Prosecution Case-Counts Six, Seven, Eight and Nine</u>

Dianna N. was working as a sales clerk at West Drug Pharmacy; she met appellant when he came into the store to make a payment on his telephone bill. (1 R.T. pp. 92, 96.) Appellant told Dianna that he worked at a beauty salon and offered her a free facial to treat her acne. He told her that students from a nearly beauty college would be there to observe. (1 R.T. p.

97.) That evening Dianna spoke with her mother and her sister, Christine N. about the offer and they agreed they would go together. (1 R.T. pp. 98, 152.)

When the family arrived at the salon, appellant offered to give Christine a facial as well. (1 R.T. pp. 115, 154.) Appellant directed the sisters to the facial room and left them after asking them to change into the robes. (1 R.T. pp. 115, 154-156.) Their mother stayed in the waiting room and watched a movie. (1 R.T. p. 132.) Both sisters removed their shirts and bras, but did not remove their pants. (1 R.T. pp. 116-117, 155-156.) Appellant first gave Dianna a facial, and after placing a clay mask over her face left the room for a few moments. (1 R.T. p. 120.)

When he returned, he told the sister that he would also give them "European massages" in addition to the facials. (1 R.T. pp. 119-120.) Appellant massaged Dianna's arms and breast area, and he then said he was going to unbutton her pants so he could massage her thighs. (1 R.T. pp. 120, 148.) Appellant pulled Dianna's pants down to mid-thigh level, and massaged her thighs. Dianna did not say anything as she was wearing a facial mask and because she trusted appellant. (1 R.T. p. 122-123.) Appellant then rubbed Dianna's vaginal area for a minute or two. He then moved to Christine, who was unable to see appellant massaging Dianna. (1 R.T. pp. 123-124, 159.)

Appellant massaged Christine, first working on her arms, stomach, and breasts; he did not touch her nipples but did massage the areas "around the

outer areas" of them. (1 R.T. pp. 159-161.) When appellant started to unbutton Christine's pants, she put a hand on his to stop him because she "didn't feel comfortable." (1 R.T. p. 161.) Appellant reassured Christine that he regularly did this as part of a massage, and that she should not worry. Christine removed her hands, and appellant unbuttoned her pants and pulled them and her underpants to her thighs. (1 R.T. pp. 162-164.) When appellant tried to put his finger inside Christine's vagina, she stopped him by removing his hand and pulling her underwear back up. Appellant continued to massage Christine's arms and breasts. (1 R.T. pp. 166-167.)

While they were in the salon, Dianna did not say anything because she was "fearful of what would happen" if she warned her sister. (1 R.T. p. 125.) After they left the salon, the sisters discussed with each other what had occurred, but did not discuss the details and did not say anything to their mother. (1 R.T. pp. 125, 173.)

A month or two afterward Dianna told her older sister, Kim, about what had happened. At Kim's urging, Dianna and Christine went to the police in August. (1 R.T. pp. 127, 174, 194, 197.)

Appellant told police that he did not do full body massages, only facials. He also told police that the women he gave facials to removed only their outer top clothing, but left on their bras. (2 R.T. pp. 325-326.)

ARGUMENT

I. THE CONVICTIONS ON COUNTS ONE, TWO, FOUR AND FIVE MUST BE DISMISSED AND NOT REDUCED TO MISDEMEANORS.

Appellant contends that these counts should be dismissed, and not reduced to misdemeanors. As respondent acknowledges there is a split of authority as to whether Penal Code section 243.4, subdivision (e)(1) is a lesser included offense of section 243.4, subdivision (c).

Appellant concedes that an appellate court has the authority to reduce a conviction to a lesser offense when the evidence supports the lesser but not the charged offense *if* the lesser is necessarily included in the charged crime. (*People v. Martinez* (1999) 20 Cal.4th 225, 241.) A crime is a lesser included offense to the greater "when the greater crime cannot be committed without necessarily committing the other offense." (*People v. Steele* (2000) 83 Cal.App.4th 212, 218.) Appellant contends that subdivision (e)(1) is not a lesser included offense to subdivision (c) of Penal Code section 243.4, and the Court of Appeal erred in holding to the contrary.

In *People v. Babaali, supra,* 171 Cal.App.4th 982, the defendant was convicted of one count of sexual battery by fraud (Pen. Code, sect. 243.4, subd. (c)) and one count of attempted sexual battery by fraud (Pen. Code sects. 664/243.4, subdivision (c)). On the defendant's motion for a new trial, the court modified the verdicts to "what it believed to be the lesser included

offenses of sexual battery (sect. 243.4, subd. (e)(1)) and attempted sexual battery (sects. 664/243.4, subd. (e)(1)).” (*Id*, at p. 987.) The Court of Appeal reversed the judgment reducing the charges and dismissed the allegations, holding that sexual battery and attempted sexual battery were not lesser included offenses to sexual battery by fraud. (*Ibid.*)

The *Babaali* decision reasoned that the essence of the crime of sexual battery by fraud was the fraudulent inducement to obtain the victim's consent by false pretenses. (*Id*, at pp. 987-988.) By contrast, sexual battery requires that the touching be “against the will” of the victim. (*Id*, at p. 989.) The *Babaali* opinion then applied the standard test for determining whether or not one offense is a lesser to another. (*Id*, at p. 994.) The court concluded that the two statutes in question had two elements in common, that of a touching of an intimate part of another and that the touching be for sexual gratification or arousal. However, the *Babaali* opinion noted that subdivision (e)(1) requires that the touching be “against the will” of the victim while subdivision (c) requires that the victim be “unconscious of the nature of the touching” due to the defendant's fraudulent misrepresentation. The *Babaali* opinion noted that the use of the word *unconscious* in subdivision (c) does not have the “ordinary or colloquial meaning;” rather in this subdivision the word *unconscious* means that the victim was tricked into submitting to the touching. The Court held that “committing an intimate touching when the victim 'at the time

unconscious of the nature of the act'" due to fraud is not the same as "committing a touching 'against the (victim's) will.'" Thus, the *Babaali* opinion concludes that subdivision (e)(1) is not a lesser included offense to subdivision (c). (*Id,* at pp. 995-996.)

While the decision in *People v. Smith, supra,* 191 Cal.App.4th 199, disagreed with the holding in *Babaali,* the *Smith* case is not directly on point. In *Smith,* the defendant was convicted, *inter alia,* of sexual battery in violation of subdivision (e)(1) of Penal Code section 243.4. On appeal, the defendant contended that this charge had to be reversed; he claimed that the victim was unconscious due to drug and alcohol intoxication, and as such the element of this event requiring that the act be "against the victim's will" was inapplicable. (*Id,* at pp. 201, 205-209.) The *Smith* opinion pointedly disagreed with the majority opinion in *Babaali,* and found that a person who is "unconscious" due to intoxication cannot give consent. (*Id,* at pp. 208-209.)

Appellant contends that *Babaali* is better reasoned than *Smith*, and should be followed by this Court. The *Smith* opinion omits any mention of the discussion in cases such as *People v. Pham* (2009) 180 Cal.App.4th 919, in which the Court explained that the 1992 amendments to various sex crime statutes, including Penal Code section 243.4, subdivision (c), criminalized fraud in the inducement because of the difficulty of securing convictions under circumstances identical to those in this matter. In other words, a new

crime was necessary to criminalization of sexual acts where "lack of consent" was absent where the victim was fraudulently induced to "consent" to the act, because lack of consent was not found in these cases. Thus, section 243.4, subdivision (e)(1) is not a lesser included offense to section 243.4, subdivision (c), as the enactment of (c) was necessary to criminalize that which was not covered by subdivision (e)(1).

II. THE JUDGMENT WITH RESPECT TO COUNTS SIX THROUGH NINE MUST BE REVERSED AND THESE COUNTS DISMISSED AS THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THESE ALLEGATIONS. NOT TO DO SO WOULD VIOLATE APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Introduction.

In counts one, two, and four through nine, appellant was charged with sexual battery by fraud, in violation of Penal Code section 243.4, subdivision (c). Counts one and two involved Trang T. as the named victim; counts four and five involved Odette M., as the named victim; in counts six and seven, Dianna N. was the named victim; in counts eight and nine, the named victim was Christina N. Counts one, four, six, and eight involved the alleged improper touching of the respective womens' breasts, and counts two, five, seven, and nine involved the alleged improper touching of their vaginas.

In each case, it is alleged that appellant induced the women to come to a beauty salon he worked at by fraudulently offering them a free facial, telling them that he needed a model for a class he was teaching; no students ever showed up.

Once appellant got the women on the facial table, he allegedly told them that he would give them European full body massages as well, and touched their breasts and vaginas.

The Court of Appeal modified the judgment by reducing the charges in counts one, two, four and five to misdemeanor violations of Penal Code section 243.4, subdivision (e)(1), but affirmed with respect to counts six through nine. The Court found that the evidence was sufficient for the jury to find that the victims in counts six through nine were "unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose" as required by the statute. (Slip, opn., p. 10.) Appellant contends that the circumstances and evidence adduced at trial were not sufficiently different between the alleged victims and thus the judgment with respect to counts six through nine should be reversed as well.

B. Standard of Review.

In examining the record for sufficiency of the evidence, "'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *(People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; emphasis in original.) The appellate court must assume the truth of every fact the trier could reasonably deduce from the evidence in support of the judgment. *(People v. Reilly* (1970) 3 Cal.3d 421, 425; accord *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237.) A reasonable inference, however,

may not be based on suspicion, imagination, speculation, surmise, conjecture or guesswork. (People v. *Morris* (1988) 46 Cal.3d 1, 21.) A jury may rely on inferences to support a conviction only if those inferences are "of such substantiality that a reasonable trier of fact could determine beyond a reasonable doubt" the inferred facts are true. *(People v. Raley* (1992) 2 Cal.4th 870, 890-891.) Finally, evidence is substantial "only if ... it reasonably inspires confidence and is credible and of solid value." *(Ibid.)*

C. <u>The Evidence Was Insufficient To Support The Verdict On Counts Six Through Nine</u>.

Penal Code section 243.4, subdivision (c), provides as follows:

> **"Any person who touches an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse, and *the victim is at the time unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose*, is guilty of sexual battery." (Emphasis added.)**

The gravamen of this statute was explained in *People v. Pham, supra,* 180 Cal.App.4th 919. In *Pham*, the Court noted that this statute was added in 2002, and is a "criminal hybridization of fraud and molestation." (*Id,* at p. 921.) The Court explained that in analyzing the issue of consent in sex crime cases the law traditionally distinguishes between two types of fraud; "fraud in the fact and fraud in the inducement." (*Id,* at p. 925.) The Court explained that "[F]raud in the fact occurs when the defendant obtains the victim's

consent to perform one act, but instead engages in another act." (*Ibid.*) By contrast, "fraud in the inducement takes place when the defendant makes misrepresentations to the victim in order to get her consent for a particular act, and then proceeds to carry out that very act." (*Ibid.*)

The *Pham* opinion then explained that when there is fraud in the inducement "courts have historically been reluctant to impose criminal liability on the defendant since the victim consented to the *particular act performed*, albeit under false pretenses. (*Ibid*; emphasis added.) To close this loophole, in 2002 the legislature to amend a number of sex crime statutes, including Penal Code section 243.4, to criminalize fraudulently inducing a victim to consent to a sexual act under the guise that the act "served a professional service." (*People v. Bautista* (2008) 163 Cal.App.4th 762, 773; *People v. Pham, supra,* 180 Cal.App.4th at p. 926.)

In *Pham*, the defendant was a chiropractor, and all three of the victims went to him for treatment. (*People v. Pham, supra,* 180 Cal.App.4th at pp. 922-924.) The defendant was allegedly touched the breasts of each of the victims and the buttocks of one during what he represented to be a preliminary examination and/or adjustment procedures. (*Ibid.*) The Court of Appeal upheld appellant's convictions for violation Penal Code section 243.4, subdivision (c), notwithstanding his claim that there was insufficient evidence that the victims "were not conscious of the sexual nature of the touching due

to any fraudulent representations he made to them." (*Id*, at p. 924.)

In applying the facts of the case to its view of the purpose and intent of the statute, *Pham* first noted that a defendant need not expressly tell the victims that the "touching of their intimate parts was for a professional medical purpose." Rather, a court should look to the "totality of the defendant's conduct – not just his verbal statements – in determining whether he fraudulently represented the nature of his actions. " (*Id*, at p. 926.) The opinion next found that "physicians occupy a position of implicit trust" and that patients have "the expectation of receiving medical treatment for their various injuries" and that any touching and moving of their bodies was to "diagnose and treat their injuries." (*Id,* at pp. 926-927.)

After finding that the evidence supported the jury's findings that appellant could reasonably conclude that the defendant fraudulently representing to each victim that the inappropriate touching served a professional purpose, the *Pham* opinion turned to the question of whether the defendant's fraud "resulted in the victims being unconscious of the nature of his acts." (*Id,* at p. 928.) The opinion held that "the unconsciousness requirement does not require proof the victim was totally and physically unconscious during the acts in question." (*Ibid.*) Rather, the unconscious requirement simply means that the defendant tricked the victim "into submitting to the touching on the pretext it served a professional purpose."

(*Ibid.*) The opinion noted that the conduct of one of the victims reflected a "degree of uncertainty" about the nature of the defendant's actions, but that the defendant's "status as a medical provider, his professional demeanor, and the presence of an assistant" would lead to a belief that the defendant's actions were possibly professionally, not sexually, motivated. (*Id*, at p. 929.)

By contrast, appellant fraudulently induced the victims in counts five through nine to come to his salon by promising each of them facials as models for his non-existent students. Neither of the women, however, could reasonably believe that appellant's actions in touching their breasts or vaginas was related to his performing a facial. Nor could they have reasonably believed that he was using them as a teaching model when no students appeared. Nor did any of the victims have any reason to have the sort of professional trust in appellant that one would have in a medical professional as in *Pham.*

Below, when the victims objected to their intimate parts being touched, appellant stopped that particular conduct. The victims here did not leave, not because they believed at any level that the unwanted touching was related to being given a facial, but because they were frightened and/or embarrassed.

As indicated above, the decision in *Pham* relied in part in the decision in *People v. Bautista, supra,* 163 Cal.App.4th 762. In *Bautista*, the defendant was charged, *inter alia*, with a violation of Penal Code section 289, subdivision

(d)(4). This subdivision, also added in 2002 as part of the legislation adding the language of subdivision (c) to section 243.4, and was enacted to serve the same purpose. (*People v. Pham, supra,* 180 Cal.App.4th at p. 925-926.) Penal Code section 289, subdivision (d)(4) penalizes an act of sexual penetration of a person who "was not aware, knowing, perceiving, or cognizant of the essential characteristic of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose."

In *Baustista,* the defendant challenged his conviction for violating Penal Code section 289, subdivision (d)(4). The defendant, an immigration attorney, was also the unpaid pastor and leader of an independent Pentecostal church. In his sermon's, appellant preached that God spoke through him, that if anyone went against him they went against God, and spoke forcefully about the need to segregate boys and girls. (*Id,* at pp. 765-766.) The victim in the allegation of a violation of 289(d)(4) told the defendant that she had "done something with a boy" but that she was still a virgin. The defendant had the victim accompany him to a back room of the church where he put his fingers insider her vagina to determine if she was still a virgin. (*Id,* at p. 767.)

The defendant contended that as he was both unlicensed and unpaid he could not have had the purported "professional purpose" and thus there could be no fraud leading the victim to be "unconscious" of the defendant's

sexual intent. (*Id*, at p. 772.) The Court rejected this contention, finding that as the statute's focus "is clearly the perpetrator's fraudulent representation that is used to take advantage of an unknowing and vulnerable victim. The precise nature of the perpetrators employment is less important in this context than the *appearance of authority* and legitimate purpose that allows the perpetrator to penetrate the victim without the victim's understanding of the true nature of the act." (*Id*, at p. 775.)

By contrast, below appellant did not have an aura of the "appearance of authority" and there simply is no way either of the victims, or any reasonable person, could fail to note that the massaging of the breasts and vagina were unrelated to the giving of a facial, the ruse appellant used to get the victims into the salon and onto the massage table.

The decision in *People v. Morales* (2013) 212 Cal.App.4th 583, is pertinent in resolving the issue in this matter. In *Morales*, the defendant was convicted of violating Penal Code section 261, subdivision (a)(4). This subdivision defines rape as an act of sexual intercourse "where a person is at the time unconscious of the nature of the act...because the victim...(A) was unconscious or asleep... (or) (C) was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose." The "fraudulent representation language

was added as part of the same 1992 legislation that amended Penal Code section 243 and 268, as discussed above. (*Id*, at p. 593.)

In *Morales*, the defendant entered the victim's bedroom immediately after her boyfriend left, and not announcing his identity, had sexual intercourse with her. There was evidence that the victim was asleep at the time the defendant sexually penetrated her. (*Id*, at p. 586-587.) During closing argument the prosecutor argued that the jury could convict if they found that the victim was asleep *or* if she were unaware "of the essential characteristics of the act because the defendant deceived her into believing that she was her boyfriend." (*Ibid.*)

The Court of Appeal reversed the conviction, holding that the fraud argument presented the jury with an incorrect statement of law, and it was not possible to determine which theory the jury relied upon. (*Id*, at p. 586.) Relying on the opinions in *People v. Pham, supra*, 180 Cal.App.4th 919, 925, and *People v. Babaali*, 171 Cal.App.4th 982, 987-988, the *Morales* decision discussed the difference between fraud in the inducement and fraud in fact. The Court accepted the defendant's argument that "a person who impersonates another in order to accomplish sexual intercourse engages in *fraud in the inducement*" while the statute criminalizes fraud in the fact only. (*Id*, at p. 591-592, 595-596; emphasis added.)

Applying the principles of the cases discussed above to the situation at bar, it is clear that appellant's fraudulent misrepresented "fraud in the inducement," that is appellant lied to the victims to get them to go to the salon with them in the belief that they would receive a free facial in exchange for serving as models for a facial class that appellant would be teaching.

It is equally clear that there was no "fraud in the fact;" there simply is no way the victims could reasonably believe that appellant was using them as a model when there were no students, nor could they believe that appellant's actions in touching their breasts or vaginas was part of a facial.

As such, the judgment with respect to counts six through nine must be reversed and these counts dismissed. (*People v. Pham, supra,* 180 Cal.App.4th 919; *People v. Morales, supra,* 212 Cal.App.4th 583.)

D. The Guilty Verdicts On Counts One Through Five On Insufficient Evidence Violates Appellant's Right To Due Process As Guaranteed By The Fourteenth Amendment To The United States Constitution.

As the evidence was insufficient to support the finding with respect to these counts, the guilty verdicts and imposition of sentence thereon violates appellant's right to due process under the Fourteenth Amendment to the United States Constitution. *(Mikes v. Borg* (1991) 947 F.2d 353.)

CONCLUSION

Based upon the foregoing, the Petition for Review should be granted.

Dated: July 28, 2014

Respectfully submitted,

LEONARD J. KLAIF
LEONARD J. KLAIF
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
	) S _____
Plaintiff and Respondent,	)
	) 2d Crim. G048155
v.	)
	) Sup. Ct. No.
	) 11WF0857
LEE HOANG ROBINSON,	) (Orange County)
	)
Defendant and Appellant.	)
	)

CERTIFICATE OF COMPLIANCE

I, Leonard J. Klaif, appointed counsel for LEE HOANG ROBINSON, hereby certify that I prepared the foregoing Appellant's Petition for Review on a computer using Microsoft Word, and that the word count generated for this document is 5,402 words excluding the cover and tables.

Dated: July 28, 2014

Respectfully submitted,

LEONARD J. KLAIF
LEONARD J. KLAIF SBN 140937
Attorney for Appellant

EXHIBIT "A"

Filed 6/24/14

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LEE HOANG ROBINSON, Defendant and Appellant.	G048155 (Super. Ct. No. 11WF0857) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed as modified and remanded for resentencing.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Laura A. Glennon Baggett, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Lee Hoang Robinson lured women into his beauty salon after hours by promising to give them free facial treatments. After providing them with minimal facial services, he switched gears and went into massage mode. He not only massaged their arms and legs, he rubbed their breasts and vaginal area, as well. For purposes of this appeal, appellant admits he touched the women for sexual purposes. However, he contends the women were not rendered unaware of his lewd intent by virtue of his fraudulent representations, and therefore his convictions for sexual battery by fraud must be reversed. The Attorney General concedes the evidence is lacking with respect to two of the victims, and we find the concession justified since those women clearly knew appellant's actions were sexually motivated. We also agree with the Attorney General that, as to those particular victims, the appropriate remedy is to reduce appellant's convictions to the lesser included offense of misdemeanor sexual battery, which necessitates a remand for resentencing. In all other respects, we affirm the judgment.

FACTS

Appellant worked at the Queen Beauty Salon in Garden Grove. One day in December 2009, he went to a drug store near the salon and struck up a conversation with 17-year-old Dianna N., who was working there as a cashier. Appellant told Dianna he would give her a free facial if she came by his salon that night. He said he would keep the salon open late for her, and students from a nearby beauty college would be there to observe his work. He also told Dianna that if she brought along a friend, he would give her a free facial, too.

When Dianna got off work that day, she went home and told her 18-year-old sister Christine about her conversation with appellant. After talking it over with their mother, they decided to take appellant up on his offer. When they arrived at appellant's salon that evening, appellant greeted them in the waiting area. He then took them into a back room, while their mother stayed in the waiting area and watched a movie. No one else was at the salon that night.

Appellant gave Dianna and Christine each a robe and left them alone to change. They both took off their tops and bras but left their pants on under their robes. When appellant returned, he had them lay down on separate massage tables that were in the room. He then put a cloth over their eyes, washed their faces and applied a facial cream that cakes up and hardens as it dries.

After leaving the room briefly for a second time, appellant returned and told Dianna and Christine he was going to give them a "European massage." Appellant didn't explain what that meant, and the sisters didn't know either. Appellant started out by massaging Dianna's arms. Then he opened the top of her robe and started massaging the outer part of her breasts. After that, he told Dianna he was going to unbutton her pants so he could massage her thighs. Dianna didn't object. Trusting appellant, she did not think he was going to take the massage any further than that.

But he did. After unbuttoning Diana's pants and lowering them several inches, appellant massaged her thighs briefly. Then he worked his way up to her groin, slipped his hand underneath her underwear and started rubbing her vaginal area. At that point, Dianna got scared and started to question appellant's motives. However, she still didn't say anything because she didn't know if that sort of intimate touching was part of what a European massage entailed. Appellant rubbed her vaginal area for a minute or two longer, and then he turned his attention to Christine.

Like Dianna, Christine wasn't sure what a European massage entailed. As she lay there silently, appellant opened her robe and began massaging her arms, stomach and breasts. Before long, he was down by Christine's waistline, trying to unbutton her pants. Christine put her hand on the button, but appellant told her, "This is a European massage. I do this all the time for other girls. You know, this is just part of it all . . . don't worry."

With that, Christine let appellant proceed. He unbuttoned her pants and lowered them to her mid-thigh. Then he folded back her underwear and began massaging her thighs and around her vaginal area. He told her he would be glad to give her a bikini wax if she wanted to come back another time, but Christine was too nervous to say anything at that point. However, when appellant tried to put his finger in her vagina, she pushed his hand away and pulled up her underwear because she knew "that wasn't right." While she expected a European massage to be fairly exotic, perhaps involving some intimate touching, she knew digital penetration wasn't a "normal" part of any massage.

In light of Christine's resistance, appellant went back to massaging her arms, stomach and breasts. Then, after a few more minutes, he left her and Dianna alone to get dressed. While they were in the room, they talked briefly about what had happened. However, they didn't tell their mother or go to the police until several months later, in August 2010.

In March of that year, appellant approached 37-year-old Trang T. inside a Target store and told her he owned a beauty salon. He said he needed someone to demonstrate a facial and massage for some students that evening, and he would pay her $40 to be his model. Trang agreed to meet appellant at his salon later that night.

When she arrived there, there was a person getting a haircut, but no one else was around. Appellant led her into a back room and gave her a robe to change into. Then he left the room and returned a few minutes later. He had Trang lie down on a massage table and put a cloth over her eyes. When she asked about the students, appellant said they hadn't arrived yet, and he was going to start without them. Trang could hear talking out in the lobby for a little while longer, but then she heard the front door close and the room fell silent, so she assumed she and appellant were alone.

Appellant didn't spend much time on Trang's face. After rubbing a little lotion on her checks, he oiled up his hands and began messaging her arms, legs and feet.

Although Trang told appellant she didn't like him touching her body, he opened up the front of her robe, exposing her breasts. Trang put her hands over her breasts and asked appellant what he was doing. He told her it was standard procedure and to just relax, but Trang felt scared. She didn't think any students would be showing up, and she didn't know precisely what to do.

Despite her obvious discomfort, appellant poured oil on her chest and started rubbing her breasts. He talked about how all his clients loved this and acted like it was perfectly normal. Trang wasn't buying it. When appellant tried to slip his hands beneath her underwear, she told him to stop, and he did. But then he turned her over and started massaging her back and butt. Trang didn't say anything because she didn't want to anger appellant. As he was rubbing her backside, he reached between her legs and touched her clitoris. He also penetrated her vagina with his finger. Hoping to extricate herself from the situation, Trang told appellant she had to go because she was late for a class. However, rather than letting her leave, he began wiping her down with a towel.

Appellant asked Trang to spread her legs so he could wipe her vaginal area, and even though she said no, "he just wiped it and moved on." As he was wiping her backside, he put his fingers between her legs and touched the inside of her vagina. When Trang told him she didn't like that, he said no one had ever complained about him doing that to them before. He then reached down and digitally penetrated her vagina again. At that point, Trang sat up, grabbed her clothes and told appellant she was leaving. After getting dressed, she ran out of the salon and went to the police. Having never experienced anything like that during any of the massages she had received in the past, she felt appellant's conduct was utterly wrong.

The police interviewed appellant about the incident, but he denied any wrongdoing. Asked about his work practices, he claimed he only gave his clients facials, not body massages. He also told the police he had surveillance cameras set up at his

salon. However, when the police asked to see the tapes, he told them the cameras had not been working for some time.

Four months after his police interview, in July 2010, appellant talked 24-year-old Odette M. into coming to his salon at nine o'clock one evening. Having promised Odette a free facial, appellant took her to a back room of his salon and had her change into a robe. After putting some cream on her face, he began rubbing oil on her arms and legs. Then he lifted up her robe and started rubbing oil on her stomach. Odette, who was wearing only underwear underneath her robe, balked immediately. Appellant hadn't said anything about a massage, and she told him not to go there.

Appellant told her to relax, and slipping his hands underneath her underwear, began rubbing her vaginal area. This made Odette shudder, but when she objected to appellant, he assured her he did this to all his clients and continued with the rubbing. It took several more demands by Odette before he finally relented and put her robe back in place. But then he started massaging her shoulders and lowered her robe in the front. Odette tried to cover herself back up, but appellant grabbed her breasts and started squeezing them. Again, Odette protested and again appellant was slow to respond, although he eventually relented and put her robe back in place.

After that, appellant started toweling the oil off Odette's body. She said she didn't want him touching her anymore, but he wiped the towel all over her body, including her vaginal area and breasts. He then told her to leave the cream on her face for 10 more minutes and left the room. During that time, Odette stayed put out of fear. When appellant returned, he wiped her face clean. He also asked for her phone number and said he was going to call her the next day about a possible modeling gig. Then he departed again, and Odette got dressed. Upon leaving the salon, she angrily confronted appellant in the parking lot. She went to the police about a week later and has also filed a civil suit against appellant.

As to each of the four victims, appellant was charged with two counts of sexual battery by fraud for touching their breasts and vaginal area. He was also charged with one count of sexual penetration with a foreign object for digitally penetrating Trang. The jury convicted appellant as charged, and the trial court sentenced him to 12 years in prison.

DISCUSSION

Appellant argues there is insufficient evidence to support his convictions for sexual battery by fraud. In his mind, there is just no way any of the alleged victims could have reasonably believed his sexual misconduct was related to the services he promised them. As to two of the victims – Trang and Odette – the Attorney General agrees, as do we. However, we find ample evidence to support appellant's convictions as to Dianna and Christine. We also believe that, rather than reversing and dismissing the challenged convictions as to Trang and Odette, as appellant requests, the appropriate remedy is to reduce those convictions to the lesser included offense of misdemeanor sexual battery.

As its name implies, the crime of sexual battery by fraud is a specific type of sex crime. The crime occurs when a person "touches an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse, and the victim is at the time unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose[.]" (Pen. Code, § 243.4, subd. (c).)

The crime is designed to deter fraud in the inducement, where the victim acquiesces to a sexual act under the guise it is part of a professional service. (*People v. Pham* (2009) 180 Cal.App.4th 919, 926 (*Pham*).) Although the statute uses the term "unconscious," the victim need not be "totally and physically unconscious during the acts in question." (*Id.* at p. 928.) Rather, the evidence need only show the victim was tricked "into submitting to the touching on the pretext it served a professional purpose." (*Ibid.*)

In *Pham*, the defendant was a chiropractor who treated his victims for various injuries. Some of the treatment he provided was legitimate. But during a few of the sessions, he massaged the victims' breasts and touched their vaginal area under the guise of treating them. (*Pham, supra*, 180 Cal.App.4th at pp. 922-924.) Although the victims were concerned about some of the touching when it was taking place, we held there was sufficient evidence to support a finding they were unconscious of its sexual nature due to the defendant's representations that it served a professional purpose. In so holding, we noted, "'There is an inherent trust and confidence which a patient seeking medical care places in the [professonial] and upon which a patient relies in allowing the [professional] access to the most intimate parts of the body.' [Citation.]" (*Id.* at p. 926.)

Appellant argues that because he was only a beautician, none of his alleged victims had "any reason to have the sort of professional trust in [him] that one would have in a medical professional as in *Pham*." We recognize certain professions are more trusted than others. However, to be guilty of sexual battery by fraud, the perpetrator is not required to have a professional occupation, nor must he be certified in his field or even receive remuneration for his services. (*People v. Bautista* (2008) 163 Cal.App.4th 762, 773-778.) The crime is not limited to the medical context but instead "encompasses actions taken in the course of one's vocation or based on one's specialized knowledge or training in a given field." (*Id.* at p. 775.) Indeed, "[t]he precise nature of the perpetrator's employment is less important . . . than the appearance of authority and of a legitimate purpose that allows the perpetrator to [sexually exploit] the victim without the victim's understanding of the true nature of the act." (*Ibid.*)

In this case, appellant represented to all of his victims that his services were for a professional purpose, namely a facial and/or massage, usually as part of an educational endeavor. Whenever they balked at his actions, he reassured them his conduct, including the intimate touching, was a standard practice that was universally

enjoyed by all of his clients. Those representations created the impression his lewd conduct was part and parcel of the services he was providing. Even though he was not a medical professional, the jury could reasonably conclude he had a purported "professional purpose" for his actions.

This is so despite the fact no students ever showed up to watch appellant work. Student spectators are not part of a standard facial, and notwithstanding their absence in this case, there was still ample evidence from which the victims could have reasonably believed appellant's actions were intended to serve a professional purpose. After all, he told them he worked at a beauty salon, he had them meet him at the salon and he started out all of their sessions by applying lotion to their faces. When challenged about the absence of students, he insisted they were on their way. Because the sessions had the trappings of a professional beauty service, and because appellant acted like and expressly represented his actions were part of such service, the professional purpose requirement was adequately proven in this case. (See *People v. Bautista, supra*, 163 Cal.App.4th at pp. 778-781 [14-year-old victim could reasonably believe lay pastor's actions in touching her vagina served a professional purpose since he was the leader of her church and told her he was only checking to see if she was still a virgin].)

It is also clear from the record that Dianna and Christine relied on appellant's representations. Working on the assumption the only inducement he made was the promise of a facial, appellant argues none of his victims could have actually believed his lewd conduct was related to his performance of that lone service. But appellant didn't just promise Dianna and Christine a facial. After he slathered their faces with various lotions and creams, he announced he was going to give them a "European massage" as well. That gave him an excuse to transition his attention from their faces to other parts of their bodies.

Unsure of what a European message entailed, Dianna and Christine trusted appellant when he told them it involved touching their breasts and thighs. And although they both became concerned when appellant started rubbing their vaginal areas, they still didn't say anything. Appellant asserts this is because they were frightened and embarrassed, not because they believed his acts were somehow related to his purported services. But Dianna and Christine testified they didn't know what was going on when appellant was rubbing around their vaginas. In their teens, unfamiliar with European massage practices, and together in the same room, they simply weren't sure whether appellant was giving them a proper massage or touching them with lewd intent. Only when appellant attempted to insert his finger into Christine's vagina did she fully realize he was out of line. Even so, neither she nor Dianna went to the police until several months after the incident occurred.

As we explained in *Pham*, a victim's uncertainty as to whether the services in question were legitimate does not compel reversal in a case involving fraudulent inducement. In fact, we upheld the defendant's convictions in *Pham* despite evidence the victims were uncomfortable with the defendant's touching and uncertain of his intentions at the time he carried them out. (*Pham, supra*, 180 Cal.App.4th at p. 930.) For the reasons explained above, it was reasonable for the jury to conclude Dianna and Christine were lured into submitting to appellant's lewd conduct on the pretext it served a professional purpose. Although they had some concerns when appellant was touching their breasts and vaginal areas, the totality of the circumstances supports the jury's finding in this regard.[1]

Trang and Odette are a different story, as the Attorney General rightly concedes. Unlike Dianna and Christine, they were alone with appellant, and the moment

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[1] In arguing to the contrary, appellant draws our attention to *People v. Morales* (2013) 212 Cal.App.4th 583, claiming it has "great relevance" to his appeal. However, that case involved the rape of an unconscious person and turned on the marital status of the victim. We fail to see, and appellant has not explained, how that case has any bearing on the issues before us.

he moved his attention away from their faces and started touching other parts of their bodies, they made it clear to him they were uncomfortable and wanted him to stop. Even though appellant tried to convince them his actions served a professional purpose, they did not believe him and repeatedly objected to his lewd conduct. In fact, the record shows the only reason they put up with appellant's actions for as long as they did is because they did not want to anger him and make things worse for themselves. Under these circumstances, we agree with the parties that there is insufficient evidence to support the jury's findings Trang and Odette were unconscious of the sexual nature of appellant's actions. Thus, appellant's convictions for committing sexual battery by fraud against them in counts one, two, four and five must be reversed.

The only remaining issue is whether those counts should be dismissed altogether or simply be reduced to reflect convictions for the lesser offense of misdemeanor sexual battery. While we have the authority to reduce a conviction to a lesser offense where the evidence supports the lesser but not the charged offense, we can only do so when the lesser offense is necessarily included in the charged offense. (Pen. Code, § 1181, subd. 6; *People v. Martinez* (1999) 20 Cal.4th 225, 241; *People v. Stuedemann* (2007) 156 Cal.App.4th 1, 9, fn. 6.) "'To constitute a lesser and necessarily included offense it must be of such a nature that as a matter of law and considered in the abstract the greater crime cannot be committed without necessarily committing the other offense. [Citations.]'" (*People v. Steele* (2000) 83 Cal.App.4th 212, 218, italics omitted.)

The crime of misdemeanor sexual battery occurs when a person "touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse[.]" (Pen. Code, § 243.4, subd. (e)(1).) In comparing that offense with the crime of sexual battery by fraud, it is clear both offenses "have two identical elements: (1) the defendant touches an intimate part of the victim and (2) the defendant acts for the specific purpose

of sexual arousal or gratification. The difference between the two crimes is that [misdemeanor] sexual battery requires a touching 'against the will' of the victim, whereas sexual battery by fraudulent representation requires the victim to be 'unconscious' of the nature of the touching because the defendant fraudulently represents that the touching serves a professional purpose." (*People v. Babaali* (2009) 171 Cal.App.4th 982, 995 (*Babaali*).) There is a split of authority over whether "this difference means that [misdemeanor] sexual battery is not a lesser included offense of sexual battery by fraudulent representation." (*Ibid.*)

In *Babaali*, the court analyzed this issue by looking at CALCRIM No. 938, the pattern instruction on misdemeanor sexual battery, which defines "'against a person's will'" as meaning the "'person does not consent to the act.'" (*Babaali, supra*, 171 Cal.App.4th at p. 996.) The majority contrasted this lack-of-consent requirement with the situation presented in cases of sexual battery by fraud, where "the defendant gains the victim's acquiescence to the intimate touching by fraudulently representing it has a professional purpose." (*Id.* at p. 997.) The majority simply did not believe that "making a fraudulent representation that results in the victim's submitting to a specific intimate touching" was the same as acting without the person's consent. (*Id.* at p. 998.) Therefore, it ruled misdemeanor sexual battery was not a lesser and necessarily included offense of sexual battery by fraud. (*Ibid.*)

However, as the dissenting Justice in *Babaali* correctly pointed out, the definition of "against a person's will" in CALCRIM No. 938 actually encompasses the unconsciousness element of sexual battery by fraud. Indeed, that instruction provides, "'In order to *consent*, a person must act freely and voluntarily and *know the nature of the act*.'" (*Babaali, supra*, 171 Cal.App.4th at p. 1001, quoting CALCRIM No. 938 (dis. opn. of Manella, J.).) Based on this definition, the dissent reasoned that "[i]f a victim does not know the nature of the act, she cannot consent, and under such circumstances, an

intimate touching for the purpose of sexual gratification is necessarily at least a sexual battery." (*Id.* at p. 1002.)

We agree with this reasoning, which was also adopted in *People v. Smith* (2010) 191 Cal.App.4th 199. As the *Smith* court noted, "a victim who is unconscious that she is being subjected to a *sexual* touching . . . because 'the perpetrator fraudulently represented that the touching served a professional purpose,' has not consented to that sexual touching, and that touching is against the will of the victim just as much as if the victim were incapable of consenting or if the perpetrator were to accomplish the touching by force." (*Id.* at p. 209.)

In arguing otherwise, appellant reminds us that courts have traditionally been reluctant to criminalize fraud in the inducement because the victim of such fraud ostensibly consents to the act in question, albeit under false pretenses. (See *Pham, supra*, 180 Cal.App.4th at p. 925.) However, that's precisely why the Legislature created Penal Code section 243.4, subdivision (c). That provision exemplifies the modern approach of treating fraud in the inducement as a form of coercion that vitiates the victim's alleged consent and renders the perpetrator criminally liable for the acts in question. (*Id.* at pp. 925-926; cf. *People v. Giardino* (2000) 82 Cal.App.4th 454, 460 [in the context of rape, valid consent does not exist when the victim is unaware of the nature of the act].) Under this approach, a sexual act perpetrated by fraud is always deemed to be against the victim's will, and therefore a misdemeanor sexual battery will always occur when the crime of sexual battery by fraud takes place. That being the case, it follows that misdemeanor sexual battery is a necessarily included offense of sexual battery by fraud.

Because the evidence shows appellant committed misdemeanor sexual battery, but not sexual battery by fraud, against Trang and Odette, we may lawfully reduce his convictions to the lesser offense on the counts involving those two victims. But because the trial court structured appellant's sentence based on those particular counts, the matter must be remanded for resentencing.

DISPOSITION

The judgment is modified to reduce appellant's convictions on counts one, two, four and five from sexual battery by fraud (Pen. Code, § 243.4, subd. (c)) to misdemeanor sexual battery (Pen. Code, § 243.4, subd. (e)(1)), and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.

PROOF OF SERVICE BY MAIL

Re: Lee Hoang Robinson, Court Of Appeal Case: G048155, Superior Court Case: 11WF0857

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 1235 Eleanor Ave., Rohnert Park CA. On July 27, 2014, I served a copy of the attached Petition for Review (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

Office of the District Attorney

401 Civic Center Drive
Santa Ana, CA 92701

Charles Mulles, Esq.
P.O. Box 521
Nuevo, CA 92567

Lee Hoang Robinson; AN-5241
P.O. Box 9
Avenal, CA 93204

Hon. James A. Stotler; c/o Clerk of the Court

811 13th Street
Westminster, CA 92683

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 27th day of July, 2014.

Teresa C. Martinez

(Name of Declarant)

Teresa C. Martinez

(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Lee Hoang Robinson, Court Of Appeal Case: G048155, Superior Court Case: 11WF0857

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 1235 Eleanor Ave., Rohnert Park CA. On July 27, 2014 a PDF version of the Petition for Review (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

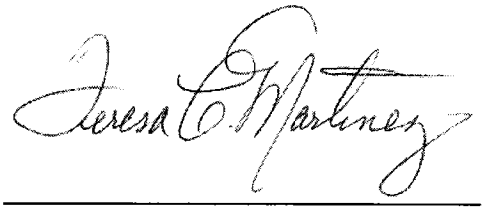
Appellate Defenders Inc. - Criminal
Lynelle Hee
San Diego, CA 92101
eservice-criminal@adi-sandiego.com

Court of Appeal, 4th District, Division 3
Clerk of the Court
Santa Ana, CA 92701

State of California Supreme Court
Supreme Court
San Francisco, CA 94102-4797

Office of the Attorney General SD
San Diego AG
San Diego, CA 92186-5266
ADIEService@doj.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 27th day of July, 2014 at 15:22 Pacific Time hour.



Teresa C. Martinez

(Name of Declarant)

(Signature of Declarant)