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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re ROGELIO B., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,
Plaintiff and Respondent,

v.

ROGELIO B.,
Defendant and Appellant.

A130625

(San Francisco County
Super. Ct. No. JW10-6165)

Rogelio B. appeals from juvenile court orders declaring him a ward of the court on the basis of findings that he committed sodomy of an intoxicated person and forcible sodomy. He contends there was insufficient evidence of either sodomy by force or sodomy of an intoxicated person; he was denied his constitutional right to present a defense when his request for use immunity for a witness was denied; the trial court abused its discretion in granting a prosecution motion to exclude defense expert witnesses; his prosecution violated his constitutional right to equal protection because the woman with whom he had sex was not prosecuted; and the evidence supported only a single finding of sodomy. We agree with the last of these claims and order the judgment be modified to strike the true finding on the second sodomy allegation. In all other respects, the judgment is affirmed.

STATEMENT OF THE CASE

On March 11, 2010, a petition was filed under Welfare and Institutions Code section 602, alleging that 17-year-old Rogelio B. committed four offenses against Antonia C.: rape of an intoxicated person (Pen. Code,¹ § 261, subd. (a)(3)), rape of an unconscious person (§ 261, subd. (a)(4)(A)), sodomy of an unconscious person (§ 286, subd. (f)), and sodomy of an intoxicated person (§ 286, subd. (i)). An amended petition filed on June 22, 2010 added a fifth allegation of sodomy by force (§ 286, subd. (c)).

The jurisdictional hearing took place from July 27 to August 2, 2010. After the prosecution rested its case, the court granted a defense motion to dismiss the two rape charges on the basis that no evidence of vaginal sex had been presented. At the conclusion of the hearing, the court found true the allegations that appellant committed sodomy by force and sodomy of an intoxicated person. It found the allegation of sodomy of an unconscious person not true.

At the disposition hearing on October 27, 2010, the court declared appellant a ward of the court, removed him from parental custody, and committed him to Juvenile Hall for 258 days, with credit for 234 days served. The court noted that appellant was aware he would be turned over to immigration authorities upon his release from Juvenile Hall and stated its intention to place him in guardianship upon completion of legal clearances. On November 16, appellant was placed in the home of his guardian.

Appellant filed a timely notice of appeal on December 16, 2010.

STATEMENT OF FACTS

In March 2010, Antonia, appellant, Mariela L. and Omar G. were all staying at a youth shelter in San Francisco, where they had met and become friends. They ate dinner, showered and slept at the shelter; during the day, when the shelter was closed, there was a drop-in center where food, a place to hang out and resources for school and work were available. Appellant did not speak much English and Antonia, who was bilingual, communicated with him in Spanish. Antonia's boyfriend, Steven, lived in Richmond.

¹ Further statutory references will be to the Penal Code unless otherwise specified.

Appellant attended a San Francisco high school and had a girlfriend there. Antonia and Mariela were both 18 years old; appellant was 17, and Omar was also under 18.

Antonia testified that she had agreed to hang out with Mariela on March 6; they wanted to go to the beach and Mariela mentioned that Omar wanted to drink. Antonia and Mariela invited appellant to join them as they were leaving the drop-in center. They stopped at a corner store, where Mariela bought a bag of chips, a Gatorade and rolling papers. Antonia had a couple of sips of a beer one of the clients at the drop-in center had given to Mariela. The group then took a bus to the beach and walked along a trail on the cliffs to a grassy area overlooking the water. Antonia had not been to this spot before; appellant “led the way.” It was early afternoon and there were no other people around.

Mariela had brought a bottle of tequila, a bottle of vodka and marijuana. Antonia rolled a “very thin small joint,” which she and Mariela smoked; she thought appellant did as well and had no idea whether Omar did. Drinking from the bottle, Antonia had some of the tequila and Mariela had both tequila and vodka; the boys did not drink. Mariela started “getting kind of wild,” wanting to drink and pushing the others to drink. They tried to take the alcohol away from her and Mariela walked toward the trees, stumbling and falling as she went. Antonia went to help her, with the boys following, and “started to not feel very well.” She felt dizzy and noticed she was not walking in a straight line; she lay down, then “blacked out,” by which she meant that she “became unconscious.”

Antonia remembered waking up and finding the others around her, with Mariela acting “a little frantic,” running toward Antonia and pushing appellant away. Antonia passed out again, then awoke to find Mariela trying to pull up her pants. Antonia pushed Mariela away because she did not want anyone to touch her, and pulled up her own pants and buttoned them. She was not sure what was going on but was starting to feel scared and still could not sit up. She blacked out again, then awoke on her back, with her legs pushed up toward her shoulders, her pants on her knees and appellant in front of her. Appellant penetrated her rectally and she said “no” and that “it hurt.” Appellant mumbled something about a condom and as she was fading out of consciousness again, she remembered him “re-penetrating.” She did not recall any vaginal penetration during

the incident. Antonia passed out again. When she awoke, she saw appellant and heard Mariela crying. She asked appellant where Mariela was, he pointed, and Antonia saw Omar on top of Mariela. Antonia tried unsuccessfully to get up to help Mariela, then passed out again.

The next time she awoke, Mariela was sitting next to her, hysterical and crying. Antonia felt scared, “almost in disbelief,” and wanted to go home. She still felt dizzy and her rectal area hurt. Someone handed her her purse, the guys started walking away, and the girls walked to the bus stop behind them. They sat several seats behind the boys on the bus and did not talk to them. Antonia did not want to cry because she did not want to scare Mariela more. Mariela kept apologizing for what happened and Antonia tried to comfort her, saying it would be okay once they got home. Mariela repeatedly said that she thought Omar had raped her and she “didn’t want it,” and that she felt bad for not protecting Antonia. Antonia said she “didn’t want it” either. When they got back to the shelter, Antonia, appellant and Omar went inside and Mariela stayed outside, saying she wanted to smoke a cigarette. Appellant told Antonia she should shower. Antonia was still feeling slightly dizzy but “mainly just in shock, and scared.” At dinner, appellant was sitting across the table from Antonia and she felt “so sick and scared” that she could not eat and “just wanted to get away.” She showered about four times that night, twice at the shelter and, later, twice at her boyfriend’s house.

At some point her boyfriend Steven called and Antonia told him she was not okay and wanted to leave; he agreed to meet her and take her back to Richmond. She told the shelter staff she needed to leave due to an emergency because she did not want to tell them what had happened. On her way to meet Steven at the BART station, she was so scared that she called Steven and he talked to her until they met. When Antonia told Steven what had happened, he suggested she go to the hospital. She did not want to because of a fear of hospitals and doctors, and because she did not want to be touched. He also suggested going to the police but she wanted to go to sleep and decide what to do in the morning. She did not feel pressured by Steven to report the offense.

In the morning, the shelter staff called to talk to Antonia because the other three had told them about the beach incident, and Antonia talked to several staff members. She and Steven called the police, who came to Steven's house and ended up referring Antonia to the San Francisco Police Department, which referred her to the United States Park police. The Park police took a more complete report on the evening of March 7. The next day, Monday, Antonia went to a health clinic where vaginal and rectal swabs were taken for testing; she went for follow-up tests a month later.

On March 10, Antonia went back to the clinic to "get some support." She suffered an anxiety attack, thinking about the incident and feeling "ruined," "weak" and like she could not protect herself, and was taken by ambulance to the hospital. She was given Ativan and, after she calmed down and explained she had been sexually assaulted, antibiotics. A urine sample was taken. Steven picked her up and took her back to Richmond, where she stayed with him and his father until she moved into transitional housing a few weeks later. She returned to the shelter only to pick up her belongings. She found work and registered for school.

Prior to March 6, Antonia had consumed small amounts of alcohol—a glass of wine or a beer at a social gathering, or small amounts of hard liquor—and had smoked marijuana "not too often," including with her boyfriend. She had never previously consumed alcohol and marijuana together and had never had the kind of reaction she had on March 6 to alcohol or marijuana. She had never drunk with Mariela before. She did not recall telling any of the shelter staff that she was a "fairly experienced party drinker," that she could "hold her liquor quite well," or that she could stay standing when others were experiencing more severe signs of intoxication.

Antonia acknowledged on cross-examination that having consensual sex with another man would violate her agreement with her boyfriend, but added that honesty was also a very important part of their relationship. She denied telling Celia Ramirez-Ruiz, a shelter staff member, that she did not want to report the incident but her boyfriend made her report it. Prior to March 6, appellant had always been respectful to Antonia and there had been nothing in their relationship suggesting to Antonia that he was interested in her

sexually; after the incident, Antonia felt confused about how someone she respected and trusted could hurt her and betray her. Antonia did not remember putting her hands on appellant on March 6, and did not remember vomiting. She was wearing underwear on March 6, as she did every day. She was aware that appellant had a girlfriend.

Steven Reaves testified that he had not planned to see Antonia the night of March 6; he worked in Vallejo and they generally saw each other once or twice a week. That evening, he texted Antonia during a break at work because he had a feeling “something [was] not right.” Antonia did not respond, so he called her and, when she answered, he could not make out what she was saying because she was crying so hard. When she was able to speak clearly, she yelled, “I said no, I said no, I said no, I am so sorry.” Steven told Antonia to meet him at the BART station and told his manager he had to leave work for an emergency. When they got to Richmond, Antonia told Steven what had happened, first responding affirmatively when he asked if someone had touched her and later using the word “rape.” When he asked if she knew who it was, she nodded; she cried through the night and toward morning told him it was appellant. He asked if she would go to the hospital but she could not handle having another person touch her. She wanted to call the police but was not ready to do so until the next afternoon; with her permission, he called the police about 3:00 or 4:00 in the afternoon. That evening he accompanied Antonia to the Park police.

Steven testified that Antonia told him she had had a few sips of alcohol on March 6. He and Antonia did not “party” and she was usually the one telling him not to drink. He had not smoked marijuana with her.

Paramedic Ken Ainsworth testified that he was called to the Larkin Street Clinic on March 10, and found Antonia short of breath, in moderate distress. While being transported to the hospital, Antonia was “extremely distraught” and physically unable to answer questions. Physician’s assistant Kara Duffy took a urine sample from Antonia, although at four days after the incident, it was outside the usual timeframe of taking urine samples within 72 hours of an assault. Antonia was very upset and hesitant to discuss the assault, but told Duffy that she thought there had been vaginal and rectal penetration and

did not know whether appellant had ejaculated or used a condom. Antonia was given antibiotics against the risk of sexually transmitted diseases, but declined a medical examination or forensic evidence collection.

Mariela, called by the defense, testified that she and Omar had planned an outing to the beach on March 6; prior to that day, Mariela discussed the plan with Antonia and told her she could invite appellant, and heard Antonia invite appellant. Shown a statement in which she had said Antonia invited appellant on March 6, Mariela said the statement was wrong and he had been invited before, on the day she told Antonia about the outing. The day before the outing, Mariela and Antonia went to BevMo and found a man to go inside and buy them a \$20 bottle of tequila and a \$20 bottle of vodka. The tequila was Honitas, at Antonia's suggestion. Mariela also bought \$10 of weed from a person Antonia took her to.

On March 6, the group went to Lands End, where Antonia rolled a joint and all four smoked it. Mariela then took the bottles of alcohol out of her backpack. Antonia opened the tequila and started "chugging" it. Mariela took a sip, the boys declined, and the girls passed the bottle back and forth between them. Omar later took sips of the tequila and the vodka; appellant had a sip of the vodka. The group also ate some candy and oranges they had with them. Mariela testified that the four were talking and she was flirting with Antonia; prior to March 6 she had told Antonia that she was physically attracted to her. Mariela was "grabbing" Antonia's leg and Antonia pushed her away. Mariela left and went up the hill to the trees. All of a sudden, the others were "already there" and Mariela was "blacking out." She remembered crying and Omar holding her, and remembered the boys telling her to go sleep with Antonia, who was passed out. She also remembered kneeling down by Antonia; Antonia's pants were down, Mariela tried to pull them up and Antonia pushed her away. Appellant was standing "kind of far away from her." Mariela told Antonia they all needed to go home. Antonia did not respond. Mariela did not remember telling appellant to leave Antonia alone but acknowledged that she had written in her report to the police that she did this. Appellant told Mariela that Antonia "wanted it" and Omar said the same thing. Omar then pulled Mariela away. At

one point, she was on the ground with Omar on top of her. When she looked back, Antonia was still on the ground but her pants were up. Mariela walked back to Antonia, held onto a tree and repeatedly said they needed to go home; she was worried and thought “something bad” had happened to Antonia. She had not seen appellant move closer to Antonia or Antonia and appellant engaged in sex, and had not heard Antonia tell appellant “no,” but there were periods when her attention was not focused on them

The next thing she remembered, the four were walking to the bus stop. Mariela did not recall Antonia stumbling or slurring her words; she seemed “pretty normal.” On the bus, Mariela cried and told Antonia she thought she had had sex with Omar. Antonia said she thought she had had sex with appellant. Mariela was very upset and Antonia tried to comfort her.

Back at the shelter, Antonia and appellant went inside together. When Mariela came in half an hour later, after taking a walk, Antonia was in bed, crying, on the phone with her boyfriend. Mariela did not talk to her upstairs; when they went down to dinner, Antonia was sitting talking to appellant and Mariella sat by herself at a corner of the table with Omar “in front” of her. Mariela was taken out of the dining room to talk to some staff members, but she did not tell them what happened at the beach because she did not want to talk about it. Later, when she went upstairs, Antonia had taken a shower and said she had to leave because her boyfriend’s father was in the hospital. Mariela cried and told Antonia she did not want any of this to happen, and Antonia told her it was okay.

Mariela testified that the day after the incident, Antonia told her that Steven was “making her go to the police” but she did not want to. Mariela had initially agreed to talk to a defense investigator but changed her mind after Antonia told her she should not talk to appellant’s defense team because they would twist her words. About a week before the hearing, she talked to the investigator because she “didn’t understand” why she had left out of her original statement “the whole her pushing me” [*sic*] and she wanted to be “completely honest about the whole thing.” After the incident, Mariela felt guilty that she had not done more to help Antonia, that she had not stayed with Antonia rather than letting Omar pull her away. She felt her friendship with Antonia had suffered and

Antonia did not want to talk to her. Mariela testified that she and Antonia had drunk and smoked marijuana together before but she had never been so drunk and had never seen Antonia so “out of it” or “wasted.” Antonia had told her that she had been drinking since she was very young, that she “drinks a lot all the time,” and that “it takes a lot for her to get drunk.”

Cecilia Ramirez-Ruiz, a counselor at the shelter, testified that on March 6 Antonia and appellant came in together before sundown. They were smiling and seemed “like normal.” Asked about her day, Antonia said it was good, she had been walking and she was tired. She did not smell of alcohol and she was not stumbling or slurring. She lay down on a couch, which was not uncommon for her. Appellant asked to use the computer; his eyes were red and Ruiz thought he had smoked marijuana, which was not unusual. Omar came in a few minutes after Antonia and appellant. He was not “in his own regular character”: He was dirty, having a hard time walking and balancing, and smelled of alcohol, and while he usually came in happy and offering to help, this day he was quiet and asked if he could go upstairs and rest. Mariela came in half an hour or an hour later, eyes drooping, smelling of alcohol and barely able to walk. This was different from Mariela’s usual talkative good mood, and the staff immediately took her into the office to talk to her. Mariela said she had been drinking a lot and her friend, whom she did not name, was “passed out drunk,” slurring her speech and barely able to walk, although she also said her friend asked her to leave. Mariela said that one of the guys she was with had “taken advantage” of her friend and she had been unable to stop this because she was pulled away by the other guy, with whom she “ended up” having sexual relations.

The other three young people were already eating dinner and, when Mariela joined them, according to Ramirez-Ruiz, the “atmosphere at the dinner table completely changed.” Antonia suddenly became “almost panicky,” said there was an emergency and she had to leave. She took a phone call outside and Mariela sat at the table looking angry. Antonia returned and asked if she could go upstairs to get her things because of the emergency. Some 30-40 minutes later, when Ruiz went upstairs, Antonia was still

there. This surprised Ramirez-Ruiz because she had seen Antonia get ready to leave in five minutes when she was in a hurry. Mariela was in the shower, crying hysterically. After the staff checked and Mariela said she was okay, Antonia asked if she was alright and Mariela said she wanted to be left alone. Antonia told Mariela to talk to Ramirez-Ruiz and wrote a letter to Mariela that she asked Ramirez-Ruiz to give to Mariela. A few days later, on the telephone, Ramirez-Ruiz asked if Antonia had consented to the sexual activity on March 6, and Antonia said she did not remember, she passed out, and she remembered only bits and pieces.

Ramirez-Ruiz had never seen Antonia drink, but Antonia had told her that she and her boyfriend and her parents would “stay up drinking or partying and that everyone would usually pass out before her because she had a very high alcohol tolerance and that it took a lot of alcohol to really have an effect on her.” Prior to March 6, Antonia and appellant seemed to have a friendly relationship. There was never anything objectionable about appellant’s behavior at the shelter.

Appellant testified that he lived at the shelter because his mother, whose housing was provided by a program for people with cancer, was not able to have him live with her. Before his arrest, appellant smoked marijuana “almost daily” and drank “rarely.”

Two or three days before, Antonia invited appellant to come with her, Mariela and Omar to the beach on March 6; that day, Antonia asked if he was coming and he did. At the beach, they went to a grassy area where Antonia rolled a marijuana joint that they all smoked, appellant smoking the most. The girls were also drinking, Mariela the most. At some point, appellant asked Mariela for a cigarette and she said she would give it to him if he drank; he drank three sips from the bottle. Mariela’s speech became slurred. She and Antonia were sitting next to each other, laughing, and Mariela was moving closer to Antonia. Mariela stood up, swaying, and started walking toward the cliff. Appellant told Omar to get her so she would not fall and when Omar went, Antonia told appellant to sit next to her. Antonia started to hug him, bringing her hand down until she touched his “private parts” over his clothes. He responded by touching her “part” over her clothes. She put her hand inside his clothes, touching his penis, so he started touching her inside

her clothes. Appellant initially testified that he and Antonia stopped touching each other when Omar and Mariela returned; later, he testified that after they stopped touching each other, but before the others returned, Antonia stood up and vomited. Trying to clarify, appellant explained that Mariela and Omar were nearby when Antonia vomited, but did not see it because Mariela was stumbling and Omar was helping her.

Mariela and Antonia said they were getting cold, so the four put on warmer clothes and moved up to a higher area where there were trees. They walked “in couples” and Antonia did not stumble or appear drunk. Mariela was stumbling a lot and Omar was helping her walk. She continued drinking from the bottle she was carrying and the others told her to sit down. At appellant’s suggestion, Omar took the bottle away from Mariela and hid it; she got upset and started back to the area where they had left the other bottles and their things, still having trouble walking. Concerned about her falling off the cliff, appellant went to get the other alcohol bottle first and told Mariela to come back up the hill. She followed him back to the others and said things appellant could not hear to Antonia. Antonia looked uncomfortable and scared and moved closer to appellant until her buttocks was touching his penis. Mariela, upset, moved away. The three talked a while, then Omar went toward Mariela.

Antonia pulled her pants down, kneeled and put her hands on the ground. She was not wearing underwear. Appellant testified, “She put the idea in my mind . . . that she wanted to have something with me.” They had never previously had sexual contact. Mariela came over and told Antonia she was going to protect her; appellant told her to ask Antonia what she wanted. Antonia was not asleep with her pants down as Mariela had testified. Mariela asked Antonia “whether she wanted to” and “when Antonia said that she did want it, she got kind of upset and pushed Mariela away, and Mariela left.” Mariela said she was going to go home alone and appellant told Omar to go after her. Antonia lay down and started to pull down her pants, again “putting this idea in me that she wanted to have something with me.” Appellant placed himself between her legs and helped her pull her pants down, then unbuttoned his own and pulled them down. Antonia put her legs up and “the only possible position in order to have sex was for her to put her

legs on my shoulders.” They started to have vaginal sex and Antonia, whose eyes were open, made “pleasure sounds.” After about 10 minutes, appellant realized he did not have a condom on and told Antonia he was going to “do it in her back part.” She did not say anything. They started to have anal sex and again Antonia made “pleasure sounds.” There came a point when appellant started moving faster and Antonia said it hurt; he slowed down and she made pleasure sounds.” She never said “no” or “stop.” During this time, appellant was “really wasted” from the marijuana he had smoked.

When they finished, appellant pulled up his pants and Antonia pulled up hers. She asked him where his girlfriend was and he said, “at home.” Antonia said, “but I love you”; the interpreter clarified that the word appellant used could mean “I want you or I love you.” Appellant told her he could not be with her because he already had his own relationship. She got “kind of upset” then said she was tired, lay down and fell asleep. Appellant looked to where Mariela and Omar were and saw Mariela on Omar. Mariela and Omar returned together, Antonia woke up and the four got their belongings and walked to the bus. Appellant described taking three busses, sitting with Omar directly behind Antonia and Mariela on the first, appellant and Antonia standing next to each other on the second, and appellant sitting facing Antonia on the third. Neither Antonia nor Mariela appeared upset. Appellant overheard Mariela tell Antonia that she was “remembering everything but that she did not want to remember” and Antonia told appellant that she too “remembered everything but did not want to remember it.” The group got off the last bus together and started to walk together, but Mariela wanted to stay out to smoke a cigarette. Omar stayed with her and appellant and Antonia continued together to the shelter. Appellant rang the bell and when asked who it was said it was “me, Rogelio.” Antonia “happily said, ‘also me, Antonia’” and the two started to laugh. Inside, appellant went to use the computer and Antonia sat next to him to use the other computer. At some point appellant told Antonia to take a shower because she was dirty from lying down at the beach.

Sometime that evening, the shelter staff asked appellant about the events at the beach. He told them about the drinking and marijuana but not about having sex with

Antonia because that was “personal.” Appellant wrote in a statement that both girls were drunk at the beach, but testified that he used a Spanish word meaning “drinking” that was translated as “drunk.” He also wrote that at one point Antonia and Mariela were sleeping together “for some time,” but he testified that he did not remember whether that happened. Appellant was asked to leave the shelter on March 8, and arrested on March 9.

Appellant attended a very small school where staff had close contact with all the students. Jacqueline Fix, appellant’s English teacher and advisor, testified that appellant is “extremely honest and trustworthy” and an “excellent” student. Appellant was “extremely respectful” toward women, had “highly mature,” “respectful” and “only positive interactions” with women and girls at school, and had “only a positive reputation.” She was aware of appellant’s habit of using intoxicants but had never seen or heard of him coming to school under the influence. His reputation at the school was entirely positive.

DISCUSSION

I.

Appellant contends there was insufficient evidence to support his conviction of forcible sodomy in that the prosecution did not prove beyond a reasonable doubt that he lacked a reasonable belief that Antonia consented to the sodomy or that he used force to accomplish it. He urges that there was substantial evidence of equivocal conduct by Antonia that led him to reasonably, albeit mistakenly, believe she consented to the sodomy, that he did not hear her say “no” and that he understood her saying “it hurts” to mean only that he was going too fast.

“ ‘It is the prosecution’s burden in a criminal case to prove every element of a crime beyond a reasonable doubt. [Citation.] To determine whether the prosecution has introduced sufficient evidence to meet this burden, courts apply the “substantial evidence” test. Under this standard, the court “must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.”

[Citations.] The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on ‘ “isolated bits of evidence.” ’ [Citation.]” (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203.) “We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. ([*People v. Wilson* (2008) 44 Cal. 4th 758, 806].) If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) ‘A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.’ (*Ibid.*)” (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

Section 286 defines “sodomy” as “sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.” (§ 286, subd. (a).) Sodomy by force requires that the act be “accomplished against the victim’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.” (§ 286, subd. (c)(2)(A).) Appellant accepts that the “force” required by section 286, subdivision (c)(2)(A), is only that necessary to overcome the victim’s will. (See *People v. Griffin* (2004) 33 Cal.4th 1015, 1028(*Griffin*) [forcible rape]; *In re Asencio* (2008) 166 Cal.App.4th 1195, 1200 [forcible sexual penetration]; *People v. Guido* (2005) 125 Cal.App.4th 566, 576 (*Guido*) [forcible oral copulation].) As our Supreme Court has explained in the context of rape, “[t]he gravamen of the crime of forcible rape is a sexual penetration *accomplished against the victim’s will* by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. As reflected in the surveyed case law, in a forcible rape prosecution the jury determines whether the use of force served to overcome the will of the victim to thwart or resist the attack, *not* whether the use of such force physically facilitated sexual penetration or prevented the victim from physically resisting her attacker. The Legislature has never sought to circumscribe the nature or type of forcible conduct that will support a conviction of forcible rape, and indeed, the rape case law suggests that even conduct

which might normally attend sexual intercourse, when engaged in with force sufficient to overcome the victim's will, can support a forcible rape conviction." (*Griffin*, at p. 1027.)² This reasoning applies to forcible sodomy, just as it has been held to apply to forcible oral copulation (*People v. Guido, supra*, 125 Cal.App.4th at p. 576) and sexual penetration (*In re Asencio*, at p. 1200).

Appellant contends there was no evidence he engaged in sex against Antonia's will because there was no evidence he threatened her or used force that might induce fear in her mind. (See *Griffin, supra*, 33 Cal.4th at p. 1028 [" 'Although resistance is no longer the touchstone of the element of force, the reviewing court still looks to the circumstances of the case, including the presence of verbal or nonverbal threats, or the kind of force that might reasonably induce fear in the mind of the victim, to ascertain sufficiency of the evidence of a conviction [of forcible rape].' ([*People v.*] *Barnes* [(1986)] 42 Cal.3d [284,] 304)".]) That such circumstances are relevant, however, does not mean evidence of threats or force sufficient to induce fear is necessary in every case. Since the " 'fundamental wrong is the violation of a woman's will and sexuality . . . 'force" plays merely a supporting evidentiary role, as necessary only to insure an act of

² By contrast, a conviction for committing a lewd act against a child (§ 288, subd. (b)) requires proof that the defendant used physical force "substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*In re Asencio, supra*, 166 Cal.App.4th at p. 1200; *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 (*Cicero*), overruled on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248.) This heightened requirement derives from the statutory distinction between forcible and nonforcible lewd conduct: "It necessarily follows that if commission of a lewd act itself constitutes the minimum proscribed conduct under subdivision (a), then in cases where 'force' is charged under subdivision (b), and the People pursue a theory that physical force was used on a child, and the child is not physically harmed, it is incumbent upon the People to prove that the defendant used physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*Cicero*, at p. 474.) As explained in *Griffin, supra*, 33 Cal.4th at page 1027, "[t]hat same distinction does not arise in the context of the rape statute. The element of force in forcible rape does not serve to differentiate between two forms of unlawful sexual contact as it does under section 288. When two adults engage in *consensual* sexual intercourse, whether with or without physical force greater than that normally required to accomplish an act of sexual intercourse, the forcible rape statute is not implicated."

intercourse has been undertaken against a victim's will.' ” (*Griffin*, at p. 1025, quoting *Cicero, supra*, 157 Cal.App.3d at p. 475.)

Here, the trial court accepted Antonia's testimony that she told appellant “no” and “it hurts” while he sodomized her. This is evident from an exchange at the conclusion of closing arguments. The court noted that the prosecutor had “addressed the fact that Antonia said ‘no, it hurts’ ” and asked counsel, “[i]s any more required under the law for us to make a finding as to the use of force?” The prosecutor replied that no more was required and defense counsel stated she could offer no law to the contrary. The court then stated its findings that the allegations of sodomy of an unconscious person were not true and the allegations of sodomy of an intoxicated person and forcible sodomy were true.

Antonia's testimony was sufficient to support the trial court's conclusion that the sodomy was against her will. (See *In re Jose P.* (2005) 131 Cal.App.4th 110, 117 [victim engaged in sexual foreplay with defendant but when he began to attempt penetration told him to stop and that he was hurting her].) Appellant's argument is based entirely upon his own testimony that he did not hear Antonia say “no,” that she made sounds indicating pleasure during the sexual acts, including after she said “it hurts” and he slowed down. The trial court was not required to believe this testimony.

Appellant's main argument is that his reasonable belief in Antonia's consent was a defense to forcible sodomy. A defendant's reasonable and good faith mistake of fact regarding a person's consent to sexual intercourse is a defense to rape. (*People v. Williams* (1992) 4 Cal.4th 354, 360; *People v. Mayberry* (1975) 15 Cal.3d 143, 155 (*Mayberry*).) This “*Mayberry* defense” “is predicated on the notion that under section 26,³ reasonable mistake of fact regarding consent is incompatible with the

³ “Section 26 provides in part:
“ ‘All persons are capable of committing crimes except those belonging to the following classes:
“ ‘

existence of wrongful intent. ([*Mayberry, supra*, 15 Cal.3d] at pp. 154-155; see *People v. Hernandez* (1964) 61 Cal.2d 529, 535 [reasonable and good faith mistake of fact as to victim’s age defense to statutory rape]; *People v. Vogel* (1956) 46 Cal.2d 798, 801, 804-805 [reasonable and good faith mistake of fact regarding divorce from first wife defense to bigamy].) [Fn. omitted.]

“The *Mayberry* defense has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. [Fn. omitted.] In order to satisfy this component, a defendant must adduce evidence of the victim’s equivocal conduct on the basis of which he erroneously believed there was consent.

“In addition, the defendant must satisfy the objective component, which asks whether the defendant’s mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction. (See *People v. Bruce* (1989) 208 Cal.App.3d 1099, 1104 [one relying on *Mayberry* defense must produce some evidence of victim’s equivocal conduct that led the accused to reasonably believe there was consent]; *People v. Romero* (1985) 171 Cal.App.3d 1149, 1156 [‘defense must produce some evidence of equivocal conduct by the victim which led him to reasonably believe that there was consent where in fact there was none’].)” (*People v. Williams, supra*, 4 Cal.4th at pp. 360-361.)

The defendant bears the burden of raising a reasonable doubt as to whether he had a reasonable and good faith but mistaken belief of consent. (*People v. Williams, supra*, 4 Cal.4th at p. 361, *Mayberry, supra*, 15 Cal.3d at p. 157.) To support a *Mayberry* defense, there must be “substantial evidence of equivocal conduct that would have led a

“ ‘Three—Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.’ ” (*People v. Williams, supra*, 4 Cal.4th at p. 360, fn. 4.)

defendant to reasonably and in good faith believe consent existed where it did not.”
(*People v. Williams*, at p. 362.)

Appellant urges that there was substantial evidence of such equivocal conduct, pointing to his testimony that Antonia initiated the physical contact with him, pulled down her pants and knelt with her hands on the ground, pushed Mariela away when Mariela tried to talk to her, pulled down her pants a second time, and made sounds of pleasure during intercourse, and that she did not slur her words, stumble when she walked, or tell him “no” to anal sex. The juvenile court’s remarks, he argues, show that the court believed Antonia invited appellant to have sex with her, as well as appellant’s other descriptions of her behavior, and that his belief that she consented to sex was reasonable.

At the jurisdictional hearing, explaining why it was finding true the allegations that appellant committed sodomy of an intoxicated person, the court stated that “the victim was too intoxicated to give legal consent, and that the minor knew or should have known by virtue of behaviors at the time, the amount she had consumed, and the vomiting.” The court then simply stated it was finding the forcible sodomy allegations true as well.

The remarks appellant relies upon were made at a hearing on November 16, some three and a half months after the court’s findings at the jurisdictional hearing, in explanation of the court’s order prohibiting disclosure of appellant’s probation officer’s report and victim statements to the Immigration and Customs Enforcement Agency. The court stated, “[m]y order will pertain only to this case, because it’s a very unique situation, and I am going to make an order that the things that may not be disclosed to ICE are [the probation officer’s] report and any victim statements. The petition, the outcome can all be disclosed. And I don’t usually do this, but I think this case is unique enough that I have to put on the record what this Court found to be the facts of this case based on all the testimony that was heard.

“This was a situation in which these four young people were out at the park drinking. The victim, the adult, got drunk, took off her pants and invited the minor to

have sex with her. When her friend came and tried to interrupt that sexual encounter, she pushed her away. This minor was found guilty because he should have known that she was drunk, that was the sole basis on which he was found guilty. Quite candidly, I don't think you could find a few hundred boys in the world that wouldn't have taken advantage of this situation, but it was a crime of opportunity. I do not believe he's a sexual predator, I agree with Dr. Ralph's report, that is that he is very low risk. I think if the genders had been reversed, this case wouldn't have even been charged, so I am putting that on the record as to why I'm not releasing either the victim's statement or [the probation officer's] report."

While the juvenile court's remarks indicate it believed at least some of appellant's description of the events, the remarks also make clear that if the court credited appellant's professed belief that Antonia consented to sodomy, it found that belief *unreasonable*. The substantial evidence of equivocal conduct required to support a jury instruction on the *Mayberry* defense (*Williams, supra*, 4 Cal.4th at p. 362) does not require the trier of fact to accept the defense. As appellant recognizes, even if he honestly but mistakenly believed Antonia consented, the *Mayberry* defense would apply only if that belief was "formed under circumstances society will tolerate as reasonable." (*Id.* at p. 361.) Appellant takes the trial court's statement that "I don't think you could find a few hundred boys in the world that wouldn't have taken advantage of this situation" to mean his belief in Antonia's consent was "formed under circumstances society will tolerate as reasonable." To the contrary, while recognizing that many in appellant's situation would act as he did, the court expressly viewed such conduct as "taking advantage," not as reasonable.

II.

Appellant also argues there was insufficient evidence he committed sodomy of an intoxicated person. The proscribed conduct is sodomy "with a person who is not capable of giving legal consent because of intoxication." (See *People v. Giardino* (2000) 82 Cal.App.4th 454, 462 (*Giardino*) [rape].) "[T]he issue is not whether the victim actually consented to [sodomy], but whether he or she was capable of exercising the

degree of judgment a person must have in order to give legally cognizable consent.” (*Ibid.*) “An honest and reasonable but mistaken belief that a sexual partner is not too intoxicated to give legal consent to [sodomy] is a defense to [sodomy of an intoxicated person]. (*Id.* at p. 472.)

Giardino explained that “[i]n deciding whether the level of the victim’s intoxication deprived the victim of legal capacity, the jury shall consider all the circumstances, including the victim’s age and maturity. (Cf. *People v. Young* (1987) 190 Cal. App.3d 248, 257.) It is not enough that the victim was intoxicated to some degree, or that the intoxication reduced the victim’s sexual inhibitions. ‘Impaired mentality may exist and yet the individual may be able to exercise reasonable judgment with respect to the particular matter presented to his or her mind.’ (*People v. Peery* [(1914)] 26 Cal.App.[143,] 145; accord, *People v. Griffin* [(1897)] 117 Cal. [583,] 585.) Instead, the level of intoxication and the resulting mental impairment must have been so great that the victim could no longer exercise reasonable judgment concerning that issue.” (*Giardino, supra*, 82 Cal.App.4th at pp. 466-467, fn. omitted.)

In *Giardino*, there was evidence that the victim was intoxicated, but also evidence that she was not so intoxicated as to lack legal capacity to consent to sex. The trial court failed to instruct the jury that its task was to determine whether, as a result of her intoxication, the victim lacked legal capacity to give consent. (*Giardino, supra*, 82 Cal.App.4th at pp. 466, 471.) This failure to properly instruct the jury was prejudicial because “there [was] substantial evidence both that the victim actually consented and that she possessed the legal capacity to do so.” (*Giardino*, at pp. 470-471.)

Appellant analogizes this case to *Giardino*, arguing that there was substantial evidence Antonia consented to the sodomy and was capable of giving legal consent. He notes the evidence that Antonia engaged in sex play with him, pulled down her pants and invited him to have sex with her, sounded like she was enjoying the sex, and, although she vomited once, did not slur her words or stumble while walking and appeared normal when she returned to the shelter. Unlike *Giardino*, however, this is not a case in which the trier of fact was given incomplete instructions on how to evaluate the evidence. The

problem in that case was that the evidence would have supported a properly instructed jury reaching a conclusion that the victim was capable of giving legal consent. Here, the trial judge was fully aware of the legal issues to be determined. That substantial evidence may have supported a different conclusion does not alter the fact that substantial evidence supports the trial court's conclusion that Antonia was too intoxicated to give legal consent—as evidenced by her behavior, the amount she consumed, and her vomiting—and that appellant reasonably should have known this.⁴

III.

Appellant next contends he was denied his constitutional rights to present a full defense and to a fair trial by the trial court's denial of his request for use immunity for Omar. He urges that both the prosecutor's failure to grant immunity and the trial court's subsequent denial of his request to compel the grant of immunity were improper.

On July 27, 2010, appellant filed a motion to compel use immunity for defense witnesses Omar and Mariela, the prosecutor having denied a request for use immunity. Appellant argued that both witnesses would contradict Antonia's testimony that she was unconscious or too intoxicated to give consent as well as testify that Antonia gave outward signs of consent, and that because the incident involved four teenagers who were all intoxicated, the court needed to hear from all involved to fully understand what occurred. The motion suggested the prosecutor's failure to grant use immunity to the defense witnesses could rise to the level of prosecutorial misconduct if use immunity was granted to Antonia. Statements given by the witnesses to the defense were submitted to the trial court, which ordered them sealed because Omar's statement was obtained while he was represented by counsel but without counsel's knowledge or consent. The prosecution opposed appellant's request, urging a strong governmental interest weighing against immunity because Omar was a suspect in an ongoing rape investigation—his

⁴ Appellant follows his challenges to the true findings with an argument that after reversal of those findings, rehearing of these charges would be prohibited by the constitutional protection against double jeopardy. (U.S. Const., Fifth Amend.; Cal. Const. art. 1, sec. 15.) Given our conclusion that the trial court's findings must be affirmed, this argument is moot.

alleged rape of Mariela—although he had not yet been charged. The prosecutor clarified that Antonia had not been given immunity but had chosen to testify with advice from counsel.

The court denied the request for use immunity for Omar, explaining, “apparently it’s not even a violation of due process if your key witness gets deported. So I am not sure this is a situation [where] there’s a violation of due process. It’s also not clear to me that if I were his attorney, I’m going to let him testify at all without a transactional immunity.” The court found there had been no prosecutorial misconduct. Mariela was granted use immunity, and an attorney was provided to represent her.

In the statement given to the defense investigator about the March 6 incident, Omar said that all four were drinking and that when Mariela commented that she was drinking more than anyone else, he and Antonia started drinking more. Mariela, Antonia and Omar all threw up; Omar did not remember vomiting himself, but Antonia told him he had done so. Appellant and Antonia were sitting together, appellant hugging Antonia and Antonia leaning against appellant, and appellant had his hand on Antonia’s buttocks. She did not say anything about this. The four walked up the hill to the area with trees, appellant and Antonia walking together and Omar helping Mariela. Omar looked over and saw appellant and Antonia having sex, she “face down with her knees propping her buttocks into the air” and her pants pulled down, he behind her. They stopped and Omar saw Antonia pulling her pants up, while Mariela was telling her something. He then saw Antonia lying on her back, saw Mariela try to kiss Antonia, and Antonia push Mariela away. Omar took Mariela away from Antonia and when he looked back, appellant and Antonia were again having sex, first in the same position as before, and then with Antonia lying on her back with her legs in the air. Omar thought Antonia was not nearly as drunk as Mariela because Antonia was not slurring her words, walked “fine,” and threw up only once. After the sex between appellant and Antonia, Omar saw them “together all the time like nothing happened.”

“ ‘A defendant’s constitutional rights to compel the attendance of witnesses, as guaranteed by the Sixth Amendment, and to due process, as guaranteed by the Fourteenth

Amendment, are violated when the prosecution interferes with the defendant's right to present witnesses.' ” (*People v. Lucas* (1995) 12 Cal.4th 415, 456 (*Lucas*), quoting *People v. Mincey* (1992) 2 Cal.4th 408, 460.) To prevail on such a claim of interference, the defendant “must establish three elements. ‘First, he must demonstrate prosecutorial misconduct, i.e., conduct that was “entirely unnecessary to the proper performance of the prosecutor’s duties and was of such a nature as to transform a defense witness willing to testify into one unwilling to testify.” ’ (*In re Williams* (1994) 7 Cal.4th 572, 603.) Second, he must establish the prosecutor’s misconduct was a substantial cause in depriving the defendant of the witness’s testimony. (*Ibid.*) . . . Finally, the defendant must show the testimony he was unable to present was material to his defense. ([*In re Martin* (1987) 44 Cal.3d 1,] 32.)” (*Lucas, supra*, 12 Cal.4th at p. 457.)

As documented in email correspondence, defense counsel asked the prosecutor to grant use immunity to Omar and Mariela so that their testimony could not be used against them in potential future prosecutions (of Omar, for sexual offenses against Mariela, and of Mariela, due to her admission of providing alcohol and marijuana to the others). The prosecutor declined, stating that appellant was receiving a fair trial and she could not be responsible “for granting potential defendants immunity at the cost of the integrity of this case.”

Addressing the elements of a claim of interference with his right to present witnesses, appellant contends that the prosecutor’s treatment of Omar as a suspect in a rape case arising from the same incident, without granting immunity, amounted to prosecutorial misconduct because it was “wholly unnecessary” to the proper performance of her duties in prosecuting appellant. According to appellant, the prosecutor could have agreed to limit the scope of Omar’s testimony to exclude reference to sexual activity between Omar and Mariela, or this testimony could have been “sanitized.” Appellant points out that defense counsel represented to the court that Omar came to the defense wanting to talk about the March 6 incident, apparently suggesting Omar was initially willing to testify. As the prosecutor acknowledged, however, Omar’s statements about the incident would be “obviously very incriminating” as he was a suspect in an open rape

investigation; if he testified without immunity, it was expected that Omar would claim his Fifth Amendment privilege against self-incrimination. (*Hoffman v. United States* (1951) 341 U. S. 479, 486-487 [“To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result”].) Accordingly, appellant maintains, the prosecutor’s position transformed Omar into an unwilling witness, and was a substantial cause of depriving appellant of his testimony. Finally, appellant urges that Omar’s testimony was material and favorable to the defense because it would have corroborated appellant’s testimony that he actually and reasonably believed Antonia was capable of consenting to sex.

We find no reason to reject the trial court’s conclusion that the prosecutor’s refusal to grant Omar immunity was not misconduct. Nothing in the record suggests the prosecution did not have a real interest in investigating, and potentially pursuing, a rape case against Omar. As will be discussed in a subsequent section of this opinion, the prosecutor had a legitimate basis for refusing to agree to limit the scope of Omar’s testimony: In a case where all the witnesses were to some degree impaired and distracted, Omar’s testimony about what he was doing during the time appellant and Antonia were engaged in sex was relevant to his ability to observe and interpret the others’ communication and conduct. The prosecutor’s conduct was not “ ‘ ‘ ‘entirely unnecessary to the proper performance of the prosecutor’s duties.’ ’ ” (*Lucas, supra*, 12 Cal.4th at p. 457.)

Turning to appellant’s claim that the trial court should have granted Omar use immunity, our Supreme Court has observed “that many courts—including this court (see [*People v.*] *Hunter* [(1989)] 49 Cal.3d 957, 973 [(*Hunter*)]—have recognized that the power to confer immunity is granted by statute to the executive, that is, to the prosecution (see § 1324), and have questioned whether a trial court possesses inherent authority to grant such immunity. Indeed, addressing this question in [*Lucas, supra*,] 12 Cal.4th 415, our court characterized as ‘doubtful’ the ‘proposition that the trial court has inherent

authority to grant immunity.’ (*Id.* at p. 460; see also, e.g., *Carter v. United States* (D.C. 1996) 684 A.2d 331, 338-339 . . .)” (*People v. Stewart* (2004) 33 Cal.4th 425, 468 (*Stewart*)). The court has acknowledged, however, that it is “ ‘possible to hypothesize cases’ in which ‘a judicially conferred use immunity might possibly be necessary to vindicate a criminal defendant’s rights to compulsory process and a fair trial.’ [Citation.]” (*Ibid.*, quoting *Hunter, supra*, 49 Cal.3d 957, 974.)” Analyzing *Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d 964—“ ‘the one case which has clearly recognized’ ” judicial authority to confer use immunity—*Hunter* “highlighted two ‘ ‘clearly limited’ ” circumstances . . . in which judicially conferred use immunity might be constitutionally necessary.” (*Stewart*, at pp. 468-469, quoting *Hunter*, at p. 974.)

“The first of the two tests outlined in *Hunter, supra*, 49 Cal.3d 957, would recognize the authority of a trial court to confer immunity upon a witness when each of the following three elements is met: (1) ‘ ‘the proffered testimony [is] clearly exculpatory; [(2)] the testimony [is] essential; and [(3)] there [is] no strong governmental interest[] which countervail[s] against a grant of immunity.’ ’” (*Stewart, supra*, 33 Cal.4th at p. 469, quoting *Hunter*, at p. 974.) The second of the tests “would recognize such authority when ‘the prosecutor intentionally refused to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative exculpatory evidence,’ thereby distorting the judicial factfinding process.” (*Stewart, supra*, 33 Cal.4th at p. 470, quoting *Hunter, supra*, 49 Cal.3d at p. 975.) “Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government’s witnesses.” (*Government of Virgin Islands v. Smith, supra*, 615 F.2d at p. 972.)

Neither of these tests has been satisfied in the present case because appellant has not demonstrated that Omar’s testimony was “clearly exculpatory” or “essential” to his defense. In his statement to the defense, Omar said that Antonia was less drunk than Mariela, that Antonia was not slurring her words or having trouble walking, and that after seeing appellant and Antonia having sex, Omar saw the two together “like nothing happened.” He also said, however, that all four were drinking, that Mariela said Antonia

was used to drinking, that he and Antonia increased their drinking when Mariela complained they were not drinking enough, that Antonia threw up, that he himself threw up and fell down when he was walking up the hill, and that he was still drunk at dinner, though less so than at the beach. Omar did not see the beginning of appellant and Antonia's sexual activity and did not hear anything either of them said to each other. At most, Omar could have corroborated appellant's testimony that Antonia did not appear as intoxicated as Antonia and Mariela described. His ability to make that assessment, however, was undermined by his own level of intoxication. The idea that Antonia was less intoxicated than she portrayed was clearly presented by Ramirez-Ruiz, who saw nothing unusual about Antonia's appearance or demeanor when she returned to the shelter—in contrast to her observations of Mariela and Omar. Ramirez-Ruiz also testified that Antonia and appellant returned to the shelter together, apparently happy and on friendly terms. In short, Omar's testimony was not essential because it would not have significantly added to other evidence the court received casting doubt on Antonia's testimony.

IV.

Appellant asked the trial court to exclude evidence of sexual acts between Omar and Mariela as irrelevant and unduly prejudicial. Opposing this request, the prosecution argued that this evidence was relevant to the witnesses' ability to perceive, recollect and describe details about the alleged offenses, as "part and parcel of what was going on with those two witnesses at the time." The court ruled the evidence admissible, explaining, as to Omar, "I don't think there is any way to evaluate his testimony without knowing what he was doing during this whole incident, and that involved whatever sexual relationship he had with Mariela. And I can't possibly allow his testimony without allowing cross-examination with respect to what activity he was engaged in, and his ability to perceive, observe, whatever, at the time." Appellant argues this ruling resulted in a miscarriage of justice because it resulted in Omar being unavailable as a witness due to the prosecutor's treatment of Omar as a suspect in raping Mariela.

“Relevant evidence is defined in Evidence Code section 210 as evidence ‘having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.’ The test of relevance is whether the evidence tends ‘logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive. [Citations.]’ (*People v. Garceau* [(1993)] 6 Cal.4th [140,] 177.) The trial court has broad discretion in determining the relevance of evidence (*ibid.*; *People v. Crittenden* [(1994)] 9 Cal.4th [83,] 132; *People v. Babbitt* [(1988)] 45 Cal.3d [660,] 681), but lacks discretion to admit irrelevant evidence. (*People v. Crittenden, supra*, 9 Cal.4th at p. 132; *People v. Burgener* (1986) 41 Cal.3d 505, 527.)” (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) Evidence Code section 352 gives the court discretion to exclude evidence “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” “A trial court’s exercise of discretion in admitting or excluding evidence is reviewable for abuse (*People v. Alvarez* (1996) 14 Cal. 4th 155, 201) and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice (*People v. Jones* (1998) 17 Cal.4th 279, 304).” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Appellant argues that evidence of Omar and Mariela’s sexual activity was not relevant to the “main issue in dispute”—whether appellant actually and reasonably believed Antonia consented to have sex with him—because it did not establish “any circumstance making the victim’s consent to sexual intercourse less plausible.” (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123-1124 [evidence victim of rape/murder at motel was in area to begin college studies, not vacation or as prostitute, relevant to prove lack of consent to intercourse], citing *People v. Rowland* (1992) 4 Cal.4th 238, 264 [evidence that victim had headache and had to be at work early next morning probative of rape].) Appellant views the evidence of Omar and Mariela’s sexual conduct as a collateral matter that “at most had a slight relevancy to the prosecution case.”

“A collateral matter has been defined as ‘one that has no relevancy to prove or disprove any issue in the action.’ (1 Jefferson, Cal. Evidence Benchbook (3d ed. 1997) §§ 27.105, 27.106, pp. 478-479.) A matter collateral to an issue in the action may nevertheless be relevant to the credibility of a witness who presents evidence on an issue; always relevant for impeachment purposes are the witness’s capacity to observe and the existence or nonexistence of any fact testified to by the witness. (Evid. Code, § 780, subds. (c), (i); *People v. Lang* (1989) 49 Cal.3d 991, 1017.)” (*People v. Rodriguez, supra*, 20 Cal.4th at p. 9.) This was the basis of the trial court’s ruling in the present case.

Contrary to appellant’s view, the relevance of this evidence was more than slight. The credibility and value of Omar’s and Mariela’s testimony depended on the witness’s ability to observe, interpret, remember and report details of Antonia’s and appellant’s conduct. That ability was necessarily affected by what the witness was doing at the time. In the circumstances of this case, the potential distraction of their own sexual interaction had as obvious a bearing on their abilities as witnesses as their degree of intoxication.

Appellant’s argument that the evidence should have been excluded as more prejudicial than probative, as indicated above, is based on the prospect of Omar being prosecuted for raping Mariela and, due to his privilege against self-incrimination, being unavailable as a witness for appellant. As discussed above, Omar’s testimony was not essential to appellant’s defense. The trial court did not abuse its discretion in refusing to exclude evidence of Omar and Mariela’s sexual activity.

V.

Appellant’s next contention is that he was denied the right to present a full defense when the trial court granted the prosecution’s motion to exclude two proposed defense witnesses. Appellant sought to have Dr. Nikolas Lemos, an expert in toxicology, testify about Antonia’s level of and perception of intoxication, alcohol tolerance, and the objective manifestations of intoxication described by the witnesses. Dr. Scott Fraser would have testified about memory in general, reconstructive memories and false memories.

“ ‘[T]he requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates.’ ” (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506, quoting *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371.) “On the other hand, ‘[e]xpert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness.’ ” (*People v. Valdez*, at p. 506, quoting *People v. Torres* (1995) 33 Cal.App.4th 37, 45.) “ ‘As a general rule, a trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused. [Citation.]’ ” (*People v. Valdez*, at p. 506, quoting *People v. Page* (1991) 2 Cal.App.4th 161, 187.)

Characterizing Dr. Lemus’s expected testimony as addressing the question whether Antonia was in an alcoholic blackout at the time of the offenses and therefore did not remember giving her consent, the prosecution argued the proposed testimony was too speculative because there was no evidence of Antonia’s blood alcohol level, the amount she drank, or her genetic susceptibility to blackouts. Defense counsel told the court that appellant was not claiming Antonia had an alcoholic blackout. Rather, Dr. Lemus would testify, based on witnesses’ descriptions of the symptoms displayed, about how level of intoxication can be determined from the symptoms presented; how alcohol tolerance can affect the symptoms displayed by an intoxicated person as well as that person’s ability to perceive; and whether it would have been possible to analyze the urine sample taken from Antonia several days later to determine her level of intoxication at the time of the incident. Stressing the variables subject to speculation—how much alcohol and marijuana was ingested, over what period of time, what if anything was eaten—the prosecutor suggested the expert testimony would not assist the court in interpreting what the witnesses saw or believed. The request to exclude the two defense witnesses was initially taken under submission, then granted when considered after other witnesses had testified. The court stated that it was not sure an expert was needed to

make the point that a person could be drunk and another not notice it, and that evaluation of the situation was “sort of common sense.”⁵

In *People v. Daniels* (2009) 176 Cal.App.4th 304, the defendant was convicted of kidnapping for rape; the victim had been very drunk and had many gaps in her memory of the events. The defense sought to present expert testimony on alcoholic blackouts or alcohol’s effects on memory. (*Id.* at p. 318.) *Daniels* upheld the trial court’s decision to exclude this evidence under Evidence Code section 352 because it had little probative value and would be unduly confusing and time-consuming. (*Id.* at pp. 321-323.) As relevant to the present case, *Daniels* viewed the proposed testimony as having minimal probative value because it was speculative: The defense’s theory of relevance was that the victim *might* have agreed to accompany the defendant in his car but did not remember doing so because she *might* have been experiencing an alcoholic blackout, but there was no evidence either that she in fact was experiencing an alcoholic blackout or that she in fact agreed to accompany the defendant. (*Id.* at p. 321.) On the contrary, the victim’s testimony that she was drifting in and out of consciousness and unable to move or speak was inconsistent with her being in a blackout and she testified that she said or did nothing to indicate agreement to going with the defendant; the defendant did not testify and there was no other evidence regarding the victim’s condition or conduct. (*Ibid.*)

Appellant argues that the present case differs from *Daniels* because he did not seek to present evidence about an alcoholic blackout for which there was no evidentiary support, but rather to present expert testimony on alcohol tolerance, levels of intoxication and impairment due to alcohol. Unlike the situation in *Daniels*, where only the victim

⁵ The court stated, “I think [defense counsel] said that he is going to come in and testify that a person might be drunk and another person might not notice it. I’m not sure you need an expert for that. I think it once again it depends on all kinds of situations, you know, everything from what a person wants to perceive, is able to perceive, what the behaviors are. So I candidly don’t think I need an expert for that. I think it’s sort of common sense, quite candidly.

testified, here there was conflicting evidence as to Antonia's alcohol consumption, behavior and alcohol tolerance.⁶

The trial court here excluded Dr. Lemus's testimony because it viewed the issue Dr. Lemus would be addressing as a matter of "common sense" for which it did not need expert opinion. The purpose of Dr. Lemus's testimony was to support appellant's defense by explaining how Antonia could have consumed a large quantity of alcohol yet remained, or appeared, capable of giving consent. There being no evidence of Antonia's blood alcohol level at the time of the incident, the only basis for Lemus's opinion as to Antonia's level of intoxication was the various witnesses' descriptions of how much she drank and how she behaved. There was no clear evidence of the amount Antonia drank, as the group was drinking directly from the bottle. The descriptions of Antonia's behavior provided by Antonia, Mariela and appellant had to be considered in the context of each one's own level of intoxication; the descriptions provided by Ruiz-Ramirez and Steven had to be evaluated with consideration to the passage of time since Antonia ingested the alcohol and marijuana. There was conflicting evidence about Antonia's drinking history and tolerance for alcohol. In these circumstances, the trial court did not abuse its discretion in concluding that its evaluation of Antonia's level of intoxication would not be assisted by expert testimony that necessarily would have been based on speculation as to myriad underlying factors.

Appellant relies upon *People v. Jackson* (1992) 6 Cal.App.4th 1185 to argue that alcohol tolerance is not a matter of common knowledge or common sense. In that case, after the trial court granted a motion to exclude evidence that the victim and one of the defendants met while in the brig, a defendant sought to refer to the victim's time in the brig as a basis for arguing his alcohol tolerance was low because he had not been

⁶ Appellant cites *People v. Wallace* (2008) 44 Cal.4th 1032, 1046, as a case in which expert testimony on such issues was found admissible. Appellant's citation is to the statement of facts, which summarizes testimony from expert witness on alcohol tolerance and the need to assess alcohol intoxication level based on behavior and not solely on blood-alcohol level. (*Ibid.*) *Wallace* did not address any issue related to the admissibility of this evidence.

drinking for 50 days prior to the incident. (*Id.* at p. 1191.) The defendant did not have an expert witness on alcohol tolerance and the court refused to allow the point to be argued on the basis of common sense. (*Ibid.*) *Jackson* does not support a conclusion that exclusion of expert evidence on alcohol tolerance is necessarily an abuse of discretion. The issue in that case was very specific: how a particular period of not drinking would affect a person's alcohol tolerance. Here, the general subject of the proposed testimony—that alcohol tolerance can affect the level of intoxication a person experiences and exhibits—was one within common knowledge. Any specific opinion Dr. Lemus could have rendered on Antonia's alcohol tolerance and level of intoxication would have been speculative, as discussed above. Appellant's suggestion that speculative expert testimony bears on the weight rather than admissibility of the evidence is immaterial: The question here is not whether the proffered evidence was admissible, but whether the trial court's decision to exclude it was an abuse of discretion.

With respect to the expert testimony on memory, the prosecutor argued Dr. Frazier's testimony would be irrelevant because the case involved fragments of actual memory, with gaps, rather than confabulation. Defense counsel told the court Dr. Frazier would testify about how memory works in general, particularly how it deteriorates over time, to address the fact that Antonia added the details underlying the forcible rape charge in a statement to the prosecutor months after March 6, and there were other details that changed in her testimony over time. The prosecutor disputed this characterization, stating that the facts were included in Antonia's statement to the park police the day after the incident, although the petition was not amended to add the forcible rape count until after the prosecutor confirmed the statement with Antonia. The court granted the motion to exclude, subject to reconsideration after Antonia's testimony, stating that "minor differences are not of concern."

Appellant argues that Antonia's testimony was unreliable and Dr. Fraser's testimony would have corroborated the defense theory by explaining "how Antonia's memory of the events of March 6 was not consistent with the known truth and was influenced by her desire to preserve her relationship with her boyfriend and his

perception of her.” Appellant points to various differences between Antonia’s account and that of other witnesses: Antonia did not remember having vaginal sex with appellant, but appellant admitted that they did; Antonia did not remember inviting appellant to the outing, but appellant and Mariela testified she did; Antonia’s claim that she drank very little in general or that day in particular was contradicted by Mariela’s and Ramirez-Ruiz’s reports that Antonia told them she was an experienced drinker and Antonia’s own testimony that she drank enough on March 6 to go in and out of consciousness; Antonia did not mention that she went with Mariela to buy liquor, suggested what to buy, and directed Mariela to the person from whom Mariela bought marijuana, all points to which Mariela testified; Antonia testified that she lost consciousness, but the other witnesses disputed this and the trial court did not find it to be true; Antonia remembered telling appellant “no,” but he did not hear her say this and said she responded to the sex with pleasure; Antonia testified she was dizzy, in shock and scared when she returned to the shelter, but Ramirez-Ruiz testified that Antonia seemed happy and “like normal.”

As appellant points out, expert testimony on memory is common in eyewitness identification cases. Appellant cites *People v. Campos* (2007) 156 Cal.App.4th 1228, 1235, and *People v. Earle* (2009) 172 Cal.App.4th 372, 405. The former described, in its summary of the evidence in the case, testimony given by an expert on memory and eyewitness identification, “about the fallibility of memory, and how people remember major features of important events and use inferences, which are sometimes inaccurate, to fill in the gaps. When they reconstruct or recall memories, they recall the most recently reconstructed version. The likelihood of memory error increases if a person is given misinformation shortly after the memory-causing incident because, as time passes, the person will mix the misinformation with the memory. Stress and trauma also affect the accuracy of a person’s memory, intensifying the focus on some things, while causing a loss of focus on others.” (*People v. Campos*, at p. 1235.) *People v. Earle* discussed the testimony of an expert on eyewitness identification in a case involving serious questions in that sphere; appellant notes the court’s statement that “[c]ompressed to its essentials, this testimony informed the jurors that reported memories may not only be rendered

inaccurate by deficiencies in the witness's original perception, but may in effect be corrupted by information later encountered and incorporated into memory.” (*People v. Earle*, at p. 405.)

Appellant's argument is based on his assumption that his testimony and that of witnesses who contradicted parts of Antonia's testimony established the “known truth,” while Antonia's account was unreliable. Appellant maintains that Antonia had reason—whether due to intoxication, motivation to protect her relationship with her boyfriend, or otherwise—to misremember the events of March 6. But Mariela's testimony was subject to question in light of her undisputedly high level of intoxication, and appellant was also under the influence at the time of the incident, as well as having an obvious self-interest to protect in his testimony. There was no “known truth” in this case, only a number of accounts that agreed on some points and disagreed on others. The question is whether the trial court abused its discretion in determining it did not need expert testimony on memory to evaluate the evidence.

Appellant urges that because “Antonia's testimony was a key element of the prosecution's case that was not corroborated by the other percipient witnesses,” Dr. Frazier's testimony on factors that could have affected Antonia's memory was improperly excluded. But the force of his argument is undermined by his own assertion that “[i]t seems self-evident that our memories are often not as accurate as we believe they are.” Appellant's quotation from a case on eyewitness testimony is telling: “When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but *are not likely to be fully known to or understood by the jury*, it will ordinarily be error to exclude that testimony.” (*People v. McDonald* (1984) 37 Cal.3d 351, 377, italics added, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) *McDonald* “also emphasized, however, that ‘the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter

within the trial court's discretion' and that such evidence 'will not often be needed.' [Citation.]" (*People v. Sanders* (1995) 11 Cal.4th 475, 508-509, quoting *People v. McDonald*, at p. 377.)

Here, the trial court was obviously aware that Antonia's testimony perception and memory of the events of March 6 could be affected by her intoxication; counsel further argued that she was motivated to describe what happened in a way that would protect her relationship with her boyfriend, that her memory was "selective," and that she did not remember things that were "not consistent with what she wants to believe occurred and most certainly wants us to believe occurred." There was no indication in Antonia's testimony that she constructed facts to fit gaps in her memory; rather, she testified that she remembered certain things, including going in and out of consciousness, and that she had no memory of other things. In the circumstances of this case, appellant suggests nothing Dr. Frazier's testimony could have provided beyond what the trial court could recognize from common knowledge about the unreliability of memory. (See *People v. Clark* (1992) 3 Cal.4th 41, 137 [expert testimony not necessary on questions of how ability to identify a voice diminishes over time and how voices may sound slightly different through different media].)

VI.

Appellant asked the juvenile court to dismiss the petition as violating his constitutional right to equal protection of the law because he was charged with sexual offenses against Antonia while she, an adult, was not charged with any offense. Asserting that the evidence would show he and Antonia had a consensual sexual encounter while he was intoxicated after being given alcohol and marijuana by Antonia and Mariela, appellant argued that Antonia was guilty of statutory rape (§ 261.5), because he was under 18 years of age, as well as rape and sodomy of an intoxicated person (§§ 261, subd. (a)(3), 286, subd. (i)). Section 261.5 defines as "unlawful sexual intercourse" "an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor." According to appellant, he and Antonia were both "eligible to be considered victims" because both were incapable of

giving legal consent. At the outset of the hearing, defense counsel acknowledged that under Antonia's version of the facts there would be no equal protection violation; the prosecutor stated her view that Antonia was the victim and that even considering the conflicting testimony of other witnesses, there was no evidence that Antonia was the perpetrator of any crime. The court declined to find an equal protection violation, but appointed counsel for Antonia in an "abundance of caution."

As described above, several months after the court found true the petition's allegations of forcible sodomy and sodomy of an intoxicated person, in the context of explaining its order prohibiting disclosure of appellant's probation officer's report and victim statements to the Immigration and Customs Enforcement Agency, the court summarized what it found to be the facts of the case. Among these remarks, the court said, "I think if the genders had been reversed, this case wouldn't have even been charged"

"Although referred to for convenience as a 'defense,' a defendant's claim of discriminatory prosecution goes not to the nature of the charged offense, but to a defect of constitutional dimension in the initiation of the prosecution. (*Murgia [v. Municipal Court (1975)]* 15 Cal.3d [286], 293, fn. 4., (*Murgia*)).) The defect lies in the denial of equal protection to persons who are singled out for a prosecution that is 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' (*Oyler v. Boles (1962)* 368 U.S. 448, 456.) When a defendant establishes the elements of discriminatory prosecution, the action must be dismissed even if a serious crime is charged unless the People establish a compelling reason for the selective enforcement. (*McLaughlin v. Florida (1964)* 379 U.S. 184, 193-196; *Murgia, supra*, 15 Cal.3d at p. 304.)

"Unequal treatment which results simply from laxity of enforcement or which reflects a nonarbitrary basis for selective enforcement of a statute does not deny equal protection and is not constitutionally prohibited discriminatory enforcement. (*Wayte v. United States (1985)* 470 U.S. 598, 608-610; *Murgia, supra*, 15 Cal.3d at p. 296.) However, the unlawful administration by state officers of a state statute that is fair on its

face, which results in unequal application to persons who are entitled to be treated alike, denies equal protection if it is the product of intentional or purposeful discrimination. (*Snowden v. Hughes* (1944) 321 U.S. 1, 8.)” (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 831-832.)

“ ‘The elements of the defense of discriminatory enforcement were set forth in *Murgia v. Municipal Court, supra*. To establish the defense, the defendant must prove: (1) “that he has been deliberately singled out for prosecution on the basis of some invidious criterion”; and (2) that “the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.” ’ ’ ” (*Baluyut v. Superior Court, supra*, 12 Cal.4th at p. 832, quoting *People v. Superior Court (Hartway)* (1977) 19 Cal.3d 338, 348.)

Citing *People v. Tobias* (2001) 25 Cal.4th 327, 337, appellant characterizes himself as the victim of a “predatory adult female[.]” *Tobias* rejected the contention that a minor who has a consensual incestuous sexual relationship with an adult is an accomplice to the offense. “[A] child under 18 who has an incestuous sexual relationship with an adult is a *victim*, not a perpetrator, of the incest, and this conclusion remains valid even when the child consents to the sex. In short, the law puts the burden on the adult, not the minor child, to refrain from a sexual relationship.” (*Id.* at p. 329.) The problem for appellant is that he was not charged on the basis of a consensual sexual encounter with Antonia; he was charged because the prosecutor viewed Antonia as the victim of offenses committed without her consent. The court necessarily took the same view: It could not have sustained the allegations of forcible sodomy otherwise. The court’s comments at the hearing several months after the petition was sustained, expressing its view that Antonia got drunk and invited appellant to have sex with her, cannot retroactively alter the findings made at the jurisdictional hearing, at which time it based its finding of forcible sodomy on the evidence that Antonia told appellant “no” and “it hurts” when he engaged in sodomy.

The same point refutes appellant’s argument that the decision to prosecute him but not Antonia reflects impermissible gender stereotypes. Prior to 1993, section 261.5

defined “ ‘unlawful sexual intercourse’ as ‘an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.’” (*Michael M. v. Superior Court* (1979) 25 Cal.3d 608, 610; Stats. 1993, ch. 596, § 1 (SB 22).) *Michael M.* rejected an equal protection challenge to the gender-specific statute, finding the classification based on sex justified by the state’s compelling interest in minimizing the number of teenage pregnancies. (*Michael M.*, at p. 611.) While the majority concluded the Legislature had the power to impose criminal sanctions solely against males because only males “physiologically cause the result which the law properly seeks to avoid” (*id.* at p. 612), Justice Mosk’s dissent rejected the “implied premise of the majority that the female of the human species is weak, inferior, and in need of paternalistic protection from the state.” (*Michael M.*, at p. 615 (dis. opn. of Mosk, J.)) Justice Mosk saw the statute as reflecting an outmoded belief that minor females were less capable of making decisions and less responsible for their actions than males, and therefore in need of special protection, and viewed this perpetuation of sexual stereotypes as violating the central principle of the equal protection clause that each individual, regardless of sex, must be treated as an equal member of society. (*Id.* at pp. 624-625.)

Appellant views the prosecutor’s decision to hold him and not Antonia responsible for their joint conduct as reflecting the impermissible view of women as less capable of giving consent described in Justice Mosk’s dissent. Again, appellant’s argument cannot prevail because he was not prosecuted for engaging in consensual sex, but rather for sexual acts committed against Antonia’s will.

We are not persuaded that the trial court’s post-hearing comment that the case would not have been prosecuted if the genders had been reversed demonstrates an equal protection violation. As we have said, the remarks made several months after the petition was sustained cannot change the findings made at the jurisdictional hearing. In deciding to grant appellant the protection of limiting disclosure to immigration authorities, the court expressed the view that appellant committed a crime of opportunity and was not a significant risk to the community. The gender comment was made as part of what was, in

essence, the court’s minimization of the severity of the conduct because of the circumstances in which it occurred. It did not represent a considered conclusion by the juvenile court.

VII.

Appellant contends he was improperly found to have committed two acts of sodomy—by force, and of an intoxicated person—when the evidence showed only one act of sodomy. He relies upon *People v. Smith* (2010) 191 Cal.App.4th 199, which held that “ ‘only one punishable offense of rape results from a single act of intercourse, though it may be chargeable in separate counts when accomplished under the varying circumstances specified in the subdivisions of section 261 of the Penal Code.’ ” (*People v. Smith*, at p. 205, quoting *People v. Craig* (1941) 17 Cal.2d 453, 458.)

As appellant recognizes, multiple convictions for the same sex offense can result from a continuous sexual encounter where the evidence shows separate penetrations. (*People v. Harrison* (1989) 48 Cal.3d 321, 338; *People v. Brown* (1994) 28 Cal.App.4th 591, 601; *People v. Marks* (1986) 184 Cal.App.3d 458, 464-467.) *People v. Harrison*, at pages 324-325, upheld separate convictions on three counts of sexual penetration (§ 289) where the defendant inserted his finger into the victim’s vagina, the finger was dislodged by the victim’s struggles and reinserted, then again dislodged and reinserted. As is the case with rape and sodomy, the offense defined in section 289 “is committed simply by causing a proscribed ‘penetration, however slight.’ ” (*People v. Harrison*, at p. 328; § 289, subd. (k)(1).) “As with rape and sodomy, a violation of section 289 is ‘complete’ the instant ‘slight’ ‘penetration’ of the proscribed nature occurs. [¶] It follows logically that a *new and separate* violation of section 289 is ‘completed’ each time a *new and separate* ‘penetration, however slight’ occurs.” (*People v. Harrison*, at p. 329; *People v. Marks*, at pp. 464-467 [two separate anal penetrations where defendant inserted penis into victim’s anus, withdrew, forced her across the room, repositioned her and repenetrated].)

Antonia testified that after several sequences of passing out and waking, she awoke to find her legs pushed up toward her shoulders, her pants on her knees and appellant in front of her. Appellant penetrated her rectally and she said “no” and that “it

hurt.” Appellant mumbled something about a condom and, as she was fading out of consciousness again, she remembered him “re-penetrating.”

Based on this testimony, respondent maintains there was evidence of two separate penetrations to support the two sodomy findings. Appellant resists this conclusion by arguing that there was no evidence his penis left Antonia’s anus between the penetrations. Antonia did not testify that appellant’s penis came out of her anus and was re-inserted; her use of the term “re-penetrating” could as easily have meant that appellant’s penis moved within her anus so that she felt it move some distance out, then in again. This second interpretation is particularly plausible as Antonia was responding to the question, “Do you recall whether he stopped or he continued to engage in the penetration?”⁷

Two sexual acts can support separate convictions even if committed within a short time of each other (*People v. Marks, supra*, 184 Cal.App.3d at p. 466), and no minimum amount of time is required to separate them (*People v. Harrison, supra*, 48 Cal.3d at p. 330). But respondent offers no authority, and we are aware of none, that multiple convictions can be based on “penetrations” that are not separated by any exit from the victim’s body. To support a separate conviction, each penetration must be “separate and distinct.” (*People v. Marks*, at p. 466.) We see no way to give meaning to this requirement other than to conclude that a “separate and distinct” penetration can occur only after a different penetration has concluded. Otherwise, a defendant could be convicted of as many counts as the number of thrusts involved in a rape, sodomy or other sexual offense based on penetration.

⁷ Dictionary definitions of “penetrate” support an interpretation of the word as meaning an entry “into” rather than just a “going deeper.” Webster’s defines “penetration” as “*a* : to pass into or through *b* : to enter by overcoming resistance *c* : to gain entrance to.” The Oxford English Dictionary definition is: “*a. trans.* To get into or through, gain entrance or access to, esp. with force, effort, or difficulty; to pierce.” But we cannot assume Antonia was aware of the legal ramifications of the word penetrate—or “re-penetrate”—so as to view her testimony as proving appellant’s penis left her vagina between penetrations, rather than simply moving in and out while still within her body, in the absence of any evidence supporting this interpretation.

Here, Antonia’s response was sufficiently ambiguous that the trial court could not have concluded, beyond a reasonable doubt, that appellant engaged in two *separate* acts of sodomy.⁸ The evidence supported finding appellant engaged in forcible sodomy or in sodomy of an intoxicated person, but it did not support finding two separate offenses.

The judgment shall be modified to strike the true finding on the second sodomy count. As so modified, the judgment is affirmed.⁹

Kline, P.J.

We concur:

Lambden, J.

Richman, J.

⁸ In theory, perhaps, appellant might be viewed as having committed two acts of sodomy in that Antonia testified she awoke to find him sodomizing her (i.e., he had penetrated her without her being conscious of it); when she objected, his continuation constituted an act of forcible sodomy. The analogy would be to a victim who engages in consensual sex, then withdraws consent during the act. In this situation, consensual intercourse becomes rape when the victim withdraws consent. (*In re John Z.* (2003) 29 Cal.4th 756, 758.) The withdrawal of consent scenario results in only a single conviction, however, corresponding to the initial penetration with the withdrawal of consent nullifying the initial consent; it does not support finding multiple acts. And, as a factual matter, the juvenile court here did not sustain the allegation of sodomy of an unconscious person, indicating a rejection of the testimony that Antonia was unconscious at the time of the initial penetration.

⁹ Appellant additionally contends reversal is required due to the combination of the many errors he complains of. Having rejected all of appellant’s claims save the one last discussed, we find no additional relief warranted.