

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JON SCHENBERGER,

Defendant and Appellant.

C069146

(Super. Ct. No. 10F02298)

Defendant Jon Schenberger appeals following his conviction on multiple counts of sex offenses against a child, including lewd and lascivious acts committed by means of duress on the victim (Pen. Code, § 288, subd. (b)(1)¹). Defendant was sentenced to 195 years four months in prison.

Defendant contends: (1) the trial court erroneously limited his cross-examination of his wife concerning part of e-mails he sent to her before his arrest after she testified on

¹ Undesignated statutory references are to the Penal Code in effect at the time of the charged offenses.

direct examination about another part of the same e-mails; (2) the sequence of jury instructions conferred special deference to the victim's credibility by sequencing the instruction that a sexual assault conviction may be based on the victim's testimony alone after the witness credibility instruction that explains a fact can be proved by the testimony of a single witness; and (3) the trial court violated due process by instructing the jury that victim consent does not negate duress, pursuant to *People v. Soto* (2011) 51 Cal.4th 229 (*Soto*), which postdated defendant's commission of the crimes and which he asserts was an unforeseeable expansion of criminal liability.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Charges

In 2010, defendant was charged with 40 counts of molesting victim C., his biological daughter.

Count one: Lewd and lascivious act on a child under age 14, to wit 9 or 10, between December 19, 2000, and December 18, 2002 (defendant's finger on victim's vagina while applying cream; § 288, subd. (a));

Counts two through seven, nine through sixteen, eighteen through twenty-three, twenty-five through thirty-two, thirty-four through thirty-seven: 32 counts of lewd and lascivious acts upon a child under age 14, to wit 11, committed by duress, between August 7, 2003, and December 18, 2007 (hand on vagina or finger in vagina; § 288, subd. (b)(1));

Counts eight, seventeen, twenty-four, thirty-three: Four counts of aggravated sexual assault upon a child under age 14, one count occurring in each of August, September, October, and November of 2003 (penetration of anal opening; § 269, subd. (a)(5)); and

Counts thirty-eight through forty: Three counts of lewd and lascivious acts on a child between the ages of 14 and 15 between December 19, 2005, and December 18,

2007 (defendant's mouth on victim's breast, mouth on vagina, and finger in vagina; § 288, subd. (c)(1)).

The Prosecution's Case

Defendant and his wife D. had two daughters, C. and A.

When C. was about 12 years old, she had a recurrence of a medical condition that called for the application of medicinal cream to her vaginal area. Defendant applied the cream on three occasions in order, he said, to show her how to do it. On the third occasion, he placed her on the counter and showed her in a mirror how he was applying the cream. She felt awkward but did not say so. After that, she told him she could do it herself, and he stopped doing it. When he asked her if he could, she said no.

A few weeks later, defendant's family moved in with D.'s mother and the mother's husband. Defendant's wife shared a bedroom with A., while defendant shared the other bedroom with C. According to D., defendant suggested this arrangement after she hurt her back; he said it would be better if she had more space since the beds were really small.

C. testified that one night, when she was in the bedroom with defendant, he said he wanted to show her something. He started giving her a massage, during which he touched her vagina and inserted his finger in her vagina. He told her this was what an orgasm feels like. He told her not to tell her mother. C. was confused and did not understand what was happening. Defendant repeated this act almost every night for the four months the family stayed at that house. On each incident, defendant started by stroking C.'s body, then massaged her vagina, then inserted his finger in her vagina about three times. He fondled her all night. About a quarter of the time, he inserted his finger in her anal opening. During these actions and afterwards, he asked her if it felt good and if she was "getting there." He said he wanted to teach her what sex felt like.

C. testified defendant never asked her permission. She never told him it made her uncomfortable. She wanted to please him and was not going to stand in his way if this

was what he wanted. She never told her mother, because he said not to, and she did not want to displease him. She tried to avoid it by going to bed early or pretending to be asleep, but that did not work. She sometimes lay on her stomach to deny him access, but he rolled her over, even when she tried to resist being rolled over.

After defendant's family moved into their own home, C. had her own bedroom, but defendant's touching continued. Defendant tucked her in at night, and on occasion he massaged her, then her vagina, then inserted his finger in her vagina or sometimes in her anus. On about 10 occasions, when she had nightmares, she went to sleep in her parents' bed. She always got into the bed on her father's side. He pulled her close and massaged her vagina. Her mother was there but seemed to be asleep.

In one incident when C. was 15 years old, defendant came into her bedroom, stroked her all over her body, kissed and sucked her breasts, and kissed her vagina. During a walk the next day, defendant told C. he felt bad for using his mouth and was sorry. She told him it was okay. But the incident made C. feel very insecure and disconnected from her father. Their relationship had changed and had become very sexual, making her think it was even more wrong.

C. testified defendant also molested her when he took her out-of-town overnight for her to compete in soccer tournaments. He massaged her, stroked her, massage her vagina, and put his finger in her vagina. On one occasion, he gave her sushi and two alcoholic drinks in the hotel room, had her take a bubble bath, laid her on towels on the bed, rubbed her down with oil, kissed and licked her everywhere, and massaged and touched her vagina. She thought he was going to put his penis in her vagina, but he never did. At times, he got on his knees and moved his hand around his penis.

The jury also heard C.'s testimony about subsequent, uncharged sexual conduct by defendant after the family moved to Oregon. In the last uncharged act, he touched her vagina in South Lake Tahoe on New Year's Eve 2009, when he had been drinking.

In 2009, C. and a friend confided in each other about their sexual experiences. C. disclosed her father's conduct, which shocked the friend. C. testified she did not think her relations with her father seemed wrong and assumed they occurred in every household. The friend threatened never to speak to C. again unless C. told her mother.

Later, while riding in a car with her mother in May 2009, C. made a partial disclosure of only one incident. She told her mother, " 'Dad gave me an orgasm.' " Her mother said that was really wrong, and she was going to talk to him. C. testified she disclosed only one incident because she felt one incident was forgivable, and she did not want her family to split up, and her mother did not ask her any questions, so C. thought she was "off the hook" by having done what her friend wanted her to do. Her father never told her that this could break up the family, but she was concerned about it and felt that "family being together is the most important thing."

D. testified that her daughter had said she had been curious and asked her father what an orgasm felt like, and he gave her one through her underwear at the last soccer tournament. D. said C. was scared about how defendant would react when he found out D. knew, because C. was very agitated and kept asking D. what she was going to do.

D. testified she told defendant that night what C. had disclosed. Defendant feigned ignorance, then said he was really, really sorry, it was a mistake, and he did not know why he did it. He said it would never happen again. D. asked no questions. D. decided her daughter must have become curious about sex, and her husband made a bad judgment. D. said she did not want to talk about it anymore, which was fine with defendant.

In January 2010, while the family was living in Oregon, C. attended a church youth group where the pastor encouraged them not to hide anything from the people they loved. C. disclosed her father's sexual offenses to a friend. The friend had her mother talk to C. and encouraged her to see a doctor. The following week, C. went to her doctor and, with the doctor's encouragement, called Child Protective Services. A social worker

and police detectives in Oregon interviewed C. With their help, she made a pretext phone call to defendant on January 29, 2010.

The recorded pretext call, played for the jury, included the following excerpts:

“[C.]: Okay. So, I was in the counseling office and, um, okay, I’m just going to be honest with you, remember when you gave me an orgasm?”

“[Defendant]: Yeah.

“[C.]: In 5th grade?”

Defendant asked why she was talking about this now and calling from a blocked phone number. She said her cell phone was off, and she was using a friend’s phone. He said, “[T]his is very dangerous but I thought we talked about this.” C. said she told a friend, who was really upset. Defendant said he thought C. and her mother had talked about it. C. said no, she told her mother, but her mother did not tell her anything.

“[Defendant]: Oh, I’m sorry. I thought it was all resolved.

“[C.]: Okay, what did you guys talk about? Like what’d you tell her?”

“[Defendant]: Um, well we talked and we decided it was -- it was bad judgment.

“[C.]: Bad judgment?”

“[Defendant]: Right.

“[C.]: But --

“[Defendant]: And that --

“[C.]: I was in the 5th grade, dad. I was nine years old.

“[Defendant]: I know! I don’t think it was that long ago, but I know, it was bad.

It was wrong.

“[C.]: Okay. Then why then at New Years you try to do it again?”

“[Defendant]: I didn’t try again New Years, I’m sorry. That was (unintelligible) that did not -- I will never put you in a position again, okay?”

“[C.]: I don’t trust you.

“[Defendant]: Oh [C.], please!

“[C]: You --

“[Defendant]: I’ve apolo -- Um, what can I -- what can I do to --

“(Simultaneous talking)

“[C]: -- this was my vagina.

“[Defendant]: I’m sorry.

“[C.]: Like I was in 5th grade. Maybe if I was a little older -- that is not right.

“[Defendant]: I know it’s not.

“[C.]: Okay. And you did it during my Soccer tournament. Like you did it almost every single Soccer tournament.

“[Defendant]: Can I come talk to you; can I come talk to you and explain this to you?”

C. insisted on continuing the phone conversation. Defendant asked if anyone was recording the call, “[b]ecause I -- I’m going to jail.” She told him the call was not being recorded. He sighed and said, “I screwed up,” and “I screwed up big time.” She asked him why he did it. He replied, “I thought I was helping you understand.” She asked, “Helping me understand what?” He replied, “Your, yourself, your sexuality.”

He denied that anything happened on New Year’s Eve. She insisted it did. He said he was sorry she “misunderstood New Years” and swore he would never do it again. She berated him and he apologized.

“[C.]: Yeah, okay. Rubbing me down with oil and like licking me, and --

“[Defendant]: I thought -- I screwed up.

“[C.]: What’d you tell mom? Did you just tell her it happened once?

“[Defendant]: I didn’t tell her anything. She -- she -- all I know is what you told her. She did not want me to talk about it.

“[C.]: Why didn’t she want you to talk about it?

“[Defendant]: Cause she was very upset and told me as long as I promised to never do it again, that she wouldn’t kick me out of the house, and wouldn’t send me to jail.

“[C.]: And she was okay with that?

“[Defendant]: No, she’s not okay with it.

“[C.]: I’m still really upset, and I still don’t believe you. Why did you -- why did you try in the first place?

“[Defendant]: Because guys are stupid, that’s why.

“[C.]: Guys are stupid, that’s all you can come up with?

“[Defendant]: What do you want me to say, [C.]? It -- it was very, stupid, dumb thing for me to do.

“[C.]: Ugh!

“[Defendant]: [C.], look, we can talk about the past, but I need to talk about the future right now, kay? Tellin somebody else is just like completely doubled the chances of me going to jail. Maybe I should. Maybe that would be the best thing. I mean, I’d just write my life off for the rest of my life and it’d be done with. But, that’s gonna happen if you keep tellin people. As a matter of fact it’s probably gonna happen now anyway. Because your friend’s gonna tell her mom and her mom is gonna tell somebody, and I’m toast. So I’m gonna pack --

“[C.]: You just get what you deserve.

“[Defendant]: You’re right, I do. But mom --

“[C.]: Because it was like end of 5th grade, then went from 6th grade, 7th grade, 8th grade, like through high school. Ugh, you look like --

“[Defendant]: I -- I’m sorry, kiddo.

“[C.]: -- sucking my boobs, um, rubbing me down, like that’s just so wrong. I did not know it was wrong. (Sighs) I thought this was right.

“[Defendant]: Sorry kiddo.

“[C.]: I thought like my friends were going through the same thing I was.

“[Defendant]: No! We talked about that. I told you I was wrong a long time ago.

“[C.]: No you did not.

“[Defendant]: I told you -- I told ya I was wrong a long time ago.

“[C.]: When? When did you tell me?

“[Defendant]: When we were walkin down the, um, horse pasture, with the Alpacas, long -- you know I need to -- I need to stop doing this.

“(Simultaneous talking)

“[C.]: -- me because that was the first time you did it.

“[Defendant]: Yes. Yeah, exactly. When I said I should not do that anymore.

“[C.]: And you did.

“[Defendant]: (Sighs) I made a mistake. I am wrong.”

Defendant kept apologizing and said, “I wished we would have talked about it sooner cause I know it’s been bothering you, and I -- but I wish we could talk about it in person.” He said, “It’s all my fault. If you -- if you want me to go to jail, I will go to jail.” Defendant said, “I loved you too much and I went too far with you.”

“[C.]: I’m still not getting why. Like you’re not explaining it to me. Like oh, I was confused, I was lost, I did it because I was -- that -- that’s not anything to me.

“[Defendant]: I -- I confused my love of you, with sexuality and that’s wrong.

“[C.]: You did it almost every month in California. Ever since I was like 10 years old.

“[Defendant]: It -- I remember starting, and I apologized and that didn’t happen that often. And you’re right and I was wrong. (Sigh) I shouldn’t have done it. I don’t know what to say.”

Defendant asked C. to promise she would not tell anyone else, but she refused. Defendant said, “Just think about your mother before you make another comment, please. I’m thinking of your mother right now.”

After learning the police had recorded the phone call, defendant agreed to a voluntary interview with police in Oregon, with his wife present. In the recorded interview, which was played for the jury, defendant said that during the months they lived with his mother-in-law, he petted C.'s bare vagina with his hand, once or twice in the house and at least twice at soccer tournaments, which took place once every few months. After they moved into their own home, he touched her vagina with his hand two or three times. He said he had oral sex with her once when she was 16 and once when she was 17. Defendant said, "I was not doing anything for myself. This was all educational for her, in my mind, as deluded as it may be." He said his actions were for her sexual pleasure, not his.

The detective told defendant he had to move out of the house. He collected his belongings and left, later moving back to California. He was arrested in Fremont on May 5, 2010. While being handcuffed for transport, defendant asked why they arrested him rather than asking him to turn himself in. The arresting officer said they could not take the chance he might run. Defendant replied, "[I]t wouldn't do any good to run, I checked."

Defendant's wife testified that, after defendant moved out of the home, he sent her approximately four e-mails in April 2010, asking her to send him his passport. She planned to do so but never did, because her divorce attorney told her it might not be a good idea.

The Defense Case

Defendant did not testify.

Defendant's sister, L.P., testified she considered defendant an honest man; she never noticed any problems between C. and defendant; and she had no qualms about letting her own 16-year-old daughter spend time with defendant and his family.

Defendant's former co-worker, Thomas Nicholas, testified he never noticed any discomfort by C. when he spent time with defendant's family. Nicholas said he had a positive opinion about defendant and believed defendant to be honest.

Daniel Mattsson-Boze, who was defendant's employer at the time of the arrest, testified defendant's work was professional and, around the time of defendant's arrest, they planned to send him on a business trip to Korea. They had been talking about it for a couple of months but had not finalized the date.

The Verdicts and Sentencing

The jury returned verdicts finding defendant guilty on all 32 counts of lewd and lascivious acts committed by duress (§ 288, subd. (b)(1)), and guilty on all three counts of lewd and lascivious acts on a child between ages 14 and 15 (§ 288, subd. (c)(1)). The jury acquitted defendant on all four counts of aggravated sexual assault (§ 269, subd. (a)(5); all related to the alleged anal penetration) but found him guilty on the lesser-included offenses of misdemeanor battery (§ 242). The jury was unable to reach a verdict on the sole count of lewd and lascivious act without force or duress (count one), and that count was dismissed in the interests of justice.

The trial court sentenced defendant to a total aggregate term of 195 years four months in prison.

DISCUSSION

I. Preclusion of Cross-examination – Evidence Code section 356

A. Defendant's Contention

Defendant argues the trial court erred in preventing him from eliciting on cross-examination of his wife, that when he asked his wife for his passport in e-mail communications he told her he needed it for a business trip. Defendant contends the trial

court erred in rejecting his argument that the evidence was admissible under Evidence Code section 356.² We conclude the trial court erred, but the error was harmless.

B. Background

Defendant's wife testified on direct examination that, after defendant moved away from the family and before his arrest, he communicated with her several times by phone, text messages, e-mail, and in person. In his first e-mail and in a few subsequent e-mails, he asked her for his passport. After consulting her divorce attorney, she declined to give it to him.

On cross-examination, defense counsel asked, "Did [defendant] explain to you that he needed the passport for work?" The trial court sustained the prosecutor's hearsay objection. The court also sustained hearsay objections to defense counsel's questions asking whether defendant gave an explanation for wanting his passport. In a sidebar conference, which was later placed on the record, defense counsel argued that he was asking for the context of defendant's communication and that the evidence was admissible under the rule of completeness (Evid. Code, § 356) to explain defendant's request for the passport. The trial court explained its ruling, acknowledging that it had not researched the matter. "I don't think that Evidence Code Section 356, to wit, the rule of completeness, is an exception to the hearsay rule. Because if it were, it would seem that the exception would consume the rule. And under a theory of completeness, allow virtually the entire content of every conversation to come in, notwithstanding the hearsay rule."

² Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

C. Analysis

We review the trial court's evidentiary ruling under the abuse of discretion standard. (*People v. Parrish* (2007) 152 Cal.App.4th 263, 274.) "[W]hen a trial court's decision rests on an error of law, that decision is an abuse of discretion." (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 746.)

The trial court was incorrect in its view that hearsay is a valid objection to admission of the evidence defendant sought to introduce here. Evidence Code section 356 contains California's rule of completeness. It is well-settled that "[i]n the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence and are not excluded by a rule of law *other than the hearsay rule.*" (*People v. Williams* (1975) 13 Cal.3d 559, 565.) The purpose of the statute is to prevent the use of selected aspects of an act, declaration, conversation, or writing, so as to create a misleading impression on the subject addressed. (*People v. Clark* (2016) 63 Cal.4th 522, 528-529; *People v. Arias* (1996) 13 Cal.4th 92, 156.) In other words, "[t]he rule of completeness exists to prevent such a misuse of evidence." (*People v. Vines* (2011) 51 Cal.4th 830, 861.) Our high court has "taken a broad approach to the admissibility of the remainder of a conversation under Evidence Code section 356." (*Clark*, at p. 600.) The remainder of the conversation need only have "some bearing upon, or connection with, the admission or declaration in evidence." (*Clark*, at p. 600, quoting *People v. Harris* (2005) 37 Cal.4th 310, 334-335.) Even self-serving hearsay is admissible in order to avoid the misleading impression. (*Arias*, at p. 156.) "[T]he jury is entitled to know the context in which the statements on direct examination were made." (*Harris*, at p. 335.)

The wife's testimony that defendant wanted his passport, together with the arresting officer's testimony that defendant said he checked on the possibility of avoiding arrest, created the impression that defendant intended to flee the country, which was relevant to consciousness of guilt. The prosecutor in closing argument urged the jury to adopt that impression and apply the jury instruction on flight as evidence of consciousness of guilt.

Nevertheless, the error in this case was harmless. Error in ruling on the admissibility of evidence under Evidence Code section 356 does not call for reversal of a judgment unless defendant can show it is reasonably probable a more favorable result would have been obtained absent the error. (*People v. Riccardi* (2012) 54 Cal.4th 758, 803-804 [applying *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) in the context of allowing the prosecution to introduce more of a conversation than should have been admitted under Evid. Code, § 356], disapproved on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) “[T]he *Watson* test for harmless error ‘focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.’ ” (*People v. Beltran* (2013) 56 Cal.4th 935, 956.)

Here there was no prejudice because the evidence against defendant, including C.'s testimony and defendant's own admissions during the pretext call, to his wife and to the police in front of his wife, was overwhelming.

Moreover, the jury heard evidence that served to explain why defendant needed his passport. His employer testified that he was planning to send defendant on a business trip to Korea. Defendant argues the employer's testimony was not good enough. According to defendant, “there was still a missing link in the evidence,” because

defendant's own statement that he needed the passport for work was precluded and the employer's testimony was "in its function, only corroborative, but it had nothing to corroborate." In our view, the employer's testimony was sufficient in and of itself, did not need corroboration, and came from a better source than defendant's own self-serving comment to his wife.

Defendant also argues, without any supporting evidence whatsoever, that he may have been joking when he told the police he had checked about avoiding arrest, "an off-key jest under stressful circumstances." Defendant views his comment about avoiding arrest as weak evidence of flight, because he could have fled without a passport but did not do so. While it is true defendant could have fled to some other part of the country without his passport, this does not detract from the fact that he admitted he had checked on the viability of fleeing. And if he thought about fleeing and went so far as to check on whether he could successfully elude the law, that is evidence of his consciousness of guilt. Moreover, even if the jury disregarded the employer's testimony about the business trip or did not connect that testimony to defendant's request for the passport, it is not reasonably probable that the jurors would have reached a different result had they heard that defendant told his wife he needed the passport for a business trip. As we have noted, evidence of defendant's guilt was overwhelming, including his own admissions in the pretext phone call and in the police interview.

We conclude defendant was not prejudiced by the trial court's erroneous ruling on Evidence Code section 356.

Defendant argues the cumulative effect of this error with other errors produced prejudice. However, there were no other errors, as we next discuss.

II. Sequence of Sexual Assault Victim Testimony and Single Witness Jury Instructions

A. Defendant's Contention

Defendant contends the trial court's placement of CALCRIM No. 1190 (sexual assault victim's testimony needs no corroboration) among the credibility instructions, and immediately after CALCRIM No. 301 (testimony of only one witness can prove a fact) created a substantial likelihood that the jury would misinterpret CALCRIM No. 1190 as a credibility instruction requiring the jury to give special deference to the victim's credibility. We disagree.

B. Background

The trial court instructed the jury on evaluating witness testimony, union of act and intent, and that neither side is required to call all witnesses.

The trial court then instructed the jury with CALCRIM No. 301 that "[t]he testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

Immediately thereafter, the court instructed with CALCRIM No. 1190, that "[c]onviction of a sexual assault crime may be based on the testimony of a complaining witness alone."

The court then instructed the jury on evaluating conflicting evidence.

C. Analysis

Defendant acknowledges he did not complain in the trial court about the sequencing of the instructions. He merely objected to the giving of CALCRIM No. 1190 at all, on the ground it was duplicative. The trial court ruled it was not duplicative, and on appeal defendant acknowledges the trial court was correct on this point. (*People v. Gammage* (1992) 2 Cal.4th 693 (*Gammage*) [CALJIC versions of the instructions were not duplicative].)

Defendant’s argument on appeal is that the sequencing of the instructions created an ambiguity. An argument that a correct instruction created an ambiguity is forfeited if not raised in the trial court. (*People v. Mejia* (2012) 211 Cal.App.4th 586, 636.) Accordingly, we conclude that the argument was forfeited.³ However, to forestall a claim of ineffective assistance of counsel, we will address the argument on the merits.

Generally, the order in which jury instructions are given is immaterial and is left to the sound discretion of the trial court, and that discretion is not deemed abused absent a strong showing of prejudice. (*People v. Visciotti* (1992) 2 Cal.4th 1, 61; *People v. Carrasco* (1981) 118 Cal.App.3d 936, 942.) However, instructional error may be found if the jury instructions create an ambiguity whereby an otherwise-correct instruction is substantially likely to be misunderstood and misapplied by the jurors. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [116 L.Ed.2d 385, 399]; *People v. Clair* (1992) 2 Cal.4th 629, 663.)

Defendant relies on *Gammage*, in which the court said, “Although the two instructions overlap to some extent, each has a different focus. CALJIC No. 2.27 [single witness suffices] focuses on how the jury should evaluate a fact . . . proved solely by the testimony of a single witness. It is given with other instructions advising the jury how to engage in the *fact-finding* process. CALJIC No. 10.60 [sexual assault victim], on the other hand, declares a substantive rule of law, that the testimony of the complaining

³ We reject defendant’s request for review under section 1259. That section provides in pertinent part: “The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.” That provision authorizes the review of instructions, but does not expressly authorize review of the order in which proper instructions are delivered to the jury when there is no objection in the trial court. We think the reason for this is self-evident. The order in which otherwise proper instructions are given does not implicate a substantial right.

witness need not be corroborated. It is given with other instructions on the legal elements of the charged crimes.” (*Gammage, supra*, 2 Cal.4th at pp. 700-701.)

Defendant argues that *Gammage* stands for the proposition that failure to separate the instructions is error, and that giving CALCRIM No. 1190 with credibility instructions contravenes the rule that it is improper for the court to single out a particular witness and instruct the jury how that witness’s evidence should be considered. (*People v. Wright* (1988) 45 Cal.3d 1126, 1135, fn. 6.) Defendant argues the sequencing of the instructions created an ambiguity whereby an otherwise correct instruction was substantially likely to be misunderstood as requiring special deference to C.’s testimony, thereby constituting instructional error.

However, *Gammage* did not address the issue defendant raises here, nor did it hold that the sequencing was critical. Cases are not authority for propositions not therein considered. (*People v. Barragan* (2004) 32 Cal.4th 236, 243.)

Instead, *Gammage* rejected the defendant’s argument “that, in combination, the instructions create a preferential credibility standard for the complaining witness, or somehow suggest that that witness is entitled to a special deference. The one instruction merely suggests careful review when a fact depends on the testimony of one witness. The other tells the jury there is no legal corroboration requirement. Neither eviscerates or modifies the other. . . . The instructions in combination are no less correct, and no less fair to both sides, than either is individually.” (*Gammage, supra*, 2 Cal.4th at p. 701.)

Moreover, modern courts provide written copies of the jury instructions to the jury, as the trial court did here. (§ 1093, subd. (f) [the court may, at its discretion, provide the jury with a copy of the written instructions given]; § 1137 [jury may take copies of the jury instructions into deliberations].) During deliberations, the jury is free to disassemble the instruction packet and sequence the instructions in any order they desire. Given the jury’s ability to consider the instructions in any order they deem

appropriate to their deliberations, the order in which the trial court reads the instructions to the jury takes on far less significance than defendant espouses here.

We conclude there was no instructional error. But even assuming error, there was no prejudice warranting reversal.

Defendant argues this was constitutional error requiring reversal unless lack of prejudice is shown beyond a reasonable doubt, because the error somehow deprived him of a meaningful opportunity to present his partial defense that he committed many fewer acts than claimed by C. (*Crane v. Kentucky* (1986) 476 U.S. 683, 689-690 [90 L.Ed.2d 636, 644-645] [constitutional right to present a defense]; *Chapman v. California* (1967) 386 U.S. 22-23 [17 L.Ed.2d 705, 709-710].) Defendant argues the placement of CALCRIM No. 1190 “so obscured the playing field, as it were, that [defendant] was effectively denied this meaningful opportunity.” We disagree. The placement of the instruction did not interfere with defendant’s opportunity to present a defense.

We apply the *Watson* standard of prejudice, asking whether defendant has established it is reasonably probable that he would have obtained a more favorable outcome had the trial court separated the two instructions,⁴ but even if we were to apply *Chapman*, we would still conclude that any error was harmless.

As we have noted, the prosecution’s case was strong and included defendant’s own very damaging statements. The victim testified in detail about the molestations, and her testimony was corroborated by defendant’s numerous admissions during the pretext

⁴ To establish a claim of ineffective assistance of counsel, a defendant must show prejudice. Prejudice in that context is the same standard applied in *Watson*. To establish prejudice, “[i]t is not enough ‘to show that the errors had some conceivable effect on the outcome of the proceeding.’ ” (*Harrington v. Richter* (2011) 562 U.S. 86, 104 [178 L.Ed.2d 624, 642].) To show prejudice, a defendant must show a reasonable probability that he would have received a more favorable result had counsel’s performance not been deficient. (*Strickland v. Washington* (1984) 466 U.S. 668, 691-694 [80 L.Ed.2d 674, 696-698]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.)

call and in his interview with the police. That he admitted to fewer molestations than those alleged does not weaken the prosecution's case. We think it obvious he would try to minimize his bad behavior, especially when he discussed that behavior with the police in the presence of his wife.

Defendant admits the prosecution case was strong, but he argues it was not strong enough for 40 counts. He fails to prove his point. Defendant notes his defense was that he molested his daughter only six times, whereas she claimed it was 40 times. He says he thus partially corroborated her testimony, which, combined with the "*illegitimate* boost to her credibility from the misapplication of CALCRIM No. 1190 rendered it unduly difficult for [defendant]'s credibility to be assessed accurately, and – need it be said? – the difference between a conviction on 40 serious felony counts and 6 is substantial."

However, it seems clear the jury did not defer to the victim's testimony, because the jury acquitted defendant on four counts of aggravated sexual assault for the alleged anal penetrations. Defendant claims the acquittals were due to the fact that the victim's account of anal penetrations was unreliable. But that is exactly the point; the jury did not defer to the victim.

Defendant argues the victim's testimony was suspect because, by her trial account, there would have been hundreds of molestations at home, yet she stated in earlier interviews that the molestations occurred mainly during overnight soccer tournaments. Defendant argues the victim had a motive to exaggerate the number of molestations because she wanted to see defendant punished and, despite her trial testimony that she did not want to hurt him, she told an interviewer that she did want to hurt him and wanted him to feel bad for what he did to her. However, defendant was not charged with hundreds of counts of molestation, only 40.

Defendant says there were "problems" with the victim's testimony about getting into bed with her father and mother, in that the mother had no memory of it. However,

the victim testified her mother appeared to be sleeping. We perceive no problem with the testimony.

Defendant asserts the evidence showed restraint on his part, in that he did not threaten violent injury or apply rough coercion; he never inserted his penis in her; and even the victim admitted the molestations tapered off over time. He notes he apologized. Insofar as defendant suggests that any of this weakened the prosecution's case, we simply do not see it that way. Also, that some people in defendant's circle considered him honest did nothing to undercut the strength of the prosecution's case.

Defendant argues the sequencing of CALCRIM No. 1190 was a "significant thumb on the scale for the prosecution." We reach the only reasonable conclusion: it was not.

Any instructional error in sequencing of CALCRIM No. 301 and CALCRIM No. 1190 was harmless.

III. Instruction About Consent and Duress

For the 32 counts of lewd and lascivious acts by force, violence, duress, menace or fear (§ 288, subd. (b)(1)), the prosecution's theory was limited to duress. As set forth in CALCRIM No. 1111, the trial court instructed, "Duress means the use of a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to cause a reasonable person to do or submit to something that he or she would not otherwise do or submit to. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child and her relationship to the defendant. [¶] *It is not a defense that the child may have consented to the act.*" (Italics added.)

The last sentence was in accordance with *Soto*, which was published after defendant committed his offenses but before his trial. The *Soto* court, settling a conflict between court of appeal decisions, held that consent does not negate duress in section 288, subdivision (b)(1), offenses. (*Soto, supra*, 51 Cal.4th at pp. 241-248.)

Defendant argues *Soto*'s holding was an unforeseeable expansion of criminal liability, and its application to offenses committed before the 2011 publication of *Soto* constitutes a violation of due process. We disagree.

Judicial opinions have retroactive effect on pending cases. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 409-410; *People v. Guerra* (1984) 37 Cal.3d 385, 399.) An exception exists where due process would be offended by retroactive application of a judicial opinion that is an “unforeseeable judicial enlargement of a criminal statute.” (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 353-354 [12 L.Ed.2d 894, 899-900]; *People v. Crew* (2003) 31 Cal.4th 822, 853.) For example, in *Bouie*, a South Carolina statute prohibited *entry* on lands of another after being given notice not to enter. The South Carolina Supreme Court in 1961 construed the statute as also prohibiting the act of *remaining* on premises after being asked to leave, and the court applied that judicial construction to affirm convictions of African-American persons who in 1960 refused to leave a drugstore luncheonette booth after being asked to leave. (*Bouie*, at pp. 348, 353-356.) The United States Supreme Court held the state court opinion was an unforeseeable expansion of the statute's precise language.

However, there is no due process violation in application of a judicial rule that is foreseeable. (*People v. Rathert* (2000) 24 Cal.4th 200, 202-204.) In *Rathert*, the defendant was convicted of burglary for entry into a market with the intent to commit false personation (§ 529), by attempting to cash another person's bad check and presenting that person's driver's license. The trial court did not instruct that the statute required an intent to subject the impersonated individual to liability for suit or prosecution, or to secure a benefit for any person. (*Rathert*, at pp. 202-203.) The Court of Appeal reversed the judgment, holding the statute required such specific intent. (*Id.* at p. 202.) Our Supreme Court concluded the statute required no such specific intent. (*Ibid.*) The defendant argued that that rule could not be applied to him, because it was an unforeseeable enlargement of a criminal statute. (*Id.* at p. 209.) Our Supreme Court

disagreed. The statute plainly encompassed an impersonator's commission of *any* act that *might* result in liability. (*Id.* at pp. 209-210.) “That one appellate decision [citation] erroneously conflated another's [citation] description of the mens rea of an aider and abettor of false personation with the elements of the crime itself did not generate such a *firmly established rule* as to erect a constitutional bar to [the Supreme Court] applying the present decision to this defendant.” (*Id.* at p. 210, italics added.)

Here, although there were conflicting authorities on whether consent was a defense to duress before the Supreme Court decided *Soto*, *Soto*'s holding was not unforeseeable.

The Supreme Court began its *Soto* opinion: “The Legislature has made it a crime to commit a lewd or lascivious act on a child under age 14. [Citation.] It has mandated additional penal consequences when the act is committed ‘by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim.’ [Citation.] [Fn. omitted.] Unlike the crime of rape, there is no requirement that the lewd acts be committed ‘against the will of the victim.’ Indeed, 20 years ago the Legislature specifically deleted language to this effect from the definition of the aggravated lewd act crime. [Citation.] [¶] Despite this change, and despite long-standing precedent holding that a child under age 14 is legally incapable of consenting to sexual relations, some Courts of Appeal have reasoned that consent is a defense to an aggravated lewd act charge because consent is logically inconsistent with the perpetrator's use of force or duress. We disagree with this conclusion. We hold that the victim's consent is not a defense to the crime of lewd acts on a child under age 14 under any circumstances. [Fn. omitted.] Thus, it is not error to so instruct a jury.” (*Soto, supra*, 51 Cal.4th at p. 233.)

The court in *Soto* disapproved this court's divided decision in *People v. Cicero* (1984) 157 Cal.App.3d 465, which had held, where a forcible lewd act causes no physical harm to the child, the prosecution must prove (1) that the defendant used physical force substantially different from or in excess of that required for the lewd act, and (2) that the

lewd act was accomplished against the will of the victim. (*Soto, supra*, 51 Cal.4th at pp. 243-244, citing *Cicero*, at p. 484.) The *Soto* court explained that *Cicero* was wrong on the second point. (*Soto*, at p. 248.)

The Supreme Court noted, “For over 100 years, California law has consistently provided that children under age 14 cannot give valid legal consent to sexual acts with adults. [Citation.] The Legislature has drafted the child molestation laws to make issues regarding the child victim’s consent immaterial *as a matter of law* in these cases.” (*Soto, supra*, 51 Cal.4th at p. 238.) The court added: “The approach we endorse today is venerable. California law has long recognized that consent is not a defense when the victim of a sex crime is a child under age 14. Many early decisions under the rape statute [citation] held that a minor could not legally consent to intercourse. [Citations.] This incapacity was conclusively presumed notwithstanding any ‘actual consent’ the child may have conveyed. [Citation.] . . . ‘Here the law implies incapacity to give consent, and this implication is *conclusive*.’ ” (*Id.* at pp. 247-248.)

Accordingly, despite this court’s opinion in *Cicero*, the rule from *Soto* was not an unforeseeable judicial enlargement of a criminal statute.

The trial court properly instructed the jury that consent was not a defense to the duress offense.

DISPOSITION

The judgment is affirmed.

MURRAY, J.

We concur:

BLEASE, Acting P. J.

HULL, J.