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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA ANTONIO WILLARD,

Defendant and Appellant.

D059699

(Super. Ct. No. SCD229525)

APPEAL from a judgment of the Superior Court of San Diego County, Leo Valentine, Jr., Judge. Affirmed.

I.

INTRODUCTION

The People charged Joshua Antonio Willard with two counts of forcible rape (Pen. Code, § 261, subd. (a)(2))<sup>1</sup> (counts 1 and 2); forcible sodomy (§ 286, subd. (c)(2)) (count 3); two counts of forcible oral copulation (§ 288a, subd. (c)(2)) (counts 4 and 5); assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) (count 6);

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<sup>1</sup> Unless otherwise specified, all subsequent statutory references are to the Penal Code.

and making a criminal threat (§ 422) (count 7). The People also alleged that Willard personally inflicted great bodily injury on the victim pursuant to section 12022.8 (counts 1-5) and section 12022.7, subdivision (a) (count 6). A jury found Willard guilty on all counts, and found true the great bodily injury allegations with respect to counts 3 and 6. The jury found the remaining great bodily injury allegations not true. The trial court sentenced Willard to an aggregate term of 29 years in prison.

On appeal, Willard claims that the trial court erred in admitting evidence of his commission of prior sexual offenses. Willard also contends that the trial court erred in denying his request to instruct the jury pursuant to *People v. Mayberry* (1975) 15 Cal.3d 143 (*Mayberry*). Willard maintains that a *Mayberry* instruction was required because there is substantial evidence that he reasonably, but mistakenly, believed that Christine S. (Christine) had consented to the sexual acts that form the basis of the charged sex offenses. We affirm the judgment.

## II.

### FACTUAL BACKGROUND

#### A. *The People's evidence*

##### 1. *The charged offenses*

Christine testified that Willard committed various sexual offenses against her in August 2010.<sup>2</sup> Christine stated that she met Willard at a bus station shortly after

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<sup>2</sup> During the initial portion of her trial testimony, Christine was uncooperative, hostile, and answered many of the prosecutor's questions by stating, "I don't remember." The trial court took a recess and, outside the presence of the jury, admonished Christine

midnight on August 27, 2010. Willard asked Christine if she wanted to share a hotel room with him. Christine agreed to get a room with Willard because she was tired. Christine and Willard went to a nearby hotel. Willard paid for a room, and the two walked up to the room. Once inside, Willard asked Christine to give him a hug. Christine gave Willard a hug. At some point thereafter, Willard punched Christine in the nose while she was sitting on the bed with him.<sup>3</sup> Christine's nose began to bleed as a result of Willard's punch.

According to Christine, after Willard punched her, he made a series of threats. Willard told Christine that he would hurt her and her children unless she complied with his demands. Willard also threatened to throw Christine out of the hotel room window, and to stab her in the neck with a pen. Willard picked up a blanket from the bed and tried to wrap it around Christine's head while threatening to suffocate her.

Willard told Christine to take off her clothes, get on the floor on her knees, and put her "butt" in the air. Christine complied. Willard placed his penis in Christine's vagina two times and then placed his penis in her anus. Willard also forced Christine to put his penis in her mouth "a few times." Christine told Willard that she thought that she might become "sick" while was performing oral sex on him. Willard told Christine not to get

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to "not yell and not act out." Shortly thereafter, the prosecutor reported to the court that she had attempted to speak with Christine during the recess, but that Christine "became upset and left the courtroom." Christine was eventually persuaded to return to court and resumed her testimony later that day.

<sup>3</sup> On cross-examination, Christine stated that Willard "kind of shoved [her]" while she was sitting on the bed with him. Christine said that this shove occurred before Willard punched her.

sick because he would hurt her. Willard also told Christine that he and his friends had beat up a girl in Las Vegas, which made Christine feel afraid. Christine's nose continued to bleed throughout the incident.

After the sexual assaults, Willard fell asleep. Later that morning, Christine and Willard went downstairs to the hotel lobby. Christine sat on a couch while Willard went to check out. After checking out, Willard told Christine not to leave. Willard then left the hotel. Willard stole a laptop, an iPod, and \$5 from Christine.

Christine remained on the couch for a "long time" and then went to a bathroom near the hotel lobby. She asked a hotel gardener to stand in front of the bathroom door because she was afraid Willard might return. The gardener testified that Christine asked him to follow her to the bathroom because she was afraid that someone might kill her. The gardener asked another hotel employee, Angelica Fuentes, to check on Christine while she was in the bathroom. Fuentes went into the bathroom and found Christine shaking and crying. Fuentes notified a hotel manager, who called the police. San Diego Police Officer Mike Bland responded to the scene and interviewed Christine. Christine reported the sexual assaults to Officer Bland.

A sexual assault exam performed on the day of the incident revealed red bruising in Christine's anus and pooled blood in her anal canal. The day after the incident, Christine went to the hospital. A doctor diagnosed her as suffering from a nasal fracture and a sprained knee.

Police discovered small amounts of a substance that appeared to be blood in the hotel room in which Willard and Christine had stayed, and also found blood on

Christine's clothing. A hotel maid provided police with a bag of trash from Willard's hotel room. The bag contained a used condom. The parties stipulated that the condom contained DNA from both Willard and Christine.

2. *The uncharged offenses*

As described in greater detail in part III.A.1.b., *post*, Jane Doe testified that on August 25, 2010, she went to Willard's hotel room in Las Vegas. While she was in the room, Willard raped Jane Doe twice and stole approximately \$140 from her. During the incident, Willard made various threats to harm Jane Doe and her children.

B. *The defense*

Willard testified that he had met Christine on the night in question and that she had agreed to share a hotel room with him. After walking to a nearby hotel and obtaining a room, Christine and Willard went inside the hotel room. They sat on the bed and the two began to watch television. According to Willard, while the two watched television, "[Christine] grabbed [his] leg toward [his] penis area." Defense counsel asked Willard whether he believed "[Christine] was coming on to [him]." Willard responded in the affirmative and explained that he and Christine then had sex. According to Willard, Christine did not tell him that she did not want to have sex and did not appear to be scared.

According to Willard, after having sex, Christine began to speak in a "child-like [*sic*] voice" and "started pulling her hair out." Willard thought that her behavior was odd. Willard explained that the reason he had Christine's iPod in his possession when he was arrested for the charged offenses was because she had given it to him to help offset the

cost of the room. Willard denied that he had hit Christine, forced himself on her, or restrained her. Willard also denied having threatened to throw Christine out of a window or to harm her children.

Willard testified that he had met Jane Doe in Las Vegas on the "the Strip." The two exchanged telephone numbers. Later that same day, Jane Doe sent Willard a text message and agreed to come to his hotel room. Willard did not think that Jane Doe was a prostitute. Willard said the two began to talk in a "friendly" way and then had sex. After having sex, Jane Doe demanded that Willard pay her. After Willard refused to pay, Jane Doe "became very mad," and left. Shortly thereafter, a number of police officers came to Willard's hotel room. After briefly detaining Willard and searching his room, the police let him go.

### III.

#### DISCUSSION

A. *The trial court did not abuse its discretion in admitting evidence of Willard's commission of prior sexual offenses*

Willard contends that the trial court erred in admitting evidence of his commission of prior sexual offenses against Jane Doe. Specifically, Willard contends that the trial court erred in refusing to exclude the evidence as unduly prejudicial pursuant to Evidence Code section 352. We apply the abuse of discretion standard of review to Willard's claim. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1113, disapproved on another ground by *People v. Rundle* (2008) 43 Cal.4th 76, 151 [abuse of discretion standard of

review applies to any ruling by a trial court concerning the admissibility of evidence and is particularly appropriate for questions concerning undue prejudice].)

1. *Factual and procedural background*

a. *Pretrial proceedings*

Prior to trial, the People filed a motion in which they requested permission to introduce evidence of Willard's commission of prior sexual offenses against Jane Doe. At a pretrial hearing on the motion, the trial court stated, "Given what [the prosecutor has] laid out in the People's moving papers, it appears to the court that [the evidence pertaining to alleged offenses committed against Jane Doe] would fall in an area that would be similar enough to the allegations" in the charged offenses as to be admissible pursuant to Evidence Code sections 1101, subdivision (b) and 1108. In describing the People's motion, the court stated:

"As I understand the proffer . . . [Jane Doe] was an alleged prostitute that [Willard] met in a hotel in Las Vegas. And once inside the hotel it appears that the allegation is that he conducted himself similarly as this particular case."<sup>4</sup>

The trial court indicated that it appeared that the evidence pertaining to the Jane Doe incident was admissible pursuant to Evidence Code section 1101, subdivision (b). The court reasoned, "[I]f I were to take the people's proffer as articulated in the moving papers, it would appear to the court on the surface that it would meet the threshold of common plan, design and scheme." The court further indicated that the evidence

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<sup>4</sup> Although it is clear from the trial court's comments in the reporter's transcript that the People filed a written motion, Willard has failed to include that motion in the record on appeal.

pertaining to Jane Doe would also likely be admissible pursuant to Evidence Code section 1108 for the purpose of proving Willard's propensity for committing sex offenses.

The trial court stated that it would consider whether the evidence should be excluded pursuant to Evidence Code section 352. The court began its analysis by noting that the uncharged and charged offenses were committed "pretty much within the same time period." The court also stated that the uncharged offense was "not such an egregious charge different from the current charge that would inflame the passions of the jury." In this regard, the court noted that both the charged and uncharged offenses involved Willard allegedly committing sexual offenses against women in hotel rooms. The trial court also stated that the charged offenses could be seen as "more alarming" in that the People intended to present evidence that Willard broke Christine's nose during the commission of the charged offenses.

The trial court next considered the possibility of prejudice arising from the fact that Willard had not been charged with or convicted of the alleged offenses involving Jane Doe. The court also expressed concern about the defense's ability to investigate the alleged offenses involving Jane Doe, given that they had allegedly occurred in Las Vegas. After further discussions between the court and counsel concerning the status of the investigation conducted by the Las Vegas police, the trial court stated the following:

"[T]he court, based upon the People's proffer is satisfied that [the uncharged offenses are] of such a similar nature that it is highly probative . . . . One, both [of] these alleged offenses occurred in hotel rooms that the defendant Mr. Willard allegedly secured himself, that he invited the alleged victims to that motel/hotel room. [¶] That once inside, he then began to overcome their will, and based upon their allegations the position of the sexual acts in both

these alleged offenses are of a similar nature suggests that it is highly probative . . . . [¶] That the threats that were allegedly made against both these individuals appear to be similar in nature . . . [, in particular] the threat to throw them from the window of the hotel room. [¶] There appears to be no evidence that either alleged victim knows . . . [the] other, [or] had any prior contact with each other. And it is highly probative that they both would pretty much have the same version of what took place inside the hotel room."

The court stated that it would be "more than happy to address any prejudicial effect in terms of [there] being no convictions, if, in fact, the defense wants . . . a stipulation that there [were] no charges filed against Mr. Willard in [the Jane Doe] case." After defense counsel stated that she would request such a stipulation, the court and counsel discussed further the potential wording of such a stipulation. The prosecutor expressed reluctance to agree to the court's suggestion that the stipulation state that "law enforcement investigated the case [involving Jane Doe] and no charges were filed." The court directed the prosecutor and defense counsel to discuss whether they could agree to the wording of a stipulation that would inform the jury that Willard had not been charged with any crimes based upon the alleged incident involving Jane Doe. The court stated, "Until such time, the court denies any request to enter any prior bad acts under [Evidence Code] section[s] 1101, [subdivision (b)] and 1108."<sup>5</sup>

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<sup>5</sup> As is discussed in part III.A.1.b, *post*, the prosecutor and defense counsel subsequently agreed to the wording of a stipulation. The prosecutor read the stipulation to the jury after the completion of Jane Doe's testimony.

b. *Evidence presented at trial concerning Willard's commission of sexual offenses against Jane Doe*

At trial, Jane Doe testified that on August 25, 2010,<sup>6</sup> she was working as an escort in Las Vegas and that she went to Willard's hotel room. Once inside the room, she discussed with Willard "what kind of entertainment" he was seeking. During this discussion, Willard told Doe that he would pay her "after." Doe told Willard that this was unacceptable, and she began to walk toward the hotel room door. Willard pushed Doe toward the bathroom and began to "force himself on [Doe]." The two struggled for approximately 15 minutes. After realizing that she "wasn't going to be able to fight him off," Doe said, " 'Let me give you what you want.' " Willard told Doe to get undressed and to "get on all fours." While positioned behind Doe, Willard raped Doe. During the rape, Willard repeatedly told Doe to raise her "butt" higher. After raping Doe, Willard threatened to wrap Doe in a blanket and throw her out of a hotel room window. Willard then raped Doe a second time in the same manner as the first rape. After raping Doe, Willard took approximately \$140 from Doe's wallet. At some point during the incident, Willard also made Doe "promise on [her] kid's life," that she would not report the incident to the police.

After Jane Doe testified, the prosecutor read the following stipulation to the jury: "It is stipulated by the parties that this particular incident did not result in arrest or charges being filed against Mr. Willard."

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<sup>6</sup> The charged offenses involving Christine S. took place on August 27, 2010.

San Diego Police Detective Holly Erwin testified that she interviewed Jane Doe in September of 2010. Detective Erwin stated that Doe claimed that Willard had raped her. Detective Erwin recounted Doe's statements concerning the rape in a manner that was consistent with Doe's trial testimony. For example, Detective Erwin stated that Doe described the reason she was in Willard's room, the manner by which Willard raped her, and the threats that Willard had made during the incident.

2. *Governing law*

Evidence Code section 1108, subdivision (a) provides:

"(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

Evidence Code section 1101 provides in relevant part:

"(a) Except as provided in this section and in Section[] . . . 1108 . . . evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

Evidence Code section 352 provides:

"The court in its discretion may 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."

In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), the Supreme Court described the factors that a trial court should consider in determining whether to exclude evidence that is otherwise admissible pursuant to Evidence Code section 1108, pursuant to Evidence Code section 352:

"[T]rial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra*, at p. 917.)

The *Falsetta* court explained that "the probative value of 'other crimes' evidence is increased by the relative similarity between the charged and uncharged offenses, the close proximity in time of the offenses, and the independent sources of evidence (the victims) in each offense." (*Ibid.*)

A trial court need not expressly refer to all of the *Falsetta* factors in considering whether to exclude evidence pursuant to Evidence Code section 352. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1168 [" '[W]e are willing to infer an implicit weighing by the trial court on the basis of record indications *well short* of an express statement.' [Citation.]".])

### 3. *Application*

The People's proffer suggested that the manner in which Willard committed the uncharged and charged offenses was highly similar.<sup>7</sup> As the trial court observed, Willard allegedly committed the uncharged and charged offenses against women who he had invited to his hotel room. Once inside, Willard allegedly ordered the women to assume similar physical positions to facilitate the sexual assaults, and uttered similar threats during the incidents. The great degree of "similarity between the charged and uncharged offenses" increased the probative value of the uncharged offense evidence. (*Falsetta, supra*, 21 Cal.4th at p. 917.)<sup>8</sup> In addition, "[t]he close proximity in time of the offenses"—in this case, just two days apart—also supports the trial court's Evidence Code section 352 ruling.<sup>9</sup> (*Falsetta, supra*, at p. 917.) The lack of any evidence that Christine and Jane Doe knew each other or had had any prior contact with each other also supports the trial court's ruling. (*Ibid.*) Further, we reject Willard's contention that the inflammatory nature of the allegations pertaining to the Las Vegas incident required exclusion of the uncharged offense evidence. Both the charged and uncharged offenses

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<sup>7</sup> In evaluating whether the trial court abused its discretion in refusing to exclude evidence pursuant to Evidence Code section 352, "[w]e review the correctness of the trial court's ruling at the time it was made, . . . and not by reference to evidence produced at a later date." (*People v. Welch* (1999) 20 Cal.4th 701, 739.) In this case, the trial court's pretrial evidentiary ruling was based on the People's motion to admit evidence of the uncharged offenses. Since Willard has failed to include that motion in the record, we assume for purposes of this decision that the trial court accurately described the motion at the pretrial hearing on the motion.

<sup>8</sup> Willard concedes that the "allegations of Jane Doe were similar to the accusations made by Christine," but suggests that this fact weighs *against* admissibility. Willard's

involved Willard using physical violence and threats to accomplish sexual assaults. The trial court reasonably determined that the uncharged offense evidence was not unduly inflammatory relative to the evidence pertaining to the charged offenses.

Although the fact that Willard was not arrested or charged with any crimes arising out of the alleged incident involving Jane Doe increased the possibility for prejudice (*Falsetta, supra*, 21 Cal.4th at p. 917), the trial court carefully considered this factor and reasonably addressed it by compelling the People to agree to a stipulation informing the jury of these facts. With respect to Willard's contention that he had no "opportunity to investigate the [Jane Doe] case thoroughly," the trial court considered this issue as well, and reasonably determined that this did not constitute a ground for excluding the evidence. In discussing the issue with counsel, the prosecutor informed the court that the information surrounding the Jane Doe incident had been provided to the defense in September 2010,<sup>10</sup> and that the defense had been provided with Jane Doe's criminal record. The court also observed that the defense would have the opportunity to cross-examine Jane Doe at trial.

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argument is directly contrary to *Falsetta*, and accordingly, we reject it. (See *Falsetta, supra*, 21 Cal.4th at p. 917 [similarity of the charged and uncharged offenses increases the probative value of uncharged offense evidence].)

<sup>9</sup> Although the trial court stated that the uncharged and charged offenses took place in the "same time period," the court did not discuss the exact timing of the offenses. However, it is undisputed that the charged offenses occurred on August 27, 2010 and that the uncharged offenses allegedly took place on August 25, 2010.

<sup>10</sup> The trial of the charged offenses occurred in February 2011.

In sum, the record indicates that the uncharged offense evidence was highly relevant and that the trial court reasonably determined that the probative value of this evidence would not be "substantially outweighed" by the probability that its admission would "create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Accordingly, we conclude that the trial court did not abuse its discretion in admitting evidence of Willard's commission of prior sexual offenses against Jane Doe.<sup>11</sup>

B. *The trial court did not err in refusing to instruct the jury pursuant to Mayberry*

Willard contends that the trial court erred by denying his request to provide the jury with a *Mayberry* instruction. Willard maintains that the court's refusal to give this instruction was error because there is substantial evidence that he reasonably, albeit mistakenly, believed that Christine had consented to the charged sexual acts. On appeal, an appellate court must independently review the record to determine whether there is substantial evidence in the record to support the giving of a *Mayberry* instruction. (Cf. *People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1055 ["On review, we determine independently whether substantial evidence to support a defense existed"].)

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<sup>11</sup> Willard also contends that the trial court "compounded" its error by improperly admitting Doe's statements to Detective Erwin concerning the uncharged offenses. In light of our conclusion that the court properly admitted Doe's testimony concerning the uncharged offenses, any error in admitting Detective Erwin's cumulative testimony on the same subject was harmless because there is not a reasonably probable that the admission of Detective Erwin's testimony affected the verdict. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 153 [concluding that admission of cumulative testimony was harmless because "it is not reasonably probable that such erroneous admission affected the verdict"].)

1. *Factual and procedural background*

After the close of evidence, the trial court held a hearing outside the presence of the jury for the purpose of discussing jury instructions. During the hearing, defense counsel stated the following:

"I noticed that the court had deleted the paragraph at the end of—it's on each of the charges so [CALCRIM] number 1015, CALCRIM number 1015,<sup>12</sup> and CALCRIM [number] 1000. The paragraph regarding consent had been deleted from the instruction. I would ask that it be included."

In his brief on appeal, Willard states his proposed *Mayberry* instruction stated:

"The defendant is not guilty of rape [or oral copulation or sodomy] if he actually and reasonably believed that the woman consented to the [act]. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman consented. If the People have not met this burden, you must find the defendant not guilty."<sup>13</sup>

The trial court explained its reasoning for refusing to provide such an instruction as follows:

"It does not appear it is appropriate to give that [instruction] in this case. The jurors either believe the alleged victim or . . . believe Mr. Willard. [¶] Given the testimony, there is no question that if they believe the alleged victim's version there could be no reasonable belief of consent. And I believe the case law cited in the bench notes behind those instruction will indicate that. [S]o I will have the

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<sup>12</sup> It appears likely that defense counsel intended to refer to CALCRIM No. 1030, which pertains to the charged offense of forcible sodomy. CALCRIM No. 1015 pertains to forcible oral copulation and CALCRIM No. 1000 pertains to forcible rape.

<sup>13</sup> Willard's proposed *Mayberry* instruction is not included in the record. We assume for purposes of this decision that Willard has properly stated the content of the instruction in his brief.

record reflect that you are requesting it, but the court is excluding it for those reasons over the defense's objection."

2. *Governing law*

In *Mayberry, supra*, 15 Cal.3d 143, the Supreme Court held that a defendant who makes a reasonable and good faith mistake regarding a person's consent to sexual intercourse is not guilty of forcible rape. (*Id.* at p. 155.) The *Mayberry* court based its holding on the notion that a reasonable mistake of fact regarding consent is incompatible with the existence of wrongful intent. (*Ibid.* ["If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite . . . [for] rape by means of force or threat".])<sup>14</sup>

In *People v. Williams* (1992) 4 Cal.4th 354 (*Williams*), the Supreme Court stated that a trial court must instruct the jury concerning the reasonable mistake of fact defense discussed in *Mayberry* where "there is substantial evidence that the defendant honestly and reasonably, but mistakenly, believed that the victim consented to sexual intercourse." (*Williams, supra*, at p. 361.) Because a *Mayberry* instruction is premised on a mistake of fact, the *Williams* court explained that there must be "substantial evidence of equivocal

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<sup>14</sup> As noted in the text, *Mayberry* involved the offense of forcible rape (§ 261, subd. (a)(2)). (See *Mayberry, supra*, 15 Cal.3d at p. 155.) In this case, in addition to two counts of forcible rape (§ 261, subd. (a)(2)) (counts 1 and 2), the People charged Willard with forcible sodomy (§ 286, subd. (c)(2) (count 3) and two counts of forcible oral copulation (§ 288a, subd. (c)(2)) (counts 4 and 5). We assume for purposes of this decision that the principles of *Mayberry* are equally applicable to the charged offenses of forcible sodomy and forcible oral copulation. The People do not contend otherwise.

conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not." (*Williams, supra*, at p. 362.)

The *Williams* court explained further:

"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 . . . . 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. [Citations.]" (*Williams, supra*, 4 Cal.4th at pp. 360-361, fn. omitted.)

The *Williams* court also reiterated that a trial court is required to give a requested *Mayberry* instruction "only when the defense is supported by 'substantial evidence,' that is, evidence sufficient to 'deserve consideration by the jury,' not 'whenever *any* evidence is presented, no matter how weak.'" (*Williams, supra*, 4 Cal.4th at p. 361.)

Applying this law, the *Williams* court concluded that "there was no substantial evidence supporting a *Mayberry* instruction," in that case, in light of the following:

"[The defendant] testified that [the victim] initiated sexual contact, fondled him to overcome his impotence, and inserted his penis inside herself. This testimony, if believed, established actual consent. In contrast, [the victim] testified that the sexual encounter occurred only after [the defendant] blocked her attempt to leave, punched her in the eye, pushed her onto the bed, and ordered her to take her clothes off, warning her that he did not like to hurt people. This testimony, if believed, would preclude any reasonable belief of consent." (*Williams, supra*, 4 Cal.4th at p. 362.)

The *Williams* court reasoned that a trial court should not provide a *Mayberry* instruction where the victim and the defendant provide "wholly divergent accounts [of the alleged sexual encounter that] create no middle ground from which [the defendant] could argue he reasonably misinterpreted [the victim's] conduct." (*Williams, supra*, 4 Cal.4th at p. 362 ["See *People v. Burnett* [(1992)] 9 Cal.App.4th 685, 690 [if 'defense evidence is unequivocal consent and the prosecution's evidence is of non-consensual forcible sex, the [*Mayberry*] instruction should not be given']; *People v. Rhoades* (1987) 193 Cal.App.3d 1362, 1369 [neither account of sexual encounter was evidence that defendant mistakenly believed victim consented even though she did not—'sexual act was [either] entirely consensual or the obvious product of force']"] (*Williams, supra*, at p. 362)].)

After concluding that there was no "substantial evidence of equivocal conduct" warranting a *Mayberry* instruction in that case (*Williams, supra*, 4 Cal.4th at p. 363), the *Williams* court also stated, in dicta, the following:

"We note for the guidance of the lower courts that there may be cases, as in *Mayberry*, in which there is evidence of equivocal conduct that could be reasonably and in good faith relied on to form a mistaken belief of consent, but also evidence that this equivocal conduct occurred only after the defendant's exercise or threat of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.' (§ 261, subd. (a)(2); . . . [citations].) No doubt it would offend modern sensibilities to allow a defendant to assert a claim of reasonable and good faith but mistaken belief in consent based on the victim's behavior *after* the defendant had exercised or threatened 'force, violence, duress, menace or fear of immediate and unlawful bodily injury on the person or another.' (§ 261, subd. (a)(2) . . . .) [Citations].) However, a trier of fact is permitted to credit some

portions of a witness's testimony, and not credit others. Since a trial judge cannot predict which evidence the jury will find credible, he or she must give the *Mayberry* instruction whenever there is substantial evidence of equivocal conduct that could be reasonably and in good faith relied on to form a mistaken belief of consent, despite the alleged temporal context in which that equivocal conduct occurred. The jury should, however, be further instructed, if appropriate, that a reasonable mistake of fact may not be found if the jury finds that such equivocal conduct on the part of the victim was the product of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.' " (*Williams, supra*, 4 Cal.4th at p. 364.)

### 3. *Application*

Christine testified that she engaged in sexual acts with Willard because he punched her in the nose and threatened to harm her and her children. Willard denied that he had hit or threatened Christine, and testified that Christine had initiated the sexual conduct with him. (See pt. II, *ante*.) Thus, as in *Williams*, Christine and Willard provided "wholly divergent accounts" about the incident forming the basis of the charged offenses that create no "middle ground" from which Willard "could argue he reasonably misinterpreted [the victim's] conduct." (*Williams, supra*, 4 Cal.4th at p. 362.)

We reject Willard's contention that a *Mayberry* instruction was required because the "jury could reasonably reject portions of Christine's disjointed, inconsistent, and angry testimony, and also reject [Willard's] assumption that she actually consented to sexual activity." On the contrary, there was *no* evidence that would support a finding that Willard could have misinterpreted Christine's conduct. Rather, the evidence in this case supported only two findings, unequivocal consent or nonconsensual forcible sex. Under these circumstances, no *Mayberry* instruction was warranted. (See *Williams, supra*, 4

Cal.4th at p. 362 ["if 'defense evidence is unequivocal consent and the prosecution's evidence is of non-consensual forcible sex, the [*Mayberry*] instruction should not be given' ".])

Willard contends that the following evidence supported his request for a *Mayberry* instruction:

"[Christine] happily went with [Willard] to a hotel room, hugged him when asked, and then, according to her testimony submitted without objection because she was afraid. Her actions in going to the room with [Willard] and then offering no resistance was equivocal testimony that the jury should have been allowed to evaluate."

We reject Willard's suggestion that Christine's act of accompanying him to a hotel room constitutes substantial evidence supporting a *Mayberry* instruction because such an argument is directly contrary to *Williams*. In *Williams*, the court stated the following:

"In finding substantial evidence to support a *Mayberry* instruction, the Court of Appeal . . . noted that [the victim] 'willingly accompanied [the defendant] to the hotel after spending several hours in his company, [and] that she did not object when the hotel clerk handed him a bedsheet.' The relevant inquiry under *Mayberry*, however, is whether [the defendant] believed [the victim] consented to have intercourse, not whether she consented to spend time with him. To characterize the latter circumstance alone as a basis for a reasonable and good faith but mistaken belief in consent to intercourse is, as noted by Presiding Justice Low's dissent in the Court of Appeal, to 'revive the obsolete and repugnant idea that a woman loses her right to refuse sexual consent if she accompanies a man alone to a private place. That is an especially cruel assumption here, where the victim, a homeless woman, may well have wanted nothing more than the relative quiet and comfort of a private room in which to relax and watch television.' " (*Williams, supra*, 4 Cal.4th at p. 363.)

The same rationale applies to Willard's suggestion that Christine's willingness to give him a hug constitutes substantial evidence that he reasonably mistakenly believed that she had consented to engage in sexual acts. Willard could not have reasonably believed that Christine had consented to have sexual relations with him based on her willingness to give him a hug. (See also *Williams, supra*, 4 Cal.4th at p. 361 [defendant's belief in victim's consent "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"].)

We also reject Willard's suggestion that Christine's "testimony [that she] submitted without objection because she was afraid" constituted substantial evidence that supports a *Mayberry* instruction. The *Williams* court did state in dicta that a modified *Mayberry* instruction should be given where "there is substantial evidence of equivocal conduct that could be reasonably and in good faith relied on to form a mistaken belief of consent," even where there is evidence that such equivocal conduct occurred only *after* the defendant's threats. (*Williams, supra*, 4 Cal.4th at p. 364.)<sup>15</sup> However, in this case, there is no evidence that Christine engaged in any "equivocal conduct" at *any time* during the encounter. (*Ibid.*) As discussed above, Christine testified that she complied with Willard's orders because of his threats and his physical assault, while Willard testified that Christine initiated sexual conduct. Thus, there is no evidence in the record that

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<sup>15</sup> The *Williams* court stated that in such a situation a *Mayberry* instruction should be modified to inform the jury that a reasonable mistake of fact may not be found if the jury finds that the victim's equivocal conduct was the product of the defendant's threats. (*Williams, supra*, 4 Cal.4th at p. 364.)

Christine engaged in any "equivocal conduct that would have led [Willard] to reasonably and in good faith believe consent existed where it did not." (*Williams, supra*, at p. 362.)

Accordingly, we conclude that the trial court did not err in refusing to instruct the jury pursuant to *Mayberry*.

IV.

DISPOSITION

The judgment is affirmed.

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AARON, J.

WE CONCUR:

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BENKE, Acting P. J.

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HALLER, J.