

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

BENJAMIN RAMOS SANCHEZ,

Defendant and Appellant.

E051586

(Super.Ct.No. SWF026319)

**OPINION**

APPEAL from the Superior Court of Riverside County. Mark E. Petersen, Judge.

Affirmed.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Benjamin Ramos Sanchez was accused of sodomizing his 12-year-old half sister. In closing argument, defense counsel conceded that the charged act of

sodomy occurred. He argued, however, that because the act was consensual there was no force, fear, or duress.

A jury found defendant guilty of aggravated sexual assault on a child by means of sodomy (count 1, Pen. Code, § 269, subd. (a)(3)), a forcible lewd act on a child (count 2, Pen. Code, § 288, subd. (b)(1)), and sodomy on a child (count 3, Pen. Code, § 286, subd. (c)(1)).

Defendant was sentenced to a total of 21 years to life, plus the usual fines and fees.

Defendant contends:

1. There was insufficient evidence of force, fear, or duress to support the convictions on count 1 (aggravated sexual assault on a child) and count 2 (forcible lewd act on a child).

2. The trial court erred by ruling that consent was not a defense to count 1 (aggravated sexual assault on a child).

We will hold that there was sufficient evidence of force. The trial court did err by ruling that consent was not a defense to count 1. We are convinced, however, that the error was harmless.. Accordingly, we will affirm.

I

FACTUAL BACKGROUND

A. *The Charged Sex Act.*

As of the night of August 18-19, 2008, defendant was 29. His half sister, Jane Doe,<sup>1</sup> was 12. They lived in Riverside County with their mother and her “significant other.”

That night, Doe was sleeping, as she usually did, in a bed with her two younger brothers. Around 4:00 or 5:00 a.m., she woke up and saw defendant. He reached under her bra and touched her breasts. He also put his mouth on her breasts. This went on for “about five minutes.”

Doe kept pinching one of her brothers “hard” to wake him up, but without success. When asked why she did not use her voice, she said, “I couldn’t because [defendant] was on top of me.”

Doe repeatedly testified that she did not remember whether she was lying on her back or on her stomach at this point. She did testify that defendant was lying on her and pressing “on [her] back.” However, when asked if she was lying on her back, she said, “I think so.” She also testified that defendant then “moved” her onto her stomach.

---

<sup>1</sup> The trial court ordered that the victim be referred to in the record by this fictitious name. (See Pen. Code, § 293.5.)

Next, defendant sodomized her. His hands were on either her head or her back, “pushing [her] toward the bed.” “[B]ecause of that, [she] couldn’t really get away . . . .” It hurt “[a] little bit.” After 10 or 15 minutes, he ejaculated.

Doe admitted that she did not resist. She testified that she was scared that defendant would hurt her “if [she] tried to do something.”

After defendant got up and went to the bathroom, Doe woke her mother and told her what had happened. Doe was scared and crying. Her mother talked to defendant;<sup>2</sup> he then left the house.

In a forensic interview, Doe made a number of statements that were inconsistent with her testimony at trial. She was not sure whether defendant touched her breast first or sodomized her first; she thought these occurred at the same time. At trial, she said she saw defendant’s face, but she could not see his tattoo. In the interview, however, she said she could not see his face, but she recognized him from, among other things, his tattoo. She also said that defendant had already left the house when she told her mother.

A sexual assault examination showed three superficial anal lacerations, which is “very unusual” but consistent with anal intercourse (including consensual anal intercourse).

B. *Uncharged Sex Acts.*

Doe testified that defendant first started “touching” her in February 2008. “[A]lmost every day,” he came into her room while she was in bed with her younger

---

<sup>2</sup> Doe’s mother did not remember whether she talked to defendant.

brothers and had intercourse with her — about half the time anal but about half the time vaginal. Her brothers never woke up.

She was “[a] little” scared. She did not tell anybody, because she “thought [defendant] was going to do something if [she] said anything.” After the charged sex act, however, she went to her mother because she “just got tired of it.”

Doe did not disclose the uncharged sex acts in the forensic interview or at the preliminary hearing. Ultimately, she disclosed them for the first time about six months after the preliminary hearing to a investigator from the district attorney’s office. She explained that she was “worried that [her] mom would be mad because [she] hadn’t told her sooner[.]”

The sexual assault examination indicated that Doe’s hymen was intact.

## II

### THE SUFFICIENCY OF THE EVIDENCE OF FORCE, FEAR, OR DURESS

Defendant contends that there was insufficient evidence of force, fear, or duress to support the convictions on count 1 (aggravated sexual assault on a child) and count 2 (forcible lewd act on a child).

“When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] ‘Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge

or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.’ [Citation.] Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]” (*People v. Elliott* (2012) 53 Cal.4th 535, 585.)

The crime of an aggravated sexual assault on a child by means of sodomy requires an act of “[s]odomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of [Penal Code s]ection 286.” (Pen. Code, § 269, subd. (a)(3).) Of these, the only one even arguably applicable here is Penal Code section 286, subdivision (c)(2), which requires that the act of sodomy 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 . . . .” (Pen. Code, § 286, subd. (c)(2)(A), (B), (C).)

Similarly, the crime of a forcible lewd act on a child requires a lewd act committed “by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . .” (Pen. Code, § 288, subd. (b)(1).) The prosecutor argued that the relevant lewd act consisted of touching Doe’s breasts.

Even though the statutes use identical language, the definition of “force” for purposes of a forcible lewd act on a child is different than for purposes of forcible sodomy. (See *People v. Griffin* (2004) 33 Cal.4th 1015, 1028 [rape].)

For purposes of forcible sodomy, all that is required is “physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim].’ [Citation.] . . . ““The kind of physical force is immaterial; . . . it may consist

in the taking of indecent liberties with a woman, or laying hold of and kissing her against her will.’” [Citation.]” (*People v. Griffin, supra*, 33 Cal.4th at p. 1024 [rape].)

By contrast, for purposes of a forcible lewd act on a child, the force must be “‘substantially different from or substantially greater than that necessary to accomplish the [sexual] act itself.’ [Citation.]” (*People v. Soto* (2011) 51 Cal.4th 229, 242.) Though this is a higher standard, it is not particularly high. For example, in *People v. Bolander* (1994) 23 Cal.App.4th 155, disapproved on other grounds in *People v. Soto, supra*, at page 248 and footnote 12, the court found sufficient evidence of force based on the “‘defendant’s acts of overcoming the victim’s resistance to having his pants pulled down, bending the victim over, and pulling the victim’s waist towards him . . . .” (*Bolander*, at p. 161.) In *People v. Babcock* (1993) 14 Cal.App.4th 383, evidence that the defendant grabbed the victims’ hands and forced them to touch his genitals was held sufficient to show the requisite force. (*Id.* at p. 386.)

Proceeding chronologically, we start with count 2, which charged a forcible lewd act based on the touching of Doe’s breasts. Doe testified that defendant was lying on top of her, “‘pressing on [her,]” and that this prevented her from calling out to her brothers. While this was going on, it hurt “[a] little bit.” This showed that defendant used more force than was necessary solely to touch Doe’s breasts. Accordingly, it was sufficient evidence of force for purposes of a forcible lewd act on a child.

We turn to count 1, which charged an aggravated sexual assault on a child, based on an act of forcible sodomy. Doe testified that, during the sodomy, defendant’s hands were on either her head or her back, “‘pushing [her] towards the bed.” He was pushing

“[k]ind of hard.” Once again, this hurt “[a] little bit.” It prevented her from getting away. This showed that defendant used physical force that was sufficient to support a finding that the act of sodomy was against the will of the victim. Accordingly, it was sufficient force for purposes of forcible sodomy.

Defendant argues that he pushed on Doe only during the sodomy, and not earlier, while touching her breasts. Not so. According to Doe, during the touching, he was lying on top of her and pushing her down with his body, whereas during the sodomy, he was pushing her down with his hands.

Defendant also argues that the force shown was not more than was necessary to commit the act of sodomy. As already noted, count 2 required force greater than that necessary to accomplish the sexual act itself, but count 1 did not. In any event, the evidence *did* show more force than necessary. Defendant did not have to press on Doe’s back or head with his hands to accomplish sodomy. Indeed, sodomy can be performed in positions that do not require the active participant to lie on top of the passive participant at all.

Finally, defendant argues that there was no evidence that he pushed on Doe with the intent to overcome her will. However, there is no such intent requirement. Indeed, at least with respect to a forcible lewd act on a child, there is no requirement that the act be against the victim’s will at all. (*People v. Soto, supra*, 51 Cal.4th at p. 248.) Even with respect to forcible sodomy, there is no requirement that the defendant use force with the *intent* to overcome the victim’s will; the force need only be *sufficient* to overcome the victim’s will.

Because we conclude that there was sufficient evidence of force, we need not decide whether there was also sufficient evidence of duress.

### III

#### INSTRUCTIONS REGARDING CONSENT IN CONNECTION WITH AGGRAVATED SEXUAL ASSAULT ON A CHILD

Defendant contends that the trial court erred by ruling that neither consent nor a mistaken belief in consent is a defense to aggravated sexual assault on a child.

##### *A. Additional Factual and Procedural Background.*

CALCRIM No. 1123 defines aggravated sexual assault on a child. As given in this case, it provides:

“The defendant is charged in Count 1 with aggravated sexual assault of a child who was under the age of 14 years and at least seven years younger than the defendant in violation of Penal Code [s]ection 269(a).

“To prove that the defendant is guilty of this crime, the People must prove that: One, the defendant committed sodomy by force, fear, or threats in violation of Penal Code [s]ection 286 on another person; and, two, when the defendant acted, the other person was under the age of 14 years and was at least seven years younger than the defendant.

“To decide whether the defendant committed sodomy by force, fear, or threats in violation of Penal Code [s]ection 286 on another person, please refer to the separate instructions that I will give you on that crime.”

CALCRIM No. 1030 defines forcible sodomy. It requires the prosecution to prove, among other things, that the victim “did not consent to the act . . . .” It also includes the following optional wording: “[The defendant is not guilty of forcible sodomy if (he/she) actually and reasonably believed that the other person 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 other person consented. If the People have not met this burden, you must find the defendant not guilty.]”

Both the prosecutor and defense counsel requested CALCRIM No. 1030. During an instructions conference, however, the prosecutor asked the trial court to omit the portions of CALCRIM No. 1030 referring to consent: “I don’t think that’s appropriate to give in this case where . . . there’s a minor. A minor cannot consent to these acts.”

The trial court agreed: “[A] minor cannot consent. All the instructions dealing with minors state that. Case law states that.”

The trial court ruled that it would still give the portion of CALCRIM No. 1030 that required the prosecution to prove lack of consent,<sup>3</sup> but only because it believed that consent negated the force or fear element of the crime. It refused to give the bracketed portion dealing with a reasonable belief in consent, “because that would fly in the face of . . . the law that says a minor cannot consent.”

---

<sup>3</sup> By contrast, in connection with the other two counts, it specifically instructed the jury: “It is not a defense that the [victim] may have consented to the act.” (CALCRIM No. 1090, No. 1111.)

In addition, the trial court cautioned defense counsel not to argue that consent was a defense, though it allowed him to argue that the victim’s consent tended to disprove force or fear. It added that, if defense counsel *did* argue that consent was a defense, “I then [would] have to instruct the jury [that] a minor cannot consent . . . .” Finally, it ruled that the prosecutor could argue that “minors can’t consent, and that’s an accurate statement of the law. And if you try to object, I’m going to overrule it.”

The prosecutor’s eventual argument was somewhat ambiguous with respect to whether consent was a defense. He stated:

“The first element that needs to be met is . . . that there was sodomy . . . .  
[¶] . . . [¶]

“*The second one is that [Jane Doe] did not consent to the act. Ladies and gentlemen, this is just common sense. She’s a 12-year-old girl. She’s a minor. We have laws that protect minors from acts like this. She can’t protect herself, and she can’t consent to these acts.*” (Italics added.)

The prosecutor also argued, at some length, that Doe was not, in fact, a “willing participant.”

B. *Analysis.*

The crime of aggravated sexual assault on a child requires that the defendant commit an enumerated sex act on a child victim. (Pen. Code, § 269, subd. (a).) Specifically, aggravated sexual assault on a child by means of sodomy, as charged in this case, requires an act of “[s]odomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of [Penal Code s]ection 286.” (Pen. Code, § 269, subd. (a)(3).)

The cited subdivisions of Penal Code section 286 define certain acts of sodomy as unlawful. Subdivisions (c)(2) and (d) require that “the act is 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 . . . .” Subdivision (c)(3) similarly requires that “the act is accomplished against the victim’s will by threatening to retaliate . . . .”

Defendant therefore argues that one of the elements of aggravated sexual assault on a child by means of sodomy is lack of consent. We are not necessarily convinced. “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.]” (*People v. Soto, supra*, 51 Cal.4th at p. 238.) We see an analogy to the crime of kidnapping, which ordinarily requires lack of consent (*People v. Mayberry* (1975) 15 Cal.3d 143, 153); nevertheless, when the victim is a child of tender years, he or she is deemed incapable of giving legal consent. (*People v. Oliver* (1961) 55 Cal.2d 761, 764-765.) If consent could negate aggravated sexual abuse of a child, that rule could not be limited to the 12-year-old victim in this case; we would have to hold that an 8-year-old or even a 4-year-old could consent to be sodomized. Indeed, even if the victim were a 2-year-old, the prosecution would have to prove that the child did not consent to be sodomized by an adult.

As already discussed in part II, *ante*, the force element of forcible sodomy requires “‘physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim].’ [Citation.]” (*People v. Griffin, supra*,

33 Cal.4th at p. 1024 [rape].) Thus, the words “against the victim’s will” and the words “force, violence, duress, menace, or fear” are intertwined. The Legislature may have intended to incorporate the force element — along with the requirement that the force be measured by whether it was sufficient to overcome the victim’s will — while relying on the courts to apply the well-established principle that the act itself is deemed to be against the will of a child victim.

For purposes of this case, however, we need not decide this question. We may assume, without deciding, that lack of consent *is* an element of aggravated sexual abuse of a child. Even if so, as we will discuss, the error was harmless.

“[A] trial court’s failure to instruct on an element of a crime is federal constitutional error that requires reversal of the conviction unless it can be shown beyond a reasonable doubt that the error did not contribute to the jury’s verdict. [Citations.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1208-1209.) Here, however, the trial court did *not* fail to instruct that lack of consent was an element. Despite the opinions it had expressed outside the jury’s presence, it instructed the jury that the prosecution had to prove lack of consent.

Admittedly, the trial court also allowed the prosecutor to argue that consent was not a defense. But unlike a trial court’s misinstruction on the law, a prosecutor’s misstatement of the law in closing argument is subject to the “reasonable possibility” standard of harmless error. (See *People v. McDowell* (2012) \_\_\_ Cal.4th \_\_\_, \_\_\_ [2012 Cal. LEXIS 5821, \*91-\*92].) Here, the prosecutor did not take full advantage of the trial court’s permission. In fact, he conceded that consent was an element of the offense. He

did assert, without further explanation, “She’s a minor. . . . [S]he *can’t consent to these acts.*” (Italics added.) The trial court, however, had instructed that “[y]ou must follow the law as I explain it to you . . . . If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.” Thus, we see no reasonable probability that this isolated statement affected the verdict.

The trial court also prohibited defense counsel from arguing that consent *was* a defense. Nevertheless, it allowed him to argue that the victim did, in fact, consent, and that this disproved force, fear, or duress. Accordingly, he argued: “. . . [Jane Doe] said that this had been going on for four to five months. If she has been engaging in this conduct with him, then that would certainly be evidence that she had been engaging willingly or engaging without fear.” He also argued that the victim was “a willing participant” in a “taboo relationship,” and that it was “eas[ier] for her to explain to her mother and everybody that this was a forced situation as opposed to her engaging in acts, sexual acts with her brother.” The jury, however, evidently rejected these arguments. Thus, we can be confident that the jury considered the issue but concluded that the victim did not consent.

At oral argument, defendant’s counsel suggested that, but for the trial court’s erroneous views, defendant might have taken the stand; he might even have testified that the victim consented. The record, however, is to the contrary. During the trial, the trial court suggested that, in its view, consent was not a defense; however, it added, “[C]ertainly both of you can do all the research you want on this issue. Bring me cases to read if you’d like, and I’ll read them.” The defense then rested *before* the instructions

conference at which the trial court definitively ruled that consent was not a defense. Moreover, once again, the trial court *allowed* defense counsel to argue that consent disproved force, fear, or duress. Thus, if defendant could testify that the victim consented, he had every incentive to do so; the trial court did not stop him.

Finally, the trial court also refused to instruct on a mistaken belief in consent. Under *People v. Mayberry, supra*, 15 Cal.3d 143, a defendant charged with a forcible sex offense is not guilty if he or she had a mistaken but good faith and reasonable belief that the victim consented. (*Id.* at pp. 153-158.) “If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented . . . to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite . . . to a conviction of . . . rape by means of force or threat [citation].” (*Id.* at p. 155.) If, as we are assuming, aggravated sexual assault on a child incorporates the requirement of lack of consent, it must also incorporate the defense of a mistaken belief in consent.

“[T]he *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. 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.’ [Citation.]” (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1148.)

Defendant did not take the stand; thus, he did not testify that he subjectively believed that the victim consented. And there was virtually no evidence of “equivocal conduct” on the part of the victim. While she admitted that she did not resist, as we discussed in part II, *ante*, there was sufficient evidence that, in committing the sodomy, defendant used force sufficient to overcome her will. Indeed, there was *uncontradicted* evidence that he pressed down on the victim’s head or back, pushing her into the bed. Moreover, the jury found that the sodomy was, *in fact*, accomplished by force (or, alternatively, duress).

There was also no evidence of a mistaken belief in consent that society would tolerate as reasonable under the circumstances. Defendant and the victim were half siblings. Defendant was 29, and the victim was 12; we are talking about an adult male sodomizing a child. And, again, the jury found that defendant used force and/or duress to accomplish the sodomy.

We therefore conclude that defendant was not entitled to a *Mayberry* instruction. Separately and alternatively (though for much the same reasons), we are convinced beyond a reasonable doubt that, even if the jury had been given a *Mayberry* instruction, it would have found that defendant did not actually entertain an objectively reasonable belief in consent.

IV  
DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI  
J.

We concur:

RAMIREZ  
P. J.

McKINSTER  
J.