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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE CASTRO,

Defendant and Appellant.

E053888

(Super.Ct.No. SWF029285)

OPINION

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge.
(Retired judge of the Tulare Mun. Ct. assigned by the Chief Justice pursuant to art. VI,
§ 6 of the Cal. Const.) Affirmed in part; reversed in part; remanded with directions.

Stephen M. Lathrop, 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, Brad Weinreb and William M.
Wood, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Jorge Castro, of oral copulation of a minor by force (Pen. Code, § 269, subd. (a)(4)),¹ aggravated sexual assault of a minor by force (§ 269, subd. (a)(5)), and five counts of committing forcible lewd and lascivious acts on a minor (§ 288, subd. (b)). He was sentenced to two consecutive 15-years-to-life terms, plus 40 years. He appeals claiming insufficient evidence to support all the convictions, save the forcible oral copulation. We reject his contention. He also contends that the jury was erroneously instructed as to aggravated sexual assault by force, and we agree. Therefore, we reverse that conviction and strike its sentence and that portion of the fine imposed under section 290.3 attributable to it. The People will have the option of retrying defendant on that count. If they opt not to do so, defendant will stand convicted instead of a violation of section 289, subdivision (j) and he must be sentenced for that conviction.² Finally, defendant contends that the trial court erroneously calculated the fine imposed pursuant to section 290.3. We remand the matter to allow the trial court to determine when count one was committed and adjust the total fine in accordance with the views expressed in this opinion, if appropriate. Should the People opt not to retry defendant for the aggravated sexual assault by force, we will direct the trial court to also determine when the violation of section 289, subdivision (j) was committed and adjust the total fine according to the views expressed in this opinion. We affirm the remainder of the judgment.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² See footnote 10, *post*, page 9.

FACTS

Most of the facts will be disclosed in connection with our discussion of the issues. Between 2005 and 2009, defendant, brother of the victim's father, molested the victim in his own home and while living in the victim's family's home. The victim was best able to provide the chronology of the acts by referring to the house in which they took place. One incident, which we will refer to as the bed incident, that has not otherwise been described in detail below, took place at defendant's house in Hemet. Defendant had constructed for his young daughter a castle type configuration that contained a play kitchen on the floor of her bedroom and her bed a distance above the play kitchen. During the bed incident, defendant's daughter pretended to take food orders from defendant and the victim, and then pretended to prepare the food in the play kitchen. While the daughter was "down stairs" in the play kitchen, defendant laid the victim on the bed and pulled her pants and panties down to the bottom of her legs. Defendant French kissed the victim, sucked on her breasts, then moved down to her genitals where he used his hands to open her outer lips and touched the middle part of the entry to her vagina with his tongue. He fingered the area between her outer genital lips. More than one time, he told her to suck his penis and he held her head and moved it while his penis was in her mouth. He placed his penis between her outer genital lips and moved it until he ejaculated onto her genitals. He and the victim then heard the front door open and he told her to hurry up and run to the bathroom and wash off the ejaculate, which he called "love juice." She did not understand what defendant had done. Later that day, they went

to the park and when she and defendant were alone, he asked her if she had cleaned off “all the love juice.” He told her not to tell about this incident.

Defendant bought the victim shoes with wheels on the heels and an iPod Touch for Christmas and her birthday, while buying her brothers less expensive gifts for Christmas and their birthdays. The victim’s mother testified that the iPod Touch cost \$300 and was given to the victim by defendant when the victim was 9 or 10 years old.³ The mother confirmed that her sons did not get such expensive gifts from defendant. The victim’s father testified that when defendant, his brother, was confronted with the victim’s accusations, he left the father’s home, where he had been living with his wife and children, leaving them there. The father said that he attempted to call defendant, but defendant would not answer his phone or respond to any of the father’s voice mail messages. At the time of trial, defendant’s wife and children were living in Mexico. According to the father, defendant’s wife had been 15 or 16 years old when she and defendant had first gotten together.

The victim testified that she disclosed the molestations after she caught defendant’s daughter masturbating in the shower and concluded that defendant must have been molesting her also because she was too young to do this without having been abused.

Defendant testified, admitting that his wife and mother had confronted him on September 9, 2009 about the victim. He further admitted that while the victim’s father

³ For his part, defendant admitted giving the victim the iPod for her tenth birthday.

was gone from the home the two families shared, defendant left, leaving his wife and children behind, and never returned. Thereafter, he did not communicate with the victim's father or her mother. He admitted that he had a history of being accused of sexual assault. He denied inappropriately touching the victim or the minor daughter of a girlfriend with whom he had previously lived in Las Vegas, which we refer to below as "the prior victim."

ISSUES AND DISCUSSION

1. Aggravated Sexual Assault by Force

The prosecution elected to have the forcible aggravated sexual assault charge to be comprised of what occurred when defendant, defendant's daughter, the victim and the victim's brother played hide-and-seek at the Hemet house.⁴ Prior to this incident, according to what the victim told her mother when she disclosed the molestations in August 2009, defendant had been touching her inappropriately since she was small and he had molested her for a very long time in every home in which he lived in Southern California. On more than one occasion in defendant's Fontana home, where defendant lived before moving to his Hemet home, defendant had grabbed her breasts from behind and squeezed them in his daughter's bedroom. The victim testified that when defendant began molesting her when she was six, he told her not to tell anyone.⁵ She was

⁴ The People's assertion that this crime could have been based on defendant's digital penetration of the victim during the bed incident ignores this.

⁵ The victim testified, ". . . In the beginning when he started doing it or when he—not when he started doing everything but somewhere in the beginning he was like,
[footnote continued on next page]

frightened.⁶ According to the mother and father, the victim was six when defendant lived in his house in Fontana. The first incident of molestation the victim could associate with a particular event was her sixth birthday party, which was at the Fontana home. The victim testified that defendant took her into his bedroom to take a picture of her with her favorite dolls. Defendant had the dolls on his bed and he closed and locked the door. He told the victim he was going to take pictures and he took down her pants and told her he could show her something inside her body with the camera and a mirror. She knew this was wrong. She said no, pulled up her pants and ran out of the room. She believed that defendant had already inappropriately touched her when this incident occurred.

According to the victim's father, defendant moved to the Hemet house in about 2004. At

[footnote continued from previous page]

[‘]Don’t say anything . . . like I’m touching you or anything.[’] And I was like, [‘]Okay.[’]” Defense counsel then said to the victim, “In the beginning when you were like six years old, I think you said.” The victim replied that it started when she was six. The victim also testified, “[W]hen I was young, he told me not to say anything.” When talking about defendant grabbing her “throughout her lifetime” and “as far back as . . . the house in Fontana” the victim was asked if defendant ever told her not to tell anyone and she said he did. Defendant purports to rely on this and the victim’s testimony on pages 156 through 157 of the Reporter’s Transcript to assert that it was not until later, when he began to grab and squeeze her breasts, that he told her not to tell. However, the first bit of transcript cited by defendant directly contradicts his assertion and the victim did not specify on pages 156 and 157 when defendant told her not to tell. Moreover, the victim testified that defendant began grabbing and squeezing her breasts in the Fontana home, before the hide-and-seek incident.

⁶ When the victim was testifying about the breast grabbing and squeezing incidents, which occurred “throughout her lifetime” and “as far back as [she could remember which would be in] the house in Fontana[,]” she was asked how she felt when defendant did this to her. She responded, “I was young so I didn’t know what he was doing. I didn’t understand.” When pressed as to whether she felt frightened, she said she was “[o]f what he was doing” and, “then I was scared that, like . . . I didn’t tell anyone because I thought I was going to get in trouble for what was happening.”

that point, the victim would have been eight. The victim estimated her age to be eight or nine at the time of the incident involving the hide-and-seek game.

That incident began with the victim's brother being the "seeker" and defendant, defendant's daughter, who was a toddler at the time, and the victim being the "hidiers." Defendant told the victim to go with him into a closet to hide from the victim's brother and defendant's daughter entered the closet as well. Defendant sat the victim down on his lap and placed his daughter to her left. Defendant unbuttoned the victim's pants and put his right hand down her pants under her panties. He touched the "middle top" of the entrance to her vagina⁷ between her outer labial lips and rubbed with his finger. He asked her if it tickled and she said it did. She said this because it did, in fact, tickle and because she "was young [and] didn't even know what that was at the time." However, she felt it was wrong and she pushed his hand away and he stopped. He did not tell her during this incident not to disclose it to anyone. When asked if she was scared during this, she testified, "No, because I didn't know what he was doing." The victim testified that one of the reasons she did not report the molestations was that when she was younger, she did what adults told her to do,⁸ but she realized in 5th grade, when she was 10 or 11, that what defendant was doing to her was not right. She added that from that

⁷ Although the victim described this as her vagina rather than the entrance to her vagina, medically speaking, the vagina is the interior structure. (Taber's Cyclopedic Medical Dict., V-3, (12th ed. 1973).)

⁸ She added that her family was very close. Her father testified that as a result of this case, his family no longer speaks to him.

point on, she was “just scared” and didn’t know what to do. Defendant never said he would harm the victim if she told.

When the victim disclosed the molestations to her friend, she told the friend that she was afraid of defendant. The victim testified, without specifying a time, that she was scared defendant would do something to her, like hurt her, if she told and defendant “scares [her] a lot.” She added that she knew defendant would end up in jail.

Defendant was charged with a “violation of Penal Code section 269, subdivision (a), subsection (5) . . . in that . . . he did commit aggravated sexual assault . . . , in that he did willfully and unlawfully commit a violation of Penal Code section 289, subdivision (a)^{9]} sexual penetration *by force, violence, duress, menace, fear and threat.*” However, the jury was instructed as to this count, “The defendant is charged . . . with aggravated sexual assault of a child who was under the age of 14 and at least seven years younger than the defendant in violation of Penal Code section 269(a)(5). [¶] To prove that the defendant is guilty of this crime, the People must prove that: One, the defendant committed sexual penetration on another person; and two, when the defendant acted, the other person was under the age of 14 years and was at least 7 years younger than the defendant.” “The defendant is charged . . . with aggravated sexual assault by sexual penetration with a person who was under the age of 14 in violation of Penal Code Section

⁹ Section 289, subdivision (a), provides in pertinent part, “Any person who commits an act of sexual penetration when the act is accomplished against the victim’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury of the victim or another person shall be punished by imprisonment”

289(h).^[10] [¶] To prove that the defendant is guilty of this crime, the People must prove that: One, the defendant participated in an act of sexual penetration with another person; two, the penetration was accomplished by using a foreign object; and three, the other person was under the age of 14 years at the time of the act. [¶] . . . [¶] It is not a defense that the other person may have consented to the act.”

The instruction that should have been given for the offense charged and found is Judicial Council of California Criminal Jury Instruction, CALCRIM No. 1045, which provides, “The defendant is charged . . . with sexual penetration by force . . . in violation of Penal Code section 289 [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act of sexual penetration with another person; [¶] 2. The penetration was accomplished by using . . . a . . . foreign object . . . ; [¶] 3. The other person did not consent to the act; [¶] AND [¶] 4. The defendant accomplished the act: . . . [¶] by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to another person [(hereinafter, “force, etc.”)]. [¶] . . . [¶] . . . In order to *consent*, a person must act freely and voluntarily and know the

¹⁰ Section 289, subdivision (h) provides, “Except as provided in section 288, any person who participates in an act of sexual penetration with another person who is under 18 years of age shall be punished by imprisonment in the state prison or in the county jail for a period of not more than one year.” As it turns out, this was not the correct subdivision. The instruction should have referenced subdivision (j) which provided at the time this crime was alleged to have occurred, “Any person who participates in an act of sexual penetration with another person who is under 14 years of age and who is more than 10 years younger than he . . . shall be punished by imprisonment in the state prison for three, six or eight years.” Of course, we note that the instructions given the jury required that the victim be only seven years younger than defendant, however, the evidence at trial that defendant was 25 years older than the victim was not contradicted.

nature of the act. [¶] . . . [¶] An act is *accomplished by force* if a person uses enough physical force to overcome the other person’s will. [¶] *Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person of ordinary sensitivity to do . . . or submit to . . . something that . . . 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 other person and . . . her relationship to the defendant. [¶] [Retribution and menace were also defined.] [¶] . . . An act is *accomplished by fear* if the other person is actually and reasonably afraid . . . or . . . she is actually but unreasonably afraid and the defendant knows of . . . her . . . fear and takes advantage of it”

Thus, the instruction given omitted the force, etc. element of the charged offense and erroneously provided that the consent of the victim was not a defense to the crime.¹¹ In argument to the jury, the prosecutor said, in pertinent part, of this count, “The fact that she didn’t fight and scream inside the closet does not mean he had a right to do this to her. Consent is not a defense to these crimes. A child cannot consent to this type of crime. It doesn’t matter that when he asked her if it tickled she said yes. The fact that he did it . . . means he is guilty of that crime.” The prosecutor did not argue to the jury that this crime had to be accomplished by force, etc.

Without addressing the second error in the instruction given noted above, the parties agree that the failure to instruct the jury on force, etc. requires reversal of this

¹¹ Neither party addresses this latter aspect of the instruction.

conviction unless we may conclude, beyond a reasonable doubt, that the error did not contribute to the verdict. It must be clear beyond a reasonable doubt that a rational jury would have found defendant guilty even if it had been instructed as to the force, etc. element. (See *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827].) The People assert that it would have because defendant's defense was that he didn't commit any inappropriate touching of the victim *ever*—that the hide-and-seek incident never happened. In convicting defendant of the other counts, the People argue, the jury necessarily disbelieved his all-encompassing denial, and would have done the same regarding this count as well.¹² However, rejecting defendant's claim that this incident never happened still did not necessarily mean that the jury would have convicted defendant of this count if it had been required to find the force, etc. element. The People also assert that the evidence of use of force during this incident was uncontested and not contradicted. While the victim's version of this incident certainly was both of these things, and assuming the jury rejected defendant's claim that it never happened, her

¹² In support of this argument, the People point out that when there is a failure to provide a unanimity instruction, the error is not prejudicial where it is clear from their verdicts that the jury found defendant incredible and the victim credible. (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.) However, there is a substantial difference between this situation and the instant one. The precise statement in *Thompson* was that when the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all the acts if he committed any, failure to give the unanimity instruction is not prejudicial. (*Id.* at p. 853.) Here, however, even if the jury rejected defendant's claim that the hide-and-seek incident did not occur, and accepted everything the victim said about it, the jury would not necessarily have found the force, etc. element as to this particular incident as we explain in the body of this opinion.

testimony as to the force, etc. element was less than overwhelming. Not only did the victim expressly deny that she was afraid during this incident, but she drew a distinction between the acts that occurred when she was younger and did not understand the nature of what defendant was doing to her, which included this incident, and those that occurred later, when she did. While there was evidence to contradict both her denial of being afraid during this incident and the distinction she drew between acts committed when she was young versus those committed when she was older, we are not convinced, beyond a reasonable doubt, based on the state of the evidence as described above, that if the jury had been told that it had to find the force, etc., element in connection with this incident that it would have. Of course, considerations of the differences in ages between defendant and the victim, the fact that he was her uncle and that she had been taught to obey her elders, he had abused her previously and she may have not disclosed, even at this early point, because she feared he would harm her, were considerations the jury could have taken into account in making a finding of duress. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13, 14 (*Cochran*) [Fourth Dist, Div. 1] disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12, (*Soto*)). However, the evidence on the matter was in conflict, therefore, we cannot conclude that if the jury had been instructed to find force, etc., it would have done so. At the same time, we cannot agree with defendant that no rational trier of fact could have found that the force, etc. element had been established (see *In re Asencio* (2008) 166 Cal.App.4th 1195, 1204-1205 [“[The defendant’s] act of pulling down [the victim’s] underwear and rolling his adult body on top of this six-year-old child . . . are sufficient acts of force”]; *Cochran*,

supra, 103 Cal.App.4th at pp. 15-16 [relative ages and sizes of defendant and victim and the facts that he was her father and she lived with him, she did not want to participate, he gave her gifts and he told her not to tell anyone or he could go to jail supported finding of duress]), thus, we cannot conclude that defendant cannot be retried for this crime on the basis that there was insufficient evidence presented to support it.

2. *Two of the Forced Lewd and Lascivious Acts*

The People elected the act that comprised the forced oral copulation charge to be defendant putting his mouth on the victim's vaginal opening or forcing her to put her mouth on his penis during the bed incident.¹³ The People's election as to the act that supported the aggravated sexual assault by force charge has already been described. The five counts of forcible lewd and lascivious acts on a minor were alleged to have occurred on or between January 16, 2008, when the victim turned 12, to and including September 5, 2009, a month after the then 13 year old disclosed the molestations to her mother. As to those charges, the People argued to the jury, "The defendant willfully touched any part of a child's body. . . . [The victim] told us about a lot of touching. . . . [M]ost of it involved squeezing and grabbing of the breasts. . . . [T]he defendant grabbed her any chance he got. Whenever there weren't other adults around, . . . he came up behind her and grabbed and squeezed her breasts, . . . with so much force that on . . . [one] occasion . . . , they fell backwards onto the couch. [¶] . . . It was a come up [from]

¹³ Although the prosecutor did not make clear during her argument to the jury that *either* act would suffice, the jury had been instructed that evidence of more than one act had been presented as to this charge.

behind and grab and squeeze and try to overcome the [victim's] will. Even though he knew she didn't like it, even though she knew he wasn't supposed to be doing it, we know that at th[e Winchester]¹⁴ house . . . the defendant did it all over [the house]. . . . [¶] . . . [H]e willfully touch[ed] her breasts[.] . . . Both under and over the clothing he touched her vagina. . . . [¶] . . . [A]lso, we have other acts, such as French kissing, other inappropriate touchings the defendant engaged in, rubbing his penis on her vagina [during the bed incident] and the defendant ejaculated¹⁵ [¶] . . . [¶] [The victim] said it happened all the time, every time he got a chance. He followed her around the house, every room of the [Winchester] house including the garage." The People asserted, as to the force, etc. element for these counts, "Force is different than the force required to accomplish the act. . . . It wasn't like the defendant came up to her. She was laying [*sic*] down. He hugged her and he caressed her. He caressed her breasts. Because that would still be illegal, but it wouldn't be force. This is not what we have here. We have [the victim] saying that as she grew older, she grew wiser. She learned to try to fight the defendant off and move him and push him off, but he still, because he was a grown man, was able to overpower her and grab and squeeze her breasts, not just touch them. [¶] . . . [T]he fear here means the [victim] is actually and reasonably afraid or she is

¹⁴ The Winchester house was the third house in which defendant and his family lived. It was owned and occupied by the victim's family and the victim's parents, who allowed defendant and his family to stay there.

¹⁵ Defendant correctly points out that these acts could not have constituted the charged offenses because they occurred during the bed incident, which happened when she was 8 or 9, not when she was 12 or 13.

unreasonably afraid and he takes advantage of that. . . . [W]e have both here. . . . [W]hether you believe [her fear] was reasonable or not, he took advantage of that fear. . . . He told her not to say anything. And she tried to fight him off, and he wouldn't listen. . . . [I]t is reasonable for a child to be scared when an adult in a position of power over [them] is doing things to [them] that [they] don't like, that make [them] feel uncomfortable, that are physically and emotionally harming [them] and [they] have no way to stop them. It's reasonable to be scared. And that's exactly how [the victim] felt. [¶] . . . [W]as [the victim] afraid or under duress? . . . [W]e have to look at all the things she told us leading to this. . . . [S]he kept saying over and over, I didn't understand what I was doing. . . . [T]his started at such a young age for [the victim]. . . . To a certain extent, even though [the victim] knew that [defendant] shouldn't be doing that, it was normal to her. He made her believe that because that is what she was used to. Her age led her to confusion. It led her to erroneously believe that she would be in trouble if her parents found out. And she was also scared . . . because those acts themselves were threatening. She knew that they would keep happening, and she was scared of that and she feared that they would get worse. [¶] . . . [W]hen you look at whether or not someone is under duress, whether or not someone is fearful, you look at that victim's age and [her] relationship to this defendant. . . . Her age and relationship made it so that she would be under duress, made it so that she would be scared."

The victim testified that she did not try to push defendant away when he touched her breasts when she was younger, but she did when she was older. She testified that at the Hemet house, when no one was looking, defendant grabbed her breasts more than five

times and touched her private part on top of and under her clothes, all throughout the house, on occasion while she was playing with his daughter. According to the victim's father, defendant moved out of Hemet and into the victim's family's Winchester house in 2006 or 2007, when the victim was 10 or 11 years old. The victim testified, without specifying where this occurred, that defendant touched her private part a lot and she got used to it after a while, but when she got older, at age 11 or 12, she realized what defendant was doing and she pushed him off. She added that in later years, when she would push defendant off her, he would not stop, but would continue to keep trying to touch her. At the Winchester house, once when she went into the computer room where defendant and his family stayed, defendant grabbed her breasts and private part. On another occasion in the garage of this house, she went to get something out of the freezer and defendant grabbed her breasts and commented that they were getting really big and he rubbed her nipples. On another occasion in this house, defendant came up from behind the victim, who was sitting on the couch, and grabbed and squeezed her breasts. This happened again when the victim went into her father's and stepmother's bedroom to borrow a shirt. She pushed defendant off and ran out of the room and he followed her. On another occasion, she was showing defendant and his daughter her room at the Winchester house when defendant closed the door and sat blocking it. He grabbed the victim, turned her around, pulled her onto his lap and put his hands down her pants and panties. He rubbed her private part and stopped only when the victim's father called her name. She testified that over 50 times, defendant followed her around the Winchester house and waited until no one was around and touched her breasts. Without specifying

where this occurred, the victim testified that defendant touched her over 30 times in the presence of his daughter, who was too young at the time to realize what defendant was doing, and 30 times outside the daughter's presence.¹⁶ The victim said that defendant scares her a lot and when he would pull her towards him and grab her, it was with medium force such that she'd have to struggle to push him off.¹⁷

Defendant claims that the jury *must have* based its finding as to two of these counts on the incidents occurring on the couch, in the computer room and in the garage.¹⁸ First, this is quite an assumption, considering the number of acts to which the victim testified. However, even if the jury did base two of its verdicts on two of these three acts, we disagree with defendant that there was insufficient evidence of duress to support them. As already described, by the time the victim was 12, there was a long history of molestation by defendant, including the "more substantial" acts that occurred during the

¹⁶ The victim was eight or nine years older than defendant's daughter.

¹⁷ Defendant claims that one of the discrete acts upon which the People relied as to these counts occurred in the playroom of the Winchester house, when defendant tried to sit on the couch with the victim, she got up and tried to walk away because she was now old enough to know what was going on and defendant grabbed her and pulled her back towards him. She told him to stop and pushed him off and ran downstairs. Because the People did not expressly argue that this constituted one of the charged offenses and because the victim did not testify that any touching of a sexual nature occurred during it (while acknowledging that *any* touching, if sexually motivated, constitutes a violation of section 288, subdivision (b)), we have not included it in our statement of facts supporting the verdicts for these counts.

¹⁸ Defendant's contention, in his reply brief, that the prosecutor elected these three discrete acts as constituting two of the five counts is belied by the record. Clearly, the prosecutor argued that the many acts of defendant grabbing the victim's breasts and private area while living at the Winchester home could have constituted these counts.

bed incident. According to the victim, the defendant touched her inappropriately just about every opportunity that arose in the Winchester house. If she were walking by defendant, he would “pull [her] and grab [her]” in order to touch her. She testified to her fear of defendant. As stated before, she said that in later years (and there were only two before she turned 13, i.e., when she was 11 and 12) when she pushed defendant off her, he would persist in trying to touch her. She described how she would have to struggle to push defendant off her after he applied medium force in pulling her towards him and grabbing her. As stated before, defendant was her uncle, the family was close and the jury could extrapolate from her appearance at trial as to the differences in their sizes during the time of these incidents. Defendant was 25 years older than the victim. Even, as defendant correctly points out, there was no opportunity for the victim to resist during these three incidents, when she resisted during other incidents, defendant persisted in touching her. Evidence of prior forcible molestation incidents might be sufficient to show that later acts without force were nonetheless committed with duress. (*People v Pitmon* (1985) 170 Cal.App.3d 38, 48 [disapproved on other grounds in *Soto, supra*, 51 Cal.4th at p. 248, fn. 12].) The evidence here was sufficient to establish duress.

As defendant correctly acknowledges, duress can be based on the familial relationship between the victim and the defendant, their relative ages and sizes, and the fact that the defendant had continuously exploited the victim. (*People v. Schultz* (1992) 2 Cal.App.4th 999, 1005.) However, defendant asserts that where the defendant does not restrain the victim and the victim does not resist, there can be no duress, citing *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1319-1320. However, in *Espinoza*, the victim,

who was mentally challenged, had an opportunity to resist or object and did not. (*Id.* at pp. 1293, 1320.)¹⁹ Additionally, in *Espinoza* there was no evidence of prior forcible acts of molestation to establish duress. Here, in contrast, the victim had no such opportunity to resist as defendant just grabbed her without apparent warning. Additionally, there were prior forcible acts. Finally, in *Veale, supra*, 160 Cal.App.4th at page 50, we noted, as is relevant here, that the victim in *Espinoza* did not state that she feared the defendant and *Espinoza* had been decided before *Cochran, supra*, 103 Cal.App.4th 8. In *Cochran*, the appellate court upheld a finding of duress where the victim was nine years old, there was a significant disparity between her size and that of the defendant, he was her father and lived with her, she was reluctant to engage in the acts and they made her mad or sad, he directed her on how to perform the acts, he gave her gifts and he told her not to tell anyone or he would go to jail. (*Cochran, supra*, 103 Cal.App.4th at pp. 15-16.)

In *Veale, supra*, 160 Cal.App.4th 40, this court upheld convictions of committing forcible lewd and lascivious acts on a minor on the basis of duress where “[The victim] testified [her stepfather] did not threaten her or use physical force She also testified that when [he] asked her to put his penis in her mouth and, on another occasion, asked her to touch his penis, she got mad and threw clothes around the room. [He] relented and did not make the same request again. [¶] . . . [The victim] was seven years old at the

¹⁹ We also note that *Espinoza* cited with approval the holding in *People v. Hecker* (1990) 219 Cal.App.3d 1238 [disapproved on other grounds in *Soto, supra*, 51 Cal.4th at p. 248, fn. 12], that “‘Psychological coercion’[,], without more[,], does not establish duress.” This court and another have disagreed with this position. (See *People v. Veale* (2008) 160 Cal.App.4th 40, 48 (*Veale*) [Fourth Dist., Div. Two]; *Cochran, supra*, 103 Cal.App.4th at pp. 8, 15.)

time of the molestation. . . . [S]he was normally alone with defendant in his or [her] bedroom. On at least one occasion, the bedroom door was locked. And, as [her] stepfather, [he] was an authority figure in the household. In addition, [she] feared defendant and feared that if she told anyone [he] was molesting her, [he] would kill her or her mother. [¶] . . . A reasonable inference could be made that [he] made an implied threat sufficient to support a finding of duress, based on evidence that [she] feared [him] and was afraid that if she told anyone about the molestation, [he] would harm or kill [her], her mother or someone else. Additional factors supporting a finding of duress include [her] young age when she was molested; the disparity between [her] and [his] age and size; and [his] position of authority in the family.” (*Id.* at pp. 46-47.)

Here, like in *Veale*, the victim testified that she was afraid of defendant, that he scared her and she feared that he would harm her. There was evidence of his position as her superior, whom she had been taught to obey, and of his position of importance in the family. She feared the repercussions to her family of reporting the molestations and her father felt those repercussions first hand, in that his family stopped speaking to him due to her report. Although the victim was older than the victim in *Veale* at the time of the incidents at issue, it cannot be forgotten that she was *younger* than the victim in *Veale* when defendant began inappropriately touching her, and this reasonably had an impact on her psychologically. Finally, to whatever extent the victim “accommodated” defendant’s unwanted and inappropriate sexual contact when she was younger because she perhaps did not understand the significance of them, by the time the acts at issue here occurred, she did understand and she did resist, but that resistance was overcome. Under the

circumstances, defendant has not carried his heavy burden of demonstrating that the evidence was insufficient to show duress. (See *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

3. Admission of Section 1108 Evidence

Before trial began, the People sought to introduce evidence of defendant's prior molestation of a victim in Las Vegas (hereinafter, "the prior victim") to prove intent. The People asserted that the prior victim "will testify that when she was 9 or 10 years old, the defendant ([her] godmother's son) touched her on many occasions in her [home] and his. The defendant told [her] that he had wanted to do things to her since she was a baby but that she was too small. He took pictures of her orally copulating him and then ripped them up. The defendant made her orally copulate him on at least 10 occasions, digitally penetrated [her] on more than 5 occasions, grabbed her breasts on numerous occasions, and orally copulated her more than once. As with [the current victim], the defendant showered [her] with presents. He also threatened to cut her with ninja stars or harm her family if she did not comply with his demands." The People represented that the victim of the instant crimes would testify that defendant grabbed her breasts nine times in the Winchester house, including one incident during which he commented on their size and another during which he was so forceful that he fell onto the sofa and caused the victim to fall on top of him. The People also represented that defendant touched the 10 or 11 year old current victim on the opening of her vagina when she showed him and his daughter her room. The hide-and-seek incident was described by the People to include digital penetration and the rubbing of the victim's chest. According to the People, the

victim's breasts were grabbed on at least five occasions at the Hemet home and she was molested about 12 times there. This included the bed incident, when the victim was seven or eight years old. The incident involving the dolls on defendant's bed and two incidents of defendant squeezing the victim's breasts in the Fontana home was also described by the People.

At the hearing on the motion, defense counsel represented that the prior victim had reported the molestations to her mother on March 5, 1996. The defense opposed the introduction of this evidence on the ground that its prejudicial impact outweighed its probative value. Counsel also informed the court that the prior incidents had not resulted in any charges against defendant. The trial court allowed the evidence to be admitted, finding that its probative value outweighed its prejudicial impact. Defendant now contests this ruling.

Defendant contends that considering the number of acts the prior victim testified to and how he threatened her with physical injury and death, the trial court abused its discretion in admitting the evidence. The prior victim testified that when she was seven and eight years old, defendant grabbed and squeezed her breasts more than 50 times, mostly in her home. Defendant told her if she ever told, he would hurt her family. She testified that defendant also rubbed her between her outer labia lips, both over and under her pants, but never when anyone else was at home, with the exception of her little brother, who would be in the next room. On one occasion, he laid her down on a bed and pulled down her pants and panties and inserted his finger into her vagina, which really hurt, she told him to stop, but he did not. On sixty other occasions, he touched her

genitals.²⁰ On 15 occasions, he forced her to orally copulate him and he told her how to do it. He took Polaroid pictures of her doing this, then destroyed them. In her room, he would pull down her pants and panties and lie her down and orally copulate her, spreading her vaginal lips to do this. During the first couple of molestations, he told her he would kill her if she told. When she was seven or eight, he threatened her with a ninja star, saying if she didn't do what he told her to do, he would cut her with it. When she was eight, he told her that when she had been a baby, he had wanted to do things to her but he could not because he would be discovered.

Defendant did not object when the prior victim's trial testimony differed from the People's prediction as to it regarding the number of times defendant forced her to orally copulate him (10 versus 15) and the fact that he touched her genitals 60 times. Other than the express threats made to the prior victim, the one digital penetration and the taking of pictures, the number and nature of the acts to which she testified were not remarkably different from those testified to by the current victim. In fact, they were so similar that the trial court's finding of high relevancy was entirely reasonable. While defendant points out that the fact that he was not charged for the prior molestations created the possibility that this jury convicted him of the charged crimes to punish him also for those, it was a fact used to benefit defendant in that defense counsel could imply that the

²⁰ Contrary to defendant's representation, the prior victim did not testify that defendant digitally penetrated her 60 times. In fact, she testified expressly that he did not put his finger inside her during these occasions.

authorities disbelieved the prior victim, and, thus, refused to bring charges against defendant.

Defendant claims, for the first time, that the prior molestations were too remote in time to be relevant. However, his failure to object on this specific basis below forecloses this argument. (Evid. Code, § 353.) Moreover, there was only a five or six year time gap between the prior victim's molestations and the beginning of this victim's.²¹

Finally, contrary to defendant's assertion, the trial court has no obligation to engage in a balancing process under Evidence Code section 352 on the record. Defense counsel's objection on the basis of that section was clear—the trial court's rejection of it was equally clear.

Defendant's attempt to argue that section 1108 violates his constitutional rights is foreclosed by the Supreme Court's rejection of this argument in *People v. Falsetta* (1999) 21 Cal.4th 903, which defendant acknowledges binds us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

²¹ This is based on representations made in the People's written motion, which were not contradicted by the defense before the trial court ruled. The fact that the prior victim, at trial, testified that the acts involving her occurred two or three years earlier than the representation in the People's moving papers was an occasion for defendant to object on the basis of remoteness, but he did not.

4. *Sex Offender Fine*

The trial court ordered defendant to pay a fine of \$3,300 pursuant to section 290.3.²² Before 2007, section 290.3 provided for a fine of \$200 for the first conviction and \$300 for each subsequent conviction.²³ Beginning on September 20, 2006, the fines were increased to \$300 for the first conviction and \$500 for each subsequent conviction.²⁴ The trial court used the post September 19, 2006 version of section 290.3 to impose the fine for all of the convictions. Counts one (forced oral copulation) and seven (aggravated sexual assault by force) were found to have occurred between April 2005 and December 2007, while counts two through six (forcible lewd and lascivious acts) were found to have occurred between January 16, 2008 and September 5, 2009. As to the incidents that the People elected to comprise counts one and seven, the victim testified that they occurred when she was eight or nine years old, which was in 2004 or 2005. She also testified that both occurred in defendant's Hemet house. Her mother

²² In 2005 and before September 20, 2006, that section provided, "Every person who is convicted of any offense specified in subdivision (a) of Section 290 shall . . . be punished by a fine of two hundred dollars . . . upon the first conviction or a fine of three hundred dollars . . . upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine." Section 290, subd. (a)(2) included violations of sections 269, 288 and 289. (Former section 290, subd. (a)(2).) In 2008, the subdivision of 290 which contained the provisions for violations of 269, 288 and 289 was (c). (Former section 290, subd. (c).) On September 20, 2006, the amounts were raised to \$300 for the first offense and \$500 for the second and each subsequent conviction, and they remained at that level throughout 2009. (Section 290.3, subd. (a), as amended by Stats. 2006, ch. 337, §18, eff. Sept. 20, 2006.)

²³ See footnote 22, *ante*.

²⁴ See footnote 22, *ante*.

testified that the victim was nine in 2005 when defendant lived in Hemet and her father testified that the defendant moved to Hemet in about 2004 and stayed until 2006 or 2007. On the other hand, defendant testified that his daughter was born in 2003 and he moved to the Hemet house in 2006 and remained there for two years. The victim also testified that defendant's daughter was a toddler when the victim "was in the Hemet house." She testified that at the time of the hide-and-seek incident, defendant's daughter wanted to get into the closet after she went into it at defendant's directions. This suggests that the daughter was walking around on her own at the time. The victim also testified that during the bed incident, the daughter wanted to play "kitchen" and she was pretending to take food orders from defendant and the victim, indicating that she could talk at the time. If defendant's testimony that he did not move to the Hemet house until 2006 was believed, the date of both offenses would be 2006 or later. If the victim's testimony that defendant's daughter was a toddler at the time of the hide-and-seek incident and speaking at the time of the bed incident and the defendant's testimony that his daughter was born in 2003 was believed, the hide-and-seek incident could not have occurred before 2005 and the bed incident before 2006. Defendant here contends that using the post September 19, 2006 version of section 290.3 to calculate the fines for counts one and seven was improper and he should have been fined a total of \$3,000.

In *People v. Voit* (2011) 200 Cal.App.4th 1353 and *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248, the appellate courts held that fines under section 290.3 constituted punishment, subject to the prohibition on ex post facto laws.

The trial court did not make a determination, based on the conflicting evidence presented at trial as outlined above, when counts one and seven occurred. Such a factual determination must be made, at least as to count one. If the People opt not to retry defendant for count seven and his conviction is thereby reduced to a conviction of violating section 289, subdivision (j)²⁵ the trial court must also determine when this count occurred. We will remand the matter to the trial court to make this determination and to adjust, or not, the section 290.3 fine imposed. While doing so, the trial court should correct the abstract of judgment to show that count one was not committed in 2009, as it currently states, but in whatever year the court determines it was committed. The same should be done as to count seven if the People opt not to retry defendant and his conviction is reduced to one for a violation of section 289, subdivision (j). Additionally, the abstract should be corrected to show that counts two through six were committed, not in 2009, as the abstract currently states, but in 2008-2009.

DISPOSITION

Defendant's conviction for aggravated sexual assault of a minor by force (count seven) is reversed for instructional error. Its 15 years-to-life term and that portion of the total \$3,300 fine pursuant to section 290.3 attributable to it is stricken. The matter is remanded so the trial court can determine when count one was committed and impose an appropriate fine pursuant to section 290.3 as to it. If the trial court determines that it was committed before September 20, 2006, it must amend the total fine according to the

²⁵ See footnote ten, *ante*, page nine.

views expressed in this opinion and reflect this in an amendment to the abstract of judgment. The court is further directed to amend the abstract to show whatever year it determines this crime was committed, rather than the year 2009, as the abstract currently states. The court is further directed to amend the abstract to show that counts two through six were committed in 2008-2009, not 2009, as the abstract currently states. If the People opt not to retry defendant on count seven, his conviction on that count will be for a violation of section 289, subdivision (j) and the trial court will sentence him for that conviction, determine when that crime occurred, adjust the total fine imposed under section 290.3 according to the views expressed in this opinion, if appropriate, and note all of this in an amendment to the abstract of judgment. The remainder of the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

RICHLI
J.

CODRINGTON
J.