

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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.

WYLEY TOMAS BAIRD,

Defendant and Appellant.

E060751

(Super.Ct.No. RIF1208442)

OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge.

Affirmed as modified

Jill M. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., Susan Miller and Jennifer Truong, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Wiley Tomas Baird molested two of his daughters, Jane Jane Doe 1 (JD1) and Jane J Doe 2 (JD2). Defendant was convicted of four counts of forcible sexual penetration (Pen. Code, §§ 269, subdivision (a)(5), 289, subd. (a); counts 1-4)<sup>1</sup> and five counts of forcible lewd and lascivious acts (§ 288, subd. (b)(1); counts 6-9) against JD1. Defendant was also found guilty of four counts of committing lewd and lascivious acts against JD2 (§ 288, subd. (a); counts 10-14). The jury also found true the allegation that defendant committed a sexual offense against more than one victim (§ 667.61, subd. (e)(4)). Defendant was given a total sentence of 150 years to life.

Defendant now claims on appeal as follows:

1. Insufficient evidence was presented to support his five convictions of violating section 288, subdivision (b)(1), as there was no evidence he committed the crimes with the use of force, duress, menace or fear of immediate injury.
2. Insufficient evidence was presented to support his four convictions of violating sections 269, subdivision (a)(5) and 289, subdivision (a) as there was no evidence he committed the crimes by means of force, violence, duress, or fear of immediate and unlawful bodily injury.
3. The trial court erred by failing to instruct the jury with an essential element of the crime of sexual penetration by means of force in violation of his federal constitutional rights to due process and trial by a jury requiring reversal of his four

---

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

convictions (counts 1-4) of violating sections 269, subdivision (a) and 289, subdivision (a).

4. The prosecutor committed misconduct under the state and federal constitutions by eliciting inadmissible evidence and questioning witnesses without a good faith belief that such evidence existed.

5. The trial court should have stayed the imposition of the section 290.3 fines for the counts it stayed pursuant to section 654.

There was substantial evidence presented to support defendant's convictions. Although the prosecutor committed misconduct, and there was instructional error, we find no prejudicial error. We will order that the section 290.3 fines be stayed for counts 6 through 9. We otherwise affirm the judgment.

## **FACTUAL AND PROCEDURAL HISTORY**

### **A. PROSECUTION'S CASE**

#### **1. *JD1'S TESTIMONY***

JD1 had just turned nine years old at the time of trial. In August 2012, JD1 went to stay with defendant in Moreno Valley for four days while her mother, D.W. (Mother), looked for a new place for them to live. While staying with defendant, she slept with him on the couch in the living room. They slept underneath an unzipped sleeping bag. She wore pajamas with a top and bottom.

On the first night that she slept at the house, she fell asleep. She woke up because she felt defendant put her hand on his "thing." She described it as his "stick thingy," and as being "weird" and "slimy." Doe pulled her hand away. It made her feel gross and

afraid. Defendant did not say anything and she said nothing back. Defendant then touched her “private.” She said that she had two private parts: the front that she used to “pee” she called “private part”; the back private area she used to “poop” she called her “butt.”

Defendant took JD1’s pajama bottoms and underwear off. He put his finger on the front of her private part. He flicked his finger back and forth. He did this for a couple of minutes. Defendant then put his finger inside where the “pee comes out.” This hurt her. Defendant did this only once but “for a period of time.” Defendant took his hands and placed them under her shirt and rubbed her chest.<sup>2</sup>

After defendant did these acts, he took out his cellular telephone. He typed on the screen of the phone, ““Don’t tell anybody,”” on it and showed it to JD1. JD1 was confused. He responded, ““Read it. Do what it says. Don’t tell anybody.”” The message made her feel scared that he was going to do something to her if she did tell. Doe slept the rest of the night with defendant on the couch. JD1 told no one what happened after the first night.

The second night, JD1 again slept on the couch with defendant. Defendant took off her pajama bottoms and put his finger into her private area like the first night. Defendant also put his two fingers in and out of her vagina for a few minutes. This hurt JD1. He then put his stick thing in her private. JD1 started crying because it hurt. Defendant told her to be quiet and that she would be okay. She thought that defendant

---

<sup>2</sup> On cross-examination, she also said that he put his “stick thing” in her private part the first night.

stopped because she was crying. Defendant also rubbed his stick thing between her butt cheeks.

The next morning, JD1 did not tell anyone what had happened because he had told her not to tell anyone and told her that something would happen to her if she did say anything. JD1 did not talk to anyone and did not call her mother.

On the third night, JD1 thought about sleeping somewhere else but believed something bad would happen to her if she did. She slept on the couch again with defendant. On that night, defendant rubbed her chest, put his finger and “stick thingy” in her private, and rubbed his “stick thingy” against her butt cheeks. It hurt again; she kept saying “ouch.” Defendant said nothing. This third incident lasted one hour. Again she thought he stopped because she was crying.

Sometime the third night, defendant told JD1, “Don’t tell your mom. Don’t tell anybody. Don’t tell your uncle or anybody.” JD1 was “very, very scared.” Defendant also told JD1 at some point, “I did it to [JD2] and now I’m doing it to you.” He told her it was a “family thing.” JD1 told JD2 that defendant was touching her in the wrong places. JD1 also told JD2 that defendant had said it was a family thing.

JD1 called Mother on the third night and told her she wanted to come home. JD1 told her she was hungry and had been bit by a spider. Sometime on the fourth night, Mother picked her up and took her home. At trial, she thought nothing happened the fourth night. JD1 later testified that the same things that happened the first three nights happened the fourth night. JD1 did not tell Mother what defendant had done because she

was afraid if she told her, defendant would do something to her. She also testified that he orally copulated her at some point.

Sometime later, JD1 told her best friend and her best friend's sister what defendant had done to her. Mother then found out about the abuse. JD1 was still afraid to tell Mother because she thought the police would get defendant and defendant would do something to her.

JD1 was interviewed by a woman from the police department.

JD1 did not initially tell the police that defendant's stick thingy went inside her private part because she was scared to say it. She did not say that he touched her chest under her shirt or that he kissed her on her private. She was embarrassed. She did not reveal that defendant typed a message on his cell phone.

## 2. *JD2'S TESTIMONY*

JD2 was 14 years old at the time of trial. She was a half sister to JD1; they had different mothers. JD2 lived with defendant in Moreno Valley during the summer of 2012. She recalled that JD1 would visit and stay the night. JD1 slept on the couch with defendant.

Defendant began touching JD2 when she was either the age of "late" 11 or "early" 12 years. The incidents occurred in a house in Moreno Valley. Most of the incidents occurred while she was sleeping on the couch with defendant. The touching started without any warning. Doe thought the molestations lasted a couple of months, until she was about 12 years old. Defendant also told her what he was doing was to keep the bloodline strong. The first time that defendant touched her she did not tell anyone

because she was embarrassed or thought she would get in trouble. JD2 thought it was her fault that defendant was touching her.

Defendant started by touching her breasts and vagina over her clothes with his hands. He touched her vagina over her clothes about five times. This first time he stopped because she got up and moved. She also said that she told him to stop and that she pushed him away.

Defendant then progressed to putting his fingers inside of her vagina. Defendant put his fingers inside her vagina on five or six separate occasions. It hurt and she was shocked. He would move his two fingers in her vagina. JD2 told defendant to stop. Defendant said nothing while doing this.

Defendant also put his finger on top of her vagina, skin-to-skin, probably more than five times.

Defendant put his penis inside her vagina between two to five times. JD2 was confused as to what was happening. This hurt and she cried. Defendant told her to stop crying. Defendant's tone was angry. Doe was sad and afraid. She did not tell anyone what was going on. She did not recall that anything ever came out of his penis.

One night, defendant told JD2 he wanted to talk to her in the bathroom. Once inside, he tried to get her to touch his penis. She tried to leave but he blocked the door. He masturbated in front of her. She told him she wanted to leave but he told her to be quiet. She was disgusted. He put his penis in her vagina while they were on the couch and the time they were in the bathroom.

Defendant had also performed oral sex on her. Defendant also had tried to grab her butt over her clothing when she was the ages of 11 and 12. Defendant had nibbled her ears while sexually abusing her.

Defendant would say to her ““Don’t tell.”” She threatened to tell her great-grandmother what he was doing and defendant told her, ““You better not.”” This made her scared. She was afraid he would hurt her. JD2 stated that defendant was tall and she was a little girl. Anything could have happened to her because of him being bigger than her.

When JD1 was staying at the house in August 2012, JD1 told JD2 that defendant was touching her. JD1 told her that defendant had told her that the molestation was a “family thing.” Defendant had said the same thing to JD2. JD2 told her not to let him do that to her.

JD2 was interviewed by police after JD1 disclosed that she was being abused by defendant.

At the interview with the police she did not reveal that defendant put his penis in her vagina because she was embarrassed and confused. She also did not reveal that he kissed her vagina or that they had sex in the bathroom.

### 3. *OTHER EVIDENCE*

While JD1 was at defendant’s house, JD1 called Mother and told her she wanted to come home because she had been bitten by a spider. Mother told her she needed a few more days and then she would get her. JD1 called her several more times asking to be picked up. JD1 stayed with defendant about four days. When Mother picked her up, JD1

said nothing about defendant touching her. JD1 later told her friends at school and Mother discovered it. Mother asked JD1 about the abuse. At first JD1 was scared and was crying. Mother immediately contacted the police.

Riverside County Sheriff's Detective Eric Holland was assigned to the Moreno Valley Police Department to investigate sexual assault and child abuse cases. Detective Holland set up interviews of JD1 and JD2. He observed the interviews.

Defendant was interviewed by Detective Holland and the interview was played for the jury. Defendant initially denied he molested JD1. He did not believe that she would make up that story. He then stated that something may have happened in his sleep because he was used to sleeping with his girlfriends. He may have been having a dream. It would never happen again because he would not sleep on the couch with her. When confronted about the allegations of JD2, he said "Oh." He said he did not know how that happened, and if it did it was accidental, but that it would not happen again. He also said that there was no reason for the girls to make up the allegations. He agreed to write them apology letters.

When Detective Holland said to him that it was not an accident and it did happen, he nodded his head yes. Also, when Detective Holland confronted him with the accusations made by JD2, his voice reduced to a whisper. He sat with his shoulders slumped and just look down at the floor. Defendant wrote letters to JD1 and JD2. He did not admit he touched them inappropriately, but was sorry if they felt that he done something wrong.

## DISCUSSION

### A. INSUFFICIENT EVIDENCE OF VIOLATIONS OF SECTION 288, SUBDIVISION (B)(1)

Defendant contends that insufficient evidence was presented to support his convictions in counts 5 through 9, the charges of violating section 288, subdivision (b)(1), the forcible lewd and lascivious acts against JD1. He insists that no evidence was presented he committed the acts constituting those counts through the use of force, violence, menace, duress or fear of immediate and unlawful bodily injury.

“In considering a challenge to the sufficiency of the evidence . . . , we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, 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.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] ‘A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.’ [Citation.]” (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

Here, counts 1 through 4 involved the digital penetration of JD1’s vagina. Counts 1 through 4 were based on the theory of forcible sexual penetration pursuant to sections 269, subdivision (a)(5) and 289, subdivision (a), which we will discuss in further detail, *post*. Count 5 was a violation of section 288, subdivision (b)(1), based on him placing

JD1's hand on his penis. Counts 6 through 9 were alternatives to counts 1 through 4 based on the digital penetration of her vagina with the use of force pursuant to section 288, subdivision (b)(1).<sup>3</sup>

Under section 288, subdivision (a), it is a crime to commit a lewd or lascivious act on a child under age 14 with the intent to arouse or satisfy the sexual desires of the perpetrator or the child. Any touch with the requisite sexual intent is a violation of subdivision (a). (*People v. Martinez* (1995) 11 Cal.4th 434, 440-441, 452.) Subdivision (b)(1) of section 288 prohibits the commission of such an act described in section 288, subdivision (a) ““by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.”” (*People v. Soto* (2011) 51 Cal.4th 229, 237.)

“‘[D]uress,’ as used in section 288(b)(1), means “‘a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.’” [Citation.]” (*People v. Soto, supra*, 51 Cal.4th at p. 246; see also *People v. Veale* (2008) 160 Cal.App.4th 40, 46 [Fourth Dist., Div. Two] (*Veale*)).<sup>4</sup>

---

<sup>3</sup> Counts 10 through 14 were digital penetration of JD2 by defendant.

<sup>4</sup> Here the jury was instructed in conformity with the statute. The jury was instructed for counts 5 through 9 that defendant was charged with committing a lewd or lascivious act by force or fear on a child under the age of 14 years, in violation of section 288, subdivision (b)(1). Pertinent here, the jury was instructed, “[I]n committing the act, the defendant used force, violence, duress, menace, or fear of immediate and unlawful

[footnote continued on next page]

Many courts have affirmed section 288, subdivision (b)(1) convictions based on duress where the victim was under 10 years old and the defendant was an older family member, even in the absence of explicit threats of violence. In *Veale, supra*, 160 Cal.App.4th 40, for example, this court found sufficient evidence supported the defendant's convictions of violating section 288, subdivision (b)(1), when the defendant molested his seven-year-old stepdaughter, even though there was no evidence that the defendant threatened her. (*Id.* at pp. 43-45, 47.) The court held, "[T]he evidence is sufficient to support a finding of duress, based on [the victim's] age and size; her relationship to defendant; and her testimony that she feared defendant and feared he would harm or kill her or mother if she told anyone defendant was molesting her. . . . It could be reasonably inferred that defendant threatened [the victim] implicitly or explicitly, based on her fear of defendant . . . ." (*Id.* at pp. 48-49.)

Further, in *People v. Cochran* (2002) 103 Cal.App.4th 8, 13 (*Cochran*), the defendant was a foot and a half taller than the nine-year-old victim and outweighed her by about 100 pounds. (*Id.* at p. 15.) The court found, "[t]his record paints a picture of a

---

*[footnote continued from previous page]*

bodily injury to the child or someone else." The jury was instructed, "The force used must be substantially different from or substantially greater than the force needed to accomplish the act itself. [¶] 'Duress' means the use of a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to cause a reasonable person to do or submit to something that he or she would not otherwise do or submit to. [¶] When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child and her relationship to the defendant. [¶] 'Menace' means a threat, statement, or act showing an intent to injure someone. An act is accomplished by fear if the child is actually and reasonably afraid or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it."

small, vulnerable and isolated child who engaged in sex acts only in response to her father's parental and physical authority. Her compliance was derived from intimidation and the psychological control he exercised over her and was not the result of freely given consent. Under these circumstances, given the age and size of the victim, her relationship to the defendant, and the implicit threat that she would break up the family if she did not comply, the evidence amply supports a finding of duress." (*Id.* at pp. 15-16, fn. omitted.) The court also stated, "as a factual matter, when the victim is as young as this victim and is molested by her father in the family home, in all but the rarest cases duress will be present." (*Id.*, at p. 16, fn. 6.)

Here, JD1 was nine years old and defendant, who was her biological father, was 33 years old. JD2 testified that defendant was tall and she was a little girl; JD2 was older than JD1 when defendant molested her. Further, JD1 had been entrusted to defendant's care while Mother tried to find new housing for her and JD1. JD1 reasonably considered defendant to be an authority figure and that she must comply with his demands. Like in *Veale* and *Cochran*, defendant, who was JD1's father, had a position of dominance and authority over young JD1. (*Veale, supra*, 160 Cal.App.4th at p. 49; *Cochran, supra*, 103 Cal.App.4th at pp. 15-16.) A reasonable jury could conclude that there was duress based on the relationship between JD1 and defendant.

Moreover, at the end of the first night, defendant told her not to tell anyone about what he had done to her. JD1 stated that this made her feel scared and that he was going to do something to her if she told anyone about what had happened. On the second night, defendant told her not to say anything to anyone. He also told her that something would

happen to her if she did say anything. Defendant again told JD1 on the third night not to tell anyone. JD1 expressed that she was “very, very scared.” “It could be reasonably inferred that defendant threatened [JD1] implicitly or explicitly, based on her fear of defendant . . . .” (*Veale, supra*, 160 Cal.App.4th at pp. 48-49.)

Defendant has argued that there was no evidence of duress as to count 5 because JD1 had been asleep when defendant placed her hand on his “thingy.” However, she testified that she was afraid when he did this, but said nothing. As stated, “‘duress,’ as used in section 288(b)(1), means ‘‘a direct or implied threat of force, violence, danger, hardship or retribution . . . .’’” (*People v. Soto, supra*, 51 Cal.4th at p. 246.) The jury could reasonably infer, based on their relationship and size, that there was an implied threat of violence or retribution from defendant if JD1 did not comply, and that she was immediately placed in fear of him when he put her hand on his penis. Further, defendant proceeded to take off her clothes, put his finger in her vagina and rub her chest. Rather than move after the first incident, she remained on the couch with defendant and did not resist. The duress that she was under caused her “‘‘to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.’’’” (*Ibid.*)

Defendant’s attempts to distinguish *Veale* and *Cochran* are unavailing. Defendant contends that based on one act occurring behind a locked door, there was evidence of a threat in *Veale*, unlike in this case. He claims in *Cochran*, it differed from this case because in that case, there was evidence of coercion and retribution, such as he told her she should not tell anyone because he would get in trouble and go to jail. As stated, *ante*,

we believe that it is reasonable to conclude that defendant's statements to JD1 that she was not to tell anyone was an implied threat that something could happen to her if she told anyone. Defendant's implied threat caused her to acquiesce in an act to which she otherwise would not have submitted. Substantial evidence supported his five convictions of violating section 288, subdivision (b)(1).<sup>5</sup>

B. INSUFFICIENT EVIDENCE OF VIOLATIONS OF SECTIONS 269, SUBDIVISION (A), 289, SUBDIVISION (A)

Similar to the preceding argument, defendant claims that there was insufficient evidence to support his convictions of violating sections 269, subdivision (a)(5) and 289, subdivision (a) in counts 1 through 4. Specifically, he contends there was insufficient evidence presented to support that the acts were committed by the use of force, menace, duress, violence, or fear of immediate or unlawful bodily injury.

Here, the information charged defendant with forcible sexual penetration within the meaning of sections 289, subdivision (a) and 269, subdivision (a)(5) in counts 1 through 4. Section 269, subdivision (a)(5) provides that any person who commits a violation of section 289, subdivision (a) is guilty of aggravated sexual assault of a child. Section 289, subdivision (a)(1)(A), provides: "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 on the victim

---

<sup>5</sup> Since we find there was ample evidence of duress, we need not address the other factors, e.g., force, menace, violence, and fear of immediate or unlawful bodily injury, supporting a conviction of section 288, subdivision (b)(1).

or another person shall be punished by imprisonment in the state prison for three, six, or eight years.”

As recognized by defendant, the acts in counts 1 through 4 were based on the same conduct as counts 6 through 9. As set forth in detail, *ante*, there was ample evidence of duress based on the relationship between defendant, his implied threats to her that she should not tell anyone or something bad would happen to her, and his position of authority. We reject that there was insufficient evidence presented to support his convictions in counts 1 through 4.

### C. INSTRUCTIONAL ERROR

Defendant contends that the trial court erred by failing to instruct the jury for the sexual penetration crimes (§§ 269, subd. (a), 289, subd. (a)) in counts 1 through 4 that they had to 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. We set forth the elements of the crime, *ante*.

A trial court has a sua sponte duty to instruct on all general principles of law that are closely and openly connected with the facts of the case. (*People v. Ervin* (2000) 22 Cal.4th 48, 90.)<sup>6</sup> In a criminal case, the general principles of the law include all the elements of the charged offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.)

The jury was instructed as to the elements of section 289, subdivision (a) with CALCRIM No. 1100 as follows: “One, the defendant committed sexual penetration with

---

<sup>6</sup> Defendant did not object to the instructions. However, it is clear that the trial court must instruct the jury on the elements of the crimes.

a foreign object 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 the crime of sexual penetration with a foreign object, please refer to the separate instruction that I will give you on that crime.” They were also instructed, “To prove that the defendant is guilty of sexual penetration with a foreign object, the People must prove the following elements: [¶] 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, at the time of the act, the other person was under the age of 14 years and was at least ten years younger than the defendant.” [¶] ‘Sexual penetration’ means penetration, however slight, of the genital or anal openings of another person for the purpose of arousal or gratification.”

The trial court did not instruct the jury that they had to find within the meaning of section 289, subdivision (a) that the acts were committed through the use of force, menace, violence, duress or in fear of immediate or unlawful bodily injury. Such failure to instruct on an element of the crime was error.<sup>7</sup>

Omission or removal of a single element from the jury is not “a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal . . . .” (*People v. Flood* (1998) 18 Cal.4th 470, 503; *People v. Marshall* (1996) 13 Cal.4th 799, 851-852.) Accordingly, we may affirm the jury’s verdict despite the error if it

---

<sup>7</sup> The trial court should have instructed the jury with CALCRIM No. 1045.

appears beyond a reasonable doubt that the error did not contribute to the jury's verdict. (*Flood*, at p. 504; see *Chapman v. California* (1967) 386 U.S. 18, 24.) In particular, we affirm "where an omitted element is supported by uncontroverted evidence" (*Neder v. United States* (1999) 527 U.S. 1, 18) or if, at the end of an examination of the record, we can conclude "beyond a reasonable doubt that the jury verdict would have been the same absent the error . . . ." (*Id.* at p. 19.)

Initially, counts 1 through 4 were based on the same conduct that constituted counts 6 through 9. Here, the prosecutor argued, "[s]o the difference between the counts that we've just discussed with [JD2] and these counts here pertaining to [JD1] deal with the act of force or fear of duress." Also stated, "Some of you may be thinking, why different counts for certain acts? Right? The defendant's conduct is encompassed with different types of charges. . . . But when he committed these acts, it qualifies for more than one charge, as simple as that."

The jury was instructed as to counts 6 through 9 that they must find those counts were committed through the use of force, violence, menace, duress or fear of immediate and unlawful bodily injury. It is inconceivable that the jury would have found that there was duress for counts 6 through 9, as we discussed *ante*, but not found duress for counts 1 through 4. The jury here necessarily found duress for these counts.

Further, we have already discussed that there was strong evidence of duress for counts 1 though 4. As such, any conceivable error in omitting the element of force, violence, menace, duress or fear of immediate and unlawful bodily injury for a violation of sections 269, subdivision (a) and 289, subdivision (a) was clearly harmless.

D. PROSECUTORIAL MISCONDUCT

Defendant contends that the prosecutor committed prejudicial misconduct when he questioned JD1 and JD2 as to whether defendant performed oral copulation on them when such evidence was not elicited during the preliminary hearing or in the pretrial interviews of the two girls. As such, the prosecutor did not have a good faith belief that such evidence existed. Moreover, if the prosecutor did have a good faith belief that such acts occurred, the prosecutor had a duty under Evidence Code section 1108 to disclose such information 30 days prior to trial.

1. *ADDITIONAL FACTUAL BACKGROUND*

During JD1's testimony, the prosecutor asked about what had happened between her and defendant. The prosecutor asked JD1, "Did he ever kiss your private parts?" JD1 responded, "Yes." The prosecutor stated, "He did?" and she nodded her head in the affirmative. The prosecutor asked, "When did that happen?" JD1 responded, "A different time." The prosecutor inquired, "Okay. Anything else happen that night?" JD1 responded, "The different time or the first time?" The prosecutor clarified, "The first time." JD1 responded, "No."

On redirect, the prosecutor asked JD1, "[w]hen did your dad kiss your private part? What day?" JD1 stated she could not remember. She was asked, "How did he kiss your private part?" She responded, "With his tongue." The following exchange occurred:

“[Prosecutor:] With his tongue. Was it your front private part or your butt?”

[JD1:] My private part.

[Prosecutor:] Did his tongue go on top of your private part?

[JD1:] In.

[Prosecutor:] In your private part?

[JD1:] Yes.”

They then discussed her body position and whether they were under covers. The prosecutor asked how defendant put his mouth on her private part. She opened her mouth and stuck out her tongue. JD1 stated that her legs were open and her pants were off. It felt weird and embarrassing.

During the direct examination of JD2, the following exchange occurred between her and the prosecutor:

“[Prosecutor:] Just that time? Did he ever put his mouth on your body?

[JD2]: Yes.

[Prosecutor:] Tell me about that.

[JD2]: It was on my vagina.

[Prosecutor:] Where did that happen?

[JD2]: In my room.”

JD2 explained it happened during the night and she was “very weirded out” by it.

Detective Holland testified that JD1 and JD2 never said anything before trial that defendant had performed oral sex on them. We have reviewed the preliminary hearing transcript, and there is no mention of oral copulation.

During discussion of the instructions, the trial court inquired if there should be any instruction regarding the uncharged acts of oral copulation and sexual intercourse.

Defense counsel objected because the information was disclosed for the first time at trial. Further, it was distracting and misleading to ask the jury to determine whether these uncharged acts occurred. As set forth, *post*, the jury was instructed on this evidence.

## 2. STANDARD OF REVIEW

“The standards governing review of misconduct claims are settled. ‘A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such “unfairness as to make the resulting conviction a denial of due process.”’ [Citations.] ‘Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.’ [Citations.]” (*People v. Friend* (2009) 47 Cal.4th 1, 29 (*Friend*)).

## 3. WAIVER

Respondent contends that defendant has waived any claim of misconduct by failing to object to the questioning by the prosecutor.

““It is improper for a prosecutor to ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief that such facts exist.”” (*Friend, supra*, 47 Cal.4th at p. 80.) ““But if the defense does not object, and the prosecutor is not asked to justify the question, a reviewing court is rarely able to determine whether this form of misconduct has occurred. [Citation.] Therefore, a claim of misconduct on this basis is waived absent a timely and specific objection during the trial.” [Citation.]” (*Ibid.*)

Here, as noted, the prosecutor asked JD1 and JD2 if defendant had orally copulated them. It is undisputed that such information was never disclosed to the

defendant prior to trial, and there are no records supporting that such claims had previously been made by JD1 and JD2. Defendant did not object. It appears that the trial court would have sustained the objection since this evidence was never disclosed and the trial court could have admonished the jury immediately. However, defendant makes an additional claim that if we find that he waived his misconduct claim, that he received ineffective assistance of counsel. We will review the claim on its merits.

#### 4. MISCONDUCT

If a prosecutor has evidence, which provides a good faith belief in the existence of a preliminary fact, then the prosecutor is entitled to question the witness in an attempt to establish a foundation for further evidence related to the good faith belief. (*People v. Lucas* (1995) 12 Cal.4th 415, 467; see also *People v. Mooc* (2001) 26 Cal.4th 1216, 1233.) The requisite “good faith” can be inferred from the record based on the factual specificity of the prosecutor’s questions which can show “they were based on information obtained during the [prosecutor’s] review of records available to the defense.” (*People v. Hughes* (2002) 27 Cal.4th 287, 388.) ““It is, of course, misconduct for a prosecutor to “intentionally elicit inadmissible testimony.” [Citations.]’ [Citations.]” (*People v. Smithey* (1999) 20 Cal.4th 936, 960.)

Here, the issue is complicated by the fact that Evidence Code section 1108 requires the disclosure of other sexual acts 30 days prior to trial. Evidence Code section 1108, subdivision (a) provides that “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.” Subdivision (b) of Evidence Code section 1108 provides, “In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal Code.” Penal Code section 1054.7 requires disclosure at least 30 days prior to trial. No such notice was given to defendant.

If we were to determine on the record before this court that the prosecutor had a good faith belief that oral copulation had occurred, as noted by defendant, the People had an obligation under Evidence Code section 1108 to disclose the information within 30 days of trial. If we were to determine that the prosecutor did not have a good faith belief that such acts occurred, then misconduct occurred. The record does not show that JD1 and JD2 volunteered the information during trial. Rather, the prosecutor asked pointed questions as to whether defendant had put his mouth on them; evidence that was not provided prior to trial. Whether the prosecutor intended to introduce inadmissible testimony, or did not have a good faith belief as to the testimony to be provided by JD1 and JD2, defendant has shown that there was misconduct.

##### 5. *PREJUDICE*

However, we find the prosecutorial misconduct does not warrant reversal. “A defendant’s conviction will not be reversed for prosecutorial misconduct [under state law], however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.]” (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Further, as previously stated, in order to require

reversal under federal law, the misconduct must so infect the trial with unfairness that the resulting conviction was a denial of due process. (*Friend, supra*, 47 Cal.4th at p. 29.)

Under either standard, there was no prejudice. Here, the evidence elicited by the prosecutor was only a small portion of the evidence. Further, the evidence was certainly no more inflammatory than the evidence that defendant had sexual intercourse with his own daughters. Additionally, the prosecutor advised the jurors that “[a]nd those extra things that they talked about here in court, they’re not charged. You only need to focus on the touching of the vagina, the touching of the stick thingy. It’s not difficult, folks. It’s very straightforward.”

In addition, the jury was instructed, “The People presented evidence that the defendant committed the crimes of rape and oral copulation that were not charged in this case. . . . You may consider using this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses.” They were also instructed, “If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of any or all of the crimes charged in this case. . . . Do not consider this evidence for any other purpose.”

Based on the instructions given to the jury, and the overwhelming evidence of defendant’s guilt, the misconduct did not so infect defendant’s trial to render it fundamentally unfair, and it is not reasonably probable that a result more favorable to defendant would have been reached in absence of the misconduct.

D. STAY IMPOSITION OF FINE

Defendant contends that the trial court should have stayed imposition of the fines imposed pursuant to section 290.3, for the four counts of violating section 288, subdivision (b) (counts 6 through 9) because the trial court stayed the sentences on these counts.

At sentencing, the trial court imposed consecutive 15-years-to-life sentences on counts 1 through 5. The trial court stayed the sentence on counts 6 through 9 because they were based on the conduct in counts 1 through 4. As to counts 10 through 14, defendant was given five consecutive 15-years-to-life sentences. The trial court then imposed a fine of \$6,800 pursuant to section 290.3.

The probation report stated, “Pursuant to Penal Code Section 290.3 (2010-2012), the defendant should also be punished by a fine of \$300.000 for the first conviction and \$500.00 for each subsequent conviction for specified sex offenses. Based on the number of counts, the total calculated amount would be \$6,800.00 with the penalty assessments.”

Section 290.3, subdivision (a) provides in part: “(a) Every person who is convicted of any offense specified in subdivision (c) of section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars (\$300) upon the first conviction or a fine of five hundred dollars (\$500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine.” A fine imposed pursuant to section 290.3 has been found to be punitive in nature. (See *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248 [finding section 290.3 punitive and

therefore subject to the prohibition against ex post facto laws].) Punitive fines cannot be imposed on a sentence stayed pursuant to section 654. (See *People v. Sharret* (2011) 191 Cal.App.4th 859, 865.)

The trial court stayed the sentence on counts 6 through 9. As such, it could not impose the four \$500 section 290.3 fines for those counts. We will order the fine imposed pursuant to section 290.3 reduced to \$4,800.

**DISPOSITION**

We order that the minute order from sentencing on February 21, 2014, be modified to strike the fines imposed pursuant to section 290.3 on counts 6 through 9. Further, we order that the abstract of judgment be corrected to reflect that the fines imposed pursuant to section 290.3 totaled \$4,800. The clerk of the Riverside County Superior Court shall forward the amended abstract of judgment to the California Department of Corrections and Rehabilitation. We otherwise affirm the judgment in its entirety.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER  
J.

We concur:

McKINSTER  
Acting P. J.

KING  
J.