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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS GARCIA SANCHEZ,

Defendant and Appellant.

F067975

(Super. Ct. No. VCF263788)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

William A. Malloy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Alice Su, Deputy Attorneys General for Plaintiff and Respondent.

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\* Before Kane, Acting P.J., Peña, J. and Smith, J.

Defendant Carlos Garcia Sanchez was charged with multiple counts of molesting his stepdaughter (victim) over the course of many years. A jury convicted him of 21 counts of a lewd and lascivious act on a child under 14 years of age (Pen. Code, § 288, subd. (a);<sup>1</sup> counts 1-21) and one count of a lewd and lascivious act on a child of 14 or 15 years of age when the defendant was at least 10 years older than the child (§ 288, subd. (c)(1); count 22). The jury found true the special allegation attached to counts 7 through 14 that defendant had substantial sexual conduct with victim while she was under 14 years of age (§ 1203.066, subd. (a)(8)). The trial court sentenced defendant to 48 years 8 months in prison. On appeal, defendant contends (1) the prosecutor committed prejudicial misconduct when she argued the meaning of reasonable doubt, (2) a restitution fine should be stricken because the trial court erroneously imposed it, and (3) another fine should be stricken because the trial court did not orally pronounce it. We strike the two fines, order the abstract amended, and affirm the judgment in all other respects.

## **FACTS**

### ***Victim***

Nineteen-year-old victim testified that she was eight years old when her mother (mother) married defendant. Victim grew up with mother, defendant, and two brothers. Defendant started touching her when she was about five years old and continued to touch her until she was about 17 years old.<sup>2</sup> She could not remember the exact date he began

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

<sup>2</sup> Victim thought defendant began touching her when she was about five years old because her six-year-old brother had touched her when she was five years old. She thought it was a game and did not understand it was wrong. When mother caught them doing it, the brother got in trouble. Victim remembered wondering why her brother was getting punished when defendant was doing the same thing to her.

touching her, but she was sure he was touching her by the time she was eight years old. The touching began while they lived in Fresno, where they lived until she was nine years old. In third grade, she watched a video at school about an uncle who touched a girl, and it reminded victim of her home. When she was about nine years old, the family moved to Tulare, where they lived in three different houses, one of which was on [street name]. In Tulare, defendant continued to touch her. Throughout the whole period, he touched her breasts, vaginal area, and buttocks with his hands and mouth on a daily basis. He would touch her when he got off work or while people were sleeping or doing other things. The touching occurred in victim's bedroom, her parents' bedroom, or in the attic at the [street name] house. Sometimes defendant took off her clothes or he asked her to take them off. Defendant would tell her she could not tell anyone. He usually touched her skin, but sometimes he touched her over her clothing. A couple of times, when he was touching her vaginal area, he caused her pain. She did not know if he penetrated her. She estimated that he touched her breasts with his mouth at least 100 times. He touched her vagina with his mouth daily, including before she was 14 years old. Defendant also asked her to touch him. She touched his penis twice when she was 14 or older when they were on her parents' bed.

On one occasion, when victim was 12 or 13 years old, she was home from school sick. Defendant came home from work early and told her to take a shower. As she lay on the bed naked on her stomach, defendant got on top of her buttocks. She did not think he was wearing clothes. He kept telling her to pick up her buttocks, but she was scared and told him she was sick. She thought he wiped his penis off on her when he was done. A few weeks after this incident, victim told mother that defendant kissed her lower stomach. Mother seemed sad and she vomited. But she did not do anything or call the police. Instead, they went to the church once for counseling by a nun. Victim did not tell the nun more than she had told mother. Victim was present for about 10 minutes, then she waited in the hallway for mother and defendant for about 30 minutes. Afterward,

mother would sometimes come into victim's room to ask her if she was okay and if there was anything she needed to tell her. Defendant stopped touching victim for about two weeks. When he started again, she did not tell mother. She felt there was no point because nothing had changed, and she was only 12 or 13 years old and did not really understand what defendant was doing to her. She was not really able to explain it. The touching depressed her and caused her to pull her hair out. She did not know why she had not talked to her mother about the touching before she was 12 or 13 years old. She did tell mother not to marry defendant, but mother ignored her.

Victim tried to stop the touching when she was 14 years old. She decided she was not going to put up with it anymore, but it was difficult having to push defendant away every day. He would get mad and she felt it was the reason he was mean to her brothers and mother. He was mad all the time because she would not let him touch her. Sometimes she would give in. But by the time she was 17 years old, she was "completely done" and was not going to take it anymore, so she "just stopped being home."

When victim was 17 years old, she talked to a counselor. When mother picked her up from counseling, victim told mother she had told the counselor about the touching and the counselor was going to report it. Mother told defendant it was going to be reported. When victim got home that evening, mother and defendant were up talking. There was a fight and a lot of yelling. Defendant said it was victim's fault too.

The police came six months to one year later, right before victim's 18th birthday. Victim had all her things packed because she was already planning to move out the day she turned 18. Mother and defendant had kicked her out of the house.

Victim testified that the touching had made her life really hard. She said she hoped defendant would kill himself and go to hell.

### ***Mother***

Mother testified that one day victim stayed home sick. She was about 14 years old and not in high school yet. They were living on [street name], where they lived for four years. When mother came home that day, defendant was rubbing victim's back. Mother felt uncomfortable because victim was not a little child anymore. Shortly after that, victim came to her. Victim's demeanor was sad. She said defendant started kissing her down her neck and toward her breast. Hearing this made mother sick and she vomited in the garage. Mother was shocked by even this little bit of information. Mother could not handle it, and after that, victim closed up to her and would not tell her anything. Mother did not know the extent of the situation. She confronted defendant and he said he was just giving victim a massage. He did, however, admit that he started having strange feelings he knew were not right. The three of them went to a counselor at church and mother thought everything was going to be okay, but it was not okay. She tried to watch victim closely. She always tried to keep her safe, but she no longer trusted what was going on in her house. Victim started having behavioral problems in high school, so she began counseling. Victim was coming home in the middle of the night and causing problems at home. Mother served her with an eviction notice. She was supposed to move out when she turned 18. Mother did not understand the extent of the situation until defendant was arrested. Then she realized everything.

### ***The Investigation***

Officer Adney received a report of suspected child abuse from Child Welfare Services after they received a tip from a mandated reporter. On February 12, 2012, he responded to the family's house, where he contacted mother and victim. Victim told him defendant started touching her after an incident with her brother. She said she reported defendant to mother when she was 12 years old because she was mad at defendant. After speaking with them, Officer Adney notified Detective Ramirez.

Detective Ramirez spoke to victim and mother at the police department the same day. He then spoke to defendant. He and defendant were alone in an interview room and the interview was recorded. The video recording was played for the jury.

During the interview, defendant initially explained that victim threatened to get him in trouble by telling mother that he was touching her unless he bought her clothes and other things. She was always rubbing herself on him and he would push her away. He was getting tired of it and could not live that way.

Defendant agreed victim had told mother once before that he had touched her. It was about four years earlier. They had been lying on the bed together and when he turned to kiss her good night on the cheek as usual, he somehow kissed her on the upper chest. She was fully clothed. Then she told mother that he kissed her or tried to kiss her inappropriately. That was when he realized she was trying to make it look like he was initiating something with her. Victim was always touching him, even in front of the family, and they would tell her to stop. She would insist on getting kisses from him and walking on his feet and getting him to hold her more tightly. She did these things in front of the family. When mother confronted defendant after victim's report, he admitted to her that he was having inappropriate thoughts about victim. He told Detective Ramirez, "Well it was, was, it was kind of bad yeah[,] it was sexual things but nothing ever happened." They went to church for counseling, where defendant was told that sometimes these things happen, but he and victim should not be lying next to each other because she was a minor.

Defendant told Detective Ramirez he never had sex with victim and she was trying to get him in trouble because he and mother were kicking her out of the house.

Detective Ramirez asked defendant when this first started. Defendant said it was just this incident he had described. Nothing else really happened. He felt he was being accused of having sex with victim, but he never did. He said maybe they touched a little

bit, “like hugging and stuff”; “maybe [he] did hold her in a twisted way maybe”—  
“maybe a wrong way not as a daughter ....”

Victim would always threaten to tell mother that defendant was touching her. She said mother would believe her, and defendant was afraid mother would believe her and he would end up in prison. He thought he would not win because victim was a child.

Detective Ramirez told defendant to tell him about the times he put his mouth on victim. Defendant repeatedly denied doing it. He said he was not going to admit something he had not done. He said he was trying to live his life properly. He said, “I know that that was wrong and maybe it was a little bit of a twisted feeling that I have but it wasn’t like I’m forcing her or whatever. I’m kind of ... and I was never initiated nothing. But nobody is going to believe that.” When Detective Ramirez asked him what victim was threatening to tell mother, he said, “I don’t know but one time you know [victim] was laying in my bed too and I guess my hand was ... I was just laying watching the TV like that and she was laying on it and it was not like I put her in my hand or she got on you know or my hand was already there and she got on it and [mother] would come in and she would not even say nothing but she was like hugging me like that but her private was kind like around here and then when I want to pull it out she like ‘unum no’ like she not even going to let her move it you know and I’m like okay did I ... that she didn’t want me to move my hand. She like oh you’re touching I mean that wasn’t thoughts come through my head like why did I do that I one time tried to push her off and she got mad and she went and told her uh that I push it and I touch her butt or something when I was pushing her off the bed. I said why do you think I push her out of the bed and then she goes ‘[victim] just get out of this room and go in your room’ and she got all mad.” This happened four or five years earlier, sometime before the kissing incident he described. He told Detective Ramirez, “[Y]ou know it did uh it had a little bit of affect [*sic*] of feeling it wasn’t like a daughter feeling that I have you know next to me when those feelings were there but its [*sic*] not like I said it—I know that it’s wrong but its [*sic*]

not like ... at first I didn't think about it but when she exposed herself to—to be at a certain point I'm like oh shit nobody is going to believe my side I mean.”

When Detective Ramirez continued to press him to explain when the touching started, defendant stated: “I can't remember—I think that was it. I mean we have a few you know ... it was kind of weird you know uh she would spend a lot of time in my bed and stuff and I don't know why she was feeling like that it just I couldn't—I guess I could [have] refused maybe that—maybe I didn't want too [*sic*] you know. [¶] ... [¶] [B]ut its [*sic*] like—so now I'm fucked because I didn't ... I guess my responsibility should be me telling my wife what she's doing and I didn't.” He estimated that victim was 13 or 14 years old when this started. Detective Ramirez said victim had told him she was 12 years old when she approached mother. Defendant said victim was probably right.

Detective Ramirez asked defendant what he and victim would do in the attic of the house on [street name]. Defendant said they did nothing. With prodding, he eventually said, “I told you it was twisted feelings that I have you know.” He added, “[Y]ou know and its [*sic*] like the way we were hugging and stuff it would be—you know it was it was a little bit of a weird thing going on ....” He said he did not want to say what they did in the attic because he thought it was bad and he would get in trouble.

Defendant said they never had sex. He would feel her body a little. He did not think victim had ever seen his penis, although he did ask her to put her hand on it one time when they were lying in bed under the blanket and watching television when she was 12 or 13 years old. She touched him, then moved away when mother came into the room. He felt kind of bad asking her to do it, so he did not ask again.

Defendant explained that victim was getting older and going through a stage, and she needed attention. She would tell him he had already touched her many times and he would get in trouble anyway.

Detective Ramirez pressed defendant about what happened in the attic. Defendant admitted he was holding back information. He said “those things it didn’t happen like all the time.” But once he and victim did those things, she would bring it up if something did not go her way. He said victim wanted to be in the attic, and if she did not want him to touch her, she would have told someone when she came down. He admitted that the worst thing he did to her was touch her vagina with his mouth, which happened only once. He also touched her breasts with his mouth. Victim told him to “touch this and that.” The last time he touched her inappropriately was about four months earlier.

Defendant admitted he felt bad about what happened and would apologize to victim if he could. He said, “Well I mean I ... I admit to you and ... what she said you know its true uh you know but it is not like ... she’s been living this kind of hell kind of life all this time.” She would tell him it was okay to do it, but then when she did not get her way she would threaten to tell mother. He told Detective Ramirez, “[B]ut I mean I know I shouldn’t [have] done that.”

### ***Defendant’s Calls to Mother***

After defendant was taken into custody, he made telephone calls to mother from jail. Three recorded calls were played for the jury.<sup>3</sup>

In the first call, defendant told mother: “Hey listen, I don’t have too much time to talk to you, I want you to know that I will spend the rest of my life fucking kissing up to you and forever, and I mean the rest of my life. I cannot take this anymore for [victim] too, she will not have to move, I will make it up to her, she will move whenever she will move with her money with money and everything right so she will always have a place to stay if not she can come back home she will always be welcome home stuff like that, I mean every fucking second of the rest of my life I will make it up to you guys. I know

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<sup>3</sup> The transcripts of each call bear the date May 31, 2013, but the second call references what defendant said to mother the previous day, and the third call also seems to have occurred on a later date.

that it's gonna be hard for you to trust me I will never mistreat her again, never ever again, I have a plan, um the only way I am gonna get out of here is if you guys drop the charges and, and she will probably have to sit, you know meet me half way of whatever happens it was never a threat, it was never like that so it's just, just have her meet me half she doesn't have to say anything, she just has to whatever happened happened, there was no threat, no nothing just that it just happened but she has like to meet me half way and if she accepts that then that would be good that because the judge will accept it better because if not she is gonna say, you know it's just you but it's not, but anyways tell her that I will never say a bad word to her for the rest of her life, never or cuss word, nothing against her like mean way or some um I have an idea, um whoever you talk to, tell them that I will explain things better to them, I was thinking about, you need to write things down ....”

He told mother to get some money, get a good lawyer, and have him drop the charges against him. He told her, “[T]his is hell and shit but if the reason why we want to drop the stuff is that the family, this big mistake, this big thing I think is gonna bring us closer than ever and be the happy family that it should be. I admit that I fuck up and all that, like I said I don't have enough words to say that right now but I need this opportunity, I need this fucking chance, I cannot deal with this anymore ... I really want to repair my fuck up and as soon as I get the opportunity I can put things back together and I'm telling you I want to spend the rest of my life fucking making it up to you I will be your fucking slave for life, I mean I need this opportunity and [victim] will never hear attitude from me I will never mistreat her, tell her stupid none of that ever ever again ....”

Mother said, “[W]ell I mean they said you confessed.”

Defendant said, “[Y]eah well I admit to, to, to what I, you know but I didn't confess, you know its [*sic*] whatever she said, yes, it did happen but like I said there was no threat or anything, it was volunteer, I mean not volunteer but it was, we both did it and it just happened, you know, it wasn't like I forced her or nothing we just, you know.”

Mother said, “[B]ut this happen when she was 5.” Defendant repeatedly denied this, and then repeated that he would be mother’s slave for the rest of her life and he would make it up to her. He said he could not explain right now, he just wanted them to drop the charges against him. Mother said she did not think victim would agree.

In the second telephone call, mother informed defendant that victim did not want to have the charges dropped. Defendant said there was no way he could prove victim was doing drugs. Then mother said he had done things with victim when she was young, before she was on drugs. He said, “[Y]eah well like I said, there is nothing I can do about that right now, so just if you, you know, I don’t want to keep wasting money for you out there so I’ll just you know whatever I gotta do what I gotta but but I’m saying, if I’m gonna do time I know I’m gonna end up in Mexico.” She told him he could not come back to her even if the charges were dropped. She said he “messed up” and she had told him so many times. He said, “I know, I know and like I said, well listen, I gotta go, just, there is nothing I can do from here ....” He advised her on property she could sell to make some money.

In the third telephone call, defendant told mother, “[L]isten, in the court I’m gonna admit what I did and it was like 4 times that we did it and [victim] was always willing to do it and she told me that she was never gonna tell you and all the stuff from when she was young and stuff that never happen, I started touching her when she was all over me and stuff but I’m gonna need you have at least you in court so you can testify like, ‘yeah she was all over him all the time, she would sit on the recliner’ I mean, just the truth, I don’t want you to lie for me, I don’t want you to lie for her, and I think that she got threaten by her guy so you need to talk to him, I think that they told her, you know, ‘if you want to be in a gang with us you better fucking send that guy something’ besides that she has something to do but I’m gonna admit to what I did and like I said I’m really sorry but I felt that she had me by the balls, that she couldn’t because every time she would say ‘well come in’ and I just didn’t want to deal with it and that’s why we always figured and

I would always say ‘no lets [sic] give her the jeans, lets [sic] give her the purse, lets [sic] give her everything’ and like she knew what she was doing [mother], but she has evil mind but[.]”

Mother said she did not understand because she had asked him before and he said nothing happened.

He responded, “I know [mother] and I’m sorry but like, you know like when she was like when she would be laying down with me and stuff, she would be like rubbing all over me and stuff and it was fucked up feeling that I couldn’t help it, like like she knew what she was doing.” He said he knew he had lied to mother. He said, “I know, but I mean how can I, if I would have said no to [victim] she would have said the same thing that she is doing right now, well he made me, I never made her, know can I make her I mean she would, if she wasn’t willing to do it as soon as you asked her she would have told you right there. She wanted to do it the whole time, it’s just that if I would have say anything to you and get her, try to get her in trouble, she would have done the same thing that she is doing right now.” He told mother he just wanted her to testify that victim would sit on his lap when he was watching television on the recliner. What he did was wrong, but victim knew what she was doing. Mother told him the counselors were saying children do that because they feel affectionate. She told him saying that in court would turn against him.

### ***Defendant’s Letters to Victim***

While in custody, defendant wrote victim three letters. In the first, he apologized and asked forgiveness for all the bad things and the “twisted feelings” and all the “weird things” they went through. A book he was reading inspired him to let her know what his heart was feeling. He said he hated the way things were at the moment and he wished none of this had ever happened. He said he missed everyone. He was writing the letter so he could move on with his life and with God. He loved victim as a daughter and the

letter had nothing to do with court. He had been reading books and the Bible. He had been making crosses and dream catchers. He hoped she would write back.

In the second letter, defendant told victim that he had been in court that day and things looked really bad for him. He could spend the rest of his life in prison and he was overwhelmed by the thought. He asked her if she would call the district attorney and explain that she said he had done these things because she was really upset and just wanted to get him in trouble after he and mother quit buying her things and told her to move out. He said this was the only thing that would help his case. She should say that not everything she initially said was the truth. He told her he had admitted that everything started at the [street name] house and they did some things he knew were wrong and that he kissed her body “on a wrong way and that the wors[t] time was in the attic and that after that there was like 3 times that [he gave her] massages and [he] got twisted feelings.” His attorney told him that even if everything went his way, these admissions alone would result in eight to 12 years in prison, and he might be deported. If she would call the district attorney, they might not go to trial and he might get a deal. If they did call her to testify at a trial, he hoped she would agree with what he said. If she did not do anything, he would most likely spend his life in prison. He thanked her for helping him if she could, and he asked her not to tell the district attorney about this letter because he did not want it used against him to show he was forcing her to do something against her will. He asked her to write back and he told her he loved her.

The third letter was dated August 13, 2012.<sup>4</sup> Defendant told victim he would show her his appreciation but he would not come around if she did not want him to. Things would be however she wanted them to be. If she helped him, he would owe her his life. He had learned his lesson and he would do whatever he could to help the family. Things were currently bad, but they could get much worse if he went to prison. The less

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<sup>4</sup> The other two were undated.

time he served, the sooner he could show the family that he wanted to make things up to them. He asked victim to talk to mother about whether she was going to help him. He would be speaking to mother on the telephone.

### ***Defense Evidence***

Defendant was the sole defense witness. He testified that he touched victim in a way he felt was inappropriate when she was 14 years old, but not before. He regretted what he did with her.

Defendant explained that victim blackmailed him by telling him that if he bought her certain expensive things, she would be good to him and not say anything to mother. He knew he would be in trouble if she said something, so he bought her the things. Once, she told him that if she did not get a new smart phone, she would tell her therapist that defendant touched her when she was little and he was going to get in trouble.

Defendant stated he was really drunk when Detective Ramirez was interviewing him.

Defendant admitted sending the letters to victim. His previous public defender told him the only thing that would help him was if victim dropped the charges. When defendant spoke to mother, she told him victim talked to the district attorney and wanted to drop the charges, but the district attorney told her it was too late. Defendant was desperate because he was looking at the rest of his life in prison, so he sent the letters asking for help from the only person who could make the difference. He was not trying to threaten or intimidate victim or mother.

On cross-examination, defendant agreed he was saying for the first time that victim was definitely at least 14 years old when he touched her. If he said otherwise in his interview with Detective Ramirez, it was because he was drunk and did not do the math counting back to victim's age. He was drunk even though he did not tell anyone he was drunk.

Defendant admitted he touched victim inappropriately—he put his mouth on her vagina, put his mouth on her breasts, and had her touch his penis once. He did not necessarily blame her for not stopping the touching; both of them were involved. Although he told Detective Ramirez about victim’s coming on to him and rubbing him all over, he agreed that he was the adult and that he knew what he was doing was wrong. He felt really bad. He said, “It’s embarrassing, but it happened.” He sent letters to victim because he found out she accused him of “all these times” and her story needed to match what actually happened.

### ***Rebuttal Evidence***

Detective Ramirez was trained in dealing with people under the influence of alcohol. He was familiar with the signs and symptoms of alcohol consumption. He spent over an hour with defendant during the interview and at no time did he suspect that he might have been under the influence. He did not smell of alcohol, he was steady on his feet as they walked 30 to 40 feet together, and he did not slur his speech.

## **DISCUSSION**

### **I. Prosecutorial Misconduct**

Defendant contends the prosecutor committed misconduct and violated his due process rights when she used an American flag analogy to explain reasonable doubt to the jurors. The People respond that it is not reasonably likely that the jurors applied the flag analogy in a way that lessened the prosecutor’s burden of proof.

#### **A. Facts**

The trial court instructed the jury as follows:

“A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove the defendant guilty beyond a reasonable doubt.

“Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true.

The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt.

“In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial.

“Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal, and you must find him not guilty.

“Evidence is the sworn testimony of witnesses and exhibits that were admitted into evidence. Nothing the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Also their questions during the trial are not evidence. Only the witness[es]’ answers are evidence.”

After the court finished reading the instructions, a short recess was taken, and then counsel gave their closing arguments. During the prosecutor’s opening argument, the following occurred:

“[PROSECUTOR]: The judge read you this instruction about reasonable doubt. And sometimes it’s hard to really conceptualize what does reasonable doubt mean. And I like to give one example.

“The evidence—it says it doesn’t need to eliminate all possible doubt. Everything in life is open to that or some imaginary doubt. We’re in a courtroom here in, you know, the State of California, Superior Court. It’s very official. And up behind the bench there is an American flag. We can all see that.

“Now, we can see it’s an American flag, and we assume it has the correct number of stars and stripes on it. Is it possible that somebody at the flag-making factory messed up or was having a bad day and there’s really only 49 stars on there? Well, we can’t see the whole flag here so, you know, I mean I guess it would be possible.

“Is it reasonable to think that in, you know, a very official capacity in the Superior Court that they would be hanging up defective flags? No. I think we can all beyond—

“[DEFENSE COUNSEL]: Your Honor—

“[PROSECUTOR]: —you know, agree that that is an American flag.

“[DEFENSE COUNSEL]: I’m going to object to that as misstating the standard of proof.

“THE COURT: Overruled.

“[PROSECUTOR]: In this case I think it’s easier than most, though. There’s no reasonable doubt here. I mean the defendant admitted that he was wrong. In so many different ways he admitted that he was wrong.

“In this letter, this one is Exhibit 3, he says I admit most—or he says, ‘I said that on [street name] that’s where everything started and that we did some things that I knew that are bad, that I kiss your body in a wrong way, and that the worst time was in the attic. And that after that there was like three times that I give you massages and I got twisted feelings.’

“I mean it’s right there. It’s laid out in black and white. And then even after he does this, he continues to try to manipulate and pressure [mother] and [victim] so he can get away with it. Just like he did before. Just like he did when [victim] was 12.

“I mean he sends entire letters to [victim], giving her detailed instructions on how she can help him get out of this.

“He says, ‘I’m asking you if you can please call the D.A. and let her know that a lot of that is not truth, if you’re willing to help me. That’s what you will have to do. Nothing else will help me. And if I go to trial and they call you to come in and testify against me, I just hope that you can agree with what I said. That’s the only thing that will help me a little bit. And I’m not trying to be selfish.’

“He just hopes she can agree with what he said. Not I hope you can agree with the truth. I just hope you’ll come in and tell the truth. I hope you’ll agree with what I said. He gave specific instructions for [victim] to be able to help him dig himself out of this hole. [¶] ... [¶]

“... He tried to fool [mother] and [victim]. But this time they said no. This time [victim] was not going to be fooled. She was not going to back down. And I’m asking each and every one of you to not be fooled by this man. I’m asking you to find him guilty on all counts. Thank you.”

## **B. Analysis**

We focus our analysis on the recent case of *People v. Centeno* (2014) 60 Cal.4th 659 (*Centeno*) which was filed after the briefing in this case was completed.

In *Centeno*, where the defendant was charged with molesting a child, the prosecutor used a visual display of the state of California to illustrate the standard of proof. The prosecutor argued as follows:

“Let me give you a hypothetical. Suppose for me that there is a trial, and in a criminal trial, the issue is what state is this that is on the [overhead projector]. Say you have one witness that comes in and this witness says, hey, I have been to that state, and right next to this state there is a great place where you can go gamble, and have fun, and lose your money. The second witness comes in and says, I have been to this state as well, and there is this great town, it is kind of like on the water, it has got cable cars, a beautiful bridge, and it is called Fran-something, but it is a great little town. You have another witness that comes in and says, I have been to that state, I went to Los Angeles, I went to Hollywood, I saw the Hollywood sign, I saw the Walk of Fame, I put my hands in Clark Gable’s handprints in the cement. You have a fourth witness who comes in and says, I have been to that state.

“What you have is you have incomplete information, accurate information, wrong information, San Diego in the north of the state, and missing information, San Bernardino has not even been talked about, but is there a reasonable doubt that this is California? No. You can have missing evidence, you can have questions, you can have inaccurate information and still reach a decision beyond a reasonable doubt. What you are looking at when you are looking at reasonable doubt is you are looking at a world of possibilities. There is the impossible, which you must reject, the impossible [*sic*] but unreasonable, which you must also reject, and the reasonable possibilities, and your decision has to be in the middle. It has to be based on reason. It has to be a reasonable account. And make no mistake about it, we talked about this in jury selection, you need to look at the entire picture, not one piece of evidence, not one witness. You don’t want to look at the tree and ignore the forest. You look at the entire picture to determine if the case has been proven beyond a reasonable doubt.” (*Centeno, supra*, 60 Cal.4th at pp. 665-666, fn. omitted.)

The *Centeno* court explained that “case law is replete with innovative but ill-fated attempts to explain the reasonable doubt standard. [Citations.] We have recognized the ‘difficulty and peril inherent in such a task,’ and have discouraged such “‘experiments’” by courts and prosecutors. [Citation.] We have stopped short, however, of categorically disapproving the use of reasonable doubt analogies or diagrams in argument. Rather, we assess each claim of error on a case-by-case basis.” (*Centeno, supra*, 60 Cal.4th at p. 667.)

The court explained that “[a]dvocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, ‘it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its ... obligation to overcome reasonable doubt on all elements [citation].’ [Citations.] To establish such error, bad faith on the prosecutor’s part is not required.” (*Centeno, supra*, 60 Cal.4th at p. 666.) “When attacking the prosecutor’s remarks to the jury, the defendant must show that, ‘[i]n the context of the whole argument and the instructions’ [citation], there was ‘a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.’” (*Id.* at p. 667.)

In its analysis, *Centeno* discussed *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 (*Katzenberger*), upon which defendant relies in the present case. *Centeno* summarized *Katzenberger* as follows:

“In *Katzenberger* ..., the Court of Appeal disapproved of an argument similar to that made here. During closing argument, the prosecutor used a slide show to display pieces of a puzzle. As six pieces of the puzzle came onto the screen, the picture became ‘immediately and easily recognizable as the Statue of Liberty’ [citation], even though two pieces that would have shown part of the statue’s face and the torch were missing [citation]. Over defense objection, the prosecutor argued, “[w]e

know [what] this picture is beyond a reasonable doubt without looking at all the pieces of that picture. We know that that's a picture of the Statute of Liberty, we don't need all the pieces of the [*sic*] it.” [Citation.]

“The appellate court concluded that the presentation misrepresented the standard of proof. As relevant here, it observed, ‘The Statue of Liberty is almost immediately recognizable in the prosecution’s PowerPoint presentation. Indeed, some jurors might guess the picture is of the Statute of Liberty when the first or second piece is displayed ... [and] ... most jurors would recognize the image well before the initial six pieces are in place.’ [Citation.] The court reasoned that the presentation invited the jurors to guess or jump to a conclusion without considering all of the evidence, an approach ‘completely at odds with the jury’s serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt.’ [Citation.]

“The Court of Appeal deemed the error harmless, however. Defense counsel had argued vigorously against the prosecutor’s analogy, and the trial court reread the reasonable doubt instruction to “‘clarify’” the issue. [Citation.] Additionally, evidence of the defendant’s guilt was strong. [Citation.] The appellate court nonetheless expressly ‘caution[ed] prosecutors who are tempted to enliven closing argument with visual aids that using such aids to illustrate the “beyond a reasonable doubt” standard is dangerous and unwise.’ [Citation.]” (*Centeno, supra*, 60 Cal.4th at pp. 667-668.)

Agreeing with *Katzenberger* and *People v. Otero* (2012) 210 Cal.App.4th 865

(*Otero*), the *Centeno* court concluded:

“The use of an iconic image like the shape of California or the Statue of Liberty, unrelated to the facts of the case, is a flawed way to demonstrate the process of proving guilt beyond a reasonable doubt. These types of images necessarily draw on the jurors’ own knowledge rather than evidence presented at trial. They are immediately recognizable and irrefutable. Additionally, such demonstrations trivialize the deliberative process, essentially turning it into a game that encourages the jurors to guess or jump to a conclusion.

“A criminal trial is regulated by rules of procedure. A jury may only decide the issue of guilt based on the evidence presented at trial, with the presumption of innocence as its starting point. Although the jurors may rely on common knowledge and experience in evaluating the evidence [citation] they may not go beyond the record to supply facts that have not

been proved. Facts supporting proof of each required element must be found in the evidence or the People's burden of proof is unmet. It is thus misleading to analogize a jury's task to solving a picture puzzle depicting an actual and familiar object unrelated to the evidence.

“Here, the prosecutor began with the outline of California. She did not posit that the outline had been established by any evidence; it was simply presented as a given. The essential question, ‘[W]hat state is this[?],’ began with an important factor presumed: that the outline was, indeed, the depiction of a state. In these two respects, the hypothetical invited the jury to jump to a conclusion before the prosecutor recounted any other hypothesized ‘evidence.’ [Citation.] The prosecutor did go on to mention other ‘evidence,’ and urged the jury to ‘look at the entire picture.’ However, the most important part of her hypothetical, the visual aid showing the shape of California, was not supported by evidence admitted during the imaginary trial and was also irrefutable.

“Additionally, the hypothetical was misleading because it failed to accurately reflect the evidence in this case, which was far from definitive. There may certainly be cases in which a few particularly strong pieces of information (such as scientific evidence or the testimony of a single reliable witness) are sufficiently compelling to prove the defendant guilty beyond a reasonable doubt. [Citations.] This was not such a case. It involved starkly conflicting evidence and required assessments of witness credibility. The crucial evaluation of [the victim's] testimony involved many factors, including her demeanor at trial, the inconsistencies in her various accounts, her initial denial under oath, her unwillingness to answer numerous questions, the lack of corroborating evidence, defendant's denials, and testimony from [the victim's] father corroborating defendant's account.

“We take care to note that not all visual aids are suspect. The use of charts, diagrams, lists, and comparisons based on the evidence may be effectively and fairly used in argument to help the jury analyze the case. In contrast, one of the dangers with the kind of presentation made here is that it had nothing to do with the case or the evidence before the jury. It presented a simplistic hypothetical case, oddly described as a ‘criminal trial.’ It used a visual in no way analogous to the facts at issue and characterized the essential question as ‘[W]hat state is this?’ The hypothetical presented the answer to that question as a given, based not on evidence received, but on the jurors' outside knowledge of what the geographical outline of California looks like. What occurred here was not the legitimate marshaling of evidence with charts outlining the facts or relating them to the legal concepts explained in the jury instructions.

Instead the prosecutor offered a theoretical analogue, unrelated to the evidence, purporting to relate the exacting process of evaluating the case to answering a simple trivia question. As noted, judges and advocates have been repeatedly admonished that tinkering with the explanation of reasonable doubt is a voyage to be embarked upon with great care.

“Counsel trying to clarify the jury’s task by relating it to a more common experience must not imply that the task is less rigorous than the law requires. By presenting a hypothetical whose answer involves a single empirical fact, the prosecutor risked misleading the jury by oversimplifying and trivializing the deliberative process.” (*Centeno, supra*, 60 Cal.4th at pp. 669-671, emphasis and fns. omitted.)

The court concluded it was “reasonably likely that the prosecutor’s hypothetical and accompanying argument misled the jury about the applicable standard of proof and how the jury should approach its task.” (*Centeno, supra*, 60 Cal.4th at p. 674.)

The court noted that “the *Katzenberger* and *Otero* courts found the prosecutors’ use of visual aids harmless in light of the correct instructions on reasonable doubt, defense counsel’s objections to the argument, the trial courts’ admonitions, and the strength of the evidence. [Citations.] Those saving factors are not present here.” (*Centeno, supra*, 60 Cal.4th at p. 676.) The court stressed the very closeness of the case—noting in particular that the victim made inconsistent statements, recanted, and refused to answer questions, and that her father also recanted what he had witnessed. The court determined that the reasonable doubt argument and other improper arguments prejudiced the defendant and required reversal of the judgment. (*Id.* at pp. 676-677.)

In this case, the prosecutor similarly relied on an iconic image, the American flag. Like the image of California and the Statue of Liberty, the flag was immediately recognizable and irrefutable. The prosecutor argued that the jurors could assume the object was the flag without examining the entire flag, suggesting assumptions were appropriate and deliberations were unnecessary. For the reasons explained in *Katzenberger* and *Centeno*, we conclude the argument was improper.

But, as in *Katzenberger* and *Otero*, we conclude the misconduct was harmless. We first note that the trial court properly instructed the jurors on reasonable doubt and the burden of proof, and instructed that counsel's comments are not evidence and that they must follow the court's instructions (CALCRIM Nos. 200, 220, 222). We generally presume the jurors understood and followed the court's instructions. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1234.) Furthermore, the prosecutor's improper argument was brief and immediately followed by a discussion of the evidence against defendant. But most importantly, the evidence against defendant was overwhelming. Victim described the touching, and defendant admitted his inappropriate feelings and his sexual touching of victim (even though he denied touching her when she was extremely young). His defense was not that the touching did not occur, it was that victim teased him and did not stop him from touching her, that they were both involved in the touching, and that it was her fault too. He said he guessed he could have resisted, but maybe he did not want to. The only real question left for the jurors was how many counts to convict him of.

Defendant maintains he was prejudiced because the credibility contest between him and victim should have favored him since "it seems unfathomable" that mother, after being informed of his behavior and being on heightened alert, would not have been aware of continuing, even daily, abuse. He points out that he admitted only four incidents of touching and therefore only four of his 21 section 288, subdivision (a) convictions can survive.

We disagree. Unlike the victim in *Centeno*, here victim provided consistent statements and testimony. Her recollection of the past was closely connected to events and dates in her life that were unrefuted, such as when her brother touched her and when she lived in particular houses. Defendant admitted having improper sexual feelings toward her and touching her sexually. He originally agreed with victim's report of her age, then insisted she was over 14 years old. He attempted to persuade her to change her story to match his own, hoping that many of the charges would be dropped and he would

serve less prison time. The record supports the jury's conclusion that, between the two, victim was the credible party.

After reviewing the entire record, we conclude beyond a reasonable doubt defendant was not prejudiced by the improper argument. (*Chapman v. California* (1967) 386 U.S. 18.)

## **II. Section 294, Subdivision (b) Fine**

Defendant argues, and the People concede, that the trial court imposed an unauthorized fine when it ordered him to pay a \$1,000 restitution fine pursuant to section 294, subdivision (b) because the offenses he committed are not listed in that provision. It provides as follows:

“Upon conviction of any person for a violation of Section 261, 264.1, 285, 286, 288a, or 289 where the violation is with a minor under the age of 14 years, the court may, in addition to any other penalty or restitution fine imposed, order the defendant to pay a restitution fine based on the defendant's ability to pay not to exceed five thousand dollars (\$5,000), upon a felony conviction, or one thousand dollars (\$1,000), upon a misdemeanor conviction, to be deposited in the Restitution Fund to be transferred to the county children's trust fund for the purpose of child abuse prevention.” (§ 294, subd. (b).)

Defendant's convictions were under section 288, subdivisions (a) and (c)(1). Because section 288 is not listed in section 294, subdivision (b), the fine was improper and must be stricken.

## **III. Section 290.3 Fine**

The People also concede that the \$300 section 290.3 fine should be stricken from the abstract of judgment because the trial court did not orally pronounce the fine.

We agree that the court did not mention the fine during pronouncement of judgment. We will order the trial court to correct the abstract of judgment and minute order to conform to its oral pronouncement of sentence. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

### **DISPOSITION**

The \$1,000 section 294, subdivision (b) fine and the \$300 section 290.3 fine are stricken. The trial court is directed to amend the abstract of judgment and minute order to reflect these changes, and to forward certified copies to the appropriate authorities. In all other respects, the judgment is affirmed.