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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS AGUILAR,

Defendant and Appellant.

G052130

(Super. Ct. No. RIF1205924)

OPINION

Appeal from a judgment of the Superior Court of Riverside County,
Charles J. Koosed, Judge. Affirmed.

Alan S. Yockelson, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney
General, Eric A. Swenson, Lynne G. McGinnis and Kristine A. Gutierrez, Deputy
Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Jose Luis Aguilar of aggravated sexual assault of his 12-year old daughter, R.A. (Pen. Code, § 269, subd. (a)(1) [count 1]; all citations are to the Penal Code unless noted), and aggravated lewd acts with her (§ 288, subd. (b)(1) [count 2]), lewd acts on L.A., his 15-year old granddaughter (§ 288, subd. (c)(1) [count 3]), and misdemeanor sexual battery (§ 243.4, subd. (e) [count 5]). Aguilar challenges the sufficiency of the evidence to support his convictions for aggravated sexual assault (count 1) and aggravated lewd acts (count 2). He also contends his trial attorney performed ineffectively by failing to object to the prosecutor's statement that duress was not required to establish the offense of aggravated lewd acts (count 2), and the trial court erred by failing to instruct the jury on the lesser included offenses of unlawful sexual intercourse with a minor (count 1) and nonforcible lewd and lascivious conduct (count 2). Finally, he argues the trial court abused its discretion by denying his mistrial motion based on jury misconduct, and the court's jury instruction on voluntary intoxication lowered the burden of proof. Finding no basis to overturn the judgment, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

L.A. (born in April 1995) routinely visited her grandparents after school in their Mead Valley home. On August 17, 2012, L.A. arrived at her grandparents' home around 3:00 or 3:30 p.m. Aguilar, her 63-year-old maternal grandfather, joined her in the living room and sat on the opposite end from her on an L-shaped couch. L.A.'s grandmother, J.A., was not home. Aguilar turned on the television, and after several minutes, he began discussing various features of his daughter R.A.'s (born December 1995) body, comparing it to J.A.'s body.

At some point, Aguilar asked for a hug. She walked to his side of the couch, sat down, and hugged him. Aguilar slid his right hand down from her shoulder to her buttocks. She jerked her elbow reflexively and pushed his hand away, telling him

“no” and “stop.” He protested he was “not doing anything,” but then moved his hand down and “proceeded to grab on [her] vagina.” All the touching was over her clothing. She pushed herself away and moved back to her side of the couch. L.A. smelled alcohol on his breath and he appeared drunk or hung over.

L.A. agreed to take him to the store to buy beer. Aguilar retrieved his car keys, but then again threw himself on her, kissing the top portion of her breasts. He also kissed her neck and cheek, and tried to kiss her lips. L.A. was stronger than her grandfather and pushed him away. When she threatened to leave Aguilar agreed to stop.

Shortly after Aguilar and L.A. returned from the store, L.A.’s uncle Jose and his wife Alexis arrived. L.A. told Alexis about the incident. L.A. cried and asked Alexis not to tell anyone because she did not want her family to hate her. Alexis was infuriated and “not about to risk having it happen with her” own daughter, told Jose they should leave, ostensibly to get pizza. L.A. left with Alexis’s family and accompanied them to their home. Someone, perhaps Alexis, phoned the police.

L.A. spoke to a deputy sheriff at Alexis’s home. L.A. later informed her school counselor about her grandfather’s abuse and also claimed Aguilar had abused his daughter, R.A. The counselor notified the school resource officer, Deputy April Wille, who spoke with L.A. and R.A.

L.A. also described an earlier incident that formed the basis for Count 3. Two years earlier, when L.A. was 15 years old, she was using the bathroom in Aguilar’s house when he knocked on the door, said he needed to talk, and opened the door. He approached her from behind and pulled at her bra strap through her shirt. She exclaimed “what are you doing,” and he said “shh, shh.” L.A. began crying and told him she wanted to leave, but he pushed her and grabbed her underwear. He also groped her breasts over her clothes and touched the area between her belly button and vagina under her clothing. She could not tell whether he was “trying to look inside or pull [her

underwear] off.” She eventually got him “off [her] back” and walked out. He threw himself on her again, but she ran outside and told her uncles.

L.A. told R.A. about the bathroom incident the day it happened. Hearing about L.A.’s ordeal, R.A. began crying and confided that Aguilar had “sexual intercourse with her” on more than one occasion. Afterward, he would cry, tell R.A. he loved her, and claim he would never do it again. R.A. told L.A. she should forgive Aguilar because he did not know what he was doing, and “love[d] us in the end.”

L.A. told her mother about the incident in the restroom, and the family convened to discuss the abuse. J.A. cried and stated she knew what “has been going on” and “this needs to stop.” R.A. apparently had disclosed to J.A. that Aguilar sexually abused R.A., but J.A. said they needed to forgive, move on, and improve.

Deputy Wille testified she interviewed R.A. after speaking with L.A. R.A. initially denied Aguilar had abused her, and appeared angry L.A. had reported the abuse. R.A. asked to speak to L.A., and Wille sat the girls together in her office. R.A. eventually conceded Aguilar when intoxicated molested her at their home when she was 12 years old. She initially claimed Aguilar only touched her breasts, but after further questioning, R.A. admitted Aguilar had vaginal intercourse with her on this occasion. He stopped when she started crying.

Detective Thomas Salisbury interviewed R.A. a few hours after Wille’s interview. R.A. admitted Aguilar raped her during the summer when she was 12 years old. She recalled playing video games in her bedroom when an intoxicated Aguilar entered the room and told her to lie down. He touched her breasts, pulled on her nipples, and removed her gym shorts. Aguilar took off his pants, got on top of her, spread her legs, and had sexual intercourse with her. When she began crying, he stopped, and said he was sorry. She fled the room and found her mother, J.A., but did not disclose the rape. R.A. claimed this was the only time Aguilar abused her. R.A. disclosed the rape to L.A. in 2009, and told her mother, J.A., in March 2010. R.A. heard J.A. confront Aguilar

about it the next day. J.A. acknowledged to Salisbury that R.A. had told her about the rape.”

R.A. came to the station on September 9 and told Salisbury she “wanted to take back everything that she said about her father, that it was a lie.” She asked if her father could be placed “under house arrest” and receive therapy.

According to L.A., J.A. spoke with her a few weeks before trial. J.A. told L.A. to say she “made it all up because [she] wanted to get out of the house.” L.A. responded she was not going to lie, but agreed she “would be quiet,” perhaps in the belief officials would “drop the charges” L.A. testified sexual molestation was a “dark secret” in the family and untoward sexual behavior by the males towards the girls was common. L.A.’s mother told L.A. that Aguilar and her uncles repeatedly molested her and other girls in the family.

At trial, R.A. testified she falsely told family members, school officials, and law enforcement officers Aguilar raped her because she was “going through a stage in life, like being bisexual and stuff,” and told L.A. about the abuse “to get attention from her.” She claimed she was pressured into making false accusations by school officials, who threatened her with consequences, such as going to juvenile hall or a foster home.

J.A. testified and denied R.A. or L.A. previously disclosed sexual abuse by Aguilar. She did not recall having a family meeting to discuss sexual abuse, and denied telling L.A. to change her story.

Following trial in January and February 2014, the jury convicted Aguilar of the charged offenses. In May 2014, the court imposed a term of 15 years to life for aggravated sexual abuse of a child (count 1), a consecutive two-year midterm for lewd acts on a child age 14 or 15 (count 3), a concurrent one-year term for misdemeanor sexual battery (count 5), and stayed (§ 654) a six-year midterm for aggravated lewd acts (count 2).

II

DISCUSSION

A. *Substantial Evidence of Duress*

Aguilar challenges the sufficiency of the evidence to support his convictions for aggravated sexual assault of a child, [count 1]) and aggravated lewd acts on a child under 14 years old [count 2]). He contends there was no evidence of duress when he committed these crimes and therefore we must reduce his convictions to the lesser included offenses of unlawful sexual intercourse (§ 261.5, subd. (d)) on count 1 and lewd conduct on a child (§ 288, subd. (a)) on count 2. We do not find the contention persuasive.

On appeal, we must view the record in the light most favorable to the judgment below. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) The test is whether substantial evidence supports the verdict (*Jackson v. Virginia* (1979) 443 U.S. 307, 318; *People v. Johnson* (1980) 26 Cal.3d 557, 577-578), not whether the appellate panel is persuaded the defendant is guilty beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139 (*Crittenden*)). It is the jury's exclusive province to weigh the evidence, assess the credibility of the witnesses, and resolve conflicts in the testimony. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330 (*Sanchez*)). Accordingly, we must presume in support of the judgment the existence of facts reasonably drawn by inference from the evidence. (*Crittenden*, at p. 139; see *People v. Stanley* (1995) 10 Cal.4th 764, 792 [same deferential standard of review applies to circumstantial evidence].) The fact that circumstances can be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) Consequently, an appellant "bears an enormous burden" in challenging the sufficiency of the evidence. (*Sanchez*, at p. 330.)

Each of the offenses Aguilar challenges requires evidence that a defendant employed at least one of several aggravating factors. Thus, the "use of force, violence,

duress, menace, or fear of immediate and unlawful bodily injury” are aggravating factors that increase punishment for a defendant who commits a lewd act on a child under the age of 14. (§ 288, subd. (b)(1).) The rape of a child is an aggravating factor and occurs when a defendant uses “force, violence, duress, menace, or fear of immediate and unlawful bodily injury” to accomplish the act of intercourse with the child. (§§ 269, subd. (a)(1); 261, subd. (a)(2).)

Here, the prosecutor relied on the evidence of duress as the aggravating factor in counts 1 and 2. “[D]uress’ means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.” (§ 261, subd. (b) [as defined in rape statute]; *People v. Soto* (2011) 51 Cal.4th 229, 236, 246 [duress as used in section 288(b)(1) means the use of a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act that otherwise would not have been performed or acquiesce in an act to which one otherwise would not have submitted].)

Here, R.A. revealed to L.A., Wille, and Salisbury that Aguilar had sexual intercourse with her. She told the deputies this happened at their home when she was 12 years old. She was playing video games in her bedroom when an intoxicated Aguilar entered her room. Aguilar directed her to sit on the bed, asked for a hug, and asked if she loved him. He told her to lie down and when she complied he touched her breasts and pulled on her nipples. He removed her gym shorts, took off his belt and pants, got on top of her, spread her legs, and had sexual intercourse with her. Aguilar stopped only when his daughter began crying.

The jury reasonably could infer Aguilar used duress to sexually molest his daughter. He knew, of course, his 12-year-old daughter was aware of his importance to the family as its bread winner and that his role as the dominant authority figure in the family would psychologically coerce her acquiescence. The jury also could find Aguilar psychologically coerced his daughter when he asked her if she loved him, a question designed to implicitly suggest an affirmative response required sexual submission when he began molesting her. Aguilar also was aware R.A. would feel physically vulnerable because of her small size relative to him and this would intimidate her further. (*People v. Soto, supra*, 251 Cal.4th at p. 246 [use of intimidation to commit lewd act constitutes duress].)

The jury also could infer the particular circumstances of R.A.'s family life increased her psychological duress. Rampant sexual abuse by Aguilar and other family members was the family's "dark secret," which R.A.'s mother and other family members ignored and accommodated.¹ According to L.A., R.A. admitted Aguilar had sexual intercourse with R.A. on several occasions. Because R.A. cried when Aguilar raped her, and became physically ill in describing the incident years later to Deputy Wille, the jury reasonably could conclude Aguilar used his parental authority and physical size to psychologically coerce R.A.'s acquiescence when he molested her. "The very nature of duress is psychological coercion." (*People v. Cochran* (2002) 103 Cal.App.4th 8, 15 (*Cochran*)). Ample evidence satisfies the element of duress for the aggravated sexual assault crimes.

Aguilar argues no evidence of duress was shown because he did not use or threaten to use force against R.A. But as the court in *People v. Schultz* (1992) 2 Cal.App.4th 999, observed, "[p]hysical control can create 'duress' without constituting

¹ R.A. disclosed L.A.'s father V.R. repeatedly sexually abused and raped R.A. when he lived with the family in Santa Ana. R.A. also said she was molested by an older brother. There were indications R.A.'s older sisters were also abused.

‘force.’ ‘Duress’ would be redundant in the cited statutes if its meaning were no different than ‘force,’ ‘violence,’ ‘menace,’ or ‘fear of immediate and unlawful bodily injury.’” (*Id.* at p. 1005.) The court in *Schultz* explained “duress involves psychological coercion. [Citation.] Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes.” (*Ibid.*) Thus, substantial evidence of duress exists where the facts show a parental authority figure exercises psychological dominance or manipulation and physical control over a child.

Aguilar relies on *People v. Espinosa* (2002) 95 Cal.App.4th 1287 (*Espinosa*) and *People v. Hecker* (1990) 219 Cal.App.3d 1238 (*Hecker*). *Espinosa* found the “mere fact” the defendant was the victim’s father and larger than her did not constitute evidence of duress, even though the victim had limited intellectual abilities and feared the defendant. (*Espinosa, supra*, 95 Cal.App.4th at p. 1321.) *Espinosa* held duress cannot be established unless there is evidence of a direct or implied threat. (*Ibid.*) Because there was no evidence of threats and the 12-year-old victim offered no resistance, the court concluded there was insufficient evidence of duress. (*Ibid.*)

Espinosa relied on *Hecker* for its analysis. *Hecker* concluded there was insufficient evidence of duress because the defendant did not expressly or implicitly threaten the victim. Although the victim testified she felt “‘pressured psychologically’” and was “‘subconsciously afraid,’” *Hecker* emphasized there was no evidence the defendant knew the victim was afraid and sought to take advantage of this. (*Hecker, supra*, 219 Cal.App.3d at p. 1250.) *Hecker* concluded “‘[p]sychological coercion’ without more does not establish duress. At a minimum there must be an implied threat of ‘force, violence, danger, hardship or retribution.’” (*Id.* at pp. 1250-1251.)

We decline to follow the overly broad pronouncements of *Espinosa* and *Hecker* and join other courts who have questioned the language and reasoning in both cases. (See, e.g., *People v. Veale* (2008) 160 Cal.App.4th 40, 48-50.) As the *Cochran*

court observed, when a father molests a young victim in the family home, “in all but the rarest cases duress will be present. (*Cochran, supra*, 103 Cal.App.4th at p. 16, fn. 6.)

Cochran illustrates the point. There, a videotape of the defendant sexually abusing his nine-year-old daughter showed the defendant directed the victim through various lewd acts. Although the victim testified she was not afraid of the defendant and that he did not threaten or force her compliance, *Cochran* found the evidence showed a “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” (*Cochran, supra*, 103 Cal.App.4th at p. 15; *People v. Pitmon* (1985) 170 Cal.App.3d 38 (*Pitmon*).)

Cochran relied on *Pitmon* in concluding the absence of force or threats did not necessarily negate a finding of duress. In *Pitmon*, the court found sufficient evidence of duress despite the victim’s testimony the defendant did not use force or violence and never threatened to hurt her. *Pitmon* stated “at the time of the offenses, [the victim] was eight years old, an age at which adults are commonly viewed as authority figures. The disparity in physical size between an eight-year-old and an adult also contributes to a youngster’s sense of [her] relative physical vulnerability.” (*Pitmon, supra*, 170 Cal.App.3d at p. 51; see *People v. Sanchez* (1989) 208 Cal.App.3d 721, 747-748 [duress found where defendant molested eight-year-old granddaughter repeatedly over a three-year period and victim viewed defendant as a father figure]; *People v. Superior Court (Kneip)* (1990) 219 Cal.App.3d 235, 239 [“Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim’ is relevant to determining duress”].) (*Cochran, supra*, 103 Cal.App.4th at p. 14.)

In sum, the circumstances here presented sufficient evidence of duress.

B. *Ineffective Assistance of Counsel*

Aguilar contends his trial lawyer acted ineffectively by failing to object when the prosecutor in closing argument stated: “With regard to Count 2, I previously told you that it’s the same act [as count 1]. I’m just charging it differently. The only thing that I don’t have to prove in order for Count 2 to be found is that there was force or duress. Everything else remains basically the same.” The Attorney General concedes the prosecutor misstated the law. Nevertheless, reversal of this count is not required.

To establish a claim of ineffective assistance of counsel, a defendant must show counsel’s representation failed to meet an objective standard of professional reasonableness and this prejudiced the defendant. In other words, absent counsel’s deficiencies, there is a reasonable probability the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Failing to object to the prosecutor’s misstatement of the law during closing argument may constitute deficient performance. (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 395.)

Contrary to the prosecutor’s claim in her closing argument, the crime of aggravated lewd acts (§ 288, subd. (b)(1)) requires the use of “force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.” But we agree with the Attorney General there is not a reasonable probability the result would have been more favorable to Aguilar had his defense counsel objected. The prosecutor told the jury the charges in counts 1 and 2 were based on the same act, and the jury’s finding Aguilar committed aggravated sexual assault (count 1) necessarily resolved the factual issue against him on count 2. The prosecutor did not repeat her brief statement, the court correctly instructed the jury on the elements of the aggravated lewd acts offense (CALCRIM No. 1111), and the jury had these instructions available during deliberations. (2 CT 415; 3RT 684) Finally, the primary defense argument was that no rape or other sexual abuse occurred, not that sexual intercourse was accomplished

without duress. Consequently, counsel's failure to object does not warrant overturning the verdict on count 2.

C. *Lesser Included Offenses*

Aguilar asserts the trial court erred by failing to instruct on unlawful sexual intercourse (§ 261.5, subd. (d)) and nonforcible lewd acts (§ 288, subd. (a)) as lesser included offenses of aggravated sexual assault of a child charged in count 1 and aggravated lewd acts charged in count 2. Both these counts relate to the same act of sexual intercourse against R.A.

The trial court must instruct on general legal principles relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) These include principles ““closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.”” (*Ibid.*) The obligation includes giving instructions on lesser included offenses ““when the evidence raises a question whether all of the elements of the charged offense were present, [citations] but not when there is no evidence that the offense was less than that charged.”” (*Ibid.*) Instructions on lesser included offenses are required when evidence the defendant is guilty only of the lesser offense is ““substantial enough to merit consideration”” by the jury. (*Id.* at p. 162; see *People v. Elliot, supra*, 37 Cal.4th at pp. 470-471.) We review the issue under the de novo standard of review, and consider the evidence in the light most favorable to Aguilar. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

An offense is a lesser included offense if all legal elements of the lesser crime are included in the definition of the greater crime such that the greater cannot be committed without committing the lesser. Alternatively, under the accusatory pleading test, an instruction is required where “the accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime.” (*People v. Moon* (2005) 37 Cal.4th 1, 25-26.)

The parties disagree whether unlawful sexual intercourse with a minor under the age of 16 (§ 261.5, subd. (d)) was a lesser included offense of aggravated sexual assault of a child by means of rape (§ 269, subd. (a)(1)) as charged in count 1. Applying the statutory elements test, unlawful sexual intercourse with a child under the age of 16 occurs when “[a]ny person 21 years of age or older . . . engages in an act of . . . sexual intercourse with a minor who is under 16 years of age.” (§ 261.5, subd. (d).) Aggravated sexual assault (rape) of a child under the age of 14 is committed when sexual intercourse is accomplished against the will of a person who is under 14 years of age and seven or more years younger than the defendant, “by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.” (§ 261, subd. (a)(2); §269, subd. (a)(1).) a 20-year-old offender who rapes a child under the age of 16 commits the crime of aggravated sexual assault, but not unlawful sexual intercourse. Accordingly, unlawful sexual intercourse is not a lesser included offense of aggravated sexual assault under the statutory elements test because the greater crime of rape can be committed without committing unlawful sexual intercourse.

Applying the accusatory pleading test, the information charged Aguilar in count 1 with “a violation of Penal Code section 269, subdivision (a), subsection (1), a felony, in that on or about December 6, 2007, through and including December 5, 2008, . . . he did willfully and unlawfully commit a violation of Penal Code section 261, subdivision (a), subsection (2) or (6), RAPE, upon Jane Doe No. 1 (R.A.), a child who was under 14 years of age and seven or more years younger than the defendant.” Because the information does not allege Aguilar was 21 years of age or older, it does not describe the greater offense in language showing that he also must necessarily have committed the lesser crime. Accordingly, unlawful sexual intercourse is not a lesser included offense of aggravated sexual assault under the accusatory pleading test.

The parties agree lewd acts (§ 288, subd. (a)) was a lesser included offense of the aggravated lewd acts) offense charged in count 2 under the elements test. (*People*

v. Ward (1986) 188 Cal.App.3d 459, 472 [only difference between the crimes is that forcible lewd conduct requires a finding the defendant used force, violence, duress, menace, or fear of immediate and unlawful bodily injury].) The parties disagree whether the evidence of the lesser offense was substantial enough to merit consideration by the jury, and whether the failure to instruct was harmless error.

“The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818 Reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of.” (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868.)

Here, it is not reasonably probable Aguilar would have obtained a different result. In rejecting Aguilar’s claim the crime never occurred, the jury thereby credited R.A.’s statements that when she was 12 years old, her father called her into his room, made her lie on the bed, removed her clothing, spread her legs apart, and had sexual intercourse with her. Given Aguilar’s status as R.A.’s father and his authoritative position as head of their large family, if the jury believed Aguilar assaulted R.A. in the manner she described, it is not reasonably probable it would have believed Aguilar did not use duress. The evidence overwhelmingly supports the conclusion Aguilar raped R.A. and therefore any error in failing to give instructions on lesser included offenses was harmless.

D. *Jury Misconduct*

Aguilar contends the trial court erred in denying his mistrial motion based on juror misconduct. We review the denial of a mistrial for abuse of discretion. (*People v. Silva* (2001) 25 Cal.4th 345, 372.)

Curing trial Detective Salisbury advised the court that as he was leaving the courthouse the day before, he saw a group of people, including several jurors, standing around a car with its hood up. When someone asked if he had jumper cables, he retrieved

cables from his car, and assisted a juror in starting the car. Salisbury did not engage in discussion about anything pertaining to the case, but he overheard “I can’t believe it, I can’t believe,” and “I don’t understand.” He perceived this was “quoting testimony that was given.” Salisbury told the jurors to report the incident to the court. Salisbury recognized the need to be “minimally involved,” but it appeared the group had no other options, and he “would give anyone a jump” if “[he] had cables. So that’s what [he] did.”

Defense counsel asked the court to investigate whether the jurors had committed misconduct. Juror 6 reported he discovered during the lunch break he had a dead battery after the court advised jurors there was Honda in the parking lot with its headlights on. Juror 11 asked everyone who passed by, including Salisbury, if they had cables. Salisbury replied he had cables, went to his car, returned with cables, and assisted in starting the car. Juror 4 called AAA, but cancelled the call after Salisbury produced the battery cables. The jurors unanimously asserted no discussion of the case occurred. Salisbury told them to report the incident to the court. All the jurors stated the incident did not impact their ability to be fair and impartial or to credit Salisbury’s testimony more or less than before.

Defense counsel spoke to Aguilar, who requested a mistrial. The trial court denied Aguilar’s mistrial motion, noting Salisbury’s assistance was minimal and none of the jurors gave the court reason to believe they could not be fair and impartial. The court also noted the case was “not about” Salisbury and did not hinge on his credibility. Finally, the court refused to speculate whether the “I can’t believe it” statements referred to the case.

Section 1122, subdivision (a), requires the trial court to instruct the jury after it is sworn and before opening statements on “its basic functions, duties, and conduct,” including that they “shall not converse among themselves, or with anyone else, . . . on any subject connected with the trial.” “[I]t is misconduct for a juror ‘to communicate with anyone associated with the case.’” (*People v. Linton* (2013))

56 Cal.4th 1146, 1194 (*Linton*).)” ““On appeal, . . . whether jury misconduct was prejudicial presents a mixed question of law and fact ““subject to an appellate court’s independent determination.”” [Citation.] We accept the trial court’s factual findings and credibility determinations if supported by substantial evidence.””(*People v. Weatherton* (2014) 59 Cal.4th 589, 598.)

Here, the trial court at the beginning of the trial advised the jury not to speak to a defendant, witness, lawyer, or anyone associated with them. Thus, misconduct occurred even if Salisbury and the jurors did not discuss any matters related to the case. (*People v. Ryner* (1985) 164 Cal.App.3d 1075, 1081 (*Ryner*).) But the brief conversation and contact associated with Salisbury’s assistance with starting the juror’s car was brief and not ““intimate”” (*Turner v. Louisiana* (1965) 379 U.S. 466), unrelated to the case, and the interaction was unlikely to have caused a juror to feel ““indebted”” to Salisbury and accord his testimony greater credibility. (*Ryner, supra*, 164 Cal.App.3d at pp. 1081,1083 [conversation between jurors and officer limited to topics unrelated to the case at hand and brief]). We discern no prejudice from this interaction. Aguilar’s fate did not depend on how much confidence the jury placed in Salisbury as a witness because his testimony was largely foundational to the admission of R.A.’s statements, which were recorded and played for the jury. R.A. previously had made the accusations during interviews with school officials before Salisbury interviewed her. (*People v. Pierce* (1979) 24 Cal.3d 199, 207 [misconduct raises a presumption of prejudice and is rebutted by proof no prejudice actually resulted]; *People v. Jones* (1998) 17 Cal.4th 279, 310 [misconduct for jurors to communicate with anyone associated with the case but misconduct not ““egregious””].) The trial court did not abuse its discretion in denying Aguilar’s request for a mistrial.

Aguilar also argues the record shows the “I can’t believe it” statements by a juror or jurors jokingly referred to J.A.’s testimony, and the court’s implied finding to the contrary is not supported by substantial evidence. Even if we agreed with Aguilar a juror

or jurors were referring to J.A.’s testimony concerning her failure to recall R.A.’s accusatory statements at the sheriff’s station, a recording of which was played for the jury, the comment does not require reversal. (See *Linton, supra*, 56 Cal.4th at p. 1194 [juror did not commit misconduct by “venting” to her husband over something in the case where husband did not respond to the comment].)

E. *Instruction on Voluntary Intoxication*

The court instructed on voluntary intoxication with a version of CALCRIM No. 3426: “You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with the intent of arousing, appealing to, or gratifying the lusts, passions, or sexual desires of himself or the child for the specific purpose of sexual arousal, sexual gratification, or sexual abuse. [¶] A person is voluntarily intoxicated if he or she became intoxicated by willingly using any intoxicating drug, drink, or other substance, knowing that it could produce an intoxicating effect or willingly assuming the risk of that offense. [¶] In connection with the charge of lewd and lascivious acts with a child, the People have the burden of proving beyond a reasonable doubt that the defendant acted *or failed to act* with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child. If the People have not met this burden, you must find the defendant not guilty of lewd and lascivious acts with a child. [¶] In connection with the charge of sexual battery the People have the burden of proving beyond a reasonable doubt that the defendant acted *or failed to act* with the specific purpose of sexual arousal, sexual gratification or sexual abuse. If the People have not met this burden, you must find the defendant not guilty of sexual battery. [¶] You may not consider evidence of voluntary intoxication for any other purpose. Voluntary intoxication is not a defense to aggravated sexual assault.” (Italics added.)²

² CALCRIM 3426 (Feb. 2015 rev.) provides: “You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider

Aguilar correctly notes the trial court erred in instructing with the “or failed to act” language italicized above. As the Attorney General concedes, the prosecution did not have the burden of proving Aguilar *failed to act* because none of the charged offenses listed this as an element of the crime. But the jury would recognize the “failed to act” portion of this instruction and CALCRIM No. 251 as a non sequitur (see *People v. Carey* (2007) 41 Cal.4th 109, 130 [jurors presumed to be intelligent and capable of understanding and correlating jury instructions]) because CALCRIM No. 251 (Union of Act and Intent) told the jury the “crimes . . . charged in this case require proof of the union, or joint operation, of act and wrongful intent,” “the act and the specific intent required are explained in the instruction for that crime,” and the instructions defining the crimes told the jury the prosecution was required to prove beyond a reasonable doubt that

that evidence only in deciding whether the defendant acted [or failed to do an act] with ___ <insert specific intent or mental state required, e.g., ‘the intent to permanently deprive the owner of his or her property’ or ‘knowledge that . . .’ or ‘the intent to do the act required’> A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. In connection with the charge of ___ <insert first charged offense requiring specific intent or mental state> the People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with ___ <insert specific intent or mental state required, e.g., ‘the intent to permanently deprive the owner of his or her property’ or ‘knowledge that . . .’>. If the People have not met this burden, you must find the defendant not guilty of ___ <insert first charged offense requiring specific intent or mental state>. <Repeat this paragraph for each offense requiring specific intent or a specific mental state.> You may not consider evidence of voluntary intoxication for any other purpose. [Voluntary intoxication is not a defense to ___ <insert general intent offense[s]>.]”~()~ The bracketed “failed to act” phrase is apparently for use in cases where the defendant has a legal duty to act. (See, e.g., 1 LaFave & Scott, Substantive Criminal Law (2d ed. 2015) Omission to Act, § 6.2 [a number of crimes are statutorily defined in terms of failure to act, others may be committed either by affirmative action or by failure to act under circumstances giving rise to a legal duty to act; illustrative of the former are statutes making it a crime for a taxpayer to fail to file a tax return, for a parent to neglect to furnish medical care for his sick children, for a motorist to fail to stop after involvement in an automobile accident, or for a draftee to fail to report at the appointed time and place for induction into the armed forces].)

Aguilar “acted” with the specified intent or purpose. For aggravated lewd and lascivious acts (count 2) and lewd acts on a child age 14 or 15 (count 3), CALCRIM Nos. 1111 and 1112 required the jury to find Aguilar “willfully touched any part of a child’s body” with the specified intent. For sexual battery (count 5), CALCRIM No. 938 required the jury to find Aguilar “touched an intimate part of [L.A.]” against her will with the specified purpose.

Considering the instructions in their entirety (*California v. Brown* (1987) 479 U.S. 538, 541-542)), the jury would understand it must consider evidence of voluntary intoxication in deciding whether Aguilar acted with the requisite mental state, and that the prosecution bore the burden of proving beyond a reasonable doubt that Aguilar committed the charged acts with the requisite intent. There is no likelihood the jury misconstrued or misapplied CALCRIM No. 3426 to relieve the prosecution of proving guilt beyond a reasonable doubt.

Finally, Aguilar did not claim his voluntary intoxication prevented him from forming the requisite intent. Rather, he claimed the crimes did not occur because and the girls lied. But assuming Aguilar was intoxicated when he committed the charged acts, the evidence recounted above does not suggest his intoxication prevented him from forming the requisite sexual intent. Given the strong evidence of Aguilar’s intent and the lack of reliance on voluntary intoxication by the defense, any instructional error could not have affected the jury’s verdict under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional error reviewed to see if the error was harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [state law error reviewed to see if it is reasonably probable a more favorable result would have been obtained absent the error].)

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.