

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY ACHILLES POLETTI,

Defendant and Appellant.

H035544

(Santa Cruz County

Super. Ct. No. F16423)

A jury convicted defendant Anthony Achilles Poletti of five counts of forcible lewd acts upon a child (counts 1, 3, 5, 8 & 10), four counts of aggravated sexual assault upon a child (counts 2, 4, 7 & 9), one count of forcible oral copulation (count 6), two counts of forcible rape (counts 13 & 15), one count of lewd act upon a child aged 14 or 15 (count 14), one count of dissuading a witness (count 16), and one count of possession of child pornography (count 17). It acquitted defendant of one count of forcible rape (count 11) and one count of lewd act upon a child aged 14 or 15 (count 12). The trial court sentenced defendant to 68 years and eight months to life in prison.

On appeal, defendant principally contends that the trial court erred by denying his motion for a new trial based on juror misconduct. He secondarily contends that the trial court abused its discretion by (1) admitting into evidence the victim's entire recorded pretrial interview as prior-consistent-statement evidence to rebut prior inconsistent statements from the interview and permitting the jury to take the recording into the jury room, (2) refusing to admit into evidence as unduly inflammatory clinical photographs of

vaginal injuries to young girls who had been raped to support his expert's opinion that the victim's allegations should be evidenced by some residual injury, (3) permitting the jury to take a recording of a pretext telephone call from the victim to defendant into the jury room, (4) admitting in evidence opinions of the victim's credibility, and (5) refusing to enforce a subpoena seeking the whereabouts of a witness who would support that the victim had told her father that she would lie to authorities if the father told authorities about defendant's sexual abuse of her. He finally contends that no substantial evidence supports a rape conviction (count 13) because the victim, on cross-examination, contradicted her direct examination testimony by denying that she had been raped on the occasion in question.

We agree with defendant that juror misconduct occurred in this case and the People did not rebut the presumption of prejudice from the misconduct. We also agree with defendant that no substantial evidence supports the conviction on count 13. We therefore reverse the judgment, direct a verdict of acquittal on count 13, and direct a retrial of counts 1 through 10 and 14. Defendant stands convicted of counts 16 and 17 since his challenges to the judgment do not pertain to those nonassaultive offenses. We also provide guidance on other selected issues that are likely to arise on retrial.

BACKGROUND

At the time of trial, the victim was a 17-year-old high school senior who was planning to graduate in six months and go to college. During the years in question, she lived part time in Watsonville with her father and part time in Santa Cruz with her mother, defendant, and two younger half-brothers. She had known defendant since she was five years old and before her mother and defendant were married. She had a good, trusting relationship with defendant until 2002 when she was 10 years old. At that time, defendant began sexually touching her in the home when her mother was not at home. Defendant's behavior involved repeated rapes and forcefully grabbing the victim by the

wrists. The victim, however, never suffered a bruise, bleeding, or injury from the assaults. Certain acts were interrupted by the victim's mother returning home. But the mother never saw any indication that she had returned in the aftermath of a sexual assault. Defendant's behavior continued every few months until June 2007 when the victim was 15 years old. During the time of defendant's behavior, the victim never told anyone about the behavior because she was ashamed and afraid that no one would believe her. She believed that nothing positive would result from telling anyone. She did not have a close relationship with her mother and believed that her mother would not care. She tried to be happy with others and not show that anything was bothering her. She sometimes asked to accompany her mother on errands so as not to be in the home with defendant. She testified about seven specific incidents that occurred during the five-year period.

The first incident the victim remembered was at the beginning of fifth grade in September 2002 when she was watching television in the living room. Defendant came downstairs, grabbed her wrist, pulled her into the downstairs bathroom, put her up against the counter, took her pants down, took his pants down, and "rubbed his penis in [her] butt." The incident lasted only a few minutes after which defendant pulled his pants up and left. Defendant said nothing throughout the episode. The victim then went to her bedroom. She told Santa Cruz County Sheriff's Sexual Assault Detective Krissi Durant that the episode had ended when her mother came home and opened the front door: "it stopped when the front door opened." In defendant's opening statement, however, defendant highlighted that the episode could not have ended when the victim's mother came home given the proximity of the downstairs bathroom and front door. In her direct testimony, the victim stated that her mother had come home "later." And on cross-examination, when viewing pictures of the home's interior showing that the front door and bathroom in question were proximate, she stated that it was not true that defendant had stopped when he heard the front door. She added that defendant had "left before [her

mother] came home” and she did not remember when she saw her mother or where she was when she saw her mother. This incident is the basis for count 1.

The second incident the victim remembered was at the beginning of sixth grade in September 2003 when defendant took her from her bedroom or downstairs into the downstairs bathroom, pushed her up against the wall, pulled her pajama pants down, spread her legs apart, took his pants down, and put his penis in her vagina. After that, the victim put her pants back on and tried to leave, but defendant blocked the door. Defendant then put his hands on the victim’s shoulders, pushed her down on her knees, put his penis in her mouth, and pulled her head back and forth. Defendant said nothing throughout the episode. He left and the victim went upstairs to her room and started crying. This incident is the basis for counts 2 through 6.

The third incident the victim remembered was in December 2003 when defendant took her from her bedroom into the master bedroom, pulled off her pajamas, and made her put on her mother’s lingerie. He then pushed her down on the bed, grabbed a video camera, angled the camera toward her spread legs, and put his fingers inside her vagina while she squirmed. The episode lasted a few minutes until the two heard the mother arrive downstairs. Defendant told the victim that the mother would never see the video and went downstairs. The victim put on her clothes and went to her room. This incident is the basis for counts 7 through 8.

The fourth incident the victim remembered was during seventh grade in 2004 when defendant grabbed her wrist in her bedroom and took her into the master bathroom, pushed her against the wall, pulled her pants down, spread her legs apart, and picked up a video camera and aimed it at her vagina. He then took his hand off her chest and put his fingers inside her vagina while she squirmed. The episode lasted until the two heard the mother arrive downstairs. Defendant said nothing throughout the episode. He left and went downstairs. The victim pulled her pants up, went to her bedroom, and started crying. This incident is the basis for counts 9 through 10.

The fifth incident the victim remembered was during ninth grade--freshman year in high school--in 2007. It occurred "sometime during winter break" after the New Year and before winter break ended in early January. The victim described the episode as follows: "I was sitting in my room watching TV. He took my wrists again; and I kept saying no. And I started making myself heavy and trying to make it hard to get me into my bathroom and pushed me up against--closed the door and pushed me up against the counter and took my pants down and took his down and rubbed his penis in my butt again." The episode lasted a few minutes and defendant left. On cross-examination, the victim affirmed that this incident occurred shortly after the New Year before she went back to school during a two-week break that had begun just before Christmas. She remembered that defendant was in the hospital with a leg infection but did not remember when. Defendant's hospital records established that defendant was hospitalized from December 26, 2006, through January 16, 2007. This incident is the basis for counts 11 and 12 for which the jury acquitted defendant.

The sixth incident the victim remembered was in June 2007 after she had just turned 15 years old when defendant came into her bedroom, pulled her into her bathroom, pushed her against the counter, took her pants down, "and took his penis and rubbed it in [her] butt. And after that [she] remember[ed] him sticking it inside [her] vagina." She recalled that it hurt, lasted two minutes, and ended when she heard her mother walking up to the door. At that point, defendant "pulled his penis out of my vagina, pulled his pants up and walked out." Defendant said nothing throughout the episode, and the victim pulled her pants on and went to her room. The victim also told Detective Durant that defendant had raped her during this episode. On cross-examination, however, she denied being raped during the episode and explained that her direct testimony referred to the winter break rape. This incident is the basis for counts 13 and 14.

The seventh incident the victim remembered was “a couple more” rapes additional to those that she had already described, which occurred in one of the bathrooms when she was 11 years old. One of these incidents is the basis for count 15.

The victim also testified about uncharged sex acts, such as (1) during eighth grade in 2005 when defendant picked the bathroom lock while she was taking a shower and took several photographs of her showering, (2) during sixth grade when defendant took her into the master bedroom, pushed her down on her knees, and put his penis in her mouth, and (3) during seventh or eighth grade when defendant pulled down her gray plaid pajama bottoms and took a cell phone picture of the back of her body from the underwear to the pajama bottoms.

During eighth grade, the victim told her best friend about being raped and the two maintained a dialogue about the subject in conversations, e-mails, and texts. Toward the end of ninth grade, she told two other friends. At the beginning of tenth grade in October 2007, the victim’s father received a phone call from one of her friend’s guardian to the effect that “stuff was going on at [her] mom’s house regarding [defendant] and him touching [her] like inappropriately.” He asked the victim if it was true. The victim “told him the stuff only happened once and that it was a long time ago and that he didn’t need to do anything.” The father asked whether he should tell the victim’s mother, and the victim told him that he did not need to do so. The father then dropped the subject. According to the father, the victim admitted that “something happened between [defendant] and her,” he proposed to call the sheriff, but the victim got upset and said that she would not talk to anyone about it. In one of the e-mail strings, however, the victim told her friend that her “dad found out bout [sic] [defendant].” When the friend asked what the victim’s father was doing about it, the victim wrote, “hes [sic] not doin [sic] anything cuz he said its [sic] to [sic] hard to take care of me by himself cuz of the money issues and stuff, so he wants me to keep living with my mom.” To this, the friend responded: “umm WHAT? [¶] hes [sic] not even gonna say anything to ur [sic] mom or

anything? he thinks that him just 'knowing' about it is enough? theres [sic] a thing called CHILD SUPPORT. and theres [sic] also a thing called CHILD EXPLOITATION and MOLESTATION. which equals fucking jail. keeping u [sic] in that situation just because he doesnt [sic] have enough money to raise u [sic] by himself because HE will only get a job during the summer, only proves how much of a shitty parent he is."

In February 2008, Child Protective Services called Detective Durant and reported possible sexual abuse. Detective Durant interviewed the victim at school. The victim admitted the abuse, and Detective Durant recorded a 40-minute conversation in which the victim described being "raped," "fingered," and forced to give "head." The victim then agreed to make a recorded pretext call to defendant during the following week from the sheriff's office. Detective Durant declined to take the victim to the hospital for a sexual assault examination because she reasoned that the last incident was eight months old and, after time passes, an exam yields no findings of sexual abuse in 95 percent of the cases. But the victim's mother took the victim to Coastal Women's Healthcare where a nurse examined the victim to see if she was "damaged in any way." After the pretext call, sheriff's investigators executed a search warrant and seized defendant's computer, DVDs, cameras, and the like. They analyzed the contents and some deleted files. They found child pornography (count 17) and other sexual material but no sexual images depicting the victim.

On cross-examination of the victim, defendant elicited several inconsistencies between what the victim had told Detective Durant in the pretrial interview and what she had told the jury during her direct testimony. Anticipating that the People would proffer prior consistent statements from the interview to rehabilitate the victim, the trial court listened to the recording. Outside the jury's presence, it noted that "The essential discussion of what happened" occurred between the sixth and twenty-eighth minute of the interview. It then reasoned: "Now, it's abundantly clear to me--to this Court when you look at time spent and that playing 22 minutes of a tape is going to take at least or

less time than going through and asking each of the consistent questions that would be asked by [the prosecutor]. That's going to take more than 22 minutes. We were talking 45 minutes, one hour. You know, at about 7:45 on Tuesday evening I finished and go 22 minutes. So as far as undue consumption of time it would be quicker to play the modified tape."

Defendant objected to playing the recording: "[T]here were nine prior inconsistent statements that I elicited from [the victim] during my entire cross-examination, on nine occasions, and I can list them for the Court. They had to do with the front door open, whether she was threatened every time, how many times she was raped, whether it happened right after her mom left, every time her mom left as I said and whether she said sex or stuff, which still is not clear on the tape, whether he had sex with her or stuff in terms of what her father knew. [¶] Those were the only nine times that I impeached her with what she said to Durant and my questioning of Durant would be very simple: Did she say this, did she say this, did she say this. The People are only allowed to put in a prior consistent statement to that and if they have any prior consistent statements, fine. I don't believe there are any prior consistent statements to that. Our allegation is she fabricated when she gave the interview to Durant. She testified differently on the stand. I put on a prior consistent. [*Sic.*] They are only allowed to put on prior consistent statements. So I don't see where under the Evidence Code they're allowed to put on the entire tape. I understand time wise it would not be that lengthy but here's my concern: If that tape is played and marked and goes back into evidence then the jury is going to have the opportunity to play over and over again the People's version of the case even where I have not cross-examined or put on a prior inconsistent statement and for tactical reasons--I didn't go through all of them. So if they're allowed to mark it now--any time the jury plays that they not only hear the prior inconsistent statements but they hear her whole version of the events. [¶] I would urge the Court to just allow Durant to testify--I'll be very quick with her--on these nine occasions where there was a prior

inconsistent statement and she can say it was or was not. [The prosecutor] can go into any prior consistent statements and not to play the entire tape even it's only the six minutes or the 28 minutes which is 22 minutes. If the Court rules against me on that then I think the only fair thing is to play the tape once in court as you would with Durant on the stand, let the jury hear, let them go through it with the transcript because the only purpose is to see if she made prior consistent or inconsistent statements, but not put the tape back in evidence where they can play it over and over again where I don't have an opportunity to cross-examine. I didn't have an opportunity to cross-examine on the tape. It's like putting in a police report where they now hear the whole People's case. If the only purpose is to show what she said, prior consistent or inconsistent, it can be played--if the Court is going to rule on it--I don't think it should rule that way based on the Evidence Code--play it once, let the jury follow it with the transcript, let Durant say this is accurate or inaccurate, she said this to me or not and they will have heard that. Now, if they ask on any questions well we want to hear it again we can come into court and play that, but to introduce a tape of an entire interview for the jury to hear on all of the issues I did not impeach her on is just allowing her to have her story without cross-examination listened to as many times as the jury wants and that's not what the Evidence Code allows, Your Honor."

The People countered that Evidence Code section 356 allowed one to place "in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence provided the statements have some bearing upon or connection with the admission or declaration in evidence and that's why it is appropriate that the whole recording come in." They continued later: "It's all part of the same lie. According to the defense they're accusing her of lying. It is all part of the same lie. Does it have any connection to any bearing upon? It's the same lie. Of course, it does. Of course, it does. The case law absolutely permits it. It's not even a close call. It's not. They're saying she is lying about all of it. It's connected. It has bearing upon it."

Defendant added: “Your Honor, there is no case which allows--because a witness is never allowed to get on the stand and make a statement, a lying statement different than what she said to a police officer and I then bring that out and suddenly the whole interview with the police officer comes in. The only thing that comes in is what has bearing on the issues. If I said you said every time your mom left something happened on the stand and she says, no, it wasn’t every time then any statement that she made previously bearing on the front door issue comes in. It doesn’t mean she is allowed to get in that I was raped seven times. That has nothing to do with the issue I impeached on. If I impeach and say you told Deputy Durant every time this happened he threatened to throw you out of the house and she says on the stand that didn’t happen, I’m going to be punished now for bringing that out, that the whole interview where she describes every allegation against her comes in for the jury to hear?” “Those--I did not impeach her on the specific accusations that she said something different to Durant. Of course I’m claiming she is lying. That’s why there is a trial. But the Evidence Code doesn’t say because I claim she is lying an entire interview comes in. That’s why you testify in person so I can cross-examine. I can’t cross-examine an interview and it only comes in on the specific issue I impeached her on, Your Honor. [¶] And then I get back to the last point. If the Court is going to overrule me and I sense the Court rule, but I hope it doesn’t, that tape can be played when Durant is on the stand so the jury can hear the entire context as he said and I can go into with the transcript with what I said is inconsistent or not. That’s the purpose of Durant’s testimony: Putting on what was inconsistent. He wants to put on what’s consistent. But to put into evidence an entire interview for a jury to play back and forth, whatever they want, on the whole case is not what 356 deals with. It only deals with a specific issue that I impeached her on and anything bearing on that issue. I did not bring up prior inconsistent statements on most of the accusations here. My argument that she is lying was not based on that and to play that all in front of the jury and to put it into evidence . . . is just error. . . . It’s similar to

putting in a police report because you impeach a witness on a statement and through a police officer. The only difference here it was tape-recorded.”

The trial court overruled defendant’s objection. It explained that it was limiting admission to the 22-minute segment and added “While this is probative, I don’t believe that--while this is prejudicial, I don’t believe that it would be as prejudicial as going through each question and each consistency. [¶] Lastly, the issue in this case involves the victim’s motive to fabricate which, according to the defense, has been from day one or before day one. The Court does find that this would be probative and if the proper foundation is met the Court would admit those pertinent points.” It then played the 22 minute segment during redirect examination of Detective Durant after which defendant cross-examined Detective Durant with several specific questions designed to highlight the victim’s prior inconsistent interview statements such as, “Did [the victim] tell you on the last occasion, in June of 2007, that the defendant raped her?” During jury deliberations, the trial court allowed the recording to be taken into the jury room with a recorder over defendant’s objection that the jury should listen to the recording in open court.

At another point during Detective Durant’s testimony, over defendant’s relevancy objection, Detective Durant testified that a willingness to make a pretext call is relevant to her investigation because “if an alleged sexual assault victim makes a report that they have been victimized [and] [t]hey then refuse to complete a call, it may indicate they’re not being completely honest.” She added that the victim in this case had no hesitation in making the pretext call to defendant’s cell phone. The prosecutor then played the 18-minute recording of the pretext call to the jury during Detective Durant’s testimony. Detective Durant described the victim as very upset during the call because “the way that [defendant] repeatedly denied what she was accusing him of. She burst into tears and pretty much cried for the majority of the call.” We recount most of the dialogue from the transcript.

“[Victim]: Um, I’ve like been talking to my counselor at school about some stuff.

“[Defendant]: Yeah.

“[Victim]: And I told her that there’s been some stuff going on at home that I didn’t like, but like I didn’t tell you--tell her about you like touching me and stuff.

“[Defendant]: What?

“[Victim]: When you used to touch me, and but talking to her, like she was making me think about it, and stuff.

“[Defendant]: Okay. And that’s me we’re talking about. No one else, right?

“[Victim]: No. Just you, but I don’t understand why you did it.

“[Defendant]: Okay. When was it?

“[Victim]: I was only 10 when it started, but like, it’s like been going on and stuff like-- [¶] . . . [¶]

“[Victim]: I know nothing’s happened since like last summer, but like whenever mom’s not home, I worry that you’re like gonna do something to me.

“[Defendant]: Was I drunk or something? I mean that wasn’t me. Are you sure? I mean, what about your dad?

“[Victim]: No.

“[Defendant]: Well, you have nothing to worry about from me.

“[Victim]: Well, what about the pictures you took like when you picked the lock, and I was in the shower, and you came in with a camera and started taking pictures?

“[Defendant]: No. Um, ah, um, was I, was I drunk or something?

“[Victim]: No.

“[Defendant]: I don’t remember that. I would never do that, and I would never, I mean, I will never You have nothing to worry about from me

“[Victim]: I don’t understand like why you’re denying it?

“[Defendant] Because I ju-- I don’t, I would never do that to you And if I did, I mean, oh my God, I would go to jail, You know what I mean? I mean.

“[Victim]: I won’t talk to anyone or anything, but just like promise me like you’ll stop.

“[Defendant]: I promise. I promise I will never do anything like that I will, I will cut off my head before I’d do anything like that. Do you understand? I mean, I will, I will protect you. I will never even do anything that will make you nervous or scared. Do you understand? Do you believe me, . . . ?

“[Victim]: No, but like I don’t understand though, because like you have done this stuff to me.

“[Defendant]: . . . what? Oh, are you alright, babe? . . . are you there? Are you okay? Oh, . . . I’m sorry. . . . did . . . I mean, I’ve had some crazy ideas before, but I’ve never hurt you, . . . I’m sorry if I made you feel funny in any way.

“[Victim]: I just don’t understand.

“[Defendant]: Oh . . . , it’s all my fault. You okay, . . . ? You are safe. Do you understand? You are safe no matter what. I will never even go near you. Do you understand?

“[Victim]: But like why did you do it though?

“[Defendant]: I--I must have been crazy. I must have, I don’t know, must have been drunk or something or on drugs, or I must have been on drugs or something

“[Victim]: I know you remember though.

“[Defendant]: You know what?

“[Victim]: That you remember.

“[Defendant]: That I--that I wasn’t or do you know--what?

“[Victim]: No. You remember like what happened. You’re just like denying it.

“[Defendant]: Well, . . . even if, I mean, I didn’t deny it, if I said so, I would go to jail. Do you understand? If I said so on the phone, you know what I mean?

“[Victim]: But I’m not gonna tell anyone anything.

“[Defendant]: Right. Do you need me to hear, you know, say I’m sorry?

“[Victim]: Yeah.

“[Defendant]: I’m sorry

“[Victim]: I’m just trying to understand like, why?

“[Defendant]: I, I couldn’t tell you why. I mean, just, I’m maybe you remind me of your mom. I, I don’t know. I couldn’t tell you why, I mean, other than maybe I’m sick and need just to not do drugs. I don’t know. You know what I mean? I mean, maybe I mis-used my affection for you. You know, showed my love the wrong way. I mean there’s no ‘good’ why. It’s crazy stuff. You know what I mean? I mean, that’s wrong. And no one, you know, you shouldn’t even have to deal with that, ever. I mean ever, you know what I mean?

“[Victim]: Yeah.

“[Defendant]: I mean, that’s just wrong. I mean, I do not want to be that guy. Your mom had that problem with her dad, and you know, my, I’ve had--every girlfriend I’ve ever had had that problem with their dad, and I am not that guy. I don’t want to be that guy. You know what I mean? I mean, but if, you know, you say this to people, and if you have to, you have to. You know what I mean? But I’ll go to jail, and the marriage is over, and my life is over, and I won’t be able to see my kids again. But I need to do whatever it takes to make, you know, things right with you. Do you understand?

“[Victim]: Yeah. I just, I still don’t like understand like why it was me though?

“[Defendant]: Because, you know, I don’t know. You were a pretty little girl. I don’t know. I mean, you know, I took affection I needed from you. I don’t know. Because I know you loved me. I don’t know. You know what I mean? I mean maybe because I did not think you would tell. What’s that?

“[Victim]: Why when I was so young?

“[Defendant]: I, I am so sorry Is there anything I can do? I mean other than promise you that, that you’re totally safe, and I love you. You know I love you, right?

“[Victim]: Yeah.

“[Defendant]: And I’ll do anything for you. I mean, I will protect you until the end. I will, you know what I mean?”

“[Victim]: Yeah. I don’t know. I guess I just want you to promise me like you’ll never touch me again.

“[Defendant]: I--I promise, never ever ever. I’m not--I won’t even give you a hug unless you want me to. You are safe, and I swear I’m gonna look at not doing drugs and whatever it takes. I mean, I--I’m probably in denial about the whole thing then.

“[Victim]: What about the videos that you took when I was like in like mom’s lingerie and stuff?”

“[Defendant]: I’m sorry I’m--

“[Victim]: Well, do you still have the videos?”

“[Defendant]: Are you gonna--I might be able to, I mean, what can I do to help you?”

“[Victim]: Do you still have the videos?”

“[Defendant]: What’s that?”

“[Victim]: Do you still have those videos that you took when I was in mom’s lingerie?”

“[Defendant]: No. No. No way.

“[Victim]: What did you do with them?”

“[Defendant]: I don’t have any videos or pictures or anything.

“[Victim]: What did you do with them?”

“[Defendant]: I probably erased them or destroyed them, or I have the tape in the room. I’ll go over them to make sure. I mean, your mom looks at those tapes too. I mean, if there’s something on there, I better find it. I mean I wouldn’t even--yeah. Oh, . . . are you, can you forgive me?”

“[Victim]: Maybe.

“[Defendant]: Maybe, I understand. I mean, you know, it’s so horrible I must be in denial about it. I mean, I remember playing with you. You know what I mean? But . . . Oh . . .

“[Victim]: But why would you like touch me and stuff and like

“[Defendant]: What’s that?

“[Victim]: . . . want to have sex with me and stuff when I was so young?

“[Defendant]: Did what? Say that again.

“[Victim]: When I was so young, like why would like want to touch me and like have sex with me and stuff?

“[Defendant]: I don’t, I don’t know Like I said, It must be some mental problem I have. I mean no one, no one has ever, you know, touched you, right?

“[Victim]: No.

“[Defendant]: Okay. Oh poor . . . I’m sure it was misguided affection. Sick. I’m sorry. There’s . . . I’m sure I’m in denial. I mean, you know what though? You have nothing to worry about from me. Do you believe that?

“[Victim]: Yeah.

“[Defendant]: Do you believe I’ll do whatever it takes to make this right?

“[Victim]: Yeah.

“[Defendant]: I will do whatever it takes to make this right. Alright?

“[Victim]: Yeah.

“[Defendant]: If I have to, you know, secretly go to counseling or anything for that, stop drinking, stop smoking or whatever it takes. I mean, I’ll do it.

“[Victim]: Okay.

“[Defendant]: So I mean . . . I mean, and if you tell anybody this, my life is over, I mean.

“[Victim]: I won’t tell anyone.

“[Defendant]: I mean wouldn’t--you, you know, when you’re ready, we gotta talk about this face to face, and I’ve got to apologize and, you know, if I’ve got to spend the rest of my life like making this right because, you know, that’s something your mom’s dad never did, you know what I mean? And she’s messed up about it, and I don’t want you to be messed up, you know, the rest of your life.

“[Victim]: Okay.

“[Defendant]: You know what I’m saying?

“[Victim]: Yeah.

“[Defendant]: I mean, you can’t even tell your friends because that, you know, they’ll want to help, and that might be the best thing, you know? If they’re worried about you, they’re going to, you know, tell their friends, you know? Or tell someone, like I would. You know what I mean? Just like you should if you think someone’s like, you know, in a bad situation like, and it’s not going to get any better, you need to help. You know what I mean? You know what I mean?

“[Victim]: Yeah.

“[Defendant]: Oh baby. Ah. You didn’t tell your counselor or anything, did you?

“[Victim]: No.

“[Defendant]: Ah.

“[Victim]: Do you still have like the pictures or anything though?

“[Defendant]: No. I swear to you. I’ll take a lie detector test. I have no pictures.

No nothing.

“[Victim]: And you didn’t show anyone?

“[Defendant]: No. No. Never.

“[Victim]: And you didn’t put anything on the internet?

“[Defendant]: No. No way.

“[Victim]: Okay.

“[Defendant]: I . . .

“[Victim]: Just promise me like you won’t ever like do anything again.

“[Defendant]: Oh promise, totally promise. Totally promise, and I swear if I even try something, you have my--You know, I mean, you go ahead and you tell someone. You know what I mean?

“[Victim]: Yeah.

“[Defendant]: And just so you know, I mean, you have nothing to worry about. I mean, if I so much as look at you funny, then you, you tell someone that you don’t feel safe around me. Okay?

“[Victim]: Okay.

“[Defendant]: But it won’t even be that way. I mean, not at all.

“[Victim]: Okay. [¶] . . . [¶]

“[Defendant]: Well, are you going to be okay to go back to class?

“[Victim]: Yeah.

“[Defendant]: Everyone’s going to wonder why you’re so upset.

“[Victim]: No. It’s okay.

“[Defendant]: Are you going to make something up or something?

“[Victim]: Yeah.”

Defendant called emergency room physician Dr. Steven Gabaeff as his expert witness. Dr. Gabaeff had reviewed the victim’s testimony, recorded interview, police report, and medical report. He opined that, based on the victim’s testimony describing incidents of rape, he would expect a physical examination performed six to eight months after the last rape to show “physical findings a hundred percent of all cases.” He explained that prepubescent girls “are much more inclined to get injuries because of significant size disproportion issues that exist.” He noted that one would expect two or three distinct findings in a forced intercourse scenario and one finding in a consensual intercourse scenario. He added that he had reviewed thousands of photographs of the female anatomy where the subject has suffered a rape. He explained that acute healing

generally occurs in less than two weeks but “the actual clefts or defects in the hymen that occur and do occur in sexual intercourse to a prepubescent female are maintained after puberty has reached and the hymen has gone through this transformation that’s called estrogenization.” He then made a drawing of how a prepubescent minor’s vaginal area would look before experiencing vaginal intercourse and described that “First time active intercourse, there’s going to be a slight amount of bleeding associated with the hymen being torn,” and, after first time intercourse, one would expect to see certain clefts in the hymen. “There is also another component which is the amount of injury that takes place at the time the event takes place, which is very substantial in small children, leading to bleeding, bruising of the tissues, a lot of disruption of the anatomy. If the child is small enough, the laceration that could occur not only go through the hymen but it could extend down into this area. And, in some cases, you can have clefts that extend all the way down into this structure here, which is called posterior fourchette.” He acknowledged that some healing occurs over time but he would expect to see on a 16-year-old child--who had been raped two to five times over five years--six or eight months after the last rape “this ‘two clefts’ scenario we are talking about here, these areas, literally, there would be no hymen at all. And these defects would persist. And there are many photographs showing the areas where the hymen is completely absent from the previously damaged area.” “The deformation of the tissue that occurs from injury. You get a cut. You get a scar. And the scar is permanent. The cut is the acute injury. The scar is the permanent configuration.”

Dr. Gabaeff explained that the records of the victim’s medical examination show that the nurse who conducted the examination was informed that the victim had claimed four to five incidents of vaginal penetration and intercourse. He then stated that the result of the examination did not indicate any residual damage, clefts, injury, or anything else present. He added that the result of the examination, according to the nurse who conducted it, was “normal.” He opined that there would have been residual evidence of

rape in the examination had the victim been penetrated as she described in testimony. He added that the nurse who examined the victim would have recognized abnormalities had any existed.

In rebuttal, the People called pediatrician Dr. John Stirling as their expert witness. Dr. Stirling had listened to Dr. Gabaeff's testimony. He opined: "Categorically, I think I can state that penile penetration in an adolescent woman does not always result in physical damage when you are examining the child weeks or months after the penetration. [¶] . . . [¶] I can clearly state that most examinations that are done in children who report penile entry, adolescents who report penile entry, most examinations are normal and do not produce forensic evidence, especially, a week, a month, two months later." He added that he disagreed with Dr. Gabaeff's opinion that one would expect to see physical findings in virtually 100 percent of cases where the last sexual abuse to a 15-year-old girl occurred six to eight months previously. He opined that it was possible that the victim had suffered no injury because (1) penetration did not go past the hymen or (2) estrogenization--the appearance of female sex hormones shortly before the first menstruation--had occurred making the hymen more tolerant to stress. He opined that it was possible that any injury had healed. And he opined that it was possible that the victim had an injury but the medical examination was forensically inadequate. He stated that he had reviewed the victim's medical report and "The examiner here made a line, an arrow line, sort of including everything from pelvic down through uterus and written letters 'WNL' which means 'within normal limits.' There is no indication as to the nature of the examination. There's no mention of a colposcope being used. [¶] . . . [¶] The documentation of the examination here is very sketchy. There's nothing to indicate that any special instrumentation or approach was used to visualize the hymen directly much less a multi-method, Q-tip, saline wash, turn-the-patient-over kind of examination, as you would expect from a forensic examination. This is a kind of pelvic examination. This is how they are usually documented." He added during redirect examination:

“There’s no indication on the record of use of a colposcope, Q-tips, saline washes, or any of those multi-position examinations that we’ve talked about. Those are not expected in a routine GYN examination. Whether you have one or two clefts or no cleft in your hymen is not of a great health concern. So they don’t pay very much attention to those.”

In closing argument, defendant emphasized the following themes beginning with his motive-to-fabricate theory.

“That’s the e-mail that was sent by [the victim] to [her friend] and back, in October of 2007. And what is significant about that, ladies and gentlemen, not only that [the victim’s father] lied on the stand under oath when he said he never brought up money and not being able to care for her, but [the victim] lied on the stand when she said, oh, this had nothing to do with my dad caring for me and money. We made it clear I didn’t want to tell my mom. He made it clear he wouldn’t. Not what she says here. I don’t know what he is going to do. They both lied about that. And the reason they lied about that is because there is no father in this world, certainly none who loves their child as much as [the victim’s father] loved his child, that would ever put money in front of their daughter’s safety, if it really happened, if they believed it really happened, or if there wasn’t some other conversation there like ‘Dad, what are you going to do?’ ‘You know, I can’t afford you.’ ‘Well, okay. It didn’t really happen that way.’ ‘I’ve got to go to the sheriffs if it happened.’ ‘No, it didn’t really happen that way, Dad.’ [¶] You know what? Amazingly, after that conversation, there was no other allegations, were there? Because it wouldn’t do [the victim] any good, at that point, to make other allegations. Dad had said he wouldn’t take her. That is what she wanted. When she was talking to [her friend] and her friends--this girl who we were told so embarrassed could not tell anyone, did not want anyone to know--she tells her friend, her best friend, and gives her best friend permission to tell her mother. But what did she say? You didn’t hear [the friend] on the stand, did you, saying what she said. Some vague stuff. Because, in the end, yes, she wanted this to get back to her father. She wanted her father to say, you are

coming home and you are living with me, period. She didn't want a whole big trial like this. She didn't want the police to find out. She just wanted to come home to dad. And, in order to do that, because she was so miserable there and because she hated her mother so much--and we know she did--she starts telling her friends that something was going on, my stepdad is doing something. She wasn't afraid of [defendant]. What toll did he have on her? [¶] . . . [¶] And [the friend's mother] called up and said something is going on, something is going on. Remember that. Something. Not rape, not fingering--her words--not giving head, oral copulation. Something. And her father asks her. What is she going to say? Oh, no. It just happened one time a long time ago, Dad. Now, this is the one person in the world that she wants to know. This is the one person that she wants to know. And she says nothing so that it will stay just the same? No. This rumor came up. And she said to dad, hey, Dad, what are you going to do about it if it's true? And dad says, well, I don't know. You know, is it really happening now? Well, kind of, a long time ago. Come on, [victim]. Tell me the truth here. I wish we had a phone or a microphone there. That's what happened. And, eventually, [the victim's father] realized she wasn't being molested or attacked. He would have been on that phone the second no matter what she said. What he said was, [victim], if you are making this up to come live with me, I can't afford it. Now, that you would say if you didn't believe your child was being molested and you just thought she was manipulating. There's the manipulation. In that situation, then, yes, you would send her back because he knew it wasn't true. And, sure enough, she never came back to him again or said anything was going on. [¶]

Amazingly, no other allegations against [defendant] after that October, was there? Until the police are called because CPS is called, not by [the victim's father], not by [the victim], but by one of the mothers. And now she is stuck. Now either she claims she was lying to [her best friend] and lying to everybody or she says something happened. And she has been thinking about that for a while because, as soon as she knew that the mother of someone had called her dad, she knows it's only a matter of time before the parents of

the girlfriend do something else or call someone else because nothing is happening. She is still living in the home. They don't know that she spoke to the father and the father realized that it was bologna."

"You would make up your mind just when you heard that [pretense] call in the opening statement because, sure, if you just listen to that call and know he has child porn, your first thought is going to be, oh. But listen to the call carefully. The words he uses and the tenses he uses. And, more important, perhaps, listen to what [the victim] is accusing him of doing. And then decide whether that, by itself, is going to convince you that he is guilty beyond a reasonable doubt of 15 charges of forceable [*sic*] rape, oral copulation, and fingering, if you will, [the victim's] words, because nowhere, nowhere on that tape, do you hear the words rape, penis, vagina, finger, head. I am using the vernacular for oral copulation. [¶] . . . [The victim] has a script. She was told ahead of time what to say. And, as she was on the phone, notes were being written as to what to say. And Detective Durant testified that she wanted [the victim] to be specific about what she was accusing [defendant] of. Of course, she did. They had just had an interview a few days before where [the victim] claimed he had raped her four to five times. Forced oral copulation, forced finger in the vagina. Now, these are serious charges. . . . [¶] . . . She knows what rape is. 17 when she testified. Penis all the way in. It hurt. Eight on a scale of one to ten. And what Detective Durant wanted . . . --was for her to accuse him of rape. All she had to say when she was crying or before--and I submit to you that if you saw those shredded notes--and why did Detective Durant shred her notes that she was writing to [the victim]? Why? Is this Watergate? Are these national security issues? Why? Wouldn't you like to know what she was asking [the victim] to do? Because I guarantee you she said to [the victim], 'Say rape. Say penis. Say to him.' [¶] '[Defendant], how could you have done that? I was so little. How could you have put your penis in my vagina? How could you have put your finger inside of me? How could you have made me blow you, give you head?' Why didn't she say that?

It wasn't because she couldn't say the word. She had spoken those same words to a stranger Detective Durant three days before. What she said was 'Touch and stuff.' What does that mean? Well, touch. He certainly is not charged with touching. . . . [¶] She didn't use those words because she knew it didn't happen. Had she used the words, 'You put your penis in me; you raped me,' he would have said, 'Wait. What are you talking about here.' This is well beyond when he says, 'I was showing affection to you in the wrong way' or maybe when he was saying anything to calm her down. Why not those words?"

"You heard two doctors here. . . . Because, in the final analysis, Dr. Gabaeff had to admit that, when someone is violently raped at a young age, prepubescent, the first one, you are going to see notches and clefts, even when it heals, if you just take a Q-tip and open it up. And that's one rape. These are four to five rapes. And that's what Dr. Gabaeff said. All Dr. Stirling said was, 'Well, that might mean injury. It might not. That could be normal. It could not.' Dr. Gabaeff said--and use your common sense. You are raped at that age. The hymen is torn. No, you are not the same. Four times. You are not the same. So who does he attack and [the prosecutor] attack? They attack the nurse. Before Dr. Stirling was through attacking the nurse, she was no better than the parking lot attendant. Right? [¶] [The victim] came in and the mother asks her, a trained nurse at a women's health clinic. A woman's health clinic. Who does she deal with? Women, children, girls. 'Is my daughter damaged?' [The mother] wanted to know."

"Let's look at what [the victim] said about spring break, shall we? Something that [the prosecutor] never even discussed in his opening statement. . . . She really couldn't give you, for the most part, any specific days of the week. Times of day were rare. Dates were impossible. Once I was in the sixth grade. Once I was in the seventh grade. Once I was in the eighth grade. So how do you--how are you able to prove if you lived in the house, like [defendant] does? Oh, I wasn't there that day. He can't. Right? [¶] Sometimes you get lucky. Sometimes you hardly get lucky. . . . We looked at the dates

that [the victim] claimed in the report in her interview with Detective Durant before we were ever involved as to when she says this happened. And, lo and behold, to Detective Durant, she says in the interview, which you can play because you will have it if you want to listen to it, it happened, one of the times, the second to last, over Christmas break, over her winter break. Now, that's a pretty clear recollection because you are either in school or you are not in winter break, as I recall. And everyone loves winter break, and everyone loves Christmas. So you are going to remember that. You weren't in school. She said a few days after New Year's before she went back to school. She said that without any prodding from me. She said it to Detective Durant. [¶] . . . But we got lucky, and [defendant] was fortunate enough that, during that whole time period, from December 26th to January 16th, he was in a hospital. In a hospital bed with a staph infection with renal failure. That's kidney failure. And he just didn't get that illness on the 26th, as you heard. He had some problems leading up to it, [the mother] said. He got an infection at work. It got so bad that, on the day after Christmas, he was in the hospital. He got out on January 16th. That's two weeks after winter break had ended. [The victim] swore to you on the stand he wasn't at home in bed. [¶] Well, so you stick by your testimony and your statement to Krissi Durant--this is from the testimony--that you were assaulted in the bathroom during Christmas break a few days after New Year's? Yes. And it doesn't matter to you if your father was admitted in the hospital on December 26th and released on January 16th, long after Christmas break? You are saying he got out of the hospital and attacked you in the bathroom; right? That's what you are saying; right? Would you say that again? All right. You are saying that it's true, when you testified under oath, you told Krissi Durant, Christmas break, '06, and just a few days after New Year's, you are still saying your father attacked you a few days after New Year's during that Christmas break; right? Yes. He was not in the hospital during that time. Not in the hospital. You remember this clearly? Yes. Over Christmas break? Yes. And he came to your room? Yes. And he pushed you against the sink? Yes. And

he put his penis in your vagina? Yes. [¶] Then it is interesting. Then she's asked some questions. You see, she can describe the event. She can make up 'He rape[d] me in the bathroom' and so forth. But then you say, when did [the mother] leave home? I don't know. You know when she left? No. You know where she went? No. You know how long she was gone? No. But you know it was during Christmas break? Yes. Before you went back to school? Yes. You remember this clearly? Yes. And he came into his room? Yes. Yes, yes, yes. And then, when I showed her the records which clearly showed he was in a hospital during that time, you know what she said? Could I have a five-minute break, Your Honor? Well, this is not something [the prosecutor] prepared me for even though we met ten times before my testimony. No, he wasn't in the hospital. He dragged me in the bathroom a few days after this. She was saying this under oath. You told Krissi Durant, during Christmas break, a few days after, he assaulted you? Yes. He was not in the hospital. Trial transcript. You stick by your testimony. Yes. Are you sure that happened over Christmas break in '06, as sure as you are about everything that happened in this case? Yes. [¶] Now, people can forget. And people can make mistakes. And all [the victim] had to say on that stand was to say, well, maybe I was wrong. You know, maybe it wasn't over Christmas break, a few days after New Year's. Maybe it was in February or March. Or maybe it was the previous year. . . . She swore to you on the stand it happened. He wasn't in the hospital. He wasn't laid up in bed after he came home. No. Even after the five-minute recess where she consulted with who knows who. Then she really got feisty, didn't she? She did. Because you know how you get sometimes when you are wrong. When you know you are wrong, sometimes you fight even harder, don't you? [¶] She lied to you about an important thing. About a very important thing. No person has a good enough memory to be a successful liar. If you decide that a witness deliberately lied about something, you should consider not believing anything that witness said. Now, [the prosecutor] doesn't want to quote that instruction to you because he wants you to believe everything [the victim] says. Everything she

says. Because, you see, this case is not just about finding child pornography. We've never contested that. You will have the numbers that were found. Six on that one, seven on that one. There was adult pornography there, too. He's got a problem with that. His wife knew that. He hid it from her. And, if you decide to convict him on that count of child pornography, he's got no one to blame but himself. But it's a big jump. It's a big jump than just to assume he violently raped his daughter four to five times over five years. And she cannot remember anything other than the front door opened almost every time. [¶] . . . Look at the number of lies that [the victim] was caught in. And this is just some of them. She told Detective Durant, every time her mother left, something happened. Every time she said when she was interviewed. It's not on the portion of the tape you have. But Detective Durant told you that. Well, you know that's not true. Mom must have gone on how many errands over the years? Why did she say that? Just to make up stuff because she didn't remember what she said. So, when she got on the stand, she said, no, it wasn't every time. But I showed her what Durant said. She said every time. Well, I must have been mistaken. Okay. Right after she left, right after mother left, she said it happened the first time. Right after. Well, that didn't make sense because she said it was about ten minutes in the bathroom downstairs when suddenly someone was approaching the front door. Where did mom go? Drive around the corner? Couldn't have happened that way. Another mistake I am sure. [¶] She said, every time, he threatened to kick me out of the house. Now, on the stand, she never said that originally. She said that to Durant. On the stand, she never said that. She said it was going to be our secret and so forth. Why is that important? It's important for a couple of reasons. Number one, she lied about it. It's important because what she told Detective Durant was, one of the reasons she didn't tell was because she was afraid. If she did, he would throw her out of the house. Well, who cares? That's what she wanted. She wanted to live with her father. We know that. [¶] But there's something more important than that. Think about this. First, you have to consider the kind of person who would

commit crimes that [the prosecutor] has charged [defendant] with. He's not charged with stepdad going over to his stepdaughter and saying I love you and hugging and kissing and then his hand moves. He says, oh, it's okay, sweetheart. I love you. It's okay. Don't tell. It will be our secret. You see that in child molestation cases. And then the child is really conflicted what to tell, what not. She loves her stepfather. She loves her mother. There are horrible cases. We know that. This isn't one of them. What he's accused of doing is, out of the blue, just dragging her into the bathroom, pulling down her clothes, fingering her, having sex with her, taking her head, forcing it on his penis. No words. The reason [the victim] can't remember any words is because you can make up events, but it's hard to make up dialogue. It's hard to make up dialogue if you lie. [¶] . . . [¶] Every time [the victim] was asked what did he say to you when he grabbed you, nothing. What did he say to you in the bathroom? Don't remember. Nothing. What did he say to you? Nothing. The only thing she said was he threaten[ed] to throw me out of the house. And she lied on that on the stand."

"Now, this one I didn't quite understand because--and if this ever was an example of what that says about no person having a good enough memory--[the victim] got up on the witness stand under direct examination from [the prosecutor] and said that the last event took place in June of--or the summer of 2007. [¶] . . . [¶] Now, you can have the testimony reread if you want. And I hope you do. [The prosecutor] is asking you to convict [defendant] of rape on the last incident. And [the victim], on this stand, under oath, on cross-examination--and I gave her every chance to say it was the last time she was raped--she said, no, it was the second to last time. The Christmas break, the time when he was in the hospital. Why did she change within a few days whether she got raped the last time or not? Because no person has a good enough memory to be a successful liar. She would remember the very last time. Anyone would. Especially now that you are up there on the stand and you are being asked and you've already told Krissi Durant you were raped the last time. And yet, on cross, you changed 180 degrees. Why

did she do that? You have a right to ask yourself that. You may come to a different conclusion than myself. But ask yourself that. She's lied now twice about charges, serious charges. She said he attacked her over Christmas break, a few days after New Year's. And she said he raped her on the last one then changed and said he didn't rape me in the last one."

"[B]ut the bottom line is add up what we don't have here. We don't have any corroboration for what she says. We have just the opposite. He was in the hospital. The front door couldn't have opened then. She changed her testimony about whether she was raped the last time or the second to the last time. We have proof it didn't happen. We have no physical evidence, no video, no pictures on the camera, nothing. [The mother] was even finding things and turning them over. Nothing. Not even stuff deleted. And we have no medical evidence. So you start thinking, as we did, some things don't make any sense. And here's the list. Number one, most always ended when hears the front door open. Again, that doesn't make any sense. You are not going to wait for [the mother] to come in the front door before you pull up your pants and run out. You are not. You don't have to. She's gone an hour or two. These events take place over 5, 10, 15 minutes. Number two, takes ten minutes, mom gone one to two hours. Number three, no bruises, pain, ejaculation, blood, or anything. [¶] Think about this. This is a young girl of 11 years old when this starts. And one of the things that we asked her was, when you saw your mom, were you able to conceal your anger, whatever pain you were in? Yes, to keep it from her, yes. [Victim], during your entire period this was going on, is it your testimony that, in your mom's presence or [defendant's] or anyone else's, including her father, mind you, you were never sobbing when this happened to you? Yes. Never shaking? Yes. Never had puffy eyes or red eyes? Yes. Never had any severe pain? I didn't show pain. Didn't show it. Never had trouble walking? No. Never thought like you were in shock? Didn't show her. You were able, as a 10-, 11-, 12-, 13-year-old, to hide all of this from your mom and everyone else; correct? Yes. Physically and

emotionally; right? Yes. You knew, if your stepfather was raping you, all you had to do was tell your dad. He would tell the sheriff's department. He would be arrested and it would all stop. Yes. You never did that, did you? No. [¶] Now, I know and you know and [the prosecutor] will tell you that, yes, kids can hide things. Kids can be ashamed of things and so forth. But we are not talking about touching here. We are not talking about hiding that someone touched your breast or whatever. We are talking about violent rape, as she described it, four, five times. And her mom is going to come home and there's not going to be any blood? From the wonderful Dr. Stirling. Blood? Half the time maybe. Really? 11-year[-]old girl? Rape? No blood? She's not going to show any pain, any trouble walking, no blood on the clothes. Her father does the laundry. Not a drop. No puffy eyes, no crying, no nothing? Even the first time before you've had a chance to think it through whether you want to tell her or not? That doesn't make any sense. No changes in behavior, suppression of anger, changes in grades. [¶] . . . So, in other words, with all the medical science and so forth, we have--in essence, what Dr. Stirling is saying is, if you find something, that means she is telling the truth; if you are not sure you find something, that means she is telling the truth; if you find nothing, that means she is telling the truth. Really? Is that what you believe? That's not what Dr. Gabaeff says. Is that what you believe? Doesn't matter what you find. He is guilty. [¶] They found nothing here. And Dr. Stirling, after ridiculing this nurse and claiming that, even though the mother came in and said I want you to see if there's damage. Just do a regular gynecological exam, would you? You are not even trained nurses. If someone came in and said I want you or your doctor to see if this girl's been damaged and then the history says four to five rapes, penetration, would you just say, 'Oh, let's see. Take your temperature, blood pressure. Everything looks good. See you later'? You would either do the exam to find out, which this nurse did, I submit to you, or you call in someone to do the exam, or say you'd better take her to Dominican Hospital or Dr. Stirling, the guru of examinations. She didn't. She did the exam. And Dr. Stirling didn't even have the

guts to call this woman and talk to her. Well, [the prosecutor] would ask why didn't we call her? We put on the exam that she did. Within normal limits. Plenty of room to write hymen cleft, hymen notch. Plenty of room there. Plenty of room. We put it in. All they had to do was bring in this nurse to say, 'You know what? I really didn't do really that good of an exam.' All Dr. Stirling had to do was call the nurse up and say, 'Nurse, what's your background and training? Did you do a good exam? What did you do?' He wouldn't do that. He was afraid to do that. He didn't even read what [the victim] said happened. So then he could say, well, maybe the penetration was just--it didn't go as far as the hymen, which is like an inch, when [the victim] said full penetration, all the way in, moving around back and forth. It hurt eight to ten. No. Dr. Stirling didn't want to do that, neither did [the prosecutor], because it just might be that this nurse knew what she was doing."

DEFENDANT'S MOTION FOR A NEW TRIAL

Background

The motion for a new trial was based on declarations submitted by two jurors, which, according to defendant, revealed two instances of misconduct committed by one of those jurors and another juror. One of the declarations described the instances as follows: "I was a school teacher in San Jose for over twenty years. I retired from teaching in 1999; [¶] During deliberations, I explained to the other jurors the difference between Christmas break and Winter break. I said that in my experience as a teacher, Winter break takes place in February. I never stated that this is the case in Santa Cruz; [¶] During deliberations, some jurors had trouble understanding some of the technical terms regarding [the victim's] medical examination. Another juror, Dr. [J.F.], explained those terms to us, and stated that it appeared that no rape kit examination had been conducted, only a basic gynecological examination testing for STDs."

As to the winter-break point, the trial court opined that "I don't think that what juror [Juror Name Redacted] did amounted to any misconduct at all. And if you want to

call it even misconduct, it enured to the benefit of the defendant because the jury acquitted him on those two counts.”

Defendant responded as follows: “The point the Court is missing, not intentionally I know, perhaps [the prosecutor] is missing, even though he sat through all the closing arguments, is that it did not enure to the defendant’s benefit. The reason that he was acquitted is and was clear of those two counts is precisely because the jury accepted what [Juror Name Redacted] had stated and that is that the winter break occurs later and they could not--in February--and they could not convict [defendant] because those two counts listed the dates as occurring in December or January and not February. [¶] The problem is--the problem is that acquittal was not based because of those, that extra judicial evidence, was not based on their belief that [the victim] was lying, it was based on their belief that she was telling the truth and the winter break was really in February and so we cannot convict because the People charged it wrong. [¶] The problem for the defense was our entire defense was based on two key points, most of our defense. [¶] Number one, that she was caught in an out-and-out lie about those counts because she stated on the witness stand it was during Christmas or winter break a few days after New Year’s. [¶] There was never any evidence presented by [the prosecutor], Ms. Durant or [the victim] that she was talking about February. Had there had been, as a break, we would have put on evidence from the school and from anyone we could find which would have established there is no winter break in February, there’s a three day weekend; that’s all. The only breaks are in winter break and Christmas break meaning the same thing. We did not present that because there was never an issue that came up during the trial. It only came up when new evidence was introduced during deliberations that there’s a winter break later in February. And the problem is that the jury then was permitted and did conclude that [the victim] was not a liar, she was just mistaken or the People had in error charged the case, those counts, as to occurring in December and January not February. [¶] When they found that she was not lying but just mistaken, then that section

of the jury instructions where you can disbelieve a witness' testimony in total if you believe she lied on material point was no longer relevant. It was no longer relevant because [the victim] wasn't lying now. She must have just been mistaken because there's really a winter break in February. She must have been talking about that because [defendant] was in the hospital and as we proved by an abundance of evidence in December up to January 16th. [¶] So while the defense's argument and the defense relied almost entirely on the belief that if she could get up there and lie, and she never changed her testimony even on redirect, she said he attacked me during the winter break a few days after New Year's in the home. He was there. He was not in the hospital. And the jury when they heard there's a winter break in February and she must have been talking about that, at that point was allowed to believe that [the victim] was not a liar. She was just mistaken. That destroyed the defense argument that if she lied about something so clear, and why would you ever make up something occurring over Christmas when the man wasn't even in the home, that she could not be trusted in the rest of the testimony. That no longer became an issue for the jury.

“The other key point of our defense was that there would have been and should have been physical injuries and we'll get to that with [juror Dr. J.F.]. [¶] So with both extra judicial statements in the jury room which the prosecution in their motion have conceded is admissible evidence to present to the Court, and was clearly stated in the affidavits of [the two jurors], that this evidence was brought out during the deliberations when the defense had no opportunity to rebut it. Those two factors destroyed the credibility of the defense counsel's arguments and it also allowed the jury to believe that [the victim] was being truthful throughout her testimony not just--and just perhaps mistaken when she said it occurred in winter break over Christmas was probably winter break over February. That's the problem here. And the fact that they acquitted was evidence that they believed [the retired schoolteacher juror]. They believed her that there was a winter break in February but they couldn't convict him because the dates did not

match. Not because the jury applied that jury instruction that the Court stated. That instruction would have been applied to the benefit of [defendant], there would have been a reasonable doubt had that jury felt and believed that [the victim] intentionally lied about a significant part of her testimony and she likely could have lied about the others. They were taken--that argument was alleviated and removed by the extrajudicial evidence introduced in deliberation by [the retired schoolteacher juror], not intentionally I'm sure, that is new testimony. New evidence not presented during the trial. Never came up during the trial. And that's why [defendant] did not receive a fair trial."

The People argued that there was no misconduct because everyone has had common experiences with school schedules and no prejudice because the juror's observation about a winter break in February did not apply to Santa Cruz.

Defendant countered: "If it had no bearing then why was it said? Obviously it came up during discussions of [the victim's] credibility. And the only reason [the retired schoolteacher juror] would have said that, I'm not blaming her, I don't think she intentionally violated any oath, was because she was explaining that there's a difference between Christmas and winter break and in her experience winter break takes place in February. There's a reason she said that. . . . [¶] Common experience does not relate to this case. This was a factual issue as to where [defendant] was over Christmas and the first part of January. He was in the hospital. When a juror comes forward and in essence says [the victim] must have been talking about February, that's not common sense. [¶] . . . [¶] When the statement was made by [the two jurors] as contained here that winter break takes place later in February, and not when [defendant] was in the hospital, that is evidence and testimony being taken outside the presence of the jury. [¶] . . . [¶] So this is not something of common sense and common knowledge. This is a statement; and frankly [the retired schoolteacher juror] did not say it only happens in San Jose. I don't know what happens in Santa Cruz. She said I didn't mention Santa Cruz. But she obviously mentioned it because they were talking about winter and Christmas break.

Why else would it come up? And she mentioned it to say that there is a winter break later and in essence [the victim] could have been talking about the winter break in February. That destroyed the defense argument that she had out-and-out intentionally lied and destroyed our argument if she lied about that, she was lying about other testimony that she gave.”

As to the medical-examination point, defendant urged the following: “As far as [juror Dr. J.F. is] concerned, Your Honor, again, we understand that people take their life experiences and so forth into a jury room. And if [juror Dr. J.F.] had simply said, in my experience I know exams are given. Some are gynecological. Some are rape exams and so forth. That would have been one thing. He actually looked at the report, interpreted words in the report and explained those terms to the jurors and stated it appeared that no rape examination had been conducted only a basic gynecological examination. In essence he became a second expert for the People because the defense argument was not that a rape had taken place but just that the nurse would have examined [the victim] and looked at her vaginal area and looked at her hymen, if it was there, because the mother had asked, brought her in because she wondered if there was any damage. Was there any damage? So the nurse obviously would have looked there. [¶] And, frankly, had the jury been allowed to see the slides would have been even more clear but Dr. Gabaeff’s testimony was there would have been notches and clefts that would have been clearly visible. [¶] [Juror Dr. J.F.] looked at the report and interpreted it for the jury, was not subject to cross-examination by the defense obviously, became a second expert supporting Dr. Sterling. And not just--just supporting him as a doctor himself but actually looking at the reports and making a conclusion from the report that he saw that this was a gynecological exam and not a rape exam as stated by my [juror’s declaration]. When he makes that statement, he is testifying. He’s testifying as an expert and of course not subject to cross-examination by the defense. And not subject to the jury determining his credibility. They just obviously believed he was a nice man--I know he is and was--

and accepted his statement and that destroyed the second part of the defense's argument that [the victim] was lying because there was no physical evidence."

The People argued that there was no misconduct or prejudice because Dr. Sterling opined that the medical examination was not forensic and Juror Dr. J.F. did no more than agree with Dr. Sterling's testimony rather than opine on things that took place outside the courtroom.

The trial court concluded that Juror Dr. J.F. "simply imbued his experience. I don't think he testified as a second expert. It doesn't appear at all he committed any misconduct."¹

Discussion

The parties reiterate their arguments on appeal.

"A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16. . . .) A defendant is 'entitled to be tried by 12, not 11, impartial and unprejudiced jurors. "Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." ' ' (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Cissna* (2010) 182 Cal.App.4th 1105, 1123; *People v. Duran* (1996) 50 Cal.App.4th 103, 111.) Furthermore, under Penal Code section 1181, subdivision 2, a

¹ Defendant had asked the trial court to conduct a hearing for the purpose of examining two jurors who were present in the courtroom. The jurors had declined to sign declarations but had given statements to his investigator. The trial court refused after explaining that there was no dispute about what had been stated in the jury deliberations. Defendant complains about this ruling but we agree that the trial court could have rationally decided against a hearing because the facts were undisputed. And we observe that the investigator's hearsay declaration--summarizing what the two declining jurors would testify--adds little more than corroboration for what was undisputed.

motion for a new trial may be granted if the jury has “received any evidence out of court, other than that resulting from a view of the premises, or of personal property.”

“Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly.” (Evid. Code, § 1150, subd. (a); *People v. Hutchinson* (1969) 71 Cal.2d 342, 350.) Thus, to the extent declarations in support of a motion for a new trial set forth evidence of overt acts, objectively ascertainable, as opposed to evidence of the jurors’ subjective thought processes, they are admissible. (*Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 508, fn. 5.)²

To prevail on a claim of jury misconduct, a defendant must show misconduct on the part of a juror; if he or she does, prejudice is presumed and the state must then rebut the presumption or lose the verdict. (*People v. Marshall* (1990) 50 Cal.3d 907, 949 (*Marshall*).

A juror may commit misconduct if he or she obtains or shares with other jurors information about the case that was not received in evidence at the trial. (*People v. Nesler, supra*, 16 Cal.4th at p. 578.) “A juror . . . should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror’s own claim to expertise or specialized knowledge of a matter at issue is misconduct.” (*In re Malone* (1996) 12 Cal.4th 935, 963.) However, “[i]t is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors’ views of the evidence, moreover, are

² The parties agree that the declaration evidence as recounted herein is admissible because it pertains to objective statements made in the jury room. We have not considered portions of the declarations that relate subjective thought processes.

necessarily informed by their life experiences, including their education and professional work.” (*Ibid.*)

Thus, as our Supreme Court noted in *People v. Steele* (2002) 27 Cal.4th 1230, 1266 (*Steele*): “A fine line exists between using one’s background in analyzing the evidence, which is appropriate, even inevitable, and injecting ‘an opinion explicitly based on specialized information obtained from outside sources,’ which we have described as misconduct.”

The key is how to draw that line in the context of the “jury system [as] an institution that is legally fundamental but also fundamentally human.” (*Marshall, supra*, 50 Cal.3d at p. 950.) After all, “during the give and take of deliberations, it is virtually impossible to divorce completely one’s background from one’s analysis of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations. ‘Jurors are not automatons. They are imbued with human frailties as well as virtues.’” (*Steele, supra*, 27 Cal.4th at p. 1266; see also *In re Carpenter* (1995) 9 Cal.4th 634, 650, quoting *Marshall, supra*, at p. 950.)

It follows that although “[a] juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, . . . if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in evaluating and interpreting that evidence.” (*Steele, supra*, 27 Cal.4th at p. 1266.)

From these cases, we distill that juror misconduct occurs where a juror uses specialized knowledge to contradict evidence presented at trial and to unduly sway the other jurors’ opinions on the basis that his or her specialized knowledge is authoritative. (Compare *In re Malone, supra*, 12 Cal.4th at p. 963 [holding a juror’s insertion of personal technical knowledge of polygraph testing is misconduct] with *Steele, supra*, 27

Cal.4th at p. 1266 [holding jurors' insertion of knowledge gained through military experience and principles of medical testing is not misconduct].)

Applying these principles to the present case, we disagree with the trial court's conclusion that there was no misconduct as to the winter-break issue.

Though knowing that a winter school break can occur in February cannot be fairly characterized as expert knowledge, it is not necessarily a matter of universal experience. But the context of this case is that (1) the victim's credibility was the pivotal issue on all of the assaultive counts, (2) the parties and witnesses used the terms Christmas break and winter break interchangeably, (3) the victim unequivocally testified that the relevant incident took place a few days after New Year's during her two-week winter break that began a couple of days before Christmas and ended in early January, (4) either the victim fabricated the incident or defendant's alibi was not credible, and (5) the acquittal demonstrates that the jury believed defendant's alibi. Thus, the juror's revelation that she had experienced school winter breaks in February was neither an interpretation of ambiguous evidence nor an effort to come to grips with apparently conflicting testimony. Rather, it was the sharing of specialized information that was not received at trial to contradict the evidence presented at trial. The information filled an evidentiary void in that it allowed the jury to conclude that the victim was mistaken about the timing of an incident (February instead of January) when the evidence only allowed a conclusion that the victim was truthful or mendacious about the occurrence of the incident (in January).

“A juror's misconduct raises a presumption of prejudice, which may be rebutted by proof no prejudice actually resulted. [Citations.] ‘A judgment adverse to a defendant in a criminal case must be reversed or vacated “whenever . . . the court finds a *substantial likelihood* that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury.’ [Citations.] . . . [¶] “The ultimate issue of influence on the juror is resolved by reference to the substantial likelihood test, an

objective standard. In effect, the court must examine the extrajudicial material and then judge whether it is inherently likely to have influenced the juror.” ’ ” (*Malone, supra*, 12 Cal.4th at pp. 963-964.)

“ ‘Such “prejudice analysis” is different from, and indeed less tolerant than, “harmless-error analysis” for ordinary error at trial. The reason is as follows. Any deficiency that undermines the integrity of a trial--which requires a proceeding at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury--introduces the taint of fundamental unfairness and calls for reversal without consideration of actual prejudice. [Citation.] Such a deficiency is threatened by jury misconduct. When the misconduct in question supports a finding that there is a substantial likelihood that at least one juror was impermissibly influenced to the defendant’s detriment, we are compelled to conclude that the integrity of the trial was undermined: under such circumstances, we cannot conclude that the jury was impartial. By contrast, when the misconduct does not support such a finding, we must hold it nonprejudicial.’ ” (*Malone, supra*, 12 Cal.4th at p. 964.)

The *Malone* court found that the prosecution had rebutted a presumption of prejudice resulting from misconduct (a juror had injected specialized knowledge regarding polygraph evidence into the deliberations) by “showing the externally derived information was substantially the same as evidence and argument presented to the jury in court.” (*Malone, supra*, 12 Cal.4th at p. 964.) As the court explained, “Because [the juror’s] assertions were substantially the same as evidence and argument presented at trial, her error was much less egregious than similar misconduct we have found warranted reversal. [Citations.] Viewed in context of the evidence at trial, the misconduct here does not support a finding that at least one juror was improperly influenced to petitioner’s detriment.” (*Id.* at p. 965.)

In the present case, the winter-break information offered by the juror was not substantially the same as the evidence presented at trial. Rather, as discussed above, the

information filled an evidentiary void concerning the pivotal issue in the case. There was no reason to reveal the information in deliberations other than to fill the evidentiary void. Filling the void allowed the jury to sidestep making the inevitable conclusion that the victim's winter-break testimony was mendacious if defendant's alibi was truthful. (Cf. *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1209 [prejudicial error where "the finders of fact were deprived of the fundamental inference that if [the pivotal witness] lied about X, Y and Z, it is quite likely that he lied about Q, R and S."].) We conclude that there is a substantial likelihood that at least one juror was impermissibly influenced by the winter-break information to defendant's detriment.

The People argue that the information about winter break was not prejudicial because, absent the information, the jurors could still have concluded that the victim was mistaken about the timing of the winter-break rape. But we disagree because the victim was unequivocal about the timing. The victim did not confuse Christmas break and winter break as the People urge. On cross-examination, she adamantly affirmed that she was not mistaken about the timing. In short, the evidence allowed a conclusion that the winter-break rape either occurred in January or did not occur.

The People also urge that the evidence of guilt was overwhelming and the defense theory weak. But their point follows a harmless-error analysis for ordinary error at trial. It overlooks that we are addressing a deficiency that undermines the integrity of a trial and calls for reversal without consideration of actual prejudice. In any event, we observe that the case was not so one-sided as the People suppose. There was no physical evidence. The victim gave inconsistent (abuse stopped when mother came home; mother came home after abuse stopped) and improbable (bathroom abuse stopped when mother arrived at front door proximate to bathroom door) accounts. The victim recanted the June 2007 incident. The victim, according to defendant, had a motive to fabricate (claim the abuse so as to live full-time with her father). The victim's mother did not suspect abuse. The victim's father, according to defendant, did not believe the victim's revelation that

abuse had occurred. The pretext call can be considered ambiguous in large part. The experts diverge on the critical point whether the victim should show physical injury.

Given that we must reverse due to the winter-break misconduct, we have no occasion to address the medical-examination-misconduct issue.

SUBSTANTIAL EVIDENCE (COUNT 13)

“ ‘The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] ‘Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder.’ ” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

“While it is commonly stated that our ‘power’ begins and ends with a determination that there is substantial evidence [citation], this does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal ‘was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review.’ [Citation.] ‘[I]f the word “substantial” [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with “any” evidence. It must be reasonable . . . , credible, and of solid value’ ” (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633, fn. omitted.)

Numerous cases have noted that where the testimony of a complaining witness is so improbable or false as to be incredible a conviction cannot be based upon it. (*People v. Huston* (1943) 21 Cal.2d 690, 693 [conviction affirmed because testimony not “inherently improbable”], overruled on other grounds in *People v. Burton* (1961) 55 Cal.2d 328, 352; *People v. Headlee* (1941) 18 Cal.2d 266, 267 [“evidence . . . so improbable as to be incredible”]; and *People v. Carvalho* (1952) 112 Cal.App.2d 482, 489 [testimony inherently improbable or “unbelievable *per se*”].)

To be disregarded as “inherently improbable,” the testimony must be “fantastic” and “do violence to reason, challenge credulity, and in the light of human experience, emasculate every known propensity and passion of people under the conditions testified to by the prosecutrix.” (*People v. Carvalho, supra*, 112 Cal.App.2d at p. 489.) The testimony must “involve a claim that something has been done which it would not seem possible could be done under the circumstances described.” (*Ibid.*) “To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.” (*People v. Huston, supra*, 21 Cal.2d at p. 693.) “[T]estimony which merely discloses unusual circumstances does not come within that category.” (*Ibid.*)

“ ‘ “To these well settled rules there is a common sense limited exception which is aimed at preventing the trier of the facts from running away with the case. This limited exception is that the trier of the facts may not indulge in the inference when that inference is rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men. The trier of the facts may not believe impossibilities.” ’ ” (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 389-390.)

The case of *In re Eugene M.* (1976) 55 Cal.App.3d 650 is instructive. There, the court reversed a judgment of wardship for insufficiency of the evidence. It explained:

“In sum, proof of guilt here consists of a prior unsworn out-of-court statement [prior-inconsistent-statement evidence] given by an apparent accomplice under threat of prosecution and thereafter repudiated under oath. We think this proof ‘so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt.’ [Citation.] It fails to meet the necessary standard that it inspire confidence and be of solid value.” (*Id.* at p. 659.)

People v. Casillas (1943) 60 Cal.App.2d 785, is similar to this case. There, a rape and incest victim in a prosecution without any corroborative evidence or incriminatory circumstances “gave three separate, distinct and contradictory versions as to who ravished her and the circumstances surrounding the commission of the offenses.” (*Id.* at p. 794.) On direct examination, she testified that she had sexual intercourse with her father twice; on cross-examination, she denied having sexual intercourse with her father and accused a boy of being responsible for her pregnancy; and on recross-examination, she testified that she had sexual intercourse with her father once and with the boy once. In reversing convictions for two counts of rape and two counts of incest against the father, the court noted that “an appellate court may set aside the findings of the trial court when there is no substantial or credible evidence in the record to support them or where the evidence relied upon by the prosecution is apparently so improbable or false as to be incredible.” (*Ibid.*) It then explained: “That such a situation only presents itself in extreme cases we may concede, but we are convinced that the case at bar does not present the usual and ordinary situation where the evidence was in conflict as to the main or only issue, but on the contrary, tenders to us a case wherein the evidence is so lacking in substantiality as to truth or credibility that it falls far short of that quantum of verity, reasonableness and substantiality required by law in criminal cases to satisfy the reason and judgment of those bound to act conscientiously upon it as to the existence of guilt beyond a reasonable doubt and to a moral certainty. It must, therefore, be regarded as amounting to no evidence at all, as a matter of law, sufficient to overcome the

presumption of innocence and to meet the burden resting upon the prosecution to establish guilt beyond a reasonable doubt.” (*Ibid.*)

Here, in a rape case without corroboration or incriminating circumstances, the victim told Detective Durant and testified on direct examination that, in June 2007, defendant had put his penis in her vagina for two minutes. But, on cross-examination, the victim repudiated her out-of-court statement and testimony:

“Q: What did he do to you on that occasion? What are you claiming?”

“A: He rubbed his penis in my butt.”

“Q: And then what?”

“A: That’s all I remember.”

“Q: On this last occasion, June, didn’t you say he also put his penis in your vagina?”

“A: That was the one before it.”

“Q: That was the one over Christmas break?”

“A: Yes.”

“Q: Was that when he was in the hospital? [*Sic.*]

“A: He was not in the hospital.”

“Q: So you didn’t say that the last time something happened to you that he put his penis in your butt and then his penis in your vagina; you didn’t say that last week?”

“A: Over winter break he stuck his penis, rubbed it in my butt and stuck it in my vagina.”

“Q: Last incident I’m talking about, [victim], what did he do?”

“A: Rubbed his penis in my butt.”

“Q: He didn’t rape you on that last one?”

“A: I don’t remember, no. I don’t remember him--just rubbing it in my butt.”

“Q: You don’t remember telling the jury the last incident he raped--”

“A: That was the second to last incident.”

“Q: My question is? Do you remember telling this jury last week that the last incident he raped, put his penis in your vagina against your will; you don’t remember saying that last week?

“A: On the second to last incident.

“Q: Not the last one?

“A: No.

“Q: You didn’t tell Detective Durant in the last one he raped you? No?

“A: What?

“Q: Did you tell Detective Durant that the last incident that happened before you spoke to her that he raped you in the bathroom?

“A: I don’t remember.”

And on recross-examination, the victim repudiated her prior statement and testimony again.

“Q: But I’m talking about the last time. This was on November 7 [*sic*]. Do you recall saying on Friday, ‘He pulled my pants down and took his penis and rubbed it in my butt and after that I remember him sticking it inside my vagina’ do you remember saying that on Friday?

“A: Yes.

“Q: For the last incident?

“A: No, the second to last incident.

“Q: So it wasn’t the last incident?

“A: No, second to last incident.

“Q: You don’t remember testifying last week that on the last incident he both rubbed it in your butt crack and placed it in your vagina; you don’t remember saying that Friday?

“A: I remember saying that was the second to last incident.”

In short, this was not the usual and ordinary situation where the evidence on the pivotal issue was in conflict. The evidence whether defendant raped the victim in June 2007 is self-contradicting rather than conflicting. As such, the evidence supporting defendant's conviction (the victim's unsworn out-of-court statement and direct examination testimony) was rebutted by clear, positive, and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men (the victim's repudiation of her unsworn out-of-court statement and direct examination testimony). It therefore fails to meet the necessary standard that it inspire confidence, be of solid value, and be of ponderable legal significance. Stated another way, the evidence supporting that defendant raped the victim in June 2007 is fantastic and does violence to reason because the victim who gave that evidence unequivocally, repeatedly repudiated that evidence. The evidence supporting defendant's conviction of count 13 is therefore "so lacking in substantiality as to truth or credibility that it falls far short of that quantum of verity, reasonableness and substantiality required by law in criminal cases to satisfy the reason and judgment of those bound to act conscientiously upon it as to the existence of guilt beyond a reasonable doubt and to a moral certainty. It must, therefore, be regarded as amounting to no evidence at all, as a matter of law, sufficient to overcome the presumption of innocence and to meet the burden resting upon the prosecution to establish guilt beyond a reasonable doubt." (*People v. Casillas, supra*, 60 Cal.App.2d at p. 794.) To affirm, "we would be compelled to emasculate completely the doctrine of reasonable doubt." (*Ibid.*)

The Double Jeopardy Clause forbids a second trial after reversal for insufficiency of the evidence. (*Burks v. United States* (1978) 437 U.S. 1, 18.) We will therefore direct the trial court to enter a verdict of acquittal on count 13. (*Ibid.*)

Because we are reversing other counts for retrial, we need not scrutinize every ruling that defendant secondarily challenges. But we make the following two observations.

ADMISSION OF PRETRIAL INTERVIEW

A statement “that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated” constitutes hearsay. (Evid. Code, § 1200, subd. (a).) Hearsay statements are inadmissible, unless some exception applies. (*Id.* subd. (b).)

Evidence Code section 356 reads: “Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.”

Evidence Code section 356, creates an exception to the hearsay rule “without labeling it as such.” (*People v. Pic'l* (1981) 114 Cal.App.3d 824, 863-864, fn. 13, disapproved on another point in *People v. Kimble* (1988) 44 Cal.3d 480, 496 & fn. 12.) It is known as California’s “statutory version of the common law rule of completeness.” (*People v. Parrish* (2007) 152 Cal.App.4th 263, 269, fn. 3.) “By its terms [Evidence Code] section 356 allows further inquiry into otherwise inadmissible matter only, (1) where it relates to the same subject, and (2) it is necessary to make the already introduced conversation understood. Thus it has been held: the court must exclude such additional evidence if not relevant to the conversation already in evidence.” (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192-193, italics omitted.) The purpose of the section is to place the portions of the admitted conversation or writing in context and to “prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.” (*People v. Arias* (1996) 13 Cal.4th 92, 156.) It follows that if excerpts of a recorded conversation are admitted in a *form*--such as participant testimony or written transcripts--that creates a misleading impression, the

recording itself may be proffered as necessary to correct that misimpression. (*People v. Pride* (1992) 3 Cal.4th 195, 235.)

It is true that “[i]n applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. ‘In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence. . . .’ ” (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1174 (*Hamilton*)). However, this standard does not create an open-sesame for anything said out of court on any subject merely because it was uttered on the same occasion as the statement admitted in evidence. As noted, Evidence Code section 356 requires the admission only of “the whole” of an out-of-court statement “on the same subject” as the part which has already come in. If “the same subject” means “anything discussed in the same interview,” the Legislature’s use of “the same subject” to qualify and limit “the whole” would be surplusage.

In *Hamilton*, the defense offered part of a witness’s statement relating what defendant had told her about “ ‘the details’ of the planned crime.” (*Hamilton, supra*, 48 Cal.3d at p. 1174.) The trial court allowed the prosecutor to put on the entire statement, in which the witness also spoke of the defendant’s motive, over defense counsel’s objection that motive was outside “the subject” of his evidence. The reviewing court upheld this ruling because “[d]efendant’s conversations with [the witness] encompassed motive as well as plan, and counsel’s questions draw no clear distinction between the two subjects.” (*Ibid.*) In other words, if counsel had clearly defined “plan” as “the subject” for which he was offering the evidence, his objection that “motive” was outside that subject would have been well-founded.

In *People v. Zapien* (1993) 4 Cal.4th 929, the defendant had introduced certain portions of a witness’s prior testimony as prior inconsistent statements, and the trial court

had allowed the prosecution to introduce the entire transcript of the prior testimony in order to place those statements into context. On appeal, the defendant argued that the trial court had erred by admitting the entire transcript. The court found no error because the remainder of the testimony “had ‘some bearing upon, or connection with’ the inconsistent statements introduced by defendant.” (*Id.* at p. 959.)

Here, defendant offered into evidence parts of the victim’s interview with Detective Durant that involved whether the victim made certain statements in the interview, namely, (1) “it stopped when [defendant] heard the front door opening,” (2) defendant threatened the victim “every time something happened,” (3) defendant forced the victim “to do stuff” every time her mother would leave, (4) “there was never any ejaculation,” (5) her “butt was on the floor” during the first rape, (6) her mother “never asked [her] about” the cell phone picture, and (7) she was “pushed on the floor” during the June 7 incident.

As we have previously noted, the trial court found that “The essential discussion of what happened” occurred between the sixth and twenty-eighth minute of the interview and it reasoned that admitting that portion of the interview would save time and be less prejudicial than “going through each question and each consistency.” And it also reasoned that “the issue in this case involves the victim’s motive to fabricate” and the recording “would be probative.” But this analysis is erroneous.

It is true that the pivotal issue in this case was whether the victim fabricated her trial testimony about what defendant did to her (“what happened”). But the subject for which defendant offered the prior-inconsistent-statement evidence was not “what happened.” The subject was the difference between the specific details that the victim related to Detective Durant and the specific details that the victim related to the jury. Thus, defendant’s introduction of specific details from the interview did not create an open-sesame for the entire interview, which includes the victim’s hearsay account of the distinct subject “what happened.” Moreover, neither economy of time nor lack of

prejudice to someone is a justification for admitting hearsay under the rule of completeness. And there is no justification for admitting hearsay to rehabilitate a witness's motive to fabricate unless the hearsay qualifies under the exception for a prior consistent statement. (See e.g., fn. 3, *infra*.)

Even supposing that the specific details brought out via the prior inconsistent statements and “what happened” could broadly be considered as the same subject, admission of the whole interview was not necessary to make any of the prior inconsistent statements understood.

The People's purpose for offering the interview was to rebut the prior-inconsistent-statement evidence with prior-consistent-statement evidence. A prior consistent statement is an express exception to the hearsay rule but narrowly defined.

Evidence Code section 791 states: “Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.”³

Reading Evidence Code section 356, subdivision (a), and Evidence Code section 791 together, we glean that, if a party introduces in evidence a witness's prior inconsistent police interview statement to attack the credibility of the witness's

³ Since defendant's theory is that the victim fabricated her story from the outset, the fabrication predated the victim's interview with Detective Durant. Evidence Code section 356, subdivision (b), is therefore not pertinent to this case.

testimony, the opposing party may show a statement from the same interview that is consistent with the hearing testimony if the statement (1) was made before the alleged inconsistent statement, and (2) has some bearing upon or connection with the inconsistent statement in evidence.

By definition, a prior consistent statement has some bearing upon or connection with an inconsistent statement in evidence only if it contradicts or compromises the inconsistent statement. Thus, where a witness's credibility has been attacked by means of a prior inconsistent statement, it is a simple matter for the opposing party to (1) identify the prior inconsistent statement that was brought out in testimony--such as the victim told the detective that the defendant threatened her every time, and (2) identify a prior, contradictory interview statement--such as the victim first told the detective that the defendant did not threaten her every time--and place that prior statement in evidence via testimony or a recording snippet. In short, it is difficult to conceive circumstances in which a jury would need more than a prior consistent statement to place a prior inconsistent statement in an understandable context.

Of course, if the People on retrial nevertheless believe that the jury should be presented with expansive portions or all of the victim's interview with Detective Durant "for the purpose of placing [the victim's] allegedly inconsistent statements in their proper context, provided that the [entire interview has] 'some bearing upon, or connection with' the inconsistent statements introduced by defendant" (*People v. Zapien, supra*, 4 Cal.4th at p. 959), the People must necessarily make a showing that (1) the proffered whole or part of the interview relates to the same subject, and (2) the inconsistent statement in evidence cannot be understood without interview evidence additional to the interviewee's consistent statement.

ADMISSION OF EVIDENCE ON THE VICTIM'S CREDIBILITY

We agree with defendant that the trial court abused its discretion by overruling his relevancy objection to Detective Durant's testimony to the effect that a refusal to make a pretext call indicates dishonesty and the victim did not hesitate to make the pretext call.

It is a well-recognized proposition that neither lay nor expert witnesses may express their opinions regarding witness credibility because such testimony invades the province of the jury and is not sufficiently beyond common experience to be of assistance to the trier of fact. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82; *People v. Melton* (1988) 44 Cal.3d 713, 744; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40 (*Sergill*).

In *Sergill*, the court considered a situation similar to the one presented in this case. There, the defendant was convicted of a sexual offense against his eight-year-old niece. He had called two officers to testify about inconsistencies between the victim's trial testimony and statements taken by the officers. On cross-examination the prosecutor asked one of the officers whether he had formed an opinion as to whether the victim was telling the truth and what was that opinion. The trial court overruled the defendant's objection to these questions and the officer testified that, in his opinion, the victim was truthful. The officer further explained that, as a result of his dealings with many children, he could usually determine with a high degree of accuracy whether their statements were true. The trial court also allowed the other officer to express an opinion that the victim was telling the truth when she reported that her uncle had molested her.

In reaching its conclusion that the trial court had abused its discretion in admitting the officers' opinion evidence, the *Sergill* court cited several reasons.

First, there was no basis to admit the opinion evidence as expert testimony: "We find no authority to support the proposition that the veracity of those who report crimes to the police is a matter sufficiently beyond common experience to require the testimony of an expert." (*Sergill, supra*, 138 Cal.App.3d at p. 39.)

Second, there was no basis to admit the evidence as lay opinion evidence: “A lay witness may testify in the form of an opinion only when he cannot adequately describe his observations without using opinion wording” such as “ ‘when the details observed, even though recalled, are “too complex or too subtle” for concrete description.’ ” (*Sergill, supra*, 138 Cal.App.3d at p. 40.) The court noted that the officers were able to testify about their interviews with the child in concrete detail and, thus, their opinions as to her truthfulness were not helpful to a clear understanding of their testimony.

Finally, the opinion evidence was irrelevant because the officers did not know the child and her reputation for truthfulness: “[T]he officers’ opinions on the child’s truthfulness during their limited contacts with her did not have a *reasonable* tendency to prove or disprove her credibility and were therefore not relevant.” (*Sergill, supra*, 138 Cal.App.3d at p. 40.)

The court had previously noted that the opinion evidence was not character evidence arguably admissible under Evidence Code section 780 but rather opinion evidence “as to whether she was telling the truth on one particular occasion.” (*Sergill, supra*, 138 Cal.App.3d at p. 39.)⁴

The People insist that “Detective Durant did not give a lay opinion about [the victim’s] credibility” but instead merely “relate[d] her personal experience” about a willingness to make a “pretext call” and “relate[d] her concrete observation that [the victim] did not hesitate when asked to make the pretext call.” We disagree.

Even though Detective Durant did not directly espouse the veracity of the victim’s allegations, the obvious inference from Detective Durant’s pretext-call testimony is that,

⁴ The court concluded that the error in allowing the testimony was prejudicial because the victim’s credibility was the “critical question,” and there were other doubts about the evidence as a whole, including “inconsistencies in the child’s several accounts of this incident.” (*Sergill, supra*, 138 Cal.App.3d at p. 41.) It therefore reversed the judgment.

because the victim readily agreed to place the call, she is honest and truthful. Like the officers in *Sergill*, the import of the testimony was to usurp the jury’s role in evaluating the credibility of the complaining witness.

For the same reasons, we agree with defendant that the trial court abused its discretion by overruling his objections to the prosecutor’s questions--asked of the victim’s mother--that solicited the mother’s opinion on the victim’s veracity, such as: “[D]o you have an opinion as to whether [the victim] is making all this up?”⁵

DISPOSITION

The judgment is reversed. The trial court is directed to enter a verdict of acquittal on count 13 and verdicts of conviction on counts 16 and 17. It is then directed to retry counts 1 through 10 and 14. After the trial, it is directed to enter judgment consistent with the acquittal of count 13, the convictions of counts 16 and 17, and the jury or court verdicts on counts 1 through 10 and 14.

Premo, J.

I CONCUR:

Rushing, P.J.

I CONCUR IN JUDGMENT ONLY

Walsh, J.*

⁵ In overruling defendant’s objections, the trial court reasoned, “They can give the opinion of a lay witness whatever they think.”

* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.