

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

JOSE ANTONIO ORTIZ,

Defendant and Appellant.

H036150

(Santa Clara County

Super. Ct. No. CC941508)

Jose Antonio Ortiz appeals from his judgment of conviction of multiple sex offenses. He was sentenced to a total prison term of 120 years consecutive to 21 years. We have reviewed his contentions and will now affirm the judgment as modified.

*A. Procedural History*

On June 17, 2010, a third-amended information containing five counts was filed against defendant. Counts one and two charged defendant with forcible lewd or lascivious acts against A., a child under the age of 14 years, committed on or about and between January 1, 2008 and April 22, 2009. (Pen. Code, § 288, subd. (b)(1).)<sup>1</sup> Counts three and four charged him with aggravated sexual assault against N., a child under 14 and 10 or more years younger than defendant, by the commission of rape (§ 261, subd.

---

<sup>1</sup> All further unspecified statutory references are to the Penal Code.

(a)(2)). (§ 269.) Count three was alleged to have occurred on or about and between January 1, 1995 and September 15, 1995. Count four was alleged to have occurred on or about and between September 15, 1995 and September 15, 1996. Count five charged defendant with a forcible lewd or lascivious act against N., a child under the age of 14 years, committed on or about and between January 1, 1996 and September 15, 1996. The information also alleged, as to each of the three forcible lewd or lascivious act counts, that defendant committed an offense set forth in section 667.61, subdivision (c) against more than one victim.<sup>2</sup> (See § 667.61, subds. (b), (e).)

The information included a prior prison term allegation, arising from a conviction of corporal punishment of a child (§ 273d, subd. (a)), with respect to counts one and two. (§ 667.5, subd. (b).) It also alleged a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12) and a prior serious felony conviction (§ 667, subd. (a)) based on a New York felony conviction of attempted assault in the second degree.

Following trial, a jury found defendant guilty of counts one, two, four, and five but not guilty as to count three. The jury found the multiple victim allegations true as to counts one, two, and five. After defendant waived his right to a jury trial, the court found the alleged priors to be true.

## B *Evidence*

### 1. *Prosecution Case*

The parties stipulated that defendant was born on August 6, 1950. N. was born in September 1986. N.'s mother met defendant when N. was two years old and they married.

N., who was 23 years old at the time of the jury trial in June 2010, identified defendant at trial. At trial, N. admitted that she never had a good relationship with

---

<sup>2</sup> Section 667.61, subdivision (b), states with exceptions not here applicable: "[A]ny person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life."

defendant and there was a lot of bickering when she was growing up. N. acknowledged that she would talk back to defendant and be sarcastic or sassy and that defendant wanted respect and wanted children to do as told.

When N. was little, she was scared of defendant because he would hurt her physically. "If [she] did something wrong in his eyes, he would grab [her] and throw [her] . . . on the bed and hit [her] with a belt." At trial, she recalled defendant often hitting her mother when she was young and yelling. Defendant started sexually touching her when she was a little girl. He touched her many times.

During one incident in the spring or summer, N. fell asleep on her bed in the living room, which also served as her bedroom in their one bedroom apartment, and she woke up to find defendant lying on top of her. She had gone to sleep wearing blue overalls and "a peachy-pink shirt," but when she awoke, her overalls and underwear were off. It was daytime and her mother was not at home. Defendant was "rubbing himself" on N., moving up and down, and she could feel him inside her. It hurt. N. was scared. The incident ended when defendant got off N. and told her to get in the shower. N. saw "white stuff," which she later realized was semen, on the floor. Defendant had told her to call it milk. Defendant warned N. not to tell her mother and N. did not tell her mother when her mother came home. Defendant said that, if she did, her mother would call the police, who would come and take her away from her mother.

N. testified that incidents involving defendant putting his penis into N.'s vagina occurred more than five times but less than 10 times. N. would tell defendant to stop and that it hurt. Sometimes he would stop and sometimes he would keep going. Sometimes N. would push defendant or kick him to try to get him away from her but that did not work. N. indicated that sexual intercourse happened more than once, when she was eight years old or in fourth grade and at least once when she was nine years old. She attended

the same school when she was eight, nine, and 10 years old. N. turned eight years old in September 1994 and nine years old in September 1995.

In addition to incidents involving sexual intercourse, there were incidents involving other types of sexual touching by defendant. N. recalled an incident when defendant threw her onto the bed in the bedroom and she was struggling to get away and screaming. Her mother was at work. To get her to comply, defendant hit her with his hand, both with an open palm and a closed fist. He also told her to stop moving. He took off her clothes, flipped her over and started rubbing his penis on her buttocks.

N. also remembered another incident when defendant rubbed his penis on the outside of her vagina. Defendant had done that more than once.

When N. came home from school at about 3:30 p.m., her mother was still at work. N. indicated that sometimes defendant would try to bribe her by telling her she could stay home if she did not want to go to school. She remembered one time that defendant made that offer while "he was sitting really close to [N.]," "he was rubbing [her] leg" as he spoke, and N. "felt very uncomfortable."

In the summer of 1996, when N. was still nine years old, an incident occurred in which she awoke with her clothes on and defendant was naked and on top of her. Defendant was rubbing his penis on her vagina. N. was scared of him. She got away from him.

When N. was about 10 years old, defendant was in and out of their lives and not always living with them. Defendant stopped molesting N. around the time she turned 10 in September 1996.

N. could not recall talking to a social worker by the name of Maria in March 1997.

N.'s half-sister A. was born in February 1998. Defendant, who was A.'s father, was not around when A. was born; he was already in New York. The parties stipulated

that defendant was absent from California and in New York from on or about August 6, 1997 to on or about December 6, 2001.

When N. was about 13, after defendant was no longer living with them, she wrote her mother a letter in which she revealed that defendant had touched her and she was scared that he would touch her again if he ever came back. She handed her mother the letter and later, after her mother had read it, her mother went to N. and asked if everything she had said was true. Her mother cried and held her and asked why N. had not told her before. N. had explained that defendant had scared her and told her that she would be taken away from her mother and "he would hurt her." N. said she was very scared for herself and scared for her sister and she kept repeating that she did not want him to come back.

N.'s mother subsequently spoke with defendant who said N. was lying. N. told her mother that she was not lying and her mother told N. that she did not want to talk about it anymore. Her mother never reported the molestations to police.

When N. was about 13 or 14 years old, N. told her best friend about defendant touching her. Sometime later, when she was about 14 years old, N. also told that friend's father, whom she trusted. They knew N.'s birth father.

Defendant came back to live with the family.

At trial, N. acknowledged that, in the past, police or social workers had asked her whether she was being molested by defendant and she had denied being molested. N. explained that she had been scared.

In April 2002, when she was 15, N. spoke with a social worker named Manuel Valdez. N. told him that she was not being molested by anyone and her sister A. was safe from anyone bothering her. N. said she was scared and did not want her sister to be taken away.

In July 2002, police officers came to N.'s home to speak with her. When N. entered the room, she saw defendant sitting on the couch, holding A. "between his legs . . . ." N. became scared that defendant could hurt her sister. When she spoke privately with an officer outside the home and was asked whether she had ever been molested, she denied it. She wrote, dated, and signed a statement indicating that she did not want to speak to any officer and she had never been molested.

In early September 2002, when N. was 15 years old, she returned home and heard defendant's voice coming from the backyard. N. went inside and told her mother that she could not have defendant in the house and it was not good for her sister. When defendant walked inside, N. smelled alcohol on him. N.'s mother told defendant that she did not want him in the house like that and told him to leave. As they argued about it, N. was watching to make sure he was not "putting his hands on" her mother. Defendant threatened to kill N. if she called the police. N. yelled out the open window to a neighbor to call the police. N.'s mother told defendant that he needed to leave. Defendant turned around, looked at N., charged her, and pushed her against the wall. He was choking her with his hands and kept repeating, "I'm going to kill you, you little bitch. I'm going to kill you." He banged her head on the closet wall and then dragged her to the living room. He banged her head on the corner of the sofa and was choking her repeatedly threatening to kill her. N. grew faint and then woke up and saw her mother pulling defendant's hair. A., who was then four years old, handed her a phone.

N. ran out of the house with defendant chasing her. N.'s neighbor grabbed her and pulled her into his house and blocked defendant's way. Defendant was yelling and threatening to kill her. Meanwhile N. was speaking with the police by phone. N. was crying, screaming, and telling them that defendant was threatening her, he had hurt her, and he wanted to kill her. Defendant left when the police arrived.

Based on the parties' stipulation, an excerpt of N.'s preliminary hearing testimony in the choking case was read to the jury. That testimony indicated that the argument between N.'s mother and defendant began because N.'s mother did not want defendant drinking in the house.

On September 18, 2002, N.'s mother kicked N. out of the house because of arguments between N. and defendant and mother. N. had been confronting defendant in front of her mother about what he was doing and what he had done. N. went to stay with a friend. She would visit the house to check on, and spend time with, her sister.

In late 2002, Enrique Duran, a San Jose Police Officer, was involved in investigating a case of child physical abuse in which defendant was accused of choking his step-daughter N.

At some point, when N. was 16 years old, defendant came into her bed and lay down next N. Defendant whispered in N.'s ear that he missed her and wanted her back. He was rubbing her chest and side with his hand over her clothes. N. flinched and defendant got up and ran out of her room. N. "got up and . . . stared at him and he looked at [her] like what." N. went into the bathroom, turned on the shower, and cried in the shower.

On March 20, 2003, Officer Duran brought N. to court to testify at the preliminary hearing regarding the choking incident. While they were waiting in the witness room outside the courtroom, N. told Duran that she had been molested by defendant. N. indicated that she had been molested by defendant twice a week from the age of five years to the age of eight years.

Officer Duran discovered that N. had previously spoken with Investigator Lee. N. explained to Officer Duran that she lied to Lee because she was scared of defendant. The matter was referred to the sexual assault unit.

On about April 30, 2003, Alex Nguyen, a San Jose Police Officer in the Sexual Assault Unit, interviewed N. at the Children's Interview Center and the interview was recorded. N. stated that defendant had sexually molested her until she was almost 10 years old. She cried. A case was not filed with the District Attorney, however, because, after the interview, Nguyen had trouble locating N.

When N. was about 17 years old, N. stood up to defendant after he tried to grab A. because A. was not obeying him and he appeared ready to hit her. N. told him that he was not going to lay a hand on her sister and his behavior was going to stop.

When A. was about eight years old, N. tried to warn A. about defendant. She told A. that if defendant was touching her in certain places that he should not be touching her, A. should go to their mother, to her, or to anybody and say something because it was not okay. A. said nothing was happening.

At some point, defendant began touching A. in a sexual manner. More than once, defendant had her sit in his lap and rubbed his penis against her buttocks.<sup>3</sup> These incidents were brief and occurred when A.'s mother was not at home.

The first lap incident occurred when A., who was dressed, was sitting on the living room couch watching TV and defendant was sitting on a chair. Defendant asked A. to sit on his lap. Instead of sitting in his lap, A. got up and walked toward the kitchen. Defendant grabbed her and tried to put her on his lap and rub his lower body against her buttocks. A. was momentarily on defendant's lap but got away from him.

On another occasion, defendant again asked A. to get on his lap. They were sitting on the living room couch watching TV. A. was wearing pajamas. A. was trying to get away because she knew what he was "trying to do" because he had done it before and she thought it was wrong. Defendant grabbed A. and put her on his lap. Defendant, who was

---

<sup>3</sup> In addition to A.'s live testimony at trial, the parties stipulated to the reading of A.'s preliminary hearing testimony to the jury.

dressed, rubbed his "private spot," or genitalia, against her buttocks. A. resisted him and got away.

During another incident, defendant tried to take off A.'s pajama pants when they were in the living room. A. was on the couch watching TV. Defendant, who was bigger and stronger, was using his hands to take them off and they came down a number of inches. She was able to push him away and he stopped. At the preliminary hearing, A. indicated that defendant momentarily touched her on her private parts over her underwear during this incident but she quickly pushed him away. A. was scared of defendant during this incident and whenever he tried to molest her.

On another occasion, while she was sitting on a chair at the computer, defendant touched A. in a way she did not like. He touched her arm or shoulder, brushing her skin softly. She asked him to stop and he stopped.

Defendant had called A. a "puta," a Spanish word that A. understood to mean "acting bad" or "grouchy." This made her feel "a little bad" but she just ignored it.

A. was a "little scared" by the fact defendant was in the courtroom while she was testifying at trial in June 2010. She was trying not to look in his direction.

A. testified at the preliminary hearing that defendant told her that he saw pictures of naked women on the Internet. She ignored the remark. A. also recalled defendant saying, "[T]ry to give me some of that stuff you have." She understood that comment to refer to her "private spot."

At the preliminary hearing, A. described a number of other incidents. One time defendant grabbed A. and put her on the couch. He tried to get on top of her and hold her down. A. was trying to push him away. She thought defendant had touched her but she could not remember. She also mentioned another incident during which she was lying on her side on the floor of the living room and defendant rubbed his private part against her. She thought there had been one or two occasions on which defendant had tried to rub his

private part against her private part. She believed that there had been fewer than five incidents of molestation in all.

In April 2009, when A. was in the fifth grade, A. asked to talk to an elementary school counselor named Maria Chichizola. A. was then living with her mother and defendant in San Jose. When A. went to see the counselor, A. had a bruise on her leg from her father punching her while they were in the car together. A. was scared of him and felt unsafe. A. had seen defendant hit N. and, when she was a little girl, A. had seen defendant choking N. and the police had come.

Chichizola recalled that A. was upset when she came in to see her on April 22, 2009. At that time, Chichizola had known A. for four or five years. A. told her that defendant had hit her in the leg when they were in the car after A. had talked back to him. Chichizola saw a bruise on A.'s right leg. A. told her that defendant had choked her sister.

A. repeatedly told Chichizola that defendant tried to "get close" to her and A. did not like it. A. said that defendant had been "trying to get close" for less than a year. A. was scared because defendant had told her not to tell anyone.

A. told Chichizola that about a month earlier, defendant had pinned A., face down, on the floor and "tried to get on top of her and rub up and down, her body with his body." He had warned A., "If you tell mom, I'll go crazy and you won't like it." A. said this meant that "he would hurt somebody." A. revealed that a similar incident had occurred when she was seven years old and A. had broken free and run to the telephone to call police but defendant had taken the telephone away. A. stated that defendant had said, "Don't do that or I'll hurt you" or "You're never going to see me again." A. also told Chichizola that defendant put her on his lap and moved up and down.

A. revealed to Chichizola that defendant talked to her about sex a lot and A. did not like it. He had told A. that he watched people having sex, which made A. very

uncomfortable. A. told Chichizola that defendant called her "nigger," "puta," and "bitch." Chichizola knew that "puta" means slut or bitch in Spanish.

A. had not talked to her mother about defendant because she was scared. She had not told N. about the incidents with defendant either.

On April 22, 2009, San Jose Police Officer Jamil Carter met with A. at her school. The recorded portion of the interview was played for the jury. The officer also described the interview. A. talked about the recent incident, about a month before, in which defendant got on top of her and rubbed his body against hers and about another incident when A. was sitting in defendant's lap and he was rubbing her up and down with his groin area. A. mentioned a past incident in which she had attempted to telephone police but defendant had stopped her, an incident in which defendant rubbed her arm while she sat at the computer, and an incident in which A. had witnessed defendant choke N. until N. passed out. A. explained that she had not told her mother anything because A. was very afraid of defendant and her sister had told her mother but nothing had happened.

A. testified at the preliminary hearing that she had spoken the truth when she talked to Chichizola and a police officer on April 22, 2009. A. recalled telling them that defendant sometimes "talks nasty" to her.

In April 2009, N. learned from a police officer that A. had made a report concerning defendant, A. had been taken to a children's shelter, and the police needed to speak with N. When N. told her mother, her mother was shocked and upset but discouraged N. from telling police about what had happened to her because defendant was old and sick and had "already paid for what he'[d] done."

On April 22, 2009, Detective Eric Michel, a San Jose police officer, interviewed N. and defendant. Both interviews were recorded.

N. told Detective Michel that she remembered defendant molesting her in fourth or fifth grade and the incidents stopped when defendant went back to New York. N. said

that defendant had raped her and rubbed his private part against her private part, his genitals to her genitals. N. told him that defendant would bribe her to pull down her pants and allow him to rub against her. Defendant would tell her that if she did not want to go to school, "we can do this and I won't tell mommy." N. told the detective that, at some point, she had asked A. whether defendant had ever touched her and, after A. indicated he had not, N. had "just left it alone." N. told Officer Michel that she did not care what happened with her case because "nothing [had] ever happened before and [she] wanted something to be done for [her] sister."

The redacted CD of the October 22, 2009 police interview of defendant was played for the jury. Defendant conceded that he had gotten into a physical altercation with N. in 2002 when he was drinking and she "gave [him] that shitty attitude." He admitted that he "went off at her" and "grabbed her by the hair . . . ." Defendant said that he had grabbed N. by the neck and he was told that she went unconscious. He said he lost his mind for a few minutes and did not realize it until his wife grabbed him by the hair.

During the interview, defendant initially denied that A. sat on his lap. Well into the interview, an officer asked why A. would say there had been occasions when she was on defendant's lap and he "grinded on her" without an erection but in a way that was "very inappropriate to her" and made her uncomfortable. Defendant responded, "Okay, that could of, yeah, it could have happened, you know." He admitted that she had told him that it was wrong. He thought it had happened about a year ago when she was 10 years old. Defendant acknowledged that he became sexually excited when A. sat in his lap and he did get an erection. Detective Michel stated: "So you, a few times she was sitting in your lap, you became aroused, you got an erect penis, got a hard on, . . . and at some point, she told you finally, that you know what, you need to stop doing this, I'm uncomfortable, don't do it anymore." Defendant responded, "That's right." Defendant

subsequently claimed it happened only one time and was an isolated incident. When the police asked if that situation had occurred with N., defendant said. ". . . I don't remember a lot of stuff that happened in the past, I was drunk all the time."

When asked to explain why N. had separately disclosed similar incidents, defendant mentioned revenge and said, "[N. had] always been against us." When pressed, defendant repeatedly indicated that he did not remember what happened in the past and that he was then drinking and using drugs and he was drunk all the time.

After defendant was told that N. was saying that defendant had gone beyond getting an erection while N. sat on his lap, defendant denied it. An officer asked, "Aren't you curious what she said?" Defendant replied, "Yeah, she talking about, you talking about sex, sex or whatever. Yeah, yeah, you know. That's what I'm telling you, that back in my past, I was drinking all the time, I must have done some a lot of crazy stuff and I don't remember any of that stuff." An officer then inquired, "Is it possible?" Defendant first answered, "Could be. But I—if that's what she say, you know." Defendant then asserted he never did that and N. was trying to "get even" with him because of what happened in 2002 and what she was doing at home before then. He indicated that he had been gone from home for four years and another man had stayed with his wife. He suggested, "[W]hy don't you ask them what happened. Because [N.] accused me with her mom that I raped her . . . ." He said that accusation was not true.

Debra Madrid, a social worker with the Santa Clara County Department of Family and Children Services, interviewed A. on April 23, 2009. A. indicated that she had been sexually touched by defendant and referred to the touching as "nasty stuff." She reported that the touching had started around age eight and most recently occurred about a month earlier. It usually occurred when her mother was not at home. When asked about the bruise on her leg, A. said that she had talked back to her father.

Carl Lewis, an expert on Child Sexual Abuse Accommodation Syndrome (CSAAS), explained the syndrome and its "five basic categories." He emphasized that the syndrome was not diagnostic. CSAAS cannot be used to prove that sexual child abuse occurred or did not occur. It generally describes the unexpected, unusual dynamics of such cases but is not meant to be applied diagnostically to a particular case.

The first category is secrecy. Child sexual abuse "occurs almost exclusively when the offender and child are alone or somehow isolated." The offender can reinforce this sense of secrecy verbally and nonverbally. The offender may warn the child of bad consequences if he or she tells anyone. The offender may also give the child special treatment as a way of strengthening the bond between the child and the offender.

The second category is helplessness. It describes the basic vulnerability and dependence of children. Consequently, a child may make a limited disclosure to see the adult reaction. Disclosure becomes a process not a single event. If a non-offending caretaker disbelieves a child's disclosure of child abuse, the child's sense of helplessness may be reinforced and make the child less ready to tell somebody else about the abuse.

The third category is entrapment and accommodation. Children who are being sexually abused are trapped by their situations and attempt to accommodate their negative experiences in various ways. Sexually abused children may act as if nothing is wrong and even deny any abuse because of their shame and embarrassment, fear of the offender, or the uncertainty of the outcome of disclosure. Some children engage in substance abuse or self harm.

The fourth category is delayed, conflicted, and unconvincing disclosure. Sexually abused children can suffer internal conflict in deciding whether to disclose because of the unknown consequences of disclosure. Most often, information comes out in bits and pieces and a child's statements may conflict. Delays in disclosure may occur because "[a] child might have a sense that the family needs to stay together" or that disclosure will

likely cause the family to be dismantled. Often there is a subsequent triggering event for delayed disclosure such as perceiving that a sibling is about to be subjected to the same abuse. A delay in disclosure often confuses adults who believe that the child would have said something earlier if the abuse had really happened.

The fifth category is retraction. Disclosure can result in chaos, unwelcome attention focused on the child and his or her family, or anger at the child who made the disclosure. The child may attempt to fix that problem by retracting the disclosure in whole or part or minimizing what occurred.

## *2. Defense Case*

On March 12, 1997, Maria Oropesa, a Santa Clara County social worker first interviewed N. at school and then visited the home and spoke with N.'s mother and defendant. Oropesa was investigating whether anybody was touching N. inappropriately. N. said that nobody was touching her improperly. Oropesa concluded that the allegations were unfounded and the case was closed.

On April 15, 2002, Manuel Valdez, a Santa Clara County social worker, interviewed N., then 15 years old, at her house where she was living with her mother and sister. He was investigating a report, with a referral date of April 5, 2002, that N.'s step-father may have been molesting her. Apparently, the reporter was N.'s father, who had received the information from N.'s friend.

When Valdez asked N. whether she had been molested by anyone, N. said no. When he asked whether anybody was bothering her sister, N. said no. N. said that A. was "safe from anybody bothering her." A. was present in the room when these questions were asked. Valdez wrote in his report that both minors appeared healthy and safe. Valdez left his card with N. and asked her to have her mother call him.

Their mother called Valdez and he noted in his report that the mother seemed loving and protective of the girls. Valdez did not talk to the reporter or N.'s friend even

though he admitted at trial it was important to talk to them. He concluded the molest allegations were unfounded and the case was closed.

On July 15, 2002, David Lee, a City of San Jose Police Officer in the sexual assault investigation unit, attempted to make contact with N. at her apartment. He was investigating a social services report and was not in uniform. He had made seven previous unsuccessful efforts to contact N. by telephone and, on June 24, 2002, he had sent a letter to her, which stated that the San Jose Police Department was trying to contact her about a case in which she had been a victim. N. told him that he had not been sexually assaulted or abused by her step-father. N. said that she did not have anything to say to "no cop." She seemed angry about having to speak to police. He suggested that she put something in writing. In his presence, N. wrote, "I don't want to talk to no cop about my father Jose Ortiz molesting me because this is not true." She dated it July 15, 2002 and signed it.

### *C. Redaction of Defendant's Interview Statements to Police*

#### *1. Background*

The prosecution moved in limine to prevent defendant from bringing up any instances of unrelated sexual conduct engaged in by the victims. The moving papers noted that there had been no defense motion pursuant to Evidence Code section 782. That section provides for a special procedure, commenced by written motion, "if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780." (Evid. Code, § 782, subd. (a).) Evidence Code section 780 states the general rule that "the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including," among other considerations, "[t]he existence or nonexistence of a bias, interest, or other motive." (Evid. Code, § 780, subd. (f).)

The Evidence Code section 782 procedure applies in a prosecution under Penal Code section 261 (rape) or Penal Code section 288 (lewd or lascivious act).<sup>4</sup> (Evid. Code, § 782, subd. (c)(1).) It recognizes the possibility of an Evidence Code section 352 ruling excluding probative evidence of a victim's sexual conduct. (Evid. Code, § 782, subd. (a)(4).)

At the hearing on the in limine motion regarding sexual conduct evidence, defense counsel stated that N. had "significant discipline problems" and she was "always talking back." Counsel explained that, when N. was 15, she was dating a man who, counsel believed, was in his middle 20's and defendant was "saying that he walked in and saw the

---

<sup>4</sup> Presumably, Evidence Code section 782 also applies to prosecutions for aggravated sexual assault under section 269 based on rape. That section establishes the following procedure: "(1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness. [¶] (2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing pursuant to paragraph (3). After that determination, the affidavit shall be resealed by the court. [¶] (3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant. [¶] (4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court. [¶] (5) An affidavit resealed by the court pursuant to paragraph (2) shall remain sealed, unless the defendant raises an issue on appeal or collateral review relating to the offer of proof contained in the sealed document. If the defendant raises that issue on appeal, the court shall allow the Attorney General and appellate counsel for the defendant access to the sealed affidavit. If the issue is raised on collateral review, the court shall allow the district attorney and defendant's counsel access to the sealed affidavit. The use of the information contained in the affidavit shall be limited solely to the pending proceeding." (Evid. Code, § 782, subd. (a).)

two of them having sex and because she was so disrespectful, she just kept doing that conduct right in front of [defendant]." Defense counsel informed the court that a large part of the defense related to the family dynamics and the extreme hatred and tension that existed between N. and defendant. Defense counsel thought it was "extremely significant" that defendant "witnessed her having sex" and that "she constantly disrespected him by seeing this older man against his wishes."

The court determined that the defense had not filed a written motion pursuant to Evidence Code section 782. It also indicated that evidence of N.'s sexual conduct with someone else had little probative value and would distract the jurors from the issues in the case and divert their attention to the sexuality or morality of the alleged victim. The court indicated that, if the defense offered relevant evidence of the alleged victim's sexual conduct, it would find that the evidence was far more prejudicial than probative. The court advised defense counsel that he could still establish the unhealthy relationship between defendant and N. and talk about the tensions and bad feelings between them. The defense could "not go into some sexual episode where the defendant allegedly saw her engaging in sexual activity and continued to engage despite his presence." The court indicated that it would be willing to revisit the issue of admissibility under Evidence Code section 352 based on the evidence at trial.

The prosecution also brought a motion in limine to admit selected portions of defendant's interview statement under the Evidence Code section 1220 hearsay exception for party admissions. The prosecution indicated that it planned to redact the highlighted portions, which included, among other things, "references to the defendant's prior incarceration or other crimes, other sexual conduct by the victims, defense character evidence regarding the victims, and innuendo regarding third-party culpability." The prosecution maintained that Evidence Code section 356 did not require admission of defendant's statements regarding the character of the victims. It was also argued: "[I]t is

up to the defense to introduce such evidence during the defense case-in-chief. If the defense wishes to play those portions of the defendant's statement, the People would object that the defendant's statement is hearsay when played by the defense."

At the motion hearing, defense counsel agreed that references to prior arrest or jail or prison sentences served by defendant should be redacted but argued that, aside from those redactions, the entire interview should come in under Evidence Code section 356. The prosecutor pointed out that the trial court had "already ruled that the defense can't go into specifics of [N.'s] sexual relationship with this other guy when she was 15 or 16." Defense counsel replied, "That's understood. Obviously the Court would have to make an exception for that." The court indicated that it would go over the interview line by line.

During trial, out of the presence of the jury, counsel and the court discussed the redactions at length, page by page. At one point, the court stated that defendant's statements regarding N.'s prior sexual conduct were "clearly more prejudicial than probative under [Evidence Code] section 352."

## *2. Evidence Code Section 782*

Defendant is not arguing, and has not shown, that the trial court erred in making its pretrial ruling excluding evidence of any alleged victim's sexual conduct with a person other than defendant. Defense counsel had not sought to comply with the procedures mandated by Evidence Code section 782. Moreover, the court clearly indicated that it would rule that such evidence was inadmissible under Evidence Code section 352 unless the trial evidence warranted a different result.

Defendant's present contention that his counsel rendered ineffective assistance of counsel by not complying with Evidence Code section 782's procedural requirements is unavailing. Defense counsel may have made a reasonable tactical decision to not file a written motion under Evidence Code section 782. The evidence of N.'s sexual conduct as

a young teen was, at best, only marginally relevant to defendant's theory that N. wrongfully accused him because she deeply resented and disrespected him. After the pretrial ruling, defense counsel could reasonably anticipate that such a motion would be unsuccessful and the trial court, acting within its discretion, would find the proffered evidence inadmissible under Evidence Code section 352. The record does not show that there is a reasonable probability that the result of the proceeding would have been different had defendant's counsel filed a motion pursuant to Evidence Code section 782. Defendant has shown neither the deficient attorney performance nor the prejudice required to establish an ineffective assistance claim. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 [104 S.Ct. 2052]; *Harrington v. Richter* (2011) \_\_\_ U.S. \_\_\_ [131 S.Ct. 770].)

### 3. Evidence Code section 356

Defendant contends that the trial court's redactions of his pre-arrest interview with police violated Evidence Code section 356, referred to as the "rule of completeness." (See *People v. Ervine* (2009) 47 Cal.4th 745, 783.) That section provides: "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." (Italics added.)

"The purpose of [Evidence Code section 356] is 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. [Citation.] Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.' [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92,

156.) Evidence Code section 356 "only makes admissible such parts of an act, declaration, conversation, or writing as are relevant to the part thereof previously given in evidence. See, e.g., *Witt v. Jackson*, 57 Cal.2d 57, 67 . . . (1961) (the rule 'is necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced')." (Assem. Com on Judiciary com., 29B Pt. 1A West's Ann. Evid. Code (2011 ed.) foll. § 356, p. 650.)

"Application of Evidence Code section 356 hinges on the requirement that the two portions of a statement be 'on the same subject.' " (*People v. Vines* (2011) 51 Cal.4th 830, 861.) "[Section 356] permits the introduction of statements that are necessary for the understanding of, or to give context to, statements already introduced. (*People v. Harrison* (2005) 35 Cal.4th 208, 239 . . . ; *People v. Zapien* (1993) 4 Cal.4th 929, 959 . . . .)" (*People v. Lewis* (2008) 43 Cal.4th 415, 458.) "A trial court's determination of whether evidence is admissible under section 356 is reviewed for abuse of discretion. (See *People v. Pride* (1992) 3 Cal.4th 195, 235 . . . .)" (*People v. Parrish* (2007) 152 Cal.App.4th 263, 274.)

Limits on the scope of evidence admissible under Evidence Code section 356 may be proper. (See *People v. Lewis, supra*, 43 Cal.4th at p. 458 [limits proper when a codefendant's rights under *Aranda* or *Bruton* would be violated].) In determining the scope of evidence admissible under Evidence Code section 356, the trial court could consider, with respect to defendant's interview statements regarding N.'s sexual conduct with others, the public policy underlying Evidence Code section 782, which "represents a valid determination that victims of sex-related offenses deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. [Citations.]" (*People v. Fontana* (2010) 49 Cal.4th 351, 362.)

Defendant claims that his "redacted statements were critically important to understanding the full dynamics of his relationship with [N.]" He asserts that the "level

of filial disrespect" "failed to come through as a result of the court's redactions." In particular, defendant complains of the redaction of his statements regarding N. having sex with her boyfriend while the door was open and defendant was in the living room and N. telling him, "I don't give a fuck, you know, you're not my dad, [I'll] do whatever I want to do in my house." Defendant asserts that his statement was "vital" and the redacted interview statements did not fully paint "the portrait of an insubordinate and uncontrollable teenager with deep-seated contempt for her parents." He claims that this incident of sexual conduct "bore heavily on [N.'s] credibility and her motives to lie."

The redactions included defendant's statements regarding N. being a "wild teenager," her swearing, her lying, her many boyfriends who were in and out of the house when she was 13 years old, N. "hanging out" with boys and girls, drinking beer, and smoking cigarettes, his belief that N. told her mother that he raped her because N. was afraid to tell her that a "boy she was going with" raped her, N. having sex with a boyfriend with the door open in view of defendant, N. becoming pregnant and running away with the baby's father and disappearing for a year when she was 15 years old, and N. taking money out of her mother's bank account without permission.

Numerous of defendant's statements regarding N.'s character, her alleged misbehavior, and her antagonistic attitude toward him, however, were not redacted. His comments that N. "used to sneak out [of] the back door just to be with her called [sic] friends" and "when she reached a certain age, she started hanging around with the wrong crowd, about age 11" came in. He indicated that he left the house when N. was about 11 and returned when she was 15. He stated with respect to his return: "[N.] resented it [sic] me, she start to hate me, because I stopped the bullshit that was going around the house. And I came back, it was chaos man . . . ." He said, "[N.], to me she's a gangster, (inaudible) the way she acts, and she still does." He said that N. resented him coming

back and hated him. He explained, "[N.]'s angry because of what happened when I came back you know. I told you what she was doing man, she was chaos man."

Many of defendant's unredacted statements indicated that N. was unruly and antagonistic toward him and placed his suggestions to police that N. was making accusations for reasons of revenge in context. The redactions did not omit portions of the interview necessary to make defendant's statements understood, distort the meaning of his statements, transform any exculpatory statement into an inculpatory one by taking it out of context, or keep out any matter that was exculpatory. In making the redactions, the trial court did not abuse its discretion under Evidence Code section 356.

#### 4. *Due Process*

We also reject defendant's claim that reversal is required because the redactions infringed on his Fourth Amendment right to present a defense. Defendant failed to assert in the trial court that the admission of any of his redacted statements was compelled by his constitutional right to present a defense (see Evid. Code, § 354). Therefore, he "forfeited his contention of constitutional error by failing to assert it below, except to the extent that the constitutional claim relies on the same facts and legal standards the trial court itself was asked to apply." (*People v. Ervine, supra*, 47 Cal.4th 745, 783; see *People v. Partida* (2005) 37 Cal.4th 428, 435, see also *People v. Partida, supra*, 37 Cal.4th at p. 437 ["Once the reviewing court has found error in overruling the trial objection, whether that error violated due process is a question of law for the reviewing court . . ."].) "[R]ejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well" and "[n]o separate constitutional discussion is required . . . ." (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

Moreover, contrary to defendant's assertion, this case is not legally and factually similar to *Crane v. Kentucky* (1986) 476 U.S. 683 [106 S.Ct. 2142], which he cites. In

*Crane*, the trial judge made a pretrial ruling that the defendant's confession was voluntary. (*Id.* at p. 684.) At trial, the defendant "sought to introduce testimony about the physical and psychological environment in which the confession was obtained" "to suggest that the statement was unworthy of belief." (*Ibid.*) "The trial court ruled that the testimony pertained solely to the issue of voluntariness and was therefore inadmissible." (*Ibid.*) If not for the court's evidentiary ruling in *Crane*, that defendant would have presented "testimony from two police officers about the size and other physical characteristics of the interrogation room, the length of the interview, and various other details about the taking of the confession. [Citation.]" (*Id.* at p. 686.)

The U.S. Supreme Court in *Crane* held that the trial court erred in excluding "testimony about the environment in which the police secured his confession." (*Id.* at p. 691.) The court explained: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, *supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' *California v. Trombetta*, 467 U.S., at 485, 104 S.Ct., at 2532; cf. *Strickland v. Washington*, 466 U.S. 668, 684–685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) ('The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment'). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507–508, 92 L.Ed. 682 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). That opportunity would be an empty one if the State were permitted to exclude competent,

reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." (*Id.* at p. 690.)

Unlike the defendant in *Crane*, defendant did not proffer relevant and admissible evidence bearing on the victims' bias against him or motivation to lie in the defense case. The redactions of the police interview, admitted in the prosecution's case in chief, did not necessarily preclude such evidence. In addition, the defense was free to cross-examine N. and A. to show facts indicating they were unworthy of belief. The challenged redactions did not deny defendant a meaningful opportunity to present a complete defense.

#### *D. Defense Counsel Request for Admonition*

During trial, the prosecutor asked N. to tell him about the period when she was about 10 years old when defendant was "in and out of your lives meaning not necessarily living there all the time." N. replied, "He was always in and out of jail." Upon objection and motion to strike, the court struck that testimony and directed the jury to disregard it.

Based on that testimony, defense counsel unsuccessfully moved for a mistrial. Defense counsel sought a further curative instruction and suggested the court give an admonition that the testimony "was a reference to some minor alcohol related offenses" in addition to telling the jury that the testimony must be disregarded and was irrelevant as suggested by the court. The court then told the jury in reference to that testimony: "I instructed the jury to disregard that. It was a time where there was some minor alcohol offenses which had no relevance to this proceeding. Please just disregard that."

In its final instructions, the court directed the jury to "[p]ay careful attention to all of these instructions and consider them together." It also instructed: "You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom." The court admonished the jury to not let bias or prejudice influence their decision. The court instructed: "If I ordered testimony stricken from the record, just

disregard it and don't consider it for any purpose." It further instructed: "References made during trial to jail time served by an individual on unrelated offenses should be disregarded and not considered in any way as evidence in this case."

On appeal, defendant argues that defense counsel's request that the court tell the jury that defendant's incarceration was for "some minor alcohol related offenses" constituted ineffective assistance of counsel. He asserts: "An implicit (if not explicit) theory behind the prosecution's case was that [he] committed these sexual offenses . . . because his inhibitions were compromised by alcohol. Indeed, this was a central theory advanced by the two police officers during the pre-arrest interview of [him]." He argues that the requested admonition was "actually harmful" to and "directly undermined" his case.

During that police interview, defendant repeatedly referred to his earlier, serious problems with drinking and drugs. He indicated that, in the past, he had been drunk all the time. When asked what he was like when he drank alcohol and used drugs, defendant replied, "I was dangerous, I mean I was a crazy guy. I couldn't remember things . . . I slept in the streets, I went anywhere." Given the anticipated admission of these statements by defendant, it is conceivable that defense counsel made the tactical decision that it would be better to tell the jury that the jail time mentioned by N. related to "minor alcohol offenses" rather than risk having the jury speculate that the incarceration involved more serious crimes.

"[E]xcept in those rare instances where there is no conceivable tactical purpose for counsel's actions, claims of ineffective assistance of counsel should be raised on habeas corpus, not on direct appeal. (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at pp. 266–267 . . .)" (*People v. Lopez* (2008) 42 Cal.4th 960, 972.) Counsel representing defendants have "wide latitude" in making tactical decisions. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 689.) "A court considering a claim of ineffective assistance must apply a

'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance. *Id.*, at 689, 104 S.Ct. 2052." (*Harrington v. Richter*, *supra*, 131 S.Ct. at p. 787.) Defendant has failed to establish that defense counsel's request for admonishment constituted deficient performance by defense counsel.

Neither has defendant shown that the requested admonishment was prejudicial in light of his admitted interview statements and the jury instructions taken as a whole. With regard to prejudice component of an ineffective assistance of counsel claim, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid.*) "In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. [Citations.] Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different. *Id.*, at 696, 104 S.Ct. 2052. This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.' *Id.*, at 693, 697, 104 S.Ct. 2052. The likelihood of a different result must be substantial, not just conceivable. *Id.*, at 693, 104 S.Ct. 2052." (*Harrington v. Richter*, *supra*, 131 S.Ct. at pp. 791-792.)

We reject defendant's ineffective assistance claim.

#### E. *Evidence of Defendant's Prior Incarceration*

Defendant now argues that he was denied his Fourteenth Amendment due process right to fair trial because the jury learned of his prior incarceration. He argues that his convictions must be reversed as prejudicial under the either the *Chapman* standard

(*Chapman v. California* (1967) 386 U.S. 18, [87 S.Ct. 824]) or the state standard (*People v. Watson* (1956) 46 Cal.2d 818, 836).

As already indicated, the court struck N.'s testimony that defendant "was always in and out of jail" and repeatedly admonished the jury to disregard it. Two statements concerning defendant's prior incarceration were inadvertently not redacted from the CD and transcript of the April 22, 2009 police interview of defendant and were admitted into evidence.

Detective Michel said to defendant at one point during the interview: "[Y]ou had two daughters that you've been responsible for raising, [N.] for the most part, you had a little hiatus there when you did some time." At another point, another officer asked defendant, "[Y]ou've been in the pen twice (inaudible), what? Six years total?" Defendant answered, "Yeah." The prosecutor brought the inadvertent admission of these interview statements to the trial court's attention. The court told defense counsel, "I'd be glad to do any admonition the defense requests. Otherwise I don't want to call attention to it."

In attacking the fairness of the trial, defendant now relies on *People v. Allen* (1978) 77 Cal.App.3d 924, 934-935 (rebuttal witness testified that defendant was "on parole"), *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342 (officer testified to defendant's statement that he was an exconvict), and *People v. Figuieredo* (1955) 130 Cal.App.2d 498, 505-506 (officer's testimony indicated defendant served time in San Quentin). But even the *Allen* case recognized: "A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith. [Citations.] It is only in the exceptional case that 'the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions.' (*People v. Seiterle* (1963) 59 Cal.2d 703, 710 . . .)" (*People v. Allen, supra*, 77 Cal.App.3d at pp. 934 -935.)

First, defendant concedes, as he must, that defense counsel did not preserve the right to challenge the admission of the interview statements concerning defendant's past incarceration. (See Evid. Code, § 353, *People v. Partida*, *supra*, 37 Cal.4th at pp. 438-439, *People v. Jennings* (1991) 53 Cal.3d 334, 375.) Since defense counsel interposed no objection at trial to the admission of the interview statements now being challenged, due process claims of error were not preserved. (*Ibid.*)

Second, in any case, defendant's due process claim is unfounded. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment . . . ." (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 684-685.) The U.S. Supreme Court has stated: "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate 'fundamental fairness' very narrowly." (*Dowling v. U.S.* (1990) 493 U.S. 342, 352 [110 S.Ct. 668]; see *Marshall v. Lonberger* (1983) 459 U.S. 422, 438, fn. 6 [103 S.Ct. 843] ["the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules"]; see also *Spencer v. State of Tex.* (1967) 385 U.S. 554, 563-564 [87 S.Ct. 648] ["Cases in [the U.S. Supreme] Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. [Citations.] But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority."]; *Lisenba v. People of State of California* (1941) 314 U.S. 219, 236 [62 S.Ct. 280] ["As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as

necessarily prevents a fair trial"].) "[T]he admission of evidence, even if error under state law, violates due process only if it makes the trial fundamentally unfair." (*People v. Partida, supra*, 37 Cal.4th at p. 436.)

Here, the statements revealing defendant's prior incarceration were brief. The police interview statements did not identify any particular offense, much less an offense suggesting a propensity to commit sex offenses. The court's admonition that N.'s statement referred to "minor alcohol offenses" was consistent with defendant's disclosures of his past serious drinking problems. As already discussed, the trial court clearly directed the jurors to disregard the statements regarding defendant's prior incarceration and told them that the statements were not evidence, they must decide the facts based only on the evidence, and they must not allow bias or prejudice to influence their decision. We have no reason to believe that the jurors failed to obey the court's instructions and, accordingly, presume that the jury understood and followed the court's directions. (See *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) "Defendant was entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

The fact that the jury learned of defendant's prior incarceration did not render his trial fundamentally unfair in violation of due process.<sup>5</sup>

#### F. Evidence to Support Count Five

Count five charged a forcible lewd or lascivious act on or about and between January 1, 1996 and September 15, 1996, when N. was nine years old. The evidence

---

<sup>5</sup> Defendant additionally contends that defense counsel rendered ineffective assistance by failing to request redaction of the challenged interview statements and "failing to move for mistrial, and/or admonition of the jury, after learning of the errors." Even assuming that defense counsel should have done so, defendant's ineffective assistance claim fails because he has not established the requisite prejudice for the reasons already discussed. (See *Strickland v. Washington, supra*, 466 U.S. at pp. 687, 694; *Harrington v. Richter, supra*, 131 S.Ct. at pp. 791 -792.)

disclosed only one specific incident of molestation when N. was nine, which occurred in the summer of 1996 and apparently began when N. was asleep and ended when she awoke to find an unclothed defendant rubbing against her and immediately got away. Defendant maintains that the evidence was not sufficient to show that the act was committed by force or duress as asserted by the prosecutor at trial. (See § 288, subd. (b)(1).) He argues that the count five conviction must be reduced to a non-forcible lewd act. (See § 288, subd. (a).)

"When a defendant challenges the sufficiency of the evidence, "[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' (*People v. Davis* (1995) 10 Cal.4th 463, 509 . . . , quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578 . . . ) ' Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]' (*In re Michael D.* (2002) 100 Cal.App.4th 115, 126 . . . ) We ' " 'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " [Citation.]' (*People v. Davis, supra*, at p. 509 . . . )" (*People v. Clark* (2011) 52 Cal.4th 856, 942.)

The word "force" as used in section 288, subdivision (b), must be " be 'substantially different from or substantially greater than that necessary to accomplish the lewd act itself.' [Citation.]" (*People v. Soto* (2011) 51 Cal.4th 229, 242.) The People correctly do not contend that the evidence was sufficient to prove force but rather argue that the evidence was sufficient for the jury to find duress.

The California Supreme Court has recently clarified the meaning of "duress" as used in section 288, subdivision (b): "[T]he legal definition of duress is objective in nature and not dependent on the response exhibited by a particular victim. In *People v.*

*Leal, supra*, 33 Cal.4th 999 . . . , we held that 'duress,' as used in section 288(b)(1), means ' "a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." ' (*Leal*, at p. 1004 . . . , quoting *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 . . . .) Because duress is measured by a purely objective standard, a jury could find that the defendant used threats or intimidation to commit a lewd act without resolving how the victim subjectively perceived or responded to this behavior. Consistent with the language of section 288 and the clear intent of the Legislature, the focus must be on the defendant's wrongful act, not the victim's response to it." (*People v. Soto, supra*, 51 Cal.4th at p. 246, fns. and italics omitted.) The court held that "consent of the victim is not a defense to the crime of aggravated lewd conduct on a child under age 14." (*Id.* at p. 248.)

*Soto* recommended that a court instruct a jury regarding the definition of duress as follows: " 'Duress means *the use of* a direct or implied threat of force, violence, danger, hardship, or retribution *sufficient to cause* a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child and (his/her) relationship to the defendant.' " (51 Cal.4th at p. 246, fn. 9.) A perpetrator's position of dominance and authority and a disparity in physical size between the perpetrator and child may be relevant factors in assessing whether duress was used. (See *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1319–1320, *People v. Pitmon, supra*, 170 Cal.App.3d 38, 51.)

When we focus on defendant's actions during the particular incident, as the law requires, it is apparent that there was no evidence that defendant *used* any direct or implied threat of force, violence, danger, hardship, or retribution in committing the lewd

act. Here, there was no evidence that defendant grabbed, held, or restrained N. There was no evidence that he said anything to her. There was no evidence that, during this incident, he made any threat, verbally or nonverbally. The scanty evidence with respect to this particular incident does not satisfy the substantial evidence test on the element of force or duress. (Cf. *People v. Espinoza, supra*, 95 Cal.App.4th at pp. 1318-1322 [insufficient evidence of duress].) Accordingly, the conviction on count five must be reduced to a violation of section 288, subdivision (a).

Modification of the count five conviction, however, does not require resentencing. A lewd or lascivious act in violation of section 288, subdivision (a), is also a qualifying offense under section 667.61, subdivision (c). (§ 667.61, subd. (c)(8) (see former subd. (c)(7)).) The reduction of the count five conviction does not invalidate the finding that defendant committed qualifying crimes against more than one victim as alleged with regard to count five. The sentencing court cannot strike any finding properly made under section 667.61, subdivision (e). (§ 667.61, subd. (g).)

#### G. *Prior New York Conviction*

The trial court found true the prior serious felony enhancement and Three Strikes allegations based on official records concerning a 1973 New York conviction of "attempt assault" in the second degree, an "E" felony. (See §§ 667, subd. (a), 667, subds. (b)-(i), 1170.12.) Defendant asserts that this conviction did not qualify under subdivision (c)(23) ("any felony in which the defendant personally used a dangerous or deadly weapon") of section 1192.7 as a prior "serious felony" for sentencing purposes. He maintains that "no rational fact-finder could have found that the evidence from [his] 1973 record of conviction was sufficient to prove, beyond a reasonable doubt, . . . that the offense involved the personal use of a deadly weapon." He argues: "The record is silent as to where the victim was cut, how deep or serious that cut was, or whether the victim required hospitalization or medical treatment. Absent such facts, there is no basis for

inferring that appellant used the knife in a deadly or dangerous manner that was likely to cause death or great bodily injury."

"Conviction of a serious felony has substantial sentencing implications under the 'Three Strikes' law ( *People v. Woodell, supra*, 17 Cal.4th at p. 452 . . . ) and also under section 667, subdivision (a)(1), which mandates a five-year sentence enhancement for each such conviction. To qualify as a serious felony, a conviction from another jurisdiction must involve conduct that would qualify as a serious felony in California." ( *People v. Avery* (2002) 27 Cal.4th 49, 53; see § 667, subd. (a) [subdivision applies to "any person convicted of a serious felony who previously has been convicted . . . of any offense committed in another jurisdiction which includes all of the elements of any serious felony"].)

"[T]he relevant inquiry in deciding whether a particular prior conviction qualifies as a serious felony for California sentencing purposes is limited to an examination of the record of the prior criminal proceeding to determine the nature or basis of the crime of which the defendant was convicted. ( *People v. Woodell, supra*, 17 Cal.4th at pp. 454–461 . . . ; *People v. Myers* (1993) 5 Cal.4th 1193, 1198–1201 . . . ; see also *People v. Guerrero, supra*, 44 Cal.3d at p. 355 . . . )" ( *People v. McGee* (2006) 38 Cal.4th 682, 691-692.) "Where . . . the mere fact of conviction under a particular statute does not prove the offense was a serious felony, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue. (E.g., *People v. Reed* (1996) 13 Cal.4th 217, 222–223 . . . ; *People v. Guerrero* (1988) 44 Cal.3d 343, 355 . . . ) This rule applies equally to California convictions and to those from foreign jurisdictions. ( *People v. Woodell* (1998) 17 Cal.4th 448, 453 . . . ; *People v. Myers* (1993) 5 Cal.4th 1193, 1198–1201 . . . )" ( *People v. Miles* (2008) 43 Cal.4th 1074, 1082.)

"On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine

whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. (E.g., *Tenner, supra*, 6 Cal.4th 559, 567 . . . ; *Jones, supra*, 75 Cal.App.4th 616, 631 . . . )" (*Id.* at p. 1083.)

The People have never asserted that the least adjudicated elements of the New York crime were sufficient to establish a "serious felony." Rather, the People relied upon official records to establish that the underlying conduct qualified as a "serious felony" under California law. To prove that defendant had suffered a prior serious felony conviction, the prosecutor asked the trial court to take judicial notice of (1) a certified New York City Criminal Court felony affidavit, dated April 19, 1972,<sup>6</sup> (2) a certified New York indictment charging defendant with attempted murder and assault in the second degree committed on or about April 19, 1972, (3) a certified reporter's transcript of defendant's plea to "attempt assault" in the second degree, an "E" felony, on January 31, 1973, (4) a certified court endorsement sheet reflecting his plea, (5) certified and notarized fingerprint cards for defendant, and (6) a FBI fingerprint card for defendant reflecting an April, 19, 1972 arrest.

The grand jury indictment charged defendant in count one with attempted murder, alleging that he, "on or about April 19, 1972, . . . with the intent to cause the death of Juan Munoz, attempted to cause the death of Juan Munoz by means of a dangerous instrument, to wit: a knife, thereby inflicting divers [sic] wounds and injuries upon Juan Munoz." It charged defendant in count two with assault in the second degree, alleging that he, "on or about April 19, 1972, . . . with the intent to cause physical injury to Juan

---

<sup>6</sup> The officer affiant stated: "Deponent states upon information and belief, he is informed by Juan Munoz . . . that at [about 2:00 p.m. on April 19, 1972] the defendant while armed with a knife, did stab informant [sic] in the right ribcage thereby causing informant [sic] serious physical injury, requiring treatment and confinement at Brookdale Hospital."

Munoz, did cause such injury of Juan Munoz, by means of a dangerous instrument, to wit: a knife."

The reporter's transcript shows that, at the plea hearing, defendant's counsel informed the court that defendant and the victim knew each other and both of them were drunk. The prosecutor confirmed those facts and stated that the victim was stabbed and injured during the course of an argument. The court stated the charges, indicated the allegation that defendant had caused physical injury "by use of a dangerous instrument and knife," and asked if defendant recalled that. Defendant responded that "[i]t was all because of a handball game" and, the victim and he were "in a park drinking and playing handball," when they had a sudden argument during which the victim pushed defendant and the defendant "got mad." Defendant admitted to the court that he opened the blade of a three inch pocket knife and "cut" the victim. Defendant then entered a guilty plea to "the crime of attempt assault in the 2nd degree[,] an E felony."

"The list of serious felonies in section 1192.7 . . . is not limited 'to specific, discrete offenses.' (*People v. Jackson* (1985) 37 Cal.3d 826, 831 . . .)" (*People v. Trujillo* (2006) 40 Cal.4th 165, 175.) Any felony, including an assault with a deadly weapon, may be found to constitute a serious felony under section 1192.7, subdivision (c)(23), if the record of conviction shows that defendant personally used such weapon. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262; *People v. Equarte* (1986) 42 Cal.3d 456, 465.) In addition, "[i]n 2000, the voters adopted Proposition 21, which, among other things, added subdivision (c)(31) to section 1192.7" and "[u]nder this provision, all assaults with deadly weapons are serious felonies." (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067, fn. 3.)

An assault with a deadly weapon is a wobblers offense (see §§ 17, subd. (b), 245, subd. (a)). "When a defendant is convicted (whether by a guilty plea or a no contest plea, or at a trial) of a wobblers offense, and is granted probation without the imposition of a

sentence, his or her offense is '*deemed* a felony' unless subsequently 'reduced to a misdemeanor by the sentencing court' pursuant to section 17, subdivision (b). [Citations.]" (*People v. Feyrer* (2010) 48 Cal.4th 426, 438-439.) "The determination of whether a prior conviction is a prior felony conviction for purposes of [Three Strikes law] shall be made upon *the date of that prior conviction* and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor." (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1), italics added; see *People v. Feyrer, supra*, 48 Cal.4th at p. 443, fn. 8.) Even if a charge is dismissed upon successful completion of probation pursuant to section 1203.4, subdivision (a), "in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." (§ 1203.4, subd. (a).)

Under California law, "[a]n assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) The crime of "assault does not require a specific intent to injure the victim. (See *Rocha, supra*, 3 Cal.3d at p. 899 . . . .)" (*People v. Williams* (2001) 26 Cal.4th 779, 788.) Evidence of actual injury is not required to prove an assault with a deadly weapon. (See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028 ["One may commit an assault without making actual physical contact with the person of the victim; because the statute focuses on *use* of a deadly weapon or instrument or, alternatively, on force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial"]; see also CALCRIM No. 875 (2010 ed.) p. 665 ["No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was"]; *People v. Williams* (2001) 26 Cal.4th 779, 787 ["assault criminalizes conduct based on what *might* have happened—and not what *actually* happened—"]);

*People v. McCoy* (1944) 25 Cal.2d 177, 189 ["To warrant conviction of [assault with a deadly weapon] it was not necessary that the prosecution introduce evidence to show that the appellant *actually made an attempt to strike or use the knife upon the person of the prosecutrix* [citations]".])

"As used in section 245, subdivision (a)(1), a 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' (*In re Jose R.* (1982) 137 Cal.App.3d 269, 275–276 . . . .) Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. (*People v. Graham* (1969) 71 Cal.2d 303, 327 . . . ., disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 32 . . . .) Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. (*In re Jose R., supra*, 137 Cal.App.3d at p. 276 . . . ; see *People v. Nealis* (1991) 232 Cal.App.3d Supp. 1, 4, fn. 2 . . . [citing California decisions holding various objects, not deadly per se, to be deadly weapons under the particular circumstances].)" (*People v. Aguilar, supra*, 16 Cal.4th 1023, 1028-1029.)

A pocket knife is not a dangerous or deadly weapon as a matter of law since it is not designed to be used as a weapon and has other ordinary, nondangerous uses but such a knife may be a deadly weapon under particular circumstances. (See *People v. McCoy, supra*, 25 Cal.2d at p. 188; *People v. Raleigh* (1932) 128 Cal.App. 105, 108; see also *People v. Burton* (2006) 143 Cal.App.4th 447, 457.) As observed in *People v. Pruett* (1997) 57 Cal.App.4th 77, 86, "[n]early all knives have sharp edges and points which are *designed* to cut things, and knives can be—and all too often are—employed to cut—and

kill—people." (But cf. *In re Brandon T.* (2011) 191 Cal.App.4th 1491, 1496-1498 [rounded butter knife not deadly weapon].) In this case, the official records of the prior New York felony conviction were sufficient to establish that defendant personally used a deadly weapon, namely a pocket knife, to assault someone.

The officer affiant's description of the offense, made on information and belief, set forth in the New York felony affidavit does not reliably reflect the facts of the offense of which defendant was ultimately convicted. (Compare *People v. Reed* (1996) 13 Cal.4th 217, 223 [reporter's transcript of preliminary hearing is part of the record of a prior conviction] with *People v. Trujillo* (2006) 40 Cal.4th 165, 179 ["a defendant's statements, made after a defendant's plea of guilty has been accepted, that appear in a probation officer's report prepared after the guilty plea has been accepted are not part of the record of the prior conviction, because such statements do not 'reflect[ ] the facts of the offense for which the defendant was convicted.' [Citation.]"].)<sup>7</sup> Nevertheless, the court could reasonably infer from the indictment and the record of the plea colloquy that defendant used the pocket knife as a deadly weapon during the 1972 incident in that defendant got mad and opened the knife's three-inch blade during an altercation with the victim and then cut him. Defendant's present ability to perpetrate a violent injury was established by these facts. It was also reasonable to infer from the fact that the knife was three inches long and sharp enough to in fact cut the victim that the knife was capable of producing and likely to produce death or great bodily injury under the circumstances. While the extent and location of any wound would have been relevant (see *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086), such information was not essential. The trial court could

---

<sup>7</sup> In addition, the description of the offense in the felony affidavit was inadmissible hearsay. (Evid. Code, § 1200, cf. *People v. Reed, supra*, 13 Cal. 4th at pp. 230-231 [description of offense in probation report was inadmissible hearsay]; cf. also Evid. Code §§ 452.5 [admissibility of official record of conviction], 1280 [official record exception to the hearsay rule].)

properly conclude that defendant's 1973 New York conviction was a prior "serious felony" conviction (§ 1192.7, subd. (c)) within the meaning of section 667, subdivision (a), and Three Strikes law (§§ 667, subds.(b)-(i); 1170.12).

DISPOSITION

The conviction on count five is modified to reflect a conviction of the lesser included offense of violating Penal Code section 288, subdivision (a). As modified, the judgment is affirmed.

---

ELIA, J.

WE CONCUR:

---

PREMO, Acting P. J.

---

MIHARA, J.