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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE TRINIDAD BARAJASGARCIA,

Defendant and Appellant.

H036706  
(Santa Clara County  
Super. Ct. No. C1065817)

A jury convicted defendant Jose Trinidad Barajasgarcia of four counts of aggravated sexual assault (rape accomplished by force, violence, duress, menace, or fear) on a child under 14 years old and 10 or more years younger (Pen. Code, § 269)<sup>1</sup> (counts 1-2, 14-15) and 16 counts of lewd conduct upon a child by means of force, violence, duress, menace, or fear (§ 288, subd. (b)(1)) (counts 3-13, 16-20). Counts 1 through 13 were committed between July 9, 1999, and July 9, 2001, in San Jose; counts 14 through 20 were committed between July 9, 2003, and July 9, 2005, in Hayward. The trial court sentenced defendant to four consecutive 15-year-to-life terms for the rape convictions consecutive to 16 consecutive six-year terms for the lewd conduct convictions (156 years to life).

On appeal, defendant contends that (1) no substantial evidence supports the element of force, etc., (2) the trial court erred by failing to instruct the jury on the lesser-

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

included offense of statutory rape as to the rape counts, (3) the trial court erred by precluding him from presenting evidence as to the victim's motive to fabricate her allegations against him, (4) he received ineffective assistance of counsel because his counsel failed to object to the admission of evidence as to his bad character, (5) he received ineffective assistance of counsel because his counsel failed to move to dismiss counts 13, 19, and 20, (6) the trial court imposed improper multiple punishment as to counts 13, 19, and 20, and (7) he received ineffective assistance of counsel because his counsel failed to object to the imposition of consecutive sentences as to counts 13, 19, and 20. We disagree and affirm the judgment.

### BACKGROUND

In 1999, defendant lived with his wife and his wife's seven-year-old daughter (the victim) in San Jose. The three shared a home with the wife's brother and family. They occupied one bedroom and one bed. The wife typically left the home for her job at 4:00 or 5:00 a.m. while defendant and the victim remained in bed. One day after the wife left for work, the victim was lying on her side and defendant closed in from behind and touched her between her legs on her vagina with his penis, moving his penis back and forth. On another day during the daytime, defendant told the victim to stop playing outside with her cousin and come inside the bedroom. There, he put the victim on the bed on her back, removed her pants and underwear, opened her legs up, and moved the tip of his penis inside her vaginal lips until he ejaculated on her stomach. According to the victim, defendant abused her from behind the back or on top while the two lived in San Jose (1) about once a week, or (2) more than 10 times. According to the victim, she was afraid of defendant because (1) she knew he had been abusive to his former wife in Mexico, and (2) he was firm with her and feared that he would hit her if she disobeyed him.

At the end of 2000, defendant, his wife, and the victim moved to Monroe, Washington. There, defendant's abuse escalated to at least three episodes of full penetration and the kissing and touching of the victim's breasts.

In July 2003, the wife ended her relationship with defendant and moved to Hayward with the victim. The two lived with the wife's brother and wife (defendant's sister). After a month, defendant came to live with them. He stayed four to six weeks before moving back to Monroe. During defendant's time in Hayward, he continued to abuse the victim by calling her into the bedroom, locking the door, closing the windows, putting the victim on the bed on her back, taking off her pants and underwear, pushing her shirt up, touching and kissing her breasts, spreading her legs, and fully penetrating her vagina with his penis until he ejaculated on her stomach or a towel. According to the victim, this occurred (1) at least once a week, or (2) at least five times but not more than 10.

#### SUBSTANTIAL EVIDENCE OF FORCE, ETC.

In any challenge to a conviction based on the insufficiency of the evidence, our review is highly deferential. We determine “ “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Citations.] We examine the record to determine “whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.] Further, “the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” ’ ’ ( *People v. Moon* (2005) 37 Cal.4th 1, 22.) Thus, “[a]lthough 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.” ( *People v. Jones* (1990) 51 Cal.3d 294, 314 ( *Jones* ).) And so “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." (*Ibid.*)

"However, '[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact. [Citations.]' [Citation.] 'Circumstantial evidence is like a chain which link by link binds the defendant to a tenable finding of guilt. The strength of the links is for the trier of fact, but if there has been a conviction notwithstanding a missing link it is the duty of the reviewing court to reverse the conviction.' " (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955-956; see also *People v. Wader* (1993) 5 Cal.4th 610, 640.)

In child molestation cases, "generic testimony" is sometimes presented, in which a victim describes multiple incidents that are not differentiated by dates, times, or places. Such testimony may be presented in cases where the molester has resided in the victim's home and molested the victim repeatedly, so that "[a] young victim . . . may have no practical way of recollecting, reconstructing, distinguishing or identifying by 'specific incidents or dates' all or even any such incidents." (*Jones, supra*, 51 Cal.3d at p. 305.) This can create certain issues of proof in molestation cases. In *Jones*, the court reconciled the tensions between a defendant's due process rights with society's need "to assure that the resident child molester is not immunized from substantial criminal liability merely because he has repeatedly molested his victim over an extended period of time." (*Ibid.*) It held that generic testimony can support a conviction if certain minimum requirements are met.

"The victim, of course, must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the

information or indictment (e.g., ‘twice a month’ or ‘every time we went camping’). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., ‘the summer before my fourth grade,’ or ‘during each Sunday morning after he came to live with us’), to assure the acts were committed within the applicable limitation period.” (*Jones, supra*, 51 Cal.3d at p. 316.)

The jury convicted defendant of aggravated sexual assault by rape upon a child under the age of 14 and 10 or more years younger. (§ 269.) To prove the crime of rape, section 269 references the elements of the stand-alone rape statute, which defines one form of rape as sexual intercourse “accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.” (§ 261, subd. (a)(2).) The jury also convicted defendant of aggravated lewd act on a child “by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury . . . .” (§ 288, subd. (b)(1).)

Defendant contends that no substantial evidence supports the elements of force, violence, duress, menace, or fear. We disagree.

“Decisional law makes clear that the definition of the word ‘force’ in sexual offense statutes depends on the offense involved.” (*In re Asencio* (2008) 166 Cal.App.4th 1195, 1200.) In *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 (*Cicero*), the court held that to establish “force” within the meaning of section 288, subdivision (b)(1), the prosecution must show that the defendant “used physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.”

In *People v. Griffin* (2004) 33 Cal.4th 1015, 1025-1026 (*Griffin*), the California Supreme Court limited the use of this specialized definition of force, finding that it did not apply to the forcible rape statute. The *Griffin* court observed that “[t]he element of force in forcible rape does not serve to differentiate between two forms of unlawful sexual contact as it does under section 288. When two adults engage in *consensual*

sexual intercourse, whether with or without physical force greater than that normally required to accomplish an act of sexual intercourse, the forcible rape statute is not implicated. The gravamen of the crime of forcible rape is a sexual penetration *accomplished against the victim's will* by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. As reflected in the surveyed case law, in a forcible rape prosecution the jury determines whether the use of force served to overcome the will of the victim to thwart or resist the attack, *not* whether the use of such force physically facilitated sexual penetration or prevented the victim from physically resisting her attacker.” (*Id.* at p. 1027.) In short, “ ‘ “force” plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim’s will.’ ” (*Id.* at p. 1025.)

The *Griffin* standard takes into account the totality of the circumstances. Such things as the respective ages of the parties, the nature of their relationship or the lack thereof, prior sexual conduct between the parties, and any other relevant factor may be considered. Thus, in *Griffin*, the court considered the totality of the circumstances in concluding the act of pinning the victim’s arms to the floor was sufficient to support a conviction for forcible rape. (*Griffin, supra*, 33 Cal.4th at p. 1029.) As to the assertion that there was no evidence the victim demonstrated unwillingness to engage in sexual activities or objected to the intercourse, *Griffin* held that, in light of the circumstances, the jury could conclude that by pinning the victim’s arms to the floor, the accused was able to achieve penetration without the victim’s consent and before she could register objection. (*Ibid.*)

Here, neither the surrounding circumstances nor the acts of intercourse in San Jose or Hayward bore any reasonable indicia of consensual intercourse. And it is absurd to so propose in light of the victim’s ages (seven years old in San Jose; 11 years old in Hayward), defendant’s status as the victim’s stepfather and disciplinarian, and the great disparity in age (defendant was born in 1950). The manner of defendant’s repeated

sexual assaults on the victim bespeaks anything but normal sexual relations. Substantial evidence supports the element of force for purposes of the four section 269 convictions.<sup>2</sup>

Defendant urges that, for purposes of the 16 section 288, subdivision (b)(1), convictions, there is no substantial evidence of force, violence, duress, menace, or fear. We disagree and focus on the duress element.

“Duress” 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.” (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 (*Pitmon*) [superseded by statute on another ground as stated in *People v. Valentine* (2001) 93 Cal.App.4th 1241, 1250].)

In evaluating a sufficiency-of-the-evidence challenge to a finding of duress, we consider the totality of the circumstances “including the age of the victim, and [the victim’s] relationship to [the] defendant.” (*Pitmon, supra*, 170 Cal.App.3d at p. 51.) Physical control over the victim, even if it is insufficient to constitute “force”--meaning “force substantially different from or substantially greater than that necessary to accomplish the lewd act itself” (*Cicero, supra*, 157 Cal.App.3d at p. 474)--may create “duress.” (*People v. Schulz* (1992) 2 Cal.App.4th 999, 1005.) Other factors include the physical size disparity between the defendant and the victim that may contribute to the victim’s sense of vulnerability. (*Pitmon, supra*, at p. 51.) In addition, “the position of dominance and authority of the defendant and his continuous exploitations of the victim” (*People v. Cardenas* (1994) 21 Cal.App.4th 927, 940) are relevant factors in determining

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<sup>2</sup> Since section 261, subdivision (a)(2) (the stand-alone rape statute) uses the terms “force,” “violence,” “duress,” “menace,” or “fear” in the disjunctive and we have found sufficient evidence of “force,” we need not decide whether the evidence was sufficient to support the four section 269 convictions based upon the alternative prongs of the stand-alone rape statute.

whether the sex crime was accomplished through duress. Other relevant circumstances may include threats to harm the victim, physically controlling a resisting victim, and threats of retribution if the victim reveals the molestation. (*People v. Cochran* (2002) 103 Cal.App.4th 8, 14 (*Cochran*)).) But duress can be established only if there is evidence that the victim's participation was impelled, at least partly, by an implied threat. (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1321 (*Espinoza*)).)

In *Cochran*, the defendant videotaped himself and his nine-year-old daughter engaging in various sexual acts. The child testified at trial that she was not afraid of the defendant. The appellate court affirmed the 10 section 288, subdivision (b), violations found by the trial court in a court trial. "The fact that the victim testifies the defendant did not use force or threats does not require a finding of no duress; the victim's testimony must be considered in light of her age and her relationship to the defendant." (*Cochran, supra*, 103 Cal.App.4th at p. 14.) The *Cochran* court also observed: "Neither the trial court's ruling nor our ruling on appeal holds that the parent/child relationship, as a matter of law, establishes force or duress. Nonetheless, as a factual matter, when the victim is as young as this victim and is molested by her father in the family home, in all but the rarest cases duress will be present. This conclusion does not eliminate the distinction between subdivisions (a) and (b) of section 288; those subdivisions may be violated by persons other than the child's parent or one having parental authority and under circumstances where the victim truly consents, e.g., a 13-year-old girl consenting to engage in sexual acts with her boyfriend." (*Id.* at p. 16, fn. 6.)

In *Pitmon*, the defendant engaged in various sexual acts with an eight-year-old boy he had found in a schoolyard. The boy testified that the defendant never used force on him, never threatened to hurt or harm him, and never exercised any duress. The court affirmed the defendant's convictions on all eight section 288, subdivision (b), counts. It observed: "We note that at the time of the offenses, Ronald was eight years old, an age at which adults are commonly viewed as authority figures. The disparity in physical size

between an eight-year-old and an adult also contributes to a youngster's sense of his relative physical vulnerability. . . . These factors . . . bear upon the susceptibility of a typical eight-year-old to intimidation by an adult.” (*Pitmon, supra*, 170 Cal.App.3d at p. 51.) The court concluded: “Viewing defendant's physical control over Ronald from the perspective of a normal, average eight-year-old, we have little difficulty in finding defendant's actions constituted an implied threat of force, violence, hardship or retribution which prompted Ronald against his will to participate in the sexual acts.” (*Ibid.*)

And we have noted that, at the time of the rapes, the victim was seven and 11 years old and defendant was 49 and 53. Defendant presumably was physically larger than the young victim. He was the victim's family authority figure. The victim was afraid of disobeying defendant. In San Jose and Hayward, defendant physically put the victim on her back, took off her clothes, and spread her legs. In Hayward, defendant continued subjecting the victim to penetration that he had begun in Monroe. We have little difficulty in finding that a rational jury was entitled to infer from the totality of the circumstances that defendant's actions constituted an implied threat of force that prompted the victim to participate in the sexual acts against her will.

Defendant argues that the circumstances here are analogous to those in *Espinoza*, a case in which this court concluded that there was insufficient evidence of duress. We disagree.

In *Espinoza*, the victim was the defendant's 12-year-old daughter. On several occasions during a one to two week period, the defendant came into the victim's bedroom at night while her sisters were asleep in the other room. The defendant sat on the edge of her bed and fondled her and on the last occasion attempted to rape her before she moved to prevent him. The victim reported that she was scared, and, on one occasion, defendant asked her whether she still loved him and asked her to love him. We concluded that there

was no evidence that the defendant's lewd acts were accompanied by a direct or implied threat of any kind.

Here, the victim was seven years old when defendant's behavior began. And defendant used force against the victim by putting her on her back and presumably immobilizing her while he took off her clothes and spread her legs. (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005 [courts have held that the force required under § 288, subd. (b), "includes acts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves"].)

Moreover, in *Espinoza*, the defendant behaved as if he were crying and asked the victim for her love, a demeanor inconsistent with using duress to coerce his victim's acquiescence. (*Espinoza, supra*, 95 Cal.App.4th at pp. 1292-1295.) In contrast, here, in addition to the force, defendant told the victim that "he was teaching [her] a lesson and that later on [she] would appreciate him and [she] would thank him."

We conclude that a rational jury was entitled to infer from the totality of the circumstances that defendant took advantage of his position of authority as a member of the family, his superior size and heft, the age difference, and the victim's vulnerability (she was alone without any potential rescuers to come to her aid) to intimidate the victim into submission. When we add to this the physical force of pinning the victim on her back, taking off her clothes, and spreading her legs, we have no trouble finding sufficient evidence of an implied threat of danger sufficient to constitute duress.

#### LESSER INCLUDED OFFENSE--STATUTORY RAPE

"A criminal defendant has a constitutional right to have the jury determine every material issue presented by the evidence, and an erroneous failure to instruct on a lesser included offense constitutes a denial of that right. To protect this right and the broader interest of safeguarding the jury's function of ascertaining the truth, a trial court must instruct on an uncharged offense that is less serious than, and included in, a charged greater offense, even in the absence of a request, whenever there is substantial evidence

raising a question as to whether all of the elements of the charged greater offense are present. [Citations.] [¶] But this does not mean that the trial court must instruct sua sponte on the panoply of all possible lesser included offenses. Rather, . . . ‘ “such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is ‘substantial enough to merit consideration’ by the jury. [Citations.] ‘Substantial evidence’ in this context is ‘ “evidence from which a jury composed of reasonable [persons] could . . . conclude[]” ’ that the lesser offense, but not the greater, was committed.” ’ ” (*People v. Huggins* (2006) 38 Cal.4th 175, 215.) “Speculation is insufficient to require the giving of an instruction on a lesser included offense. [Citations.] In addition, a lesser included instruction need not be given when there is no evidence that the offense is less than that charged.” (*People v. Mendoza* (2000) 24 Cal.4th 130, 174.)

In this case, the central difference between aggravated sexual assault of a child by means of rape and unlawful intercourse in violation of section 261.5 (statutory rape) is that, although both offenses require sexual intercourse with a child, only aggravated sexual assault requires that the sexual intercourse consist of a rape “accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.” (§ 261, subd. (a)(2).)

Defendant argues that statutory rape is a lesser included offense of aggravated sexual assault of a child by means of rape under the so-called “accusatory pleading” test. Under that test, a lesser offense is included within a charged offense if the allegations of the accusatory pleading describe the offense in such a way that if committed as specified the lesser offense is necessarily committed. (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289.) According to defendant, the victim’s testimony “raised a question as to whether, during any of the incidents involving intercourse, [defendant] used ‘force sufficient to overcome [the victim’s] will.’ ” From there, defendant contends that the trial court erred by failing to instruct the jury sua sponte on statutory rape.

The People suppose that statutory rape is a lesser included offense of aggravated sexual assault of a child by means of rape under the accusatory pleading test. However, they contend that the trial court had no sua sponte duty to instruct the jury on statutory rape because there was no evidentiary basis for instructing the jury on that offense. We agree with the People.

Here, there is no evidence that the offense was less than charged. The victim described a lack-of-consent scenario, which equates to forcible rape. Moreover, there is “the long-standing presumption that children *under age 14* cannot give legal consent to sexual activity.” (*People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 11.) And, when the law “ ‘implies incapacity to give consent, . . . this implication is *conclusive*. In such case the female is to be regarded as resisting, no matter what the actual state of her mind may be at the time. The law resists for her.’ ” (*Id.* at p. 248, quoting *People v. Verdegreen* (1895) 106 Cal. 211, 215.) Thus, a reasonable juror in this case could not conclude “that the lesser offense, but not the greater, was committed.” (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

In sum, the evidence and inferences therefrom that defendant highlights are minimal and speculative at best, unworthy of the requested lesser included instruction. Moreover, rather than tending to establish that the rapes were not against the victim’s will and not effected by force, as defendant would have it, the evidence as a whole described a longstanding pattern of force or threat of force and coercion to which the victim submitted, not to normal or consensual sexual activities. (See *People v. Mejia* (2007) 155 Cal.App.4th 86, 101.)

#### EXCLUDED EVIDENCE ON VICTIM’S MOTIVE TO FABRICATE

The victim had a child with her 24-year-old boyfriend when she was 15 years old. As a result of the liaison, the boyfriend was convicted of statutory rape and placed on probation. When the victim was 17 years old, she reported defendant to the police.

When the police investigated the victim's report, they discovered that the boyfriend was living with the victim in violation of his probation.

During in limine proceedings, defendant moved to admit evidence of the victim's sexual relationship with her boyfriend. The purpose was "to dispute the credibility of [the victim], particularly to provide a clear motive to fabricate the allegations . . . ." According to defendant, "the story about the Defendant's molesting [the victim] was fabricated to divert attention away from [the boyfriend's violation of probation]." The People disagreed. They pointed out that the victim first disclosed defendant's rapes to her high school dean, the dean reported the matter to the police, and the police independently learned of the probation violation when they investigated the dean's report. A police officer then testified that (1) he interviewed the victim about her report to the dean, (2) the victim gave him a detailed account of her accusations against defendant, (3) the victim told him she was living with her boyfriend, (4) he ran a records check on the boyfriend and learned that the boyfriend was on probation, and (5) he then told the victim that the boyfriend was or might be in violation of probation by living with her. The trial court denied the motion. It explained: "Then the court is going to rule that the information relating to [the victim] having had sex with a boyfriend and the boyfriend later being charged with statutory rape is irrelevant to this trial and the jury will not know about it."

Defendant contends that "The court's ruling was plainly erroneous. Obviously, the complainant's motive to distract the police from prosecuting her boyfriend and the father of her child was relevant evidence that the charges might be untrue, or that she might be exaggerating the severity of the molestations or the number of incidents."

"A defendant generally cannot question a sexual assault victim about his or her prior sexual activity." (*People v. Bautista* (2008) 163 Cal.App.4th 762, 781, citing *People v. Woodward* (2004) 116 Cal.App.4th 821, 831.) An exception exists when evidence of the complaining witness's prior sexual history is "offered to attack the

credibility of the complaining witness as provided in [Evidence Code] Section 782.” (Evid. Code, § 1103, subd. (c)(5).) “Evidence Code section 782 provides for a strict procedure that includes a hearing outside of the presence of the jury prior to the admission of evidence of the complaining witness’s sexual conduct. [Citations.] Evidence Code section 782 is designed to protect victims of molestation from ‘embarrassing personal disclosures’ unless the defense is able to show in advance that the victim’s sexual conduct is relevant to the victim’s credibility. [Citation.] If, after review, ‘the court finds the evidence relevant and not inadmissible pursuant to Evidence Code section 352, it may make an order stating what evidence may be introduced and the nature of the questions permitted.’ ” (*People v. Bautista, supra*, at p. 782.) “By narrowly exercising the discretion conferred upon the trial court in this screening process, California courts have not allowed the credibility exception in the rape shield statutes to result in an undermining of the legislative intent to limit public exposure of the victim’s prior sexual history.” (*People v. Chandler* (1997) 56 Cal.App.4th 703, 708.) Stated another way, the credibility exception to the inadmissibility of a complaining witness’s prior sexual conduct should not “impermissibly encroach upon the rule itself and become a ‘back door’ for admitting otherwise inadmissible evidence.” (*People v. Rioz* (1984) 161 Cal.App.3d 905, 919.)

We review the trial court’s ruling in denying the admission of sexual conduct for an abuse of discretion. (*People v. Chandler, supra*, 56 Cal.App.4th at p. 711.) We will not disturb a court’s exercise of its discretion “*except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Defendant fails to carry his burden to demonstrate an abuse of discretion. As is apparent, defendant’s argument is a reargument of his position rather than a showing that the trial court’s ruling was arbitrary, capricious, or patently absurd.

Moreover, defendant could not demonstrate that the trial court's irrelevancy ruling was arbitrary, capricious, or patently absurd. This follows because defendant's theory of relevance supposes that the victim fabricated the rape allegations to shield her boyfriend from suffering a violation of probation. But the victim reported her allegations, first to the dean and then to the police officer, well before knowing that her boyfriend was at risk.

We also reject defendant's claim that exclusion of the evidence deprived him of his right to due process of law or of the right to confrontation. "Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right." (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.) "A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.)

Here, defendant extensively cross-examined the victim, calling into question the inconsistencies between and among the statements she had made to the police and in court. The lynchpin of his argument to the jury was the victim's compromised credibility. Thus, the trial court did not limit cross-examination in any significant way. In short, a reasonable jury would not have received a significantly different impression of the victim's credibility had evidence of her sexual relationship with her boyfriend been admitted.

#### INEFFECTIVE ASSISTANCE OF COUNSEL--CHARACTER EVIDENCE

Defendant's wife testified, without objection, that defendant threatened to kill her when she ended their relationship in Monroe and moved to Hayward. Defendant contends that defense counsel's failure to object to this testimony on the grounds of

relevancy and Evidence Code section 352 (more prejudicial than probative) deprived him of effective assistance of counsel. He claims that “Since there was no evidence adduced at trial to show that [the victim] even knew about [his] threat to her mother, [his wife’s] testimony had no relevance to the charges at hand and should have been excluded.” He adds that the evidence “evoked an emotional bias against [him] because it portrayed him as a person who would threaten a woman to whom he was married [and] had little effect on the disputed issue of whether the molestations occurred, how many times they occurred, and whether they were accomplished by fear or duress.” Defendant fails to carry his burden to demonstrate ineffective assistance of counsel.

“Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) That right “entitles the defendant not to some bare assistance but rather to *effective* assistance.” (*Ibid.*) But “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” (*Yarborough v. Gentry* (2003) 540 U.S. 1, 8.)

“To establish constitutionally inadequate representation, a defendant must demonstrate that (1) counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel’s representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the defendant. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1058; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-696.) ‘When a defendant on appeal makes a claim that his counsel was ineffective, the appellate court must consider whether the record contains any explanation for the challenged aspects of representation provided by counsel. ‘If the record sheds no light on why counsel acted or failed to act in the manner challenged, ‘unless counsel was asked for an explanation and failed to provide one, or

unless there simply could be no satisfactory explanation,' [citation], the contention must be rejected." ' ' ' ( *People v. Samayoa* (1997) 15 Cal.4th 795, 845.)

Defendant bears a burden that is difficult to carry on direct appeal. ( *People v. Lucas* (1995) 12 Cal.4th 415, 436.) Our review is highly deferential; we must make every effort to avoid the distorting effects of hindsight and to evaluate the challenged conduct from counsel's perspective at the time. ( *In re Jones* (1996) 13 Cal.4th 552, 561; *Strickland v. Washington, supra*, 466 U.S. at p. 689.) In evaluating whether trial counsel's representation was deficient "we accord great deference to the tactical decisions of trial counsel in order to avoid 'second-guessing counsel's tactics and chilling vigorous advocacy by tempting counsel "to defend himself [or herself] against a claim of ineffective assistance after trial rather than to defend his [or her] client against criminal charges at trial." ' ' ' ( *In re Fields* (1990) 51 Cal.3d 1063, 1069.) A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. ( *Strickland v. Washington, supra*, at p. 689; *People v. Hart* (1999) 20 Cal.4th 546.) The burden is to establish the claim not as a matter of speculation but as a matter of demonstrable reality. ( *People v. Garrison* (1966) 246 Cal.App.2d 343, 356.) As to the failure to object in particular, "[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel." ( *People v. Kelly* (1992) 1 Cal.4th 495, 540.) This is the case especially when trial counsel might reasonably have concluded that an objection would be futile. ( *People v. Price* (1991) 1 Cal.4th 324, 387.)

The point here does not concern the admissibility of evidence. It concerns whether defense counsel had reason to refrain from objecting to the admissibility of evidence. Here, defendant concedes that the threat evidence might have had "some minimal relevance as to why [defendant's wife] decided to move back to California from Washington." And the prosecutor did not question the wife further about the threat or other threats in an attempt to paint defendant as a violent person. We recognize that

defendant urges that the minimally relevant evidence gave the jury a general picture of defendant as an antisocial individual of generally bad character and offered the jury a way to speculate that he had threatened the victim because he had threatened the wife. But defendant's viewpoint reveals a difference of opinion rather than of legal error. The wife's threat testimony was brief, and defense counsel may have decided against objecting because an objection might (1) provoke a relevancy argument that would unduly emphasize the evidence by prolonging the jury's exposure to it, or (2) be unsuccessful because the trial court might conclude that the probative value of the evidence was not outweighed by any prejudicial effect. Again, the failure to object rarely establishes ineffectiveness of counsel. An attorney may choose not to object for many reasons, our review is highly deferential, and we presume that counsel's acts were within the wide range of reasonable professional assistance.

#### INEFFECTIVE ASSISTANCE OF COUNSEL--DISMISSAL MOTION

The prosecutor argued to the jury as follows.

"Now, the charged dates July 9th, 1999 and July 9th, 2001. Her birthday is July 9th and we wanted to have a big enough span and the acts fall within that span. The judge read you the instructions that talks about on or about, it doesn't have to be the exact date. [¶] When did the first group, the San Jose molest, take place? Well, they took place somewhere after her birthday in '99 is what I believe the mother testified when they brought her up and it went on to the end of 2000. So you've got a pretty good period of time, well over a year where he has access to her on a regular basis. [¶] And the mother's testimony . . . was that she is leaving the house at 5:00 o'clock in the morning, leaving this guy there in bed with her daughter, going to class at night to learn to speak English. And so he's got access to her on all kinds of occasions during that time period. [¶] And what does she say on the witness stand? Now, this is interesting. The defense is going to get up and say at the original statement to Detective Kidwell what does she say? Oh, I can remember four times and one time he touched me. What was the full context of that

when we got up in redirect? Well, it was--she couldn't remember very well. I can't tell you, once a week, once a month I can't remember. But think about that for a second. It took her four or five years to tell her mother about this, right? [¶] . . . [¶] So what does she say? At the preliminary hearing the testimony that came in and have it read back on redirect. We got it there with the transcript of the prelim. She says, before I turned 7 it was somewhere between five and ten times, but after I turned 8, which is in that set of charging dates it happened more frequently. Remember? [¶] And defense counsel said if you did the math. Well, I will tell you to do the math. Did this happen more than ten times during that period? You bet your bottom dollar it did and it's courageous for her to get up here and be able to relay that many times. A total of 12 actually. She said ten where he rubs it against my vaginal lips and a couple of times where it was from behind. She probably had two proven acts during trial. Common sense, yeah, it did happen more frequently than that. [¶] What I want you to do, ladies and gentlemen, is find a not guilty of count 13, because if you do the math, two counts of 269. Did he do ten acts of 269? Of course he did during that time period. He is charged with two. Find him guilty of 1 and 2 and find him guilty of 288(b), the touching. The touching can be with a penis and the 288(b)(1), for a total of 12 counts and find him not guilty of count 13. Because the reasonable testimony is that she said ten times plus two. [¶] Now, the other charging dates and basically what she is saying every week, sometimes once every two weeks. Do you think this was just a once in awhile thing? No. [¶] All right, the other charging dates July 9, 2003, to July 9, 2005. I think six weeks was the final conclusion. Some are between a month or two and some others say six weeks. That takes place somewhere between six weeks in between July, August, September or October because there was a delay, but it is clearly within the charging dates. [¶] What she said at the prelim and to Kidwell and that's something a little clearer in her mind. Remember the gap of time and the memory of a 7, 8 year old goes up to Washington for a number of years. She's now older, closer in time. She's probably able to relay those events a little better. And she

says to Kidwell five times. Now full vaginal penetration this time and at prelim five times. And when she gets up on the stand very carefully, very thoughtfully, after the therapy she is able to relate to you at least five times in Hayward with full vaginal penetration. [¶] So, in regards to those counts find him guilty of counts 14 and 15, the 269. Now, do you have five 269's proven beyond a reasonable doubt? Of course you do, but they are not charged and that's fine. So find him guilty of 14 and 15 and then find him guilty of 16, 17 and 18 because that's what's been proven and then find him not guilty of 19 and 20. That's what the evidence is in this trial. [¶] Now, beyond a reasonable doubt, common sense, did it happen more times than that? Think about the levels of denial, the years of trying to forget, the years of struggling, not even being able to talk to your mother. And you saw the type of relationship and how close they appeared to be. Not even able to talk to her mother. [¶] And think about how difficult for a child molest victim at 18 years old to walk into this courtroom and look at you all, 14 strangers and talk about the most intimate details, the most embarrassing, the most humiliating and the most emotionally and destructive information of their lives and she did. And she gave us enough to convict him of all of those counts that we just talked about. [¶] You all have to agree when generic testimony is offered. And all you have to do is agree, this count she said ten times, 12 times. And you all agreed it happened how many times, you don't have to know exactly when it happened, or the details, but the penetration that she talked about, how many times it happened. Boom, you're done."

The prosecutor concluded: "So find him not guilty on those counts and find him guilty on the majority that we talked about in detail and then you're finished."

Defendant claims that the prosecutor conceded to the jury that there was insufficient evidence as to the lewd acts charged in counts 13, 19, and 20. From there, he contends that defense counsel was constitutionally ineffective because he did not move to dismiss those counts before they were submitted to the jury.

Defendant's claim of ineffective assistance of counsel hinges on whether a motion to dismiss would have been granted. If it would have, then counsel's failure to make it would demonstrate ineffective assistance of counsel. The omission could not have reflected a reasonable tactical decision; and its prejudice would be obvious, in that defendant unnecessarily suffered convictions on counts 13, 19, and 20.

Here, had defense counsel moved to dismiss counts 13, 19, and 20, the trial court could have rationally concluded that the prosecutor was not conceding that there was insufficient evidence as to those counts. This follows because it could have instead interpreted the prosecutor's argument as inviting the jury to acquit given that the victim's specific statements to the police and at the preliminary hearing that supported 17 counts (12 times in San Jose; five times in Hayward) were more reasonable than her generic trial testimony that supported 20 counts (once a week in San Jose; five but not more than 10 times in Hayward). Had it so interpreted the prosecutor's argument, it could have reasoned that the jury should resolve whether the generic or specific testimony was more credible. Thus, the trial court was not compelled to grant a motion to dismiss. Defendant therefore fails to carry his burden to prove ineffective assistance of counsel as a demonstrable reality.

#### MULTIPLE PUNISHMENT--COUNTS 13, 19, AND 20

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

By its terms, the section applies where a person suffers from multiple punishments for a single criminal act or omission. (*People v. Beamon* (1973) 8 Cal.3d 625, 637-638.) The purpose of the statute is "to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more

than one crime. Although the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one offense--the one carrying the highest punishment.” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

As this court explained in *People v. Braz* (1997) 57 Cal.App.4th 1, 10, multiple punishment is permissible notwithstanding section 654 if the defendant “entertained multiple criminal objectives which were independent of and not merely incidental to each other. [Citation.] A defendant’s criminal objective is ‘determined from all the circumstances and is primarily a question of fact for the trial court, whose findings will be upheld on appeal if there is any substantial evidence to support it.’ ” We must view the evidence in a light most favorable to the respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698.) The proper procedure for disposing of a term banned by section 654 is to impose and stay the sentence. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 420.)

Defendant contends the trial court erred by failing to stay his consecutive sentences for counts 13, 19, and 20. According to defendant, “there is no principled way to determine from this record just what criminal acts the jurors employed to convict [him] of the section 288 lewd acts charged in counts 13, 19, and 20.” He interprets the prosecutor’s invitation to acquit on counts 13, 19, and 20 as an election of “a theory of the case which had at least three of section 288 lewd acts . . . occurring on the same occasion as the section 269 rapes.” He concludes: “Thus, it must be assumed that the lesser section 288 acts in counts 13, 19, and 20 were merely incidental to the greater section 269 acts of rape in counts 1, 2, 14, and 15.”

Defendant stands our scope of review on its head. As we have explained in examining defendant’s previous contention, the generic evidence supports defendant’s convictions of counts 13, 19, and 20 as separate, independent lewd acts notwithstanding

the prosecutor's view that the victim's specific testimony indicated that they did not occur at all. Defendant's interpretation of the record leading to his assumption that count 13 was tied to count 1 or 2 and counts 19 and 20 were tied to counts 14 and 15 is simply another way to view the evidence.

The Supreme Court has cursorily rejected application of section 654 where the record does not conclusively require application: "Defendant also claims that the trial court imposed sentence for the offense of lewd conduct in violation of Penal Code section 654. He relies on *People v. Siko* (1988) 45 Cal.3d 820, but to no avail. In that case, we held that the defendant, who had been convicted of rape, sodomy, and lewd conduct, could not be punished for all three offenses. There, we were able to conclude that the lewd conduct consisted solely of the rape and the sodomy: 'the charging instrument and the verdict both identify the lewd conduct as consisting of the rape and the sodomy rather than any other act.' [Citation.] Here, we are unable to come to a similar conclusion." (*People v. Ashmus* (1991) 54 Cal.3d 932, 1011, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

In short, we must view the evidence in a way that supports the judgment.

#### INEFFECTIVE ASSISTANCE OF COUNSEL--CONSECUTIVE SENTENCES

The trial court imposed mandatory full consecutive sentences for counts 13, 19, and 20 pursuant to section 667.6, subdivision (d).<sup>3</sup> Defendant contends that the trial court erred because the prosecutor conceded that the "20 [charged] counts consisted of only 17 'separate occasions' within the meaning of section 667.6, subdivision (d)." Defendant reasons that consecutive sentences for counts 13, 19, and 20 were discretionary and counsel was ineffective for failing to object and require the trial court to state reasons for

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<sup>3</sup> Section 667.6, subdivision (d), provides that for certain specified sex crimes, including the commission of a forcible lewd act in violation of section 288, subdivision (b), "[a] full, separate, and consecutive term shall be imposed for each violation . . . if the crime[] involve[s] . . . the same victim on separate occasions."

consecutive sentences in the event it elected to impose discretionary consecutive sentences.

As we have explained in examining defendant's previous two contentions, the prosecutor did not concede that only 17 lewd acts occurred and the evidence supports defendant's convictions of counts 13, 19, and 20 as separate lewd acts. Consecutive sentences were therefore mandatory. It follows that defense counsel was not constitutionally ineffective for failing to object to mandatory consecutive sentences.

DISPOSITION

The judgment is affirmed.

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Elia, J.