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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ALBERT ANGELO CRESPO, Defendant and Appellant.	C048486 (Sup.Ct. No. 02F08167)

A jury convicted defendant Albert Angelo Crespo of domestic abuse, assault, false imprisonment, and two counts of forcible oral copulation. (Pen. Code, §§ 236, 240, 273.5, subd. (a), 288a, subd. (c)(2).) In a bifurcated proceeding, the trial court found he had a prior strike conviction. The trial court sent defendant to prison for 35 years and defendant timely filed this appeal.

Defendant asserts (1) no substantial evidence supports the forcible oral copulation counts, (2) the court misinstructed on prior act evidence, (3) the court should have instructed on

mistake of fact, (4) the court misinstructed on consent, (5) the court should have struck the prior conviction and (6) the court should not have sentenced him based on facts not found true by the jury. We shall affirm.

FACTS

The victim had known defendant for many years and they dated for about three years and had been engaged for perhaps two years. By September 2002 the relationship had turned sour and they argued regularly. Although she told him she wanted to end the relationship "He did not want the relationship to end and was very adamant about the fact that he wasn't going anywhere."

On about September 1 and 18, 2002, he was violent with her, pushing or pulling her and grabbing her by the throat each time, and she filed for a restraining order against him on about September 21, 2002. At about 3 a.m. on September 23, 2002, she woke up to find defendant standing over her bed.

The victim was scared but got up and spoke with defendant. He told her to go into the shower. Then he became angry and grabbed her arm: "I kept telling him I didn't want to go take a shower. I was tired, and I wanted to go to bed. We started walking back towards the bathroom. He . . . pushed me against the wall and told me: Don't make any noise. Don't wake everyone up, or he would fuck everybody up in the house." He was angry and she was angry and afraid. "It wasn't like he was dragging me down the hall. He had hold of me, and I was reluctant in going with him." Later she testified "It wasn't a

kicking, screaming fit, but I wasn't saying, 'Yeah. Sure. Come on. Let's go,' either."

When they entered the bathroom she asked him to leave the door open but he shut and locked it. She reluctantly got into the shower because "he wouldn't let me not." He told her "to suck his dick" while he had his hand on her head with a handful of her hair which he held tightly, pushing her head down; although she told him she did not want to, she eventually did as he ordered. She relented "Because I just wanted him to go away. Q. And after you did that, what happened next? A. Then I stopped, and I stood up, and he put my leg on the side of the tub and start[ed] performing oral sex on me, and he stopped. Q. And when you say he performed oral sex on you, was that your request? A. No. Q. And is that something that you wanted at that time? A. No."

The victim was afraid defendant was going to hit her and she fled from the bathroom and pounded on a roommate's door. When the household awoke defendant pretended that he did not know what was happening. As defendant tried to pull a blanket off the victim (who was otherwise still naked), they struggled and he "started hitting me on my face and picked me up by my hair." Defendant said she was going with him. She saw that he had a steak knife, with which he "barely cut" her shoulder.

Eventually, the couple left the apartment. At one point away from the apartment defendant "said that he had dug a ditch out there that he was taking me out to put me in," and at another he punched her so hard her vision was blurred for

several minutes. The victim thought defendant was "coming down" off of drugs and she had intercourse with him in the back of their truck to help him go to sleep; she viewed this as entirely consensual and so did not mention it during early interviews. When he fell asleep she fled to nearby Grant High School to get help. According to officers who saw her, she was shaking and "very scared" and had visible injuries. When defendant was captured he was asleep near the knife.

A school police officer testified as follows: "Q. When you were speaking with [victim], did she tell you that the Defendant made her perform oral sex on him? A. Yes." Another officer testified as follows: "Q. [W]hen you were speaking with the victim and she was recalling to you what had happened to her, did she tell you whether or not the Defendant made her give him oral sex? A. Yes. Q. And what specifically did she say? A. She said that happened when he was in the apartment where she lives, and that he forced her into the shower and that he forced her to have oral sex on him." Although defendant objected to these passages, his objections were impliedly overruled.

The victim told an investigator there had been no threats during oral sex, but there had been before; she told defendant "no" and he grabbed her hair and held her head down. She told an investigator "the same thing I just told this court, [which] was that I went in there. He was coercing me in there. It wasn't -- like I said before, we weren't holding hands as we tra-la-laed into the bathroom. But I didn't put up a screaming

fight either." She testified that as to getting into the shower, to say he "heavily persuaded would probably be an accurate description. He didn't threaten me if I didn't, but I was afraid at the time already."

She also testified on cross-examination as follows: "Q. It is true, though . . . that you did not have unconsensual oral sex with Albert in the shower at that point; is that true? A. Correct." On redirect the prosecutor asked her "did the defendant hold you down in the shower while you were in the shower? A. He had my hair and he had his hand full of my hair and was holding me." She reiterated that she had not wanted to have oral sex and had told him so:

> "A. I told him no. I didn't want to do that. I tried to stand up.
>
> "Q. What happened when you tried to stand up?
>
> "A. He just put pressure on my head, and he wasn't like forcefully putting a lot of pressure on me and holding me down, but he was putting enough pressure that I felt that pressure and wasn't going to push back.
>
> "Q. Why didn't you push back and push him down?
>
> "A. I did not want things to escalate, and I wanted to -- wanted him to leave. I just wanted him to go.
>
> "Q. And at that time when he -- when you told him you didn't want to, what words specifically did you say to him?
>
> "A. No, I don't want to do this; no.
>
> "Q. After you said: No, I don't want to do this, what did he do?

"A. He was just persuading: Come on. Do this. Then it was: Oh, you are going to do this. He said: You are going to do this. You are going to do this one last time.

"Q. And when he said that, when he said you were going to do this one last time, was he holding your head at that point?

"A. Yes.

"Q. And you said after you did -- you performed oral sex on the defendant, he lifted up your leg?

"A. Yeah.

"Q. Can you describe what he did?

"A. He just grabbed my leg like underneath my knee and just lifted my leg and put it on the side of the tub."

She then testified she neither protested nor encouraged him and eventually he stopped.

The victim testified that she went to defense counsel's office "to discuss the case with you because I was concerned about the sexual charges," and when asked if she told counsel defendant had "not force[d] you to have sex in the shower" she replied "That he had not forced-forced, yes."

Later still she attempted to clarify:

"I don't know how to explain how I feel about [whether she was forced] because . . . that's not the focus of why we're here today . . . because if everything had ended after the shower, he could have walked out of my house and it would have been a done deal.

"But that's not why we're in this courtroom today. You know, so I don't feel -- no, I didn't want to do it, but I'm not going to say he forced me or her raped me either because it wasn't -- I don't feel that -- I don't know how to explain to you how I feel about that. I didn't want to do it, but I was heavily coerced. I don't feel

comfortable using the word forced, but I wasn't willing either.

"Q. Well, did you fear that he was going to hit you?

"A. I -- he had already grabbed me and he had already put his hand on me, so there was already a fear there. So, yes, I was afraid."

She had also stated that she had never known defendant to force himself sexually on anyone and that he did not force himself on her "sexually speaking" that night. However, she drew a Clintonian line between "sex" and "oral sex." When asked to explain statements "about having sex in the shower" she replied "A. We didn't have sex in the shower." Later when she was asked to clarify whether something happened "after you were having sex with him in the bathroom shower," she replied, "You keep saying after I had sex with him in the bathroom, and no, we didn't have sex in the bathroom. But after, after oral sex was performed in the bathroom, the argument escalated after that." Thus, when she testified she did not know defendant ever to force himself on anyone and he did not force himself "sexually speaking" on *her* that night, this is perfectly consistent with her understanding of "sex" as opposed to "oral sex," and her view that he coerced her into the latter, but not the former.

She also testified to having previously "stated that when you are in a relationship, there are times your partner asks you to do things that you may or may not want to do. So I didn't consider it necessarily forcible, but I didn't want to do it, and I made it clear that I didn't want to do it. [¶] At that point what I was doing was stating that that was not the

significance of what happened on that day. What happened in the shower, that was not the significance of the day. That was the point I was trying to make with that statement. That's not -- Q. And that you further stated that you did not feel that that day or that morning that he had forced himself on you; is that true? A. Correct. Q. He did not force you to have oral sex with him? A. That's correct." She later testified that during the relationship she would sometimes submit to sex even after saying "no."

During one round of cross-examination she testified: "Q. Isn't it true . . . that Albert did not force you to have sex with him, *any sex*, on September 23rd? A. Yes." (Italics added.) It is not clear whether she interpreted "any sex" to mean "any kind of sex" or that it included oral sex, given her earlier distinction between "sex" and "oral sex." Further, given prior testimony, it is clear she understood the term "force" in a special way. On redirect she was asked about this testimony and asked to define what she meant by "force" but at first she was not able to explain what she meant; then she testified ". . . I was just standing there in my clothes, and he said well, get undressed. Aren't you going to take your clothes off? So he was prompting me like that and just like standing there over me and I started crying. [¶] So, I mean, yes, I stepped into the shower myself with -- you know, heavily prompted. Like I said about the whole thing, he didn't grab me and throw me in the tub, but he didn't leave me too many options to say no either."

Defendant did not testify but introduced evidence that he had recently been in a serious accident, reducing his ability to do the things the victim described (e.g., picking her up by her hair). He emphasized that the victim testified she was angry with him about taking her truck and because she had seen him with another woman, thereby providing a motive to lie. He also introduced some evidence which, if believed, tended to show the victim's description of events in the apartment were exaggerated and that she had had earlier opportunities to escape.

DISCUSSION

I

Defendant contends no substantial evidence supports the oral copulation convictions because there was no evidence of force. He raises this alternatively as a claim that the trial court improperly denied his motions for a directed verdict (Pen. Code, § 1181.1) and for a new trial, both of which challenged the sufficiency of the evidence. Defendant asserts, "Without question, the victim testified she was not forced by Appellant into the acts of oral copulation. [Citations.] Nor was there evidence that the acts of oral copulation were accomplished by violence, given the fact that Appellant was not violent with [the victim] in the shower. [¶] The question then becomes, was the evidence sufficient to show the acts were accomplished by means of duress, menace or fear of immediate and unlawful bodily injury?"

Defendant's recitation of the facts improperly skews them in the light most favorable to his claim and improperly segments

the events into discrete periods which, in his view, bear no relationship to each other. In fact, when we view the events in their totality, and in the light most favorable to the verdict, as we are obliged to do (see *People v. Johnson* (1980) 26 Cal.3d 557, 578), we find substantial evidence to support the verdicts.

Penal Code section 288a, subdivision (c)(2) provides in part: "Any person who commits an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison . . . ."

In *People v. Pitmon* (1985) 170 Cal.App.3d 38, a case involving *child molestation,* we discussed (at page 48) that for purposes of sentencing "force" required "physical force beyond that necessary to accomplish the lewd act," but concluded that Pitmon's "manipulation of Ronald's hand as a tool to rub his genitals was a use of physical force beyond that necessary to accomplish the lewd act. . . . Further the record reveals that in those instances in which Ronald orally copulated defendant, defendant slightly pushed Ronald's back during each performance of that act. Again this displayed a use of physical force that was not necessary for the commission of the lewd acts." As to acts of oral copulation *by* Pitmon *on* Ronald, we said "the force associated with the commission of [Pitmon's] other acts and all the circumstances surrounding them are sufficient to show [Pitmon] accomplished all of the acts charged by means of duress." (*Ibid.*) Similarly, here defendant accomplished the

first act of oral sex by entering her house in the early morning, threatening her housemates, locking the victim in a bathroom, ignoring her "no" response and by holding her hair and pushing it onto his penis. He then physically moved her leg aside so he could perform oral sex. The "force associated" with the former act, coupled with "all the circumstances" show that the latter was accomplished by duress. (See *ibid*.; *People v. Senior* (1992) 3 Cal.App.4th 765, 775 [also a molestation case].)

Further, it is not necessary in *adult* sexual crime cases to show more force than is necessary to accomplish the act, only enough force to overcome the victim's will. In *People v. Guido* (2005) 125 Cal.App.4th 566 we explained (at page 576) that the term "force" in such cases simply plumbs the line between consensual and nonconsensual adult sexual activity:

> "Consensual oral copulation, with or without physical force greater than that normally required to accomplish the act, is not unlawful except when accomplished [with a minor]. As with forcible rape, the gravamen of the crime of forcible oral copulation is a sexual act accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. As with forcible rape, it is only when one participant in the act uses force to commit the act against the other person's will that an otherwise lawful act becomes unlawful.
>
> "Unlike sexual abuse of a child by use of force, a specialized definition of force is not necessary to the crime of forcible oral copulation because a different concept of force is not needed to distinguish between two crimes or to give substance to the Legislature's use of the term 'force,' such as it is in section 288, subdivision (b)(1).

> "We note, too, the statutory language, 'accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury,' is the same language that makes two otherwise lawful acts criminal.
>
> "In all, there is no reasoned basis to apply a different concept of the term 'force' to forcible rape and forcible oral copulation and we hold oral copulation by force within the meaning of section 288a, subdivision (c)(2) is proven when a jury finds beyond a reasonable doubt that defendant accomplished an act of oral copulation by the use of force sufficient to overcome the victim's will. The term does not carry a specialized legal definition."

The instructions required the jury to find that "The act was accomplished against the alleged victim's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the alleged victim *or any other person*." (CALJIC No. 10.10; italics added.)

Duress was further defined to mean "a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which she would not otherwise have performed, or acquiesce in an act to which she otherwise would not have submitted. The total circumstances, including the age of the alleged victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of the duress." (CALJIC No. 10.10.)

We note in particular that the victim's prior statements to two police officers, to the effect that defendant "made" or "forced" her to have sex were highly significant. (RT 267, 313) By omitting any mention of this evidence in his briefs,

defendant has failed in his duty to paint the evidence faithfully. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) In any event, the victim's testimony taken as a whole supports the jury's verdicts. To briefly recap, the victim had broken up with defendant *and sought a restraining order against him after he assaulted her on two occasions*. She woke up *at 3 a.m. to find him in her bedroom*. When she refused to take a shower with him *he became angry and grabbed her arm*. He ignored her refusals and *he pushed her against a wall and threatened to "fuck everybody up in the house" if she made noise*. *He locked her in the bathroom*. After she was in the shower *he ignored her refusals and pushed her head onto his penis*. When this act finished defendant physically moved her leg and began an act of oral copulation.

The post-assault evidence can also be used to circumstantially bolster the evidence of lack of consent. (See *People v. Maury* (2003) 30 Cal.4th 342, 403 [in part pointing to evidence "that, after the act of intercourse, she grabbed a screwdriver . . . to protect herself"] (*Maury*).) Here, after the oral sex the victim fled the bathroom to seek help; after being urged so to do by her housemates, the victim left with defendant but ultimately fled from him once he fell asleep, whereupon she ran from the house to the high school to get help; once an officer found her she was screaming and still very scared.

Contrary to defendant's view, the victim was not "unequivocal" in her discussion of force and it is abundantly

clear, as the prosecutor argued to the jury, that her testimony was predicated on her personal definition of "force," which differed from the legal definition provided to the jury. Her view was she was not "forced-forced" but was afraid and "heavily coerced" because of his conduct. That equates to duress. The fact the victim did not think defendant applied enough "force" to make the acts criminal is not dispositive, and her personal views about the appropriate charges are not binding.

To the extent defendant separately contends the trial court misapplied the law in denying his new trial motion, the claim is based on an overly-fine reading of the trial court's ruling. The trial court stated: "Well, there was evidence presented at the time of the trial that, in fact it [oral copulation] did occur and that the -- there was certainly sufficient evidence for the jury to have concluded that even with the impeachment, and that's really a province of the jury, and it is not clear enough that this Court would overstep the decision of the jury in that case." Later the court stated there was "clearly sufficient evidence to sustain" the verdicts.

On a motion for a new trial the judge reweighs evidence as a "13th juror." (See *People v. Lagunas* (1994) 8 Cal.4th 1030, 1038, fn. 6.) "It has been stated that a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on motion for a new trial. [Citations.] This does not mean, however, that the court should disregard the verdict or that it should decide what result it would have reached if the case had been tried without a jury, but instead that it

should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict." (*People v. Robarge* (1953) 41 Cal.2d 628, 633; see *People v. Lopez* (1969) 1 Cal.App.3d 78, 84-85.) In our view the trial court found that the evidence was "clearly" sufficient, and the court deferred to the jury *because it agreed with the jury*.

Although, as the Attorney General concedes, the trial court's language was "less than artful," we do not read the record to indicate the trial court misunderstood its duty regarding the new trial motion. (See *People v. Price* (1992) 4 Cal.App.4th 1272, 1275-1276 ["I think the evidence was sufficient, and *I think that . . . there was enough evidence there for the jury to do what the jury did*"; denial of motion upheld; trial court's "use of less than artful language cannot be equated with having applied the wrong standard"].) Further, in the unlikely event that this experienced trial judge actually misunderstood the scope of its discretion on the new trial motion, given the trial court's comments and the strength of the evidence, any error by the trial court was harmless. (See *People v. Braxton* (2004) 34 Cal.4th 798, 817-818.)

II

Under Evidence Code section 1109 (§ 1109) the trial court allowed the People to introduce evidence of specific acts of prior domestic abuse to show his propensity to commit such acts, and gave the jury standard limiting instructions on the use of such evidence. (CALJIC No. 2.50.2.) Defendant contends the

trial court misinstructed on the scope of permissible use of the prior act evidence. He asserts the trial court instructed that prior acts could be used to show his guilt of *all* the instant "offenses", but defendant points out that not all of the instant offenses involved domestic abuse as defined by statute. He concedes the instruction was proper as to Count I (domestic abuse) and Count II (assault with a deadly weapon), but asserts it should not have applied to Count III (kidnapping) or Counts IV and V (forcible oral copulation).

For purposes of this appeal we agree with defendant that the prior act evidence was not admissible as to Counts III-V under section 1109, but we do not believe the instruction given would be interpreted by the jury in the way defendant suggests, nor do we believe, based on the record of this case, that any prejudice ensued even if the instruction was so interpreted.

The challenged instruction probably should not have been given for an entirely different reason. Although the People also wanted to introduce evidence of domestic abuse defendant committed against another victim, that evidence was excluded before trial. The only "propensity" evidence was based on alleged assaults against the instant victim. Those were directly relevant to defendant's intention towards this victim and therefore were admissible *regardless of section 1109*. (See *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1026 ["Even before the enactment of section 1109, the case law held that an uncharged act of domestic violence committed by the same perpetrator against the same victim is admissible"].)

The trial court partly instructed as follows:

> "Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence on one or more occasions other than that charged in the case.
>
> "'Domestic violence' means abuse committed against . . . a . . . person with whom the defendant . . . is having or has had a dating or an engagement relationship. [¶] . . . [¶]
>
> "'Abuse' means intentionally or recklessly causing or attempting to cause bodily injury . . . .
>
> "If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that defendant had a disposition to commit other offenses involving domestic violence. If you find that the defendant has this disposition, you may, but are not required to infer that he was likely to commit and did commit the crime of which he is accused.
>
> "However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses.
>
> "If you determine an [inference] properly can be drawn from this evidence, the inference is simply one item for you to consider along with all the other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime.
>
> "Unless you are otherwise instructed, you must not consider this evidence for any other purpose."

As stated, defendant asserts the instruction—absent modification, which he failed to request—could have led the jury to conclude he was guilty of offenses other than the domestic abuse charged in Count I and the assault charged in Count II. We disagree.

The instruction as given told the jury it "may . . . infer that defendant had a disposition to commit *other offenses involving domestic violence*," and domestic violence was defined as "abuse" in a specified relationship, further defined as "intentionally or recklessly causing or attempting to cause bodily injury[.]" Thus, by its terms the instruction limited the permissible use of the evidence to and only to "offense[s] involving domestic violence" as defined. It would not allow the use of the evidence as to the kidnapping and oral copulation charges. True, it also states, "If you find that the defendant has this disposition, you may, but are not required to infer that he was likely to commit and did commit *the crime of which he is accused*." (Italics added.) But in the context of the instruction as a whole, it is not reasonable to conclude the jury would interpret this sentence to mean the evidence was relevant to all crimes "of which he is accused" whether or not they involved domestic abuse.

A similar argument was treated similarly by another court, and we agree with its reasoning, as follows (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1336-1337 (*Brown*)):

> ". . . Brown notes that while the admission of prior acts of domestic violence as propensity evidence 'may be logical' when the charged offense is for a similar act of domestic violence, '[t]he incidents of uncharged domestic violence introduced against him simply have no logical relevance to the firearm or weapon possession charges . . . . However, the jurors were plainly told that they could infer from that evidence that he did in fact commit all five of the charged offenses.' Thus, he claims, 'due process requires that the court explain to the jury specifically which crimes the prior incidents may be used

to inferentially establish.'

> "In the absence of a request, the court had no sua sponte duty to give such a limiting instruction. [Citation.] The record reflects Brown did not request one. In any event, as noted, the court instructed the jurors that if they found Brown committed a prior act of domestic violence, 'you may infer that [Brown] had a disposition to commit offenses involving domestic violence.' By its own terms, the instruction was not applicable to the charged weapons offenses. Moreover, the prosecutor discussed the prior acts of domestic violence only in the portion of his argument regarding Brown's assault on Lisa Haynes. These circumstances convince us there was little risk the jury might have been confused. Therefore, we do not find a reasonable probability the jury would have returned a more favorable verdict on the weapons charges had a limiting instruction been given."

Moreover, the prior act evidence came solely from the victim, and consisted of brief testimony that she sought a restraining order against defendant based on two acts of violence he perpetrated in the weeks before the charged offenses. On or about September 1, 2002, he grabbed her by her throat, leaving a lump under her chin and he pulled her around by her arm. On or about September 18, 2002, they argued over some car keys and "He had grabbed me and pushed me. Grabbed me by my arm and was punching me. And he grabbed me by my throat[.]" Based on these incidents she filed for a restraining order on September 21, 2002. This evidence was unlikely to be significant as applied to any of the challenged counts.

As for the kidnapping count, even if the jury somehow interpreted the instruction to permit use of the uncharged-act evidence when it considered the kidnapping charge, the evidence bore little relationship to that charge. The uncharged-act

evidence possibly explained her statement to an officer that defendant could no longer rely on hitting her to control her, but had to "elevate[]" to using a knife to control the victim when he took her from the apartment. *But defendant was acquitted of kidnapping and convicted of the lesser charge of false imprisonment.* This shows the jury was carefully evaluating the evidence relevant to this charge and we fail to see how the prior act evidence could have tipped the scales; indeed defendant impliedly concedes the point by not explicitly arguing about Count III. As for the oral copulation offenses, the evidence of which we have recounted in exhaustive detail, the uncharged-act evidence could have bolstered the victim's explanation of why she feared him. But the fact he appeared in her home uninvited early in the morning, made threats and grabbed her, amply explained her fear before she succumbed to demands for oral sex. The prior act evidence was minor in comparison.

It is also important that in argument the prosecutor discussed the prior act evidence only in connection with domestic abuse, not in connection with the kidnapping or sex charges. The California Supreme Court has said in determining "whether the interplay of argument with individually proper instructions produced a distorted meaning, it seems appropriate to evaluate the remarks of both counsel to determine whether the jury received adequate information." (*People* v. *Brown* (1988) 45 Cal.3d 1247, 1256, see *People* v. *Fudge* (1994) 7 Cal.4th 1075, 1111 ["Although [defense] counsel's arguments are not a

substitute for a proper jury instruction, such detailed argument supports our conclusion that the error in refusing the instruction was harmless in this case"]; *People* v. *Champion* (1995) 9 Cal.4th 879, 949-950; *People* v. *Beeler* (1995) 9 Cal.4th 953, 983-984 ["the prosecutor's closing argument foreclosed any realistic possibility of the jury not believing they had to find intent to kill"].) The possible misconstruction of the instruction theorized by appellate counsel was not pressed at trial and, for the reasons stated we do not believe it would have occurred to the jury. (See *Brown*, *supra*, 77 Cal.App.4th at p. 1337.)

Even assuming the instruction should have been modified for clarity, as given it did not undermine the People's burden of proof. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1015-1016; *Brown*, *supra*, 77 Cal.App.4th at pp. 1335-1336; *People v. Johnson* (2000) 77 Cal.App.4th 410, 419-420.) At worst it allowed a permissive inference to be applied to the wrong counts, an error of California law which we would not find to be prejudicial under the *Watson* definition of a miscarriage of justice. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).)

Finally, even if we agreed with defendant that trial counsel was incompetent because no modification to clarify the instruction was sought, the lack of prejudice defeats his claim of incompetence of counsel. (See *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

III

Defendant contends the trial court should have instructed the jury to acquit him of the sex offenses if he had a reasonable belief that the victim consented to the acts, a form of mistake-of-fact defense. (CALJIC No. 10.65; see *People v. Mayberry* (1975) 15 Cal.3d 143, 153-155 (*Mayberry*).)

Despite contrary language in some cases, we recently explained that instructions on a defense must be given if and only if substantial evidence supports it. (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1046, 1058-1059.)

To require a *Mayberry* instruction there must be substantial evidence of a defendant's "reasonable and good faith belief" that the alleged victim "voluntarily consented" to the sexual activity; however, "a belief that is based upon ambiguous conduct by an alleged victim that is the product of conduct by the defendant that amounts to force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of the alleged victim or another is not a reasonable good faith belief." (CALJIC No. 10.65; see *People v. Williams* (1992) 4 Cal.4th 354, 364 (*Williams*).) Assertion of the defense is successful if the defendant raises a reasonable doubt on the issue of his intent. (*Mayberry*, *supra*, 15 Cal.3d at p. 157,)

"[R]egardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction."

(*Williams*, *supra*, 4 Cal.4th at p. 361.) Defendant intruded into the victim's house early in the morning, threatened her housemates to keep her quiet and pulled her towards the bathroom where he demanded oral sex, ignored her refusal and pushed on her head to accomplish the first act; later, he physically moved her leg to accomplish the second act. Our society does not tolerate such conduct as reasonable. (See *Maury*, *supra*, 30 Cal.4th at pp. 424-425 [victim was tricked into going with Maury and became scared when he refused to take her home].)

Usually the defense is raised by a defendant's testimony about his beliefs and intentions. (*People v. Simmons* (1989) 213 Cal.App.3d 573, 579 [noting a case where the testimony of a percipient bystander to the assault was sufficient to raise the defense] (*Simmons*).) Although in some cases a defendant may succeed in raising the *Mayberry* defense without testifying, "the record must contain evidence, whether direct or circumstantial, of the defendant's state of mind at the time the offense was committed." (*Maury*, *supra*, 30 Cal.4th at p. 425; see *Simmons*, *supra*, 213 Cal.App.3d at pp. 579-580.)

Although the relationship between defendant and the victim may have been relevant, "the victim's testimony regarding the circumstances of the alleged offenses was uncontroverted [i.e., the defendant did not testify and there were no percipient witnesses]. If the victim's testimony was believed, the circumstance, standing alone, that she previously had consented to sexual relations with [defendant] has no tendency in reason

to prove she consented to sexual relations on the date of the alleged offenses." (*Simmons*, *supra*, 213 Cal.App.3d at p. 581.)

As we have said before, a *Mayberry* defense "is founded upon evidence showing the defendant acted under a mistake of fact sufficient to harmonize his assertion of consent with the victim's story that consent was lacking. Where there is no evidence putting into issue the nature and quality of the defendant's belief in consent," the instruction need not be given. (*People v. Rhoades* (1987) 193 Cal.App.3d 1362, 1369.)

It is true the victim testified to the effect that during their relationship she sometimes submitted to sexual contact with defendant when he disregarded her "no" statements, but that does not inform as to defendant's "state of mind at the time the offense was committed." (*Maury*, *supra*, 30 Cal.4th at p. 425.) Given that the jury found defendant guilty beyond a reasonable doubt, it obviously credited her testimony about fear and duress; the *Mayberry* instruction, if given would not have changed the jury's evaluation of the victim's testimony.

Defendant correctly asserts that his testimony was not *required* because the jury was free to disbelieve portions of the victim's testimony. (See *Williams*, *supra*, 4 Cal.4th at p. 364 ["a trier of fact is permitted to credit some portions of a witness's testimony, and not credit others"].) This does not mean such an instruction is always required, and we find no rational explanation in the record how defendant could have formed a *reasonable* belief in the victim's consent.

Further, apart from the lack of any reason for the jury to reject parts of the victim's story, nothing in the *Mayberry* instruction would have changed the substantive definitions of consent, force and duress, and under those instructions the jury found beyond a reasonable doubt that defendant acted by coercing the victim. This negates an innocent misunderstanding. Put another way, had a *Mayberry* instruction been given, the jury would have followed the proviso that the defense is not available where a defendant acts on a victim's ambiguous conduct in response to threats. (CALJIC No. 10.65.) Therefore, the *Mayberry* instruction would have made no difference and any error was harmless.

IV

Defendant contends the court misdefined "consent" to his prejudice. We find the misinstruction to be harmless.

The trial court instructed the jury pursuant to CALJIC No. 1.23 as follows:

> "To consent to an act or transaction, a person (1) must act freely and voluntarily and not under the influence of threats, force or duress; (2) must have knowledge of the true nature of the act or transaction involved; and (3) must possess the mental capacity to make an intelligent choice whether or not to do something proposed by another person.
>
> "Merely being passive does not amount to consent. Consent requires a free will and positive cooperation in act or attitude."

Unfortunately, "This instruction should not be given in connection with a prosecution for a violation of" inter alia, forcible oral copulation. (Use Note to CALJIC No. 1.23.) As to

the oral copulation counts the trial court should have instructed the jury pursuant to CALJIC No. 1.23.1 as follows:

> "[T]he word 'consent' means positive cooperation in an act or attitude as an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."

In denying defendant's new trial motion raising this error, the trial court acknowledged there were minor differences between the instructions, but concluded none of the differences caused prejudice. We agree with the trial court. A close comparison reveals there is very little substantive difference between these instructions.

The first paragraph of CALJIC No. 1.23 states that a person must be free of duress and have the mental capacity and knowledge to understand the request being made, similar to a portion of CALJIC No. 1.23.1. Defendant does not argue with this proposition of law.

The second paragraph of CALJIC No. 1.23 contains two sentences: "Merely being passive does not amount to consent. Consent requires a free will and positive cooperation in act or attitude." CALJIC No. 1.23.1 embraces the latter sentence by stating that consent "means positive cooperation . . . as an exercise of free will." Thus, it is only the first sentence of the second paragraph which is materially different. However, this difference is more apparent than real. Although CALJIC No. 1.23.1 does not address passivity by use of such term, passivity in this context reflects the opposite of "a free will and positive cooperation" as stated in CALJIC No. 1.23, or "positive

cooperation . . . as an exercise of free will" as stated in CALJIC No. 1.23.1.

Defendant asserts the statement that "merely being passive does not amount to consent" creates a presumption requiring the defendant to prove "either active cooperation or his reasonable, good-faith belief in such cooperation," thereby lessening the People's burden of proof and improperly shifting the burden of proof to defendant. We disagree.

As stated, the line about passivity is immediately followed by a description of its opposite, namely, that "Consent requires a free will and positive cooperation in act or attitude." Further, the jury was instructed that the People bore the burden to prove *lack of consent* beyond a reasonable doubt. The addition of the statement that "merely being passive does not amount to consent" did not change the definition of what *does* amount to consent, *viz*., free will and positive cooperation. The "passive" language did not create any mandatory presumption, nor did it alter the burden of proof. Therefore any error is a state-law error, and we find any such error to be harmless. (*Watson*, *supra*, 46 Cal.2d 818.)

V

After the verdicts the trial court appointed a new attorney to bring a new trial motion on defendant's behalf. Defendant personally filed a *Romero* motion (*People v Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*)) to have the court strike the prior conviction. The trial court later emphasized that defendant had to decide whether to represent himself or

keep the services of his lawyer and—referring to *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*) issues which were to be briefed—that "we can't be getting individual briefings from Mr. Crespo and then from [trial counsel]. It has to be one or the other." At that point, defendant stated he wanted trial counsel to represent him again, and the trial court so ordered.

Later, trial counsel filed a "superceding [*sic*]" sentencing memorandum *which did not raise Romero issues*.

At sentencing, defendant and some family members testified in mitigation. His older sister testified he helped her take care of her child and the impact of a long sentence on the family (particularly on defendant's mother) would be severe; another sister testified she thought he was innocent but in any event did not deserve much punishment; his wife testified she wanted to start a new life with him; other witnesses were to the same effect. Defendant testified he knew he had "done wrong" and wished the victim was present in court so that he could apologize directly to her; he insisted he did not force her into sex; his family needs him out of prison.

The trial court then sentenced defendant, imposing the *midterm* on the principal count, both out of *Blakely* concerns and because of the mitigating testimony.

The parties quarrel about whether the trial court impliedly denied the *Romero* motion, or declined to rule, either because it was filed by defendant or because it had been superseded.

Defendant also contends trial counsel was incompetent for not pressing the motion.

We need not resolve these procedural points because the *Romero* motion lacked merit.

A trial court has discretion to strike a prior *in the furtherance of justice*. (*Romero, supra*, 13 Cal.4th at pp. 530-531.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strike Law] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

At sentencing the trial court considered a detailed probation report. Defendant lodged no objections to the report. Therefore, he has forfeited any claim that the information therein is not accurate. (See *People v. Evans* (1983) 141 Cal.App.3d 1019, 1021.) The report reflects that defendant was born in 1976. In 1990 he was made a ward for receiving stolen property, based on being found in a stolen car. Later in 1990 he committed a robbery when he was interrupted stealing speakers

from a car, and tried to cut the car's owner with a knife. While he was detained as a ward, he escaped and committed another robbery with a firearm; during a court proceeding, he "attempted to escape from court, knocking an official to the ground." He later ran away from the Boys Ranch and burgled an occupied residence. He performed poorly during his wardship by these acts and also by "submitting a dirty urine test."

In 1994 defendant and a juvenile forced the door of a residence and defendant pointed a gun at the occupant; he was convicted in 1995 of residential burglary and sent to prison for five years. After he was paroled, he was returned to custody *seven* times, and was discharged in October 2001. In February 2002 he choked and punched his other girlfriend (Crystal) and threatened to kill her, all in the presence of Crystal's daughter. On May 24, 2002, he was convicted of misdemeanor domestic abuse and placed on three years probation—just four months before the instant crimes against his longer-term girlfriend.

Defendant has no substantial employment experience or skills and he is an admitted member of the Varrio North Side gang. During these proceedings, he twice violated jail rules, resulting in lockdowns.

Based on this record, there is no basis upon which the trial court could have stricken the prior conviction, as defendant is a veritable poster child for application of the Three Strikes law: He has committed many crimes, beginning at an early age; these include violence and use of weapons. He has

demonstrated contempt for the system by escaping or attempting to escape, attacking a court official, violating parole and violating jail rules. He committed the instant crimes while on probation. He was placed on probation for assaulting a girlfriend (Crystal) shortly after termination of his state prison sentence. Although he asserts the oral copulation offenses were minor because the victim did not think they were serious, her belief is not dispositive and defendant's record reflects no mitigating circumstances. He presents as a defendant who will likely reoffend, exactly the kind of defendant targeted by the Three Strikes law. (See *Williams*, *supra*, 17 Cal.4th at pp. 162-164 [abuse of discretion where record showed no mitigating factors, Williams failed to avoid criminality and had no prospects for reform]; *People v. Philpot* (2004) 122 Cal.App.4th 893, 907 [*Romero* discretion reserved for extraordinary cases and this was not such a case, "given defendant's continuous criminal history, his parole violations, the seriousness of the present and past offenses, his seemingly dim prospects for rehabilitation, and his lack of meaningful crime-free periods"]; *People v. McGlothin* (1998) 67 Cal.App.4th 468, 475-477.) Defendant is the type of "revolving door" criminal addressed by the Three Strikes law and therefore its application to his case cannot be deemed outside its letter and spirit. (*People v. Strong* (2001) 87 Cal.App.4th 328, 338-343.)

Because the record shows it would have been an abuse of discretion for the trial court to strike the strike, whether or not the trial court ruled on the motion and whether or not

defense counsel should have pressed the point are irrelevant questions because defendant was not entitled to the relief sought. Nor is there any reason to remand for the trial court to exercise its discretion in the first instance, as such an act would be futile: The only proper exercise of discretion would be to decline to strike the strike.

VI

The trial court relied on facts not found true by the jury to impose consecutive sentences. Defendant acknowledges the California Supreme Court has rejected a *Blakely* challenge to such sentencing practice (see *People v. Black* (2005) 35 Cal.4th 1238), but states he wishes to preserve the point for subsequent review, as the issue is now pending in the United States Supreme Court. (See *People v. Cunningham* (Apr. 18, 2005, A103501) cert. granted sub. nom. *Cunningham v. California* (2006) ___ U.S. ___ [164 L.Ed.2d 47].) The point is preserved.

DISPOSITION

The judgment is affirmed.

_____MORRISON_____, J.

We concur:

_____BLEASE_____, Acting P.J.

_____CANTIL-SAKAUYE____, J.