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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. DAVID CHARLES MCDANIEL, Defendant and Appellant.	C040513 (Super.Ct.No. 6220154)

Defendant was convicted by a jury of two counts of forcible rape (Pen. Code, § 261, subd. (a)(2)), two counts of unlawful sexual intercourse (Pen. Code, § 261.5, subd. (d)), five counts of oral copulation of a minor (Pen. Code, § 288a, subd. (c)(1)), two counts of lewd and lascivious conduct (Pen. Code, § 288, subd. (a)), and two counts of forcible lewd and lascivious conduct (Pen. Code, § 288, subd. (b)(1)). (Further undesignated section references are to the Penal Code.) He was sentenced to consecutive terms of six years on each forcible rape charge and consecutive terms of two years (one-third the midterm) on one lewd and lascivious act charge and all five oral copulation

charges, for a total of 24 years. All other terms were stayed pursuant to section 654.

Defendant appeals, contending that (1) there is insufficient evidence of force to support the forcible sexual offense counts; (2) the court erroneously failed to define "force" for rape; (3) the prosecutor committed misconduct in allowing a witness to testify that defendant was offered a lie detector test; (4) third party culpability evidence was erroneously excluded; (5) the court failed to instruct on lesser included offenses; (6) an instruction on motive should not have been given; and (7) a sexual offense fine must be stricken. We find merit in defendant's second and fifth contentions and reverse the judgment, in part.

FACTS AND PROCEDURAL HISTORY

In the fall of 1998, the victim, A. P., lived with her great-grandmother, A. M., and A. M.'s husband, W. M., in a two-bedroom house. Also residing on the property, but in a separate mobilehome, was defendant, who was W. M.'s son. A. P. was 13 years old at the time; defendant was 34.

On September 11, 1998, A. M. and W. M. left home to spend the night with a relative. That evening, A. P. attended a movie with defendant and defendant's sister, Susan. After the movie, they returned to the property. A. P. and Susan went into the house and defendant returned to his trailer. A. P. went to her bedroom, and Susan watched television. Eventually Susan left to return to her own home.

After Susan left, A. P. went to the trailer. At some point, she followed defendant into the second bedroom of the trailer and they sat on the bed together. A. P. took off her clothes and laid on the bed. Defendant orally copulated her while putting his hands on her breasts. Although she felt uncomfortable, A. P. did not tell defendant to stop. Later, defendant got on top of her. A. P. got scared when she felt his "genitalia" and told him no. She pushed defendant off of her, got dressed and departed.

Defendant molested A. P. several more times over the ensuing month. One time it occurred in defendant's truck. A. P. pulled her pants down and defendant orally copulated her. On another occasion, defendant and A. P. walked to a concrete slab "quite a ways away from the house." Again, defendant orally copulated her. Defendant also orally copulated A. P. two or three more times in the second bedroom of the trailer.

On one occasion, in defendant's bedroom, he orally copulated A. P. and then got on top of her. He explained that he was preparing her to make sexual intercourse easier. At this time, he inserted his penis partially into her vagina. On another occasion, defendant showed A. P. a pornographic movie in which a student gave a teacher a "blow job" in order to get an A. Later, A. P. orally copulated defendant.

On each of the occasions when defendant got on top of A. P., he partially inserted his penis into her vagina. It hurt her, and she told him no. A. P. pushed defendant off. At some point, defendant told A. P. that if he went to jail for what he

was doing, he would make it worth his while. She took this as a threat.

On October 31, 1998, A. P. was diagnosed with appendicitis and later had her appendix removed. During one visit to the doctor's office, A. P. told A. M. about the molestations. A. M. later confronted defendant about it, but defendant denied it. A. M. did not contact the police about the matter.

A. P. moved to Arkansas to live with other relatives. However, she returned in May 2000. During a doctor visit on February 14, 2001, A. P. revealed that she had been molested by defendant when she was 13. This was reported to authorities and defendant was arrested.

Defendant was charged with two counts of forcible rape (§ 261, subd. (a)(2)), two counts of unlawful sexual intercourse (§ 261.5, subd. (d)), five counts of oral copulation of a minor (§ 288a, subd. (c)(1)), two counts of lewd and lascivious conduct (§ 288, subd. (a)), and two counts of forcible lewd and lascivious conduct (§ 288, subd. (b)(1)). He was found guilty on all charges, and his motion for new trial was denied. Defendant was sentenced as indicated previously.

DISCUSSION

I

Sufficiency of the Evidence

Defendant contends there is insufficient evidence to support the force element on the forcible rape and forcible lewd act charges. He argues that the same conduct supporting the

forcible rape charges was the basis for the forcible lewd act charges and that there is no evidence of force in connection with either incident, because "when [A. P.] said 'no' she also successfully would shove the defendant off without any resistance on his part." The People agree the same conduct supported the rape and forcible lewd act charges but argue there is sufficient evidence of force in both instances. They further argue that conviction on all four charges is supported by evidence of duress.

"'To determine sufficiency of the evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole.'" (*People* v. *Carpenter* (1997) 15 Cal.4th 312, 387.)

Section 261, subdivision (a)(2) reads: "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] . . . [¶] (2) Where it is 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." Section 288, subdivision (b)(1) prohibits any lewd or lascivious act with a child under the age of 14 "by use of force, violence,

duress, menace, or fear of immediate and unlawful bodily injury . . . ."

In *People v. Cicero* (1984) 157 Cal.App.3d 465, this court held that to establish "force" within the meaning of section 288, subdivision (b), the People must prove "defendant used physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*Id.* at p. 474.) This is the same requirement for a charge of forcible rape. (*People v. Mom* (2000) 80 Cal.App.4th 1217, 1224.) However, the burden on the People is not a heavy one. (*Ibid.*) Under prior law, forcible rape required resistance by the victim and force by the perpetrator sufficient to overcome that resistance. (*People v. Iniguez* (1994) 7 Cal.4th 847, 854-855.) With the elimination of the resistance requirement, evidence of force is now linked to overbearing the victim's will, not overcoming her resistance. (*Id.* at p. 856.) As we explained in *Cicero*: "[T]he law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent. Because the fundamental wrong is the violation of a woman's will and sexuality, the law of rape does not require that 'force' cause physical harm. Rather, in this scenario, 'force' plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will." (*People v. Cicero*, *supra*, 157 Cal.App.3d at p. 475.) Thus, in *People v. Bergschneider* (1989) 211 Cal.App.3d 144, sufficient force was found where the defendant did nothing

more than push the victim's hands aside when she put them in front of her vagina. (*Id.* at pp. 150, 153.)

In this matter, A. P. provided the following testimony regarding the first rape.

"Q Did he do anything else with any other parts of his body?

"A Well, afterwards he proceeded to get on top of me.

"Q How did he get on top of you?

"A He just got on top. I was just laying there, and he just got on top.

"Q Were you laying on your front or your back?

"A My back.

"Q So when he got on top of you what did he do next?

"A Well, I wasn't sure, but I remember I was scared, and that's when I told him no, and started pushing and shoving him off.

"Q Were you successful?

"A Took me a little while, but yeah. Then I just got up, got dressed, and went home to my room."

Later, A. P. explained she pushed defendant off after she felt his penis against her vagina. She indicated this occurred on at least two occasions and that it hurt each time. According to A. P., defendant would first orally copulate her then get on top of her and slowly ease his penis into her vagina. A. P. testified that on each occasion she told defendant no and when asked if he stopped, she said, "No. I pushed him off usually."

This testimony is sufficient to show that the penetration occurred against A. P.'s will by the use of force. She told defendant no and then began pushing and shoving him off. Although she was successful in disengaging herself, this took "a little while." From such testimony, the jury could reasonably infer that defendant used force to stay on top of A. P. and to continue penetration for "a little while" as she attempted to push him off. This is sufficient evidence to satisfy the force element of both the rape and forcible lewd act charges.

Having so concluded, we need not decide whether there was substantial evidence of duress to support the verdicts.

II

Force Instruction

Our conclusion that substantial evidence supports the jury's finding of force is only one side of the coin. The other side requires that the jury be properly instructed on the issue. Here, the jury was instructed on the elements of forcible rape and forcible lewd acts. On the latter offenses, the jury was also told "the term force means physical force that is substantially different from or substantially greater than that necessary to accomplish the lewd act itself." However, the jury was not instructed that the same definition applies to forcible rape. Defendant contends this was error that requires reversal of his two rape convictions. We agree.

A trial court has a duty to instruct sua sponte on the general principles of law pertinent to the case. (*People* v.

Daniels (1991) 52 Cal.3d 815, 885.) "The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) Included is a duty to give explanatory instructions when the terms used in an instruction "'have a "technical meaning peculiar to the law."'" (*People v. Valenzuela* (1985) 175 Cal.App.3d 381, 393, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484, 490, fn. 12.) However, absent a request, the court has no duty to define terms which are commonly understood by those familiar with the English language. (*People* v. *Anderson* (1966) 64 Cal.2d 633, 639.)

The People argue that defendant waived any error in the absence of a force instruction by failing to request it. However, this argument assumes that the term "force," as used in section 261, subdivision (a)(2), does not have a technical meaning. In *People v. Pitmon* (1985) 170 Cal.App.3d 38, we held that the term "force," as used in section 288, subdivision (b), "does have a specialized meaning not readily known to the average lay juror--i.e., 'physical force [that is] substantially different from or substantially greater than that necessary to accomplish the lewd act itself.'" (*People v. Pitmon*, *supra*, 170 Cal.App.3d at p. 52.) Consequently, the trial court had a duty to instruct sua sponte on that definition. (*Ibid.*)

As explained previously, the meaning of force in section 261, subdivision (a)(2) is the same as that in section 288,

subdivision (b). (*People v. Mom*, *supra*, 80 Cal.App.4th at p. 1224.) Thus, the trial court erred in failing to instruct the jury on the meaning of the term in connection with the rape charges.

The People disagree that the term "force" as used in connection with rape has a technical or legal meaning. They rely on *People v. Elam* (2001) 91 Cal.App.4th 298, in which the court stated, "The force necessary in sexual offense cases is '"'physical force substantially different from or substantially in excess of that required'"' for the commission of the sexual act. [Citations.] One nonlegal meaning of force is 'to press, drive, attain to, or effect as indicated *against resistance* . . . by some positive *compelling* force or action.' (Webster's 3d New Internat. Dict. (1993) p. 887, col. 2, italics added.) Another is 'to achieve or win by strength in struggle or violence.' (Ibid.) These definitions do not differ in any significant degree from the legal definition. It thus is doubtful whether the court ever has a sua sponte duty to define 'force' in a sexual offense case containing the element that it be accomplished against the will of the victim." (*People v. Elam*, *supra*, 91 Cal.App.4th at p. 306.)

The People's reliance on *Elam* is misplaced. The foregoing discussion by the court was dictum. The defendant there was charged with assault with intent to commit forcible oral copulation. (§ 220.) The jury was not required to determine if the defendant applied the requisite force. The court explained: "It is settled that '"'[t]o support a conviction for . . . [such

an offense], the prosecution must prove the assault and an intent on the part of the defendant to use whatever force is required to complete the sexual act against the will of the victim.'"' [Citation.] The jury therefore was not charged with determining whether defendant applied physical force substantially different from or greater than that necessary to obtain oral copulation, but only with determining whether his acts demonstrated an intent to use that degree of force necessary to complete the act against [the victim's] will. For this reason, too, no special instruction on force was necessary." (*People v. Elam*, *supra*, 91 Cal.App.4th at pp. 306-307.)

The People further argue that any instructional error was harmless because "there was more than sufficient evidence that [defendant] committed the rapes of [A. P.] using force or duress." We disagree. It cannot be determined on this record whether the jury concluded that defendant used force or duress to complete the rapes. Although defendant was much older and bigger than A. P. and, as a family member, was perhaps in a position of some authority, there is no evidence to suggest A. P. permitted the intercourse because of duress. Duress means "a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary sensibilities 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*, *supra*, 170 Cal.App.3d at p. 50.) Here, the only

suggestion of a direct or implied threat was defendant's warning that if A. P. reported the matter, he would make it worth his while. This was not a threat used to obtain the victim's participation but to avoid detection.

Although we have concluded that there is sufficient evidence to support a jury finding of force, that evidence is far from overwhelming. A. P. testified she pushed and shoved defendant off her and this took "a little while." It was left for the jury to decide how long this took and whether the delay was caused by defendant's use of force greater than, or different from, that required to complete penetration or simply the fact it took some minimal amount of time for A. P. to get someone the size of defendant off of her. On the record before us, we cannot say the jury would have found the requisite force if it had been properly instructed on the meaning of that requirement. Thus, defendant's forcible rape convictions must be reversed.

III

Lie Detector Evidence

Prior to trial, defendant moved in limine to "exclude any testimony concerning a computerized voice stress analysis test administered to Defendant." The prosecution indicated it had no intention of presenting such evidence, and the motion was granted. During trial, Angela DeWolf, a detective with the Placer County Sheriff's Department, was called by the

prosecution. During cross-examination, the following exchange occurred.

"Q All right. What types of questions did you ask [defendant] concerning just general background?

"A I asked him where he lived. I asked him about any medical problems. I asked him who he lived with. And I am doing this from memory.

"Q Sure.

"A I don't have it in front of me. Asked him if he knew why he was there to see me. Asked him if he had any objections to talking to me.

"Q Okay.

"A When he told me why he was there to see me, and what he told me was because he was accused of having sex with [A. P.], I asked him how he felt about talking to me about that.

"And then when we were finished with that I asked him if, in fact, he would be willing to take a polygraph or some sort of lie detector test to verify the accuracy of any statement."

At that point, defense counsel changed gears and asked about the witness's training in investigation and interviewing.

During a break in the proceedings, defense counsel moved for a mistrial based on the testimony regarding the polygraph test. The trial court denied the motion, commenting that the evidence was elicited on defense counsel's question and was not subject to any in limine ruling. The court offered to admonish the jury to disregard any testimony concerning polygraph tests.

After the close of evidence, defense counsel indicated he did not want a limiting instruction. However, the court concluded that this would be invited error and gave the instruction anyway. Defense counsel then requested the court to inform the jury that defendant offered to take the polygraph test. The court declined, explaining that the evidence was closed. The court then read the following admonition.

"Folks, earlier in the testimony an answer was given referring to a polygraph test or a lie detector test.

"Now, folks, there is no evidence in this case regarding a polygraph test. Therefore, you are not to take into consideration anything concerning any mention about a polygraph test.

"Polygraph tests are not admissible in court. They are not part of this case. You are not to talk about it in your deliberations, and you are not to form any opinions one way or the other about any kind of a polygraph test, and you are to completely strike any, any mention of that question from your mind."

Defendant contends the testimony of Detective DeWolf regarding the polygraph test was prosecutorial or witness misconduct. The People concede that admission of the testimony was error but contend it was harmless under the circumstances. According to the People, any prejudice was overcome by the court's admonition and, in any event, the evidence against defendant was "compelling."

Evidence Code section 351.1, subdivision (a) reads, in relevant part: "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and postconviction motions and hearings . . . , unless all parties stipulate to the admission of such results." This exclusion "is justified by the unreliable nature of polygraph results, by the concern that jurors will attach unjustified significance to the fact of or the outcome of such examination and because the introduction of polygraph evidence can negatively affect the jury's appreciation of its exclusive power to judge credibility." (*People v. Basuta* (2001) 94 Cal.App.4th 370, 390.)

There is no suggestion in this record of prosecutorial misconduct. The prosecutor represented that she informed the witness not to mention the voice stress analyzer test. Defense counsel asked the witness an open-ended question about her interrogation of defendant regarding "general background." Defense counsel allowed the witness to ramble beyond general background to why defendant was being interviewed, if he objected to being questioned and "how he felt about talking to [her] about that." It was only when the witness mentioned she asked defendant if we would be willing to take a "polygraph or some sort of lie detector test" that counsel moved on to other matters.

Nevertheless, the witness's testimony violated Evidence Code section 351.1. The issue is whether that violation was prejudicial. We measure prejudice under the familiar standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Basuta*, *supra*, 94 Cal.App.4th at p. 391; *People v. Schiers* (1971) 19 Cal.App.3d 102, 109.)

Defendant claims three categories of prejudice. First, he argues "even relatively sophisticated jurors may accept the polygraph as a very important tool to discover truth" and preempt their factfinding role. Second, defendant argues that the fact he was asked if he would be willing to take a polygraph test demonstrated the officer's belief that defendant was not being truthful. Finally, defendant argues that he was prejudiced by not being permitted to refute the inference that he was not being truthful. We consider each of these categories in turn.

In light of the fact that the jury was not told defendant took a polygraph test or given the results of such test, the danger of the jury placing too much weight on the truth-seeking function of a polygraph test is minimal. The witness testified she asked defendant if he would be willing to take a polygraph test. The jury was not told defendant's response. Hence, there was nothing on which the jury could place too much weight.

Even if the jurors were inclined to speculate, there is no reason to believe they would have concluded that defendant declined to take the test or that he took the test and failed. If indeed there were jurors not willing to follow the court's

limiting instruction directing them "not to form any opinions one way or the other about any kind of a polygraph test," the reference defendant complains of would not necessarily have led jurors still willing to speculate on the point to believe defendant refused or failed the test. The jurors were, after all, also told by the trial judge that "polygraph tests are not admissible in court." Thus a juror, if he or she were inclined to wonder about the reference, could as easily have thought that defendant agreed to take a test and passed it but could not say so because, as the judge said, such tests are not admissible in court. Thus, evidence that defendant was asked if he was willing to take a polygraph test, without more, would not create a risk of the jury abdicating its factfinding mission.

As to the officer's opinion that defendant was lying, this cannot reasonably be inferred from the testimony, considered as a whole. The witness testified about the questions she asked defendant. However, none of these questions concerned defendant's guilt or innocence. Defendant was asked if he knew why he was being interviewed and how he felt about being questioned. He was then asked about the polygraph. Because the question of the polygraph came before defendant was asked what happened, there can be no implication the officer believed defendant was lying.

Finally, as to defendant's inability to refute the inference that he was not being believed, again there was no such inference. Furthermore, defendant was not precluded from refuting such imagined inference. Defendant sought to present

evidence that he offered to take a polygraph. However, this offer came after the close of evidence. Defendant does not claim that the court abused its discretion in denying him an opportunity to present such evidence. Had defendant desired to refute any adverse inference, he could have moved for a mistrial before the close of evidence in order to question the officer about defendant's response.

Defendant further claims prejudice from the fact this was a close case, coming down to a credibility contest between A. P. and his denials to A. M. and the police. This is not true. In addition to A. P.'s testimony, there was evidence that pornographic tapes were found in the trailer and one of them matched the description of the tape A. P. said defendant showed her. One of the tapes contained footage of A. P. in her bedroom. Finally, A. P.'s cousin testified that on one occasion, defendant wondered aloud what sex with A. P. would be like, and defendant admitted to police that he fantasized about having sex with A. P.

The trial court admonished the jury not to take into consideration any mention of a polygraph test and not to form any opinions "about any kind of a polygraph test." Absent contrary evidence, we presume the jury followed this admonition. (*People v. Morris* (1991) 53 Cal.3d 152, 194.) The admonition cured any possible prejudice resulting from the witness's improper testimony.

IV

Third Party Culpability Evidence

The People moved in limine to prevent defendant from presenting evidence on a theory of third party culpability. Defendant filed a countermotion to permit introduction of such evidence. Defendant theorized that it was A. P.'s great-grandfather, W. M., who molested her and not defendant. Defendant sought to present evidence that W. M. had molested his own children, that W. M. made a statement to his daughter that he was preparing her for marriage (which was similar to the statement defendant purportedly made to A. P. about preparing her for intercourse), the pornographic tapes found in the trailer belonged to W. M. and came into defendant's possession only after W. M.'s death, and W. M. had access to a camcorder (suggesting he took the video of A. P. in her bedroom). The trial court excluded the evidence on the basis of Evidence Code section 352.

Defendant's third party culpability theory is far-fetched. This is not a case where there is evidence of a crime and a question of who did it. Except for some corroborating evidence, the only evidence of a crime was the statements and testimony of A. P. There is no basis for the jury to believe A. P. that she was molested but disbelieve her identification of the molester. Even evidence that A. P. had purportedly been molested by W. M. would not undermine evidence that she had also been molested by defendant.

Defendant's concern over evidence that the videotapes belonged to W. M. is also not well-founded. The jury *was* informed that the tapes belonged to W. M. and that A. P. knew they were kept under W. M.'s bed. However, those facts do not disprove evidence that the tapes were ultimately found in the mobilehome. As to the tape containing footage of A. P., the fact that W. M. had access to a camcorder owned by his wife is hardly surprising. In other words, the jury was presented the evidence defendant sought to introduce about the videotapes.

Evidence Code section 352 permits the exclusion of relevant evidence where "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A determination under Evidence Code section 352 is within the sound discretion of the trial court, the exercise of which will not be disturbed on appeal absent a clear showing of abuse. (*People v. Barrow* (1976) 60 Cal.App.3d 984, 995, disapproved on other grounds in *People v. Jiminez* (1978) 21 Cal.3d 595, 608.) However, "'Evidence Code section 352 must bow to the due process rights of a defendant to a fair trial and to his right to present all relevant evidence of *significant* probative value to his defense.'" (*People v. Babbit* (1988) 45 Cal.3d 660, 684.)

In this matter, the evidence defendant sought to present did not have significant probative value. Furthermore, such evidence had the potential of confusing the issues and deflecting the jury from the matter at hand. The trial court

did not abuse its discretion in excluding the proffered evidence.

Defendant also contends that with the exclusion of third party culpability evidence, introduction of evidence regarding the tapes was improper because it amounted to "bad character" evidence likely to confuse the issues. Defendant moved in limine to exclude this evidence, but the motion was denied.

As the People correctly point out, regardless of who owned the videotapes, including the one containing footage of A. P., the fact they were found in the mobilehome is probative of defendant's guilt. Even if defendant did not take the videotape of A. P., his possession of the tape was probative of his interest in her. Any suggestion that defendant was not aware of what was on the tape was for the jury to decide. The evidence was properly admitted.

V

Lesser Included Offense Instructions

Defendant contends the trial court erred in failing to instruct on lesser included offenses. Defendant argues that the court was required to instruct on nonforcible lewd conduct as a lesser offense of forcible lewd conduct, on battery and unlawful sexual intercourse as lesser offenses of forcible rape, and on contributing to the delinquency of a minor as a lesser offense of unlawful sexual intercourse. The People concede nonforcible lewd conduct is a lesser offense of forcible lewd conduct and battery is a lesser offense of forcible rape. However, they

argue there is no evidence to support the lesser offense instructions and, in any event, any failure to give the lesser offense instructions was harmless.

"[A] trial court must . . . instruct the jury on lesser included offenses 'when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.'" (*People v. Barton* (1995) 12 Cal.4th 186, 194-195.) Before a duty to instruct arises, there must be "some evidence, not merely minimal or insubstantial evidence but evidence from which a jury could reasonably conclude, that the offense was less than that charged." (*People v. Jones* (1992) 2 Cal.App.4th 867, 870.)

Inasmuch as we have concluded that defendant's convictions on the two forcible rape charges must be reversed, there is no need to consider whether failure to instruct on battery or unlawful sexual intercourse as lesser offenses was prejudicial error.

The People argue that there was no requirement to instruct on nonforcible lewd conduct as a lesser offense of forcible lewd conduct because there was no evidence to support the lesser offense. According to the People, there was no evidence the offenses were committed without force. Instead, defendant denied the acts altogether. Thus, so the argument goes, defendant was guilty of either forcible lewd conduct or nothing.

The People's argument proves too much. Typically, a defendant will deny any involvement in the crimes alleged.

However, that does not mean there is no evidence from which a reasonable jury could find a lesser offense was committed. Here, as indicated previously, the evidence of force was less than overwhelming. Under these circumstances, the jury could readily have concluded that the lewd act occurred, but defendant did not use force substantially different from, or substantially greater than, that necessary to commit the act. A lesser included offense instruction was therefore warranted.

"When the trial court fails to instruct on lesser included offenses, reversal is required unless the factual issue raised by the omitted instructions was necessarily decided adversely to the defendant under other properly given instructions." (*People* v. *Ivans* (1992) 2 Cal.App.4th 1654, 1665.) The fact the jury returned a verdict finding defendant guilty of forcible lewd and lascivious conduct does not mean it necessarily decided the issue of force adversely to him. The jury was presented with an all or nothing choice, either convict defendant of forcible lewd and lascivious conduct or acquit him altogether. In *People v. Breverman* (1998) 19 Cal.4th 142, the Supreme Court said, "[I]nsofar as the duty to instruct applies regardless of the parties' requests or objections, it prevents the 'strategy, ignorance, or mistakes' of either party from presenting the jury with an 'unwarranted all-or-nothing choice,' encourages 'a verdict . . . no harsher or more lenient than the evidence merits' [citation], and thus protects the jury's 'truth-ascertainment function' [citation]. . . ." (*Id.* at p. 155,

italics omitted.) The trial court was required to instruct the jury on the full range of possible offenses.

The People contend any error in this regard was harmless because "[i]t is not reasonably probable a more favorable outcome would have [been] obtained had the instruction been given." However, the People provide no argument or authority for this assertion. Where a point is raised in an appellate brief without argument or legal support, "it is deemed to be without foundation and requires no discussion by the reviewing court." (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647.) Defendant's conviction on the two forcible lewd act charges must be reversed.

"When a greater offense must be reversed, but a lesser included offense could be affirmed, we give the prosecutor the option of retrying the greater offense, or accepting a reduction of the lesser offense." (*People* v. *Kelly* (1992) 1 Cal.4th 495, 528.) The People shall thus have the option of accepting reduction of the forcible lewd and lascivious convictions to nonforcible lewd and lascivious convictions or retrying those charges.

Defendant contends the court was also required to instruct on contributing to the delinquency of a minor as a lesser offense of unlawful sexual intercourse. "Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. . . ." (§ 261.5, subd. (a).) Contributing to the delinquency of a minor is defined as follows: "Every person who

commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 18 years to come within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code or which act or omission contributes thereto, or any person who, by any act or omission, or by threats, commands, or persuasion, induces or endeavors to induce any person under the age of 18 years or any ward or dependent child of the juvenile court to fail or refuse to conform to a lawful order of the juvenile court, or to do or to perform any act or to follow any course of conduct or to so live as would cause or manifestly tend to cause that person to become or to remain a person within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code, is guilty of a misdemeanor . . . ." (§ 272, subd. (a)(1).)

A lesser offense is necessarily included in another if the other offense cannot be committed without also committing the lesser offense. (*People v. St. Martin*, *supra*, 1 Cal.3d at p. 536.) In *People v. Greer* (1947) 30 Cal.2d 589, overruled on other grounds in *People v. Fields* (1996) 13 Cal.4th 289, 308, footnote 6, the state high court concluded that contributing to the delinquency of a minor is necessarily included within the crime of unlawful sexual intercourse. (*People v. Greer, supra,* at pp. 597-598.) According to the court, "[i]t is inconceivable that the acts described in [Penal Code] sections 261(1) and 288 would not contribute to the delinquency of a minor." (*People v. Greer*, *supra*, at p. 597.)

However, in *People v. Bobb* (1989) 207 Cal.App.3d 88, disapproved on other grounds in *People v. Barton*, *supra*, 12 Cal.4th at page 198, footnote 7, we concluded that subsequent amendments to Welfare and Institutions Code section 601 rendered *Greer* no longer good law. When *Greer* was decided, Welfare and Institutions Code section 702, the predecessor to section 272, made it a misdemeanor for any person "who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of twenty-one years to come within the provisions of any of the subdivisions of section 700 . . . ." (Stats. 1937, ch. 369, p. 1033.) Welfare and Institutions Code section 700, the predecessor of Welfare and Institutions Code section 601, extended juvenile court jurisdiction to, among others, any person under the age of 21 "[w]ho is leading, or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life." (Wel. & Inst. Code, § 700, subd. (k), Stats. 1937, ch. 369, p. 1030.)

In 1975, the Legislature eliminated the foregoing language from section 601. In *Bobb*, we indicated that "After the 1975 amendment to [Welfare and Institutions Code] section 601, none of the acts remaining as bases for juvenile court jurisdiction in that section is so closely related to the elements of unlawful sexual intercourse that it is necessarily implicated in the commission of the latter offense. The same may be said also of [Welfare and Institutions Code] sections 300 and 602. Thus having sexual intercourse with the minor does not bring her

within section 602, which confers juvenile court jurisdiction over minors who commit crimes, for the female minor is a victim of unlawful sexual intercourse and has committed no crime. [Citation.] Similarly, section 601 now confers juvenile court jurisdiction over minors who 'persistently or habitually refuse[] to obey the reasonable and proper orders or directions' of parents or who violate a curfew based on age (subd. (a)), or who are habitually truant. (Subd. (b).) Even if we presume the 'orders or directions' of parents commonly enjoin or encourage their children to refrain from engaging in sexual intercourse, a single act of intercourse does not constitute 'persistent[] or habitual[]' refusal to obey. Similarly, a single act of sexual intercourse has no necessary relationship to curfew violation or habitual truancy." (*People v. Bobb*, *supra*, 207 Cal.App.3d at pp. 93-94, fns. omitted.)

Defendant contends section 272 also includes "endeavor[ing] to induce any person under the age of 18 years . . . to so live as would cause or manifestly tend to cause that person to become or to remain a person within" the jurisdiction of the juvenile court. (§ 272, subd. (a)(1).) Defendant argues that this language "is very like the omitted archaic language relating to influences which would tend to cause [minors] to become involved in 'idle or immoral conduct.'"

We disagree. Section 272 prohibits conduct that tends to cause a minor to come within Welfare and Institutions Code sections 300, 601 or 602. For acts falling within section 261.5, the minor is the victim, not an accomplice. Hence, such

acts could not tend to induce the minor "to so live as would cause or manifestly tend to cause" (§ 272, subd. (a)(1)) her to fall within the jurisdiction of the juvenile court. The court was not required to instruct on contributing to the delinquency of a minor.

VI

Motive Instruction

The jury was instructed on motive pursuant to CALJIC No. 2.51 as follows: "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. [¶] Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty."

Defendant contends it was error to give this instruction because "in a 'sexual offense case' there will always be a 'sexual motive' which can be found." According to defendant, "[b]y instructing on 'motive' as indicative of guilt where the crime itself supplies the motive, the instruction argues for guilt." Defendant also contends "[t]elling [the jurors] that motive may show 'guilt' when there are any number of conceivable 'motives' misleads them because it excludes the possibility that 'motive' (whatever they imagine it to be) might play no role at all."

Defendant further argues that "the instruction conflicted with the notion that the specific intent was an element of the crime, and thus caused a very high risk that the jurors, taking

the instructions together, would find the sexual motivation by some standard less than beyond a reasonable doubt." Finally, defendant argues "[t]he more serious problem in this case is not that of mistaking the specific intent element but rather simply using 'motive' as proof of guilt."

Defendant's fears are not well-founded. Defendant contends the Supreme Court has observed that in some situations, giving CALJIC No. 2.51 has been found to be reversible error. However, the only situation mentioned in the case cited by defendant, *People v. Cash* (2002) 28 Cal.4th 703, is where "motive" and "intent" are used in the instructions interchangeably. (*Id.* at pp. 738-739.)

The instructions given here did not create such confusion. "'"It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction."'" (*People v. Wilson* (1992) 3 Cal.4th 926, 943.) CALJIC No. 2.51 told the jury that motive is not an element of the crimes charged but *may* be considered as *tending* to prove the defendant is guilty. The jury was not told motive, in and of itself, sufficed to prove guilt. Defendant cannot reasonably quarrel with the concept that motive is a circumstance tending to establish guilt. (See *People v. Estep* (1996) 42 Cal.App.4th 733, 738.)

The jury was further instructed on intent as an element of the various offenses and on reasonable doubt and the presumption of innocence. The jury was told to consider the instructions as

a whole and that whether certain instructions apply will depend on what the jury determines to be the facts. Absent a contrary indication in the record, we assume the jury followed the instructions given by the court. (*People* v. *Adcox* (1988) 47 Cal.3d 207, 253.) There was no error.

VII

Sex Offense Fine

The abstract of judgment indicates that defendant was assessed a fine of $200 pursuant to section 1202.5. However, section 1202.5 reads, in relevant part: "(a) In any case in which a defendant is convicted of any of the offenses enumerated in Section 211, 215, 459, 470, 484, 487, 488, or 594, the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed. . . ." Defendant contends the fine must be stricken, because he was not convicted of any of the enumerated offenses.

The trial court did not mention section 1202.5 in its pronouncement of judgment. Instead, the court said "defendant shall pay a specified sex offense conviction fine of $200." As defendant readily acknowledges, section 294, subdivision (b) authorizes a restitution fine of up to $5,000 for any person convicted of violating sections 261, 264.1, 285, 286, 288a, or 289 "where the violation is with a minor under the age of 14 years . . . ." Defendant was convicted of five counts of violating section 288a, and the victim was under the age of 14 years at the time of the offenses.

"[W]hen . . . the record is in conflict it will be harmonized if possible; but where this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater credence." (*People v. Smith* (1983) 33 Cal.3d 596, 599.) The reference to section 1202.5 in the abstract was part of the preprinted form. It was not entered by the person filling out the form. The transcript of the sentencing hearing shows no mention of any code section, only a reference to a "specified sex offense conviction fine." Section 294 authorizes imposition of a fine for certain specified sex offenses. It is clear the court intended imposition of the fine under this section.

However, section 294, subdivision (b) authorizes a restitution fine "based on the defendant's ability to pay . . . ." Here, there was no determination of defendant's ability to pay. Inasmuch as this matter must be remanded for resentencing, the trial court will have an opportunity to correct this deficiency.

DISPOSITION

Defendant's convictions on counts three and ten, for forcible rape, and counts four and eleven, for forcible lewd and lascivious conduct, are vacated. Defendant's remaining convictions are affirmed. The matter is remanded to the trial court so that the prosecution can decide within 60 days of our remittitur (unless defendant waives that time limit) whether to retry defendant on those counts or to accept the following: on

counts three and ten, dismissal (inasmuch as defendant has been convicted in counts twelve and thirteen of unlawful sexual intercourse for the same acts); on counts four and eleven, conviction of nonforcible lewd and lascivious conduct. If the prosecution does not retry defendant on these counts, the verdicts on counts three and ten are reversed and the verdicts on counts four and eleven are modified to nonforcible lewd and lascivious conduct, and the trial court is directed to resentence defendant accordingly. On resentencing, the trial court shall not impose a restitution fine pursuant to section 294, subdivision (b) unless it first determines defendant's ability to pay. The court shall prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections.

HULL, J.

We concur:

SCOTLAND, P.J.

MORRISON, J.