IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. PONCHITO ESPEJO, Defendant and Appellant.	Court of Appeal No. H051082 Superior Court No. C1900549

APPEAL FROM THE SUPERIOR COURT OF SANTA CLARA COUNTY

Hon. Eric Geffron, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

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INTRODUCTION

Appellant Ponchito Espejo appeals from his convictions on nine counts of forcible sex crimes on a child (counts 1 to 9), two counts of attempting to dissuade a victim or witness from prosecuting a crime (counts 10 and 11), and his 92 years to life sentence.

The prosecutor exercised a peremptory challenge to remove a Filipino prospective juror from the jury based on presumptively invalid reasons under Code of Civil Procedure[1] section 231.7. The prosecutor's reasons and the judicial findings did not overcome the presumption of

[1] Further statutory references are to the Code of Civil Procedure unless otherwise stated.

invalidity. The court violated appellant's constitutional and statutory rights when it denied appellant's objection to the prosecutor's use of the peremptory challenge to remove the juror. (Arg. I.)

During closing argument, the prosecutor misstated the law by telling the jurors that they did not need to consider the uncharged nonforcible lesser included crimes unless they first acquitted appellant of the greater forcible sex crimes charged in counts 1 to 9. Defense counsel did not object to the misconduct and did not request curative admonitions. Counsel's omissions were constitutionally ineffective because there is a reasonable probability that at least one juror would have harbored reasonable doubt on the greater forcible sex crimes had he properly objected. (Arg. II.)

Post charging dissuasion cannot constitute an offense under Penal Code section 136.1, subdivision (b)(2). Counts 10 and 11 are unsupported by substantial evidence because the prosecution produced no evidence of dissuasive conduct that occurred before the filing of the criminal complaint. (Arg. III.)

The judgment should be reversed.

STATEMENT OF APPEALABILITY

This appeal is from a final judgment of conviction after a jury trial and is authorized under Penal Code section 1237, subdivision (a).

STATEMENT OF THE CASE

On January 30, 2023, the Santa Clara County District Attorney charged appellant in a 13-count second amended information as follows: (1) lewd or lascivious act on a child under the age of 14 by force, violence, duress, menace or fear (Pen. Code, § 288, subd. (b)(1); counts 1-6); (2) aggravated sexual assault of a child under 14 and seven or more years younger than defendant (oral copulation by force, fear, or threats) (Pen. Code, § 269, subd. (a)(4); counts 7-9); (3) attempting to dissuade a victim or witness from prosecuting a crime (Pen. Code, § 136.1, subd. (b)(2); counts 10-11); and (4) misdemeanor contempt of court (Pen. Code, § 166, subd. (a)(4); counts 12-13.) (2CT 511-525.)

The information alleged aggravating factors under California Rules of Court: (1) as to all counts, that the victim was particularly vulnerable (rule 4.421(a)(3)) and appellant took advantage of a position of trust or confidence (rule 4.421(a)(11)) and (2) as to counts 1-9, that appellant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other

way illegally interfered with the judicial process (rule 4.421(a)(6)). (2CT 511-525.)

On February 23, 2023, the jury found appellant guilty of all counts. (11RT 1494-1498; 3CT 746-760.) In a bifurcated proceeding held on the same date, the jury found true aggravating factors under California Rules of Court, rule 4.421(a)(3) and (a)(11). (12RT 1514; 3CT 777.)

On May 19, 2023, the trial court sentenced appellant to an aggregate term of 45 years to life consecutive to a determinate term of 52 years. The indeterminate term consists of consecutive 15 years to life terms on the three counts of forcible oral copulation (counts 7-9). (13RT 3610.) The determinate term consists of consecutive eight-year midterms on the six counts of forcible lewd acts (counts 1-6), and two-year midterms on the two counts of attempting to dissuade a victim or witness (counts 10-11). (13RT 3609-3610; 3CT 860-865.)

The court awarded 732 days of credit on counts 10-13, 366 days of credits on count 1, and imposed various fees and fines, and restitution to the California Victim Compensation Board. (13RT 3609, 3611-3612.)

On May 19, 2023, appellant timely filed his notice of appeal. (3CT 838.)

STATEMENT OF FACTS

Appellant was born in 1959. (3CT 803.) Doe was born in 2005. (7RT 1039.)

A. The prosecution case on counts 1 to 9.

Doe's mother met appellant when Doe was four and married him when Doe was seven. The mother and appellant have a biological son, Doe's younger brother. (8RT 1231.)

When Doe was in the fifth through the seventh grades, the mother either worked or was at school during the day and appellant took care of the children. (8RT 1235.) Appellant worked between 5 p.m. and 6 a.m. He was the "bread winner" who paid the household bills, rent, and the food. (8RT 1235-1236.)

Appellant disciplined the children, and the children were expected to listen to him when he watched them. (8RT 1236.) The mother also taught the children to listen to appellant and other adults and follow their instructions. (8RT 1236.)

1. Doe.

Doe, 17 years old at the time of trial, testified appellant was her stepfather for as long as she can remember, and she used to call him "dad." (7RT 1039, 1046.) Appellant took care of Doe and her younger brother after school. (7RT 1050-1052.) Her parents taught Doe to follow what her parents

told her to do and she did as she was told to do. (7RT 1051, 1132.) "In some cases [appellant] was kind of strict, but he was okay." (7RT 1133.) Doe would always follow directions but sometimes got in trouble. (7RT 1051) Appellant disciplined her by hitting her with a belt or a slipper. (7RT 1133.)

When Doe was between eleven and thirteen (fifth through seventh grade), appellant touched her breasts and vagina many times a week while her mother was at work. (7RT 1046, 1048-1049, 1057, 1060-1063, 1068, 1076.) Once when Doe was in the fifth grade, appellant took off her pajama pants and underwear and rubbed his penis on the outside of her vagina. (7RT 1064-1065, 1070, 1082.) Doe said nothing to appellant but tried to push him back with her legs. She pushed him back a little, but appellant continued rubbing his penis against her vagina for a few minutes. (7RT 1066.) The next day, appellant bought a pregnancy test and told Doe to take it in the bathroom. She was not pregnant. (7RT 1069-1070.)

Appellant licked Doe's vagina more than five times but did not know approximately how many times this happened. (7RT 1072.) Doe tried to keep her legs closed but after a few seconds he forced them open and held both sides of her knees. (7RT 1074.) Before testifying at the preliminary hearing, Doe did not tell either the police or the prosecutor

that appellant licked her vagina because she did not remember. (7RT 1114-1116, 1127.)

Appellant also touched Doe's breasts and vagina over her clothes when her mother was home. He called Doe into the garage and touched her before leaving for work. (7RT 1075-1076.) Appellant had Doe rub his penis with her hand two times. (7RT 1080-1082.)

Doe was smaller and appellant was stronger. (7RT 1065.) She was afraid to disobey appellant because, "I felt like I would get abused or something like that." (7RT 1133.) Appellant told Doe one time that if she told her mother about the sexual abuse, her mother would kill him. (7RT 1067.) Doe did not tell her mother because she did not know how to tell her. She was scared to tell her because she did not know what her mom would do. (7RT 1077.)

Doe did not remember most of the details and did not remember saying anything to appellant when he touched her. (7RT 1067-1068.) She never felt that she could say "stop." (7RT 1073.)

In Doe's interview with the police, she wrote appellant "started to touch me where I don't want him to," "My mom doesn't know," and "He told me not to tell my mom." (7RT 1084-1085.) She also wrote that she tried stopped appellant and tried getting up when he either licked her vagina or rubbed his penis on her. (7RT 1089-1090.) Doe testified at

trial that none of her efforts to stop appellant at different times worked. (7RT 1090.)

Appellant took Doe's cell phone away a week or so before his arrest because her grades were starting to suffer. Just after his arrest, Doe got her cell phone back. (7RT 1117.) Doe did not make up a lie that appellant touched her because he took away her cell phone. (7RT 1120-1121.) She has had a cell phone since the fifth grade, and it has been taken away as punishment many times. (7RT 1129-1130.)

2. Fresh complaint witnesses.

In January 2019, Doe told her friends Isabella, Kimberly, and Joanna, and her counselor at school about the sexual abuse. (7RT 1083.)

Julieta Flores, a school counselor met with Doe on January 8, 2019. (7RT 1135.) Doe appeared upset, had her head down, and was crying. (7RT 1136-1137.) Flores asked Doe to respond to her questions with nods. (7RT 1138.) When Flores asked whether appellant was touching her, Doe nodded yes and cried. (7RT 1137-1138.) Flores called CPS and the San Jose Police Department. (7RT 1138.)

Joanna testified that in 2019, she was with Doe and Kimberly in an outside area at school. (8RT 1153.) Doe said her stepdad was molesting her, and she had been dealing with it for either two months or two years. (8RT 1153.) Doe

was crying and shaking a bit, and they went to the school counselor. (8RT 1154.)

Isabella testified that in 2019, when they were in the seventh grade, Doe told her and Kimberly that her stepdad was sexually assaulting her. (8RT 1158-1159, 1162.) After her recollection was refreshed with her police statement, Isabella testified that Doe said her stepdad was trying to put his penis into her vagina. (8RT 1160.) Doe was scared, sad, and crying. (8RT 1160.) Isabella and Kimberly encouraged Doe to tell the school counselor. (8RT 1162.) They had this conversation in a classroom. (8RT 1162.)

3. CSAAS expert.

Dr. Anna Washington, a psychologist, testified about Child Sexual Abuse Accommodation Syndrome (CSAAS) and the misconceptions surrounding child sexual abuse. (8RT 1182, 1187-1189.) CSAAS describes common behaviors for many children who are known victims of child sexual abuse and is not meant to be a diagnostic tool. (8RT 1190-1191.) Washington testified about the five categories of CSAAS: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted and unconvincing disclosures; and (5) and recantation. (8RT 1192.) These categories do not apply to all children, but are general patterns, and some children may have some categories. CSAAS is a framework of understanding counterintuitive

common behaviors of children who have been sexually abused. (8RT 1205.)

The first category, secrecy, addresses the common myth that children will immediately tell. Children instead tend to delay their disclosures or perhaps not tell anyone until they're adults, or never tell. Some reasons may be that someone may get hurt, people will not believe them, people will see them in a different light, and not wanting harm to the perpetrator who is also someone they have a loving, trusting relationship with outside the sexual abuse. (8RT 1195.)

The second category, helplessness, addresses the myth that children would run away or fight off the perpetrator, or tell someone right away. (8RT 1195-1196.) It is consistent for children not to engage in these behaviors because they are younger, relying on the adult to potentially meet their needs, and lack power to share what is happening. (8RT 1196-1197.) Children often know that it would be futile to try to fight off a physically larger adult. They are often taught they should listen to adults and follow commands. (8RT 1196.)

The third category, entrapment, explains how and why a child might feel stuck in abuse. (8RT 1198.) The perpetrator might be someone the child loves and trusts—a parent, stepparent, extended family member—with ongoing access to the child. As a result, the child develops various accommodation and coping strategies. (8RT 1197.) The child

may display mental health issues and trauma symptoms. (8RT 1198.) It is consistent for a child who has been sexually abused to continue engaging with the perpetrator. (8RT 1199.)

The fourth category, delayed, conflicted or unconvincing disclosure, addresses the myth that children will share all the details of abuse right away, and share all the details in the same manner each time they share as well. (8RT 1199-1200.) Children may delay disclosures. (8RT 1200.) Children also disclose information incrementally. Each time they share, they may be recalling or sharing different pieces of the abuse. (8RT 1201.) It is consistent for a child who has been sexually abused to provide different information at different times about what happened to them. (8RT 1201.) It is also consistent for the child to provide different information to the same person they speak to. (8RT 1201-1202.) A child may not be able to distinguish and recount details of multiple incidents individually. (8RT 1202.) A child who has been sexually abused may have varying details or minimize the abuse. (8RT 1202-1203.)

The fifth category, retraction or recantation, means taking back a previous true statement of child sexual abuse based on the negative consequences of sharing. (8RT 1204-1205.)

Since the idea of CSAAS originated in the early 1980s, there has been a cultural shift in how people may view

sexual abuse among children, and the experiences or expectations people have. (8RT 1206.) CSAAS is not based on any studies, data, or research. It is based on an article written by Dr. Roland Summit, based on patterns he observed in the early 1980s, in his clinical practice of known victims of child molest. (8RT 1207.) Dr. Summit wrote a second article in 1993 called, "Abuse of a Child Sexual Abuse Accommodation Syndrome." (8RT 1213.) In this article, he expressed regret at having used the term "syndrome" because "syndrome" is generally considered to be a diagnostic matter. The particular behaviors he described may not be present with molest victims. (8RT 1208-1209.)

CSAAS is not included in the Diagnostic and Statistical Manual (DSM) because it is not a diagnosis. (8RT 1210.) CSAAS begins with an assumption that the child was abused and only applies to known victims of child sexual abuse. It offers no way to determine whether, in fact, the child is telling the truth. (8RT 1210.) Thus, a confirmed victim of child molest may also disclose immediately, or flee from the abuser, or are still around the abuser. None of these behaviors are inconsistent with CSAAS. (8RT 1211.) Known victims of child abuse can have varied responses so no matter what behavior reaction a child has following sexual abuse, that reaction does not contradict CSAAS. (8RT 1212.) "No matter what behavioral reaction you have

following known sexual abuse, that wouldn't be inconsistent with having been sexually abused." (8RT 1212.)

B. The prosecution case on counts 10 to 13.

The trial court took judicial notice that the criminal charges began on January 10, 2019, when the complaint was filed, and appellant made his first appearance at arraignment. (8RT 1178; 9RT 1350.)

Between January 10, 2019, and March 8, 2019, the mother received about 30 letters from appellant. (8RT 1237-1238.) He begged the mother and Doe to forgive him, give him a chance, and stated that he is the bread winner, and they love him. (8RT 1242-1243; see also 8RT 1166-1167, 7RT 1099, 1105 [letters to Doe].) Appellant tried to convince Doe and the mother to ask the district attorney to drop the case against him. (8RT 1239-1240, 1245.) He told the mother to write a letter stating, "I want to drop and withdraw the charges against my step-dad Ponchito," and drop it off at the district attorney's office. (8RT 1241.) He asked the mother to bring another letter that he had enclosed (and addressed to the trial court) to the district attorney and to a court hearing. (8RT 1242.)

Appellant called the mother about three to four times a day, totaling over 100 calls, between January and March 2019. (8RT 1250.) In one call, appellant said that Doe could save him by changing her statement and asked them to

withdraw the charges and tell the district attorney they needed him for financial support. (8RT 1252.) Appellant also asked to speak with Doe, but she refused to talk to him. (7RT 1167.)

The mother went to the district attorney's office on March 6, 2019, wanting to talk to a deputy district attorney about dropping the charges. (8RT 1164-1165, 1239-1240, 1259.)

C. The defense case.

1. Memory and suggestibility expert.

Dr. Bradley McAuliff, a psychology professor, testified as an expert on children's memory and suggestibility and forensic interviewing. (9RT 1299, 1303.) Suggestibility addresses the accuracy of witness's memory by looking at how people encode cognition in the brain and remember the information when questioned. (9RT 1306.) It also addresses behavioral aspects of cognition, and factors that influence suggestibility and accuracy. (9RT 1306-1307.)

Suggestibility is when a witness believes what they are saying is true in full or part, but their memory is inaccurate. It is not the same as lying. (9RT 1308.) Dr. McAuliff testified about several factors that influence suggestibility.

The context of the allegation impacts suggestibility. (9RT 1311.) It includes both immediately what is happening

when a child discloses abuse and the broader context of what is happening in the family or at school. (9RT 1311.)

Passage of time also impacts suggestibility. (9RT 1312.) Memories of events get weaker over time and the brain's constructive processes fill in gaps with inaccurate information. Inaccurate details from other sources become incorporated in the memory and reported as new details. (9RT 1313.)

Age impacts suggestibility because developmentally, adults can better resist suggestion from an outside source than older children, and older children can better resist suggestion than younger children. (9RT 1314.) But adults can still be suggestible. (9RT 1314.) Adolescence begins at either age 12 or 13 and extends to 18 or 19. (9RT 1339.) In adolescence, peer groups are very important for acceptance and validation and information coming from other peers can influence an adolescent's report of abuse. (9RT 1314-1315, 1339.)

Interviewer authority influences suggestibility. (9RT 1314.) Children are deferential to adults as a source of authority and information. (9RT 1315.) An authority figure conveying inaccurate information to a child can have a big effect on the accuracy of a child's memory. (9RT 1315.) And for teenagers, peer groups are important for acceptance and validity. Thus, information from other peers can influence an adolescent's report. (9RT 1315.)

Repeated questioning containing inaccurate information can impact suggestibility. (9RT 1315.) Each time a person speaks to a child or adolescent about molestation, there is a possibility for additional contamination. (9RT 1315.) And when a young witness is questioned repeatedly, they can begin to infer that they have not given the right response or given enough information. (9RT 1316.) So even when a child denies that something happened, the child can add untrue additional details through the repeated questioning process and the pressure associated with it. (9RT 1316-1317.)

Cross-contamination focuses on how different pieces of information outside the event can influence the accuracy of a witness's report. (9RT 1316.) Source monitoring is the ability to identify the source of details outside the experienced event. (9RT 1317.) Information from questions and similar experiences from social media or peers, may fit the alleged abuse. (9RT 1317-1318.) Source monitoring error occurs when the details of an experienced event are attributed to potential contamination from sources overheard, reported, or imagined, rather than rather than what happened. (9RT 1318.)

Best practice protocols limit witness suggestibility and increase accuracy. (9RT 1319.) The questioner should ask open-ended questions and minimize his or her influence. (9RT 1319-1320, 1322.) Asking open-ended questions rather

than a series of direct questions puts the burden on the child to talk about what did or did not happen to them. (9RT 1320.) Since many conversations happen before children are forensically interviewed, it is important to understand how others remember these conversations—both what the children said and how they may have influenced the information. (9RT 1321.)

The interviewer should also give the child the ignorant interviewer instruction: "I don't know what may or may not have happened to you, and I don't know the answers to my questions." (9RT 1322.) This instruction shifts the power dynamic from a child who usually looks up to the adult as a source of information, to the child. (9RT 1322.) This approach limits confirmation bias. Confirmation is the tendency to seek information that confirms our preexisting beliefs about what happened. (9RT 1322-1323.) The expectancy effect is communicating the confirmation to the child who may be scared or may think that they are in trouble and look to the adult for cues about what to say. (9RT 1323.)

Delayed disclosure can be misleading because implies that there is something to disclose when it may not exist. (9RT 1325.) When assuming that the child was abused, there can be inconsistency in the reporting. (9RT 1325.) Yet when assuming that the child may not have been abused, there are plausible explanations for delayed disclosure. (9RT 1325.)

If a child is abused, there can be delayed disclosure with inconsistent reports. This is also true for a child who has not been abused. (9RT 1326.) Memory gets weaker over time and children may be influenced by contextual factors, such as the questions asked, repeated questioning, and other conversations they have had. (9RT 1325.) The inconsistency in reporting can result because the child is vulnerable due to the lack of real memory and the constructive process incorporates outside information to provide the details to the adults in a pressurized setting. (9RT 1326.)

2. Appellant.

Appellant raised Doe since she was a baby. Doe loved and trusted him and called him "dad." He provided food, shelter, and clothing. He taught his children to listen to adults, respect them, and be polite. (9RT 1361-1363.)

Appellant denied orally copulating Doe, pulling down her pants, exposing his genitals to her, or touching her with his penis. (9RT 1352.) He touched Doe's breasts once over the clothes and once under the clothes. (9RT 1389.) He also touched Doe's vagina twice, once over her underwear and once under on May 26, 2018, the anniversary of his father's death. (9RT 1352-1353.) Appellant thought the mother was in bed with him on this date, but woke up realizing it could not be his wife when he touched public hair because the mother shaved her pubic hair. (9RT 1354-1356.)

Appellant was arrested on January 8, 2019, when he went to Doe's school to pick her up. (9RT 1374-1375.) After his arrest, appellant spoke with Detective Vera. (9RT 1378.) He said, "Maybe I jokingly touched her vagina." (9RT 1381.) He also said he thought Doe was his wife. (9RT 1383-1384.)

In his police interrogation, appellant showed how he touched Doe's vagina with one finger. (9RT 1388-1389, 1390; 9RT 1383-1385 [video recording played for jury].) He also admitted to touching Doe's breasts one time over the clothes and one time under the clothes. (9RT 1389.) Appellant did not state that he thought Doe was his wife. (9RT 1391.)

Appellant admitted to calling the mother over a hundred times between January 2019 and March 2019. (9RT 1364.) He also used another person's booking number and pin number to make calls because he did not have money in his account. (9RT 1356-1357.) Appellant tried to talk to Doe, but she never answered the phone. (9RT 1369-1370.) Appellant told the mother he made a mistake, regretted everything, and was sorry. (9RT 1375-1376, 1377.) In one call, appellant said he ruined his life because of the mistake. (9RT 1377.) He never said he mistook Doe for the mother when he touched Doe. (9RT 1375-1376.)

Appellant sent letters to the mother and Doe from jail. (9RT 1356.) He asked Doe for forgiveness and for a second chance. (9RT 1357, 1366-1367.) He prepared a letter for Doe and the mother to sign requesting the case against him be

dropped (9RT 1357) and asked the mother to go to the district attorney's office and to tell Doe to withdraw the charges. (9RT 1367.) He promised to give the mother money and a special power of attorney and property for their son, including his 401k. (9RT 1368-1369.)

Appellant denied knowing about the restraining order or telling the mother in a jail call to drop the restraining order. (9RT 1364-1365.) He wrote a letter addressed to the trial court from Doe requesting revocation of the restraining order. (9RT 1364-1365.)

ARGUMENT

I. THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND CODE OF CIVIL PROCEDURE SECTION 231.7 WHEN IT DENIED HIS OBJECTION TO THE PROSECUTOR'S EXERCISE OF PEREMPTORY CHALLENGE TO REMOVE A FILIPINO PROSPECTIVE JUROR. THE JUDGMENT MUST BE REVERSED.

The prosecutor exercised a peremptory challenge to remove L.R., a Filipino prospective juror, from the jury based on presumptively invalid reasons under section 231.7. The prosecutor's reasons and the judicial findings did not overcome the presumption of invalidity. The court violated appellant's constitutional and statutory rights when it

denied appellant's objection to the prosecutor's use of the peremptory challenge to remove the prospective juror.

The judgment must be reversed and the case remanded for new trial.

A. Background.

Defense counsel objected to the prosecutor's peremptory challenge of L.R. who shares appellant's gender and Filipino ethnicity. (5RT 984.) He argued, "gender, race, ethnicity are all facts that are going to be central to this case." (5RT 987.)

1. L. R.'s questionnaire answers.

L.R. is single with no children. (Aug. 3CT 689.) He had lived in Santa Clara County for 23 years and lived with two people who shared his last name—a postal worker and a medical records clerk. (Aug. 3CT 689.) L.R. worked for Nike as a sales floor associate. (Aug. 3CT 689.)

In response to the questionnaire, L.R. stated he could follow the instruction that "[t]he conviction of a sexual assault crime may be based on the testimony of a complaining witness alone" and would "be able to accept proof of a fact in this case if it came from a single witness who was a child that [he] believed beyond a reasonable doubt." (3CT 694.) He also wrote: "Their testimony may be enough as long it is clear and concise." (3CT 694.)

2. L.R.'s voir dire answers.

In response to the trial court's questions, L.R. answered that he is single, has no children, and worked as a Nike sales employee and music teacher assistant at Liberty Baptist School. (Aug. 2RT 133.) In response to defense counsel's questions, L.R. stated he began working for Nike after graduating from Pensacola Christian College in Florida. (Aug. 2RT 100.) L.R. would follow the law that if he can draw two or more conclusions from circumstantial evidence, he must accept the conclusion pointing to innocence and would vote not guilty if he can reasonably conclude a person is not guilty, even if there is evidence pointing towards guilt. (Aug. 2RT 101-102.)

Before the prosecutor exercised her peremptory strike, L.R. testified in response to the prosecutor's questions that he was comfortable listening to a child or teenager and giving their testimony "the same level of open mindedness" as he would with any other witness. (Aug. 2RT 159.)

After appellant objected to the prosecutor's peremptory challenge of L.R., the trial court permitted the prosecutor to ask L.R. more questions. (Aug. 2RT 170-171.) She asked two questions:

Q. [O]n your questionnaire you had indicated that the testimony of a complaining witness alone is enough, and you didn't have a problem following the instruction. You added the caveat that, as long as it is clear and concise.

Now, if the judge gives you an instruction that, as mentioned earlier as well, that you may not hear clear and concise evidence how you wanted—the date range in this case is a couple of years. You're not going to have like a concise date about whether it happened on a Sunday or a Monday. Are you okay with listening to evidence that's not as clear and concise, as you indicated on your form initially?

A. Yes. Probably just because I've never done this before and it's new to me. I added a few more questions or added a few more comments. But from what I'm hearing of everyone, and what you've been asking, I can follow that.

Q. Fair to say that your answer to that question then would change, and that you're okay with rather generic testimony almost as long as you find that's proof beyond a reasonable doubt?

A. Yes.

(Aug. 2RT 171.)

3. The prosecutor's reasons for exercising a peremptory challenge to remove L.R.

The prosecutor stated two reasons for removing L.R. The first reason was based on his answer to single witness instruction in Question No. 33:

> Although he indicated that he would not have a problem following the instruction, he added that it may be enough as long as it's clear and concise. That statement that it is "clear and concise" gave me hesitation and concerns about this specific juror, because in sexual assault cases we have testimony from children, and evidence that may at times not be as clear and concise as some jurors may wish…. The date range here is broad. All these reasons gave us concern about [L.R.'s] ability to perhaps follow—be comfortable with following the law of a single witness if he has issues with following that witness's ability to give clear and concise evidence.

(5RT 985-986.)

L.R.'s "conditional" answer to Question 33 "places a restriction as well as skepticism on a victim's testimony" and defense counsel "voir dired heavily, over the People's objection, using the term 'skepticism.'" (6RT 997.) "[T]he evidence will at times rely on unclear and unconcise answers" from Doe and there "will not be linear responses in a clear and concise fashion that [L.R.] required, in which the law does not mandate." (6RT 997-998.)

The prosecutor's second reason was that L.R. had "lack of life experiences with interacting with children, [L.R.] is single with no kids. He does not have volunteer experience with children, and does not have any additional experience interacting with children." (6RT 998; see also 5RT 986.)

The prosecutor also stated that she did not dismiss: (1) a female prospective juror with a Spanish surname who was dismissed by defense counsel (Juror 70) and (2) a seated male juror with a Spanish surname (Juror 30) who "may be part of the same cognizable group." (6RT 999-1000; see Aug. 2RT 86, 97, 124-125, 172 [juror 70, M.R.]; Aug. 2RT 86, 114-115, 144-146 [juror 30].)

4. The Trial Court's Findings.

Based on L.R.'s "last name, his appearance," the trial court found that the juror "appears to be possibly the same ethnic group" as appellant. (5RT 984.) The court also noted that four minorities, three of whom were Asian, were excused for cause. (5RT 984.)

The trial court nonetheless denied appellant's objection to the peremptory challenge. Although "the only reason for the challenge really is that [L.R.] may be Filipino," L.R.'s ethnicity "would probably help the People more than it would help the Defense" because "all the major players, including the victim, who is the most major, is Filipino."

(5RT 987.) The court was thus "not sure how excusing him would be—detrimental to Mr. Espejo." (5RT 987.)

Defense counsel noted that "gender, race, ethnicity are all facts that are going to be central to this case." (5RT 987.)

The trial court later made additional findings that defense counsel dismissed a female prospective juror with a Spanish surname (Juror 70) and a male juror with a Spanish surname (Juror 30) "who may or may not be Filipino" remained on the jury. (6RT 1001.) When counsel stated his belief that the male juror is Latino, the court said: "It's close. And in any event, I already made my ruling." (6RT 1001.)

B. Applicable standards.

1. Section 231.7.

The federal and state constitutions prohibit the use of peremptory challenges to remove prospective jurors based on group bias, such as race or ethnicity. (*People v. Scott* (2015) 61 Cal.4th 363, 383; *Batson v. Kentucky* (1986) 476 U.S. 79, 89; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277.) Such conduct violates a defendant's rights to a fair trial, to a jury drawn from a representative cross-section of the community, and to equal protection under the federal and California Constitutions. (U.S. Const., 5th, 6th, 14th Amends.; Cal. Const. Art. I, § 16; *People v. Parker* (2017) 2 Cal.5th 1184, 1211.)

The Legislature enacted section 231.7 "to establish 'a new process for identifying unlawful bias in the use of peremptory challenges during jury selection' because studies showed that the existing *Batson/Wheeler* analysis ... was inadequate to prevent racial discrimination." (*People v. Jimenez* (2024) 99 Cal.App.5th 534, 539-540; see also Stats. 2020, ch. 318, § 1(b) [finding the procedure under *Batson-Wheeler* "for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination"].)

Relevant to this case, "[a] party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups." (§ 231.7, subd. (a).) When a party or the trial court objects to the improper use of a peremptory challenge under the statute, "the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised." (§ 231.7, subd. (c).)

The trial court "shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances," "shall consider only the reasons actually given ... for the use of the peremptory challenge," and "shall" sustain the objection if "there is a substantial likelihood that

an objectively reasonable person would view" the protected categories "as a factor in the use of the peremptory challenge." (§ 231.7, subd. (d)(1).) "The court need not find purposeful discrimination to sustain the objection." (*Ibid.*) A motion made under section 231.7 is sufficient to state a claim of discriminatory exclusion of jurors in violation of both the federal and state Constitutions. (*Ibid.*)

"[A]n objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California." (§ 231.7, subd. (d)(2)(A).) A "substantial likelihood" is defined as "more than a mere possibility but less than a standard of more likely than not." (*Id.* at subd. (d)(2)(B).) Section 231.7, subdivision (d)(3), provides a nonexhaustive list of circumstances the court may consider in the analysis.

Section 231.7, subdivision (e), further provides that certain reasons given for the use of a peremptory challenge are "presumed to be invalid unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender. . ., and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case." Clear and convincing evidence to overcome the presumption exists when the court, "bearing in mind

conscious and unconscious bias," determines "that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case." (*Id.*, subd. (f).)

2. Standard of review.

The denial of an objection made under section 231.7 "shall be reviewed by the appellate court de novo, with the trial court's express factual findings reviewed for substantial evidence." (§ 231.7, subd. (j).)

"The appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record." (§ 231.7, subd. (j).) "The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court." (*Ibid.*) "Should the appellate court determine that the objection was erroneously denied, that error shall be

deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial." (*Ibid.*)

C. The prosecutor used invalid reasons to remove L.R. under section 231.7, subdivision (e).

The prosecutor stated she removed L.R. based on his lack of "life experiences with interacting with children" because he "is single with no kids" and "does not have any work or volunteer experience with children, and does not have any additional experience interacting with children." (6RT 998; see also 5RT 986.) As shown below, each of these reasons is presumptively invalid under section 231.7, subdivision (e).

1. L.R.'s marital status and parental status are presumptively invalid reasons for a peremptory challenge under section 231.7, subdivision (e).

A presumptively invalid reason under section 231.7, subdivision (e), includes: "Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for

peremptory challenge relying on this justification to be considered presumptively invalid." (§ 231.7, subd. (e)(13).)

While the prosecutor removed L.R. based on his lack of life experience interacting with children because he "is single with no children" (5RT 986; 6RT 998), she did not remove seated jurors 12, 22, 68, 69, and 72 who were also single and childless. (See Aug. 2RT 170-171, 3RT 321-322 [peremptory challenges]; Aug. 2RT 182 [juror 12], 143 [juror 22], 135 [juror 68], 139 [juror 69]; Aug. 3RT 303-304 [juror 72].) These five jurors did not share L.R.'s race, ancestry, or ethnicity. (See 6RT 1000-1001 [prosecutor's comparative analysis argument based only on prosecutive Juror 70 and seated Juror 30 and trial court's finding that Juror 30 who "may or may not be Filipino," remained on the jury]; § 231.7, subd. (a) [race and ethnicity are protected characteristics]; see also § 231.5 and Gov. Code, § 11135, subd. (a) [race, color, ancestry, national origin, and ethnic group identification are protected characteristics].)

Juror 12 did not share L.R.'s gender. (Aug. CT 66 [Juror 12 was in sorority in college]; § 231.7, subd. (a) [gender is protected characteristic]; see also § 231.5, Gov. Code, § 11135, subd. (a) [sex is protected characteristic].) The record does not confirm Juror 72's gender. (Aug. 3RT 303 [juror's significant other is a male plumber]; Aug. CT 150, 154 [juror worked as an insurance agent and dance teacher].)

2. L.R.'s alleged lack of work or volunteer experience with children is contrary to the record and presumptively invalid under section 231.7, subdivision (e).

The prosecutor stated L.R. lacked life experiences with interacting with children because he "does not have any work or volunteer experience with children[.]" (6RT 998.) This reason is unsupported by the record. L.R. worked as a sales floor associate for Nike. (Aug. 3CT 689.) Nike is a clothing and shoe brand popular with children and adolescents, and has clothing, shoe, and accessory line for kids.[2] L.R. also worked at Liberty Baptist School as an assistant for music teacher "Ronald Newbauer [phonetic]." (Aug. 2RT 133.) Liberty Baptist School is a private school in San Jose "committed to providing a Christian education for students in K4 through 12th grade."[3] Its music teacher is Ron Muehlbauer.[4]

That said, this reason is presumptively invalid because it is similarly applicable to jurors "who are not members of the same cognizable group" as L.R. "but were not the subject of a peremptory challenge" by the prosecution. (§ 231.7,

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2 https://www.nike.com/kids (accessed on Nov. 9, 2024.)

3 https://www.libertybaptistschool.org/ (accessed Nov. 9, 2024.)

4 https://www.libertybaptistschool.org/about/our-team (accessed Nov. 9, 2024.)

subd. (e)(13).) The prosecutor did not remove Jurors 12 and 22, whose questionnaire and voir dire answers disclosed no interactions with children. (Aug. CT 62-70, Aug. 2RT 182-183 [Juror 12]; Aug. CT 84-92, Aug. 2RT 113, 143-144, 160, Aug. 3RT 187 [Juror 22].) She did not remove Jurors 69 and 72, who had either similar or less experience interacting with children. Juror 69 was a software engineer who had once interned at Walt Disney World. (Aug. CT 117, 121.) Juror 72 was an insurance agent who also worked with children as a dance teacher. (Aug. CT 150, 154.)

Jurors 12, 22, 69, and 72 did not share L.R.'s race, ancestry, or ethnicity. (See 6RT 1000-1001.)

Juror 12 did not share L.R.'s male gender (Aug. CT 66) and Juror 72 may not have shared L.R.'s sex. (Aug. 3RT 303; Aug. CT 150, 154.)

3. The prosecutor may not bury presumptively invalid reasons under an overarching facially neutral reason.

In *Uriostegui*, the prosecutor based a peremptory challenge on a juror's lack of life experience, explaining that the juror was young and was not employed. (*People v. Uriostegui* (2024) 101 Cal.App.5th 271, 279-280.) Lack of employment was a presumptively invalid reason under section 231.7. (*Id.* at p. 280.) Apparently, no challenge was made to use of the juror's age under section 231.5. The

appellate court held that reversal was required based on the presumptive invalidity of lack of employment: "To allow a party to bury presumptively invalid reasons under an overarching facially neutral reason, such as 'lack of life experience,' without the required findings under section 231.7, subdivision (f), would render section 231.7, subdivision (e) ineffective." (*Ibid*.)

The same is true here. As in *Uriostegui*, the prosecutor based her peremptory challenge based on L.R.'s lack of life experience interacting with children, explaining that he was single, childless, and lacked work or volunteer experience interacting with children—all presumptively invalid reasons under section 231.7, subdivision (e)(13). (5RT 986; 6RT 998.) And as further shown in I.D. & I.E., *post,* the prosecutor and the trial court failed to rebut the presumption of invalidity. As in *Uriostegui*, to permit the prosecutor to bury invalid reasons under the overarching facially neutral reason of lack of life experience would also render section 231.7 ineffective.

D. The prosecutor failed to rebut the presumption of invalidity.

A presumptively invalid reason is unrebutted unless the prosecutor shows "by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated" to the prospective juror's perceived "race, ethnicity, gender" and that the reasons articulated bear on

the prospective juror's ability to be fair and impartial in the case. (§ 231.7, subd. (e).)

1. L.R.'s answers did not lack depth or explanation and showed he could follow the law.

The prosecutor stated: "There wasn't a lot of depth or explanation in the questionnaire, or even during jury voir dire." (5RT 986.) But this is not clear and convincing evidence capable of rebutting the presumption of invalidity.

First, the prosecutor never asked L.R. any questions about his life experience interacting with children. (Aug. 2RT 159, 171; cf. *Miller-El v. Dretke* (2005) 545 U.S. 231, 244, 249-250 [prosecutor's stated reasons may be revealed as pretexts for discrimination if the prosecutor failed to question the excused juror on the points of asserted concern]; accord *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1170.)

Second, before striking him, the prosecutor only engaged in cursory questioning of L.R. on whether he would treat a child and teenager equally with other witnesses. She asked L.R. if he was comfortable giving a child or a teenager "the same level of open mindedness that you would any other witness" and he answered "Yes." (Aug. 2RT 159.) L.R.'s response addressed the prosecutor's question, and the prosecutor did not probe L.R. on this or any other topic. Because the prosecutor posed a straightforward question to

L.R. on a topic unrelated to his life experience interacting with children, L.R.'s answer cannot show that it lacked depth or explanation.

Third, after defense counsel objected to the prosecutor's exercise of peremptory challenge to L.R., the trial court permitted the prosecutor to ask L.R. more questions. (Aug. 2RT 170-171.) The prosecutor asked L.R. two questions about his questionnaire answer to Question 33, and did not question him about his life experience interacting with children. She first asked:

> Q. [O]n your questionnaire you had indicated that the testimony of a complaining witness alone is enough, and you didn't have a problem following the instruction. You added the caveat that, as long as it is clear and concise.
>
> Now, if the judge gives you an instruction that, as mentioned earlier as well, that you may not hear clear and concise evidence how you wanted—the date range in this case is a couple of years. You're not going to have like a concise date about whether it happened on a Sunday or a Monday. Are you okay with listening to evidence that's not as clear and concise, as you indicated on your form initially?
>
> A. Yes. Probably just because I've never done this before and it's new to me. I added a few more questions or added a few more comments. But from what I'm hearing of

> everyone, and what you've been asking, I can follow that.

(Aug. 2RT 171.)

This response did not lack depth or explanation. It also showed that L.R. could follow the law on the single complaining witness instruction. The prosecutor then asked: "Fair to say that your answer to that question then would change, and that you're okay with rather generic testimony almost as long as you find that's proof beyond a reasonable doubt?" (Aug. 2RT 171.) L.R. answered, "Yes." (Aug. 2RT 171.)

Fourth, even if L.R.'s answers to the prosecutor's questions lacked depth or explanation, it is unclear why such answers made him an undesirable juror. To the extent they suggested his lack of attention or a problematic demeanor, these reasons are also presumptively invalid under section 231.7, subdivision (g)(1)(A) and (B).

2. The prosecutor failed to provide the explanation necessary to rebut the presumption of invalidity.

The prosecutor stated: "What we're looking for is someone with life experience, and the ability to follow the law." (5RT 986.) L.R.'s answers to the prosecutor's questions about Question 33 showed that he could follow the law. (Aug. 2RT 171.) That said, the prosecutor never explained why

L.R.'s marital and parental status and work or volunteer experiences interacting with children mattered to his ability to be fair and impartial in the case. Section 231.7, subdivision (e), expressly requires such an explanation to rehabilitate a presumptively invalid reason.

3. The prosecutor's comparative analysis failed to rebut the presumption of invalidity.

The prosecutor stated she did not dismiss a female prospective juror with a Spanish surname and a seated male juror with a Spanish surname (Juror 30) who "may be part of the same cognizable group." (6RT 999-1000.) That the prosecutor did not challenge a female juror with a Spanish surname does not explain why she did challenge L.R., a male Filipino juror. As defense counsel pointed out the previous day, "gender, race, ethnicity are all facts that are going to be central to this case." (5RT 987.) The defendant is male, and Doe is female.

That the prosecutor did not challenge Juror 70, a male juror who may or may not share the same race or ethnicity as L.R., also does not explain why she removed L.R. (See 6RT 1001 [defense counsel stating Juror 70 is Latino and trial court finding Juror 70 may or may not be Filipino and "It's close"].) Juror 70, like L.R., was also childless and

worked at a private school. (Compare Aug. 3CT 733 [Juror 70] with Aug. 2RT 133, Aug. 3CT 689 [L.R.])

That said, the prosecutor's justifications cannot rebut the presumption of invalidity when she did not dismiss five jurors who were both single and childless but did not share L.R.'s race or ethnicity. (I.C.1., *ante*.) Four of these jurors also had either no experience interacting with children or had the same or less experience as L.R. interacting with children. (I.C.2., *ante*.)

In *Uriostegui,* the appellate court rejected the "blanket claim that 'lack of life experience' is not a presumptively invalid reason for excusing a prospective juror" when: (1) it was "based in part" on a presumptively invalid reason under section 231.7, subdivision (e); (2) the prosecutor failed to show that it is "'highly probable' that an objectively reasonable person aware of implicit bias (§ 231.7, subd. (d)(2)(A)) would view this reason as unrelated to [the juror's] perceived ethnicity"; and (3) the prosecutor failed to show the presumptively invalid reason bore on the juror's "'ability to be fair and impartial.'" (*People v. Uriostegui, supra,* 101 Cal.App.5th at p. 280, citing § 231.7, subd. (e); see also *People v. Jimenez*, *supra*, 99 Cal.App.5th at p. 544, fn. 3.)

Here, the prosecutor's blanket claim that L.R. lacked life experience interacting with children was based entirely on the presumptively invalid reasons of his marital and parental status and his alleged lack of work or volunteer

experience with children. (I.C., *ante.*) As in *Uriostegui,* the prosecutor failed to show that it is highly probable that an objectively reasonable person would view these presumptively invalid reasons as unrelated to L.R.'s perceived gender, race, and ethnicity and failed to show the presumptively invalid reasons bore on his ability to be fair and impartial.

E. The trial court erred when overruling appellant's objection because its findings did not rebut the presumption of invalidity.

The prosecutor's reasons for removing L.R. were presumptively invalid under section 231.7, subdivision (e)(13). (I.C., *ante.*) To determine that a presumption of invalidity has been overcome under the clear and convincing standard, the trial court "shall determine that it is highly probable that the reasons given ... are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case." (§ 231.7, subd. (f); *People v. Jaime* (2023) 91 Cal.App.5th 941, 943; *People v. Uriostegui, supra,* 101 Cal.App.5th at p. 279.) This determination is made from the view of the "objectively reasonable person" who "is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of

potential jurors in the State of California." (§ 231.7, subd. (d)(2)(A) & (e).)

Under section 231.7, subdivision (f), "a trial court may overrule an objection to the exercise of a peremptory challenge based on presumptively invalid reasons only if it explicitly makes specific findings." (*People v. Uriostegui, supra,* 101 Cal.App.5th at p. 281; see *id.* at p. 280 [appellate court cannot impute to the court findings it did not state on the record, citing § 231.7, subd. (j)].) Here, the prosecutor did not show by clear and convincing evidence that an objectively reasonable person would view L.R.'s marital and parental status and his alleged lack of work or volunteer experience with children as unrelated to his perceived race or ethnicity and these reasons bear on L.R.'s ability to be fair and impartial in the case. (I.D., *ante*.) The trial court also made no explicit and specific findings that was highly probable that the prosecutor's presumptively invalid reasons are unrelated to conscious or unconscious bias and are instead specific to L.R. and his ability to be fair and impartial in the case. (5RT 987; 6RT 1001, 1003; § 231.7, subd. (f).)

"The prosecutor's reasons and the judicial findings did not overcome the presumption of invalidity" and the trial court erred in denying appellant's objection under section 231.7. (*People v. Uriostegui, supra,* 101 Cal.App.5th at p. 281.)

F. Alternatively, the totality of the circumstances shows a substantial likelihood that an objectively reasonable person would view L.R.'s race, ethnicity, or gender as a factor in the use of the peremptory challenge.

In *Caparrota,* the appellate court held: "an objection to a peremptory challenge must be sustained whenever any reason identified for the challenge becomes conclusively invalid under section 231.7, subdivision (g), regardless of whether the party exercising the peremptory challenge also identifies facially neutral reasons that do not fall within the scope of subdivision (g)." (*People v. Caparrotta* (2024) 103 Cal.App.5th 874, 896-897.) The Legislature enacted section 231.7 with "the goal of *eliminating* the use of group stereotypes and discrimination *in any form or amount*." (*Caparrotta,* at p. 897, citing Stats. 2020, ch. 318, § 1, subd. (c); Stats. 2020, ch. 317, § 2, subds. (h), (j), italics in original.) It thus "would not have set up a procedure under which a trial court could overrule an objection after a peremptory challenge was *already* determined to be based, at least in part, on an invalid reason." (*Ibid.*)

The prosecutor's presumptively invalid reasons based on L.R.'s marital and parental status and alleged lack of work or volunteer experience with children became conclusively invalid under section 231.7, subdivisions (e) and (f), rather than subdivision (g). (I.D. & I.E., *ante*; see *People*

v. Ortiz (2023) 96 Cal.App.5th 768, 793 [section 231.7 has two subdivisions describing presumptively invalid reasons and each "sets out a distinct process by which a court determines whether a presumptively invalid reason can be absolved of that presumption"].) That said, *Caparrotta*'s rationale applies to all conclusively invalid reasons irrespective of how they became conclusive, and the judgment must be reversed.

If this Court disagrees, the judgment must still be reversed because the prosecutor's remaining reason for removing L.R. was contrary to or unsupported by the record. The totality of the circumstances here showed "more than a mere possibility but less than a standard of more likely than not" that a person who is "aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors" in the state would view race, ethnicity, and gender as factors in the prosecutor's use of the peremptory challenge. (§ 231.7, subd. (d)(1), (2)(A)-(B).)

1. The prosecutor's reason based on L.R.'s answer to Question 33 was contrary to or unsupported by the record.

The prosecutor stated she struck L.R. based on her concerns that his answer to Question No. 33 showed he was not "comfortable with following the law of a single witness if

he has issues with following that witness's ability to give clear and concise evidence." (5RT 985-986.) L.R.'s "conditional" answer "places a restriction as well as skepticism on a victim's testimony" and defense counsel "voir dired heavily, over the People's objection, using the term 'skepticism.'" (6RT 997.) But these reasons were "contrary to or unsupported by the record." (§ 231.7, subd. (d)(3)(F).),

First, when the prosecutor asked L.R. questions specific to his answer to Question 33, he responded that he could listen to evidence that is "not as clear and concise" as he "initially indicated" on his questionnaire. (Aug. 2RT 171.) L.R. also explained he added "a few more comments" to his answer to Question 33 because "I've never done this before and it's new to me." (Aug. 2RT 171.) He had since been informed by the prosecutor's questions and the responses of other jurors. (Aug. 2RT 171.) L.R.'s answer to Question 33 "would change" and he could convict based on "generic testimony almost as long as [he] find[s] that's beyond a reasonable doubt." (Aug. 2RT 171.)

L.R.'s answers to Question 33 also confirmed he did not have a problem following the instruction that "[t]he conviction of a sexual assault crime may be based on the testimony of a complaining witness alone." (3CT 694.) He would "be able to accept proof of a fact in this case if it came from a single witness who was a child that [he] believed beyond a reasonable doubt." (3CT 694.)

Second, based on L.R.'s responses, the trial court initially denied the prosecutor's peremptory challenge, before reconsidering its decision and overruling the defense objection. (Aug. 2RT 172.) The court also made no findings crediting the prosecutor's reason based on L.R.'s answer to Question 33 or his alleged inability to follow the single witness instruction when it overruled the defense objection. Instead, the court denied the objection because Doe and the mother are also Filipino and the court was "unsure how excusing [L.R.] would be detrimental" to appellant. (5RT 987.)

Third, the prosecutor's claim about L.R.'s alleged "skepticism" is unsupported and contrary to the record. Before the prosecutor struck him, L.R. said he was "comfortable" giving a child or a teenager "the same level of open mindedness that [he] would any other witness." (Aug. 2RT 159.) And when the prosecutor next asked, "Does anyone feel as if they heard a child or a teenager testify that they would be more skeptical ... and would not be able to assess that witness as an equal," L.R. did not raise his hand. (Aug. 2RT 159.)

Defense counsel also did not "voir dire[] heavily ... using the term 'skepticism.'" (See 6RT 997.) Counsel mentioned "skepticism" or "skeptical" twice on the first day of voir dire, and the second mention referred to a prospective juror's answer that the juror "would be a little bit more

skeptical." (Aug. 2RT 107, 112 [responding to juror's answer].) The next day, defense counsel told Juror 45: "And I liked another term you used a moment ago, which is viewing the witnesses critically—I used the term 'skeptical' yesterday, which I guess could be defined a few different ways. Perhaps 'critical' is the better term there." (Aug. 3RT 255.)

2. Appellant shares L.R.'s male gender.

The circumstances the factfinder may consider include whether: (1) "[t]he objecting party is "a member of the same perceived cognizable group as challenged juror" (§ 231.7, subd. (d)(3)(A)(i)), (2) "the alleged victim is not a member of that perceived cognizable group" (§ 231.7, subd. (d)(3)(A)(ii)), and (3) "Whether race, ethnicity, gender ... or perceived membership in any of those groups, bear on the facts of the case to be tried" (§ 231.7, subd. (d)(3)(B).)

The trial court correctly found appellant, Doe, and the mother share L.R.'s race and ethnicity. But it did not consider L.R. and appellant's shared male gender and their membership in both groups together bear on the facts to be tried. (See 5RT 987; 6RT 1001.) Defense counsel alerted the court that "gender, race, ethnicity are all facts that are going to be central to this case." (5RT 987.)

The ultimate issue in the case is whether appellant, Doe's stepdad, sexually abused his stepdaughter. The facts

that bear on the ultimate issue include whether appellant abused a position of trust as Doe's stepdad and whether Doe delayed disclosure of the abuse based on this relationship.

The prosecutor argued to the jury that appellant was the father who was "supposed to protect" Doe but did instead left her "hopeless, helpless, and in fear." (10RT 1427.) Appellant "exploited the trust and love that [Doe had for him. He was the only father figure that she knew." (10RT 1448.) Appellant "abused [Doe's] love for him." (10RT 1456.) The prosecutor argued that Doe did not lie because "[t]his was her father" (10RT 1483) and she would "lose a father that she has loved." (10RT 1478.)

3. Other jurors who did not share L.R.'s race or ethnicity provided similar answers to the single witness question on the questionnaire.

The circumstances the factfinder may consider include whether "other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party." (§ 231.7, subd. (d)(3)(D).)

The prosecutor did not dismiss seated Juror 45, who like L.R., was childless. (Aug. 3RT 251.) Like L.R., Juror 45 also answered Question 33 "not realizing what the actual question was asking" (Aug. 3RT 254) and changed his mind

and revised his answer. (Aug. 3RT 259-260.) The prosecutor also did not dismiss seated Juror 41 who like L.R. initially had a problem with Question 33. (Aug. 3RT 317 [Juror 41 questionnaire showed "both boxes are checked yes and no"].) These seated jurors did not share L.R.'s race or ethnicity. (See 6RT 1000- 1001.)

4. The prosecutor engaged in cursory questioning of L.R.

The circumstances the factfinder may consider include the "number and types of questions posed to the prospective juror." (§ 231.7, subd. (d)(3)(C)(i)-(iii).) Here, the prosecutor engaged in cursory question of L.R. (*Id.* at subd. (d)(3)(C)(ii); I.D., *ante.*) Before striking L.R., the prosecutor directed one or two questions about treating a child and teenager equally with other witnesses before striking him. (Aug. 2RT 158-159.) In response, L.R. said he was comfortable giving a child or a teenager "the same level of open mindedness that you would any other witness." (Aug. 2RT 159.) These questions did not relate to L.R.'s answer to Question 33, the concern "later stated by the party as the reason for the peremptory challenge." (§ 231.7, subd. (d)(3)(C)(i).)

After striking him, the prosecutor asked L.R. two questions about his questionnaire answer to Question 33. (Aug. 2RT 171.) In contrast, the prosecutor asked Juror 45 eleven questions about his answer to Question 33 (Aug. 3RT

259-261) and asked Juror 41 ten questions about his answer to Question 33. (Aug. 3RT 317-318.) The record shows the prosecutor asked different questions of L.R. "in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic" and "phrased those questions differently." (§ 231.7, subd. (d)(3)(C)(iii).)

5. The prosecutor's lack of purposeful discrimination is irrelevant.

The prosecutor stated that both defense counsel and the trial court "noted that [L.R.] belongs to an alleged cognizable group" and "he appeared to be Filipino." (6RT 996; see also 5RT 984 [trial court's finding].) She continued, "the People do not agree or disagree with this assessment because race was not a conscious, or even unconscious factor in our decision. We paid attention to the answers that [L.R.] provided in his questionnaire and in court, and not his appearance." (6RT 996.) But it is irrelevant that the prosecutor did not engage in purposeful discrimination. (§ 231.7, subd. (d)(1) [court need not find purposeful discrimination to sustain the objection].)

6. The trial court's comparative analysis fails.

The circumstances the factfinder may consider include whether the counsel exercising the challenge "has used

peremptory challenges disproportionately against a given race, ethnicity ... in the present case[.]" (§ 231.7, subd. (d)(3)(G).) Here, the trial court made an additional finding that Juror 70, a male juror with a Spanish surname who may or may not be Filipino, remained on the jury. (6RT 1001.) When defense counsel stated his belief that the male juror was Latino, the court said: "It's close. And in any event, I already made my ruling." (6RT 1001.) The court later stated:

> I indicated that [L.R.] possibly could be Filipino. I don't know for sure. It just occurs to me that he could have been Guamanian. He could have been a number of things. In fact, we have a judge on the bench who for years I thought was Hispanic. It turns out she's Guamanian. What's her last name? Judge Arroyo. I don't know if you know her, but clearly when you see her you would think she's Hispanic. And I used to work with her. And the Spaniards were all over the place, including the Philippines. So once again, is [L.R.] Filipino? Maybe. Could be. But he could be a number of other things as well.

(6RT 1003.)

These comments show the trial court may have confused race with ethnicity. Appellant and L.R.'s shared perceived race is Asian and their shared perceived ethnicity

is Filipino. (Office of Management and Budget, "Census Bureau Statement on Classifying Filipinos" (Nov. 9, 2015).)[5]

The totality of the circumstances here shows "more than a mere possibility but less than a standard of more likely than not" that an objectively reasonable person who "is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California" would view L.R.'s race, ethnicity, and gender as a factor in the prosecutor's use of the peremptory challenge. (§ 231.7, subd. (d)(2)(A)-(B).)

G. The judgment must be reversed, and the case remanded for a new trial.

Section 231.7 sets forth a bright line rule for prejudice. "Should the appellate court determine that the objection was erroneously denied, that error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial." (§ 231.7, subd. (j); accord *People v. Uriostegui, supra,* 101 Cal.App.5th at p. 279 ["if we conclude that the court erred in overruling an objection under section 231.7, 'the statute precludes a finding of harmless error'"].)

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[5] Available at: https://www.census.gov/newsroom/archives/2015-pr/cb15-rtq26.html#:~:text=Filipinos%20are%20classified%20as%20Asian,part%20of%20the%20category%20Asian. (Accessed Nov. 11, 2024.)

The judgment must be reversed, and the case remanded for a new trial because the trial court erred in overruling appellant's objection to the prosecutor's peremptory challenge to prospective juror L.R.

II. THE FORCIBLE SEX CRIMES CHARGED IN COUNTS 1 TO 9 MUST BE REVERSED BECAUSE DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO PREJUDICIAL PROSECUTORIAL MISCONDUCT IN MISSTATING THE LAW ON DELIBERATIONS.

During closing argument, the prosecutor misstated the law by telling the jurors that they did not need to consider the uncharged nonforcible lesser included crimes unless they first acquitted appellant of the greater forcible sex crimes charged in counts 1 to 9. Defense counsel did not object to the misconduct and did not request curative admonitions. Counsel's omissions were constitutionally ineffective because there is a reasonable probability that at least one juror would have harbored reasonable doubt on the charged greater crimes had he properly objected.

The judgment on counts 1 to 9 should be reversed.

A. Background.

The jury was presented with the possibility of either the greater forcible sex crimes or the lesser nonforcible

offenses in counts 1 to 9. Counts 1 to 6 charged forcible lewd acts on a child in violation of Penal Code section 288, subdivision (b). The uncharged lesser offense for these six counts is nonforcible lewd acts on a child under section 288, subdivision (a). (9RT RT 1403-1404; 10RT 1422, 1425; 3CT 739.) Counts 7 through 9 charged aggravated sexual assault of a child (forcible oral copulation) in violation of Penal Code section 269, subdivision (a). The uncharged lesser offense on these three counts included simple assault under section 240. (9RT 1403-1404; 10RT 1419-1420, 1423, 1425-1426; 3CT 739.)

The trial court instructed the jury: "If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." (3CT 697, 9RT 1395 [CALCRIM No. 200].) It also instructed: "If all of you find that the defendant is not guilty of the greater crime, you may find him guilty of a lesser crime" and "It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime." (10RT 1425-1426, 3CT 739 [CALCRIM No. 3517].)

After the trial court instructed the jury, the prosecutor told the jury:

> The judge also read to you a series of lesser included offenses. These offenses are simple assault. And for Counts 1 through 6, it's lewd touching without force or fear or duress. So essentially, you just don't find that there is any force or duress, but you still find there was touching with sexual intent.
>
> But you don't even need to reach those lesser included. If you find that he's guilty on the charge of lewd or lascivious act on a child with force, fear or duress, you just check the guilty verdict form, and you set aside all the unused verdict forms. So you only need to look at the lesser included if you've already found him not guilty, which means you did not find and believe [Doe's] testimony. So you don't need to reach any of lesser included unless you return a verdict of not guilty.

(10RT 1455.)

B. Applicable standards.

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel. [Citations.] The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its result. [Citations.] [¶] Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather

to effective assistance. [Citations.] Specifically, it entitles him to 'the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.'" (*People v. Ledesma* (1987) 43 Cal.3d 171, 215, original italics.)

To assert such a claim, the defendant must meet a two-pronged showing. First, the defendant must establish that "counsel's representation fell below an objective standard of reasonableness …. [¶] under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) When the record shows that "there simply could be no satisfactory explanation" for counsel's challenged acts or omissions, they must be deemed ineffective on appeal. (*People v. Pope* (1979) 23 Cal.3d 412, 426; *People v. Mendoza Tello* (1997) 16 Cal.4th 264, 266.)

Second, reversal is mandated where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra,* 466 U.S. at 694; *People v. Centeno* (2014) 60 Cal.4th 659, 676.) It requires "a significant but something-less-than-50 percent likelihood of a more favorable verdict." (*People v. Howard* (1987) 190 Cal.App.3d 41, 48; see also *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics in original [a reasonable

probability "does not mean more likely than not, but merely *a reasonable chance*, more than an *abstract possibility*"].)

Appellant has the burden of proving ineffective assistance by a preponderance of the evidence. (*People v. Foster* (1992) 6 Cal.App.4th 1, 11.) "Whether counsel's performance was deficient, and whether any deficiency prejudiced defendant, are mixed questions of law and fact subject to [this Court's] independent review." (*In re Gay* (2020) 8 Cal.5th 1059, 1073.)

C. The prosecutor committed misconduct by misstating the law of deliberations.

California law "simply restricts a jury from *returning a verdict* on a lesser included offense before acquitting on a greater offense and does not preclude a jury from *considering* lesser offenses during its deliberations." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 324-325, italics in original.) The Court explained:

> Instructions should not suggest that a not guilty verdict must actually be returned before jurors can consider remaining offenses. Jurors may find it productive in their deliberations to consider and reach tentative conclusions on all charged crimes before returning a verdict of not guilty on the greater offense.

(*Id.,* at p. 336.)

This rule protects a defendant's interest in "not improperly restricting the jury's deliberations." (*People v. Kurtzman, supra,* 46 Cal.3d at p. 334.) After *Kurtzman,* our high court has repeatedly instructed that "a trial court should not tell the jury it must first unanimously acquit the defendant of the greater offense before deliberating on or even considering a lesser offense." (*People v. Dennis* (1998) 17 Cal.4th 468, 536, citing *Kurtzman,* at p. 335; accord *People v. Fields* (1996) 13 Cal.4th 289, 303-304; *People v. Bacon* (2010) 50 Cal.4th 1082, 1110; *People v. Anderson* (2009) 47 Cal.4th 92, 114-115; *People v. Berryman* (1993) 6 Cal.4th 1048, 1076-1077.)

On counts 1 through 9, the prosecutor argued to the jury, "you only need to look at the lesser included if you've already found him not guilty, which means you did not find and believe [Doe's] testimony," and "you don't need to reach any of lesser included unless you return a verdict of not guilty." (10RT 1455.) The assertions that the jurors need not consider the lesser crimes unless they first found appellant not guilty of the greater crimes is contrary to settled law. (See, e.g., *People v. Kurtzman, supra,* 46 Cal.3d at pp. 334-335; *People v. Dennis, supra,* 17 Cal.4th at p. 536; *People v. Fields, supra,* 13 Cal.4th at pp. 303-304; *People v. Bacon, supra,* 50 Cal.4th at p. 1110.) The prosecutor committed misconduct by misstating the law. (*People v. Bell* (1989) 49

Cal.3d 502, 538 ["Although counsel have broad discretion in discussing the legal and factual merits of a case (citation), it is improper to misstate the law"]; accord *People v. Mendoza* (2007) 42 Cal.4th 686, 702; *People v. Marshall* (1996) 13 Cal.4th 799, 831.)

D. Counsel was ineffective when he failed to object to the prosecutor's misconduct.

Defense counsel has a duty to protect a defendant's interests against prosecutorial misconduct and preserve the issue for appellate review. (*People v. Bell, supra,* 49 Cal.3d at p. 538; *People v. Lopez* (2008) 42 Cal.4th 960, 966; *People v. Hawthorne* (2009) 46 Cal.4th 67, 90; *People v. Centeno, supra*, 60 Cal.4th at p. 674.) Here, counsel failed to protect appellant's interest in "not improperly restricting the jury's deliberations" (*People v. Kurtzman, supra,* 46 Cal.3d at p. 334) and forfeited the appellate claim of misconduct by not objecting and not requesting a curative admonition. (*Hawthorne,* at p. 90; *Lopez,* at p. 966; *Centeno,* at p. 674.)

There can be no conceivable tactical purpose for counsel's failure to object to obvious misstatements of law in closing argument. (See *People v. Centeno, supra,* 60 Cal.4th at p. 675 [failing to object to the prosecutor's argument that jury could convict based on a "reasonable" account of the evidence "cannot conceivably be viewed as beneficial to the defense"].) Appellant had nothing to gain by allowing the

prosecutor to tell the jurors that they need not consider the lesser offenses unless they first acquitted appellant of the greater forcible sex offenses charged in counts 1 to 9. (10RT 1455.)

The greater forcible sex crimes charged in counts 1 to 9, required appellant to commit the sex acts by use of force, duress, or fear. The parties disputed the sufficiency of evidence to prove this element. (See, e.g., 2CT 425-428 [defense motion to dismiss arguing insufficiency on force or duress on counts 1 to 9]; 2CT 438-443 [prosecution opposition]; 10RT 1447-1448 [prosecution closing argument]; 10RT 1474-1475 [defense closing argument]; 10RT 1482-1483 [prosecution rebuttal].) And based on his convictions on the greater forcible sex crimes, the trial court imposed greater punishment than it would have for nonforcible crimes. The court imposed six consecutive eight-year full terms on counts 1 to 6 and three consecutive indeterminate life terms on counts 7 to 9. (13RT 3609-3610; 3CT 860-865; Pen. Code, §§ 269, subd. (c), 667.6, subd. (d); *People v. Rodriguez* (2012) 207 Cal.App.4th 204, 211-212.)

Finally, because counsel could have objected at sidebar and the objection could have been "adjudicated outside the presence of the jury, there could be no satisfactory tactical reason for not making a potentially meritorious objection." (*In re Hall* (1981) 30 Cal.3d 408, 434.)

E. But for counsel's omissions, there is a reasonable probability that at least one juror would have harbored reasonable doubt on counts 1 to 9.

A reasonable probability "does not mean more likely than not, but merely *a reasonable chance*, more than an *abstract possibility*." (*College Hospital, Inc. v. Superior Court, supra,* 8 Cal.4th at p. 715, italics in original, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 and *Strickland v. Washington, supra,* 466 U.S. 668, 693-694, 697, 698.) Prejudice must be found when the defendant can "'undermine confidence'" in the trial's result. (*Ibid*.)

But for counsel's failure to object to the prosecutor's misconduct and request curative instructions, there is more than an abstract possibility the outcome of the trial would have been more favorable. (*Strickland v. Washington, supra,* 466 U.S. at p. 687; *People v. Kurtzman, supra,* 46 Cal.3d at p. 335.)

1. The jury could have properly found verdicts on the lesser crimes.

The prosecutor's improper arguments sought to limit the jury's consideration of appellant's guilt on nonforcible lesser crimes to the greater forcible sex crimes charged in counts 1 to 9. But the evidence could have supported the greater or the lesser offense on one or more of the nine

counts. There is thus more than an abstract possibility the jury would have returned verdicts on the lesser offenses if counsel had objected to the prosecutor's repeated misstatements of the law. (See *People v. Giardino* (2000) 82 Cal.App.4th 454, 467 [prejudice shown when "the evidence supports conflicting conclusions"].)

On the forcible lewd acts charged in counts 1 to 6, this Court has made clear that any violation of Penal Code section 288 is inherently coercive because of the age of the victim. Accordingly, the harsher penalty of section 288, subdivision (b) applies only to "'defendants who compound their commission of such acts by the use of violence or threats of violence[.]'" (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1321, citation omitted.) On these six counts, Doe testified only about three acts arguably involving physical control or resistance. (7RT 1066 [in one incident, Doe pushed appellant back a bit, but he continued rubbing his penis against her vagina for a few minutes]; 7RT 1080-1082 [appellant grabbed Doe's hand and put it on his penis two times].)

Doe also testified that appellant said once if Doe told her mom about the sexual abuse, her mom would kill him. (7RT 1067.) A "simple warning to a child not to report a molestation reasonably implies the child should not otherwise protest or resist the sexual imposition." (*People v. Senior* (1992) 3 Cal.App.4th 765, 775.) But here, Doe never

testified appellant made the statement before any lewd act occurred. (7RT 1067; see *People v. Espinoza, supra,* 95 Cal.App.4th at p. 1321 ["No evidence was adduced that defendant's ... [sex offenses] were accompanied by any 'direct or implied threat' of any kind"].) Doe did not remember how she felt when he made the statement and did not remember if appellant asked her not to tell her mom. (7RT 1067.)

Doe testified she was taught to follow what her parents told her to do and "would always follow directions." (7RT 1051; see also 7RT 1132 ["I was taught to like follow what my parents told me to do, and I would just follow what they told me to do"].) But Doe also testified she got in trouble if she did not listen to what her mom or dad told her to do (7RT 1051) and had her cell phone taken away many times since the fifth grade as punishment. (7RT 1130.) Appellant was at times was "kind of strict, but he was okay." (7RT 1133.) He disciplined Doe by hitting her "with a belt or a slipper or something" (7RT 1133) or by taking away her cell phone. (7RT 1117, 1130.)

Doe testified she was afraid to disobey appellant because she felt she "would get abused or something like that." (7RT 1133.) But "[i]t would be circular reasoning to find that her fear of molestation established that the molestation was accomplished by duress based on an implied threat of molestation." (*People v. Espinoza, supra*, 95 Cal.App.4th at p. 1321.)

On counts 7 to 9, the jury requested readback on Doe's testimony "about the oral copulation," indicating jury disagreement on these counts. (3CT 762, 764 [requesting readback of Doe's testimony "from the pregnancy test to the garage, plus the cross, recross and redirect" and "questions & answers about the oral copulation"]; *People v. Hernandez* (1988) 47 Cal.3d 315, 352-353 ["requests to the court for further instructions or the rereading of particular testimony" are indications of jury disagreement"]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [jury "questions and requests to have testimony reread are indications the deliberations were close"]; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 [same].)

This case must also be considered close because the prosecution case hinged on Doe's credibility. (10RT 1455 [prosecutor arguing, "So you only need to look at the lesser included if you've already found him not guilty, which means you did not find and believe [Doe's] testimony"]; 10RT 1483 [prosecutor arguing the case depended entirely on "whether or not you believe the defendant or whether or not you believe [Doe]"]; *In re Edward S.* (2009) 173 Cal.App.4th 387, 418 ["the case must be considered a close one because there was no eyewitness or physical evidence and the matter turned almost entirely on credibility"]; *People v. Centeno, supra,* 60 Cal.4th at p. 677 [a case relying "almost entirely"

on credibility of a single witness is not as strong]; *People v. Taylor* (1986) 180 Cal.App.3d 622, 633-634 [same].)

This record shows that while the verdicts on the forcible sex crimes may have been reasonable as supported by the record, verdicts on the lesser offenses would also have been reasonable. But for counsel's omissions, there is a reasonable probability that at least one juror would have reached verdicts on the lesser offenses on any number of the greater forcible sex crimes charged in counts 1 to 9. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1090 ["The actual verdict was reasonable, but so too would have been a different one"]; *People v. Dewberry* (1959) 51 Cal. 2d 548, 555 [when the jury has determined that the defendant is guilty of an offense but has a doubt whether the offense is greater or lesser, the jury must be instructed to convict on the lesser].)

2. The record does not show the jury considered the lesser included offenses.

In *Kurtzman,* the trial court's erroneous instruction on the order of deliberation was harmless because the discussions between the court and the jury showed "the jurors had in fact deliberated on both [charged offense] and on [lesser included offense]" for two days before the court's erroneous instruction and "even thereafter, despite

erroneous guidance from the court." (*People v. Kurtzman, supra,* 46 Cal.3d at p. 335.)

Unlike *Kurtzman,* the record here does not show the jury considered the lesser offenses. Although the case involved 13 charged crimes and lesser included offenses on counts 1 through 9, the jury deliberated for about four hours. (3CT 695 [deliberating for three hours on the first day]; 3CT 769 [deliberating for about an hour on the second day].) This short duration shows the jury found strong evidence of some crimes. It also shows the jury could not have substantially or meaningfully considered the lesser included offenses. In these circumstances, a clear danger exists that "'dissenters favoring the lesser may [have] throw[n] in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser charge.'" (*United States v. Jackson* (9th Cir. 1984) 726 F.2d 1466, 1469 [although evidence of greater offense was "overwhelming," jury might nonetheless "have found a basis for reasonable doubt"]; accord *People v. Hishmeh* (2020) 52 Cal.App.5th 46, 54; see also *People v. Dewberry, supra,* 51 Cal. 2d at p. 555 [when jury has determined defendant is guilty of an offense but has a doubt whether the offense is greater or lesser, jury must convict on the lesser].)

Unlike in *Kurtzman,* there is an unacceptable risk here that the prosecutor's misconduct improperly influenced the verdict.

3. The trial court's other instructions did not cure the harm.

Before closing arguments, the trial court instructed the jury with CALCRIM Nos. 200 and 3517. But these instructions could not cure the harm.

CALCRIM No. 200 instructed: "If you believe that the attorney's comments on the law conflict with my instructions, you must follow my instructions." (3CT 697, 9RT 1395.) And while lengthy, CALCRIM No. 3517 did not conflict with the prosecutor's misstatements to the jury that "you only need to look at the lesser included if you've already found him not guilty [of greater offenses], which means you did not find and believe [Doe's] testimony," and "you don't need to reach any of lesser included unless you return a verdict of not guilty." (10RT 1455.)

CALCRIM No. 3517 contains one sentence addressing the order of deliberations: "It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime." (10RT 1426; 3CT 739.) But this sentence did not tell the jury that it needed to consider the lesser included

offenses.

CALCRIM No. 3517 also did not tell the jury that "when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, ... if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*People v. Dewberry, supra,* 51 Cal.2d at p. 555; accord *People v. Crone* (1997) 54 Cal.App.4th 71, 76 ["in any case involving a lesser included offense, the trial court has a duty to give a *Dewberry* instruction sua sponte"].) Instead, it instructed: "If all of you find that the defendant is not guilty of the greater crime, you may find him guilty of a lesser crime" and "If all of you agree the People have proved beyond a reasonable doubt that the defendant is guilty of a greater crime, complete and sign the verdict form of guilty of that crime." (10RT 1425; 3CT 739.)

With no clear conflict between the prosecutor's misstatements of law and the trial court's instruction with CALCRIM No. 3517, the court's instruction with CALCRIM No. 200 could not cure the harm. (See 3CT 697 ["If you believe that the attorney's comments on the law conflict with my instructions, you must follow my instructions"]; *People v. Osband* (1996) 13 Cal.4th 622, 717 ["When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former"].) That said, with CALCRIM No. 200, the trial

court also instructed: "Some of these instructions may not apply depending on your findings about the facts of the case." (3CT 697.)

Finally, the trial court's instructions could not correct the prosecutor's misstatements or clarify the correct law after she made them because the instructions preceded closing argument. (10RT 1395, 1425-1426 [instructions]; 10RT 1455 [closing argument].)

With no objection or request for curative instructions from counsel and no clear conflict in the instructions, the jurors could have reasonably believed the prosecutor was correct when she told them they need not consider the uncharged lesser included offenses unless they first acquitted appellant of the greater charged offenses. There is a reasonable chance that but for counsel's omissions, at least one juror convicted appellant of all nine greater forcible sex crimes without considering the lesser included offenses.

The judgment on counts 1 to 9 should be reversed.

III. APPELLANT'S CONVICTIONS ON COUNTS 10 AND 11 FOR VIOLATING PENAL CODE SECTION 136.1, SUBDIVISION (b)(2) MUST BE REVERSED BECAUSE NO DISSUASIVE CONDUCT OCCURRED AFTER THE FILING OF THE CRIMINAL COMPLAINT.

Post charging dissuasion cannot constitute an offense under Penal Code section 136.1, subdivision (b)(2). Counts

10 and 11 are unsupported by substantial evidence because the prosecution produced no evidence of dissuasive conduct that occurred before the filing of the criminal complaint.

The judgments on counts 10 and 11 must be reversed.

A. Background.

The prosecution filed the criminal complaint on January 10, 2019. (8RT 1178; 9RT 1350; see 1CT 23 [complaint signed on 1/9/19].) Counts 10 and 11 allege that appellant attempted to dissuade the mother and Doe from prosecuting a crime between January 10, 2019, and March 8, 2019, in violation of Penal Code section 136.1, subdivision (b)(2). (2CT 521-522.)

The prosecution evidence on counts 10 and 11 consisted of appellant's letters postmarked in February 2019, a March 2019 jail call, and testimony about these communications. (8RT 1241 [Exh. 7, letter postmarked 2/24/19], 1241-1242 [Exh. 8, letter postmarked 2/18/19], 1242 [Exh. 11, letter postmarked 2/28/19]; 8RT 1244 [Exh.12, letter postmarked 2/12/19]; 8RT 1247 [Exh. 14A and 14B, 3/6/19 jail call]; 3CT 796.)

In the February 2019, letters, appellant: (1) told the mother to write a letter stating, "I want to drop and withdraw the charges against my step-dad Ponchito" and drop it off at the district attorney's office (8RT 1241; Exh. 7); (2) asked the mother to bring a letter he wrote addressed to

the trial court to the district attorney and to court (8RT 1241-1242; Exh. 8); (3) begged the mother and Doe to not deny him help (8RT 1243; Exh. 11); and (4) asked the mother and Doe to drop the case. (8RT 1245; Exh. 12.) In the March 2019, jail call, appellant said Doe can save him by changing her statement and asked the mother to ask the district attorney to withdraw the charges. (8RT 1252.)

B. Applicable standards.

A criminal conviction violates a defendant's federal constitutional right to due process of law and the state constitution if the evidence was insufficient to "convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." (*Jackson v. Virginia* (1979) 443 U.S. 307, 316, citing *In re Winship* (1970) 397 U.S. 358; *People v. Rowland* (1992) 4 Cal.4th 238, 269; U.S. Const., 14th amend.; Cal. Const., Art. I, § 15.)

On a challenge to the sufficiency of the evidence, the reviewing court must examine the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 320; *People v. Johnson* (1980) 26 Cal. 3d 557, 578.) "'By definition, 'substantial evidence' requires *evidence* and not mere speculation," and "[a] finding of fact must be an inference drawn from evidence rather than … a

mere speculation as to probabilities without evidence.'" (*People v. Perez* (1992) 2 Cal.4th 1117, 1133, italics in original, internal citation and quotation marks omitted.)

C. Counts 10 and 11 must be reversed because the jury convicted him on these counts based only on conduct occurring entirely after the criminal complaint had been filed.

"Penal Code section 136.1, subdivision (b)(2) makes it a crime to attempt to dissuade a victim or witness from '[c]ausing a complaint … to be sought and prosecuted, *and* assisting in the prosecution thereof.'" (*People v. Reynoza* (2024) 15 Cal.5th 982, 986, italics in original, quoting Pen. Code, § 136.1, subd. (b)(2); see also *People v. Fernandez* (2003) 106 Cal.App.4th 943, 948 ["Section 136.1, subdivision (b)(1) is not a catch-all provision designed to punish efforts to improperly influence a witness. Rather, it is one of several … which establishes a detailed and comprehensive statutory scheme for penalizing the falsification of evidence and efforts to bribe, influence, intimidate or threaten witnesses"].)

In *Reynoza,* the issue before the California Supreme Court was whether section 136.1, subdivision (b)(2) "requires proof of an attempt to dissuade a witness from causing a charging document to be sought and prosecuted ... or whether the statute also independently applies where a

defendant dissuades a witness only from 'assisting in the prosecution' of a case after the charging document has already been filed." (*People v. Reynoza, supra*, 15 Cal.5th at p. 989.) Put another way, does the statute support a "*disjunctive* interpretation—in which the statute independently applies where a defendant dissuades a witness from 'assisting in the prosecution' of a case after the charging document has already been filed—or whether a *conjunctive* interpretation precludes a conviction under such circumstances." (*Id.*, at p. 986, italics in original.)

Our high court held: "Where criminal charges have already been filed, postcharging dissuasion alone does not constitute an offense under" Penal Code section 136.1, subdivision (b)(2). (*People v. Reynoza, supra*, 15 Cal.5th at p. 1013.) The Court reasoned that because the statute "is equally susceptible to both the conjunctive and disjunctive constructions," the rule of lenity points to an "interpretation more favorable to the defendant." (*Id.* at p. 987.) The statute thus must be read in "the conjunctive construction, which does not permit a conviction to be based solely on proof of dissuasion from 'assisting in the prosecution' of an already-filed charging document." (*Ibid.*)

Here, as in *Reynoza,* the jury convicted appellant based only "on conduct occurring entirely *after* a criminal complaint had been filed." (*People v. Reynoza, supra,* 15

Cal.5th at p. 986, italics in original; 3CT 796; I.A., *ante*; 8RT 1241-1245, 1252; Exhs. 7, 8, 11, 12, 14A & 14B.) As in *Reynosa,* counts 10 and 11 must be reversed because appellant's conduct "conduct amounted to, at most, dissuasion after a complaint was filed." (*People v. Reynoza, supra*, 15 Cal.5th at p. 987.)

CONCLUSION

For the reasons discussed above, this Court should reverse the judgment.

Dated: Nov. 27, 2024 Respectfully submitted,

Mi Kim
State Bar No. 240413
Attorney for Defendant/Appellant
Ponchito Espejo

CERTIFICATION OF WORD COUNT

I, Mi Kim, hereby certify under California Rules of Court, rule 8.360(b)(1), that this brief contains 16,883 words as calculated by the Microsoft Word software in which it was written.

I declare under penalty of perjury under the laws of California that the above is true and correct.

Dated: Nov. 27, 2024 Respectfully submitted,

_____

Mi Kim
State Bar No. 240413
Attorney for Defendant/Appellant
Ponchito Espejo

PROOF OF SERVICE

I, the undersigned, declare that I am over 18 years and not a party to this action. My business address is listed above. My electronic service address is mi@sdap.org. I served the attached the attached document as follows:

TRUEFILING: By electronically serving the above-named document by transmitting a true copy via this Court's TrueFiling system to:

Office of the Attorney General	Sixth District Appellate Program

ELECTRONIC SERVICE: By sending from my electronic service address of mi@mikimlaw.com the above-named document to each of these persons at the following authorized email service addresses:

Santa Clara District Attorney dca@dao.sccgov.org	Adam Burke Adam.Burke@pdo.sccgov.org
Santa Clara Superior Court – Appeals For delivery to: Hon. Eric Geffron sscriminfo@scscourt.org	

USPS: By placing a copy of the above-named document in a sealed envelope, with the correct postage, and depositing them in the United States Postal Service, to each of these persons at these addresses:

Ponchito Espejo (address on file)

I declare under penalty of perjury that the above is true and correct. Executed on November 27, 2024, at Thousand Oaks, California.

Mi Kim