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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDGAR LLUNCOR, Defendant and Appellant.	B267538 (Los Angeles County Super. Ct. No. VA132662)

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Torribio, Judge. Affirmed.

Eric S. Multhaup for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Edgar Lluncor (defendant) was convicted of five counts of sexual penetration by fraudulent representation of a professional purpose. (Pen. Code, § 289, subd. (d)(4).)[1] The jury found true the allegation that defendant committed the offenses against multiple victims. (§ 667.61, subd. (b).) The trial court sentenced defendant to eight years in prison for the count 1 conviction and imposed concurrent eight-year terms for the remaining counts.

Defendant appeals from the judgment of conviction, contending there is insufficient evidence that he made fraudulent representations to his victims or that they were unaware of the nature of his activities, He also contends the trial court erred in failing to instruct the jury on any lesser included offenses.

There is substantial evidence to support the convictions: the evidence showed that defendant was either guilty of the charged crime or not guilty at all, and so the trial court did not have a duty to instruct on any lesser included offenses. We affirm the judgment of conviction.

BACKGROUND

Defendant received his California medical license in 1981. He specialized in gastroenterology. Defendant had an office in Bell. The office had a waiting room, an area where a patient's weight and blood pressure could be taken and two examining rooms. The jury took a field trip to view defendant's office.

The Bell Police Department began investigating defendant in 2012, following a complaint that he had sexually assaulted a patient. An officer

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1 Further unspecified statutory references are to the Penal Code.

first interviewed a victim in this case, C. Doe,[2] on November 16, 2012. Defendant was arrested on October 23, 2013. The remaining victims in this case were interviewed by police after defendant was arrested. None of the victims knew each other.

1. Prosecution case

A. B. (count 6)

B. was referred to defendant by her doctor for stomach problems. She had been seen by defendant at least one time before any improper touching occurred. At that visit, he prescribed medication for those problems.

On a subsequent visit, in 2010, B. was taken to an examination room. Defendant entered and told her to lie down so he could examine her vagina. She took off her pants and underwear and laid down on an examining table covered with paper. Defendant had a glove on one hand. He inserted his fingers into her vagina and moved them around for about two minutes. He removed his fingers, washed his hands, told B. to get up and then left the room to tell the nurse to give B. a prescription. Defendant told B. her vagina was fallen. B. got dressed and left.

Initially, B. did not tell anyone what had happened because she believed defendant had done the touching "for [her] illness." In November 2013, B.'s doctor, Leticia Gonzalez, was going to refer her to a gastroenterologist again. B. asked Gonzalez not to refer her to defendant because he had touched her vagina in the past.

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[2] The victims' true last names were withheld in the trial court and they were identified by their first names and the fictitious last name of Doe. We refer to the women by their first names [or their first initial] for clarity and not out of any lack of respect.

Gonzalez, who was in fact a physician's assistant, confirmed that B. told her of the vaginal touching on November 5, 2013, in connection with a gastroenterologist referral.

B. Olivia (count 7)

Olivia was referred to defendant by her doctor for gastritis and a hernia. In November 2010, Olivia went to defendant's office and was taken to an examination room. Defendant came in, asked her questions and wrote down the answers. She told him she was there because she had gastritis and esophagus and colon problems. Defendant told her to lie on an examining table covered with paper, and to lower her pants and underwear. She complied. Defendant, who was wearing gloves, inserted his fingers into her rectum and moved them around. He then inserted his fingers into her vagina and moved them around in a hard manner that caused pain for over five minutes. Eventually, defendant removed his fingers. He did not say anything. He may have given Olivia some medication.

Olivia continued to see defendant for her medical problems for a time. At some point, she told her sister about defendant's touching. After that, Olivia stopped going to defendant. On February 18, 2014, Olivia told a caseworker in the Department of Mental Health that a doctor had touched her inappropriately. The caseworker encouraged her to report the matter to police.

C. Teresa (count 4)

Teresa was referred to defendant by her doctor for hemorrhoid treatment. During her first three visits, defendant inspected her buttocks and prescribed medicine.

During a March 2011 visit, Teresa was taken to an examination room. Defendant entered the room and told her to get on the examining table. He

lowered her underwear and inserted his fingers into her vagina. Defendant was wearing gloves. He moved his fingers around for an extended period of time. Eventually, he took his fingers out and told her she was "ready." Her vagina hurt and stung. She left.

About 15 days later, Teresa told the referring doctor, Angel Perez, about what defendant had done to her. Dr. Perez gave her some ointment for pain to put on her vaginal area.

D. C. (count 1)

C. was referred to defendant by her doctor for treatment of abdominal pain. On October 1, 2012, C. went to defendant's office and was taken to an examination room. Defendant entered the room. C. told him that she had stomach pain. Defendant told her to lie down on the examining table. He pulled down her underwear and put his fingers in her vagina. He was not wearing gloves. C. told defendant that she had pain in her stomach, not her vagina. He did not respond. She tried to get up, but he held her down. When defendant eventually removed his fingers, he pulled something out of C.'s vagina, and urine and blood came out of her vagina. Defendant told her that she had many scars inside her. C. said that it hurt a lot. Defendant left. A woman gave her Tylenol and C. left the office.

On October 12, 2012, C. went to her referring doctor, Dr. Castillo, to tell him what had happened but he was not available. C. told Dr. Ma, another physician in the office, what had happened, but said that she really wanted to tell Dr. Castillo. Documents showed that C. saw Dr. Castillo on November 16, 2012. The document contains a reference to the police being called.

E. Ana (count 3)

Ana was referred to defendant for gastritis. She had been seen by defendant several times before the improper touching occurred.

On March 12, 2013, Ana arrived at defendant's office and was taken to an examination room. Defendant entered the room. He told Ana to lie down on the paper-covered exam table because he was going to examine her stomach. She got on the table and lowered her pants to uncover her stomach. Defendant said he was going to examine her pelvis. Ana lowered her clothes down to her knees. After touching Ana's legs, defendant told her that he was going to touch her "down there." He then put his fingers or hand into her vagina very forcefully. He moved his fingers around fast and hard and it hurt. He was wearing gloves. After he took his fingers out, he said he was going to give her some medicine. He left and returned with some medicine. Ana went to the bathroom and then left.

The next day, Ana spoke with physician's assistant Gonzalez, who had referred her to defendant. Ana told her that defendant had touched her inappropriately. Gonzalez called defendant and asked him about Ana's statement. Defendant said he had not performed a vaginal exam on Ana and he did not perform vaginal exams.

F. Expert testimony

Dr. Graham Woolf, a gastroenterologist, testified that gastroenterology is the study of the mouth, esophagus, stomach, intestines, and rectum and also the spleen, liver, gall bladder and pancreas. Dr. Woolf reviewed the medical records of the victims in this case and opined that there was no reason for a gastroenterologist to do a vaginal exam for the complaints of these patients. Dr. Woolf had been in practice for 27 years and had treated 15,000 patients. He had never performed a vaginal exam.

2. Defense

Defendant offered the testimony of his receptionist, Erika Alarcon, and his office assistant, Vanessa Razo, that they never saw any paper on the examining tables with blood or urine on them. Alarcon specifically recalled removing the paper after C.'s visit. She did not notice any blood or urine on the paper. Razo testified she never heard C. or anyone yell at defendant and accuse him of misconduct. She never heard anyone screaming or yelling behind the closed doors of the examining room.

Defendant also presented evidence that in October 2008 Olivia was diagnosed with major depressive disorder, and in September 2009 she was diagnosed with dementia.

DISCUSSION

I. Fraudulent Representations

Defendant contends there is insufficient evidence to support any of his convictions because there is no evidence he made any statement that his digital penetration of the women had a professional purpose. He also contends there is no evidence that the women believed the digital penetration was for a professional purpose. He further contends that because his conviction is based on insufficient evidence, it violates his state and federal constitutional rights to due process.

A. Sexual penetration by misrepresentation

Section 289, subdivision (d) provides in pertinent part: "Any person who commits an act of sexual penetration, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act or causing the act to be committed, shall be punished by imprisonment in the state prison for three, six, or eight years." The phrase "unconscious of the nature of the act" means "incapable of resisting because

the victim meets one of the following conditions: . . . (4) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose." (§ 289, subd. (d)(4).)

B. Statement or representation

Defendant contends section 289, subdivision (d)(4) requires an express verbal statement that the touching is for a professional purpose.

We agree with our colleagues in the First and Fourth District Courts of Appeal that an express verbal statement is not required under section 289. (*People v. Icke* (2017) 9 Cal.App.5th 138, 145 (*Icke*); *People v. Pham* (2009) 180 Cal.App.4th 919, 926-927 (*Pham*).)

In *Pham*, the court explained that section 289, subdivision (d)(4) "does not require an express representation; it simply speaks to the situation where the defendant 'fraudulently represented that the touching served a professional purpose.' (*Ibid.*) In keeping with the statute's intent to criminalize sexual acts committed under the guise of professional services, it only makes sense to consider the totality of the defendant's conduct—not just his verbal statements—in determining whether he fraudulently represented the nature of his actions. After all, actions often speak louder than words: 'A false promise can as easily, perhaps more easily, be implied from conduct as from language[.]' (*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1046.) [¶] We must also be mindful of the fact that, when it comes to treating their patients, physicians occupy a position of implicit trust. A medical professional 'who holds him or herself out to the public as one available to administer to the medical needs of patients through examination and treatment is burdened with the duty to act for medical

purposes in dealing with patients seeking medical care. There is an inherent trust and confidence which a patient seeking medical care places in the [professional] and upon which a patient relies in allowing the [professional] access to the most intimate parts of the body.' (*State v. Tizard* (Tenn.App.1994) 897 S.W.2d 732, 742–743.)" (*Pham, supra,* 180 Cal.App.4th at p. 926.)

The *Icke* court found the reasoning of *Pham* "instructive." (*Icke, supra,* 9 Cal.App.5th at p. 147.) The court in *Icke* likewise held that "the representation need not be a verbal statement; physical circumstances and a course of conduct may indirectly communicate a false professional purpose." (*Ibid*.) The court held that the context of the case before it, "an appointment with Icke for the specific purpose of providing a final chiropractic treatment . . . was sufficient to communicate a purported professional purpose for *all* of the touching Icke engaged in while Doe lay on a treatment table," including the sexual touching of her labia. (*Ibid*.)

Here, the circumstances surrounding the victims' encounters with defendant, together with defendant's conduct, is sufficient to show a false representation that the touching was for professional purposes. Defendant was a licensed medical doctor specializing in gastroenterology. The victims were all referred to defendant by another doctor for diagnosis and treatment of problems in defendant's area of specialization. Defendant had an office with a waiting area, a receptionist, a hall area where patients could be weighed and have their blood pressure taken and at least one examining room. Thus, defendant held himself "'out to the public as one available to administer to the medical needs of patients through examination and treatment.'" (*Pham, supra,* 180 Cal.App.4th at p. 926.)

The victims went to defendant's office during normal office hours, were met by staff and taken to an examining room. B., Teresa and Ana had all been seen by defendant before and treated without incident. It was Olivia's first visit, and defendant began the examination by asking her questions about her condition. It was also C.'s first visit. She began the visit by describing her medical problem. Defendant directed all the women to lie down on a paper-covered exam table. Four of the five women stated that defendant was wearing gloves. Thus, the women's encounters with defendant had all the indicia of a normal medical appointment. Accordingly, the context of the women's encounters with defendant is sufficient to convey a "purported professional purpose for *all* of the touching" defendant engaged in while the women were on the examining table. (See *Icke, supra*, 9 Cal.App.5th at p. 147.)

C. The victims' beliefs

Defendant contends that even if his conduct amounted to a false representation, the evidence shows that the victims did not believe him. He points out that all the women testified that they left his office very upset and all told a family member or their primary care provider that inappropriate conduct had occurred.

The women's emotional state when they left defendant's office and the fact they later told others that defendant had acted inappropriately do not provide a reliable indication of when they came to realize his conduct was not for a proper medical purpose. Moreover, defendant's argument does not provide the complete context for the women's actions.

Olivia, Teresa, C. and Ana described the insertion and/or movement of defendant's fingers as painful. B. did not mention pain, but she stated that when defendant removed his fingers, blood and urine came out. Each of the

five women described an abrupt ending to her examination with no apparent plan of treatment for the medical issue which had brought her to defendant. Thus, a reasonable jury could find that some or all of the women's emotional state when leaving defendant's office was attributable to their physical discomfort and unresolved medical issues.

Two of the women expressly testified they did believe defendant was acting for a professional purpose at the time of the visit. B. testified she did not say anything to anyone at the office because she believed the touching had been done for a medical purpose. Olivia testified she did not ask defendant what he was doing because she thought the touching was normal.

Two of the women made statements which expressed skepticism that defendant understood their medical problems. Ana asked defendant, "Are you the doctor? Do you know what you're doing?" Since Ana had been seen by defendant before and knew he was a doctor, her question is reasonably understood as questioning his professional judgment that a vaginal exam would be useful for her gastro-intestinal problems. Nothing in the questions suggests Ana believed that defendant had a nonmedical reason for touching her. C. testified that when defendant put his fingers in her vagina, she told him the pain was in her upper stomach area, not her vagina. Her comments indicate she believed defendant had made a mistake or was confused about her medical problems. Her comments do not suggest she believed defendant had a nonmedical reason for examining her.[3]

The fifth woman, Teresa, clearly came to believe defendant had an improper purpose in touching her vaginal area, but this awareness appears to

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[3] When defendant did not reply or remove his fingers, C. tried to get up, which could indicate that she no longer believed the touching was for a professional purpose. The offense was complete when defendant inserted his fingers, however.

have arisen after defendant began moving his fingers. Teresa had been seen by defendant on prior occasions without incident, and her description of her last visit does not indicate any suspicion of defendant's motives until after he inserted his fingers into her vagina. She testified that once defendant's fingers were inserted, he "masturbated" her. The offense was completed at that point.

II. **Failure to instruct**

Defendant contends the trial court erred prejudicially in failing to instruct the jury sua sponte on lesser included offenses to the charged offense of section 289, subdivision (d)(4). Defendant contends assault with the intent to commit a sex offense (§ 220), simple battery (§ 242), attempt (§§ 664, 289, subd. (d)(4)), sexual battery by misrepresentation (§ 243.4, subd. (c)) and misdemeanor sexual battery (§ 243.4, subd. (e)(1)) are all lesser included offenses of section 289, subdivision (d)(4).

As we explain in more detail below, defendant has not shown there are any lesser included offenses to section 289, subdivision (d)(4) under either the elements test for such offenses or the traditional accusatory pleading test. Section 243.4, subdivision (c) would be a lesser included offense only under an expanded accusatory pleading test recently adopted by the Sixth District Court of Appeal in *People v. Ortega* (2015) 240 Cal.App.4th 956 (*Ortega*). Assuming section 243.4, subdivision (c) to be a lesser included offense, the trial court had no duty to instruct the jury on that offense, given the evidence in this case.

A. Duty to instruct

A trial court has a duty to instruct on lesser included offenses if there is substantial evidence from which a trier of fact could reasonably conclude the defendant is guilty of the lesser offense but not the greater one. (*People v.*

Memro (1995) 11 Cal.4th 786, 871.) "'Speculation is an insufficient basis upon which to require the court to give an instruction on a lesser included offense.'" (*People v. Sakarias* (2000) 22 Cal.4th 596, 620.) The mere "existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) An instruction on a lesser included offense is not required when the evidence shows the defendant is "either guilty of the crime charged or not guilty of any crime." (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5.)

"To determine if an offense is lesser and necessarily included in another offense for this purpose, we apply either the elements test or the accusatory pleading test. 'Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former.' (*People v. Reed* (2006) 38 Cal.4th 1224, 1227–1228.)" (*People v. Shockley* (2013) 58 Cal.4th 400, 404.) When the information simply tracks the statutory language of an offense, "we focus on the elements test." (*Ibid*.)

B. Charged offense

A conviction for violating section 289, subdivision (d)(4) requires that the defendant (1) penetrated the genital opening of another person for the purpose of sexual abuse, arousal or gratification; (2) using a foreign object, including any part of the body except a sexual organ; (3) while the victim was unconscious of the nature of the act due to the defendant's false representation that the penetration was for a professional purpose. (§ 289, subds. (d)(4), (k)(1), & (k)(2); see CALCRIM No. 1048.)

C. Sexual battery by misrepresentation

The offense of sexual battery by misrepresentation occurs when a defendant "touches an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse, and the victim is at the time unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose." (§ 243.4, subd. (c).) As used in subdivision (c), "'touches' means physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense." (§ 243.4, subd. (f).)

Sexual penetration in violation of section 289 may be accomplished by a foreign object and so may occur without a touching within the meaning of section 243.4, subdivisions (c) and (f). Thus, sexual battery by misrepresentation is not a lesser included offense of sexual penetration by misrepresentation under the elements test. There are no additional facts alleged in the information, and so it is not a lesser included offense under the traditional accusatory pleading test either.

Defendant urges us to apply the expanded form of the accusatory pleading test adopted in *Ortega, supra,* 240 Cal.App.4th 956. Under that test, facts shown by testimony at the preliminary hearing must be considered in determining the lesser included offenses to the charged offense. (*Id*. at pp. 967-971.) If that test were applied here, sexual battery by misrepresentation would be a lesser included offense, because the facts show that defendant used his fingers to perpetrate the offense, which would constitute a direct touching. Respondent contends the holding of *Ortega* is contrary to the holding of the California Supreme Court in *People v. Smith* (2013) 57 Cal.4th

232, *People v. Ortega* (1998) 19 Cal.4th 686, *People v. Montoya* (2004) 33 Cal.4th 1031 and *People v. Wolcott* (1983) 34 Cal.3d 92.

We need not, and do not, resolve this dispute, because assuming for the sake of argument that the expanded accusatory pleading test of *Ortega*, *supra*, 240 Cal.App.4th 956, is valid and sexual battery by misrepresentation is a lesser included offense of sexual penetration by misrepresentation, the trial court did not have a duty to instruct on sexual battery by misrepresentation.

D. Misdemeanor sexual battery (§ 243.4, subd. (e)(1))

The California Supreme Court has held that misdemeanor sexual battery (§ 243.4, subd. (e)(1)) is not a lesser included offense of sexual battery by misrepresentation. (§ 243.4, subd. (c).) (*People v. Robinson* (2016) 63 Cal.4th 200, 211 (*Robinson*).)[4] The reasoning of *Robinson* shows that misdemeanor sexual battery is not a lesser included offense of section 289, subdivision (d)(4) either.

Section 243.4, subdivision (c) provides: "Any person who touches an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse, and the victim is at the time unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose, is guilty of sexual battery."

Section 243.4, subdivision (e)(1) provides: "Any person who touches an intimate part of another person, if the touching is against the will of the

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[4] The Court in *Robinson* relied on the elements test to determine if misdemeanor sexual battery was a lesser included offense of sexual battery by misrepresentation of professional purpose. (*Robinson, supra*, 63 Cal.4th at p. 210.) Defendant has argued for the use of an expanded accusatory pleading test for making such a determination. Even assuming for the sake of argument that this test applied, it would not change the analysis. The jury would still have to find a lack of consent on some basis other than fraud.

person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery."

As the Court explained in *Robinson*, if a defendant fraudulently represents that his touching is for a professional purpose, but the victim is not deceived by the misrepresentation, there is no violation of section 243.4, subdivision (c). This does not mean that the touching is a misdemeanor sexual battery in violation of subdivision (e)(1), however. "In order to convict defendant of the misdemeanor offense, the jury would have had to find lack of consent on a basis *other than* fraud." (*Robinson, supra,* 63 Cal.4th at p. 211, original italics.) Thus, "a finding of a different form of one element [is] required, and therefore the lesser offense is not included in the greater. [Citation.]" (*Ibid.*)

The charged violation of section 289, subdivision (d)(4) has a fraud requirement virtually identical to that found in section 243.4, subdivision (c), and considered by the Court in *Robinson*. Section 289 requires proof that "the victim is at the time unconscious of the nature of the act . . . due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose." (§ 289, subd. (d)(4).) Thus, if a defendant fraudulently represents that his penetration is for a professional purpose, but the victim is not deceived by the misrepresentation, there is no violation of section 289, subdivision (d)(4). In order for a jury to convict defendant of misdemeanor sexual battery, "the jury would have had to find lack of consent on a basis *other than* fraud." (*Robinson, supra,* 63 Cal.4th at p. 211, original italics.) Thus, "a finding of a different form of one element [is] required, and therefore the lesser offense is not included in the greater. [Citation.]" (*Ibid.*)

E. Section 220

Defendant contends the notes following CALCRIM No. 1048 list assault with intent to commit a sexual offense (§ 220) as a lesser included offense of section 289, subdivision (d)(4). However, there is no reference to section 220 anywhere in the notes following CALCRIM No. 1048. Defendant has not cited any other authority showing that section 220 is a lesser included offense and so has forfeited this claim. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4.)

F. Simple battery

Defendant relies almost entirely on the notes following CALCRIM No. 1048 to support his contention that simple battery in violation of section 242 as a lesser included offense of section 289, subdivision (d)(4). The only other authority he cites to support his contention is the definition of battery. His argument is cursory. Thus, defendant has not provided adequate authority or argument to support his contention. The contention is forfeited. (*People v. Stanley, supra,* 10 Cal.4th at p. 793; *People v. Harper, supra,* 82 Cal.App.4th at p. 1419, fn. 4.)

G. Attempt

Defendant relies on the notes following CALCRIM No. 1048 to support his contention that attempted penetration by a foreign object is a lesser included offense of section 289, subdivision (d)(4). Defendant has not provided adequate authority or argument to support his contention, and so it is forfeited. (*People v. Stanley, supra,* 10 Cal.4th at p. 793; *People v. Harper, supra,* 82 Cal.App.4th at p. 1419, fn. 4; see *People v. Bailey* (2012) 54 Cal.4th 740, 753 [“‘[t]he law of “attempt” is complex and fraught with intricacies and doctrinal divergences’”].)

H. Evidence

We have assumed for the sake of argument that sexual battery by misrepresentation is a lesser included offense of section 289, subdivision (d)(4). However, the trial court did not err in failing to instruct on that offense because there is no evidence from which a trier of fact could reasonably conclude that the defendant is guilty of the lesser offense but not the greater one.

Defendant would have committed only the lesser offense of sexual battery by misrepresentation if he had touched the women's genitals but had not penetrated the opening. There was, however, no evidence from which a jury could have found this "lesser" touching. The women described defendant's digital penetration in considerable detail and so a reasonable jury could not conclude that the women were mistaken about the extent of the touching, that is, the jury could not conclude that defendant only touched the outside of the women's genital areas, but the women mistakenly believed that he penetrated into their vagina. Similarly, the jury could find the women's testimony that they were vaginally penetrated not credible, but a disbelief of the women's credibility would not create evidence that defendant touched them in some other place or in some other manner. The jury would just be speculating if it found that defendant undertook touching not described by the women.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.