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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. TROY ANTHONY FRITH, Defendant and Appellant.	B231993 (Los Angeles County Super. Ct. No. BA371326)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed as modified.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

STATEMENT OF THE CASE

The jury found defendant and appellant Troy Anthony Frith guilty in counts 1, 2, and 4 of forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1))[1] and in count 3 of aggravated sexual assault of a child (§ 269, subd. (a)(1)). As to counts 1, 3, and 4, the jury found true special allegations that defendant committed the offenses by use of force, violence, duress, menace, and fear of immediate and unlawful bodily injury (§ 1203.066, subd. (a)(1)).

The trial court sentenced defendant consecutively to the midterm of six years in state prison on counts 1 and 2, and to 15 years to life on count 3. The sentence as to count 4 was stayed under section 654. The total sentence imposed was 27 years to life.

Defendant appeals from the judgment on the following bases: (1) his confession should have been suppressed as being involuntary because it was obtained through coercion and promises of leniency; (2) defendant's right to confront witnesses was violated when an expert who did not conduct a sexual assault examination video testified with respect to the exam; (3) Judicial Council of California Criminal Jury Instructions (2010-2011) CALCRIM No. 1111 is impermissibly argumentative in violation of defendant's Fifth, Sixth, and Fourteenth Amendment rights; (4) CALCRIM No. 331 impermissibly bolstered the victim's credibility in violation of defendant's Fifth, Sixth, and Fourteenth Amendment rights and rights under California Constitution, article I, section 15; (5) defendant's conviction under section 288, subdivision (b) should be reduced to a conviction under section 288, subdivision (a) because there is insufficient evidence the acts were committed by use of force, violence, duress, menace or fear of immediate and unlawful bodily injury; (6) the trial court erred in admitting the victim's mother's hearsay statement regarding who caused her pain; and (7) the abstract of judgment and minute order must be corrected to conform with the oral pronouncement of judgment.

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

We direct the trial court to correct the errors in the abstract of judgment and minute order to conform to the trial court's oral pronouncement of judgment. In all other respects, we affirm the judgment.

FACTS

Prosecution

Breanna R., born on April 30, 1998, was diagnosed with dyspraxia, a condition that affects her speech and fine motor skills. As a result of the dyspraxia, Breanna, age 12, functioned at the level of a six-year old child. She attended special education and speech therapy classes since the age of four. Her family, including defendant, who is her stepuncle, is aware of her disability and difficulty with speech.

Breanna's parents separated in May 2010. Breanna's father lived with his mother, stepfather, and his stepbrother (defendant) after the divorce. Breanna's parents shared custody of their three daughters, who lived in San Bernardino with their mother four days a week and in Los Angeles with their father three days a week.

Breanna was staying with her father shortly before Mother's Day in 2010. On the day of the charged offenses, Breanna, her two sisters, her grandfather, Samuel Frith, and defendant were all present in the house. Breanna's mother had been at the house but had gone shopping.

Breanna and her sisters were in the bedroom they shared and began to fight over the TV remote. Defendant had been given express permission to discipline the girls when necessary. When he heard the girls arguing, he walked into the room, took the remote, and went back to his own bedroom. At some point after this, he told Breanna to come to his room, which she did.

When Breanna entered the room defendant was alone, sitting on the bed and talking on the phone. Breanna sat down beside defendant on the bed. Both doors to the bedroom were open. Breanna could see her sisters sleeping in the other bedroom.

After Breanna sat down next to him, defendant unbuttoned her pants and put his hand on her vagina. Breanna put her hand over her pants and pushed defendant's hand away, but defendant moved her hand. Breanna tried to stand up, but defendant grabbed the back of her shirt and pulled her down to the bed. Breanna felt angry and afraid of defendant.

When defendant unbuttoned Breanna's pants he made direct contact with her skin. He pulled her pants down to her knees. Defendant then touched Breanna's vagina with his penis. Breanna testified that she felt defendant put his penis inside her. She described it as feeling "like a rock" and said that she felt a little pain. Breanna got up and went to the bathroom. Afterward, she complied when defendant told her to come back into his room.

Defendant was sitting on the side of his bed with his laptop when Breanna went back in the room. The doors to defendant's room were closed. Breanna sat down in the middle of the bed. Defendant told Breanna to lay down. Breanna laid down on her stomach and defendant pulled her pants down to her knees and touched her buttocks with his hand. Breanna felt a little pain when he touched her.

Breanna left the room again after defendant touched her buttocks. She went back to defendant's room, and he told her not to tell anyone what had happened. Breanna went in and out of defendant's room at least four times that day. Defendant put his mouth on Breanna's vagina during one of the times that her pants were pulled down. Breanna also had to go to the restroom a second time at some point that day, and defendant grabbed her shirt, so she stayed in his room.

Defendant again told Breanna not to say anything to anyone. Breanna was afraid of defendant. For a few days, Breanna did not talk to anyone about what happened. On the Tuesday after Mother's Day, she told her mother because she was having pain in her vagina. Her mother took her to the hospital to be examined after observing a tear and red marks with bumps on Breanna's vagina.

Defendant was interviewed by Detectives Matthew Martinez and Durden. At the interview, defendant was advised of his *Miranda*[2] rights, which he waived. Then defendant agreed to talk about why he was at the police station.

Detective Durden asked defendant if he knew why he was there, and defendant responded that he did not. Detective Durden told defendant that now was the time to tell the truth, stating, "Okay. I kinda think you know why you're here. Okay. Now, we can do this the easy way or we can do this the hard way. The easy way is, that you [are] up front and honest. The hard way is you want to play the game. Okay. If you want to play the game I have her story." Detective Durden said there were three sides to every story—his side, her side, and the truth, and that all he and his partner had to go on was Breanna's story, which was that defendant had raped her. Detective Durden offered that he thought it might have been "a consensual thing" but stated the detectives had a medical examination showing defendant had some sexual activity with Breanna. Detective Durden said, "Okay. So if you want to shuck and jive, that's fine, . . . we'll just go ahead and deal with it from her standpoint . . . [but] [i]f you want to tell us what went down, then cool, we are going to listen." Detective Martinez added, "Just remember, too, . . . you're facing a lot of different time when you force someone to do something."

Defendant recounted that on the day in question, Breanna and her two sisters were at his father's house in a bedroom across the hallway from his room and started to argue. He separated the girls and took Breanna into his room to watch TV. He and Breanna engaged in wrestling and horseplay, during which he tickled and poked her. He denied trying to have sex with her.

Detective Durden responded that defendant's version of events was "bullshit." He said that they had defendant's DNA and stated, "So you want to shuck and jive me talking about, oh, we were wrestling." The detective stated that he "[didn't] have time to mess around" and that defendant "was looking at 25 years to life if [the detectives went with Breanna's version of events]. . . . That's what my partner was referring to when he

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

says force . . . ." Defendant acknowledged the detective's statements, and the following exchange took place:

"Detective Durden: Okay. So if you want to shuck and jive, hey, we're done. I'll book you 25 years to life. It's over. You have any children?

"[Defendant:] I have one.

"Detective Durden: How old is that person?

"[Defendant:] 14. Well, you probably won't never see that person again.

"Detective Martinez: We can already prove it happened, dude. There's no question about it.

"Detective Durden: I already—

"Detective Martinez: There's scientific evidence saying that you did it.

"[Defendant:] Okay.

"Detective Durden: Just like I can get a criminalist to come in here—your parents don't know you're here, right?

"[Defendant:] I guess – I'm assuming not.

"Detective Durden: Okay. I can prove that you were in this room today by having a criminalist come in and do what they need to do on that table and say, yeah, you were in here. Okay, so you want to tell me the truth or you want to go with the bullshit that you were just giving me?

"Detective Martinez: Shit happens sometimes, man, but you need to tell the truth now."

Defendant then told the detectives that he and Breanna were wrestling and things "went a little too far." He was tickling Breanna and then she was upset about something so he started "holding on her." They watched TV together, and she started to rub his penis. Defendant rubbed Breanna but then backed off and lay back on the bed to try to put a stop to the rubbing. Breanna watched TV, and defendant was sitting on the bed with his laptop. Breanna started to rub defendant with her backside. Then they started "grinding" with their clothing on. At some later point, Breanna's clothes came off. It did not go further than grinding.

In response to defendant's description of the events, Detective Durden pointed out that defendant failed to explain how his DNA got inside Breanna. Detective Martinez said defendant was "bullshitting." Detective Durden then stated, "Okay. I'll give you time to think about 25 years to life. Evidently you need time to think about your story."

Defendant said that he did not need time to think about it and insisted that was all that happened. The officers reiterated that he should be truthful. Detective Durden again stated that they had medical evidence to prove what happened and reminded defendant that he could face 25 years to life in prison. Defendant responded, "I'm telling you guys, this was—it was not forced. I did not force myself on her." Defendant then explained that he was touching Breanna's vagina and Breanna was touching his penis, but that they were clothed. Then at some point her pants were pulled down and he licked her vagina. Detective Durden pointed out that defendant had previously omitted this detail and the detectives stated again that there was a difference between forced and consensual acts, and that defendant needed to tell them the truth.

Defendant told his story from the beginning. He said the girls had been arguing, he had taken Breanna into his room, and she was pouting so he consoled her. Defendant put an arm around Breanna and asked her what was wrong, but then the phone rang and he answered it. While he was talking on the phone, Breanna started to rub his inner thigh. He hung up the phone and she began watching TV while he was on his laptop. He lay back on the bed and then Breanna lay back on the bed as well, but diagonally so that she was touching him. She backed up and put her buttocks against his penis, and he became aroused. Then she started touching his penis, and he touched her breasts and vagina under her clothing. Then defendant pulled Breanna's pants down to mid thigh, and defendant took his penis out of his pants fly. Defendant rolled Breanna over so she was facing up and licked her vagina twice. She rolled back, and he began rubbing his penis on her buttocks. Defendant stated that at first it was "just [his] penis on her buttocks. And then it might have slipped around the front. [His] penis might have slipped down." Defendant denied penetrating Breanna.

Detective Durden stated he knew his partner was getting frustrated and wanted to book defendant for 25 years to life, but he wanted to give defendant another opportunity to be truthful. Detective Durden said he and his partner would leave and give defendant a chance to think about things. Defendant talked to himself in the room while the detectives were absent, saying that he was "done," "toast," and "finished." While he was alone, defendant also said that he would not admit to anything he did not do and that he did not feel penetration.

Detective Durden returned to the room and resumed the interview. Defendant continued to deny that he penetrated Breanna, but when Detective Durden stated they had evidence that he had, defendant said he did not know if it happened and it was not something that he realized at the time or that he would have done on purpose. He did not feel himself penetrating Breanna, and he did not think he did. Defendant also denied that he had forced himself on Breanna.

Detective Durden said he thought defendant should do something to smooth things over with Breanna. The detective suggested that defendant write her a letter of apology and defendant agreed. While determining what he would write to Breanna, defendant stated, "I'm like some kind of fucking perv. I'm disgusted. I'm disgusted with myself, man." Detective Durden said that he should just spell things out for Breanna, "[W]e shouldn't have had sex. It shouldn't have gone this far."

Detective Durden left the room and defendant began chastising himself: "Oh my God, I'm sorry, I did not know that I did that. I did not know that that happened. . . . Damn girl, I did not rape the girl . . . . I should have never let that child do this to me. I should have never led her down this path. And I don't care how you look at it that's what I did. By not putting a stop to it like I was supposed to. . . . Got caught up in the damn feeling is like a weirdo. Fucking weirdo. . . . I probably scarred this baby. On my God, I probably have scarred her. I probably scarred for, I don't know, for life. . . . [J]ust lock my ass up right now. Book me. Fucking deserve it. I did do it and I feel guilty about it. . . . I let a, fucking, situation get way out of hand. I should have popped the shit out of her hand and told her parents. But no, I didn't do that, did I. . . . But I did a fucking eerie

fucking thing . . . I've hurt that girl. That's so fucking gross. So fucking gross. . . . She was—wow. I can't even say it. Not from me. No. Penetrated Breanna? . . . [I'm] pissed at myself. I don't blame her at all. Fucking a kid—a child, supposed to know fucking better. I'm supposed to know better. Man, how this shit happened (Inaudible)? I know what I done now. I don't know what I did done then, though."

Detective Martinez came back into the room. Defendant said, "You guys—you knocked me over with that penetration thing." He stated that he wanted to make things right. He asked the detective what was going to happen to him. Detective Martinez left the room, and defendant began talking to himself again: "[T]here's no way I can make this up. That little letter is not going to—that's not going to be enough. Ain't even enough to me. . . . The situation was bad enough, they didn't have to tell me about penetration, I didn't know that (Inaudible)."

Defense

Defendant denied committing forcible lewd acts upon Breanna. He explained that, "after the first couple seconds or minutes . . . [of the interview at the police station on May 12, 2010, Detective Durden] had already implied what he wanted [defendant] to say," and that the original statement defendant gave was "unwanted."

On the day of his arrest, defendant was at his job at the Los Angeles International Airport, where he is a transportation security screener for the Transportation Security Administration (TSA). His supervisor advised him that the terminal manager wanted to speak with him and escorted him to the front of the building where they were met by a TSA law enforcement officer. The TSA officer took him to Detectives Durden and Martinez. Detective Durden informed defendant that defendant would need to come with them. The uniformed officers removed defendant's uniform and shield, patted him down, confiscated his personal property, and placed him in handcuffs. The uniformed officers and detectives in business suits walked defendant through the office to a police squad car. He asked what was going on and was told that he would be informed of that later.

Defendant was taken across town to a police station for questioning. He did not know where he was being taken.

Defendant testified that when they arrived at the station, the detectives took him to a room, which he could see on a video from the outside. Defendant approximates that he was left alone in the room for about two to two and a half hours. Defendant thought that he must have been brought in for something job-related because a TSA law enforcement officer had been involved. The detectives asked him a number of general questions. They read defendant his rights. Defendant stated that he understood his rights and wanted to speak with them. The detectives mentioned Breanna, and he thought that maybe something had happened to her. Defendant did not suspect that they thought he had done something to her.

Detective Durden told defendant that Breanna reported he raped her, but the detective thought it might have been consensual. Defendant thought to himself that the detectives had to be kidding, but he did not say that because he "[had] heard about that precinct. It has a reputation in the neighborhood." Defendant had "seen how they handled suspects, and . . . worried about [his] safety." Defendant "was trying to be nonconfrontational." Detective Durden then said that they could do things the easy way or the hard way. Defendant took this to mean he could "tell them what they wanted to hear, and [it] would be over, or [he] could tell them what they did not want to hear and there would be consequences . . . that they would beat [him] up at the station." Defendant believed the detectives thought anything he said would be a lie, and that they were implying he needed to tell them what they wanted to hear, which was that he had done something to Breanna. He first told the detectives that he had been wrestling with Breanna, which was the truth. He was fearful that they would beat him up if he did not say that he had sex with Breanna, but he hoped the truth would be enough. The detectives did not beat him up after he told his first version of what happened, but the detectives did say that it was bullshit and that they had his DNA.

He was afraid he would be beaten or killed if he did not adjust what he had said. The detectives asked if he had a child and when he stated that he did, they said that he

would never see her again. Defendant took this to mean that he would not be able to leave the station if he did not tell the detectives what they wanted to hear. Defendant said that he was fearful for his life based on rumors he had heard about the police station. He did not believe the police had DNA evidence from Breanna. He did not tell the detectives that he thought they were lying about the DNA evidence because he did not want to argue with them. The detectives referenced that his parents did not know where defendant was. He understood them to mean that they could do anything to him because no one from his family knew where he was.

Defendant then told a version of the events in which he and Breanna were rubbing each other with their clothes on. This version of events was not true. He told the detectives that they were rubbing each other because no one knew where he was and he might never see his daughter again. He knew the detectives wanted to hear he had sex with Breanna, but he hoped they would settle for less than that. The detectives said defendant was sugar coating his story, which he took as an indication that they wanted more from him. Then the detectives told him they were getting tired of the questioning. Defendant believed this was a sign they were getting aggressive and they might start "smacking [him] around." He believed Detective Martinez was going to "jump on [him] right then."

Defendant told another version of his story that included more sexual contact, though no sexual intercourse. It was not the truth, but he was hoping to calm the detectives down and have the opportunity to notify someone that he was at the station. The detectives then told defendant that he penetrated Breanna. Defendant felt that this was what they wanted him to admit, but it was not true.

After more questioning, defendant stated to the detectives that he might have slipped into Breanna, although that was not true. The detectives then asked defendant to write an apology letter to Breanna, which he did because he wanted the questioning to end. What defendant wrote in the letter was not true. Defendant never touched Breanna intimately, even over her clothing. He thinks of Breanna and her sisters as his blood nieces.

When the police left the room, defendant continued to implicate himself because he suspected there was a camera in the room and he wanted to "keep the pretense up." He felt that Detective Durden was calming things down, and he wanted to keep it that way so that he did not get hurt. He would never have lied about the events if he had not believed the detectives would harm him if he did not lie.

On cross-examination, defendant conceded he had testified in an earlier hearing that he did not know he was being videotaped. He also testified that the detectives had not yet told him the date of the alleged crimes when he explained what had occurred between himself and Breanna on the day before Mother's Day. At no time during the interview did the detectives make any obvious verbal threats to physically harm him, lift a hand to him, or show him a weapon. Defendant remembered the detectives urged him to tell the truth several times. Although he was not in immediate fear for his safety when the officers left the interview room, he was still afraid. Defendant said incriminating things to himself when he was alone because he was "starting to buy in and believe what they were telling [him] to say. . . ." The statements he made were not self-reflective. Defendant never did anything lewd to Breanna or forced her to stay in his room.

Samuel Frith, Breanna's grandfather and defendant's father, testified that Breanna and her sisters were staying at his house on the Saturday before Mother's Day. Defendant was also temporarily living in his house at that time. Breanna and her sisters were in Frith's care that day. Frith had seen Breanna off and on through the course of the day. He saw Breanna when she left to go to dinner with her parents that night and did not notice anything unusual about her demeanor. She acted the same way that she had in the morning. Frith was surprised when he learned of defendant's arrest because Frith had been watching Breanna that day.

DISCUSSION

I. *Whether the Trial Court's Denial of Defendant's Motion to Suppress his Confession Violated His Federal and State Due Process Rights*

Defendant contends the trial court erred in denying his motion to suppress his involuntary confession made to Detectives Durden and Martinez, which was obtained through coercion and promises of leniency. Defendant argues the detectives' coercive statements were causally linked to his confession because he only confessed out of fear that he would be attacked and beaten. Defendant asserts the error requires reversal because it was not harmless beyond a reasonable doubt and therefore violated his constitutional federal and state rights to due process.

"A defendant's statements challenged as involuntary are inadmissible at trial unless the prosecution proves by a preponderance of the evidence that they were voluntary. [Citations.] 'The due process [voluntariness] test takes into consideration "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."' (*Dickerson v. United States* (2000) 530 U.S. 428, 434, quoting *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226.) This test 'examines "whether a defendant's will was overborne" by the circumstances surrounding the giving of a confession.' [Citation.] . . . '[C]oercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment.' ([*Colorado v. Connelly* (1986) 479 U.S. 157,] 167; see also *People v. Williams* (1997) 16 Cal.4th 635, 659.) Coercive police activity, however, '"does not itself compel a finding that a resulting confession is involuntary." [Citation.] The statement and the inducement must be causally linked. [Citation.]' [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1093 (*Guerra*).) To be causally linked, the coercive statements must be the proximate cause of the confession. (*People v. Benson* (1990) 52 Cal.3d 754, 778-779.) Causation-in-fact is not sufficient to establish a causal link. (*Ibid*.) "'If the test was whether a statement would have been made but for the law

enforcement conduct [(causation-in-fact)], virtually no statement would be deemed voluntary because few people give incriminating statements in the absence of some kind of official action.' [Citation.]" (*Ibid*., quoting *U.S. v. Leon Guerrero* (9th Cir. 1988) 847 F.2d 1363, 1366, fn. 1.)

"We review independently a trial court's determinations as to whether coercive police activity was present and whether the statement was voluntary. [Citation.] We review the trial court's findings as to the circumstances surrounding the confession, including the characteristics of the accused and the details of the interrogation, for substantial evidence. [Citation.] '[T]o the extent the facts conflict, we accept the version favorable to the People if supported by substantial evidence.' [Citation.]" (*Guerra*, *supra*, 37 Cal.4th at p. 1093.)

Our review of the record reveals no substantial indicia of deception, undue pressure, or coercion by the detectives. (*See People v. Whitson* (1998) 17 Cal.4th 229, 248-249.) First, defendant's argument that Detective Durden's statement that questioning could go the "easy way" or the "hard way" implied the use of physical force takes the statement out of context. Directly after stating they could do it the easy way or the hard way, the detective explained, "The easy way is, that you [are] up front and honest. The hard way is, you want to play the game. Okay. If you want to play the game I have her story." Detective Durden went on to state there were always three sides to a story—his, hers, and the truth. Taken in context, it is clear the detective was exhorting defendant to tell the truth and even went so far as to indicate that he did not give defendant's story less weight than Breanna's. There was no threat, express or implied, in the detective's statements. A confession is not involuntary, where, as here, "[the detective] did not cross the line from proper exhortations to tell the truth into impermissible threats of punishment or promises of leniency." (*People v. Holloway* (2004) 33 Cal.4th 96, 115 (*Holloway*).)

Defendant next argues that when Detective Durden suggested he was "shucking and jiving," defendant believed the detective was accusing him of lying and felt intimidated by the detective's tone and body language. Even aggressive accusations of

lying do not amount to coercive threats absent threats of punishment or promises of leniency. (*See In re Joe R.* (1980) 27 Cal.3d 496, 515 (*Joe R.*) [trial court did not err in ruling that "loud, aggressive accusations of lying [during interrogation of 17-year-old]" invalidated confession].) In *Joe R.*, the court held that a minor's confession was voluntary even though the police accused him of lying "loudly, emphatically, and with terse language (e. g., 'bullshit') . . . ." (*Id*. at p. 513.) Defendant does not claim to have suffered any language stronger than "bullshit," and as a 43-year-old man and a TSA officer, he was far less likely to have felt coerced by the implication that the officers believed he was lying than the 17-year-old boy in *Joe R.* Any implication by the detectives that defendant was lying does not invalidate his confession.

Defendant's fear that he would be beaten if he did not admit the charges when Detective Durden said he didn't "have time to mess around" is also unfounded. The detective did not state or imply in any way that defendant would be beaten as a consequence of failing to confess. He was merely urging defendant not to waste time by lying. Absent threats, this exhortation to tell the truth did not render defendant's confession involuntary. (See *Holloway*, *supra*, 33 Cal.4th at p. 115.)

Defendant's contention that the detectives implied he would receive more lenient sentencing by speaking truthfully is also not a basis for invalidating the confession. Detective Durden's statement that defendant could be facing 25 years to life in prison if the acts were forcible accurately advised defendant of the extent of the punishment if force was used. "'"[W]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct," the subsequent statement will not be considered involuntarily made. [Citation.]'" (*Holloway*, *supra*, 33 Cal.4th at p. 115.) The detectives did not offer to do anything to lessen defendant's punishment, nor did they indicate the trial court would be more lenient if he confessed. They simply informed defendant of the possible consequences of committing lewd acts with the use of force. The trial court did not err in finding there was nothing in the statement that changed the voluntary nature of the confession.

Defendant also alleges the detectives coerced him by stating that defendant would not see his daughter again. The prosecution correctly points out that there is no such statement in the record. The transcript shows that at one point during the interview Detective Durden asked defendant if he had a child, and when defendant answered, he had a daughter, Detective Durden asked how old she was. Defendant answered, "14. Well, you probably won't ever see that person again." According to the transcript, neither detective stated that defendant would not see his daughter again at any point in the interview and could not have coerced defendant on this basis. Even if the statement about not seeing his daughter again was attributed to one of the detectives, it does not compel suppression of defendant's confession, as there is causal connection between the statement and the confession.

Finally, defendant alleges the detectives isolated and coerced him by referencing the fact that his parents did not know where he was. In fact, the detectives did not reference that defendant's parents did not know where he was. Detective Durden *asked* if defendant's parents knew where he was, and he responded, "I guess—I'm assuming not." Nothing more was said about defendant's parents. Moreover, defendant's argument that the implication was that no one knew where he was is not supported. Defendant was arrested from his workplace and several people were aware that he left with the police.

Even if we were to assume the statements were coercive, the record does not support defendant's contention that the statements were the proximate cause of his confession. Defendant was advised of his constitutional rights and knowingly and intelligently waived them. (See *U.S. v. Leon Guerrero*, *supra*, 847 F.2d at p. 1367 [statement was not involuntary in part because defendant was advised of his constitutional rights].) Defendant specifically stated that he wanted to talk to the detectives. He did not have any personal characteristics that would make him more vulnerable to coercive statements. He was a 43-year-old adult at the time of the interview and was familiar with the criminal justice system, as he had worked for TSA for eight years and worked for Target in its loss prevention division prior to working for TSA. (See *People v. Boyette* (2002) 29 Cal.4th 381, 412 [court considered defendant's age,

education, and familiarity with the legal system and properly concluded confession was voluntary].) Finally, as the prosecution highlights, defendant made self-incriminating statements when the detectives were no longer in the room and thus could not have coerced him to confess.

Having reviewed the totality of the circumstances independently, we conclude the confession was voluntary.

II. *Whether the Admission of Expert Testimony With Respect to a Sexual Assault Examination Video Violated Defendant's Right to Confront Witnesses*

Defendant contends his Sixth Amendment right to confront witnesses was violated when the trial court admitted the testimony of Nurse Tish Tighe, the examiner who peer reviewed the record of Breanna's sexual assault examination, because she did not perform the examination herself. Defendant reasons that Nurse Tighe's testimony violated the Confrontation Clause because he did not have the opportunity to cross-examine Nurse Sally Wilson, who conducted Breanna's sexual assault examination and filmed the examination video, as to how the video was made. According to defendant, Nurse Tighe's explanation of the results of the examination was testimonial hearsay, because although the examination video was not admitted into evidence, the findings it evidenced were effectively submitted through Nurse Tighe's testimony.

Nurse Wilson was subpoenaed to testify regarding the examination at trial. On the day of her testimony, however, Nurse Wilson had a serious family medical emergency. In her stead, the prosecution proposed to call Nurse Tighe. The following colloquy regarding admissibility of the testimony took place outside of the presence of the jury:

"The Court: Any objection [by defense counsel]?

"[Defense counsel]: Well, if any evidence is going to be presented of an exam by a witness who did not participate in the scientific examination, I believe under

Melendez[-]*Diaz*,[**3**] that there would be a lack of foundation for the evidence. [¶] On the other hand, as to stating what she sees on a video that she reviews as an expert familiar with what she is viewing, she may have the capacity to testify to that.

"The Court: Well, initially, and counsel cited *Melendez-Diaz versus Massachusetts* . . . that dealt with a [Sixth] Amendment violation to admit a laboratory analyst's certificate in defendant's trial for cocaine trafficking when the certificate and the affidavit which followed within the court class and testimony, the statements are covered by the confrontation clause. [¶] In California, *People versus Geier*[**4**] . . . which held that scientific evidence, such as lab reports, DNA reports, et cetera, are not testimonial. The analysts' notes are made during a routine nonadversarial process meant to issue accurate analysis. The fact that they are available for use at a later trial would be irrelevant. [¶] As such, the original analyst need not testify. A co-worker who is qualified to render an opinion may so testify. [¶] Consequently, based upon *Geier*, *Melendez-Diaz* is [inapposite] in that this is not testimonial. [¶] However, let me inquire further before I make my ruling. [¶] Do you intend to bring in any evidence of the video itself or . . . any evidence of the nurse who is not present in court[?]

"[Prosecutor]: No, I do not. There is a diagram however that the original nurse drew after -- or during the examination of where she viewed the injuries. I expected that the nurse who is coming in will be able to say that those are accurate -- that that diagram accurately depicts the injuries she viewed on the video.

"The Court: I understand.

"[Prosecutor]: Outside of that, I do not intend to play the video nor do I intend to introduce it into evidence or any portion of the form that was used by the original nurse, simply that this nurse reviewed the video, which is part of the record of the exam, and what her independent opinion is of what she observed.

"The Court: Anything further [from defense counsel]?

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3 *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305.

4 *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*).

"[Defense counsel]: Submitted.

"The Court: I'm going to rule that such is admissible based on the cases I have cited. [¶] I should take note that there are a number of cases which I have not cited, the most recent of which is a 2010 case *People versus Miller* . . . among other cases that review has been granted."

Nurse Tighe testified that Breanna suffered an abrasion to the peri-hymenal tissue at the four o'clock position and an abrasion of the fossa navicularis, an area below the hymen, consistent with the diagram prepared by Nurse Wilson. Nurse Tighe opined that the injuries Breanna suffered were "acute," meaning they most likely occurred within five days of when the examination video was filmed.

The Attorney General argues defendant forfeited his claim by conceding Nurse Tighe could testify at trial "as to stating what she sees on a video that she reviews as an expert familiar with what she is viewing . . . ."[5] In his reply, defendant contends he properly objected to Nurse Tighe's testimony at trial by stating he objected to any evidence presented on an examination by a witness who did not perform the examination for lack of foundation under *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*). He asserts that defense counsel's "thinking aloud" as to whether Nurse Tighe *might* have the capacity to testify as to what she observed on the examination video after counsel objected did not constitute a forfeiture. Defendant argues that given the fluctuating state of the law, counsel should be excused to the extent that he failed to object.

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion[.]" (Evid. Code, § 353.) "What is important is that the objection

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5 Alternately, the Attorney General argues Nurse Tighe's testimony was properly admitted under *Geier*, *supra*, 41 Cal.4th 555, or that if error is assumed, any such error was harmless.

fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling." (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

We hold that defendant preserved his claim on appeal. The concerns underlying Evidence Code section 353 were not implicated in this case, because the trial court and the prosecution were on immediate notice of the specific basis for defendant's objection. Defense counsel objected promptly at trial. In making his objection, counsel relied on *Melendez-Diaz, supra*, 557 U.S. 305, one of the significant United States Supreme Court cases on the issue of testimonial hearsay. Moreover, the trial court based its ruling on its analysis of *Melendez-Diaz* and *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), the leading California case concerning testimonial hearsay on which the prosecution relies on appeal. Because the court's ruling was fully informed and the prosecution was able to respond appropriately, the claim was not forfeited. Nonetheless, the argument fails on appeal because the trial court properly ruled Nurse Tighe's testimony was not testimonial hearsay.

In *Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*), the Supreme Court announced a new test for determining when an absent witness's testimonial statements may be admitted at trial. Previously, testimonial statements were admissible only if they fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66 (*Roberts*).) The *Crawford* court overruled *Roberts* in holding that, under the Confrontation Clause, testimonial statements of an absent witness against a criminal defendant may only be admitted if the witness is unavailable and the defendant has had an opportunity to cross-examine the witness. (*Crawford, supra*, at pp. 61-68.) In so ruling, the court stated: "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in

the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." (*Id*. at p. 61.)

Crawford clarified that the Confrontation Clause focused on *witnesses* against the accused. (*Crawford*, *supra*, 541 U.S. at p. 51.) The court stated that a witness is someone who "'bear[s] testimony,'" and testimony is typically "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (*Ibid*., quoting Webster's (2d ed. 1828) An American Dictionary of the English Language.) The court emphasized that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Crawford*, *supra*, at p. 51.) The *Crawford* court declined to set out a comprehensive definition of "testimonial statements," but did impart that "[v]arious formulations of this core class of 'testimonial' statements exist: 'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' [citation]; 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' [citation]." (*Id.* at pp. 51-52.)

In *Davis v. Washington* (2006) 547 U.S. 813, the Supreme Court expounded further on the definition of testimonial statements. The court held that statements identifying the perpetrator made by a nontestifying witness to an emergency operator in a 9-1-1 call were not testimonial, but that statements made to police officers after the crime had been committed were testimonial and could not be admitted. (*Ibid*.) The *Davis* court instructed, "[Statements] are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to

establish or prove past events potentially relevant to later criminal prosecution." (*Id*. at p. 822.)

In *Geier*, *supra*, 41 Cal.4th 555, the California Supreme Court addressed whether the testimony of an expert with respect to a DNA report that the expert did not prepare was testimonial hearsay, such that its admission violated the defendant's right to confront witnesses. The *Geier* court rejected the defendant's argument that *Crawford* prohibited admission of testing results absent the testimony of the testing scientist. The *Geier* court distinguished the data contained in the DNA report, which was not admitted at trial, and the opinion of the expert witness in reliance upon the report: "[The nontestifying scientist's] report and notes were generated as part of a standardized scientific protocol that she conducted pursuant to her employment at Cellmark. While the prosecutor undoubtedly hired Cellmark in the hope of obtaining evidence against defendant, [the scientist] conducted her analysis, and made her notes and report, as part of her job, not in order to incriminate defendant. Moreover, to the extent [the scientist's] notes, forms and report merely recount the procedures she used to analyze the DNA samples, they are not themselves accusatory, as DNA analysis can lead to either incriminatory or exculpatory results. Finally, the accusatory opinions in this case—that defendant's DNA matched that taken from the victim's vagina and that such a result was very unlikely unless defendant was the donor—were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness, [the DNA expert]." (*Geier*, *supra*, at p. 607.)

Subsequent to *Geier*, the United States Supreme Court issued its decision in *Melendez-Diaz*, *supra*, 557 U.S. 305. *Melendez–Diaz* involved a defendant who was charged with distributing and trafficking cocaine. (*Id*. at p. 308.) In support of the charges, the prosecution "submitted three 'certificates of analysis' showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that the bags '[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine.' [Citation.] The certificates were sworn to before a notary public by analysts . . . as required under

Massachusetts law." (*Ibid*.) At the time Massachusetts law authorized the use of affidavits as "'prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed.'" (*Id*. at p. 309, quoting Mass. Gen. Laws, ch. 111, § 13.) In "[a] rather straightforward application of [its] holding in *Crawford*," the *Melendez-Diaz* court held that the prosecution may not prove an element of its case by sworn certificate without providing live testimony of the signatory at trial or showing that the witness was unavailable and the defense was given a prior opportunity for cross-examination. (*Id*. at p. 312.) The court summarized: "[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits . . . ." (*Id.* at p. 329.) After *Melendez-Diaz* was decided, the United States Supreme Court denied the petition for writ of certiorari in *Geier* on June 29, 2009, No. 07-7770.

In *Bullcoming v. New Mexico* (2011) ___ U.S. ___ [131 S.Ct. 2705] (*Bullcoming*), the defendant was arrested for driving while intoxicated (DWI). (*Id*. at p. ___ [at p. 2709].) The prosecution's principal evidence against defendant was a "Report of Blood Alcohol Analysis" generated by the New Mexico Department of Health's Scientific Laboratory Division (SLD). (*Id*. at p. ___ [at pp. 2709-2710].) The court described the contents of the report as follows:

"SLD's report contained in the top block 'information . . . filled in by [the] arresting officer'. . . [including] the 'reason [the] suspect [was] stopped' . . . and the date . . . and time . . . the blood sample was drawn. [Citation.] (capitalization omitted.) The arresting officer also affirmed that he had arrested Bullcoming and witnessed the blood draw. [Citation.] The next two blocks contained certifications by the nurse who drew Bullcoming's blood and the SLD intake employee who received the blood sample sent to the laboratory. [Citation.] [¶] Following these segments, the report presented the 'certificate of analyst,' [citation] (capitalization omitted), completed and signed by Curtis Caylor, the SLD forensic analyst assigned to test Bullcoming's blood sample. [Citation.] Caylor recorded that the BAC in Bullcoming's sample was 0.21 grams per hundred milliliters, an inordinately high level. [Citation.] Caylor also affirmed that '[t]he seal of th[e] sample was received intact and broken in the laboratory,' that 'the statements in [the

analyst's block of the report] are correct,' and that he had 'followed the procedures set out on the reverse of th[e] report.' [Citation.] Those 'procedures' instructed analysts, *inter alia*, to 'retai[n] the sample container and the raw data from the analysis,' and to 'not[e] any circumstance or condition which might affect the integrity of the sample or otherwise affect the validity of the analysis.' [Citation.] Finally, in a block headed 'certificate of reviewer,' the SLD examiner who reviewed Caylor's analysis certified that Caylor was qualified to conduct the BAC test, and that the 'established procedure' for handling and analyzing Bullcoming's sample 'ha[d] been followed.' [Citation.] (capitalization omitted)." (*Bullcoming, supra,* ___ U.S. ___ at p. ___ [131 S.Ct. at pp. 2710-2711].)

At trial, the prosecution did not call the certifying analyst to testify because he had recently been placed on unpaid leave for an unknown reason.[6] (*Bullcoming*, *supra,* ___ U.S. at p. ___ [131 S.Ct. at pp. 2711-2712].) Instead, the prosecution called Gerasimos Razatos, another SLD analyst who was previously unfamiliar with the analysis Caylor performed on Bullcoming's blood sample. (*Id*. at p. ___ [at p. 2712].) The defense objected on the basis that counsel had not been informed that Razatos and not Caylor would be testifying prior to trial, and had not been informed that Caylor was unavailable, in violation of defendant's right to confront witnesses against him. (*Ibid*.) The trial court overruled the objection, and defendant was subsequently convicted of aggravated DWI. (*Ibid*.)

On review, the New Mexico Supreme Court acknowledged that in light of *Melendez-Diaz*, the report was testimonial, but determined that it was nonetheless admissible for two reasons. (*Bullcoming*, *supra*, ___ U.S. at p. ___ [131 S.Ct. at pp. 2712-2713].) "First, . . . analyst Caylor 'was a mere scrivener,' who 'simply transcribed the results generated by the gas chromatograph machine.' [Citation.] Second, SLD analyst Razatos, although he did not participate in testing Bullcoming's

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6 The prosecution called the arresting officer and the nurse who drew Bullcoming's blood as witnesses at trial.

blood, 'qualified as an expert witness with respect to the gas chromatograph machine.' [Citation.] 'Razatos provided live, in-court testimony,' . . . 'and, thus, was available for cross-examination regarding the operation of the . . . machine, the results of [Bullcoming's] BAC test, and the SLD's established laboratory procedures.' [Citation.]" (*Id*. at p. ___ [at p. 2713].)

In a 5-4 decision, the Supreme Court held that the trial court erred in admitting the report, which was testimonial. The court explained that, contrary to the New Mexico Supreme Court's ruling, Caylor was not "a mere scrivener" because he certified that the sample arrived with the seal intact, that he followed specific protocols, and that no "'circumstance or condition . . . affect[ed] the integrity of the sample or . . . the validity of the analysis.' [Citation.]" (*Bullcoming*, *supra*, ___ U.S. at p. ___ [131 S.Ct. at pp. 2714-2715].) The court concluded that the Confrontation Clause prevented one witness from testifying to the observations of another witness. (*Id*. at p. ___ [at p. 2715].) The court further explained that Razatos's testimony as an expert with respect to the gas chromatograph was not the equivalent of testimony from Caylor, because Razatos could not testify to what Caylor saw or knew regarding the specific test or the process employed. (*Ibid*.) It summarized that, "[i]n short, when the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had the right to confront." (*Id*. at p. 2716.)

Here, the examination video Nurse Wilson made was not admitted into evidence, in contrast to the report in *Bullcoming* and the DNA analysis in *Melendez-Diaz*. As a result, neither *Bullcoming* nor *Melendez-Diaz* mandates that Nurse Wilson testify in person or be unavailable and subject to prior cross-examination by the defense. A defendant's confrontation rights cannot be violated where the challenged statement was not admitted for its truth. (*Tennessee v. Street* (1985) 471 U.S. 409, 413-414; *Crawford*, *supra*, 541 U.S. at p. 59, fn. 9.) Defendant's case is essentially indistinguishable from *Geier*, because the examination video's testimonial nature is not at issue. The issue is whether the opinion testimony of a nurse specializing in sexual assault examinations may

properly be admitted when the nurse has relied on an examination video that she did not produce to render her own expert opinion. We hold that it may.

In California, expert testimony may "be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) An expert may testify on the basis of otherwise inadmissible evidence as long as it meets the threshold reliability requirements, and may describe the evidence that is the basis for her opinion. (*Ibid*.) This is in accordance with rule 703 of the Federal Rules of Evidence (28 U.S.C.), which provides: "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."

In this case, the evidence relied upon meets the threshold reliability requirements and is of the type that an expert in the field would normally rely upon. As was the case in *Geier*, *supra*, 41 Cal.4th 555, Nurse Wilson followed a standardized scientific protocol and conducted her analysis as part of her job, not for the purpose of incriminating defendant. The examination video Nurse Wilson made was not accusatory and could have shown a lack of evidence that Breanna had suffered injuries. The evidence was of the type Nurse Tighe would normally rely upon when evaluating a patient, and, in fact, Nurse Tighe had reviewed Breanna's examination video previously as part of the peer review process required by her employment. The accusatory opinion was Nurse Tighe's, which she based not on Nurse Wilson's evaluation of Breanna, but on her independent analysis of the examination video. Defendant was able to confront Nurse Tighe when she testified and was cross-examined at trial. We therefore hold the trial court did not abuse its discretion in admitting Nurse Tighe's testimony.

Even assuming defendant's right to confrontation was violated by Nurse Tighe's reliance on the examination video under *Melendez–Diaz* and *Bullcoming*, any error was harmless. "Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [(*Chapman*)]. [Citation.] 'Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.' [Citation.] The harmless error inquiry asks: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' [Citation.]" (*Geier, supra*, 41 Cal.4th at p. 608.) In this case, as in *Geier*, "the answer is yes." (*Ibid*.)

Even absent Nurse Tighe's opinion testimony with regard to the existence and nature of Breanna's injuries, the prosecution established its case beyond a reasonable doubt. The prosecution presented overwhelming evidence that Breanna suffered lewd acts at the hands of defendant through Breanna's testimony and defendant's extensive confession. Breanna's mother personally observed and described the injuries to her daughter's vagina. Nurse Tighe's testimony corroborated Breanna and her mother's testimony that Breanna suffered physical injuries as a result of the lewd acts. The acts themselves and the identity of the perpetrator were established by strong evidence that was entirely independent of any opinion rendered by Nurse Tighe.

III. *Whether CALCRIM No. 1111 is Impermissibly Argumentative*

Defendant argues that CALCRIM No. 1111 is impermissibly argumentative in violation of defendant's Fifth, Sixth, and Fourteenth Amendment rights to due process and a fair trial by jury. Defendant contends the instruction unnecessarily informs the jury which facts and elements do *not* need to be considered. Defendant specifically objects to the following language in the instruction: "Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is *not* required." (Emphasis added.) Defendant contends this language in CALCRIM No. 1111 distracts

the jury from the elements of the offense by telling it what not to focus on, is duplicative, and improperly diminishes the weight of certain facts that may be relevant to the jury's evaluation of the evidence. Defendant argues that CALCRIM No. 1111 implicates his federal constitutional rights under *Chapman, supra,* 386 U.S. at pages 24, 26. Defendant asserts the prosecution cannot establish the error did not prejudice him beyond a reasonable doubt because the evidence against him was weak and relied predominantly on Breanna's testimony, which was unreliable.[7]

"A trial court must instruct the jury, even without a request, on all general principles of law that are '"closely and openly connected to the facts and that are necessary for the jury's understanding of the case." [Citation.] . . . .' [Citation.]" (*People v. Burney* (2009) 47 Cal.4th 203, 246 (*Burney*).) "'An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.' [Citations.]" (*People v. Wright* (1988) 45 Cal.3d 1126, 1135, fn. omitted.) The trial court may reject an instruction that incorrectly states the law, or is not supported by substantial evidence, argumentative, duplicative, or presents a possibility of confusing the jury. (*Burney*, *supra*, at p. 246.) Instructional error is harmless where the factual question was resolved in favor of the prosecution on the basis of another instruction that was properly given. (*People v. Howard* (1992) 1 Cal.4th 1132, 1172.)

We review a claim of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) "In conducting this review, we first ascertain the relevant law and then 'determine the meaning of the instructions in this regard.' [Citation.] [¶] The proper test for judging the adequacy of instructions is to decide whether the trial court 'fully and fairly instructed on the applicable law . . . .' [Citation.] '"In determining

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[7] In the reply, defendant also argues for the first time that CALCRIM No. 1111 is unfair because it highlights the victim's consent is not a defense. We will not consider the argument here because defendant failed to raise it in the opening brief. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 ["Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument."].)

whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]"' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.)

Here, the jurors were instructed under CALCRIM No. 1111 as follows:

"The defendant is charged in counts 1, 2, and 4 with a lewd or lascivious act by force or fear on a child under the age of 14 years in violation of . . . section 288, [subdivision] (b)(1). To prove that the defendant is guilty of this crime, the People must prove that:

"One, the defendant willfully touched any part of a child's body either on the bare skin or through the clothing.

"Two, in committing the act, the defendant used force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the child or someone else.

"Three, the defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child.

"And four, the child was under age 14 years at the time of the act.

"Someone commits an act willfully when he or she does it willingly or on purpose. It's not required that he or she intend to break the law, hurt someone else, or gain any advantage. Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required.

"The force used must be substantially different from or substantially greater than the force needed to accomplish the act itself.

"Duress means the use of a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to cause a reasonable person to do or submit to something that he or she would not otherwise do or submit to.

"When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child and her relationship to the defendant.

"An act is accomplished by fear if the child is actually and reasonably afraid. It is not a defense that the child may have consented to the act."

Defendant's contention that CALCRIM No. 1111 is impermissibly argumentative lacks merit. First, as the prosecution correctly points out, the defense did not object to the instruction at trial or request any amplifying or clarifying instruction. The burden is on defendant to request amplification or clarification. (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) Having failed to do so or to object to the instruction, defendant is barred from asserting his claim on appeal unless the instruction affects defendant's substantial rights. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.)

Defendant's contention that the language in the instruction distracts from the elements of the offense by stating what not to focus on is without merit. The four factors enumerated in CALCRIM No. 1111 properly state the elements of section 288, subdivision (b). The balance of the instruction serves to clarify these four factors. The language "[a]ctually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required" is closely related to the third factor to be considered in determining whether a defendant should be convicted under section 288, subdivision (b), namely: "The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child." The language instructs and clarifies how the jury is to evaluate the third factor and was thus properly included by the trial court.

Defendant's contention that the language in CALCRIM No. 1111 is duplicative is also meritless. Defendant fails to explain the logic of his argument that "[s]ince the jury has already been instructed on what must be proved, further instruction on what need not be proved is duplicative." Duplicative language would provide the jury with the same information previously given. The language at issue does not instruct as to what the required factors are, but rather as to how to determine whether the third factor is met. It is a clarifying instruction closely related to a required factor and is not duplicative.

Defendant's argument that the language of CALCRIM No. 1111 improperly implies the jury should give no weight to whether the lewd act was "[a]ctually arousing,

appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child" fails as well. Defendant contends the presence of arousal or gratification is relevant to sexual motivation. If we accept defendant's proposition as true, he could not have been prejudiced. Defendant testified that he was aroused, which he concedes would be indicative that his motivation was sexual.

IV. *Whether CALCRIM No. 331 Unfairly Bolstered Breanna's Credibility in Violation of Defendant's Constitutional Rights*

Defendant argues that CALCRIM No. 331 impermissibly bolstered Breanna's credibility in violation of defendant's constitutional rights to a jury trial, to present a defense, to confront witnesses, and the general due process right to a fair trial. Defendant contends the instruction informs the jury not to consider the victim's level of cognitive ability, i.e., her difficulties in perceiving, understanding, remembering, or communicating, when assessing her credibility, even though these factors are relevant to assessing the credibility of other witnesses. Defendant specifically objects to the second sentence of CALCRIM No. 331, which states: "Even though a person with a developmental disability may perform differently as a witness because of his or her level of cognitive development, that does not mean he or she is any more or less credible than another witness."

The jury was instructed pursuant to a modified version of CALCRIM No. 331: "In evaluating the testimony of a person with a developmental disability, consider all of the facts surrounding that person's testimony, including his or her level of cognitive development. [¶] Even though a person with a developmental disability may perform differently as a witness because of his or her level of cognitive development, that does not mean he or she is any more or less credible than another witness. [¶] You should not discount or distrust the testimony of a person with a developmental disability solely because he or she has such a disability."

On our de novo review (*People v. Guiuan* (1998) 18 Cal.4th 558, 569 (*Guiuan*)), we reject defendant's challenge to CALCRIM No. 331. First, the Attorney General is correct that in the absence of an objection at trial, defendant has forfeited the claim. (*Guiuan*, *supra*, at p. 570.) Second, as defendant concedes, *People v. Catley* (2007) 148 Cal.App.4th 500, 506-509 rejected a similar challenge to CALCRIM No. 331. We agree with the analysis in *Catley*.

V. *Whether the Evidence Was Sufficient to Support the Conclusion That the Defendant Committed the Charged Offenses by Use of Force, Violence, Duress, Menace, or Fear of Immediate and Unlawful Bodily Injury*

The jury convicted defendant of three counts of forcible lewd conduct in violation of section 288, subdivision (b). At the close of trial, defendant moved to dismiss or reduce the forcible lewd act counts for insufficient evidence pursuant to section 1118.1.[8] The trial court denied defendant's motion. Defendant contends the convictions under section 288, subdivision (b) should be modified to convictions for violation of section 288, subdivision (a), because the prosecution did not present sufficient evidence the acts were committed by use of force, violence, duress, menace, or fear of unlawful bodily injury, an element required for conviction under section 288, subdivision (b).

"'"The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to section 1118.1 is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, that is, 'whether from the evidence, including all reasonable inferences to be drawn therefrom,

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8 Section 1118.1 provides: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right."

there is any substantial evidence of the existence of each element of the offense charged.'" [Citation.] "The purpose of a motion under section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case." [Citations.] The question "is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination." [Citation.] The sufficiency of the evidence is tested at the point the motion is made. [Citations.] The question is one of law, subject to independent review. [Citation.]'" (*People v. Velazquez* (2011) 201 Cal.App.4th 219, 229, quoting *People v. Stevens* (2007) 41 Cal.4th 182, 200.)

Evidence is substantial if, "'"after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' [Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1175 (*Young*).) "'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must . . . presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.] The same standard also applies in cases in which the prosecution relies primarily on circumstantial evidence. [Citation.]" (*Ibid*.)

We therefore review the record in the light most favorable to the prosecution to determine whether the challenged conviction is supported by substantial evidence, meaning "evidence which is reasonable, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "[M]ere speculation cannot support a conviction. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 35.) Nor does a finding that "the circumstances also might reasonably be reconciled with a contrary finding . . . warrant reversal of the judgment." (*People v. Proctor* (1992) 4 Cal.4th 499, 528-529.) The reviewing court does not reweigh the evidence, evaluate the credibility of witnesses, or decide factual conflicts, as these are the province of the trial court. (*People v. Culver* (1973) 10 Cal.3d 542, 548; *In re Frederick G*. (1979) 96 Cal.App.3d 353, 367.) "Moreover, unless the testimony is physically impossible or inherently improbable,

testimony of a single witness is sufficient to support a conviction. [Citation.]" (*Young, supra,* 34 Cal.4th at p. 1181.)

Section 288, subdivision (a) prohibits commission of a lewd or lascivious act on a child under the age of 14. Section 288, subdivision (b) defines an aggravated form of lewd act as "an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person. . . ." Nonforcible lewd conduct under subdivision (a) is a lesser included offense of forcible lewd conduct under subdivision (b).[9] (*People v. Ward* (1986) 188 Cal.App.3d 459, 472.) The judgment will be affirmed if any of the factors listed in subdivision (b) is present. (See *People v. Pitmon* (1985) 170 Cal.App.3d 38, 48 (*Pitmon*); accord, *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 154 (*Bergschneider*).) However, the appellate court will modify a conviction under section 288, subdivision (b) to a conviction under section 288, subdivision (a) if the record contains insufficient evidence of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. (*People v. Hecker* (1990) 219 Cal.App.3d 1238, 1249-1251.)

Because "commission of a lewd act itself constitutes the minimum proscribed conduct under subdivision (a), . . . in cases where 'force' is charged under subdivision (b), . . . it is incumbent upon the People to prove that the defendant used physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*People v. Cicero* (1984), 157 Cal.App.3d 465, 474, fn. omitted.) The force sufficient to sustain a conviction under subdivision (b) need not be considerable. The Court of Appeal has routinely held that pulling or holding a victim to prevent the victim from resisting or leaving constitutes force beyond that needed to accomplish the act. (See *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005 (*Alvarez*) [defendant carried victim to the couch, prevented victim from pushing him away, and held victim

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[9] At the time of defendant's trial, both offenses were punishable by a range of three, six, or eight years in state prison. However, a defendant convicted under section 288, subdivision (b)(1) was ineligible for probation (§ 1203.066, subd. (a)(1)) and subject to full-term consecutive sentencing (§ 667.6, subds. (c), (d)).

tightly]; *People v. Babcock* (1993) 14 Cal.App.4th 383, 386-388 (*Babcock*) [defendant held victims' hands on his genitals to manually stimulate himself]; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1381 [defendant placed his forearm over victim's mouth to prevent her from screaming and pushed her back when she attempted to move]; *Bergschneider, supra,* 211 Cal.App.3d at p. 154 [defendant physically overcame victim's attempts to resist him by pushing her hands aside]; *People v. Stark* (1989) 213 Cal.App.3d 107, 112 [defendant used his weight to hold victim down]; *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1307 [defendant pulled victims back as they tried to leave and pulled their heads forward to compel them to orally copulate him]; *Pitmon, supra,* 170 Cal.App.3d at p. 44 [defendant held the victim's hand on his genitals to manually stimulate himself]; but see *People v. Schulz* (1992) 2 Cal.App.4th 999, 1004 (*Schulz*) [no force where defendant grabbed victim's arm and held her while fondling her; case affirmed on duress finding]; *People v. Senior* (1992) 3 Cal.App.4th 765, 774 (*Senior*) [force not found when defendant pulled the victim back when she tried to pull away from oral copulations; case affirmed on duress finding].)

There is sufficient evidence of force to sustain defendant's conviction under section 288, subdivision (b) in this case. Breanna testified that she attempted to prevent defendant from unbuttoning her pants, but he pushed her hand away and thwarted her resistance. Breanna also testified that she tried to stand up and leave defendant's bedroom but defendant grabbed the back of her shirt, moving her back to the bed. These actions by defendant were not necessary to the commission of the acts and thus fall within the meaning of force as used in section 288, subdivision (b).

Defendant's argument that his case is analogous to *Schulz* and *Senior, supra,* is unavailing. First, we note that these cases are contrary to established precedent and have been rejected in subsequent decisions of the Court of Appeal. (See e.g., *Alvarez, supra,* 178 Cal.App.4th at p. 1004 ["*Schulz* is wrong."]; *Babcock, supra,* 14 Cal.App.4th at p. 388 ["[T]he fatal flaw . . . in the analyses in *Schulz* and *Senior*, is in their improper attempt to merge the lewd acts and the force by which they were accomplished *as a matter of law*."].)

Moreover, there is substantial evidence of duress in this case, which itself is sufficient to uphold the convictions. "'Duress' as used in this context means 'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' [Citations.] 'The total circumstances, including the age of the victim, and [her] relationship to defendant are factors to be considered in appraising the existence of duress.' [Citation.] Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family. [Citations.]" (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13-14.) The defendant's choice of an isolated location and disparity in size or age between the victim and the defendant are also relevant to duress. (*People v. Superior Court* (*Kneip*) (1990) 219 Cal.App.3d 235, 238-239.)

Defendant is Breanna's stepuncle. At the time of the acts, Breanna was living in the same house with defendant three days a week, and defendant had authority to discipline her if necessary. Defendant physically controlled Breanna to prevent her from leaving or resisting by pushing her hand away when she tried to keep him from unbuttoning her pants and pulling her by the back of her shirt when she attempted to leave the bedroom. Defendant's actions constitute duress. (*Senior*, *supra*, 3 Cal.App.4th at p. 775 [duress present where the defendant was the victim's father and an authority figure, and had physically controlled her by pulling her back when she tried to resist]; *Schulz*, *supra*, 2 Cal.App.4th at p. 1005 [sufficient evidence of duress where the defendant was the victim's adult uncle and authority figure and used physical dominance to prevent her from resisting].)

Finally, there was also substantial evidence of fear. "Fear" as defined in section 288, subdivision (b) means: "'(1) "A feeling of alarm or disquiet caused by the expectation of danger, pain, disaster, or the like; terror; dread; apprehension" [citation] and (2) "Extreme reverence or awe, as toward a supreme power" [citation].' [Citation.]"

(*People v. Cardenas* (1994) 21 Cal.App.4th 927, 939-940.) Breanna specifically testified that she feared defendant, and her fear was reasonable in light of the fact that he was a family member who had authority over her and was substantially older and larger in size than she was. Moreover, defendant physically controlled Breanna by pushing her hand away when she tried to prevent him from unbuttoning her pants and pulled her shirt when she tried to stand up to leave, and caused her pain when he touched her buttocks, giving her reason to be concerned that he would harm her if she resisted him further.

VI. *Whether Testimony Regarding the Victim's Out-of-Court Statement is Inadmissible Hearsay*

Defendant argues that Breanna's mother's testimony with respect to Breanna's out-of-court statement that defendant caused her pain is inadmissible hearsay. Defendant contends the statement does not fall within the exceptions to hearsay created by the fresh complaint doctrine or the prior consistent statement doctrine. Defendant contends that admission of the out-of court statement was prejudicial error requiring reversal.

We need not discuss the merits of the issue, because assuming error, it was manifestly harmless under both the federal and state constitutional standards of review. The statement identified defendant as the person who caused Breanna's pain. Breanna testified to the unlawful touching, and defendant admitted the touching but disputed the details. The evidence was therefore merely cumulative, and cumulative statements that repeat facts established by other means are not prejudicial. (*People v. Blacksher* (2011) 52 Cal.4th 769, 818, fn. 29.) We hold that the error was harmless under any standard. (*People v. Crew* (2003) 31 Cal.4th 822, 842 [court not required to determine if statement was hearsay because any error in admitting statement was harmless since jury had heard evidence]; see *People v. Jenkins* (2000) 22 Cal.4th 900, 1016 [challenged evidence was cumulative, thus error in admission was harmless beyond a reasonable doubt].)

VII. ***Whether the Minute Order and Abstract of Judgment Must Be Corrected***

Although the trial court imposed an indeterminate sentence of 15 years to life on count 3 and stayed the sentence as to count 4, the minute order and abstract of judgment incorrectly state the court imposed an indeterminate sentence of 15 years to life on count 1 and the count 4 sentence was imposed concurrently. We agree with both parties that the minute order and abstract of judgment must be amended to conform to the oral pronouncement of judgment. (*See People v. Sharret* (2011) 191 Cal.App.4th 859, 864 [trial court's oral pronouncement controls where there is a conflict between the pronouncement and the minute order or abstract of judgment].)

DISPOSITION

Upon issuance of the remittitur, the trial court is instructed to correct the abstract of judgment and minute order to properly reflect the imposition of an indeterminate sentence of 15 years to life on count 3 and the stay of sentence as to count 4. The clerk of the superior court shall send a copy of the corrected abstract of judgment and minute order to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J. ARMSTRONG, J.