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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ERNESTO AGUILERA, Defendant and Appellant.	B237689 (Los Angeles County Super. Ct. No. KA091928)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed as modified.

Vanessa Place, 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, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Ernesto Aguilera, of two counts of lewd conduct with a child under 14 years of age. (Pen. Code,[1] § 288, subd. (a).) The jury acquitted defendant of two counts of rape by force or fear. (§ 261, subd. (a)(2).) Defendant was a minor when he committed the offenses. He was sentenced to six years in state prison. We modify the judgment and affirm as modified.

II. THE EVIDENCE

We view the evidence in the light most favorable to the judgment. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1028; *People v. Barnes* (1986) 42 Cal.3d 284, 303.) G. accused four young male extended family members of sexual abuse: defendant; defendant's brother, Luis Aguilera (Mr. Aguilera); G.'s father's girlfriend's son, Christian Salazar; and G.'s maternal uncle, Andy Chavez. Defendant and Mr. Chavez were tried together. As discussed below, prior to the preliminary hearing, G. recanted her accusations against *Mr. Chavez*. Following trial, the jury acquitted him of all charges. Mr. Aguilera fled to Mexico to avoid arrest. Mr. Aguilera remained in Mexico at the time of trial. Mr. Salazar was charged separately. At the time of defendant's and Mr. Chavez's trial, Mr. Salazar had been declared incompetent.

Defendant sexually abused G. when she was seven and eight years old. There was evidence G. had an unusually detailed knowledge of sexual matters for a young child. There was some evidence she had been exposed to pornography. There was also evidence G. may have had sexual dreams that she confused with reality.

Detective Diana Larriva interviewed defendant prior to his arrest. Defendant admitted he had sexual contact with G. He claimed, however, that she was the aggressor.

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[1] All further statutory references are to the Penal Code except where otherwise noted.

Defendant described three sexual encounters with G. The first time, he was lying down. G. was wearing a skirt but no underwear. She jumped on top of him and put her vagina on his mouth. She left the room and then came back. She got on top of his penis and started rubbing it against her vagina. Defendant admitted he penetrated her vagina and that he ejaculated. The second time, he was changing his clothes and was wearing only a pair of boxers. G. grabbed his penis and put her mouth on it.

At trial, defendant testified about several occasions on which G. was sexually aggressive towards him. His trial testimony was consistent with his pre-trial interview. He denied, however, that he ever put his penis in G.'s vagina. He admitted he had said otherwise during his pre-trial interview, but claimed Detective Larriva had pressured him.

As noted above, G. also accused her maternal uncle, Mr. Chavez, of sexual abuse. Defendant and Mr. Chavez were tried together. G.'s accusations against Mr. Chavez were corroborated by A. G. is the older sister of A. Prior to trial, A. spoke with law enforcement officers and later testified at trial. A. saw Mr. Chavez having sex with G. Mr. Chavez was A.'s uncle. However, from his first law enforcement interview through trial, Mr. Chavez consistently denied ever touching G. inappropriately.

In September 2010, G. spoke to Detective Larriva. G. said Mr. Chavez never touched her inappropriately. And G. thought she might have had a dream that her "Uncle Andy" sexually abused her, but it never happened. At the December 8, 2010 preliminary hearing, G. recanted her accusations against Mr. Chavez. She testified she lied because Mr. Salazar threatened her and told her to accuse Mr. Chavez. She further testified she told A. to fabricate the claim of the sexual encounter with Mr. Chavez.

Two days after the preliminary hearing, on Friday, December 10, 2010, Mr. Chavez spoke by telephone with Luis Chavez.[2] They were brothers. The conversation was recorded. Luis was very angry. Luis said to Mr. Chavez: "Fucking bullshit. And I told the little girl, I told her fucking Sunday, I'm like I told her you little . . . you're so fucked up and you're fucking little, little stupid man. What you did to your

[2] To avoid confusion, we will refer to Luis Chavez by his first name.

uncle and you're gonna fucking ruin our, if he stays there you're gonna fucking ruin his whole fucking life. Just 'cuz your stupid little shit. Just for not telling the fucking truth. You know, you told the truth already and they didn't fucking believe you. What else can we expect? [¶] . . . And then you go home and try to fix everything and oh I'm sorry, I sorry, sorry's not enough. You already fucked up everything. What else can you, what else can you say? You already fucked up everything. With your stupid lies. That's what happens. You fucked up my life, you fucked up Andy's life, my mom's life. You fucked up everybody's life. Because your stupid fucking lying shit. That's bullshit." Luis said that on Sunday (December 4, 2010), he spoke to G. Luis told G. she had ruined Mr. Chavez's life with her lies. At trial, Luis denied he had said those words to G. Luis denied talking to G. about the criminal case. At trial, G. denied Mr. Chavez ever touched her in any way that made her uncomfortable. She said she lied when she accused Mr. Chavez of sexual abuse. She did so because Mr. Salazar threatened her.

On cross-examination, G. testified defendant, Mr. Salazar and Mr. Aguilar had all sexually abused her. But she denied that Mr. Chavez had ever touched her inappropriately. G. testified she was threatened by Mr. Salazar. Mr. Salazar ordered her to blame Mr. Chavez. If she did not, Mr. Salazar threatened to kill G. and her family.

III. DISCUSSION

A. Evidence Of The Victim's Sexually Aggressive Behavior

Defendant sought to introduce evidence the victim had been sexually aggressive towards several male family members in the same unwelcome way that she had approached him. Specifically, defendant sought to introduce statements Mr. Salazar made in a recorded law enforcement interview. And defendant sought to cross-examine G., "[To] elicit from her all of these different individuals who she has alleged has sexually touched her in an inappropriate way . . . ." Defendant's trial counsel, Kirt J. Hopson, withdrew a request to call Mr. Salazar as a witness.

The trial court subsequently ruled Mr. Salazar was unavailable as a witness. What followed was a review of Mr. Salazar's interview transcript. The trial court reviewed the transcript of the interview between Mr. Salazar and Detectives Larriva and Harvey. Mr. Salazar told the detectives that the first thing G. did was to tell him she had seen pornography. He told her to tell his mother; he did not want anything to do with it. The next time he saw her, one day in September 2010, G. started chasing him and tried to kiss him on the cheek. He moved away from G. He was trying to get out of bed. He was wearing pajamas. G. tried to grab his penis with her hand. Another day, Mr. Salazar was sitting down watching television when, "out of nowhere," G. put her hand under his clothes on his buttocks. Then she started touching his face and kissing him. G. also got on top of Mr. Salazar once. He pushed her off and told her, "[N]o, don't do that anymore." She was trying to put her body on top of his penis. On another occasion, Mr. Salazar woke up and G. was on his bed. She was touching his penis with her hand. She was under the covers and had his penis in her mouth. He pushed her away and said, "I'm going to tell my mom." Mr. Salazar told his mother what had occurred. Mr. Salazar told G. he was going to tell her father, but he was afraid to carry through with the threat. Mr. Salazar told the detectives: "I'm telling the truth. If I touched her, if I did something to her? No I didn't. She started touching me." The detectives questioned Mr. Salazar about what he told his mother. He admitted he had not told her everything that happened. Detective Larriva told Mr. Salazar he should be embarrassed and ashamed of himself. She then asked, "Do you think what you did was wrong?" Mr. Salazar answered, "Yes."

Ultimately, the trial court ruled Mr. Salazar's hearsay statements were inadmissible as against his pecuniary or proprietary interest within the meaning of Evidence Code section 1230. Defendant has not challenged those rulings. Further, with respect to the proposed cross-examination of G., she did testify that, in addition to defendant, Mr. Salazar and Mr. Aguilar also touched her inappropriately. The jury was fully aware G. had accused Mr. Chavez, but then recanted those accusations.

Defendant focuses his argument on the trial court's ruling under Evidence Code section 782, California's rape shield law. Under Evidence Code section 1103, evidence of a sexual assault victim's prior sexual conduct may be admissible under Evidence Code section 782. The evidence may be admissible to attack the victim's credibility provided it is relevant under Evidence Code section 780 and not barred by Evidence Code section 352. (*People v. Fontana* (2010) 49 Cal.4th 351, 362-363; *People v. Chandler* (1997) 56 Cal.App.4th 703, 707-708; *People v. Daggett* (1990) 225 Cal.App.3d 751, 757.) The evidence must be presented, however, in accordance with strict procedures set forth in Evidence Code section 782.[3] (*People v. Fontana, supra,* 49 Cal.4th at p. 362; *People v. Sims* (1976) 64 Cal.App.3d 544, 553-554.) Here, defendant failed to comply with Evidence Code section 782. As a result, he forfeited any claim of error. (*People v. Sims, supra,* 64 Cal.App.3d at p. 554.)

On appeal, defendant does not contend Evidence Code section 782 is unconstitutional on its face. (See *Michigan v. Lucas* (1991) 500 U.S. 145, 149-151 [upholding Michigan notice requirement as to victim sexual conduct evidence]; *People v.*

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[3] Section 782 provides in part: "(a) In any of the circumstances described in subdivision (c), if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780, the following procedure shall be followed: [¶] (1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness. [¶] (2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing pursuant to paragraph (3). After that determination, the affidavit shall be resealed by the court. [¶] (3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant. [¶] (4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court."

Fontana, supra, 49 Cal.4th at p. 362; *People v. Blackburn* (1976) 56 Cal.App.3d 685, 691, 692 [Evid. Code § 782 not unconstitutionally vague].) Instead, defendant argues that on the facts of this case, application of Evidence Code section 782 violated his due process and confrontation rights and deprived him of a fair trial. In other words, defendant asserts exclusion of the evidence was unjustified given its significance in this case. (See *Michigan v. Lucas, supra,* 500 U.S. at pp. 149-153 [no per se Sixth Amendment violation by preclusion sanction for failure to comply with Michigan rape shield law notice and hearing requirements]; see also *Taylor v. Illinois* (1988) 484 U.S. 400, 414-415 [preclusion sanction, which implicates substantial federal constitutional rights, justified where defendant deliberately violated discovery order].)

However, any error in excluding the evidence was harmless under any applicable standard of reversible error. (*People v. Fontana, supra,* 49 Cal.4th at pp. 364, 368.) The corroborative value of the proffered evidence was weak. To prevail, the jury would have to be convinced that defendant and other extended family members were the victims of a sexually aggressive little girl. Even if such were the case, there is no likelihood they would have acquitted defendant of the lewd conduct charges. As the trial court observed, even if defendant produced a litany of witnesses describing the child's aggressive sexual behavior toward them, he would not be exonerated. Further, defendant admitted to Detective Larriva that he had engaged in sexual conduct with G. Defendant further admitted he had penetrated G.'s vagina with his penis and that he had ejaculated. He offered no persuasive reason for his failure to report G.'s conduct to an adult. Defendant did not suffer an unconstitutional deprivation of his right to present a defense. Any error was harmless under either *People v. Watson* (1956) 46 Cal.2d 818, 836, or *Chapman v. California* (1967) 386 U.S. 18, 24.

B. Evidence Relating To The Victim's Credibility

Maria Luisa Medina Martinez was G.'s father's girlfriend and Mr. Salazar's mother. Defense counsel, Mr. Hopson, sought to elicit testimony from Ms. Martinez about G. being untruthful. Mr. Hopson reasoned the evidence would not be offered for the truth of the matter but would go to Ms. Martinez's state of mind as to the victim's believability. Mr. Hopson commented: "[G.]'s just coming up with all these different stories." The trial court ruled Ms. Martinez could not offer an opinion as to whether G. was a believable child.

On appeal, defendant argues a slightly different issue, "[Whether] it was prejudicial error to refuse to permit counsel to elicit evidence of [G.]'s character as a liar from [Ms.] Martinez." Defendant cannot raise this argument for the first time on appeal. (*People v. Tully* (2012) 54 Cal.4th 952, 1029; *People v. Riggs* (2008) 44 Cal.4th 248, 324.) Even if the issue were properly before us, we would not find any abuse of discretion. The Court of Appeal for the First Appellate District, Division Three, has explained: "An individual who has known a witness for a reasonable length of time or who knows the reputation of that witness for honesty and veracity in the community may qualify to testify as to the witness'[s] character for honesty or veracity. (Evid. Code, § 780, subd. (e); see *People v. Mendoza* (1974) 37 Cal.App.3d 717, 723-724; see also *People v. Harris* (1969) 270 Cal.App.2d 863, 872.)" (*People v. Sergill* (1982) 138 Cal.App.3d 34, 39; 31A Cal.Jur.3d, Evidence, § 810.) Conversely, a witness at trial who does not know the victim or is unaware of his or her reputation for honesty may not express such an opinion. (*People v. Mendoza*, *supra*, 37 Cal.App.3d at pp. 723-724; *People v. Sergill*, *supra*, 138 Cal.App.3d at p. 39.) Division Two of the Court of Appeal for this appellate district has explained: "To be admissible such evidence must be directed to the general reputation in the community in which the party lives or is generally known. [Citations.] 'Such evidence is properly excluded where the reputation is confined to the vicinity of his place of business or among the members of a restricted group of persons.' [Citations.]" (*People v. Carnavacci* (1953) 119 Cal.App.2d 14, 17; accord, *People v. Workman* (1955) 136 Cal.App.2d 898, 901.) Whether a witness is qualified to express such an opinion is for the trial court to determine within its

discretion. (*People v. Paisley* (1963) 214 Cal.App.2d 225, 233; *People v. Bugg* (1962) 204 Cal.App.2d 811, 818-819; *People v. Workman, supra,* 136 Cal.App.2d at p. 901.) The trial court's ruling is subject to review for an abuse of discretion. (*People v. Workman, supra,* 136 Cal.App.2d at p. 901; *People v. Carnavacci, supra,* 119 Cal.App.2d at p. 17; *People v. Love* (1916) 29 Cal.App. 521, 524-525.)

Ms. Martinez lived with G.'s father for a year, from February 2010 to March 2011. Her son, Mr. Salazar, also lived with them. G. and her siblings spent weekends with Ms. Martinez and the father during that year. Ms. Martinez "got to know" G. during that time. Ms. Martinez described their relationship as "close." Ms. Martinez took care of the children when their father was at work. When testifying, G. spoke of talking to Ms. Martinez sometimes. But G. denied discussing "private things" with Ms. Martinez. It was in September 2010 that G. first accused a male family member of sexually abusing her. This was eight months after Ms. Martinez began living with G.'s father. Two to four days later, Ms. Martinez learned G. had also accused Mr. Salazar of sexual abuse. As noted, Mr. Salazar was Ms. Martinez's son. The trial court could reasonably conclude Ms. Martinez was not qualified to give an opinion as to G.'s truthfulness. Ms. Martinez's experience of G. was limited and was confined to a restricted group of family members. There was no abuse of discretion.

Even if the trial court abused its discretion, it is not reasonably probable a result more favorable to defendant would have been reached had Ms. Martinez offered an opinion that G. was not a truthful child. (*People v. Sergill, supra,* 138 Cal.App.3d at p. 41; *People v. Watson, supra,* 46 Cal.2d at p. 836.) The jury heard G. testify and observed her demeanor. They heard her preliminary hearing testimony. G.'s testimony was inconsistent in material particulars, particularly as to Mr. Chavez. Further, the jury heard G. testify she fabricated accusations against her uncle, Mr. Chavez, because Mr. Salazar told her to do so and threatened her. And Ms. Martinez had her own credibility issues. G. had accused Ms. Martinez's son, Mr. Salazar, of sexual abuse. Under these circumstances, testimony by Ms. Martinez that G. was untruthful would not have impacted the jury's findings.

C. Cross-Examination Of G.

Defendant asserts the trial court violated his confrontation rights under the Sixth Amendment by curtailing cross-examination of G. concerning inconsistencies between her trial and preliminary hearing testimony. Defendant did not object on Sixth Amendment grounds in the trial court. As a result, he forfeited this contention. (*People v. Redd* (2010) 48 Cal.4th 691, 730; *People v. Kipp* (2001) 26 Cal.4th 1100, 1122.)

Even if not forfeited, we would not find any abuse of discretion. The applicable law is well settled: "'[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."' (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 (*Van Arsdall*), quoting *Davis v. Alaska* (1974) 415 U.S. 308, 318.) However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. (*Van Arsdall, supra,* 475 U.S. at pp. 678-679; see [*People v.*] *Cooper* [(1991)] 53 Cal.3d [771,] 817 [(*Cooper*)].) California law is in accord. (See *People v. Belmontes* (1988) 45 Cal.3d 744, 780[, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22].) Thus, unless the defendant can show that the prohibited cross-examination would have produced 'a significantly different impression of [the witnesses'] credibility' (*Van Arsdall, supra,* 475 U.S. at p. 680), the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. (*Cooper, supra,* 53 Cal.3d at p. 817.)" (*People v. Frye* (1998) 18 Cal.4th 894, 946, disapproved on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; accord, *People v. Dement* (2011) 53 Cal.4th 1, 52; *People v. Harris* (2008) 43 Cal.4th 1269, 1291-1292; *People v. Chatman* (2006) 38 Cal.4th 344, 372; *People v.*

Brown (2003) 31 Cal.4th 518, 545-546; (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1051.)

Mr. Hopson sought to introduce the "large majority" of G.'s preliminary hearing testimony portion by portion. The trial court reasonably refused to permit it. The trial court found, "[T]o subject this child to line by line, question and answer, question and answer for the . . . majority of her prior testimony, that's too much for a little child to have to experience and entertain, more importantly to digest and respond to." G. was cross-examined at length by defendant's counsel, Mr. Hopson, and Mr. Chavez's attorney, Jocelyn Sicat. As defendant concedes, G.'s entire preliminary hearing testimony was read into the record. The jury could verify whether G.'s preliminary hearing testimony was consistent with her trial testimony. There was no abuse of discretion and no deprivation of defendant's Sixth Amendment rights.

D. Sufficiency Of The Evidence

Citing the evidence favorable to him, defendant asserts: there was insufficient evidence of lewd intent and willfulness; further, "there was simply a lack of credible evidence to sustain his convictions"; it was the victim who instigated the contact; the jury convicted him only with respect to incidents where he admitted to law enforcement officers that he had genital contact with G.; his conviction rests on a lengthy police interrogation when he was 17 years old, scared and naive; and the police lied to him about the presence of deoxyribonucleic acid evidence and injuries to the victim. He concludes this was not constitutionally sufficient proof he harbored any lewd intent. We disagree.

Former section 288, subdivision (a), as effective when defendant committed the present crimes, stated: "Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or

sexual desires of that person or the child, is guilty of a felony . . . ." (Former § 288, subd. (a), as amended by Stats. 2004, ch. 823, § 7, eff. Jan. 1, 2005 to Sept. 8, 2010.) This is a specific intent crime. (*People v. Warner* (2006) 39 Cal.4th 548, 556; *People v. Pearson* (1986) 42 Cal.3d 351, 355.) A touching is willful when it is done with "a purpose of willingness to commit the act." (§ 7[4]; *People v. Kearney* (1942) 20 Cal.2d 435, 439.)

In reviewing a challenge to the sufficiency of the evidence, we apply the following standard of review: "[We] must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432; accord, *People v. Hovarter* (2008) 44 Cal.4th 983, 996-997; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576; see *People v. Jennings* (2010) 50 Cal.4th 616, 638.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes, supra,* 42 Cal.3d at p. 303; *Taylor v. Stainer* (1994) 31 F.3d 907, 908-909.) The California Supreme Court has held: "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient evidence to support [the conviction].' [Citation.]" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

There was substantial evidence of defendant's guilt. During a pretrial interview, G. told the authorities that defendant had repeatedly sexually abused her. This was corroborated during a separate pretrial interview with Dawn Henry, a sexual assault

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[4] Section 7, subdivision (1) states: "The word 'willfully' [as used in the Penal Code], when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

forensic investigator. At trial, G. testified as to repeated sexual conduct involving defendant. Even without defendant's extrajudicial confession, this was substantial evidence supporting defendant's conviction of two counts of lewd conduct with a child under 14. (See e. g., *People v. Guardado* (1995) 40 Cal.App.4th 757, 761-762; *People v. Levesque* (1995) 35 Cal.App.4th 530, 543-544; *People v. Smith* (1966) 246 Cal.App.2d 489, 490-491.)

The evidence was not, as defendant claims, incredible. Our Supreme Court has held: "To be improbable on its face [,as a ground for setting aside a conviction,] the evidence must assert something has occurred that does not seem possible could have occurred under the circumstances disclosed. The improbability must be apparent; evidence which is unusual or inconsistent is not necessarily improbable. *People v. Braun* [(1939)] 14 Cal.2d 1; *People v. Moreno* [(1938)] 26 Cal.App.2d 334." (*People v. Headlee* (1941) 18 Cal.2d 266, 267-268.) In *People v. Mayberry* (1975) 15 Cal.3d 143, 150, our Supreme Court observed: "'"Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]"'" (Accord, *People v. Hovarter* (2008) 44 Cal.4th 983, 996 [except in rare cases of demonstrable falsity, doubts about a witness's credibility should be left for the jury's resolution]; *People v. Golden* (1961) 55 Cal.2d 358, 365-366; *People v. Ennis* (2010) 190 Cal.App.4th 721, 728-730.) Nothing in the present case compels us to reject the victim's testimony as inherently incredible.

E. Further Argument During Deliberation

After jury deliberation commenced, and over defense objection, the trial court permitted further argument in response to a jury question. The jury inquired, "[R]egarding defendant Ernesto Aguilera, can we know what specific act relates to each of the counts?" The trial court asked whether further argument by counsel would be helpful. The jury unanimously agreed that it would. Each attorney was limited to 20 minutes. The prosecutor argued: counts 6, 7, 8 and 9 were "broken up by age"; counts 6 and 7 pertained to acts that occurred when G. was seven years old; counts 8 and 9 to when she was eight. Mr. Hopson reasserted that reasonable doubt precluded conviction.

Defendant relies on *United States v. Evanston* (9th Cir. 2011) 651 F.3d 1080, 1084-1085, and *United States v. Ayeni* (D.C. Cir. 2004) 374 F.3d 1313. We are not bound by lower federal court decisions. (*People v. Avena* (1996) 13 Cal.4th 394, 431; *People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) Under California law, a trial court has broad discretion allow further argument when a jury is deadlocked. (*People v. Young* (2007) 156 Cal.App.4th 1165, 1170-1171; Cal. Rules of Court, rule 2.1036 (b); see § 1094.) We see no reason why the trial court could not, in its broad discretion, allow further argument in response to the jury's question in the present case. There was no abuse of discretion.

F. Cumulative Error

Defendant contends his convictions must be reversed for cumulative error. Because we find no prejudicial error, there is no cumulative error. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1357; *People v. Tully, supra,* 54 Cal.4th at p. 1061.)

G. Presentence Custody Credit

The trial court gave defendant credit for 431 days in presentence custody and 62 days of conduct credit for a total of 493 days. Defendant received excessive custody

credit. He was arrested on September 27, 2010, and sentenced on November 22, 2011. Therefore, he was in presentence custody for 422 days. (*People v. Morgain* (2009) 177 Cal.App.4th 454, 469 [credit for date of arrest through date of sentencing]; *People v. Heard* (1993) 18 Cal.App.4th 1025, 1027 [same].) In addition, he was entitled to 63 days of conduct credit (§ 2933.1, subd. (a); 667.5, subd. (c)(6)) for a total of 485 days. The judgment must be modified and the abstract of judgment amended to so reflect.

H. Sex Offense Fine

The trial court imposed a $300 sex offense fine pursuant to section 290.3, subdivision (a) plus penalty assessments. The abstract of judgment lists the penalty assessments as follows: "[P]enalty assessment of $840.00 and a $60.00 criminal fine surcharge for a total of $1200.00." However, the penalty assessments total $780 and consist of the following: a $300 state penalty (§ 1464, subd. (a)(1)); a $210 county penalty (Gov. Code, § 76000, subd. (a)(1)); a $60 state surcharge (§ 1465.7, subd. (a)); a $90 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)); a $30 deoxyribonucleic acid penalty (Gov. Code, § 76104.6, subd. (a)(1)); a $30 state-only deoxyribonucleic acid penalty (Gov. Code, § 76104.7, subd. (a)); and a $60 emergency medical services penalty (Gov. Code, § 76000.5, subd. (a)(1).) (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528–1530; *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1254.) With respect to defendant's second lewd conduct conviction, we presume the trial court determined defendant did not have the ability to pay an additional sex offense fine. (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1371.) Therefore, the total of the fine and the penalty assessments is $1,080. The abstract of judgment must be amended to so reflect. (*People v. Jones* (2012) 54 Cal.4th 1, 89; *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

IV. DISPOSITION

The judgment is modified to award defendant 485 days of credit which includes 63 days of conduct credit and to impose penalty assessments as set forth in part III H above. The judgment is affirmed in all other respects. Upon remittitur issuance, the clerk of the superior court is to prepare an amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

KRIEGLER, J.

FERNS, J.*

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