Filed 10/17/17 P. v. Leopard CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GEORGE GARY LEOPARD, Defendant and Appellant.	B269439 Los Angeles County Super. Ct. No. VA138424

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Reversed as modified with directions.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant George Gary Leopard was convicted of 15 counts stemming from the molestation of his five-year-old step-granddaughter. On appeal, defendant contends there is insufficient evidence that any act was committed with duress or that 11 of the 15 charged acts were committed at all. He also contends the court's instruction on the use of propensity evidence misstated the law and lowered the prosecution's burden of proving guilt beyond a reasonable doubt. We conclude there was sufficient evidence that defendant committed the lewd acts but insufficient evidence of duress. We therefore modify the judgment to reflect convictions of lesser-included offenses that do not require duress. We also conclude—as have the other courts considering this issue—that the version of CALJIC No. 2.50.01 used in this case impermissibly lowered the prosecution's burden of proof. We therefore reverse the modified judgment and remand for retrial.

PROCEDURAL BACKGROUND

By amended information filed November 30, 2015, defendant was charged with one count of forcible oral copulation of a minor (Pen. Code,[1] § 269, subd. (a)(4)/§ 288a, subd. (c)(2); count 1); three counts of sexual penetration of a child (§ 269, subd. (a)(5)/§ 289, subd. (a); counts 6–8); and 15 counts of forcible lewd act upon a child (§ 288, subd. (b)(1); counts 11–25).[2] As to

---

[1] All undesignated statutory references are to the Penal Code.

[2] At the preliminary hearing on June 9, 2015, the People announced unable to proceed on counts 2–5, 9, and 10 of the complaint and dismissed them. On December 1, 2015, just before trial, the

all counts, the information alleged that the victim was under age 14 (§ 1203.066, subd. (a)(8)); that defendant had substantial sexual contact with her (*ibid.*); and that the offenses were committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury (*id.*, subd. (a)(1)).

Defendant pled not guilty and denied the allegations. The court denied defendant's pretrial motion to appoint expert witnesses. At trial—over defense objection—the court instructed the jury using CALJIC, the pattern jury instructions produced by the Thomson Reuters Corporation, rather than CALCRIM, the official jury instructions approved by the Judicial Council. (See Cal. Rules of Court, rule 2.1050(a); *id.*, rule 2.1050(e) ["Use of the Judicial Council instructions is strongly encouraged."].) After a trial at which he testified in his own defense, the jury found defendant guilty of all counts and found the conduct allegations true.

The court denied defendant's motion to run 10 of the counts concurrently under section 667.6, subdivision (c), and sentenced him to an aggregate term of 57 years to life. The court imposed a determinate sentence of 42 years for counts 11–24 (§ 288, subd. (b)(1))—a consecutive low term of three years for each count.[3] The court imposed the mandatory indeterminate

---

People dismissed counts 6, 7, and 8 under section 1385. On December 7, 2015, the court dismissed count 25 under section 1118.1.

[3] It appears from the record that the court concluded consecutive sentencing was mandatory under section 667.6, subdivision (d), rather than discretionary under subdivision (c). The court did not explain the basis for its conclusion that all incidents occurred on separate occasions, however. We note that if defendant is convicted upon retrial, the court should state the basis for its finding that consecutive sentences are mandatory under subdivision (d). Should the court

sentence of 15 years to life (§ 269, subd. (a)(4)) for count 1 (§ 288a, subd. (c)(2)), to run consecutively.

Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND

Denise O. was born on March 1, 2001. When she testified at trial in December 2015, Denise was 14 years old. Defendant was married to Denise's grandmother. He was 5'11" and weighed 185 pounds.

Defendant lived with Denise's grandmother in a mobile home in Bellflower. From the time Denise was four years old until her grandparents moved to San Jacinto when she was nine, Denise's mother, Ana O., dropped her off at the mobile home for babysitting. Ana usually dropped off her two oldest daughters—Denise and Desiree O.—when she had to go to the doctor or get groceries. While she typically brought both girls to her mother's home, on two or three occasions, Ana dropped Denise off alone. Ana's mother was always home when Ana dropped the girls off and picked them up.

When Denise was five years old and in kindergarten, defendant began acting inappropriately toward her. The first time this happened, defendant and Denise were sitting on a couch in the living room watching television. Defendant told Denise to sit on his lap. When she did, he pulled up her skirt, put his hands under the skirt, slid her panties to the side, and

---

instead conclude consecutive sentences are discretionary, the court should state the reasons for its sentencing choice under subdivision (c). (See *People v. Pitmon* (1985) 170 Cal.App.3d 38, 54.)

touched and rubbed her vagina. The incident lasted less than five minutes. Denise did not tell anyone what had happened.

Sometime after this first incident, defendant again touched Denise's vagina while she sat on his lap on the living room couch. In that incident, after defendant rubbed Denise's vagina, he unzipped his pants, pulled them down enough to expose his penis, and told Denise to touch his penis. Denise quickly touched his penis with her hand. Then defendant told Denise to put her mouth on his penis. She licked his penis for about a second.

Ultimately, defendant touched Denise's vagina five times on five different days. Each incident happened the same way, and it never happened when her sisters, Desiree and Deanna O., were there. Defendant also had Denise touch his penis four times. He had her put her mouth on his penis four times. Finally, defendant kissed Denise inappropriately on five occasions by putting his tongue in her mouth.

Though Denise could not recall when defendant stopped molesting her, she thought the molestation lasted for six months or a year. Defendant's actions made Denise feel confused and curious but not afraid. In fact, she testified that at the time, she did not think defendant was doing anything wrong.

Six or seven years later, when Denise was in sixth grade, she started seeing a therapist for anxiety. During the second appointment, Denise told the therapist about the touching and said it felt like a dream. That was the first time she learned the touching was wrong. After the session, the therapist asked Ana questions about defendant, which led Ana to ask Denise if defendant had done something to her. Denise told her mother that defendant had sexually molested her. The parties stipulated that the therapist was a mandated reporter of sexual abuse.

On February 11, 2015, Los Angeles County Sheriff's Detective Rudy Acevedo was assigned to investigate Denise's abuse claim. Acevedo had not been trained in forensic interview techniques, and Denise was not given a forensic interview. At Acevedo's suggestion, Denise made a recorded "pretext" telephone call to defendant. According to Acevedo, a pretext call is an investigative technique whereby a victim attempts to get a suspect to implicate himself in a crime.

During the call, Denise told defendant she wanted to discuss times he had done "uncomfortable things, like, you would touch me in my private parts." She said she had not told anyone yet; she just wanted defendant to apologize to her. Defendant repeatedly apologized to Denise, saying it had happened a long time ago, was a "nightmare," and would never happen again. He pleaded with Denise not to tell her mother or anyone else, saying that "mama will leave me" if Denise told anyone what he had done, and that he would get in trouble and go to jail. After Denise threatened to tell her mother, she asked why defendant had done "things like touch me and put your penis in my mouth." He answered: "I don't know, I was confused, I did some stupid, I did stupid stuff to you that I'm so sorry for." Defendant admitted that he knew what he had done was wrong. He did not remember doing anything to her sisters or to anyone else.

The People also presented evidence of uncharged conduct involving Denise's younger's sister Desiree. Desiree testified that one day when she was seven or eight years old, she was in the living room watching television with defendant, when he asked if he could take her picture. They were sitting on separate couches, facing each other. Desiree was wearing short shorts. As defendant took the photograph, he told Desiree to spread her

legs. Defendant repeatedly told her to spread her legs while he took four or five photographs of her body with his mobile phone. Desiree complied.[4]

During the 2015 pretext call, Denise alluded to this incident. Denise told defendant she remembered when he told Desiree to spread her legs and took photographs of her while she was wearing "really short shorts … ." Defendant did not deny having done so. Instead, he said, "Oh, my gosh, uh, uh, that was so stupid of me."

At trial, defendant testified that he panicked when Denise called him and accused him of touching her inappropriately. He claimed he did not do any of the things Denise accused him of doing but was afraid Denise would falsely accuse him—and if she did, people would believe her. Defendant apologized to Denise on the telephone in the hopes that she would not say anything to anyone else, "and it would be all forgotten and I'd get on with my life." He hoped that his apologies and statements of regret would satisfy Denise by telling her what she wanted to hear.

---

[4] The prosecution argued defendant's actions violated section 647.6 (annoying or molesting a child), and was therefore admissible as propensity evidence under Evidence Code section 1108, subdivision (d)(1)(A). A violation of section 647.6 requires the People to prove: "1. The defendant engaged in conduct directed at a child; [¶] 2. A normal person, without hesitation, would have been disturbed, irritated, offended, or injured by the defendant's conduct; [¶] 3. The defendant's conduct was motivated by an unnatural or abnormal sexual interest in the child or in children generally; and [¶] 4. The child was under age 18 at the time of the conduct." (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1161; see *id*. at pp. 1161–1163.)

CONTENTIONS

Defendant contends: (1) there is insufficient evidence of three of five occasions of sexual abuse; (2) there is insufficient evidence of duress; (3) the court abused its discretion by denying defendant's motion to exclude the victim's crying relatives from the courtroom during defense closing argument; (4) counsel provided constitutionally inadequate representation by failing to ask the court to admonish the jury to disregard the crying; (5) CALJIC No. 2.50.01 misstated the law and lowered the prosecution's burden of proof; (6) there was insufficient evidence that the uncharged conduct with Desiree was a sex offense; (7) the jury should not have been instructed on the elements of section 647.6; (8) the uncharged conduct should have been excluded under Evidence Code section 352; (9) the court failed to make the required findings about the necessity of a victim support person; (10) the court failed to instruct the victim support person not to prompt or sway the witness; and (11) the victim support person's conduct violated defendant's Confrontation Clause rights.

DISCUSSION

While defendant raises approximately 11 issues on appeal, we only address sufficiency of the evidence and instructional error, as those issues are dispositive.

1. Sufficiency of the Evidence

A criminal defendant may not be convicted of any crime unless the prosecution proves every fact necessary for conviction beyond a reasonable doubt. (U.S. Const., 5th Amend.; U.S. Const., 14th Amend.; see Cal. Const., art. I, §§ 7, 15; *In re*

Winship (1970) 397 U.S. 358, 364; *Jackson v. Virginia* (1979) 443 U.S. 307, 316.) This principle is so fundamental to the American system of justice that criminal defendants are always "afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." (*United States v. Powell* (1984) 469 U.S. 57, 67.)

Defendant contends there is insufficient evidence that Denise acted under duress, a required element of all counts, or that he committed 11 of the 15 charged lewd acts. We agree with the former argument and disagree with the latter.

1.1. Standard of Review

In assessing the sufficiency of the evidence, we review the entire record to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid*.)

In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) The same standard applies where the conviction rests primarily on circumstantial evidence. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) We may not reweigh the evidence or resolve evidentiary conflicts. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) In light of these principles, we may not reverse for insufficient evidence unless it appears " 'that upon no hypothesis

whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Deference is not abdication, however, and substantial evidence is not synonymous with *any* evidence. " 'A decision supported by a mere scintilla of evidence need not be affirmed on appeal.' [Citation.] Although substantial evidence may consist of inferences, those inferences must be products of logic and reason and must be based on the evidence. Inferences that are the result of mere speculation or conjecture cannot support a [guilty verdict]. The ultimate test is whether a reasonable trier of fact would make the challenged ruling considering the whole record. [Citations.]" (*In re James R.* (2009) 176 Cal.App.4th 129, 135; Evid. Code, § 600, subd. (b) ["An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."].)

1.2. There is insufficient evidence of duress—coercion achieved through threat of force, violence, danger, hardship, or retribution.

To convict a defendant of violating section 288, subdivision (b)(1), the People must prove the following elements beyond a reasonable doubt:

- The defendant willfully touched any part of a child's body—or caused a child to touch the defendant's body—either on the bare skin or through the clothing;
- In committing the act, the defendant used force, violence, duress, menace, or fear of immediate and unlawful bodily injury;

- 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
- The child was under the age of 14 years at the time of the act.

(§ 288, subd. (b)(1); see CALCRIM No. 1111.)[5] In this case, the prosecution argued the lewd acts were accomplished by duress.

Duress is "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." (*People v. Pitmon*, *supra*, 170 Cal.App.3d at p. 50, quoted with approval in *People v. Leal*, *supra*, 33 Cal.4th at pp. 1004–1005.) Duress "involves psychological coercion. [Citation.]" (*People v. Senior* (1992) 3 Cal.App.4th 765, 775 (*Senior*).) Coercion, in turn, "suggests overcoming resistance or unwillingness by actual or threatened violence or pressure." (*Synonym Discussion of Coerce*, Merriam-Webster <https://www.merriam-webster.com/dictionary/coerce> [as of Oct. 5, 2017].)

Coercion may be more likely where, for example, the defendant holds a position of authority over—or is much older or larger than—the victim. (*Senior*, *supra*, 3 Cal.App.4th at p. 775.)

---

[5] To convict a defendant of aggravated sexual assault by oral copulation (§ 269, subd. (a)(4)/§ 288a, subd. (c)(2); count 1), the touching must be an act of oral copulation. The other elements are the same. (*People v. Leal* (2004) 33 Cal.4th 999, 1004–1005 [noting § 288 definition of duress also applies to § 269 and § 288a].)

" '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.' " (*People v. Veale* (2008) 160 Cal.App.4th 40, 46.) Ultimately, however, psychological coercion, without more, does not establish duress. (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1321 (*Espinoza*).) There must also be "evidence that 'the victim['s] participation was impelled, at least partly, by an implied threat … .' [Citation.]" (*Ibid.*, alteration in *Espinoza*.)

Here, Denise repeatedly testified that defendant's actions made her feel confused and curious—not disgusted or afraid. She also repeatedly testified that she did not think defendant was doing anything wrong. To be sure, Denise performed or submitted to some acts because defendant told her to. While that evidence might be enough to establish lack of consent, however, lack of consent is irrelevant to duress. (*People v. Soto* (2011) 51 Cal.4th 229, 244–248 [because lack of consent is not an element of the offense, consent is immaterial].)

Denise testified unequivocally that she was not under duress. According to Denise, defendant did not threaten to punish her, to tell her mother she had disobeyed him, or to withhold dinner; he did not use force, threats, or intimidation to make her comply; he did not warn her not to tell anyone or suggest that telling would break up the family. Denise testified that she was not afraid of her step-grandfather; she was not afraid something bad would happen to her if she did not comply with his demands. Indeed, although Denise touched him for no more than a second each time, defendant neither asked her to continue nor physically compelled her to do so.

The People nevertheless argue defendant coerced Denise to perform and submit to various touchings based on their "relative ages" and defendant's "status and power over" her. They contend that thanks to these factors—and only these factors—defendant "did not need to use physical force or make overt threats to express dominance and control over [Denise]."

Certainly, a victim's testimony that "the defendant did not use force or threats … must be considered in light of her age and her relationship to the defendant." (*People v. Cochran* (2002) 103 Cal.App.4th 8, 14 (*Cochran*).) Such factors are relevant to whether any " 'threat of "force, violence, danger, hardship or retribution" ' " is sufficiently coercive. (*Ibid.*) Evidence of youth or family relationship does not absolve the prosecution from proving threats or pressure in the first instance, however. (See *People v. Hecker* (1990) 219 Cal.App.3d 1238, 1251 [while "all sex crimes with children are inherently coercive," the Legislature has determined "that defendants who compound their commission of such acts by the use of violence or threats of violence should be singled out for more particularized deterrence"].)

The People's cited authorities do not support the proposition that either age or family relationship, without more, is sufficient to sustain a duress finding. While *Cochran* and *Senior* discussed those issues, those cases also involved additional evidence pointing to duress. In *Senior*, the first time the defendant molested the victim, he threatened to "hit her if she moved." (*Senior*, *supra*, 3 Cal.App.4th at p. 770.) Since the defendant had hit the victim and her siblings in the past, this did not appear to be an idle threat. (*Ibid.*) Then, defendant warned the victim that if she told anyone about the molestation, there would be a divorce. (*Ibid.*) "According to defendant," who

admitted molesting his daughter, "this first molestation set the stage. He 'gave her the lecture on the first time' and after that he 'didn't have to' have a similar conversation." (*Id.* at pp. 770, 771.) *Senior* concluded that these factors—combined with the physical restraint imposed in some subsequent molestations—provided sufficient evidence of an " 'implied threat of force, violence, danger, hardship or retribution' " to sustain a duress finding for later molestations in which the defendant did not explicitly threaten the victim. (*Id.* at p. 775–776.)

Though *Cochran* featured less compelling testimony than *Senior*, the *Cochran* jury was able to infer duress from *video evidence* of the actual molestation in the family home. (*Cochran*, *supra*, 103 Cal.App.4th at p. 15.) The video depicted "a small, vulnerable and isolated child" recoiling from her father. (*Ibid.*) Moreover, the defendant in the case told the victim "not to tell anyone because he would get in trouble and could go to jail," which the jury could have viewed as an "implicit threat that she would break up the family if she did not comply … ." (*Id.* at pp. 15–16.) In short, the evidence in *Cochran* and *Senior* extended well beyond the quantum of evidence hypothesized in *Cochran*'s footnote 6—i.e., that where a child is molested by her father in the family home, "in all but the rarest cases duress will be present" (*id.* at p. 16, fn. 6)—and the evidence in this case falls far short of it.

Finally, the People's discussion of *Espinoza* is not persuasive. The People attempt to distinguish that case, which found insufficient evidence of duress, by suggesting that here, defendant "had a far closer and more authoritative relationship to Denise (as her frequent babysitter) than the defendant in *Espinoza* did to his victim, who had been living in another state

until shortly before the molestations began." As in the other cited authorities, however, the molester in *Espinoza* was the victim's father—and as with the other cited authorities, the People do not explain why a step-grandparent or "frequent babysitter" is a more compelling authority figure than a parent. (*Espinoza*, *supra*, 95 Cal.App.4th at p. 1292.) Nor do the People acknowledge the precarious position in which the *Espinoza* victim found herself. At the victim's request, the defendant in that case had driven from California to Nebraska, picked up the victim and her sisters, and brought them to live with him in Salinas. (*Ibid*.) The victim's apparently unreliable mother remained in the Midwest. (*Id*. at pp. 1292, 1295 [victim and sisters stayed with defendant's sister for three months and were then placed in foster care].) Paternity aside, it is not clear that the *Espinoza* victim, a special needs student and previous molestation victim living thousands of miles from her mother, was less "susceptible to implicit pressure" than Denise. (*Id*. at pp. 1292, 1294 [sisters did not believe victim's previous abuse report], 1296 [same], 1321.)

After reviewing the entire record, we find no substantial evidence that Denise performed or submitted to the charged acts under duress. Consequently, the section 288, subdivision (b), convictions must be modified to the lesser-included offense of violating section 288, subdivision (a). (§ 1181, subd. 6; § 1260; *People v. Bailey* (2012) 54 Cal.4th 740, 748 [where court finds insufficient evidence of greater offense but sufficient evidence of lesser-included offense, reviewing court may modify the judgment to reflect conviction of lesser offense]; *Espinoza*, *supra*, 95 Cal.App.4th at pp. 1321–1322 [same].) Likewise, defendant's conviction for forcible oral copulation of a child (§ 269, subd. (a)(4)/§ 288a, subd. (c)(2); count 1) must be modified to the

lesser-included offense of violating section 288a, subdivision (c)(1).

1.3. There is sufficient evidence to support the number of counts.

Defendant also argues Denise's testimony was too ambiguous to support convictions for 11 of 15 incidents—namely, the acts that occurred on the third, fourth, and fifth occasions. We disagree.

To be sure, the evidence also would have supported a conclusion that Denise was not molested on five separate occasions. For example, Denise testified that she was never molested when her sisters were present, but her mother testified that she only left Denise alone two or three times. And, while Denise plainly recalled two occasions and may have recalled a third, she testified repeatedly that she was guessing about the total number. She explained that she simply could not remember each time distinctly.

As discussed, however, we may not reweigh the evidence or resolve evidentiary conflicts (*People v. Young*, *supra*, 34 Cal.4th at p. 1181), and there was also enough evidence from which a reasonable jury could conclude defendant committed 14 lewd acts and one act of oral copulation. Denise specifically remembered defendant kissing her with his tongue five times. (See *In re R.C.* (2011) 196 Cal.App.4th 741, 750–751 ["there can be no innocent or lovingly affectionate tongue kissing of a child by an adult."].) Denise also testified that she was certain she licked defendant's penis at least four times and certain that she touched defendant's penis at least four times. On each of those occasions, defendant also touched Denise's vagina. Finally, Denise remembered one

additional occasion on which defendant touched only her vagina. There is sufficient evidence to sustain the verdict.

2. Instructional Error

Defendant argues that the court erroneously instructed the jury regarding the use of evidence of his propensity to commit sex offenses. (Evid. Code, § 1108.) He maintains that the challenged instruction lowered the prosecution's burden of proof because it told the jurors they could find any *charged* offense true by a preponderance of the evidence and then use that finding to infer that he had the disposition to commit—and did commit—*other* charged offenses. Defendant is correct.

2.1. Forfeiture and Standard of Review

As a preliminary matter, the People insist defendant's failure to object to the instruction on this ground at trial forfeited the error.[6] The People are mistaken.

"A trial court in a criminal case is required to give correct jury instructions on the general principles of law relevant to issues raised by the evidence. [Citation.]" (*People v. Cruz* (2016) 2 Cal.App.5th 1178, 1183 (*Cruz*).) Certainly, a criminal defendant has a right to accurate instructions on the People's burden of proof. (*People v. Aranda* (2012) 55 Cal.4th 342.) And it is settled that a defendant need not object to preserve a challenge to an instruction that affects his substantial rights. (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; see § 1259 [we "may also review any instruction given, refused or modified, even though no objection was made thereto in the trial court, if the

---

[6] Defendant did object to the court's use of *any* CALJIC instruction, however.

substantial rights of the defendant were affected thereby."]; § 1469 [same].) Whether a defendant's substantial rights were affected, however, can only be determined by deciding if the instruction as given was flawed and, if so, whether the error was prejudicial. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012 [forfeiture rule does not apply to incorrect statements of law].) That is, if defendant's claim has merit, it has not been forfeited. Thus, we must necessarily review the merits of his claim.

We review instructional errors de novo. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

2.2. As given, CALJIC No. 2.50.01 misstated the law.

"In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a).)

"Section 1108 was added to the Evidence Code in 1995 (Stats. 1995, ch. 439, § 2, p. 3429) and, since then, courts have understood that it at least allows admission of evidence of *uncharged* sexual offenses to show a propensity to commit sexual offenses. [Citations.]" (*Cruz*, *supra*, 2 Cal.App.5th at p. 1185.) Thus, in this case, the court properly allowed Desiree to testify that one day when she was seven or eight years old and wearing short shorts, defendant told her to spread her legs so he could take a picture of her. In addition, the Supreme Court held in *People v. Villatoro* (2012) 54 Cal.4th 1152 (*Villatoro*), that the statute "also allows evidence of sexual offenses *charged in the current prosecution* to be used to show a propensity to commit *other* charged offenses in the same case. [Citation.]" (*Cruz*, *supra*, at p. 1184.)

As we will explain, while the instructions in this case were "correct in stating that charged sex offenses can be used to show a propensity to commit other charged sex offenses," they were "incorrect in stating that a charged offense need be found true only by a preponderance of the evidence before it can be used for this purpose." (*Cruz*, *supra*, 2 Cal.App.5th at p. 1184.)

The court's instruction, which it gave twice, followed CALJIC No. 2.50.01.[7] The first time, the court instructed the jury as follows:

> In determining whether defendant has been proved guilty of any sexual crime of which he is charged, you should consider all relevant evidence, including whether the defendant committed *any other sexual crime, whether charged or uncharged*, about which evidence has been received. *The crimes charged in Counts 1, 11–24 may be considered by you in that regard*.
>
> A. Any conduct made criminal by Penal Code section 647.6(a). The elements of this crime are set forth elsewhere in these instructions.
>
> *If you find by a preponderance of the evidence* that the defendant committed any such other sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit *and did commit the crime of which he is accused*.

---

[7] All undesignated jury instruction numbers are to CALJIC.

> However, even though you find by a preponderance of the evidence that the defendant committed another sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes you are determining. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes that you are determining. [Emphasis added.]

At this point in the instructions, the court had already instructed the jury on note-taking, independent investigations, and how to evaluate evidence, but had not yet instructed the jury on the presumption of innocence, reasonable doubt, or preponderance of the evidence. Then, after giving No. 2.50.01, the court read the jury the following CALJIC instructions: No. 2.62 explaining that the jury could draw a negative inference from the defendant's failure to explain or deny evidence against him; No. 2.70 defining confession and admission; No. 2.72 about corpus delicti; No. 2.81 about lay opinion testimony; No. 2.90 about the presumption of innocence and reasonable doubt; No. 3.30 about general intent; No. 4.71 explaining the People did not need to prove the precise dates of the charged crimes; Nos. 10.55 and 10.59.10 concerning the elements of count 1; No. 1.23.1 defining consent; No. 10.60 that the victim's testimony does not require corroboration; No. 10.42 concerning the elements of counts 11–14; No. 17.02 that each count is a distinct occurrence; No. 17.24.1 concerning allegations of duress and substantial sexual contact; No. 1.06 about the identities of the parties and

charged crimes; No. 10.41 concerning the elements of the lesser-included offense of section 288, subdivision (a); and No. 3.31 about specific intent.[8]

Finally, as its last substantive instruction, the court gave a longer version of No. 2.50.01:

> In determining whether defendant has been proved guilty of any sexual crime of which he is charged, you should consider all relevant evidence, including whether the defendant committed *any other sexual crime, whether charged or uncharged*, about which evidence has been received. *The crimes charged in Counts 1, 11–24 may be considered by you in that regard*.
>
> A. Any conduct made criminal by Penal Code section 647.6(a). The elements of this crime are set forth elsewhere in these instructions.
>
> *If you find by a preponderance of the evidence* that the defendant committed any such other sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit *and did commit the crime of which he is accused.*
>
> However, even though you find by a preponderance of the evidence that the defendant committed another sexual offense, that is not sufficient by itself to prove beyond a reasonable

---

[8] As defendant does not challenge any of these instructions on appeal, we express no opinion about their accuracy or propriety.

> doubt that he committed the charged crimes you are determining. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes that you are determining. [Emphasis added.]

The court provided the elements of section 647.6, subdivision (a), then continued:

> Within the meaning of the preceding instructions, the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed a crime other than those for which he is on trial.
>
> You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that the defendant committed the other crime.
>
> If you find other crimes were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime.

Finally, the court concluded by defining preponderance of the evidence:

> "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that

> you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.
>
> You should consider all of the evidence bearing upon every issue regardless of who produced it.

At best, "the instruction given here told the jury it should first consider whether the offenses charged in counts 1 [and 11–24] had been established by a preponderance of the evidence, while holding its ultimate decision on the same offenses in suspension. Then the jury was required to decide whether the preponderance finding showed a propensity, and whether this propensity, in combination with the other evidence, proved those offenses a second time, this time beyond a reasonable doubt." (*Cruz*, *supra*, 2 Cal.App.5th at pp. 1185–1186.) We agree with the *Cruz* court that this was error.

In *Villatoro*, the defendant argued "that the instruction given to the jury did not 'designate clearly what standard of proof applied to the charged offenses before the jury could draw a propensity inference from them.' [Citation.] The defendant contended the jury could have used any standard. The Supreme Court disagreed, because the instruction given (a modified version of CALCRIM No. 1191) said, ' "[t]he People must still prove each element of every charge beyond a reasonable doubt and prove it beyond a reasonable doubt before you may consider one charge as proof of another charge." ' [Citation.] [Usually, the] pattern instruction, which referred only to the use of uncharged offenses to show propensity, stated that those uncharged offenses need be proved only by a preponderance of the evidence. [Citation.] Because the modified instruction stated

instead that the reasonable doubt standard must be applied, 'there was no risk the jury would apply an impermissibly low standard of proof.' [Citation.]" (*Cruz*, *supra*, 2 Cal.App.5th at p. 1185.) In short, the instruction in *Villatoro*, which referred *only* to charged offenses, explained that any charged crime must be found beyond a reasonable doubt before it could be used as propensity evidence of another charged crime. (*Villatoro*, *supra*, 54 Cal.4th at pp. 1167–1168.)

We agree with *Cruz* that although "*Villatoro* did not expressly hold that currently charged offenses must be proved beyond a reasonable doubt before they can be used to show a propensity under Evidence Code section 1108, … it strongly implied that rule." (*Cruz*, *supra*, 2 Cal.App.5th at p. 1186.) "The instruction used in the present case, by contrast, expressly stated that the preponderance standard applied to the determination of whether [defendant] committed charged and uncharged offenses for the purpose of deciding whether he had a propensity to commit sexual offenses." (*Id.* at p. 1185.)[9]

2.3. Reversal is required.

The instruction at issue here presented "the jury with a nearly impossible task of juggling competing standards of proof during different phases of its consideration of *the same evidence*. We think the ultimate effect is to lower the prosecution's burden

---

[9] The People argue No. 2.50.01 correctly stated the law because the Supreme Court upheld CALJIC No. 2.50.01 in *People v. Reliford* (2003) 29 Cal.4th 1007, 1012. That argument overlooks the fact that *Reliford* involved the use of *uncharged* offenses to show propensity, not charged offenses, and therefore did not address the issue presented here. (*Id.* at pp. 1011–1012.)

of proving guilt beyond a reasonable doubt. Consequently, we find the error to be reversible per se … ." (*Cruz*, *supra*, 2 Cal.App.5th at p. 1187, emphasis added; accord, *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1179–1182 [same evidence used to prove mental state under Evid. Code, § 1101 *and* to prove gross negligence, an element of the offense].)[10]

---

[10] Because we conclude the error is structural, we need not address prejudice. We emphasize, however, that if the error were "one of confusion and misdirection" rather than "incorrect definition," as the People suggest, we would conclude that the People have established neither that the jury applied the correct burden of proof nor that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [reversal required for federal constitutional errors unless the People "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."].)

DISPOSITION

The judgment is modified as follows. Count 1 is modified to reflect a conviction of the lesser-included offense of violating Penal Code section 288a, subdivision (c)(1), due to the insufficiency of the evidence of duress. Counts 11–24 are modified to reflect convictions of the lesser-included offense of violating Penal Code section 288, subdivision (a), due to the insufficiency of the evidence of duress. As modified, the judgment is reversed and the matter is remanded for retrial of the lesser-included offenses in accordance with the views expressed in this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

STONE, J.*

---

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