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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. JOHN CLEOPHAS AUGBORNE III, Defendant and Appellant.	C100165, C100166 (Super. Ct. Nos. CR2021-1025, CS-2020-50)

SUMMARY OF THE APPEAL

A jury found defendant John Cleophas Augborne III guilty of 15 counts based on his sexual abuse of three of the daughters of his romantic partners over the course of approximately nine years. In this appeal, defendant challenges the guilty verdict on eight of those counts. He first argues the trial court improperly denied his Penal Code section 1118.1 motion for a directed verdict on seven sexual battery counts under Penal Code section 243.4, subdivision (a). (Section citations that follow are to the Penal Code unless otherwise indicated.) Defendant argues there was insufficient evidence in the People's case in chief to support a finding that he unlawfully restrained the victim when he

sexually touched her. Next, defendant argues the trial court committed prejudicial error when it failed to instruct the jury with a unanimity instruction on a count that alleged he committed oral copulation with person aged 10 or younger in violation of section 288.7, subdivision (a).

We hold that sufficient evidence supported the trial court's denial of the section 1118.1 motion, and that the trial court's failure to give a unanimity instruction was harmless.

Defendant also argues that various clerical errors in the minute order memorializing his sentence and on the abstract of judgment need to be corrected. The People agree and we direct the trial court to make the corrections.

FACTS AND HISTORY OF THE PROCEEDINGS

Case No. C100165

J.S. is the alleged victim in counts 1 through 9. Count 1 charged defendant with attempted forcible rape. (§§ 21a, 261, subd. (a)(2), 664.) Count 2 charged defendant with forcible oral copulation. (§ 287, subd. (c)(2)(a).) Counts 3 through 9 charged defendant with sexual battery while the victim was unlawfully restrained. (§ 243.4, subd. (a).)

D.T. is the alleged victim in counts 10 and 11. Both counts charged defendant with oral copulation with a child aged 10 or younger. (§ 288.7, subd. (b).)

A.H. is the alleged victim in counts 12 through 15. Count 12 charged defendant with sexual intercourse with a child aged 10 or younger. (§ 288.7, subd. (a).) Counts 13 and 14 charged defendant with the sexual penetration of a child aged 10 or younger. (§ 288.7, subd. (b).) Count 15 charged defendant with oral copulation with a child aged 10 or younger. (§ 288.7, subd. (b).)

The information also alleged defendant had two prior strikes and two prior serious felony convictions (§ 667, subds. (a)(1), (d), & (e)(2)) and various factors in aggravation.

The People's Case at Trial

Incidents Involving J.S. (2011-2013)

J.S. was born in February 1995. She lived on the Hoopa Indian Reservation in Humbolt County for most of her childhood, but she sometimes lived in Sacramento. J.S. never had a relationship with her biological father and thought of defendant as her dad. J.S. did not want to testify against defendant.

J.S. testified defendant had been in her life since she was born, and she really got to know him when she was 12 and living in Sacramento. She remembers defendant was at her house one day, and "from that day forward" she was "with him every day." They would hang out, go for rides, and do everything together. She liked being around him. J.S. has heard stories of defendant being with her when she was a baby and already saw him as her father by the time she was 12.

After J.S. turned 13, she moved back to Hoopa reservation with her mom and younger siblings, W.S. and D.T. Defendant did not move with them. Defendant and J.S. spoke on the phone every day. At that point, defendant was just friends with J.S.'s mother, though later defendant and J.S.'s mom married.

J.S. saw defendant on the reservation when she had knee surgery in the eighth grade and around her eighth-grade graduation.

About the time J.S. turned 16 in 2011, defendant moved to Hoopa. This made J.S. happy, because she saw defendant as her best friend. After defendant arrived, he was there for a while, likely months. He left for a period then came back.

Maybe a year or so after defendant came to the reservation after J.S.'s 16th birthday, defendant asked J.S. sexual questions, such as whether she had ever had sex or an orgasm. This happened a couple times. These questions made J.S. feel a little uncomfortable.

One day J.S. and defendant were sitting on the bed in her mom's room with their backs on the headboard, they watched television. Defendant began to touch J.S.'s lower leg, then his hand moved up to her thigh area. As defendant rubbed J.S.'s leg, he told her he loved her and would never do anything to hurt her. Defendant continued to massage J.S.'s leg, and his hand moved close to her vaginal area. At trial, J.S. could not recall if defendant touched her vagina or was just close to it. J.S. felt uncomfortable.

Once near the end of J.S.'s senior year of high school, when she was 18, J.S. came home from school and defendant was the only person home. She was wearing a skirt, tank top, and overshirt. Defendant was in a bathroom doing something to his face. J.S. went into the bathroom and spoke with defendant. Defendant kissed J.S. on the lips. This made J.S. uncomfortable. Defendant kissed other places on J.S.'s body. His lips were directly on her skin, and he kissed her breasts and nipples. J.S. ended up on the bathroom counter. At trial she said she could not remember how she got on the counter. Defendant kissed J.S.'s thighs close to her vagina. Defendant kissed J.S.'s vagina under her underwear and used his tongue. She felt his tongue go between her vaginal lips. J.S. tried to push defendant away. J.S. testified:

"Q. Tell me about pushing him away. Tell me what you remember about that.

"A. I don't know.

"Q. How were you trying to push him away? Where were your hands?

"A. Pushing, I don't know, his shoulders, his chest, I don't know. Just trying to push him away.

"Q. What was he doing when you were trying to push him away?

"A. I don't know. I don't know. He did stop.

"Q. How did it stop?

"A. The front door opened."

J.S. said there never was a time when defendant had or tried to have sexual intercourse with her. She said there were times when defendant touched her breasts or

vagina over her clothing, and she estimated it was less than 10 times. She testified these incidents happened in Humbolt. She said the last time anything sexual happened between her and defendant was the incident in the bathroom.

Detective Lindblad, who interviewed J.S., testified J.S. told him about other incidents of sexual abuse. According to Detective Lindblad, J.S. told him that one time defendant had tried to put the head of his penis in her vagina, and she kicked him off. Detective Lindblad testified that J.S. described to him six or seven other incidents when defendant touched her bare skin by kissing her breasts.

Detective Lindblad testified that J.S. told him that during the incident in the bathroom defendant picked her up and set her on the counter. An investigator with the Yolo County District Attorney's Office, Matthew Jameson, also testified that J.S. told him defendant picked her up and placed her on the counter during the bathroom incident.

Included in records submitted into evidence is a copy of J.S.'s identification card that was issued in April 2013. The identifications lists her weight as 102 pounds.

Defendant and J.S.'s mom married in December 2013. Some months later defendant left.

In December 2014, J.S. gave birth to her first child, a son. The hospital induced her on a Friday, and she delivered the baby by cesarian section on the next Monday. When J.S. was in labor, she learned defendant was in the same hospital for a procedure. She and other family members went to see him. At some point, she believes defendant was released from the hospital. After defendant was released, he would come and go to the hospital, bringing her food, staying there when she had her cesarian section, getting to "hold his grandson for the first time," and staying with her a long time after the baby was born. Defendant was not the child's father.

According to J.S.'s hospital records in June 2014 she weighed 120 pounds and was 5 feet and 2 inches tall. In December 2014, shortly before she gave birth, she weighed

143 pounds. According to defendant's hospital records in December 2014 he weighed 220 pounds, was 6 feet and 1 inch tall, and had a heavy build.

In 2015, J.S. lost touch with defendant and did not see him for a long time.

J.S. testified that years later, in 2020, she brought up the bathroom incident with defendant. She asked him why he did it and what made him think it was okay to hurt her. She said he told her he was sorry.

Oral Copulation Incidents Involving D.T. (2014-2015)

D.T. was born in September 2006. D.T. thinks she met defendant when she was six or seven. Defendant was like a father figure to D.T., but not her dad.

D.T. went to the hospital when J.S. had her son. D.T. was eight. When they found out defendant was in the same hospital, D.T. and her mother went to visit defendant.

The second day they were at the hospital, D.T.'s mother left D.T. in defendant's room while her mother went to be with J.S. Defendant was getting out of the shower, and D.T. was sitting on the bed. As defendant was getting dressed, he was putting on baby powder, and he asked D.T. to come wipe it off. He had put the powder on "his private parts and his bottom." She wiped it off quickly. It made her feel awkward and weird. Defendant's pants were around his thighs. She contacted his skin. Defendant told D.T. to be gentle.

When D.T. tried to walk away, defendant grabbed her by the arm, and he pulled her back to him.

Defendant said to D.T., "[o]pen your mouth," and she said, "[n]o." When she said no, he tried to put his penis in while she was talking. When she tried to move away from him putting his genitals in her face, he moved her head onto his genitals. His penis went in her mouth. She was scared. She tried to move away, but he would not let her and held her head. This continued for about 30 seconds, and then he heard someone walking by, moved away, and pulled his pants up.

A few months after the incident in the hospital, D.T. was in her mother's room and trying to get in the shower before school. As she was heading to the shower, defendant was in a dark corner. When she tried to walk into the bathroom, "the same stuff had happened that happened in the hospital." Defendant pulled D.T. by grabbing her arm. He put his genitals in her mouth. It lasted 10 to 15 seconds. She felt scared. When it was done, D.T. got ready for school.

After the second incident, defendant went away.

D.T. did not tell anyone about either incident when it happened.

Incidents with A.H. (Early 2020)

A.H.'s mother, K.H., met defendant in 2007. They were on friendly terms but not romantically involved.

A.H. was born in June 2010.

In 2012, K.H.'s and defendant's relationship became romantic for a time, but they ended things when he moved back to Humboldt later in 2012. K.H. and defendant kept in sporadic contact and saw each other in person in late 2018 or early 2019, after he reached out to her. They became more than friends and started having conversations about what their future might look like.

Defendant moved in with K.H. in January 2020, when A.H. was nine years old.

Defendant and A.H. would roughhouse—play fight—together.

A.H. testified about an incident that happened when defendant had been living with her and K.H. for about three weeks and K.H. was at church. A.H. was sitting on the living room couch when defendant asked A.H. to sit on his lap. A.H. sat on defendant's lap and started to doze. Defendant started rubbing A.H.'s legs. Defendant told A.H., "I have secrets, your mom has secrets, me and your mom have secrets, so me and you can have this secret." Defendant spread A.H.'s legs apart and placed his hand inside A.H.'s pajama pants and started moving his fingers near A.H.'s vagina. A.H. was scared.

Defendant then touched A.H.'s vagina and placed his fingers inside her vagina. For several minutes defendant moved his fingers in and out of A.H.'s vagina.

A.H. testified that later that day while she and her mother were in a car outside their house, A.H. told K.H. what defendant had done. K.H. kept asking her, "[a]re you sure? Are you lying?" A.H. told K.H. no. K.H. told A.H. that she did not believe her. K.H. left A.H. in the car and went to speak to defendant. After this, before K.H. came back out, defendant came out to the car, knelt, and started to apologize to A.H. Defendant said, "I'm sorry, like I didn't mean for this to happen. Towards the end of the apology, defendant said, "I'm sorry, I thought you liked it." Defendant then closed the car door and went back into the house. Both adults then returned to the car and they drove around to find a hotel for defendant to stay in.

A.H. testified she then stayed at her grandparents' home for some time. K.H. stayed there part of the time too, because they were dog-sitting while her grandparents traveled.

A.H. eventually went back to the apartment she shared with her mother, and defendant was still staying there.

According to A.H., about one month after she returned to her apartment, K.H. left her alone with defendant. A.H. and defendant were in K.H.'s room, lying next to each other on the bed and watching television. Defendant said something to A.H. like, "[w]e have to keep this secret because if anyone finds out, you know, your mom, she won't be here anymore, and I don't want to hurt you. And if you ever want me to stop, just say stop and I'll stop. And I just want you to feel comfortable and just keep it a secret and don't tell anybody." After this, defendant pulled down his pants, exposed his penis and asked A.H., "[c]an you suck it?" A.H. did. A.H. then "spit out" her saliva "on the floor." A.H. told defendant she could not do that anymore, he pulled his pants up, and A.H. went into the living room.

A.H. said defendant would touch her "[a]t least once a day." At night, defendant would ask A.H. to come sit with him on the couch, and he placed his fingers in her vagina while they watched a show. A.H. complied with defendant's requests because she did not want anything to happen to K.H. When defendant touched A.H.'s vagina, his fingers would go inside the vaginal canal. This would last for five or 10 minutes. A.H. estimated that defendant put his fingers in her vagina 10 or 15 times.

A.H. testified that, "occasionally, [defendant] would put his face down near my private part near my vagina, but it was mostly putting his fingers in my vagina." Defendant would place his tongue on the surface of A.H.'s vagina and between the lips of her vagina, but not in her vaginal canal.

According to A.H. the sexual abuse occurred both when her mom was home and when her mom was not home. Normally, A.H. and defendant would be in K.H.'s room roughhousing, and things would change. Defendant "would start doing whatever he was going to do."

When K.H. was home, A.H. would yell out K.H.'s name if defendant was making her too uncomfortable, and defendant would stop. When K.H. came into the room, A.H. would say defendant had been tickling her too much or doing something playful. A.H. was afraid that if she ever told K.H. what was really happening, something would happen to K.H. where K.H. would be taken away.

Defendant also touched A.H.'s breasts over her clothes and under her clothes, although this did not happen often—approximately 10 times. When defendant touched A.H.'s bare skin on her breasts, "[u]sually [her] nipple," he would use his mouth or hands.

A.H. described "the big one," as the time "when [defendant] put his penis inside of me." A.H. and defendant were home alone. A.H. was playing video games in the living room. Defendant stopped at the end of the hallway and asked A.H. to go to him. A.H. paused her game and went to defendant, and defendant started wrestling with her.

Defendant picked A.H. up and threw her on K.H.'s bed. Defendant then pulled down A.H.'s pants and placed his mouth between her legs. Defendant's tongue went between A.H.'s vaginal lips. Defendant asked A.H. if it felt good and she shook her head. Defendant then pulled his pants down and tried to place his penis in A.H.'s buttocks, and it hurt. A.H. kept saying, "[o]w, that hurts," and defendant kept saying, "Sorry." A.H. told defendant to stop, but he kept going. Defendant's penis penetrated A.H.'s buttocks, "one time," and went inside, "a little bit." Defendant had been on top of A.H. during the incident. Every time A.H. would try to get up, defendant would lay on top of her. When defendant was not on top of A.H. and was standing upright, A.H. kicked him. Defendant fell, and A.H. grabbed her shorts and ran into the bathroom. At trial, A.H. denied that defendant placed his penis in her vagina during the "big" incident.

Shortly after the incident when defendant penetrated A.H. with his penis, defendant went to Humbolt.

A.H. saw defendant a few more times. She testified, "[a]nd then every time he would come back he would touch me and then he would leave again and then he'd come back and touch me and then leave again." He would touch A.H. with his fingers.

In June 2020, a child interview specialist (specialist) interviewed A.H., who had just turned 10.

What A.H. told the specialist was largely consistent with A.H.'s testimony. However, there were differences between her testimony and what she told the specialist. First, she did not mention the incident where defendant put his penis in her mouth. When asked on the witness stand why she had not previously reported the incident to anyone, A.H. said it was because she had not wanted to get defendant in more trouble.

Second, she claimed during the "big" incident she had fought defendant off by grabbing something by the bed and hitting the defendant in the head with it. On the witness stand, A.H. admitted being untruthful about this detail during the interview,

explaining she had said that at the time to make it seem more believable that she was able to get defendant off of her.

Third, when A.H. spoke with the specialist, she said that during the "big" incident defendant had put his penis in her vagina rather than her buttocks. A.H. testified that when she met with the specialist, A.H. had been confused about whether defendant had penetrated her buttocks or vagina with his penis, and she did not realize where she had been penetrated until later.

Finally, when she met with the specialist, A.H. explained that when K.H. was home defendant would just put his finger in A.H.'s vagina, but K.H. would be gone when he put his mouth on A.H.'s vagina. A.H. also said defendant would touch her whenever he felt like it, and there was no real schedule to it.

J.S., A.H., and K.H. Meet (Spring 2020)

J.S. again saw defendant in February 2020. Defendant told J.S. he was living with K.H., and she met K.H. and A.H. at their home.

J.S. and K.H. got to know each other and became friends. J.S. and her children stayed with K.H. when J.S. was moving to Sacramento from Brentwood and looking for her own place. Defendant was not staying there at the time.

A.H. became very attached to J.S. and would call J.S. her sister. When J.S. moved to her own place, A.H. often stayed with J.S.

One day, J.S. told K.H. the defendant had done something to her that made her uncomfortable. The conversation occurred in K.H.'s car.

After the conversation in the car, J.S. spoke with A.H. at J.S.'s home. J.S. asked A.H. if defendant had ever done anything to make A.H. feel uncomfortable. A.H. told J.S. defendant had touched A.H. when they were playing wrestling. A.H. told J.S. defendant would touch her butt and vagina. A.H. was crying hard when J.S. asked her

about defendant. J.S. called K.H. K.H. came to J.S.'s house. K.H. had already called the police when she came over.

A.H. told K.H. that defendant had touched her genital area and that he had, "licked on her. That she had licked him."

Near when A.H. told J.S. defendant had abused her, D.T. saw A.H. crying and asked her what was wrong. D.T. then told A.H. what defendant had done to D.T., because she did not want A.H. to feel like she was the only person defendant had ever sexually abused. A.H. told D.T. to tell J.S. that defendant had abused D.T. D.T. first told K.H., who is like an auntie to her. When D.T. told J.S. defendant had abused her too, J.S. cried.

K.H. confronted defendant over Facebook Messenger. In a message, K.H. wrote, "[y]ou are fucking sick. You stuck your dick in my little girl, had her lick your dick, you touched in multiple spots and licked on her!!!" Defendant responded suggesting he was shocked by the allegations.

Propensity Evidence

Detectives searched defendant's e-mails. An e-mail sent on February 1, 2020, contained a fictional story entitled, "Father Discovers a Lust he Never Saw Coming." The story described a minor female, weighing less than 90 pounds, riding on her father's lap and squeezing his penis. The story talked about the minor enjoying it and the father ejaculating. The story also discussed the minor putting her crotch in her father's face. The e-mail was sent to an address the police determined to be invalid.

The Defense

Defendant testified he was born in December 1974. He denied he did any of the acts of which he was accused.

Though defendant admitted to sometimes viewing porn sites, he denied ever seeing or hearing the fictional story found on his e-mail account about a sexual encounter between a minor and her father.

Verdict and Sentence

The jury found defendant guilty of all 15 charges.

Defendant waived his right to a jury trial on the truth of the recidivist allegations. The trial court found true that defendant had two prior convictions for serious felonies as contemplated by section 667, subdivision (e)(2) (strikes). The court also found true the allegations that defendant has two prior convictions for serious felonies, which each required the court to sentence him to an additional five years under section 667, subdivision (a)(1) (nickel priors).

At sentencing, the trial court struck the nickel priors. The trial court sentenced defendant to a determinate term of 18 years as follows: The trial court gave defendant three years for count 3, sexual battery under section 243.4, subdivision (a); and one consecutive year each for the counts 4 through 9, which were also sexual battery counts under section 243.3. The court then doubled the nine-year base determinate term under section 667, subdivisions (b) through (i).

The trial court also imposed a consecutive indeterminate term of 25 years to life on the attempted forcible rape conviction under count 1. It imposed a consecutive indeterminate term of 25 years to life on the forcible oral copulation under section 287, subdivision (c)(2), conviction under count 2. It imposed a consecutive indeterminate term of 15 years to life, tripled to 45 years to life because of the strikes, for the sexual act with a child under 10 offense under section 288.7, subdivision (b), conviction in count 10. It imposed a consecutive indeterminate term of 15 years, tripled because of the strikes, to 45 years to life on count 11. It imposed a consecutive indeterminate term of 25 years to life, tripled to 75 years to life, on count 12. It imposed a consecutive

indeterminate term of 15 years to life, tripled to 45 years to life, on count 13. It imposed a consecutive indeterminate term of 15 years to life, tripled due to the strikes to 45 years to life on count 14. It imposed a consecutive indeterminate term of 15 years to life, tripled to 45 years to life because of the strikes on count 15. The total indeterminate term was 350 years to life.

The trial court awarded defendant 1,112 days in presentence credit.

Defendant filed a timely notice of appeal.

Case No. C100166

In case No. C100166, defendant had been convicted in Humbolt County Superior Court of possession for sale of a controlled substance under Health and Safety Code section 11351, with an enhancement under then Penal Code section 12022, subdivision (c), for being personally armed with a firearm while committing the offense. The Humbolt County Superior Court sentenced defendant to a determinate term of six years.

Defendant was released on supervision in January 2020. In April 2021, citing various alleged offenses, including one for felony molestation under section 288, subdivision (a), the Yolo County probation department filed a petition for revocation of defendant's supervised release in Yolo County Superior Court.

On December 21, 2023, the Yolo County Superior Court terminated defendant's supervised release as unsuccessful. The court imposed a 180-day sentence to run concurrent with the sentence in case No. C100165. Defendant timely noticed an appeal in case No. C100166.

On defendant's motion, on February 3, 2025, this court ordered case No. C100165 consolidated with case No. C100166 for any further appellate proceedings. None of defendant's arguments allege error in the trial court's judgment in case No. C100166.

DISCUSSION

I

Substantial Evidence Supported Denying the Section 1118.1 Motion

Additional Background

At the close of the People's case in chief, defendant brought a motion for a directed verdict under section 1118.1 on counts 3 through 9, which alleged defendant committed felony sexual battery on J.S. under section 243.4, subdivision (a). Defense counsel argued, "[t]here was no evidence of any force presented to the jury and the Court." Defendant made a related argument that there were "very significant issues" with respect to the proof offered on the attempted rape charge. With respect to the attempted rape charge, defense counsel noted J.S. had testified nothing like the alleged attempted rape incident had ever happened.

The People disagreed. First, the People addressed the attempted rape charge. They noted that, according to Detective Lindblad's testimony, in a prior statement to him, J.S. had said defendant tried to have sex with her and "she had to kick him off." The People also noted the force used during the incident in the bathroom wherein she repeatedly tried to push defendant, "along with some of the force that was used in the other incidents, as well as kind of just common sense that a daughter would not willingly engage in consensual sex with her father, I believe that there is sufficient evidence for the People to argue these theories to the jury." The People then argued, with respect to the sexual battery charges, that "similar arguments" would apply "where she disclosed that he kissed her breasts multiple times to Detective Lindblad underneath the clothes. . . . [¶] It's consistent with force that he's used against . . . A.H. and D.T., therefore, I do think there is sufficient evidence that a reasonable trier of fact could find the defendant guilty under those theories."

Though the trial court agreed that the claims at issue were, "weak," it denied the section 1118.1 motion on the grounds that "[t]he People have produced some evidence. . . . [T]here is some evidence from which a reasonable juror could convict. [¶] It's particularly complicated because of J.S.'s conflicting statements going back and forth. A jury might reasonably conclude that her testimony to law enforcement officers initially is the most credible of her statements if they find her to be credible at all and, therefore, the People's theory in those claims could move forward."

Trial and Appellate Court Standard of Review of Motions Brought Under Section 1118.1

Under section 1118.1, "[i]n a case tried before a jury, the court on motion of the defendant . . . , 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."

" 'In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies 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, there is any substantial evidence of the existence of each element of the offense charged.' [Citations.]" [Citation.] "Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point." ' (*People v. Cole* (2004) 33 Cal.4th 1158, 1212–1213.)" (*People v. Royal* (2024) 105 Cal.App.5th 1242, 1255.)

On appeal " '[W]e review the denial of a Penal Code section 1118.1 motion using the same standard "employed in reviewing the sufficiency of the evidence to support a conviction." [Citation.] We thus examine " 'the entire record in the light most favorable

to the judgment' " to determine whether it discloses substantial evidence—" 'evidence that is reasonable, credible, and of solid value' "—" 'from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " [Citation.] Our review " ' " 'presume[s] in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." ' [Citation.] Even where . . . the evidence of guilt is largely circumstantial, our task is not to resolve credibility issues or evidentiary conflicts, nor is it to inquire whether the evidence might ' " 'be reasonably reconciled with the defendant's innocence.' " ' " [Citation.] Instead, we ask whether there is " ' " 'substantial evidence of the existence of each element of the offense charged" ' " such that any rational jury may have convicted defendant.' (*People v. Veamatahau* (2020) 9 Cal.5th 16, 35–36 [].)" (*People v. Barrett* (2025) 17 Cal.5th 897, 964.)

The Meaning of Unlawful Restraint as Used in Section 243.4, Subdivision (a)

Under section 243.4, subdivision (a), "[a]ny person who touches an intimate part of another person while that person is unlawfully restrained by the accused . . . , and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery." An intimate part is "the sexual organ, anus, groin, or buttocks of any person, and the breast of a female." (§ 243.4, subd. (g)(1).) " '[T]ouches' means physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense." (*Id.* at subd. (f).)

Here, defendant argues the People did not present sufficient evidence of unlawful restraint prior to the defense bringing its section 1118.1 motion.

Section 243.4 does not define " 'unlawfully restrained.' " The "term can be viewed as distinguishing the nonsexual physical element of sexual battery from the more wanton 'force, violence, or fear' element of rape." (*People v. Pahl* (1991) 226 Cal.App.3d 1651, 1661, fn. omitted (*Pahl*).)

In *People v. Arnold* (1992) 6 Cal.App.4th 18, 28 (*Arnold*), the court held "a person is unlawfully restrained when his or her liberty is being controlled by words, acts or authority of the perpetrator aimed at depriving the person's liberty, and such restriction is against the person's will. . . . The 'unlawful restraint required for violation of section 243.4 is something more than the exertion of physical effort required to commit the prohibited sexual act.' " Although restraint can be physical (*Pahl, supra*, 226 Cal.App.3d at p. 1661), physical restraint is not required. (*People v. Grant* (1992) 8 Cal.App.4th 1105, 1111-1113 (*Grant*).) The restraint may be psychological. (*Ibid.*; *Arnold*, at p. 28.) "There are many situations where one is compelled, i.e., forced, to do something against one's will but the compulsion does not involve personal violence or threats of personal violence." (*Grant*, at p. 1112.) For example, when the perpetrator allegedly exerting compulsion "is an authority figure or posing as a person in authority," the force used, "is a psychological force compelling the victim to comply with the orders of the authority figure." (*Ibid*.)

The trial court's assessment of the evidence was correct. There was sufficient evidence of unlawful restraint for the section 243.4, subdivision (a), charges to be presented to the jury. Three cases interpreting section 243.4, subdivision (a), and one affirming sexual molestation convictions for crimes committed with "force, violence, duress, menace, or fear of immediate and unlawful bodily injury" are instructive. (See *People v. Senior* (1992) 3 Cal.App.4th 765, 769 (*Senior*).)

In *Alford*, in two separate instances a defendant correctional officer fondled and put his mouth on inmates' breasts when he was transporting the women between jails. (*Alford* (1991) 235 Cal.App.3d 799, 802.) He argued he could not commit sexual battery by restraint because the victims had been placed in restraints for a lawful purpose. (*Id.* at p. 803.) The Court of Appeal recognized the "utter absurdity" of this argument. (*Ibid.*) In rejecting the defendant's argument, the court observed that in analogous circumstances it has been "recognized that what is lawfully begun can become unlawful when for

example, it exceeds the bounds of reasonableness, when the conduct which would otherwise be lawful is engaged in for an improper purpose or when, as in this case, the original lawful purpose is replaced with or supplemented by an unlawful purpose." (*Id.* at pp. 803-804.)

In *Arnold*, a high school teacher was convicted under section 243.4, subdivision (a), for two incidents involving a student. (*Arnold*, *supra*, 6 Cal.App.4th at pp. 22-24.) In the incident giving rise to the first conviction, the defendant invited the victim, who was infatuated with the defendant, to run with him to a local college football stadium. (*Id.* at p. 22.) At the stadium, the defendant grabbed the victim's buttocks, kissed her, and put his hands under her top and touched her breasts. (*Ibid.*) When she pushed him away and told him "no" he ran ahead. (*Ibid.*) In the later incident that gave rise to the second conviction, the defendant called the victim into the wrestling room, closed the room's front entrance, and put a mat against the door. (*Ibid.*) The victim went to the other side of the room but complied when the defendant asked her to come closer. (*Id.* at p. 23.) The defendant put his hands down the student's top, and he touched her breasts under her bra. (*Ibid.*)

On appeal, the defendant teacher in *Arnold* argued unlawful restraint requires a significant limitation on the personal liberty of the victim and renders the crime physically traumatic and psychologically terrifying. (*Arnold*, *supra*, 6 Cal.App.4th at p. 24.) This court rejected this argument and adopted the definition outlined above for unlawful restraint. (*Id.* at p. 28.) Applying this definition, the court concluded the victim was not unlawfully restrained during the incident at the football stadium because there was no evidence the victim was unwilling and compelled by the defendant's words, acts, or authority. (*Id.* at p. 29.) In so doing, the court noted that the victim had, "voluntarily accompanied defendant on a nonschool-related function knowing she would be alone with him and thinking something might happen." (*Ibid.*) In contrast, the court found the defendant unlawfully restrained the victim during the wrestling room incident because he

created "a coercive atmosphere" by using the victim's isolation and fear, and his authority as a teacher to engage in prohibited touching. (*Id.* at p. 31.)

In *People v. Perez-Robles* (2023) 95 Cal.App.5th 222, 225 (*Perez-Robles*), the defendant, a massage therapist, was convicted of several sex offenses committed against his clients including two counts of sexual battery by restraint. For one of the sexual battery counts, the defendant had the victim turn on her side during a massage, moved his hand underneath her leggings, and rubbed her vaginal lips. (*Id.* at p. 228.) The victim was scared, and realized the door was closed and she was alone with the defendant. (*Ibid.*) She felt " 'really blank,' " started crying, and left shortly after. (*Ibid.*) The defendant's other sexual battery victim was over seven months pregnant at the time of the offense. (*Id.* at p. 229.) The defendant began massaging the victim's breasts during the massage. (*Ibid.*) The victim did not want the defendant to do this but did not think she could jump off the table in her advanced pregnant state. (*Ibid.*) She was scared because no one else was around and she thought if the defendant was capable of touching her breasts, she was " 'not sure what else he [was] capable of.' " (*Ibid.*) As the massage continued, the defendant put his hand underneath the victim's underwear and touched her labia. (*Id.* at pp. 229-230.)

This court rejected the *Perez-Robles* defendant's argument that there was insufficient evidence the victims were unlawfully restrained because they were adults who voluntarily consented to a therapeutic massage and could have left at any time. (*Perez-Robles*, *supra*, 95 Cal.App.5th at p. 230.) We reasoned that while the victims may have "consented to the exertion of physical restraint that is concomitant with a therapeutic massage . . . it is clear the women did not agree to being sexually assaulted during the course of that massage." (*Ibid.*) Following the reasoning of *Alford*, *supra*, 235 Cal.App.3d at pages 803-804—that lawful conduct can become unlawful when an original lawful purpose is replaced with an unlawful purpose—we held that "[o]nce defendant took advantage of the victims' consent to a therapeutic massage by touching

their genitals, he exceeded the scope of their consent and engaged in unlawful conduct." (*Perez-Robles*, at p. 231.) We found the victims relied on the defendant's authority as an "expert in massage therapy," and trusted him with access to intimate parts of their bodies "to perform a legitimate and professional massage." (*Id.* at p. 233.) We concluded, "[d]efendant violated both his position of authority and the women's trust in that authority by touching them inappropriately. When he did so, they froze in fear and shock, and as they both described, were psychologically compelled by defendant's actions to 'remain where [they] did not voluntarily wish to be,' which is the essence of restraint." (*Ibid.*)

In *Senior*, the defendant was convicted of multiple sexual molestation counts against his daughter, who was two-days shy of 14 when the first molestation incident occurred. (*Senior*, *supra*, 3 Cal.App.4th at p. 770.) In the first instance, the defendant told the victim if she told anyone there would be a divorce. (*Id.* at p. 770.) The court did not treat evidence that the defendant had pulled the victim back when she tried to pull away from sexual acts or push his hands away during sexual touching as evidence of force. (*Id.* at pp. 774-775.)[1] However, the court did find sufficient evidence of duress. (*Id.* at pp. 775-776.) In so doing, the court reasoned, "duress involves *psychological coercion*. . . . Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. [Citation.] 'Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to the existence of duress. [Citation.]" (*Id.* at p. 775, italics added.) In cataloguing the various psychological pressures the defendant had exerted in *Senior*, the court identified, among other factors: that defendant was the victim's father, and an

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[1] *Senior*'s conclusion regarding the use of force has been reassessed in later decisions. (See *People v. Guido* (2005) 125 Cal.App.4th 566, 575.)

authority figure in her life; that the defendant's pulling the victim back to him when she tried to move away suggested that greater physical resistance might be met with greater physical force; the warning the defendant gave that threatened the security of the family unit; and the fact that threats made during earlier events might contribute to duress in later events. (*Id.* at pp. 776-777.)

Here, the trial court did not err when it denied defendant's section 1118.1 motion with respect to the sexual battery counts. There was sufficient evidence with which a jury could find defendant exerted unlawful restraint on J.S. when he sexually assaulted her. He was much larger than she was at the time of the assault and had assumed the authority role of her father. J.S. very much wanted defendant in her life as her father, but she knew he could and sometimes did separate himself from her family. During the bathroom incident she tried unsuccessfully to push defendant away from her and he continued his assault until J.S. and defendant heard someone come in the front door of the house. Detective Lindblad testified that J.S. told him that during the incident in the bathroom defendant picked her up and set her on the counter. A reasonable juror could conclude he did so with some force and thus blocked her ability to escape so that he could perform the acts of sexual assault. When J.S. described incidents of defendant's sexual abuse, she admitted to being uncomfortable.

Defendant's actions with the other victims also supports a finding of unlawful restraint. It was his modus operendi to gain physical closeness to his victims by acting like a father-figure, to take advantage of their proximity to engage in sexual touching, and to exert psychological threats and physical force when they tried to extricate themselves from his touch. Sufficient evidence supported a finding that defendant took advantage of the trust J.S. placed in him as her perceived father and used that trust and influence to get her to submit to unwanted sexual touching all the while forcing himself on her by lifting her onto the bathroom counter to position her for his sex acts and then resisting her efforts to push him away.

The evidence was sufficient for the court to deny the motion brought under section 1118.1.

II

Unanimity Instruction

Additional Background

At the beginning of his testimony, defendant denied each of the charges brought against him. When his attorney asked him if there was any truth to anything the victims had said, he responded, "[n]one." At the close of his direct examination, his lawyer asked, "[y]ou didn't do any of it?" Defendant responded, "[n]one." Defendant offered some testimony regarding his "shocked, helpless, [and] diffused" reaction when K.H. confronted him about A.H.'s allegations that he "touched her inappropriately" the first time. He also admitted to watching A.H. alone after the initial alleged incident, and acknowledged they would "[r]oughhouse" together. But he offered no testimony that was specifically related to A.H.'s testimony that he had put his penis in her mouth and had licked her vagina.

In closing argument, the People encouraged the jury to find defendant guilty of one count of digital penetration based on the first incident of touching. For the second digital penetration count, the prosecutor said they needed to find "at least one other act," and noted A.H. had testified it was happening, "very frequently." With respect to count 15, regarding oral copulation with A.H., the prosecutor argued, "A.H. described—I think she gave us one description of performing oral copulation on Mr. Augborne, but she described that it happened pretty frequently as well. There were times when Mr. Augborne was placing his face between her legs, and again, what's at issue here was whether there was an act of oral copulation. [¶] Now, oral copulation and sexual penetration, they're different, right, because we're talking with sexual penetration the hand versus the mouth for oral copulation. One of the big differences here is when you

look at oral copulation there does not need to be penetration. It just needs to be face at the genitals. So what you should do is look back at your notes. If you need readback of [A.H.'s] testimony or you want to look at the [specialist interview] to see what she said regarding oral copulation, look back, and again, you just need to all agree there was at least one act of oral copulation within the time frame that's been alleged."

In closing argument, defense counsel challenged the credibility of each of the three victims. To the extent counsel made any specific reference to statements A.H. had made about A.H.'s various references to oral copulation, it was to note that during her interview with the specialist, A.H. had been asked about licking defendant's private parts and had not said she had licked defendant's penis. He argued that "for the first time" in court she had described the "visceral details, core details of this oral copulation." He suggested it was not credible that "the first time" she would be reporting the incident was in open court, or that she would have withheld the information during her specialist interview out of concern for getting defendant into more trouble.

The prosecutor did not make a clear election as to which act served as the basis for the count alleging oral copulation with A.H. The trial court did not provide a unanimity instruction for this count.

If There Was Error in the Trial Court's Failure to Give a Unanimity Instruction, It Was Harmless

Defendant argues that the guilty verdict in count 15 under section 288.7, subdivision (b), for oral copulation on a child under the age of 10 should be reversed. Defendant notes the prosecutor never made an election as to a specific act—when defendant put his penis in A.H.'s mouth or one of the various times she testified he orally copulated her. Defendant also notes the court failed to provide the jury with a unanimity instruction. Defendant argues that, because of these dual omissions, the jury may have

convicted him without reaching a unanimous agreement as to which act constituted the offense.

In response to this argument, the People argue any error in failing to give a unanimity instruction was harmless. We agree.

"As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281 [].) There are, however, several exceptions to this rule. For example, no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises 'when the acts are so closely connected in time as to form part of one transaction' (*People v. Crandell* (1988) 46 Cal.3d 833, 875 []), or 'when . . the statute contemplates a continuous course of conduct of a series of acts over a period of time' (*People v. Thompson* (1984) 160 Cal.App.3d 220, 224 []). There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime. (*People v. Carrera* (1989) 49 Cal.3d 291, 311–312 [].)" (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) *People v. Fernandez* (2013) 216 Cal.App.4th 540 (*Fernandez*) is instructive on this issue.

In *Fernandez*, *supra*, 216 Cal.App.4th at page 545, the defendant was charged with two counts of lewd and lascivious acts under section 288, subdivision (a), on Jane Doe No. 2. Jane Doe No. 2 testified about specific and generic repetitive instances of molestation, and the nature of some if the acts differed to a degree—in one instance the defendant kissed her private parts after pulling her panties down, and in another he rubbed her "private part" and bottom. (*Id.* at pp. 557-558.) "Appellant offered no evidence in his defense that might focus doubt as to any specific act of abuse as distinguished from any other act of molestation. Rather, his defense was simply that no

molestation ever occurred. Thus, it is unlikely that the jury would have a reasonable disagreement with respect to any particular act or instance of abuse or could reasonably conclude that some of the victims' testimony was true but other parts were not." (*Id.* at pp. 557-558.)

"There is a split of authority regarding the legal standard to be used to determine the effect of an erroneous failure to give a specific acts unanimity instruction. Since 1983, this court has held that the error must be shown to be harmless beyond a reasonable doubt. [Citations.] We continue to so hold. [¶] Federal due process requires that before one can be convicted of a crime the prosecution must convince a jury that the evidence establishes the defendant's guilt of the crime beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358 [].) If a jury . . . is permitted to amalgamate evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt to all of the jurors required to agree on the verdict, the prosecution's burden is lessened and defendant is denied due process. Such significant lessening of the prosecution's burden of proof compels reversal unless we are able to declare a belief that it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 []; *People v. Serrato* (1973) 9 Cal.3d 753, 767 [], overruled on another ground in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1 []); [*People v.*] *Deletto*[(1983)] 147 Cal.App.3d [458], 472.)" (*People v. Smith* (2005) 132 Cal.App.4th 1537, 1545, fns. omitted.) Under this standard, we find no error.

Here, the defendant denied every criminal act he was accused of committing against all three victims, including A.H. In closing, defense counsel engaged in a wholesale attack of all the allegations in which he attacked all the victims', and particularly A.H.'s, credibility. To the extent defense counsel treated one alleged incident of oral copulation differently, it was part of the global attack on her credibility.

Here, defendant focuses on the form of oral copulation in his harmless error analysis. He argues that perhaps some jurors convicted based on A.H. testifying she

orally copulated him, but others would not have because she admitted to not telling law enforcement about it.

But this ignores everything else the jurors decided and the state of the record. The jurors did not only find defendant guilty of oral copulation. They found him guilty of every other act A.H. accused him of, including the sexual penetration during the "big one," (an event during which she said he also orally copulated her) and touching her with his fingers one time other than the first time on the couch. The jury clearly believed A.H. regarding the "big" event and regarding her allegations of repeated other sexual abuse—which included both touching with his hands *and* orally copulating her.

Additionally, A.H.'s denial of orally copulating defendant during the specialist interview is not the red flag defendant suggests it is. First, K.H. testified A.H. had told her that "she had licked him." Thus, there is evidence that A.H. did not mention the incident for the first time on the witness stand. Second, A.H. acknowledged the other inconsistencies between what she said in the interview—regarding fighting defendant off and the form of penetration—and explained them to the jury.

Ultimately, the jury's verdict regarding the counts involving A.H. came down to whether they found her or the defendant credible. The defendant denied that any of the sexual acts alleged with the three victims occurred. The jury's verdict demonstrates the jury found A.H. credible and defendant's blanket denials not credible. That was sufficient to convict defendant of oral copulation with A.H. on multiple occasions.

"Where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless. [Citation.] Where the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless." (*People v. Thompson* (1995) 36 Cal.App.4th 843,

853 [applying *Chapman*].) The lack of a unanimity instruction here was harmless beyond a reasonable doubt.

III

Correcting the Record to Reflect Oral Pronouncement of Fines

At the sentencing hearing, the trial court imposed a minimum restitution fine of $300 (§ 1202.4, subd. (b)), and a suspended parole revocation fine of $300 (§ 1202.45). However, both the December 21, 2023, minute order from the sentencing hearing and the December 28, 2023, abstract of judgment for the indeterminate sentence both list each of these fines as $4,500. We find both fines were $300.

When there is a discrepancy between an oral pronouncement of judgment and an abstract of judgment, the oral pronouncement controls. (*People v. Burke* (2023) 89 Cal.App.5th 237, 244 [abstract of judgment]; *People v. Morales* (2014) 224 Cal.App.4th 1587, 1594 [minute order].) A court of appeal can order trial courts to amend a minute order and abstract of judgment to accurately reflect the trial courts oral pronouncement. (*People v. Clark* (2021) 67 Cal.App.5th 248, 260-261.) Accordingly, we order the trial court to amend its December 21, 2023, minute order for the sentencing hearing and the abstract of judgment to reflect the fines imposed in the oral pronouncement of judgment.

IV

Correcting Clerical Error in the Abstract of Judgment

In counts 3 through 9, defendant was found guilty of sexual battery within the meaning of section 243.4, subdivision (a). The December 28, 2023, abstract of judgment for the determinate sentence correctly identified the applicable statute as section 243.4, subdivision (a), for counts 3 and 4, but it incorrectly identified the applicable statute as section 243.5, subdivision (a), for counts 5 through 9.

"Courts may correct clerical errors at any time," and appellate courts have jurisdiction to order corrections of clerical errors contained in an abstract of judgment. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185.) The abstract of judgment will be corrected to reflect the correct statute.

DISPOSITION

This matter is remanded to the trial court with directions to amend the trial court's minute order dated December 21, 2023, and the December 28, 2023, abstract of judgment for the indeterminate sentence to reflect that the fines imposed under sections 1202.4, subdivision (b), and 1202.45 were each $300. The trial court must also amend the December 28, 2023, abstract of judgment for the determinate sentence to reflect that in counts 5 through 9 the defendant was convicted of violating section 243.4, subdivision (a).

The judgment is otherwise affirmed.

_____/s/_____
HULL, Acting P. J.

We concur:

_____/s/_____
ROBIE, J.

_____/s/_____
BOULWARE EURIE, J.