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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT LEE MIRANDA, Defendant and Appellant.	F049370 (Super. Ct. No. VCF140775) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

Charles M. Bonneau, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Stan Cross, Acting Assistant Attorney General, J. Robert Jibson and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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Robert Lee Miranda (appellant) was charged with five sex offenses committed against S.K. The offenses were alleged to have occurred between January 1995 and July 2001. A jury found appellant not guilty of rape as charged in count 1, but convicted him

of a lesser included charge of misdemeanor battery (Pen. Code, § 242),[1] one count of rape (§ 261, subd. (a)(2)) as charged in count 2, and three counts of forcible oral copulation (§ 288a, subd. (c)) as charged in counts 3, 4, and 5.[2] Almost two months after trial, defense counsel filed a motion for new trial based on newly discovered evidence and insufficient evidence to sustain the verdict. The trial court denied the motion and sentenced appellant to an aggregate prison term of 26 years, which consisted of an upper term of eight years on count 2 and three midterms of six years each on counts 3, 4, and 5, made fully consecutive pursuant to section 667.6, subdivision (d).

Appellant contends he was denied his constitutional right to call a witness in his own behalf; that there is insufficient evidence to support the jury's finding that the count 5 offense occurred within the 10-year statute of limitations; that his misdemeanor conviction for battery was time barred; and that the trial court erred in imposing the upper term on count 2. We agree only with appellant's last contention and in all other respects affirm.

FACTS

S. was born in 1983. Appellant was her stepfather and lived in her home while she was growing up.

S., who was 21 years old at the time of trial in August and September of 2005, testified that appellant began touching her inappropriately when she was seven or eight years old. Appellant began by rubbing her shoulders and back. He did not stop when she asked him to. He eventually began rubbing the sides of her breasts, the lower part of her buttocks, and, at times, her vagina. When S. tried to get up and leave, appellant forced her to stay by telling her he would kill her mother and grandparents. On a couple of

[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] The verdict forms for counts 3, 4, and 5 stated the incorrect code section for forcible oral copulation. The trial court corrected this error at sentencing.

occasions, . complained to her mother about appellant touching her back and thighs, but appellant would tell S.'s mother that the two were just wrestling.

During this same time period, appellant would unlock the bathroom door, come into the bathroom, and watch S. while she showered. When S. tried to get out of the shower, appellant would not let her. This behavior continued until after S.'s daughter was born in July of 2001.

When S. was in the fourth grade, appellant "wrestled" with her while she was in her bathing suit and inserted his thumb into her vagina. S. testified that appellant would do this occasionally and she did not know how many times he had done it. By this time, appellant had stopped touching her breasts.

S. testified that appellant forced her to participate in oral copulation with him on a number of occasions. She could not recall how often this occurred because she tried to forget these incidents. S. testified that appellant first forced her to orally copulate him during summer vacation between her fifth and sixth grade years in school. They were in S.'s mother's room, and when S. tried to push appellant away, he threatened to kill her mother and grandparents. On another occasion, S. testified that appellant made her orally copulate him in her mother's room just before she went to "SCICON,"[3] and appellant threatened to kill S.'s mother and grandparents if S. told anyone about it. S. also testified that on one occasion when she returned home from a swim party, appellant removed her bathing suit, placed her on the couch, spread her legs and stared at her. When S. tried to move, appellant moved her back. He then kissed her vagina.

S. did not recall how often appellant forced her to have sexual intercourse with him. She did recall that it began when she was a freshman in high school. S. recalled one incident when appellant called her into her mother's room while he was watching television. Appellant told S. to sit next to him on the bed. He then started to wrestle with

[3]The parties appear to agree that "SCICON" refers to elementary school science and conservation camp.

her and removed her clothing until she was naked. Appellant forced himself into her. S. tried to leave, but appellant held her down with his legs. When appellant got up and went into the bathroom, S. ran into her own room. Appellant again threatened to kill her mother and grandparents if she told anyone.

S. remembered that the last time appellant forced her to have intercourse with him was "around 2000" and she was a junior in high school. At the time, she was four months pregnant with her daughter, which appellant knew. Again, the incident occurred in her mother's bedroom, when her mother was not home. Appellant came into the room as S. was walking out. He wrestled with her and took off her clothing. S. tried to get away by "twisting, turning, pushing," but appellant held her down.

Following this incident, S. ran to her best friend's house and told her that "Robert was being Robert." S. told her friend everything that appellant had done to her except for the acts of sexual intercourse. S. tried to tell her fiancé, the father of her child, but he did not want to know. He knew only that appellant had rubbed her back and watched her shower.

In June of 1999, S. told her mother some of what appellant had been doing to her. S. told her that appellant had touched the sides of her breasts and watched her shower. As a result, S.'s mother and appellant separated, and he left the house. Because S. was afraid of appellant, she did not tell her mother that he had orally copulated her, forced her to orally copulate him, or that he had forced her to have sexual intercourse with him. Appellant had threatened S. with a gun. S. described appellant as having "a really bad anger problem."

S. observed appellant's penis and testicles when he forced her to orally copulate him. She described appellant's penis as "crooked" and his testicles as "small."

S. worked for appellant at a store because it "paid well" and she needed a job to care for her daughter. When she worked for appellant, S. was never alone because her best friend, who was very protective of her, also worked for appellant. But appellant still occasionally rubbed her back while she was at work.

On January 12, 2005, S. and her fiancé went to a restaurant to celebrate a birthday with another couple. While they were at the restaurant, the owner, Patrick Vejar, spoke to S. about working there. Vejar gave S. a tour of the restaurant, and while they were in the banquet room, Vejar kissed S. and tried to shove his hand down her pants. He stopped when a bartender walked by and saw them.

As a result of this incident, S. realized "something [she] should have realized a long time ago" and went "straight" to the police station and made a report about both Vejar and appellant.

S.'s mother, Mrs. Miranda, testified that she married appellant when S., her only child, was five years old. When S. was a freshman in high school, Mrs. Miranda noticed that, for a period of about a month, appellant would get up early and go into S.'s bedroom. Mrs. Miranda told appellant on two occasions to stop, but he claimed he was "just trying to help" by waking her for school.

Shortly thereafter, Mrs. Miranda asked S. if she was uncomfortable around appellant, and S. told her that appellant would come into her room, take her shirt off, and rub her back, breasts, buttocks and pubic area. When he touched her breasts or pubic area, he would say his hand "slipped." S. also told her mother that appellant would watch her shower, take her clothes and hide them from her, and look at her private parts while wrestling with her.

When Mrs. Miranda confronted appellant about his sexual abuse of S., he denied it and argued that S. was lying. He eventually admitted that he had touched S., claiming that, while he rubbed S.'s back, his hands would slip, causing him to rub her breasts and pubic area. Appellant admitted to his wife that he wrestled with S. while she was naked and that he would spread her legs and look at her private parts. Appellant also admitted that he unlocked the bathroom door to watch S. shower and that he would hide her clothes. Appellant told his wife, "'I don't know why I did it. I don't know what's wrong with me.'"

After appellant admitted his abuse of S., Mrs. Miranda told appellant to move out. Two to three weeks later, after appellant promised never to touch S. again, Mrs. Miranda allowed him to move back in. Mrs. Miranda testified that S. was adamantly against appellant moving back in, but she promised she would be vigilant and would not let appellant touch S. again.

Sometime while S. was in high school, Mrs. Miranda met with a school counselor about rumors or complaints that appellant had molested S. Eventually, S. denied the accusations.

Mrs. Miranda testified that, sometime after 1999, S. worked for appellant at a service station and store. In August of 2004, S. came home from work and told her mother she was going to quit because appellant was trying to rub her back and shoulders, which made her uncomfortable. S. repeatedly tried to tell appellant to stop, but he wouldn't. As a result, Mrs. Miranda again told appellant to leave the house. Mrs. Miranda described appellant as having a "bad temper."

Mrs. Miranda testified that appellant obtained a gun in 1999. According to Mrs. Miranda, appellant handled the gun recklessly and on occasion would say he heard something, load the gun, and walk through the house with it. Mrs. Miranda testified that appellant pointed the gun at her while he played with it, but he did not threaten her with it. He also told Mrs. Miranda that there was a bullet meant for him and one meant for S.'s fiancé, with whom he was not pleased when S. became pregnant.

Mrs. Miranda described appellant's penis as "slightly crooked" and his testicles as "small." She had never shared this information with S.

Mrs. Miranda testified that appellant never hit her or S., but she did see him rub S.'s shoulders when she was young and wrestle with her when she was six or seven years old.

Katherine Powell testified that she had been friends with S. since they were in the fifth grade. Powell thought of S. as a sister and considered her a truthful person. At first,

Powell thought S. was very outgoing, but her behavior changed, and she became shy and less outgoing.

In the summer of 1999, S. came to Powell's house. She was crying hysterically and could barely breathe or talk. S. told Powell appellant had been touching her breasts and watching her in the shower. Powell told S. to tell her mom, but S. was afraid of appellant. S. spent a lot of time at Powell's because she did not want to be home. Powell thought S. "seemed a lot better" when her mother and appellant first separated.

Powell worked with S. at the service station and store. On one occasion, Powell saw appellant, who was the store manager, rubbing S.'s lower back and upper buttocks when the two were bent over the store's computer.

In 2004, S. again talked to Powell about appellant. S. was hysterical and could not breathe, but she eventually described what had happened. S. had spoken to her mother before talking to Powell.

Jaclene Cartlidge, a good friend of S.'s while they were in the sixth grade, testified that S. was very upset at school one day. Cartlidge followed her into the bathroom where S. described an incident that had happened to her. Afterwards, S. spoke to a school official, as did S.'s parents, but S. later changed the statement she had made to Cartlidge. Cartlidge told someone, perhaps a peer, about what had happened, but she did not tell any school officials about the incident.

Defense

Appellant testified in his own behalf. He denied sexually assaulting S. and had various explanations for his actions. According to appellant, S. was often sick. On one occasion, when S. was sick on the couch, he rubbed her stomach under her shirt. As he did, he touched the top of her pubic hair with his little finger, which he described as crooked. He immediately apologized to S., but she said it was okay, so he continued to rub her stomach.

Appellant testified that S. was in a car accident in July of 2001, and on occasion, he would rub her back because it hurt. He also rubbed her buttocks area, because she complained about pain in her lower back.

Appellant testified that he and S. shared back rubs when they watched television. He would rub her back for 15 minutes, and then she would do the same for him. Appellant denied ever touching S.'s breasts. He also denied ever orally copulating her, having her orally copulate him, or having sexual intercourse with her.

Appellant recalled the incident which led to his wife asking him to leave the house in June of 1999. According to appellant, he was not feeling well and came home from work to go to bed. When he entered the room, he found S. under the covers watching television. Appellant asked S. to leave, but she wouldn't. He told her that if she did not get out of bed, he would "pants" her. When S. just laughed, appellant reached under the blanket and pulled off her shorts. When she still would not get up, he pulled the blanket off of her. She had nothing on but a T-shirt. Appellant then picked her up, carried her to the living room, where he dropped her, grabbed her legs and started spinning her around, thinking it was a game. He stopped when S. asked him to. S. left to take a shower, and appellant picked the lock on the bathroom door and followed her in. He talked to her while she showered and he could see her entire body.

Appellant recalled another time when he pulled down S.'s pants, but not her underwear. He recalled another time when he entered the bathroom while S. was showering, because she needed some shampoo. He also recalled a time when he picked her up by the pant leg and the button on her jeans broke. He then told her to take off her pants so he could sew the button back on.

Appellant testified that three weeks after his wife first asked him to leave, he met with her and asked if he could come back. He promised not to rub S.'s back or "anything of that nature." His wife asked S. if it was okay and she said she didn't care. But after he returned, S. asked if he would rub her back. He did when his wife did not object.

Appellant admitted that there were times when he would come up behind S. and rub her shoulders.

Appellant denied he ever threatened his wife or S. with the gun. He acknowledged that he did tell S.'s fiancé he had a bullet he would use on him if he ever got S. pregnant but denied he intended to shoot him.

In July or August of 2004, appellant's wife asked him about an incident that S. related in which appellant pressed on S.'s back and got an erection. Appellant admitted to his wife that on one occasion he passed S.'s bedroom and saw that she was lying on the bed with a hurt back. While he rubbed her back, he got an erection. This embarrassed him, and he left to put on some shorts because he was only wearing boxers at the time.

Appellant testified that he was ashamed and felt guilty about the bedroom and bathroom incidents, but denied he ever touched S. in a sexual manner. Appellant admitted that his penis always "goes to one side," and that his right testicle is bigger than the left one. But, according to appellant, these aspects of his body were discussed in front of S. as his wife called him "little balls."

In February of 2005, during the investigation of the matter, Mrs. Miranda made a pretext telephone call to appellant. Appellant acknowledged that, during the call, he admitted he had touched S.'s breasts. He admitted the same during an interview with law enforcement. But appellant explained that he only rubbed S.'s chest in the area between her nipples.

During the call, appellant tried to explain to his wife why S. knew of his genital defects, thinking that his penis must have fallen out of his boxers while he was jumping up and down in the living room with S., when he opened the door for S. while wearing white briefs, or when he was rubbing her back and got an erection.

Also, during the same telephone call, appellant told his wife that while he was spinning S. around by her legs, he looked down and noticed that she was a virgin.

Appellant did recall that he and his wife had spoken to a school counselor when S. was in the sixth grade about rumors that he was molesting S. According to appellant, S. had accused the deacon of their church, who was a friend of theirs, of touching her breasts, but appellant had not taken any action in response to this allegation.

Appellant called several character witnesses. Mike Buford, appellant's supervisor from the late 1980's until December of 1999, described appellant as an honest and truthful person with a good reputation in the workplace. Job Aleman, a church friend since 1998, testified that appellant had a reputation for being truthful and honest, but admitted he had not seen appellant in church for a couple of years. Bud Zontek worked with appellant for 15 years and described him as truthful and honest in the workplace and among his coworkers.

Joseph Sousa, appellant's godchild, testified that S. had a reputation for being dishonest, untruthful, and manipulative. He also testified that S. drank a lot. Sousa admitted that he had tried to date S., but she had refused.

Police Officer Brian Cordeniz testified that he met with S. on January 13, 2005, when she walked into the police station to make a complaint of a sexual battery. Officer Cordeniz described S. as upset and crying. He could smell alcohol on her, but did not believe that she was intoxicated. S. told Officer Cordeniz that, a few hours earlier, she had gone to Vejar's restaurant with friends when the owner, Patrick Vejar, came up to her and suggested she apply for a bartending position. When Vejar took S. on a tour of the restaurant, he kissed her. S. pulled away, and Vejar asked her if she had breast implants and injections in her buttocks. When she told him it was none of his business, Vejar grabbed S. around the buttocks and reached down the front of her pants with his left hand. S. walked away and told her friends what had happened. The friends confronted Vejar, but he denied the incident occurred. S. told Officer Cordeniz she wanted to file charges against Vejar.

S. then told Officer Cordeniz that appellant had started molesting her when she was in the third grade and he would watch her take showers. She also described him

placing his finger into her vagina. S. told Officer Cordeniz that appellant forced her to perform oral sex on him when she was in the sixth grade, to receive oral sex, and that appellant forced her to have sexual intercourse with him several times. S. related that appellant threatened to kill her mother and grandparents if she ever disclosed what was going on.

DISCUSSION

1. Was appellant denied his constitutional right to call a witness in his own behalf?

Appellant contends the trial court infringed his Sixth Amendment right to present a defense when the court informed a defense witness that he would be arrested on charges involving an incident about which he would be asked to testify and advised the witness of his right to remain silent. We disagree.

A. The trial court's advisements to the witness

The record shows the following. When S. accused appellant of molestation, she also accused Patrick Vejar of groping her while he showed her around his restaurant. Near the end of the trial in this matter, apparently, defense counsel advised the trial court that he had subpoenaed Vejar to testify in appellant's behalf the following morning. Though that exchange is not contained in the record, the following colloquy between court and counsel is:

> "THE COURT: Okay. And also, Counsel, regarding this Vejar thing, when he comes, I don't know if he's going to be taken into custody at that time.
>
> "[DEFENSE COUNSEL]: Well, I would like—if he comes, I would like him to testify.
>
> "THE COURT: Well, I have to advise him. [¶] … [¶] … I have to let him know because if he's going to testify, I need to let him know.
>
> "[DEFENSE COUNSEL]: That's right, and if he says I'm not going to testify then it doesn't matter, but I wouldn't want the jury seeing him being taken in.

"THE COURT: Absolutely, I'm not going to do that. I'm instructing you that's not to be done outside the hallway. Maybe, Carl, we can work—do you know what's happening?

"THE BAILIFF: No. That's what I was going to ask.

"THE COURT: I'm going to ask all you folks to please go outside. Is Detective Haney going to be here tomorrow?

"[THE PROSECUTOR]: I believe he is. He, too, is of the belief that that should never happen in front of any member of the jury.

"THE COURT: If this Patrick Vejar comes tomorrow, he's going to be arrested. He's going to [*sic*] arrested by Detective Haney. So Detective Haney will be taking him with him. He's not going to be turned over to Carl. It's going to be Detective Haney's arrest and he's in Detective Haney's custody. But I'm just going to let you know. And if we're going to do that, the jurors are not to be in the room when that occurs, if he shows up. But if he shows up, we're going to put him on the stand. I'm going to advise him what's going to happen. I'm going to advise him of his Fifth Amendment right not to testify, and I'm betting that he's not going to testify. And then Detective Haney will arrest him and he'll just take him with him.

"[DEFENSE COUNSEL]: I note the subpoena calls for nine o'clock in Department 2.…"

The following day, out of the presence of the jury, Vejar was called to the stand. The trial court advised Vejar that it was the court's understanding that Vejar had been subpoenaed to testify regarding "an alleged incident which occurred between you and [S.]. And my understanding is that you are going to be arrested today regarding that incident. And Detective Haney is going to be taking you into custody and you're going to be arrested on those charges that you are—that you've been subpoenaed to testify on." The court then proceeded to advise Vejar of his Fifth Amendment rights. Asked whether he chose to invoke his privilege not to testify, Vejar first responded "I'm under oath. I'll testify." But, when the court said "[y]ou understand that everything you say can and will be used against you in a court of law and you wish to testify without talking to a lawyer[,]" Vejar said "[i]f I'm being arrested, I think I better talk to a lawyer." He was excused and then arrested by Detective Haney.

Though the crux of appellant's argument that his Sixth Amendment rights were violated appears to be that "a material defense witness was lost through intimidation [by] the trial court, the prosecution, and law enforcement," cogent analysis of the contention requires that we first examine what we know of the trial court's conduct as revealed above—that is, the trial court's decision to advise a potential witness of his impending arrest and his Fifth Amendment right not to incriminate himself.

We note first in this regard that there is no support in the record for appellate counsel's interpretation—that the trial court warned defense counsel the day before Vejar's appearance that "the court intended to have him arrested." A reasonable reading of the record indicates that, instead, the court warned defense counsel that there would be an arrest by law enforcement, directed that this not be done by the bailiff and not be done in the presence of the jury, and stated the court's intent to advise the witness of his rights. We proceed, then, to determine whether the trial court erred in advising the witness.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) The Sixth Amendment to the United States Constitution provides a criminal defendant with the right "to have compulsory process for obtaining witnesses in his favor." In *Washington v. Texas* (1967) 388 U.S. 14, the United States Supreme Court recognized the importance of the compulsory process right:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." (*Id.* at p. 19.)

The right to compulsory process is independently guaranteed by the California Constitution. (Cal. Const., art. I, § 15.)

"A defendant's constitutional right to compulsory process is violated when the government interferes with the exercise of his right to present witnesses on his own behalf," e.g., by intimidating defense witnesses. (*In re Martin* (1987) 44 Cal.3d 1, 30.) Intimidation may take many forms, such as telling defense witnesses they will be prosecuted for perjury or any crimes revealed in their testimony, threatening that a witness will suffer adverse consequences in his or her own criminal investigation, and arresting a defense witness before he, she or other defense witnesses complete their testimony. (*Id.* at pp. 30-31, and cases cited therein.) For instance, in *In re Martin*, a prosecution investigator arrested the defendant's first witness outside the courtroom immediately after the witness gave testimony that contradicted that of the prosecution's key witness. The investigator arrested the witness in the presence of persons the investigator knew to be the other defense witnesses, which intimidated the witnesses and kept them from testifying. (*Id.* at pp. 33-34.)

But, if a trial court has reason to believe that a witness may be charged with a crime arising out of events to which he might testify, it is the court's duty to ensure that the witness is fully advised of his privilege against self-incrimination. (*People v. Seastone* (1969) 3 Cal.App.3d 60, 68; *People v. Barker* (1965) 232 Cal.App.2d 178, 182, disapproved on another ground in *People v. Barnum* (2003) 29 Cal.4th 1210, 1219, fn. 1.) The court must

> "walk [a] fine line between, on the one hand, fully advising the witness of the danger of self-incrimination and the right not to testify, and, on the other hand, threatening the witness to an extent which materially impairs the defendant's due process right to present witnesses in his defense." (*People v. Warren* (1984) 161 Cal.App.3d 961, 972.)

It is only when the prosecutor or the court goes beyond a warning and threatens the witness with prosecution, however, that the government acts improperly. (*People v. Schroeder* (1991) 227 Cal.App.3d 784, 787-788; *People v. Warren, supra*, 161 Cal.App.3d at pp. 973-976.)

Our Supreme Court has detailed how a compulsory process violation is shown.

> "In order to establish a violation of his constitutional compulsory-process right, a defendant must demonstrate misconduct. To do so, he is not required to show that the governmental agent involved acted in bad faith or with improper motives. [Citations.] Rather, he need show only that the agent engaged in activity that was wholly unnecessary to the proper performance of his duties and of such a character as 'to transform [a defense witness] from a willing witness to one who would refuse to testify ….' [Citations.]" (*In re Martin*, *supra*, 44 Cal.3d at p. 31.)

In *Bray v. Peyton* (4th Cir. 1970) 429 F.2d 500, a defense witness was arrested prior to his opportunity to testify. The defendant was charged with statutory rape. The defendant's strategy at trial was to expose the 15-year-old complainant as a consenting female, thereby reducing the offense to a misdemeanor. To do so, the defense called four witnesses to testify to their similar relations with the 15-year-old. (*Ibid.*) About the same time the defendant was indicted, one of the witnesses had also been charged with a like assault upon the girl. But the witness joined the Army and the charges were dropped. The witness attended the defendant's trial, pursuant to a summons and, once the witness was there, the prosecuting attorney directed the witness be arrested and incarcerated on the old charge. The warrant was immediately executed. Two of the other potential witnesses then refused to testify, leaving only one witness for the defense, the defendant's brother, who characterized the complainant as a "flirt." The court found that the arrest of the one witness likely robbed the defendant of his only defense. (*Id.* at p. 501.)

The present case does not show misconduct as *In re Martin*, *supra*, 44 Cal.3d 1 defined it, and it is in marked contrast to the situation in *Bray v. Peyton*, *supra*, 429 F.2d 500. Appellant acknowledges that the trial court had a responsibility to advise Vejar of the jeopardy he might face by testifying, but argues that, once the trial court advised Vejar of his right to remain silent, it was not necessary for the court to "threaten him with arrest." As noted above, however, we do not read the record as demonstrating that the trial court "threatened" Vejar with arrest. Instead, the trial court appropriately advised Vejar that it was "not making any findings here whether [the allegations] happened or

not," but was instead simply and correctly informing Vejar not only of the possible consequences of incriminating himself by his testimony, but also that he was going to be arrested by law enforcement, whether or not he was going to testify. (Cf. *People v. Robinson* (1983) 144 Cal.App.3d 962, 970 [prosecutor stated "charges not only can be charged against you, but they will be filed, should you take the stand"].) The trial court made certain that Vejar was not to be arrested before he had a right to either testify or invoke his Fifth Amendment privilege not to testify. And there is no indication in the record that Vejar's subsequent arrest discouraged any other witness from testifying. Appellant has provided and we are aware of no authority that supports the proposition that a trial court violates the defendant's rights when, in connection with informing a prospective witness of his Fifth Amendment rights, and without insinuating or telling the witness he could change the result by not testifying, the court informs a witness of his impending arrest.

B. Prosecution and law enforcement conduct

As noted previously, appellant attacks not only the trial court's conduct but also that of the prosecution and law enforcement in connection with his Sixth Amendment claim. Although appellant does not contest the denial of a motion for new trial he made below,[4] he does use evidence submitted in support of that motion to support his argument here that his constitutional right to present witnesses was violated by a combination of the trial court's advisements to the witness and the misconduct of both the prosecution and law enforcement.

About 60 days after the trial, defense counsel filed a motion for new trial on grounds of newly discovered evidence and insufficiency of the evidence to sustain the

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[4]At oral argument, counsel argued that he was contesting the denial of the new trial motion. We will not entertain issues brought up for the first time in oral argument. "An appellate court is not required to consider any point made for the first time at oral argument, and it will be deemed waived." (*Kinney v. Vaccari* (1980) 27 Cal.3d 348, 356-357, fn. 6; see also *People v. Cardenas* (1997) 53 Cal.App.4th 240, 248, fn. 4 [declining to address issue raised during oral argument but not discussed in briefing].)

verdict. In support counsel filed his own declaration, which stated, inter alia, that Vejar knew of S.'s "bad reputation for truth and honesty and that [S.] was untrustworthy and he would testify to that knowledge." The declaration stated that counsel was informed by Vejar that (1) Vejar would have testified that he was also a victim of a false accusation made against him by S. on January 1, 2005; (2) that no complaint had issued against Vejar before the district attorney was made aware of the prospect of Vejar's testimony at appellant's trial; (3) that, after Vejar was arrested outside the courtroom at appellant's trial, he was handcuffed and placed into the court holding cell; (4) that, while in the holding cell, Vejar advised a detective that he had changed his mind and wanted to testify; (5) that the detective informed Vejar that she would notify the court and Detective Haney; (6) that Vejar then spoke to Detective Haney and informed him that he wanted to testify and wanted the judge to be so informed; (7) that Detective Haney told Vejar he would not inform the judge and removed Vejar from the court holding cell; and (8) that Vejar remained in custody for five days, at which time he was informed that no complaint was filed against him and he was released.

Defense counsel's declaration stated further that he had contacted the clerk of the court on October 26, 2005, to inquire whether any criminal complaint had been filed against Vejar between the original allegation on January 1 and October 26, 2005, and counsel was told that court records did not reflect a criminal complaint or warrant had been filed against Vejar. The declaration concluded by stating that

> "the conduct of the Tulare Police Department and, specifically, Detective Haney, involved fraud and misconduct perpetrated upon the Court and materially affected the [appellant]'s, right to a fair trial."

The prosecution filed an opposition to defense counsel's motion for new trial, arguing that the information Vejar allegedly would have provided was not newly discovered evidence, that Vejar's anticipated testimony that S. was not a credible person was cumulative, and that Detective Haney had attempted several times to contact Vejar in the eight months between S.'s accusation against him and the time of appellant's trial but without success. The prosecution also pointed out that there was no affidavit from Vejar

himself, argued that Vejar did not know S. well enough to testify as a competent character witness, and claimed defense counsel should have anticipated what occurred when he planned to put Vejar on the stand.

On December 6, 2005, the trial court heard argument and then denied appellant's motion for new trial. The court reasoned as follows:

> "… In this Court's opinion, the testimony of Mr. Vejar even if he said everything that he intended to testify to would not have changed the outcome of this trial. [¶] The evidence against this [appellant] was overwhelming in this Court's opinion. The [appellant's] own statements, in this Court's opinion, convicted him. The … victim knew personal information about the [appellant's] genitalia that only a victim of sexual assault would know. The [appellant] testified himself that he had in essence sexually assaulted this victim. Mr. Vejar's testimony, in light of the [appellant's] own testimony, would not in this Court's opinion result in a verdict favorable to the [appellant]. [¶] This Court found the testimony of the victim compelling even though the [appellant] put on a witness to attack her credibility. The jury also apparently found the victim's testimony compelling. [¶] The [appellant] admitted to removing the victim's pants, looking at the victim's vaginal area. He said in play. I don't understand that type of play. [¶] In this Court's opinion, that was all corroborative of the victim's testimony that the [appellant] assaulted her and molested her. Therefore, the motion for a new trial is denied."

There is also no proof in the record before this court that the prosecution or law enforcement used Vejar's arrest to prevent him from testifying. Though such an inference could be drawn from the information supplied in defense counsel's affidavit in support of the new trial motion, a contrary inference could be drawn from the information supplied by the prosecution in response. Further, as respondent points out, there are possible explanations—explanations not at all sinister—for why Vejar was not ever charged (if, in fact, that is true). An appeal, which must be based on the record before the appellate court, is not the appropriate place in which to iron out these questions of fact.

We reject appellant's claim that he was denied his constitutional right to call a witness in his own behalf.

2. Is there sufficient evidence in the record to support the jury's finding that the count 5 offense occurred within the 10-year limitation period of section 801.1?

Appellant was charged with oral copulation in counts 3, 4, and 5 of the information. The jury was provided with and noted its finding of guilt on a verdict form on count 5 that read:

> "We, the Jury, find [appellant] guilty as charged in Count 5 of the Information, of FORCIBLE ORAL COPULATION, (VICTIM: S.K.) in violation of Penal Code section 261(a)(2) [*sic*]. (Referring to the event where [appellant] removed S.'s pants and carried her to the living room when she was approximately 13 years of age.) [¶] We, the Jury, further find to be true the special allegation that the period for commencing prosecution for a felony had not expired."

Appellant does not contest the occurrence of the act alleged in count 5; he argues instead that there is insufficient evidence that the oral copulation occurred within the limitations period. We disagree.

Section 801.1 provides, in relevant part, that a prosecution for a felony offense described in section 290, subdivision (a)(2)(A) "shall be commenced within 10 years after commission of the offense." A violation of section 288a, oral copulation, is listed in section 290, subdivision (a)(2)(A).

The original felony complaint in this matter was filed on February 10, 2005. Count 5 of the first amended information alleged that appellant committed the crime of forcible oral copulation against the victim "[b]etween the 2nd day of January, 1995 and the 2nd day of July, 2001."

The trial court instructed the jury with respect to the 10-year statute of limitations that:

> "In order for you to find that the charged offenses in Counts 2, 3, 4, and 5 occurred within the statute of limitations, you must find that the offenses occurred within ten years after February 10th, 1995. If you find that those offenses occurred before February 10th, 1995, you must find that the offenses in Counts 2, 3, 4, and 5 occurred outside the statute of limitations."

During closing argument, the prosecutor argued that the third count of oral copulation [count 5] was "that pantsing incident where [appellant] pantsed her, picked her up, carried her up into the living room, spread her legs, and bent his head down."

S. was born in October of 1983. With respect to the oral copulation allegation in count 3, S. testified that appellant's sexual abuse of her "changed" when she was "about 5th, 6th Grade," and that appellant first forced her to orally copulate him during the summer between her fifth and sixth grade years. She was in her mother's room when appellant made her put her mouth on his penis. In the summer of 1995, S. would have been 11. When S. was asked if there was another time that this occurred, she stated, "It happened a few times," and then, with respect to the oral copulation allegation in count 4, she testified that "another" incident of oral copulation occurred, also taking place in her mother's room, right before she went to SCICON. The verdict form for count 4 referred to an incident of oral copulation that occurred in the fall of S.'s sixth grade year. Appellant acknowledges that these two incidents took place within the statute of limitations period.

With respect to the oral copulation alleged in count 5, the evidence shows the following. The prosecutor asked S., "Now, you described two events of oral copulation where your head was forced down on [appellant]'s penis, was there ever a time when he kissed you in the vaginal area?" S. then testified to an incident which took place "the same day of the birthday party of Crystal's." On that occasion, appellant took off her bathing suit, laid her down on the couch, spread her legs open, stared at her, and then kissed her on her "private part." Officer Cordeniz also testified that S. told him she was in the sixth grade when appellant forced her to receive oral sex. Although the prosecutor argued during closing argument that this incident occurred when S. was 14 years old, which would be sometime in 1997 or 1998, the date is not mentioned in the evidence.

Appellant contends that the only incident which would match the description in the verdict form, "Referring to the event where [appellant] removed S.'s pants and carried her to the living room when she was approximately 13 years of age," was an

incident that occurred in 1999, when appellant came home from work and found S. in his bed. On that occasion, appellant asked S. to get out of the bed, and when she didn't, he reached under the blankets, "pantsed" her, carried her to the living room, and spun her around on the floor by her legs. According to appellant, although this incident may have been inappropriate, it did not involve an act of oral copulation.

But respondent argues that there is sufficient evidence of when the third act of oral copulation testified to by S. occurred. According to respondent, appellant's abuse of S. changed during the summer between 5th and 6th grade when he went from watching her in the shower and touching her breasts to acts of oral copulation, and it changed again during her freshman year in high school in 1999 when he began forcing her to have sexual intercourse with him. "Thus," as argued by respondent, "it appears that the act of oral copulation involving the bathing suit occurred during a period of time after the first two incidents of oral copulation and before appellant started to have sexual intercourse with her in her freshman year of high school." Because S. testified that the first incident involving oral copulation occurred in the summer of 1995, followed by another in the fall of that same year, it was reasonable for the jury to conclude the bathing suit incident, another act of oral copulation which took place in the living room and involved appellant removing S.'s clothing, happened sometime late in 1995 and before 1999, when appellant began having sexual intercourse with her. We note, in addition, that Officer Cordeniz testified that S. told him she was in the sixth grade when this act of oral copulation occurred.

We agree with respondent and find that there is sufficient evidence to prove that the incident involving appellant removing S.'s bathing suit, carrying her to the couch, and forcing her to participate in oral copulation occurred within the 10-year statute of limitations.[5]

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[5]The parties disagree over the appropriate standard of proof applicable to a jury finding on a statute of limitations issue. Appellant argues there must be proof beyond a reasonable doubt; respondent argues the preponderance of the evidence standard applies. (See *People v.*

3. Is the misdemeanor conviction on count 1 barred by the statute of limitations?

Appellant argues that his conviction on count 1 must be reversed because the crime was barred by the statute of limitations. We disagree.

Appellant was originally charged in the amended information in count 1 with felony rape alleged to have occurred between January 1, 2001, and July 2, 2001. (§ 261, subd. (a)(2).) Prosecution for a felony described in section 290, subdivision (a)(2)(A), which includes rape (§ 261), "shall be commenced within 10 years after commission of the offense." (§ 801.1.) But the jury acquitted appellant of this charge and convicted him of the lesser included offense of battery (§ 242), a misdemeanor, which is subject to a one-year statute of limitations (§ 802, subd. (a)). "The limitation of time applicable to an offense that is necessarily included within a greater offense is the limitation of time applicable to the lesser included offense, regardless of the limitation of time applicable to the greater offense." (§ 805, subd. (b); see *People v. Statum* (2002) 28 Cal.4th 682, 699.)

Appellant asserts that, since he was convicted of a misdemeanor battery as a lesser included offense, the applicable limitations period is one year and the conviction time-barred. We disagree.

In *People v. Williams* (1999) 21 Cal.4th 335, our high court held that a defendant may raise at any time the statute of limitations for conviction of a charge that in the charging document is, on its face, untimely. But it expressly declined to address what rules "apply to convictions of time-barred lesser offenses when the charged offense is not time-barred." (*Id.* at p. 338.)

Linder (2006) 139 Cal.App.4th 75, 85; *People v. Zamora* (1976) 18 Cal.3d 538, 565, fn. 27; *People v. McGill* (1935) 10 Cal.App.2d 155, 159-160 [state must prove by a preponderance of the evidence that alleged act occurred within 10-year statute of limitations period].) The question is merely academic in this case, however, because although the jury was instructed that it was to determine whether the charged offenses occurred within the statute of limitations, only the "higher," or "beyond a reasonable doubt" standard was given. We therefore assume the jury applied the reasonable doubt standard of proof to its consideration of whether the act occurred within the appropriate time period. Appellant does not argue otherwise.

In *People v. Stanfill* (1999) 76 Cal.App.4th 1137, the court addressed this question. In *Stanfill*, the defendant requested instructions on a lesser included offense and was convicted of the same. (*Id.* at pp. 1139, 1142.) On appeal, he claimed the lesser offense was time-barred. (*Id.* at pp. 1142, 1144.) The *Stanfill* court held that "a defendant forfeits the right to complain on appeal of conviction of a time-barred lesser included offense where the charged offense was not time-barred and the defendant either requested or acquiesced in the giving of instructions on the lesser offense." (*Id.* at p. 1150.)

Here, prior to closing arguments, the trial court reviewed proposed jury instructions with counsel, including the giving of CALJIC Nos. 16.140 (Battery), 16.141 (Battery – force and violence – Defined), and 17.10 (Lesser Included Offenses). Before listing the instructions the court intended to give, it specifically stated to counsel, "If you object to the giving of an instruction, state so when I get to that number, otherwise, I'm giving the instructions." Defense counsel made no objection to the proposed instructions, and the court subsequently gave the above mentioned instructions.

We find the record shows that defense counsel acquiesced on the lesser included offense instructions when he failed to object to them. To acquiesce is to "consent or comply passively or without protest." (American Heritage Dict. (3d college ed. 2000) p. 12.) Appellant has therefore forfeited his right to raise the statute of limitations on the lesser offense on appeal. (*People v. Stanfill*, *supra*, 76 Cal.App.4th at p. 1150.)

Appellant argues that *People v. Beasley* (2003) 105 Cal.App.4th 1078 controls the issue here and not *Stanfill*. In *Beasley*, the court reversed the defendant's conviction on the time-barred lesser included offenses. (*Beasley*, at p. 1090.) The court found *Stanfill* inapplicable because "nothing in the record indicates Beasley requested or acquiesced in the instruction on assault as a lesser included offense of assault with a deadly weapon …." (*Ibid.*) But as we discussed above, the record here does indicate that defense counsel acquiesced in the giving of the lesser offense instructions, and appellant

has therefore forfeited his right to raise the statute of limitations on the lesser offense on appeal. (*People v. Stanfill*, *supra*, 76 Cal.App.4th at p. 1150.)

4. Did the trial court err in imposing the upper term on count 2?

In supplemental briefing, relying on *Blakely v. Washington* (2004) 542 U.S. 296 and *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856], appellant contends the trial court violated his Sixth Amendment right to trial by jury by imposing the upper term on count 2 based on factors not admitted by him or found to be true beyond a reasonable doubt by the jury. We agree.

Prior to appellant's sentencing, the California Supreme Court undertook an extensive analysis of *Blakely*, *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *United States v. Booker* (2005) 543 U.S. 220, and concluded that the imposition of an upper term sentence, as provided under California law, was constitutional. (*People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254, 1261.)[6] Recently, however, the United States Supreme Court overruled *Black* in part and held that California's determinate sentencing law "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [Citation.]" (*Cunningham v. California*, *supra*, 549 U.S. at p. __ [127 S.Ct. at p. 868].)

Appellant was convicted of a misdemeanor violation of section 242 (count 1), a felony violation of section 261, subdivision (a)(2) (count 2), and three felony violations of section 288a, subdivision (c) (counts 3, 4, and 5). The court imposed an upper term of eight years on count 2 and three consecutive midterms of six years each on counts 3, 4, and 5. At the sentencing hearing, the trial court stated that it had read and reviewed the probation report prior to sentencing appellant to the aggravated term of eight years in count 2. The probation report listed the following factors in aggravation: the crime

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[6]In light of *Black*, any objection by appellant at sentencing based on *Blakely*, *Apprendi*, or the United States Constitution would have been futile. We therefore reject respondent's contention that appellant waived the issue by failing to object.

involved great violence, great bodily harm and the threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness, or callousness (Cal. Rules of Court, rule 4.421(a)(1)); the victim was particularly vulnerable (*id.*, rule 4.421(a)(3)); the manner in which the crime was carried out indicated planning, sophistication or professionalism (*id.*, rule 4.421(a)(8)); appellant took advantage of a position of trust or confidence to commit the offense (*id.*, rule 4.421(a)(11)); and appellant engaged in violent conduct which indicates a serious danger to society (*id.*, rule 4.421(b)(1)).

None of the factors relied upon by the trial court was found by a jury beyond a reasonable doubt. (See *Blakely v. Washington*, *supra*, 542 U.S. at p. 301; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490.) Thus, the middle term prescribed for that offense is the relevant statutory maximum the court could impose in this case.

"'An appellate court is not restricted to the remedies of affirming or reversing a judgment. Where the prejudicial error goes only to the degree of the offense for which the defendant was convicted, the appellate court may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the necessity for a retrial. (See … § 1260; *People v. Harris* (1968) 266 Cal.App.2d 426, 434-435.)' (*People v. Alexander* (1983) 140 Cal.App.3d 647, 666.)" (*People v. Edwards* (1985) 39 Cal.3d 107, 118.)

By analogizing the above type of situation to the present case, it is tempting for us to simply reduce the imposed upper term to the middle term. However, while the United States Supreme Court in *Cunningham* invalidated the *process* by which the trial court here imposed the upper term, we cannot say for certain on this record that the same term may not be imposed anew, consistent with *Cunningham.*

Accordingly, the sentence on count 2 is vacated.

DISPOSITION

The sentence on count 2 is vacated with direction as follows: If the People do not bring the matter before the trial court for a contested resentencing hearing within 60 days after the filing of the remittitur in the trial court, the trial court shall proceed as if the

remittitur constituted a modification of the judgment to reflect a sentence of the middle term on count 2 and shall so modify the abstract of judgment unless the trial court on its own decides to set a resentencing hearing. The People shall in writing notify the trial court and appellant's trial counsel of its intentions in this regard within 30 days after the filing of the remittitur; should the People state an intention to not contest the modification to the middle term on count 2, or fail to timely notify the trial court, the trial court shall promptly modify the abstract of judgment as provided herein. In all other respects, the judgment is affirmed.

_____
DAWSON, J.

WE CONCUR:

_____
VARTABEDIAN, Acting P.J.

_____
CORNELL, J.