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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROLANDO DEJESUS SALAZAR,

Defendant and Appellant.

C050817

(Super. Ct. No.
03F06229)

A jury convicted defendant Rolando Salazar of forcible sexual penetration based upon his digital penetration of the vagina of a girl (the victim) when defendant was 40 years old and the victim was 14 years old. The trial court sentenced defendant to the upper term of eight years in state prison.

On appeal, defendant contends the verdict is not supported by substantial evidence. He also contends that his conviction must be reversed because of prosecutorial misconduct, ineffective assistance of counsel, and instructional error, or because of the cumulative effect of the errors at trial. In addition, defendant

challenges the imposition of the upper term. We shall affirm the judgment.

FACTS

The victim, who was 17 years old at the time of trial, testified that defendant worked with her father, selling and delivering meat. The two men were friends outside of work also. From the time the victim was eight years old, she accompanied her father to work several nights a week. When her father became the manager, she assisted him in the office and played pool with the men who worked there. The victim would joke with the men, including defendant, and would let them know when it was her birthday, hoping they would buy her a present.

When the victim was 12 years old, defendant started talking "dirty" to her. For example, he asked to see her in a wet T-shirt. When she was 13, he asked when he was going to see her in a thong. Defendant rubbed her "behind" with his hand when she leaned over to take a shot while playing pool. He touched her bottom a couple of times, but the victim did not say anything to defendant or to her parents about defendant's conduct.

On May 23, 2003, when the victim was 14 years old, she and her girlfriend (friend) decided to "ditch" school. After leaving the campus, the girls wanted to go somewhere but needed a ride, so the victim decided to call defendant because he was "cool" and "easy going." She knew his cell phone number, having called him several times on her father's behalf regarding work. The victim telephoned defendant, told him she and her friend were ditching school, and asked if he would give them a ride.

Defendant left work, drove 20 to 25 minutes, and picked up the girls. When he arrived, they asked him to drive them to a movie theater, but he suggested they go to Discovery Park instead. On the way to the park, defendant stopped at a liquor store and bought vodka, which they drank after they arrived at the park. At one point, while they were sitting on a bench defendant put his hand under the victim's T-shirt, but over her undershirt, and touched her breast. This made the victim feel "[w]eird."

The girls then walked to another part of the park to watch the boats. According to the friend, defendant made inappropriate "sexual" comments about wanting to see the girls in wet T-shirts or swimming in their underwear. Defendant pretended to try to throw the victim into the water, and the two wrestled playfully for about 10 to 15 minutes. While they were wrestling, they fell to the ground. The victim bit defendant's arm because she "was trying to get him . . . off of [her]." The friend thought the bite might have been a signal to defendant to stop. She left the area and went to the restroom because she felt "a little uncomfortable." She could not tell if their actions were "okay"; it seemed like they were "joking around," but "it just still didn't sit right with [her]." She asked the victim to go to the restroom with her, but the victim did not accompany her.

After the friend left, defendant tried to kiss the victim on the lips. He held her by both wrists so she could not get away. She asked him to stop, but he held her wrists "very firmly" and said, "[N]o, you know you want to kiss me" and "you know you want to fuck me." The victim yelled for her friend and repeatedly told

defendant to stop and that she wanted to leave. Defendant tried to kiss her again, but the victim moved her head to prevent him from kissing her on the mouth.

Defendant got behind the victim and, while holding one of her wrists, he put his other hand down her pants. He inserted a finger into her vagina, which hurt her. The victim was scared and kept yelling for her friend. She struggled to get away, but could not stop defendant because "he had [her] wrist." The victim testified she never gave defendant permission to insert his finger in her vagina.

After defendant removed his hand from her pants, the victim saw her friend returning from the bathroom, and took her back into the bathroom to tell her what had occurred. The victim cried as she said defendant touched her with his hand down her pants. The friend told the victim to fix herself up; they then left the bathroom and tried to appear normal because they needed a ride back to school. Defendant drove them back to school in time for the victim's mother to pick them up.

The next morning, the victim told Mark, one of her father's coworkers, what had happened. With his encouragement, she told her parents about the incident. She also reported it to the police. According to one of the officers, the victim was very emotional and was crying during her statement. She said that she had a bruise on her left wrist, but the bruise was not visible in the photographs shown to the jury.

A few days later, the victim spoke with Detective Gerald Roth. Roth observed that the victim seemed young for her age, cried while

talking to him, and was embarrassed when she discussed the more intimate details of the incident. She agreed to make a pretext call to defendant, but he did not answer his phone. A couple of hours after Detective Roth left, the victim called defendant again and recorded the conversation on her own tape recorder. She then contacted Roth and told him that defendant had denied he had been with her, which upset her. She was concerned people would think she was a "slut."

The victim and Roth made another pretext call on June 3, 2003. Defendant initially denied touching the victim, but then stated repeatedly that he had made a "mistake." When the victim asked why he put his hand down her pants, defendant replied he was "just playing around," asked if she had told the police, and asked her to forgive him. The victim responded, "[B]ut you put your finger inside me and everything. Now like it's going to be . . . weird being around you." Defendant replied that he knew and that it was a terrible mistake, and then asked if the police were listening to their conversation. The victim denied the police were involved, whereupon defendant repeated his request for forgiveness, stating he had been "confused" and "wish[ed he] never did it." The victim repeated that defendant had put his finger inside her and that it hurt, to which defendant replied, "Yeah, . . . like I said, you know, I made a huge mistake"

On June 5, 2003, defendant told a coworker, Kenneth, about taking the victim to the "river." Defendant said he had been drinking, "something had went [sic] wrong," and he had put his hand down the victim's pants and inserted a finger in her vagina.

Defendant told Kenneth, "It was just my finger." He said he was afraid to go to work and face the victim's father. Defendant stated the police had come to his house and wanted to speak to him. Defendant wanted to leave the area and go to El Salvador or Southern California. He asked for money, but Kenneth refused to give him any. That was the last time Kenneth saw defendant, who first went to Los Angeles and then Atlanta, Georgia.

Defense

Defendant, who was 42 years old at the time of trial, testified on his own behalf. He said he became friends with the victim in 2003, and sometimes she called him on his cell phone to talk about school. They also played pool at work. Defendant denied telling the victim he wanted to see her in a thong or a wet T-shirt, and denied touching her bottom when they played pool. They "used to flirt basically, but nothing else." He thought the victim was interested in him sexually because she had been calling him for months, and "didn't seem like a kid anymore."

Defendant admitted (1) picking up the victim and her friend on May 23, 2003, (2) buying vodka, (3) driving to Discovery Park, and (4) giving the girls vodka. After they finished their drinks, he jokingly suggested, "[L]et's swim, let's get wet." The victim told defendant, "You first," and then they tickled and shoved each other playfully. After about five minutes, the victim bit his arm. He stood up and called her a "little shit," which was his "nickname for her at work." He did not interpret the bite as a defensive action. At that point, the friend announced that she was going to the bathroom and left.

According to defendant, he and the victim sat watching the boats, and when she began walking up the slope, he "had the bright idea of approaching her." He walked up behind her, placed his hands on her hips, and when she stopped walking, he put his "right arm on her stomach and . . . rubbed her a couple of times." She turned and said, "What's up?" and defendant replied, "Nothing." She then closed her eyes and "kind of sucked her stomach in," which gave defendant "the impression she was allowing [him] to do something else." He thought she was making room for his hand to enter her pants. He did not think she was sucking in her stomach because she was scared.

Defendant testified he put his hand inside the victim's pants for about two or three seconds, but he did not insert his finger in her vagina. She stood still, with her arms "loose," and looked at him silently. Defendant thought what he was doing was okay with her. After about "two seconds," his "sixth sense" told him he "was about to do something wrong, and [he] took [his] hand out" of her pants. He denied the victim ever told him to stop, and denied he held her hands or used force. According to him, "[i]f she would have told me [to stop] from the beginning, if she made a motion to say don't put your hand anywhere, I wouldn't be here talking to you."

After defendant removed his hand from the victim's pants, he tried to kiss her, but she "tightened up her lips." When he asked why she did not want to kiss him, she replied, "Just because." Defendant told her, "You know you want to fuck me."

Why don't you want to kiss me?" She told him, "You can touch me, but just don't kiss me."

Defendant and the victim then saw her friend returning from the bathroom and began to walk toward her. The girls went into the restroom together. When they emerged, defendant drove them to school.

Defendant denied telling Kenneth that defendant inserted a finger into the victim's vagina. Rather, defendant had said that he put his "hand in the cookie jar," which meant inside the victim's pants in the genital area. Defendant also denied that during the pretext phone call he admitted putting his finger inside the victim's vagina. She simply accused him of putting his fingers inside of her, which to defendant meant inside her pants, not her vagina. As for her reference to him hurting her, he presumed she meant emotionally rather than physically.

DISCUSSION

I

Defendant challenges the sufficiency of the evidence to support his conviction for forcible sexual penetration (Pen. Code, § 289, subd. (a)(1); further section references are to the Penal Code).¹ In particular, he contends there is insufficient evidence (1) that he used force, and (2) that he did not have

¹ Section 289, subdivision (a)(1), punishes "[a]ny person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person."

a reasonable, good faith belief that the victim consented to the penetration.

Under the substantial evidence rule, we review the facts adduced at trial in the light most favorable to the judgment, drawing all inferences in support of the judgment to determine whether there is substantial direct or circumstantial evidence that defendant committed the charged crime. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury's conclusions. (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) We may not reweigh the evidence and substitute our judgment for the trier of fact; all conflicts in the evidence must be resolved in favor of the judgment. (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1083.) Under this standard of review, defendant's challenge to the sufficiency of the evidence fails.

Defendant contends there is insufficient evidence that he used force to insert his finger in the victim's vagina; however, his appellate argument is premised on a misunderstanding of the requisite degree of force required.

In *People v. Griffin* (2004) 33 Cal.4th 1015, 1025-1029 (hereafter *Griffin*), the California Supreme Court held that the term "force" as used in the rape statute (§ 261, subd. (a)(2)) was not intended to have any specialized legal meaning significantly different from common usage definitions. Drawing an analogy to the element of force in a robbery, *Griffin* found the kind of force utilized in a rape and whether the victim resisted was immaterial.

(*Id.* at p. 1025.) The prosecution must show only that "defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim]." (*Id.* at pp. 1023-1024.) The rule in *Griffin* has been extended to forcible oral copulation. (See *People v. Guido* (2005) 125 Cal.App.4th 566, 575-576 (hereafter *Guido*)). We see no reason not to apply the analysis of *Griffin* and *Guido* to the crime of forcible digital penetration.

Here, defendant attempted to intoxicate the 14-year-old victim and, after her friend went to the bathroom, he held the victim by both wrists so she could not get away and then tried to kiss her on the lips. She asked him to stop, but he held her wrists "very firmly" and said, "[N]o, you know you want to kiss me" and "you know you want to fuck me." The victim signaled to the contrary by yelling for her friend and by repeatedly telling defendant to stop and saying she wanted to leave. Instead of stopping his unwanted sexual advances, defendant got behind her and, while holding one of her wrists, he put his other hand down her pants. He inserted a finger into her vagina, which hurt her. The victim was scared, kept yelling for her friend, and struggled to get away, but she could not stop defendant because "he had [her] wrist." This amply supports the finding defendant used force in digitally penetrating the victim's vagina.

Defendant also asserts there is insufficient evidence that he lacked a reasonable and good faith belief that the victim consented to the digital penetration. He is wrong.

In *People v. Mayberry* (1975) 15 Cal.3d 143 (hereafter *Mayberry*), the California Supreme Court held that a defendant's reasonable and good faith mistake of fact regarding a person's consent to sexual intercourse is a defense to rape. (*Id.* at p. 155.) *Mayberry* is premised on the notion that reasonable mistake of fact regarding consent is incompatible with the existence of wrongful intent. (*Id.* at pp. 154-155.)

"The *Mayberry* defense has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to [a sex act]. In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent. [¶] In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to [a sex act], that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction." (*People v. Williams* (1992) 4 Cal.4th 354, 360-361, fn. omitted.)

"The defendant bears the burden of raising a reasonable doubt as to whether he harbored a reasonable and good faith but mistaken belief of consent [citations], 'and then only if the prosecution's proof did not of itself raise such a doubt.' [Citation.]" (*People v. Williams, supra*, 4 Cal.4th at p. 361.)

Here, defendant relies on his testimony that he walked up behind the victim, placed his hands on her hips, put his "right arm on her stomach and . . . rubbed her," whereupon she closed her eyes and "kind of sucked her stomach in," giving defendant the impression she was making room for his hand to enter her pants. She stood with her arms "loose," looking at him silently so defendant thought what he was doing was okay with her. But after about "two seconds," his "sixth sense" told him he "was about to do something wrong, and [he] took [his] hand out" of her pants. According to defendant, "[i]f she would have told me [to stop] from the beginning, if she made a motion to say don't put your hand anywhere, I wouldn't be here talking to you."

The problem with defendant's claim is that the evidence must be viewed in the light most favorable to the judgment. When viewed in this light, there is ample evidence that the victim did tell him to stop. She did so explicitly when defendant kissed her and did so implicitly when she repeatedly called out for her girlfriend, but defendant ignored her entreaties, held her wrist and put his hand down her pants. Any belief of consent that possibly could have existed prior to that time became manifestly unreasonable once the victim told defendant to stop. The evidence supports the jury's rejection of defendant's *Mayberry* defense.

II

According to defendant, the trial court erred in giving the jury a modified version of CALJIC No. 10.65, concerning his belief that the victim consented to his sexual misconduct.

The jury was instructed as follows: "In the crime of unlawful penetration of the genital opening by a foreign object, substance, instrument or device by force, criminal intent must exist at the time of the commission of the penetration of the genital opening. [¶] A reasonable good faith belief that the alleged victim voluntarily consented to engage in penetration of the genital opening by a foreign object, substance, instrument or device is a defense to such a charge, unless the defendant thereafter became aware or reasonably should have been aware that the other person no longer consented to the sexual activity. [¶] However, a belief that is based upon ambiguous conduct by an alleged victim, that is the product of conduct . . . by the defendant that amounts to force, violence, duress, menace, or fear o[f] immediate or unlawful bodily injury on the person of the alleged victim is not a reasonable good faith belief. [¶] If after a consideration of all of the evidence you have a reasonable doubt that the defendant had . . . criminal intent at the time of the accused sexual activity, you must find him not guilty of the crime."

Defendant challenges the omission of the following language from the standard version of CALJIC No. 10.65: "There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in penetration of the genital opening by a foreign object, substance, instrument, or device." The trial court made the modification because it believed the instruction "was written for a situation where the complaining witness is an adult." Defendant argues the court erred. While consent or a reasonable belief in consent is not a defense to the

section 288 lewd conduct charge (*People v. Hillhouse* (2003) 109 Cal.App.4th 1612, 1619-1620), it is a defense to the far more serious sexual penetration charge even though the crime involved a minor. (See *People v. Neel* (1993) 19 Cal.App.4th 1784, 1786-1787; *People v. Anderson* (1983) 144 Cal.App.3d 55, 64, fn. 3.)

According to defendant, the effect of the unwarranted modification was to reduce the People's burden of proof with respect to the elements of intent and lack of consent, leading the jury to believe the prosecution did not have to prove beyond a reasonable doubt that defendant lacked a reasonable good faith belief that the victim consented to his conduct. In defendant's view, the error is akin to omitting an element of the offense, which requires reversal unless the error is harmless beyond a reasonable doubt. Defendant overstates the effect of the court's modification of the instruction.

In addressing a claim of instructional error, we determine the correctness of the instructions from the entire charge, rather than judging the propriety of a single instruction in artificial isolation. (*People v. Smithey* (1999) 20 Cal.4th 936, 963; *People v. Frye* (1998) 18 Cal.4th 894, 957.) An erroneously omitted element in one instruction may be supplied by another instruction or cured in light of the instructions as a whole. (*People v. Burgener* (1986) 41 Cal.3d 505, 539, disapproved on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 756; *People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)

The instructions given by the trial court defined consent and informed the jury (1) the People had to prove the sexual penetration

was committed by force, which meant without the victim's consent (CALJIC Nos. 1.23.1, 10.30); (2) it was a defense to the charged offense if defendant reasonably and in good faith believed that the victim consented to the digital penetration (CALJIC No. 10.65); (3) the prosecution had the burden of proving defendant's guilt beyond a reasonable doubt (CALJIC No. 2.90); and (4) if, after a consideration of all of the evidence the jury had a reasonable doubt that defendant had the requisite criminal intent at the time of the accused sexual activity, the jury must find him not guilty of the crime of sexual penetration (CALJIC No. 10.65).

Viewed as a whole, the instructions properly instructed the jury about the elements of the offense and the applicable burden of proof.

Defendant disagrees, arguing the court neglected to inform the jury that the People must prove the absence of a good faith belief in consent. However, a good faith belief in consent is an affirmative defense (*People v. Burnham* (1986) 176 Cal.App.3d 1134, 1141), and the absence of such a belief on the part of defendant is not an element of the offense. As we have explained, if the prosecution meets its burden of proving the absence of actual consent beyond a reasonable doubt, then it is defendant's burden to raise a reasonable doubt as to whether he harbored a reasonable and good faith belief the victim consented. (*People v. Williams, supra*, 4 Cal.4th at p. 361.) Nothing in the instructions misled the jury about defendant's defense or the burden of proof.

III

Defendant claims he received ineffective assistance of counsel based on various perceived shortcomings of his trial attorney.

To succeed on a claim of ineffective assistance of counsel, defendant must prove that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693] (hereafter *Strickland*); *People v. Kelly* (1992) 1 Cal.4th 495, 519-520.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at p. 694 [80 L.Ed.2d at p. 698].)

We review counsel's performance deferentially. (*In re Jones* (1996) 13 Cal.4th 552, 561.) "It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Strickland, supra*, 466 U.S. at p. 689 [80 L.Ed.2d at pp. 694-695]; accord, *In re Jones, supra*, 13 Cal.4th at p. 561.)

When his counsel's conduct is reviewed under this standard, defendant's claim of reversible error is unavailing.

A

According to defendant, defense counsel's conduct fell below that of a reasonably competent attorney when, during closing argument, counsel said there were inconsistencies in the various witnesses' testimony, which counsel believed were explained by human nature. In particular, counsel stated that defendant, "like any defendant when he testifies, is in a particularly unique and not positively so position. Every other one of the witnesses was kept outside during the rest of the trial. No one heard the rest of the testimony. But by right and by necessity, [defendant] sat next to me the entire time. . . . And by definition, by human nature that is going to color and alter his testimony." Counsel went on to posit that the victim's testimony was altered also as a result of the perspective she gained since the incident occurred, and observed that when two people experience the same event, each has a unique and different perspective. According to counsel, these differences and alterations in memory were perfectly innocent and did not reflect an intent to deceive anyone.

Defendant argues, as he did during a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118) that counsel's comments

about defendant's testimony being altered and colored by hearing the other witnesses' testimony inappropriately intimidated he committed perjury.

Counsel conceded during the *Marsden* hearing that she could see how defendant might interpret her argument as stating that he changed his testimony at trial. However, her argument had been interrupted because it was the end of the day, and she had not yet "brought it all together so that [it] makes sense." Counsel explained, "Suffice to say I have an explanation, a theory of the case, a defense to put on that is grounded 99 percent in argument. [¶] I do not think that [defendant's] testimony is beneficial to this case in any way, and I'm going to do the best I can to minimize the impact of his testimony on this jury."

Thereafter, counsel's argument to the jury focused on the inconsistencies in the various witnesses' testimony and the resolution of these inconsistencies in defendant's favor in light of the circumstantial evidence. According to counsel, the evidence pointed to the victim and defendant having a flirtatious relationship of increasing sexuality, which led to the touching that defendant admitted committing but not to *forcible* penetration. Counsel conceded the People had proved the commission of the lesser offense of lewd conduct, but denied they had proved the element of force necessary for a conviction under section 289.

It appears counsel understood defendant was trapped by his concessions to the victim during the pretext call and by

his admissions to Kenneth, i.e., by his statements indicating he indeed had penetrated the victim. His best defense was to claim a reasonable belief in consent, such that the penetration was not forcible. However, defendant muddied this defense when, rather than simply testifying he did not use force, he attempted to claim he never digitally penetrated the victim. Therefore, counsel had the unenviable task of convincing the jurors that defendant was being truthful about not using force regardless of whether the jurors determined that he lied about penetration. Counsel attempted to do so by demonstrating that all witnesses make inconsistent statements and have their perceptions colored by various events, but this did not mean witnesses are being deceitful. Given the evidence defense counsel had to work with, we cannot say her tactical decision was unsound. Counsel is not required to be a miracle worker, only reasonably competent. Moreover, in light of the strong evidence against defendant, it is not reasonably probable that the jury would have returned a more favorable verdict if counsel had refrained from making the challenged comment. (*People v. Kelly, supra*, 1 Cal.4th at pp. 519-520.)

B

Defendant also argues that trial counsel was incompetent because she, in effect, conceded the element of penetration. In particular, defendant observes that counsel told the jury that defendant's statement he placed his hand two or three inches down the victim's hip hugger pants was essentially the same as the victim's testimony he touched her vagina.

Again, the record discloses counsel reasonably pursued the tactic of convincing the jury that defendant did not use force, given that defendant in effect had admitted penetration in his conversations with Kenneth and the victim. As part of this tactic, counsel demonstrated the consistencies between the testimony of the victim and defendant, but emphasized the flaws in the victim's version by pointing out she told Detective Roth that defendant had her right arm behind her back and she was attempting to walk away when defendant put his hand in her pants and inserted his finger into her vagina. Counsel asserted, "Logistically, just from a practical standpoint, how much sense does that make[?]" In other words, unless the act was consensual, it was physically impossible for defendant to be able to insert a finger in the victim's vagina under the circumstances she described.

Counsel also valiantly tried to establish that defendant's statements during the pretext call were not inconsistent with his testimony that he did not use force. For example, she posited that sticking a hand down a girl's form-fitting pants is bound to result in "some shimmying and shaking and that could be uncomfortable." Moreover, "people who don't have a lot of experience can have some discomfort when they first become involved in sexual touching." Hence, defendant's admission during the pretext call that he hurt the victim did not mean that he admitted he *forcibly* assaulted her.

The victim clearly testified that defendant inserted his finger in her vagina. During the pretext phone call, she accused defendant of putting his finger "in her," and he did not deny this act. Indeed, he conceded he had made a huge mistake. Moreover,

defendant admitted to Kenneth that he had inserted his finger in the victim. Given the strength of the evidence of penetration, counsel made a reasonable tactical choice to concentrate on the element of force, rather than denying penetration. In any event, it is not reasonably probable that a different result would have occurred or that counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland, supra*, 466 U.S. at p. 686 [80 L.Ed.2d at pp. 692-693; *People v. Earp* (1999) 20 Cal.4th 826, 870.)

C

Lastly, defendant challenges trial counsel's competency based upon her failure to question the victim's girlfriend about the discrepancy between her trial testimony and the statement she gave to the police concerning the amount of time she was in the bathroom.

At trial, the friend testified she was in the bathroom about 20 minutes, but her statement to the police reflected that she was absent for only a few minutes. During the *Marsden* hearing, counsel explained that she made a tactical decision to not question the witness about this discrepancy because counsel thought it was better for the defense if the jury believed that the friend was absent for a longer period of time. Counsel stated that with respect to the defense of consent, "it was a better fact for the jury to believe that [defendant] and [the victim] had an extended period of time during which to, for lack of a better way to put it, rekindle the physical relationship or physical contact that had

been occurring” In addition, the trial court observed that the friend was not a particularly good witness for defendant, and that her emotional state and demeanor were such that counsel “would want her off the stand pretty quickly.”

In light of counsel’s explanation, the claim of ineffective assistance of counsel fails. Counsel reasonably concluded that the jury would find it doubtful that the 14-year-old victim would willingly move from playful wrestling to digital penetration in record time. If the defense of consent or reasonable belief in consent had any chance of succeeding, the jury would have to be convinced that sufficient time elapsed for defendant and the victim to rekindle their physical relationship, as counsel stated so delicately and euphemistically. Under the circumstances, counsel’s representation was not deficient because her decision to accept the friend’s assessment that she was absent for 20 minutes was a sound tactical decision. (*People v. Jones* (1997) 15 Cal.4th 119, 182 [in order to succeed on a claim of ineffective assistance of counsel, the record must negate the possibility that counsel’s decision resulted from an informed tactical choice within the range of reasonable competence], overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

IV

Defendant contends he was prejudiced by prosecutorial misconduct in various respects.

“A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process.

Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, and particularly pertinent here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Acts of prosecutorial misconduct do not justify reversal of a defendant's conviction "unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

Observing that defense counsel did not object to all of the instances of misconduct, defendant concedes this may result in the forfeiture of his claims. (*People v. Hill, supra*, 17 Cal.4th at p. 820 [a claim of prosecutorial misconduct is forfeited where an objection was not made in the trial court and a timely objection and admonition would cure the harm]. Therefore, he argues that if counsel's omission undermines any of his appellate claims of prosecutorial misconduct, he received ineffective assistance of counsel.

As we explained in part III, *ante*, to succeed on a claim of ineffective assistance of counsel, the defendant must prove (1) that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2)

that there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner. (*People v. Kelly, supra*, 1 Cal.4th at pp. 519-520.)

A

Defendant asserts that during closing argument, the prosecutor distorted the evidence and stated facts not in evidence.

Trial counsel did not object to any of the comments that are the subjects of defendant's complaints on appeal. As we will explain, this is understandable because no prejudicial misconduct occurred. Under the circumstances, counsel's performance was not deficient because counsel was not required to make futile objections. (*People v. Price* (1991) 1 Cal.4th 324, 387; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1092.)

Generally, the prosecutor is given great leeway in making closing argument. (*People v. Farnam* (2002) 28 Cal.4th 107, 200.)
""The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature." [Citation.]
"A prosecutor may 'vigorously argue his case and is not limited to "Chesterfieldian politeness"' [citation], and he may 'use appropriate epithets'" [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 221.)

Most of the prosecutor's comments that defendant challenges fall within this category. For example, defendant complains of

the prosecutor's assertion that defendant geared his testimony to achieve a conviction on only the lesser offense charged by claiming he did not insert his finger into the victim. He also challenges the prosecutor's statements that the victim spent the last two years trying to forget what had occurred, and that when she testified she appeared to be in a trance state. Defendant takes particular offense at the prosecutor's argument that adults have the perspective to see that a 40-year-old man has no interest in a 14-year-old girl "unless he wants something more," but the victim lacked the wisdom to see that she was not safe with the "cool" guy who helped her ditch school, bought her alcohol, and who she thought was her friend because he was her father's employee. The victim thought she was invincible, but she needed a lecture that the type of decisions she made "gets you killed, gets you what she got in this case, it gets you [defendant], it gets you a predator."

All of these statements are a fair comment on the evidence, and it is not reasonably possible the jury construed or applied the prosecutor's comments in an objectionable manner. (*People v. Farnam, supra*, 28 Cal.4th at p. 200; *People v. Sandoval* (1992) 4 Cal.4th 155, 180.)

According to defendant, the prosecutor erred in stating that the victim's friend recognized the victim biting defendant was a sign that she wanted him to stop. This is so, defendant argues, because the friend testified she thought the victim was still having fun at that point. However, the evidence discloses that the friend also testified she did not know what defendant did to

make the victim bite her arm, "so maybe that was maybe something that was a signal to stop maybe." Hence, the prosecutor's assertion was a fair comment on the evidence.

Defendant points out the prosecutor argued defendant rubbed the victim's bottom when she was playing pool at the age of 12, when, in fact, she had to be 13 or 14 years of age when this occurred because that is when the pool table likely was acquired. But this is an inconsequential mistake, a distinction without a difference. An adult male should not be suggestively rubbing a young adolescent female's bottom regardless of whether she is 12, 13, or 14. It is highly unlikely the jury would have viewed defendant more favorably had the prosecutor stated the victim's correct age at the time of defendant's prior lewd conduct with her.

Defendant also complains the prosecutor incorrectly stated that "one thing [the victim] never ever waives on, never, not from the first time she told [her friend] to the time she testified and every statement in between, that [defendant] held her arm and she couldn't get away and he took his finger and he stuck his hand down her pants and he stuck his finger inside her." According to defendant, the evidence reveals that the victim told her friend only that defendant put his hand in her pants and did not mention that he put his finger in her.

In other words, defendant believes that although the victim consistently stated defendant held her and put his hand down her pants, and consistently stated defendant put his finger in her, the prosecutor's argument was the equivalent of prejudicial misconduct because the victim did not mention the digital insertion to her

friend. We disagree. According to the friend, after the victim told her defendant put his hand down her pants, the friend "didn't really want to ask her much more about what [defendant] did" because the victim was crying and distraught. Thus, there is no evidence that the victim changed her story at some later date to include digital penetration; she merely did not immediately reveal the entire incident to her friend, who understandably refrained from questioning the victim about the intimate details of the assault.

Defendant has failed to establish that the challenged portions of the prosecutor's argument exceeded the boundaries of fair comment on the evidence.

B

According to defendant, the prosecutor erred by misleading the jury about the applicable law.

For example, the prosecutor questioned why defendant fled to Atlanta and hid from the police if he only put his hand down the victim's pants and put his hand on her stomach near her genitals. When the prosecutor indicated this type of conduct was "misdemeanor kind of conduct," defense counsel objected and the court sustained the objection.

Defendant argues the prosecutor misrepresented the severity of the lesser offense of lewd conduct with a minor, which can be treated as either a misdemeanor or as a felony punishable by up to three years in state prison. (§ 288, subd. (c)(1).) In his view, the comment likely misled the jury to believe defendant would not

receive serious punishment unless it convicted him of the greater offense of sexual penetration.

Although defendant's trial counsel objected to the reference to misdemeanor conduct, counsel did not ask the court to admonish the jury, which is required to preserve a claim of prosecutorial misconduct. (*People v. Montiel* (1993) 5 Cal.4th 877, 914 [although counsel objected to prosecutor's remarks at trial, the failure to request an admonition failed to preserve a claim of prosecutorial misconduct on appeal].) Because counsel may have made a tactical decision not to draw more attention to the prosecutor's otherwise legitimate argument regarding defendant's flight from the area, we cannot conclude defense counsel was incompetent for neglecting to request such an admonition. In any event, it is not reasonably probable the jury would have reached a different verdict given the strength of the evidence against defendant. The friend witnessed the victim's distress immediately after the offense; the victim promptly reported the offense and clearly described the act of sexual penetration; defendant implicitly admitted the act in the pretext call and expressly did so to Kenneth; and defendant fled the area, which is strong evidence of his guilt.

Next, defendant contends the prosecutor impermissibly shifted the burden of proof to defendant or misstated the degree of proof required. "[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]" (*People v. Marshall* (1996) 13 Cal.4th 799, 831.) According to defendant, the prosecutor distorted

the burden of proof by stating that there is no quantum of proof or evidence required to establish defendant's guilt. Defendant also contends the prosecutor erred in stating that for defendant "to not be guilty of this crime [he] has to tell you, be able to convince you in some way that [the victim] consented to this."

Defendant's claims of prosecutorial misconduct are forfeited because trial counsel did not object to the prosecutor's comments. (*People v. Hill, supra*, 17 Cal.4th at p. 820.) His alternate claim of ineffective assistance of counsel also fails because he does not show prejudice from counsel's failure to object, i.e., he has not established a reasonable probability of a more favorable verdict if defense counsel had objected to the prosecutor's remarks. (*Strickland, supra*, 466 U.S. at p. 697 [80 L.Ed.2d at pp. 699-700] [when an ineffective assistance claim can be resolved on lack of prejudice, a reviewing court need not determine whether counsel's performance was deficient].)

When viewed in context, the prosecutor's statements about the quantum of proof required were simply intended to convey that proof beyond a reasonable doubt did not require a specific number of witnesses or quantum of evidence. This is correct. (See, e.g., CALJIC No. 2.22.) But even assuming some of the prosecutor's statements can be construed as improperly shifting the burden of proof to defendant concerning whether his conduct was nonconsensual, we must decide whether the misstatement of law was prejudicial "[i]n the context of the whole argument and the instructions." (*People v. Marshall, supra*, 13 Cal.4th at p. 831.) Improper statements to the jury are not prejudicial unless

“reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.”

[Citation.]” (*People v. Carter* (2005) 36 Cal.4th 1215, 1263.)

The instructions are particularly significant because “[t]he crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.” (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

Thus, “[w]e presume that jurors treat the court’s instructions as a statement of the law by a judge, and the prosecutor’s comments as words spoken by an advocate in an attempt to persuade.” (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8; see also, *People v. Smith* (2005) 35 Cal.4th 334, 372.)

Here, the trial court properly instructed the jury on the prosecution’s burden of proving defendant’s guilt beyond a reasonable doubt (CALJIC No. 2.90) and on the prosecution’s burden to prove that the penetration was accomplished against the will of the victim (CALJIC No. 10.30). The court also advised the jurors that they must accept and follow the law as stated by the court, not by the attorneys, and “[i]f anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.” (CALJIC No. 1.00.)

The jurors were also emphatically informed during defense counsel’s closing argument that the People had the burden of proof. In light of the instructions given by the court and the argument of trial counsel, which accurately placed the burden of proving defendant’s guilt on the People, we conclude that trial counsel’s

failure to object to prosecutorial comments in closing argument was not prejudicial because there is no “reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” [Citation.]” (*People v. Carter, supra*, 36 Cal.4th at p. 1263.) Furthermore, the strong evidence of guilt renders it not reasonably probable that a different result would have occurred had counsel objected and the trial court admonished the jury to disregard the prosecutor’s comments.

C

Next, defendant contends the prosecutor erred in stating that the major problem with our system of justice is that “every defendant has the absolute right if he is accused of a crime to plead not guilty.” The prosecutor professed she would “not suggest that it be any other way,” but went on to state that this placed a sexual assault victim in the position of either letting a dangerous person go free, or testifying, which “is a horrible thing to have to do.” Defendant believes that these statements impermissibly invited the jury to punish defendant for exercising his right to a jury trial.

Defendant’s claim of prosecutorial misconduct is forfeited due to the absence of any objection by trial counsel. (*People v. Hill, supra*, 17 Cal.4th at p. 820) As for his alternate claim of ineffective assistance of counsel, our review of the record discloses no prejudicial error.

The prosecutor’s comments were part of a larger argument explaining how difficult it was for the victim to testify and how this affected her demeanor, memory, and the consistency of her

testimony. Rather than objecting, defense counsel chose to counter the People's argument by pointing out that it was the People who opted to pursue a case that was not supported by the evidence, thus placing the victim in the position of having to testify. Viewed in context, there is no reasonable likelihood the jury understood the prosecutor's comments as an invitation to punish defendant for exercising his right to a jury trial. Under the circumstances, even assuming defense counsel's failure to object can be viewed as incompetence, it was not prejudicial. (*People v. Carter, supra*, 36 Cal.4th at p. 1263.)

V

Defendant argues that the trial court erred in failing to instruct sua sponte on the lesser included offenses of (1) assault with intent to commit sexual penetration, and (2) attempt to commit sexual penetration.

"[A] trial court must instruct the jury sua sponte on an uncharged offense that is lesser than, and included in, a greater offense with which the defendant is charged only if there is substantial evidence that, if accepted, would absolve the defendant from guilt of the greater offense but not the lesser." (*People v. Waidla* (2000) 22 Cal.4th 690, 737.) When "there is no evidence that the offense was less than that charged" there is no duty to instruct. (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5.)

Here, the evidence disclosed that defendant either forcibly penetrated the victim's vagina with his finger as she alleged, or defendant put his hand down her pants without any penetration as he maintained. Accordingly, the court instructed regarding

the lesser offense of a lewd act committed with a 14-year-old or 15-year-old child by a perpetrator more than 10 years older in violation of section 288, subdivision (c)(1). This was designed to cover the possibility the jury found that penetration had not occurred. By finding defendant guilty of the greater offense, the jury determined that penetration indeed occurred.

There was no evidence that defendant put his hand down the victim's pants with the intent to penetrate her, but failed to accomplish his objective. Consequently, the court did not err in not instructing on the lesser included offenses suggested by defendant on appeal.

VI

Defendant asserts the cumulative effect of the aforementioned errors requires reversal of his conviction. We disagree.

As discussed above, defendant's appellate claims either fail on the merits or are harmless and, as for the harmless errors, "the whole of them did not outweigh the sum of their parts." (*People v. Roberts* (1992) 2 Cal.4th 271, 326.)

VII

Lastly, defendant contends that imposition of the upper term, based on defendant's forethought and planning in committing the offense, violated his federal constitutional rights as set forth in *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 [159 L.Ed.2d 403, 413-414] (hereafter *Blakely*).

Defendant recognizes that his claim of *Blakely* error must fail as a result of the California Supreme Court's decision in *People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254-1256; *Auto Equity Sales*,

Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) Since he raises the claim of error solely to preserve it for federal court review, it requires no further discussion.

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

RAYE, J.

ROBIE, J.