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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	
Plaintiff and Respondent,	E078179
v.	(Super.Ct.No. RIF1901856)
TOMAS LEONEL VICENTE PELICO,	OPINION
Defendant and Appellant.	

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni, Judge. Affirmed.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, and Eric A. Swenson and Christine Y. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Tomas Leonel Vicente Pelico of sexual intercourse with a child 10 years old or younger and aggravated sexual assault of a child under 14 years old by means of rape. On appeal, Pelico argues the trial court erred by failing to instruct the jury on the elements of unlawful sexual intercourse with a minor, a lesser included offense of aggravated sexual assault of a child by rape. We affirm.

BACKGROUND

Jane Doe, the victim, is Pelico's great-niece. Doe was born in 2008. Pelico first touched Doe inappropriately when she was nine years old, and he did so again at least one more time.

When Doe was 10, Pelico raped her for the first time. This rape was the basis for count 1 against Pelico, sexual intercourse or sodomy with a person 10 years old or younger (Pen. Code,[1] § 288.7, subd. (a); count 1). Pelico raises no challenges to his conviction for this rape.

The last time Pelico raped her, Doe was 11. This rape was the basis for count 2, aggravated sexual assault of a child under 14 years old by means of rape (§ 269, subd. (a)(1); count 2). Pelico went into Doe's room in the morning before school. Pelico separated Doe's legs and positioned himself on top of her. She tried to stop him by pushing his hips off, but that did not work. Doe eventually told her mother what happened, and her mother contacted the police.

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[1] Unlabeled statutory citations refer to the Penal Code.

At trial, Pelico argued the Doe's testimony was not credible, and that he did not engage in sexual intercourse with her. A jury found Pelico guilty on both counts.

ANALYSIS

Pelico argues the trial court erred by not instructing the jury on the elements of unlawful sexual intercourse with a minor (§ 261.5, subd. (c)) because that crime is a lesser included offense of count 2, aggravated sexual assault of a child under 14 years old by means of rape (§ 269, subd. (a)(1)). The People argue Pelico was not entitled to an instruction on the lesser included offense because there was insufficient evidence he committed the lesser crime and not the greater, and in the alternative any alleged error was harmless. We affirm.

We agree with the parties that section 261.5, subdivision (c), is a lesser included offense of section 269, subdivision (a)(1). To violate section 269, subdivision (a)(1), a defendant must forcibly rape a child who is under 14 years of age and seven years or more younger than the defendant. (§§ 269, subd. (a)(1), 261, subd. (a)(2); CALCRIM Nos. 1000, 1123.) To violate section 261.5, subdivision (c), a defendant must have sexual intercourse with a minor who is more than three years younger than the defendant. (§ 261.5, subd. (c); CALCRIM No. 1071.) A defendant cannot forcibly rape a child under the age of 14 and seven years or more younger without also having sexual intercourse with a minor three years or more younger. Therefore, section 261.5, subdivision (c), is a lesser included offense of section 269, subdivision (a)(1). (*People v. Gonzalez* (2018) 5 Cal.5th 186, 197 ["Under the elements test, one offense is another's

'lesser included' counterpart if all the elements of the lesser offense are *also* elements of the greater offense."].)

The failure to give an instruction on section 261.5, subdivision (c), however, was not prejudicial error. A trial court is obligated to "giv[e] instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) "[T]he existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*Id.* at p. 162, italics omitted.) " 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]" ' that the lesser offense, but not the greater, was committed." (*Ibid.*)

It is force that distinguishes section 269, subdivision (a)(1), from section 261.5, subdivision (c). Section 261.5 contains no requirement that the defendant use force in having sexual intercourse with the minor victim, while section 269, subdivision (a)(1), requires proving the intercourse was "accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury" to someone. (§§ 261, subd. (a)(2), 269, subd. (a)(1); CALCRIM Nos. 1000, 1123.)

Therefore, a defendant is entitled to an instruction on section 261.5, subdivision (c), only if there is sufficient evidence such that a juror could conclude the defendant had sexual intercourse with the minor victim but did not use force to do so.

Under section 269, "[t]he amount of force required is simply the 'use of force sufficient to overcome the victim's will.' " (*People v. Baker* (2018) 20 Cal.App.5th 711, 728.) Indeed, as to rape, our Supreme Court has held "the degree of force utilized is immaterial," as " 'the fundamental wrong is the violation of a woman's will and sexuality,' " and therefore " ' "force" plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will.' " (*People v. Griffin* (2004) 33 Cal.4th 1015, 1025.) In short, " '[f]orce' includes circumstances where the victim did not want to engage in the act and the evidence does not otherwise establish the victim's positive cooperation in act or attitude." (*People v. Thomas* (2017) 15 Cal.App.5th 1063, 1071.)

Given the low bar for what constitutes force for purposes of section 269, subdivision (a)(1), there was more than enough evidence to allow a juror to conclude that Pelico used force to overcome Doe's will. During the final rape—the basis for the aggravated sexual assault conviction—Doe testified to two separate acts which might qualify as uses of force. First, Pelico separated her legs; second, he resisted her attempts to push him off. Pelico does not dispute that the second act was a sufficient use of force under section 269, if it happened—he argues only that a juror might have concluded it did not. Pelico argues the first act was not sufficiently forceful; however, given there was

more than sufficient evidence that Doe was not a willing participant, *any* physical force used to separate Doe's legs was potentially sufficient to meet the force element. Therefore, either of these acts alone could be sufficient to conclude Pelico used actual force to rape Doe.

Nevertheless, the presence of evidence in favor of a greater conviction is not the absence of evidence in favor of a lesser conviction. While it is hard to imagine any person could conclude an 11-year-old child engaged in sexual intercourse with their great-uncle without being forced to, we hesitate to say there was insufficient evidence to support such a conclusion. As defendant rightfully points out, jurors may believe portions of a witness's testimony and disbelieve others. A juror could have concluded Doe was telling the truth about the sexual encounters but mistaken or deceptive about her willingness or the force Pelico used against her. Nor is a juror bound to any one party's theory of the case—a given juror could have concluded the People were right that Pelico had sexual intercourse with Doe, but wrong that it involved the use of force.

However, even if there were error, we may only reverse for a failure to instruct on a lesser included offense if " 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*People v. Watson* (1956) 46 Cal.2d 818, 837.) "Appellate review under *Watson* . . . focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is

so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Breverman*, *supra*, 19 Cal.4th at p. 177.)

Under that standard, we conclude that it is not reasonably probable that the jury would have concluded that Pelico was guilty of only the lesser crime, given the comparatively strong evidence of force. Indeed, in addition to the evidence of force discussed above, there are at least two more reasons to believe that an instruction on section 261.5 would not have resulted in a more favorable outcome for Pelico. First, because there are at least two instances of Pelico using force against Doe, a hypothetical juror would have had to disbelieve both or believe that neither constituted a use of force, to find Pelico guilty under only section 261.5, subdivision (c). Second, Pelico did not offer any contradicting evidence or otherwise contest Doe's claim about the alleged uses of force. Nor did he argue, even in the alternative, that he *only* had unlawful sexual intercourse with Doe. Pelico's principal theory at trial was that no sexual intercourse happened, and Doe was lying or mistaken about everything. That the jury convicted Pelico signifies that it found Doe's testimony credible. Thus, though it is logically possible, it is not reasonably probable that any juror in this case would have found Doe credible enough about whether the sexual intercourse happened, but not credible about how it happened, whether she engaged in it willingly, or what she did during it to try to stop Pelico.

Accordingly, we conclude that any error was harmless, and affirm the judgment.

DISPOSITION

We affirm.

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RAPHAEL
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.