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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. THOMAS RAYMOND SHOCKLEY, Defendant and Appellant.	Court of Appeal No. F058249 Stanislaus County Superior Court No. 1238243

APPELLANT'S PETITION FOR REVIEW

Appeal From The Judgment of the Superior Court
Of The State of California, County of Stanislaus

Honorable Thomas D. Zeff, Judge

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By appointment of the Court of Appeal through
the Central California Appellate Program
(Assisted)
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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

Issue Presented For Review

1. Should this Court grant review to resolve the split of authority between courts of appeal as to whether battery (Pen. Code, § 242) is a lesser included offense to a lewd act on a child under the age of 14 (Pen. Code, § 288, subd. (a))?

REASONS FOR GRANTING REVIEW

Review is necessary because the Fifth District Court of Appeal's published opinion in this matter, which finds that battery is not a lesser included offense to a lewd act on a child under the age of 14, conflicts with the published opinion of another court of appeal on the same issue, and presents important, statewide questions of law. (Cal. Rules of Court, rule 8.500(b)(1).)

The Fifth District's published holding in this case that battery (Pen. Code, § 242) is not a lesser included offense to a lewd act on a child under 14 (Pen. Code, § 288, subd. (a)) explicitly disagrees with the opinion of the First District in *People v. Thomas* (2007) 146 Cal.App.4th 1278, 1291-1293, which found that battery is a lesser included offense to such an act. The Fifth District's opinion in this case is in accord with the Sixth District's opinion in *People v. Santos* (1990) 222 Cal.App.3d 723, 739.[1] Review is necessary to establish uniformity of law on the issue, i.e., to provide authoritative guidance to districts and trial courts as to whether battery instructions may be provided to juries in cases where a lewd act on a child under the age of 14 has been charged.

A ruling by this Court that battery is a lesser included offense to a lewd act on a child under 14 would also fill a void in the law in cases where a lewd act on a child under 14 is charged. If a jury in such a case determines that a defendant touched a child in a harmful or offensive manner but did so without lewd intent, and the jury does not have the option of finding that the act constitutes a battery, no criminal liability would result. In such a scenario, the harmful or offensive touching would not constitute the offenses of battery, annoying a child (Pen. Code, § 647.6, subd. (a)), or any other offense. Review is necessary to determine whether, in prosecutions for alleged violations of Penal Code section 288, subdivision (a), judges and juries may be allowed to assign criminal liability to the harmful and offensive touching of children done without lewd intent.

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[1] As the Fifth District noted, however, the conclusion in *Santos* that battery is not a lesser included offense to a lewd act on a child was reached without analysis or citation to authority. (Opinion, p. 7.)

In addition, the decision by the Fifth District in this case is directly at odds with California statutes and case law regarding lewd acts on children under 14, battery, and the "consent" of children to such acts. The Fifth District's decision finds that the lewd touching of a child under 14 may not be harmful and offensive (and therefore does not necessarily constitute battery), because a child can consent to such touching. (Opinion, p. 9.) But our Legislature and this Court have declared that lewd acts on children under 14 constitute serious and violent felonies, and that such acts are *always* harmful and offensive. Similarly, it is beyond dispute in California that a child under the age of 14 cannot consent to a lewd act or a battery, because children lack the capacity to give informed consent to such acts. Contrary to the Fifth District's finding, *any* touching of a child under 14 done with lewd intent, even if the child consents, is harmful and offensive as a matter of law. Any lewd touching of a child under 14, then, must also be a battery (i.e., a harmful and offensive touching).

This settled body of law was formulated by the Legislature and state courts to protect naïve and dependent children under the age of 14 from child molesters. The Fifth District's decision in this case is inconsistent with this important and well-established body of law, and should be reviewed.

STATEMENT OF THE CASE

On July 1, 2008, the Stanislaus County District Attorney filed a one-count information against appellant Thomas Shockley, charging him with committing a single lewd act on a

child under the age of 14 in violation of Penal Code section 288, subdivision (a). (CT 49.) Trial began on February 2, 2009. (CT 62.) When the case was submitted to the jury, the jury was not instructed on the lesser included offense of battery. (CT 70-104.) On February 6, 2009, the jury found appellant guilty of committing a lewd act on a child. (CT 108.)

The trial court sentenced appellant on July 17, 2009. (CT 159.) The court granted appellant probation, and as a condition of probation, sentenced appellant to 120 days in county jail. (CT 159-160.)

Appellant appealed his conviction. (CT 161-162.) On December 8, 2010, the Fifth District Court of Appeal issued its opinion affirming that conviction. (See Opinion, attached as Exh. A.)

Appellant petitioned the Fifth District for rehearing on December 20, 2010. The Court of Appeal denied appellant's Petition for Rehearing on December 21, 2010. (Exh. B.)

STATEMENT OF FACTS

Ten-year-old "Jane Doe" related that appellant, her step-grandfather, touched her on three occasions in October 2007: he "French kissed" her at her house (RT 84-85; 117-118); he rubbed her stomach as they drove home from a movie (RT 64-65, 74-75); and he rubbed her vagina through her clothes on the same drive. (RT 60-61, 80.)[2]

Regarding the alleged French kiss, Jane Doe gave several inconsistent statements as to

[2] At trial, the jury was told that any one of these three separate supposed acts of touching could form the basis for a finding of guilt on the single charge of committing a lewd act on a child. (Augmented RT 89, 92-93; CT 102.) In finding appellant guilty of the charge, the jury did not specify which act served as the basis for its finding. (CT 110.)

whether such a kiss occurred at all. (RT 42-47, 84-85, 121-122; CT 14-15.) During the alleged events in the car, Jane Doe's step-sister sat next to Jane Doe in the front seat of the car, but she did not see appellant touch Jane Doe's vagina. (RT 139-142.)

Appellant did not testify. He told police that he did not French kiss Jane Doe or touch her vagina, but he did playfully rub her stomach. (RT 152-157, 165-169.)

I.

THE COURT OF APPEAL ERRED IN CONCLUDING THAT A LEWD ACT ON A CHILD IS NOT ALWAYS HARMFUL OR OFFENSIVE, AND THAT A CHILD MAY CONSENT TO A LEWD ACT.

Battery (Pen. Code, § 242) will be considered a lesser included offense to a lewd act on a child under 14 (Pen. Code, § 288, subd. (a)) if it is impossible to commit a lewd act on a child under 14 without also committing a battery. (*People v. Thomas*, *supra*, 146 Cal.App.4th at p. 1291; Opinion, p. 6.) Since any harmful or offensive touching satisfies the elements of battery (*People v. Pinholster* (1992) 1 Cal.4th 865, 961; CALCRIM 960 (2009 ed.) Vol. 1, p. 664), the Fifth District correctly framed the essential question in this case: "whether a defendant can commit a lewd act [on a child under 14] without touching the victim in a harmful or offensive manner." (Opinion, p. 7.)

The Fifth District answered this question in the affirmative, finding that the lewd acts on children under 14 may not always be harmful or offensive. (Opinion, pp. 7-9.) According to the California Legislature and this Court, however, those acts are *always* harmful and offensive. The Legislature has declared that any lewd act on a child under 14 is punishable

by up to eight years in state prison. (Pen. Code, § 288, subd. (a).) The Legislature has also deemed such acts as "serious" and "violent" felonies. (Pen. Code, § 1192.7, subd. (c)(6) [serious felony]; Pen. Code, § 667.5, subd. (c)(6) [violent felony].) Because these acts are, by definition of the Legislature, serious, violent, criminal offenses, they are harmful and offensive as a matter of law. And this Court has explicitly embraced this designation by the Legislature, commenting that Penal Code section 288, subdivision (a) violations are *always profoundly harmful* to the child victims. (*People v. Martinez* (1995) 11 Cal.4th 434, 443-444; *J.C. Penney Casualty Ins. Co. v. M.K.* (1990) 52 Cal.3d 1009, 1025-1026.) "The act [touching a child under 14 with lewd intent] is the harm." (*J.C. Penney Casualty Ins. Co. v. M.K.*, *supra*, 52 Cal.3d at p. 1026.) If the act is the harm, then touching a child with lewd intent is, by definition, harmful.

It is a matter of law decreed by the Legislature, then, that a person cannot commit a lewd act on a child under the age of 14 without touching the victim in a harmful or offense manner. In this case, however, the Fifth District came to the opposite conclusion. (Opinion, pp. 7-9.) If our Legislature has deemed such acts harmful and offensive as a matter of law, the Fifth District cannot rule otherwise. The Fifth District's ruling is without authority and is contrary to well-established law.

In contrast to the Fifth District, the First District has found that battery is a lesser included offense to a lewd act on a child under 14. (*People v. Thomas*, *supra*, 146 Cal.App.4th at pp. 1291-1293; see also CALCRIM 1110 (2009 ed.) Vol. 1, p. 809 [battery is a

lesser included offense to a lewd act on a child under 14].) In that decision, the First District found (and the Attorney General conceded) that any lewd act on a child under 14 is necessarily a harmful and offensive touching. (*People v. Thomas*, *supra*, 146 Cal.App.4th at p. 1292, fn. 8.) In *Thomas*, the Attorney General argued that battery was not a lesser included offense to such acts because a battery requires an actual touching, while a lewd act does not (i.e., an adult could persuade a child to touch himself or herself, a "constructive touching"). (*Id.* at p. 1292.) In its opinion, the First District disagreed with the Attorney General, ruling that defendants may also be found guilty of battery if they compel children to touch themselves in a harmful or offensive way. (*Id.* at p. 1293.)

In this case, in finding that not every lewd act on a child under 14 is necessarily a battery, the Fifth District adopted a different rationale. The Fifth District, without citation to any authority, found that children under 14 can consent to a lewd act. (Opinion, p. 9 ["Nor are we willing to conclude that somehow a child's consent was invalid because of the defendant's sexual motivation."].) But this Court has unambiguously found that a child under 14 cannot consent to a lewd act, because children lack the capacity to give informed consent to such acts. (*People v. Martinez*, *supra*, 11 Cal.4th 434, at p. 451, fn. 17; *People v. Olsen* (1984) 36 Cal.3d 638, 645-648.) Therefore, the Fifth District's conclusion that naïve and dependent children under the age of 14 can consent to sexual acts by an adult is contrary to settled California Supreme Court precedent. Indeed, it is even contrary to the Fifth District's own previous findings on the subject. (*People v. Paz* (2000) 80 Cal.App.4th 293,

301; *In re Billie Y.* (1990) 220 Cal.App.3d 127, 131, overruled on other grounds by *In re Manuel L.* (1994) 7 Cal.4th 229, 239; *In re John L.* (1989) 209 Cal.App.3d 1137, 1141.)

This body of law was formulated by the Legislature and state courts to protect naïve and dependent children under the age of 14 from child molesters. (*People v. Olsen*, *supra*, 36 Cal.3d at pp. 645-648; *People v. Martinez*, *supra*, 11 Cal.4th at pp. 443-444, 450.) The Fifth District's decision in this case is inconsistent with, and inimical to, this important and well-settled body of law.

In its opinion, the Fifth District further reasoned (again, without citation to authority) that if a child consents to a lewd act, no battery would occur. (Opinion, p. 9.) Implicit in this ruling are the propositions that consent is a defense to a battery, and that a child can consent to a battery. Neither proposition is true. Except for the limited exception of physical contact incident to participation in sporting events, a person cannot consent to a criminal battery. (1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 87, p. 426; 58 A.L.R.3d 662; *People v. Samuels* (1967) 250 Cal.App.2d 501, 513; *People v. Alfaro* (1976) 61 Cal.App.3d 414, 429.) In any event, a child cannot consent to a criminal act such as battery, because a child lacks the capacity to give informed legal consent to criminal acts. (1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §89, p. 428 ["Apparent consent of person without legal capacity to give the consent, e.g., of a child or insane person, is ineffective."]; *People v. Samuels*, *supra*, 250 Cal.App.2d at p. 513 [same].)

Finally, the Fifth District's decision, if left standing, would create a void in the law in

cases where a lewd act on a child under 14 is charged. If a jury in such a case determines that a defendant touched a child under 14 in a harmful or offensive manner but did so without lewd intent, and the jury does not have the option of finding that the act constitutes a battery, no criminal liability would result. In such a scenario, the harmful or offensive touching would not constitute the offenses of battery or annoying a child (Pen. Code, § 647.6, subd. (a); *People v. Lopez* (1998) 19 Cal.4th 282), or any other offense (CALCRIM 1110 (2009 ed.) Vol. 1, p. 809). In prosecutions for alleged violations of Penal Code section 288, subdivision (a), judges and juries should be allowed to assign criminal liability to the harmful and offensive touching of children under 14 done without lewd intent.

In sum, the Fifth District's opinion was in error, because it conflicts with an important and well-established body of law, and that opinion creates a legal vacuum for assigning criminal liability to the harmful or offensive touching of children.

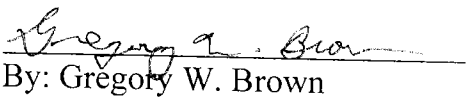
CONCLUSION

For all these reasons, review should be granted.

Dated: December 31, 2010

Respectfully submitted,

GREGORY W. BROWN



By: Gregory W. Brown
Attorney for Defendant and Appellant
Thomas Raymond Shockley

EXHIBIT A

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. THOMAS RAYMOND SHOCKLEY, Defendant and Appellant.	F058249 (Super. Ct. No. 1238243) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Thomas D. Zeff, Judge.

Gregory W. Brown, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lloyd G. Carter and Leanne LeMon, Deputy Attorneys General, for Plaintiff and Respondent.

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*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II and III.

A jury convicted appellant Thomas Raymond Shockley of one count of violation of Penal Code section 288, subdivision (a),[1] committing a lewd act on a child under the age of 14. He contends the trial court erred by failing to instruct the jury that battery was a lesser included offense to the charged crime. He also claims the trial court omitted several other instructions, thus requiring reversal of the judgment. We disagree and affirm the judgment. We are publishing our discussion of whether battery is a lesser included offense to a charge of a violation of section 288, subdivision (a) as two appellate courts have come to different conclusions.

FACTUAL AND PROCEDURAL SUMMARY

R.C. is the victim's father. R.C. is married to Shockley's daughter, making Shockley's daughter the victim's stepmother. Shockley is not the victim's biological grandfather, but the victim referred to him as her grandfather.

As a birthday present, Shockley took the victim and her stepsister to the movies. The three returned later that night and there was no obvious sign of a problem. After Shockley left, the girls stated they wanted to tell R.C. something. R.C. could tell something was wrong with the victim. R.C. was shocked by what the victim related and called the police the next day.

At trial the victim testified she was 11 years old. There had been a family gathering for her 10-year birthday party, at which Shockley was present. The victim was on the computer when Shockley arrived at the house. Shockley came up to her and gave her a kiss on the lips. She could not remember if his mouth was open or closed. The victim believed she told her dad about the kiss. At the preliminary hearing, the victim testified that her mouth was closed when Shockley kissed her, but there may have been some confusion about the visit at which the first kiss occurred. At the end of cross-

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

examination, defense counsel succeeded in convincing the victim that she was unsure whether the incident occurred.

A few days later Shockley took her to the movies as a birthday present. Her stepsister accompanied them to the movies. On the drive to the movies, the victim's stepsister sat next to Shockley; the victim sat by the door. Shockley bought the girls candy and drinks at the movie theater. Shockley put the candy in their mouths during the movie. The victim said this behavior was unusual and made her uncomfortable. Shockley also put the drink straw into the victim's mouth, again making her uncomfortable.

After the movie, Shockley bought the girls milkshakes at an ice cream parlor and bought a beer at an adjoining pizza parlor. Shockley then drove the girls to a gas station because the girls had to use the restroom facilities.

The victim was seated next to Shockley after they left the gas station. During the drive, the victim removed the sweater she was wearing. When she did so, Shockley began rubbing her stomach, which was uncovered. The victim was uncomfortable and began giggling. At the preliminary hearing the victim testified that Shockley did not touch her on the stomach, but shortly thereafter she again claimed Shockley did touch her on the stomach.

The victim asked Shockley if she could steer the vehicle while they drove; Shockley allowed her to do so. Shockley told the victim to put her leg over his leg while her hands were on the steering wheel. That is when Shockley touched the victim on her vagina. His hand was outside of the victim's clothes. Shockley was rubbing the victim with his hand. The victim was squirming a lot but did not do anything else to make Shockley stop. The victim asked her stepsister to trade seats with her so she could get away from Shockley. The victim's stepsister traded seats with the victim because the stepsister also wanted to drive.

When the three returned to R.C.'s house, the two girls went to the bedroom and began talking. The victim told her stepsister what had occurred in the car. When Shockley left, the victim told her father what had occurred.

This was the first time Shockley had done anything like this to the victim. On cross-examination the victim became somewhat confused about the details.

Police Officer Scott Nelson interviewed Shockley about the incident. Shockley admitted taking the girls to the movies and then to the ice cream parlor. On the way back to the girls' house, Shockley allowed the girls to sit in the middle seat and place their hands on the steering wheel, pretending to drive. While the girls were doing so, Shockley put his arm around the girls' shoulders. While in this position he poked them in the belly button and rubbed their stomachs. Shockley thought the victim may have thought he touched her vagina because she had had a large amount of caffeine in her drink at the ice cream parlor. Shockley also stated that while in the movie theater, he spilled some soda on his face. While he was licking the spilled soda with his tongue, the victim kissed him on the lips. That may have been why the victim thought he kissed her with an open mouth.

Police Officer Scott Myers interviewed the victim and her stepsister. He testified that when he interviewed the victim, her testimony essentially was consistent with her trial testimony. The recorded interview of the victim was then played for the jury.

The jury found Shockley guilty of the sole count in the information. Prior to sentencing, Shockley was examined pursuant to section 288.1. The report prepared by the psychologist found that there was a low risk that Shockley would commit another sexual offense. Based on this report and pursuant to the provisions of section 1203.066, subdivision (d), Shockley was placed on probation and ordered to serve 120 days in jail and attend sex offender counseling.

DISCUSSION

Shockley identifies three specific instructions that were omitted that he claims resulted in his conviction. Shockley did not request any of the omitted instructions. Therefore, unless the trial court had a sua sponte duty to give the instructions, Shockley has forfeited the claimed error by his failure to object unless the instruction affected his substantial rights. (§§ 1259, 1469; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192; *People v. Rivera* (1984) 162 Cal.App.3d 141, 146.)

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]" (*People v. Sedeno* (1974) 10 Cal.3d 703, 715 (*Sedeno*), overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89-91 and *People v. Breverman* (1998) 19 Cal.4th 142, 149 (*Breverman*).)

I. Battery as a Lesser Included Offense

Shockley contends the trial court erred in failing to instruct the jury that battery was a lesser included offense to the charged crime of committing lewd and lascivious acts.

As stated *ante*, the trial court must instruct the jury on the general principles of law relevant to the issues raised by the evidence. (*Breverman, supra,* 19 Cal.4th at pp. 154-155.) The general principles of law include instructions on lesser included offenses if there is a question about whether the evidence is sufficient to permit the jury to find all the elements of the charged offense. (*Ibid.*) There is no obligation to instruct the jury on theories that do not have substantial evidentiary support. (*Id.* at p. 162.) "[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. [Citations.]" (*Ibid.*) Evidence is substantial if it would permit the jury to conclude the lesser offense was committed, but the greater offense was not. (*Ibid.*) The trial court must instruct on lesser offenses, even in the absence of a request for such instructions or in the face of an objection by the defendant to the giving of the instructions. (*Id.* at pp. 154-155.)

A lesser offense is included in the charged offense if either of two tests is met. The first test is the statutory elements test. This test provides that a lesser offense is included in the greater offense when all of the statutory elements of the greater offense include all of the statutory elements of the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117; see also *People v. Reed* (2006) 38 Cal.4th 1224, 1227-1230.) In other words, it is not possible to commit the greater offense without also committing the lesser offense. (*Reed,* at pp. 1227-1230.) The second test is referred to as the accusatory pleading test. This test provides that a lesser offense is necessarily included in the greater offense if the allegations in the charging document establish that if the greater offense was committed as pled, then the lesser offense also must have been committed. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035.)

If the trial court fails to instruct on a lesser included offense, reversal is required only if an examination of the entire record establishes a reasonable probability that the error affected the outcome of the trial. (*Breverman, supra,* 19 Cal.4th at p. 165.)

Shockley relies on the statutory elements test to argue that battery is a lesser included offense to the charged violation of section 288, subdivision (a). The parties cite two cases that have reached different conclusions on the question -- *People v. Santos* (1990) 222 Cal.App.3d 723 (*Santos*) and *People v. Thomas* (2007) 146 Cal.App.4th 1278 (*Thomas*). Section 288, subdivision (a) explains that any person who willfully "commits any lewd or lascivious act ... upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or

gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony." "Battery" is defined in section 242 as "any willful and unlawful use of force or violence upon the person of another." Any harmful or offensive touching satisfies the element of unlawful use of force or violence. (*People v. Pinholster* (1992) 1 Cal.4th 865, 961, overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Thus, the issue is whether a defendant can commit a lewd act without touching the victim in a harmful or offensive manner.

In *Santos* the defendant was convicted of several counts related to the molestation of his stepdaughter. The defendant's theory at trial was that while he admitted he battered his stepdaughter, he did not molest her. He had battered the stepdaughter because he was angry with his wife. The defendant theorized that his stepdaughter made up the molestation allegations in retaliation for the battery. The defendant requested instructions on misdemeanor battery, which the trial court refused. The appellate court stated, without citation to authority or analysis, that battery was not a lesser included offense to a violation of section 288. (*Santos, supra,* 222 Cal.App.3d at p. 739.)

In *Thomas* the defendant was convicted of numerous counts of lewd and lascivious acts on four victims. The defendant argued to the appellate court that the trial court erred in failing to instruct the jury that battery was a lesser included offense to a violation of section 288. The appellate court concluded battery was a lesser included offense. (*Thomas, supra,* 146 Cal.App.4th at p. 1293.)

The *Thomas* court focused on the People's argument that battery was not a lesser included offense because a defendant could commit a lewd act by convincing a minor to touch himself or herself in a sexual manner, thus appealing to the defendant's sexual interests. The appellate court concluded that under such circumstances the defendant would be guilty of constructively touching the victim, thus committing a battery. (*Thomas, supra,* 146 Cal.App.4th at pp. 1292-1293.) The appellate court dismissed *Santos* because of its lack of analysis or citation to authority. (*Thomas,* at p. 1293.)

We conclude that *Thomas* is not controlling because the issue addressed in *Thomas* is different than the issue presented in this case. The appellate court in *Thomas* stated that the People conceded that any lewd act within the meaning of section 288 was necessarily an offensive touching within the meaning of section 242. (*Thomas, supra,* 146 Cal.App.4th at p. 1292, fn. 8.) The only authority for this proposition was a citation to *People v. Martinez* (1995) 11 Cal.4th 434 (*Martinez*). The appellate court focused on the statement in *Martinez* that "'young victims suffer profound harm whenever they are perceived and used as objects of sexual desire.'" (*Thomas,* at p. 1292, fn. 8, quoting *Martinez,* at p. 444.)

Martinez, however, addressed the issue of whether a violation of section 288 required the People prove that the act was not only sexually motivated, but also had to be lewd in and of itself. (*Martinez, supra,* 11 Cal.4th at pp. 438, 442.) The Supreme Court, in rejecting the defendant's argument, held that a violation of section 288 occurs where any touching is involved, so long as the touching is sexually motivated. (*Martinez,* at pp. 442, 444-445, 452.) As part of its rationale for its holding, the Supreme Court explained that the broad prohibition of any sexually motivated touching met the purpose of the statute, which was to protect children from sexual exploitation. (*Id.* at p. 443.) The justification for providing children with special protection was that they were "'uniquely susceptible'" to abuse because of their dependence on adults, their smaller stature, and their naiveté. (*Id.* at p. 444.) For these reasons, the Supreme Court stated that section 288 "assumes that young victims suffer profound harm whenever they are perceived and used as objects of sexual desire." (*Martinez,* at p. 444.)

Martinez emphasized that any touching could form the basis for a violation of section 288 since the issue is whether the touching is sexually motivated. (*Martinez, supra,* 11 Cal.4th at p. 444.) Simply stated, any contact with a child, to any part of the body, even through clothes, can constitute a violation of section 288 if the defendant's conduct is sexually motivated. (*Martinez,* at p. 444.)

While we concur with the Supreme Court's analysis in *Martinez*, we cannot agree with *Thomas* that *Martinez* established that any sexually motivated touching is necessarily a battery. That issue was not addressed by the Supreme Court, and the quoted statement was not intended to be such a bold proclamation.

This case provides an example where a sexually motivated touching may not be a battery, an example with which many parents are familiar. Many children enjoy being tickled on their stomachs. In this case, Shockley was accused of having a sexual motivation when he touched and rubbed the victim's stomach. If the victim enjoyed being tickled on her stomach, no battery would occur because she would be consenting to the touching. Even if the victim expressly consented to the tickling episode, however, Shockley still would be guilty of violating section 288 if his conduct was sexually motivated.

Or a perpetrator may put ice cream on his finger and ask a child to lick off the ice cream. The child may willingly perform the requested task, but the perpetrator's conduct would violate section 288 if it was sexually motivated.

To assume, as *Thomas* did, that all sexually motivated touching is a battery, is unsupported by common sense. Nor are we willing to conclude that somehow a child's consent was invalid because of the defendant's sexual motivation. Indeed, a child under the age of 14 may consent to the act, even knowing the defendant's motivation, if the reward is perceived as sufficient. A violation of section 288 would occur if the defendant had the requisite motivation, regardless of the child's consent. A bright-line rule, like the one assumed by *Thomas,* simply is unrealistic.

We conclude that battery is not a lesser included offense to a violation of section 288 because a defendant may violate section 288 without committing a battery. Accordingly, the trial court did not have a sua sponte obligation to instruct the jury that battery was a lesser included offense to lewd and lascivious conduct.

II. View Shockley Statements with Caution*

The prosecution introduced evidence of Shockley's statements to Nelson as part of its case-in-chief. Shockley contends the trial court erred in failing to instruct the jury that it should view the statements with caution if they were not recorded.

CALCRIM No. 358[2] instructs the jury how to evaluate an out-of-court statement made by the defendant. The trial court instructed the jury with CALCRIM No. 358, but omitted the following portion of the instruction: "[Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]" Shockley argues the trial court erred in failing to instruct the jury with the entirety of the instruction.

The cautionary instruction is not required if the defendant's statements are not incriminating (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200 (*Slaughter*)), or if they are written or recorded (*People v. Mayfield* (1997) 14 Cal.4th 668, 776). In this case, Shockley's statement was recorded, but the recording was not played for the jury. Instead, Nelson testified to portions of the statement that were deemed relevant by the parties.

Shockley argues that since the recording was not played for the jury, the cautionary portion of the instruction should have been given to the jury. We disagree. The purpose of the instruction is to aid the jury in determining if the defendant made the statements attributed to him. (*Slaughter, supra,* 27 Cal.4th at p. 1200.) Here, the jury

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*See footnote, *ante*, page 1.

[2]CALCRIM No. 358 states in full: "You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s]. [¶] [Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]"

learned from Nelson that Shockley's statement was tape recorded, and there were numerous references to the transcript of the recording. Therefore, since the jury knew Shockley's statements were recorded, and knew there was a transcript of the interview, the cautionary instruction was unnecessary because there was no dispute that the statements were made. Accordingly, the trial court did not err in failing to give the cautionary instruction.

III. Corpus Delicti*

Shockley's statements to Nelson attempted to explain how innocent actions may have formed the basis for the victim's claims. Shockley, however, denied having touched the victim in a sexual manner. Shockley argues the trial court erred because it failed to instruct the jury that his statements alone could not establish that criminal conduct occurred.

"Whenever an accused's extrajudicial statements form part of the prosecution's evidence, the cases have ... required the trial court to *instruct* sua sponte that a finding of guilt cannot be predicated on the statements alone. [Citations.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1170.) "The independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. [Citations.]" (*Id.* at p. 1171.) "Error in omitting a corpus delicti instruction is considered harmless, and thus no basis for reversal, if there appears no reasonable probability the jury would have reached a result more favorable to the defendant had the instruction been given. [Citations.]" (*Id.* at p. 1181.)

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*See footnote, *ante*, page 1.

We assume, arguendo, the prosecution relied on Shockley's statements to Nelson, but we reject Shockley's claim because there is no possibility the jury would have reached a more favorable result had the instruction been given.

CALCRIM No. 359[3] simply requires proof independent of the defendant's statements to establish that criminal conduct occurred. Here, the proof that criminal conduct occurred came from the victim, who described incidents where Shockley kissed her inappropriately, rubbed her vagina, and tickled her in a manner that made her uncomfortable. Shockley denied rubbing the victim's vagina and kissing her inappropriately and claimed the tickling was innocent. He attempted to explain, however, how the victim possibly could have made a mistake about the acts. This testimony was not relevant because the victim's statements established that criminal conduct occurred.

We conclude that simply instructing the jury that it could not find that criminal conduct occurred based only on Shockley's statements would have had no affect on the judgment. There was ample independent evidence establishing that criminal conduct occurred. The verdict would not have been different if the jury had been instructed with CALCRIM No. 359.

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[3]CALCRIM No. 359 states in full: "The defendant may not be convicted of any crime based on (his/her) out-of-court statement[s] alone. You may only rely on the defendant's out-of-court statements to convict (him/her) if you conclude that other evidence shows that the charged crime [or a lesser included offense] was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime [and the degree of the crime] may be proved by the defendant's statement[s] alone. [¶] You may not convict the defendant unless the People have proved (his/her) guilt beyond a reasonable doubt."

DISPOSITION

The judgment is affirmed.

CORNELL, Acting P.J.

WE CONCUR:

HILL, J.

DETJEN, J.

EXHIBIT B

IN THE

Court of Appeal of the State of California

IN AND FOR THE

Fifth Appellate District

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS RAYMOND SHOCKLEY,

Defendant and Appellant.

F058249

(Stanislaus Super. Ct. No. 1238243)

ORDER DENYING PETITION FOR REHEARING

Appellant's petition for rehearing in the above entitled action is denied.

Cornell, Acting P.J.

WE CONCUR:

Hill, J.

Detjen, J.

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief was produced on a computer. The word count of the computer program used to prepare the document shows that there are 2,373 words in the brief.

Dated: December 31, 2010

Gregory W. Brown

Re: State v. Thomas Raymond Shockley No. F058249

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party within the action; my business address is 2280 Grass Valley Highway #342, Auburn, CA 95603

On December 31, 2010, I served the attached

APPELLANT'S PETITION FOR REVIEW

by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Auburn, California, with postage thereon fully prepaid. There is delivery service by United States mail at each of the places so addressed, or there is regular communication between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 31, 2010, at Auburn, California.

Gregory W. Brown
DECLARANT