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.

Case No. S189462

Fifth Appellate District, Case No. F058249
Stanislaus County Superior Court, Case No. 1238243
Honorable Thomas D. Zeff, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

ISSUE PRESENTED

Whether Penal Code section 242 (battery) is a lesser included offense of Penal Code section 288, subdivision (a)[1] (lewd and lascivious acts with a child under 14 years of age)?

STATEMENT OF THE CASE

On October 17, 2007, Jane Doe had a birthday party at her house.[2] (RT 44-45.[3]) Appellant, her step-grandfather, as well as other family members attended the party. (RT 46.) When appellant entered her house on the date of the party Jane Doe was playing a game on her computer and the rest of the family was in the kitchen. (RT 46, CT 175.) Appellant came up to her and French kissed her on the lips. (RT 46-47, 82-85, 190-191; CT 176.)

For her birthday appellant gave Jane Doe the option of either $35 cash or an outing to the movies. (RT 86; CT 179-180.) She chose the movie. (CT 180.) Appellant told Jane Doe she could bring one friend to the movie. (CT 179.) She chose to bring her step-sister, Aliyah[4]. (RT 50.)

Several days after the party appellant picked up Jane Doe and Aliyah and took them to the movies. (RT 34, 50.) Appellant sat in between Jane Doe and Aliyah while they watched the movie. (RT 53.) After the movie they drove to Baskin Robbins. (RT 53.) Jane Doe and Aliyah got a milkshake and appellant bought a beer at an adjoining pizza parlor. (RT 54.)

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

[2] Jane Doe was born October 17, 1997. (RT 44.)

[3] "CT" refers to the Clerk's Transcript on Appeal; "RT" refers to the Reporter's Transcript on Appeal; "Supp. RT" refers to the Supplemental Reporter's Transcript on Appeal; and "AOB" refers to Appellant's Opening Brief on the Merits.

[4] Aliyah is one year younger than Jane Doe. (RT 50-51, 128.)

After they left the pizza parlor it was dark outside and they began driving home. (RT 95, 139.) Jane Doe sat in the middle seat in between appellant and Aliyah. (RT 55.) They stopped at a gas station on the way home so that Jane Doe could use the restroom. (RT 56-57.) Jane Doe and Aliyah exited the car while appellant waited for them in the car. (RT 56.) After they went to the restroom they returned to the car and sat in the same places they were in before they stopped. (RT 56-57.) They continued to drive, and appellant stopped at a second gas station to purchase beer. (RT 57, 80.) After appellant returned to the car he began driving. (RT 57-59.)

Jane Doe had a sweatshirt on and pulled it over her head to take it off. (RT 63, 188-189.) When she did this appellant began rubbing her stomach near her bellybutton. (RT 64.) Jane Doe giggled because she was nervous. (RT 64.) Jane Doe asked appellant if she could put her hand on the steering wheel while he was driving. (RT 58.) He agreed, and told her to put her leg over his leg. (RT 59.) Appellant then placed his hand on her vagina over her clothing and rubbed his hand back and forth over her vagina. (RT 61, 115, 189.) Jane Doe felt uncomfortable and was squirming, but appellant continued to touch her. (RT 61.) Aliyah noticed that Jane Doe jerked and was moving around and giggling while she was seated in the car. (RT 134, 143.) Appellant continued to touch Jane Doe for a long time, she estimated he rubbed her vagina for five minutes. (RT 61, 96.) Jane Doe looked at Aliyah with a worried look. (RT 81.) Jane Doe asked Aliyah if they could switch seats. (RT 81.) At a stop light, Jane Doe and Aliyah switched seats. (RT 81; CT 191.) After they switched seats Jane Doe remained quiet for the remainder of the drive home. (RT 144.)

Jane Doe's father, Ryan Shockley, estimated that they returned home from the movies at 10:00 p.m. (RT 36.) After they returned home

appellant and Shockley sat and talked. (RT 38.) Jane Doe and Aliyah ran to Jane Doe's bedroom. (RT 67.) Jane Doe was crying and told Aliyah what happened. (RT 67, 134-135.) Aliyah told Jane Doe she should tell her father. (RT 136.)

After appellant left the house, Jane Doe and Aliyah told Shockley they wanted to talk to him. (RT 38.) Jane Doe appeared nervous and afraid to tell him. (RT 38-39.) After Jane Doe told him he was shocked. (RT 39.) He reported the incident to the police the following day. (RT 40.)

On December 12, 2007, Officer Scott Nelson made contact with appellant. (RT 152.) Officer Nelson asked appellant if he knew why the police were talking to him. (RT 153.) He responded that he believed it had to do with Jane Doe. (RT 153.)

Appellant explained that he took Jane Doe and Aliyah to the movies. After they went to the movies he stopped to get the girls ice cream and they went next door and ate pizza. (RT 154.) After he ate pizza and the girls had their ice cream he began driving home. He stopped at an AM/PM store to purchase beer and then he drove the girls home. (RT 154.) He allowed the girls to take turns sitting in the middle seat so they could put their hands on the steering wheel. (RT 155.) Appellant had his arm around Jane Doe and was poking her bellybutton while she was pretending to drive. (RT 156.) Appellant said he did the same thing to Aliyah when she drove. (RT 157.) Appellant further stated that he was "hugging [Jane Doe] and loving [Jane Doe]" all night. (RT 166.)

Appellant thought that Jane Doe may have said that he touched her vagina because she and Aliyah drank large coffee drinks at Baskin Robbins. (RT 166-167.) He thought the caffeine may have affected Jane Doe's thinking. (RT 166-167.) He denied touching her vagina. (RT 176.)

Appellant thought Jane Doe may have said that he French kissed her because he spilled soda on his lips in the movie theatre and was licking the

soda off his lips when she kissed him. (RT 168.) Appellant did not know why Jane Doe was making the accusations, but he did not think that she would lie. (RT 170.)

On January 3, 2008, Jane Doe was interviewed at the Caire Center, a facility that is used to interview children. (RT 199-200.) Detective Valenti interviewed Jane Doe while Detective Steven Stanfield watched through a closed-circuit television. (RT 198-201.) Jane Doe explained to Detective Valenti that appellant had French kissed her on her birthday, and rubbed her stomach and vagina on their way home from the movies several days later. (RT 210; See CT 165-202; People Exhibits 3.)

On July 1, 2008, the Stanislaus District Attorney's Office filed an information charging appellant in Count 1, with lewd and lascivious conduct with a child under the age of 14 (§ 288, subd. (a)). (CT 48-49.)

A jury trial commenced February 2, 2009. (CT 62.) On February 6, 2009, the jury found appellant guilty as charged in Count 1. (CT 109-110.)

On July 17, 2009, appellant was granted probation and sentenced to 120 days in the county jail. (CT 159-160.)

On July 27, 2009, appellant filed a notice of appeal. (CT 161-162.)

On December 8, 2010, the Fifth District Court of Appeal issued its opinion affirming appellant's conviction. (F058249.) The Court of Appeal found that battery was not a lesser included offense to a violation of section 288. (Slip. Opn. at p. 9.)

On March 16, 2011, this court granted appellant's petition for review.

SUMMARY OF ARGUMENT

California courts are split on whether battery (§ 242) is a lesser included offense to lewd and lascivious acts on a child (§ 288, subd. (a)). (See *People v. Santos* (1990) 222 Cal.App.3d 723, 738 (*Santos*) [holding section 242 is not a lesser included crime to a section 288, subdivision (a)

violation]; *People v. Thomas* (2007) 146 Cal.App.4th 1278, 1293 [holding that section 242 is a lesser included includes offense to section 288].)

The Fifth District Court of Appeal correctly followed *Santos*, and held that battery is not a lesser included offense to section 288 because a defendant may commit a violation of section 288 without also committing a battery. (Slip. Opn. at p. 9.) The Court of Appeal reasoned that not all sexually motivated touchings are batteries because there are situations where a victim may not find the sexually motivated touchings harmful or offensive, and may even consent to the conduct, thus, making the defendant guilty of section 288 because of his specific sexual intent, but not guilty of a battery. (Slip Opn. at pp. 8-9.)

ARGUMENT

I. LEWD ACTS WITH CHILDREN ARE NOT BATTERIES AS A MATTER OF LAW

Appellant contends that lewd acts with children are always unlawful uses of force and harmful or offensive touchings and as such, they are batteries as a matter of law. (AOB 9-13.) Respondent submits that battery is not a lesser included offense because a defendant may commit a lewd and lascivious act without committing a battery.

Both parties agree that a court has a sua sponte duty to instruct on a lesser included offenses when substantial evidence shows that the lesser offense, but not the greater, was committed. (AOB 7-8; *People v. Breverman* (1998) 19 Cal.4th 142, 154, 162.) This substantial evidence requirement is not satisfied by "'any evidence . . . no matter how weak'" but by evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*People v. Cruz* (2008) 44 Cal.4th 636, 664.)

For the purpose of instructing on lesser included offenses, two tests apply in determining whether an uncharged offense is included within a

charged offense: the elements test and the accusatory pleading test. (*People v. Parson* (2008) 44 Cal.4th 332, 349.)

> [A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense [(the elements test)], or the facts actually alleged in the accusatory pleading [(accusatory pleading test)], include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]

(*People v. Birks* (1998) 19 Cal.4th 108, 117-118, fn. omitted.) Under the elements test, the courts look strictly at the statutory elements of the offenses, not to the facts of the case. (*People v. Ramirez* (2009) 45 Cal.4th 980, 985.) The courts ask whether ""all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." [Citation.]' [Citation.]" (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) In other words, "if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." (*Ibid.*; see also *People v. Montoya* (2004) 33 Cal.4th 1031, 1034.)

> Under the second, or "accusatory pleading" test, [the courts] review the information to determine whether the accusatory pleading describes the crime in such a way that if committed in the manner described the lesser must necessarily be committed. [Citation.] The evidence actually introduced at trial is irrelevant to the determination of the status of an offense as lesser included. [Citation.]

(*People v. Wright* (1996) 52 Cal.App.4th 203, 208.)

> [W]hen the accusatory pleading describes the crime in its statutory language . . . only the statutory elements test is relevant in determining if an uncharged crime is a lesser included offense of that charged. [Citations.]

(*People v. Moussabeck* (2007) 157 Cal.App.4th 975, 981.)

As will be shown below, under either test battery is not a lesser included offense of a lewd act with a child.

Section 288, subdivision (a) defines lewd and lascivious acts with children as:

> [A]ny person who willfully and lewdly 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 . . . .

"[A] "touching" of the victim is required, and sexual gratification must be presently intended at the time the "touching" occurs. [Citations.] However, the form, manner, or nature of the offending act is not otherwise restricted." (*People v. Martinez* (1995) 11 Cal.4th 434, 444.) "[T]he lewd character of an activity cannot logically be determined separate and apart from the perpetrator's intent." (*Id.* at p. 450.) "The trier of fact must find a union of act and sexual intent (see § 20) . . . ." (*Id.* at p. 452.)

Section 242 defines a battery 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.) The slightest touching can constitute a battery so long as the victim incurs unreasonable harm or offense. (*People v. Myers* (1998) 61 Cal.App.4th 328, 335.) Battery is a general intent crime. (*People v. Colantuono* (1994) 7 Cal. 4th 206, 217.)

> A crime is characterized as a "general intent" crime when the required mental state entails only an intent to do the act that causes the harm; a crime is characterized as a "specific intent" crime when the required mental state entails an intent to cause the resulting harm.

(*People v. Davis* (1995) 10 Cal. 4th 463, 519, fn. 15.)

A. A Lewd Act With A Child is Not Always a Willful and Unlawful Use of Force as Defined in Section 242

Appellant asserts that a lewd act with a child under section 288, subdivision (a), is defined as a ""willful and unlawful use of force," and is therefore also a battery." (AOB 9.) Respondent disagrees.

At the outset, the language in section 288, subdivision (a) does not use the term "unlawful" or "force" in describing the nature of the touching. Instead, section 288, subdivision (a) uses the word "lewdly." As noted above, even ordinary human contact can be lewd if the perpetrator has a sexual intent. (See *People v. Martinez*, *supra*, 11 Cal.4th at p. 452.) Therefore, a defendant may simply hug a child or touch their hair, but do so with a lewd intent, thus satisfying the elements of section 288, subdivision (a). (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1380 [babysitter rubbed the victim's lower back, stomach and thigh]; *People v. Sharp* (1994) 29 Cal. App. 4th 1772, 1789-1791 ["dangling" the hair and rubbing the back of the victim].) However, absent the lewd intent there would be nothing unlawful or forceful about the nature of the touching. It would simply constitute normal everyday human interactions, and thus, would not rise to the level of a battery.

Section 288, subdivision (a) does not require force in the sense of a harmful, offensive, rude or angry touching, it only requires a touching with a lewd intent. Thus, the type of force and the nature of the touching contemplated in the battery statute can be quite different from the touching that encompasses a violation of section 288, subdivision (a). Due to this distinction, battery lacks the elements of lewd intent and the age of the victim, but adds an element relating to the nature of the touching (that it be committed with force or violence). Thus, battery cannot be a lesser included offense to section 288, subdivision (a).

B. A Lewd Act With A Child Does Not Always Involve Touching The Victim In a Harmful Or Offensive Manner

Appellant asserts that a lewd act with a child under the age of 14 is always harmful and offensive and therefore must also be a battery. (AOB 10-13.) Respondent submits that all lewd acts are not batteries because, as noted above, there are numerous scenarios in which a sexually motivated touching may not be a battery because absent the specific intent of the perpetrator, there is no harmful or offensive touching.

As this Court observed in *Martinez*:

> [T]he courts have long indicated that section 288 prohibits all forms of sexually motivated contact with an underage child. Indeed, the "gist" of the offense has always been the defendant's intent to sexually exploit a child, *not the nature of the offending act.* [Citation.] "[T]he purpose of the perpetrator in touching the child is the controlling factor and each case is to be examined in the light of the intent with which the act was done. . . . If [the] intent of the act, *although it may have the outward appearance of innocence*, is to arouse . . . the lust, the passion or the sexual desire of the perpetrator [or the child,] it stands condemned by the statute . . . ."

(*People v. Martinez*, *supra*, 11 Cal.4th at p. 444 (italics added).)

Martinez further recognized:

> It is common knowledge that children are routinely cuddled, disrobed, stroked, examined, and groomed as part of a normal and healthy upbringing. On the other hand, any of these intimate acts may also be undertaken for the purpose of sexual arousal. Thus, depending upon the actor's motivation, innocent or sexual, such behavior may fall within or without the protective purpose of section 288.

(*Id.* at p. 450.)

This Court has recognized that the wrong punished for violating section 288 "is not the violation of a child's sexual autonomy, but of its sexual innocence." (*People v. Soto* (2011) 51 Cal.4th 229, 243.) "The

statute also assumes that young victims suffer profound harm whenever they are perceived and used as objects of sexual desire. [Citation.]" (*Ibid.*)

Appellant argues that a violation of section 288, subdivision (a), always violates section 242 because the touching of a child with a lewd intent is always harmful or offensive. (AOB 11.) However, appellant bases his argument on a flawed premise. He assumes that the harmful and offensive touching under section 242 is evaluated by looking at the perpetrator's specific intent (i.e., his lewd intent). But this is incorrect. Section 242 is a general intent crime, and the perpetrator's specific intent is not considered when determining if the touching is harmful or offensive.

As this Court stated when addressing whether section 647.6, subdivision (a) was a lesser included offense of section 288:

> Under the elements test for lesser included offenses, the criminal conduct that section 288, subdivision (a), prohibits could occur without necessarily also violating section 647.6, subdivision (a). Section 288, subdivision (a), requires a touching, even one innocuous or inoffensive on its face, done with lewd intent. Section 647.6, subdivision (a), on the other hand, requires an act objectively and unhesitatingly viewed as irritating or disturbing, prompted by an abnormal sexual interest in children. Clearly, not every touching with lewd intent will produce the objective irritation or annoyance necessary to violate section 647.6.
>
> For example, a lewdly intended embrace innocently and warmly received by a child might violate section 288, without violating section 647.6, if a normal person would not unhesitatingly find the embrace irritating or disturbing. Physical affection among relatives, generally considered acceptable conduct, nonetheless could satisfy the "any touching" aspect of section 288, subdivision (a), and violate that section if accompanied by the requisite lewd intent. However, this objectively inoffensive behavior would not violate section 647.6, subdivision (a).

(See *People v. Lopez, supra,* 19 Cal.4th at pp. 290-291 [holding that section 647.6, subdivision (a) is not a lesser included offense of section 288, subdivision (a)].)

While respondent recognizes that the issue in *Lopez* dealt with section 647.6, not section 242 as a lesser included offense to section 288, the reasoning in the opinion is persuasive and can be analogized to section 242 as lesser included offense. As this Court reasoned, a defendant can violate section 288, subdivision (a) with "objectively inoffensive behavior" but not violate section 647.6 if a normal person would not be irritated or offended by the behavior, and the same can be true of section 242.

Thus, contrary to appellant's assertion, the touching, in and of itself, is not the harm that section 288 punishes. It is not the nature of the offending act that the statute punishes, but the intent of the perpetrator that makes it criminal and harmful to the victim. Thus, the jury must determine whether the touching was innocuous or whether the defendant's intent was lewd. This determination is not made by the sexual standards of a reasonable person, but instead is dependent upon the defendant's specific intent. (*People v. Martinez, supra,* 11 Cal.4th at p. 450.) Therefore, unlike battery, the touching itself need not be harmful or offensive if the perpetrator's intent is sexual.

II. A LEWD ACT CAN BE COMMITTED WITHOUT COMMITTING A BATTERY

Appellant claims that a lewd act on a child cannot be committed without also committing a battery because both sections 242 and 288, subdivision (a), prohibit harmful and injurious touching. (AOB 14-22.) Appellant is mistaken. As noted above, a lewd act under section 288, subdivision (a), can be committed without also committing a simple battery under section 242.

A. The "Touching" Requirement For A Violation of Sections 288, Subdivision (a) And 242 Are Not Identical

CALCRIM No. 1110 sets forth the elements of section 288, subdivision (a):

> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant willfully touched any part of a child's body either on the bare skin or through the clothing;
>
> OR
>
> 1. The defendant willfully caused a child to touch (his/her) own body, the defendant's body, or the body of someone else, either on the bare skin or through the clothing;
>
> 2. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the child;
>
> AND
>
> 3. The child was under the age of 14 years at the time of the act.
>
> The touching need not be done in a lewd or sexual manner.

(CALCRIM No. 1110 (Fall 2009 ed.).)

CALCRIM No. 960 sets for the elements of battery as:

> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant willfully [and unlawfully] touched _____ <insert name> in a harmful or offensive manner.
>
> Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.
>
> The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another

person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

(CALCRIM No. 960 (Fall 2009 ed.).)

A violation of section 288 requires a touching. (*People v. Martinez, supra*, 11 Cal.4th at p. 444.) The touching can be to any part of the victim's body or clothing and does not need to be sexual so long as the perpetrator's subjective intent is to arouse his own, or the victim's, passion or sexual desire. (*Ibid.*)

The slightest touching can constitute a violation of section 242 so long as the victim incurs unreasonable harm or offense. (*People v. Myers, supra,* 61 Cal.App.4th at p. 335.) Therefore, the essence of the crime of battery is a touching that is harmful or offensive. (*Ibid.*) No specific intent on the part of the perpetrator is required for battery. (*People v. Lara* (1996) 44 Cal.App.4th 102, 107.)

Therefore, where a touching has an outward appearance of propriety, and the victim is not offended by the touching, a lewd act can still be committed upon the child without also committing a battery. This is because a particular touching may be non-offensive, such as tickling a child on their stomach, hugging a child, or stroking a child's hair. In fact, the child may even enjoy and consent to the touching. However, if an individual tickles a child with the intent to sexually arouse himself or the child then that individual has committed a lewd act as defined in section 288, subdivision (a), but has not committed a battery because there is no harmful or offensive touching. The harm contemplated by section 288 is the harm to a child's innocence, it is not the nature of the touching that is harmful, but the sexual intent of the perpetrator that makes it harmful, (*People v. Martinez, supra*, 11 Cal.4th at p. 444), this is clearly different than the harm contemplated in section 242. (*People v. Myers, supra*, 61 Cal.App.4th at p. 335 [the essence of the crime of battery is the offensive

touching].) With section 288 a child may not necessarily perceive the touching as harmful or offensive due to their maturity level. Therefore, one does not necessarily commit a battery in committing a lewd act. (*People v. Santos, supra,* 222 Cal.App.3d at p. 739 ["[S]ince battery (§ 242) is not a lesser included offense to the offense charged in this case, the trial judge was not obliged to give the instruction sua sponte. At best, battery was a lesser related offense."].)

B. Section 288, subdivision (a), Does Not Require That The Touching Be Harmful Or Offensive

Appellant asserts that the emotional or psychological injury to a child under section 288, subdivision (a), qualifies as a harmful or offensive injury that is necessary for a violation of section 242. (AOB 18-20.) Respondent submits that injury to the victim is not a requirement under either statute and that there is no requirement of a "harm" or "injury" to the child under section 288, subdivision (a).

Citing to *People v. Austin* (1980) 111 Cal.App.3d 110, 115, appellant asserts that "the harm or injury necessary for a conviction under section 288(a) need not be physical . . . ." (AOB 18.) While respondent acknowledges that the legislature and the courts have found that the harm that section 288, subdivision (a), aims to curtail is the emotional, psychological and physical harm that a child victim may incur. (*People v. Martinez, supra,* 11 Cal.4th at pp. 443–444.).) There is simply no element in section 288, subdivision (a) that requires the People to prove that the child was harmed, offended or injured as a result of the touching. The requirement is simply that the perpetrator of the lewd act have the specific intent to sexually arouse himself or the child. The fact that this may lead to injury or harm to the child is not a requirement of the statute. (CALCRIM No. 1110.) The jury is never asked to determine whether the touching under section 288, subdivision (a), was "harmful" or "injurious." In fact,

the jury instructions state that the touching does not have to be lewd, only the intent of the perpetrator need be lewd. (See CALCRIM No. 1110.)

This is quite different from the requirement of section 242. While respondent agrees with appellant that battery does not require an injury or physical pain, what it does require is that the touching be harmful or offensive. As appellant readily points out, "the gravamen of the crime of battery is that the touching must be injurious or harmful in some way." (AOB 20.) The jury instruction affirms this stating, "The slightest touching can be enough to commit a battery if it is done in a rude or angry way." (CALCRIM No. 960.) Thus, with battery the manner in which the touching is done is a factor the jury considers. As noted above, that is not a consideration under the elements of section 288, subdivision (a).

Appellant concludes that because a lewd touching always causes emotional and psychological harm, the "harm" element in section 242 is always satisfied when a lewd act is committed. (AOB 20.) Again, as noted above, the harm that is inherit in section 288, subdivision (a), is: (1) not an element of the offense; and (2) is derived from the specific lewd intent of the perpetrator. (CALCRIM No. 1110; § 288, subd. (a).) Section 242 does not require a specific intent on the part of the defendant, and therefore, the harm that is inherent in section 288, subdivision (a), is not automatically present in section 242 because there is no specific intent required to commit the offense. Furthermore, section 242, unlike section 288, requires the touching be either harmful or offensive. (But see, *People v. Gray* (Sept. 14, 2011, B224430) ___ Cal.App.4th ___ [2011 Cal.App. Lexis 1191] [holding that "any touching of a child committed for the purpose of sexual arousal (thus constituting a lewd act) would also be a touching that is harmful or offensive (thus constituting a battery).")

As a result, the "harm" element of battery is not automatically satisfied when a lewd act on a child is committed.

C. A Battery Is Not Necessarily Committed When A Lewd Act With A Child Is Perpetrated

Appellant asserts that under the elements test, a lewd act with a child is nothing more than a battery on a child under 14 with lewd intent. (AOB 20-21.) Respondent disagrees and submits that although a battery may be a lesser related offense to section 288, subdivision (a), it is not a lesser included offense.

As noted above, there are numerous factual scenarios where a defendant may violate section 288, subdivision (a), without also violating section 242. For example, a person placing a hand on the thigh of a 10-year-old girl with her consent is not, by itself, offensive or injurious. But if the perpetrator harbors the intent to sexually gratify himself or his victim by that conduct, a violation of section 288, subdivision (a) is established, despite the fact that the victim may never know or understand the perpetrator's undisclosed intent. Numerous cases have found the touching required under section 288, subdivision (a), need not be harmful, offensive, or even lewd. (See *People v. Gilbert*, *supra*, 5 Cal.App.4th at p. 1380; *People v. Sharp, supra,* 29 Cal. App. 4th at pp. 1789-1791; *People v. Lopez* (2010) 185 Cal.App.4th 1220, 1233 [victims changing into provocative clothing sufficient to satisfy "touching" requirement of section 288 when defendant's intent was lewd].) Thus, an innocuous hug, a kiss on the cheek or even a touch to a child's hair is sufficient to satisfy the touching element of a section 288, subdivision (a), if the requisite lewd intent is established. But absent the lewd intent, no crime would be committed if the victim was not offended. A necessarily included offense must share common elements with the greater offense, but lack one or more elements. Thus, if a jury found that the defendant touched the victim without a lewd intent under the factual scenarios above, there would simply be no criminal offense.

Appellant assumes in his examples that the child finds the touching offensive, thus making the touching a battery. (AOB 21.) However, there are many lewd acts that do not offend a child, and that the child may even enjoy, such as, tickling or a hug, that would not rise to the level of a battery under the elements test.

As such, under the statutory element test for determining lesser included offenses, a person who commits a lewd act on a child under section 288, subdivision (a), does not necessarily commit a battery under section 242. Section 288, subdivision (a) does not require force in the sense of a harmful, offensive, insolent, rude or angry touching; it only requires a touching with a lustful intent. (*People v. Gilbert*, *supra*, 5 Cal.App.4th at p. 1380; *People v. Sharp*, *supra*, 29 Cal. App. 4th at pp. 1789-1791; *People v. Lopez*, *supra*, 185 Cal. App. 4th at p. 1233.) Due to this distinction, battery, while lacking the elements of age and lustful intent, adds an element relating to the nature of the touching. (*People v. Myers*, *supra*, 61 Cal.App.4th at p. 335.) A defendant may therefore commit a lewd and lascivious touching of a child without committing battery. As a result, battery is not a necessarily included offense of section 288, subdivision (a).

D. The Accusatory Pleading Test Does Not Apply Here

Appellant asserts that under the accusatory pleading test that battery is also a lesser included offense to a lewd act on a child under section 288, subdivision (a). (AOB 21-22.) Respondent contends that this test is inapplicable to this case, and even if it were applicable a battery still would not be a lesser included offense for the same reasons stated above.

In the instant case, the information alleged that appellant,

> did willfully, unlawfully, feloniously, and lewdly commit a lewd and lascivious act upon and with the body and certain parts and members thereof of 10-year-old Jane Doe, a child under the age of 14 years, with the intent of arousing, appealing to, and

gratifying the lust, passions, and sexual desires of the said defendant and said child.

(CT 49.) As appellant correctly states, the language in the information mirrors the statutory language of section 288, subdivision (a). (AOB 22.) When the language in the accusatory pleading mirrors the statutory language of the crime, "only the statutory elements test is relevant in determining if an uncharged crime is a lesser included offense of that charged. [Citations.]" (*People v. Moussabeck, supra,* 157 Cal.App.4th at p. 981.) Thus, there is no occasion here to look to the accusatory pleading to determine if battery is a lesser included offense of the charge.

Even assuming the accusatory pleading test did apply, appellant's contention that battery is a lesser included offense to section 288, subdivision (a), still fails. Since the information described the offense (§ 288, subd.(a)) in statutory language and did not allege that the victim perceived the touching as harmful or offensive, or even allege that the touching was harmful or offensive, the analysis under the elements test would be applicable, and for the reasons stated above, battery would not be a lesser included offense.

III. BATTERY IS NOT A LESSER INCLUDED OFFENSE OF SECTION 288 BECAUSE CONSENT IS NOT A DEFENSE TO SECTION 288, BUT CAN BE A DEFENSE TO SECTION 242

Appellant contends that consent cannot be a defense to a battery that forms the basis of a lewd act under section 288, subdivision (a). (AOB 23-26.) Respondent disagrees with appellant's assumption that a battery is always present when a lewd act is committed, and submits that the issue of consent also demonstrates that battery is not a lesser included offense of section 288, subdivision (a).

A person does not act unlawfully where he commits an act with an honest and reasonable belief in the existence of certain facts and

circumstances which, if true, would make the act lawful. (*People v. Sanchez* (1978) 83 Cal.App.3d Supp. 1, 3, [suggesting that "affirmative defense of a bone fide and reasonable belief by defendant that the 'victim' impliedly consented and thereby would not be offended by the touching" is available where defendant is charged with simple assault].) Consent can be a defense to a battery that involves "ordinary physical contact." (*People v. Samuels* (1967) 250 Cal.App.2d 501, 513.) The consent of the victim may render an otherwise unlawful touching lawful because

> [w]here a defendant reasonably believes the touching constituting the alleged assault was consensual he cannot be guilty because there is nothing unlawful about the physical contact between the parties.

(*People v. Rivera* (1984) 157 Cal.App.3d 736, 742.)

However, consent is not a defense to section 288, subdivision (a). (*People v. Soto, supra,* 51 Cal.4th at p. 248.) In *Soto* this Court held, "[T]he victim's consent is not a defense to the crime of lewd acts on a child under age 14 under any circumstances." (*Id.* at p. 233.) Therefore, a defendant can violate section 288, subdivision (a), even if the victim acquiesces to the touching, so long as the defendant harbors the requisite specific lewd intent.

However, the same can not be said of section 242. If a defendant massages a victim's shoulders with her consent and she is not offended by the touching, then he has not committed a battery because there is no unlawful touching. However, if a defendant massages a victim's shoulders with her approval but has the requisite lewd intent he has committed a lewd act in violation of section 288, subdivision (a). Consequently, the same touching constituting a violation of section 288, subdivision (a), would not amount to a battery due to the victim's consent because whether the victim acquiesces to the touching is not relevant in addressing the elements of section 288, subdivision (a).

Appellant disagrees and asserts that

> The Fifth District's finding that consent is a defense to a battery made for lewd purposes cannot be squared with this Court's finding in *Soto* that consent is no defense to an assaultive act made on a child for lewd purposes.

(AOB 25.) First, the Fifth District Court of Appeal did not hold that consent is a defense to a battery that is done for lewd purposes. Instead, the Fifth District Court of Appeal distinguished sections 242 and 288 by noting that a child may consent to being tickled, but that consent would be irrelevant in determining if a defendant was guilty of section 288, subdivision (a). (Slip Opinion at p. 9.) However, the Fifth noted the same act may not constitute a battery if a child consented to the act because there would be no unlawful touching that was harmful or offensive under section 242. (Slip Opinion at p. 9.)

This is not inconsistent with this Court's holding in *Soto*. This Court's holding in *Soto* was narrow and did not require that the lewd touching under section 288 be harmful or offensive as defined in section 242. Therefore, the Fifth District Court of Appeal's decision did not contravene this court's holding in *Soto*, it simply distinguished the elements of section 288 and section 242 by finding that the later did not encompass the former. Specifically, the Fifth District Court of Appeal found that the two offenses could be distinguished because consent was a defense to section 242 but was not an available defense to section 288. (Slip Opinion at p. 9.)

Therefore, respondent submits that when a defendant's conduct is "ordinary physical contact" that is unlikely to cause great bodily harm, a victim may consent to a harmful or offensive touching under section 242. However, under section 288, subdivision (a), consent would not be a defense to the same conduct if the defendant harbored a lewd intent. Thus,

as noted above, a violation of section 288, subdivision (a) could be committed without also committing a battery.

IV. A LEWD ACT WITH A CHILD ACCOMPLISHED BY A CONSTRUCTIVE TOUCHING IS NOT A BATTERY

Appellant asserts that a defendant can violate both sections 242 and 288, subdivision (a) by constructively touching the victim, and concludes that battery is therefore encompassed within the statutory language of section 288, subdivision (a), making it a lesser included offense. (AOB 27-37.) Respondent agrees that case law has consistently held that a defendant can violate section 288, subdivision (a), by constructively touching the victim. However, respondent submits that a battery requires either a direct or indirect touching and therefore a defendant cannot be guilty of battery under a constructive touching theory. As a result, a lewd act with a child accomplished by constructive touching is not a battery.

A. A Lewd Act With a Child Accomplished Through Constructive Touching Is Not a Battery

Courts have held that a defendant need not necessarily touch the victim in order to violate section 288, and that the victim touching himself or herself is sufficient to satisfy the touching element of section 288, subdivision (a). (See *People v. Mickle* (1991) 54 Cal.3d 140, 175-176 [defendant compelled child to remove her own clothing]; *People v. Meacham* (1984) 152 Cal. App. 3d 142, 154 [child touched own genitalia at instigation of defendant]; *People v. Austin, supra,* 111 Cal. App. 3d at pp. 112-114 [child touched his own person, instigated by person with requisite intent].)

Battery, on the other hand, "cannot be accomplished without a touching of the victim." (*People v. Marshall* (1997) 15 Cal.4th 1, 38.) Battery requires either a direct or indirect touching. (See *People v. Duchon* (1958) 165 Cal. App. 2d 690, 692-693 [victim indirectly touched by

defendant throwing shears at him]; CALCRIM No. 960 [The touching can be done indirectly by causing an object [or someone else] to touch the other person].)

The better view is that battery is not a lesser included offense of section 288. (*People v. Santos*, *supra*, 222 Cal.App.3d at p. 739.) In *People v. Thomas, supra,* 146 Cal.App.4th at pages 1291-1293 (*Thomas*), relied upon by appellant, the First District Court of Appeal held that battery is a lesser included offense of section 288, subdivision (a). In *Thomas*, the prosecutor argued that a battery is not a lesser included offense of commission of a lewd act on a child because the former requires a touching, whereas the latter does not. Rejecting this argument, contrary to *People v. Marshall*, *supra*, 15 Cal.4th 1, the Court of Appeal reasoned that both sections 288, subdivision (a) and 242 require touching, and that touching can be constructive. (*Ibid.*)

The rationale behind allowing a constructive touching under section 288, however, does not apply to section 242. A "touching" for purposes of proving a lewd and lascivious act is broadly construed. (*People v. Martinez, supra,* 11 Cal.4th at p. 444.) "[Section 288] was enacted to provide children with special protection from sexual exploitation." (*Id.* at pp. 443-444.) "The statute recognizes that children are 'uniquely susceptible' to such abuse as a result of their dependence upon adults, smaller size and relative naivet." (*Id.* at p. 444.) Section 288 has been amended on numerous occasions since it was enacted and the Legislature is assumed to be "aware of the manner in which the offense has been judicially construed and that it has refrained from modifying the substantive terms because it accepts the prevailing view." (*Id.* at pp. 445-446.)

The same principles do not apply to battery. Battery was not enacted to protect children, as opposed to adults, but applies to any age victim. Furthermore, the essence of the crime of battery is the touching not the

intent of the perpetrator. Much of the reason courts have permitted constructive touching under section 288 revolves around punishing the act because it was occasioned by a perpetrator's specific lewd intent. (*Austin, supra*, 111 Cal.App.3d at p. 115.) The same rational does not apply to battery. As a result, respondent submits that *Thomas* was wrongly decided and that battery is not a lesser included offense to section 288 because battery cannot be accomplished through constructive touching.

Even assuming that battery can be accomplished through constructive touching it still is not a lesser included offense to section 288, subdivision (a). The court in *Thomas* did not address whether battery requires a harmful or offensive touching because the People had stipulated that the touching in that case was harmful or offensive. (*Thomas, supra,* at p. 1292, fn. 8.) Nor did *Thomas* address the issue of consent. Respondent submits that based on arguments I-III, above, *Thomas* was wrongly decided even if the touching making up the lewd act was accomplished through constructive touching because all lewd acts do not require an unlawful harmful or offensive touching.

B. Constructive Lewd Touches By Defendants Are Not Necessarily Batteries

Appellant asserts that because an assault is necessarily included within a battery and both require an identical mental state that "a person who initiates and then watches the touching of a child for sexual gratification . . . is aware of facts that would lead a reasonable person to understand that his or her course of conduct would 'directly, naturally, and probably' result in the child being touched in a harmful manner," battery must be a lesser included offense of section 288. (AOB 31-36.)

Appellant's argument is flawed in two respects. As noted above, appellant assumes that the constructive touching making up the lewd and

lascivious act is unlawful, harmful or offensive. However, this is not a requirement of section 288, subdivision (a).

A child at the direction of a parent may undress while the parent watches. Although this may constitute a constructive touching under section 288, it is not inherently harmful or offensive to the child. The parent's intent may be to have the child change into new clothes or bathe, in other words, the intent is not lewd. However, if the parent's intent is to arouse his or her sexual desires or to arouse the child's, then the parent has violated section 288, subdivision (a) through a constructive touching. Thus, a constructive touching may violate section 288 without violating section 242.

Moreover, under this scenario the constructive touching making up the lewd act would not constitute a touching under section 242 because as noted above, section 242 requires either a direct or an indirect touching. (*People v. Marshall, supra*, 15 Cal.4th at p. 38.)

Thus, for the reasons stated above, a lewd act accomplished through constructive touching does not necessarily encompass the harmful or offensive touching a battery requires.

C. Under the Elements Test Battery Is Not A Lesser Included Offense Of Section 288, Subdivision (a)

The *Thomas* court provided no real analysis of the respective offenses pursuant to the elements or accusatory pleading tests. Rather, it focused its analysis exclusively on whether the element of "touching" could be accomplished constructively for purposes of both the offenses of battery and lewd acts. (*Thomas, supra*, Cal.App.4th at p. 1291-1293.) The court concluded there was "no basis to conclude that the touching can be constructive under section 288 but not under section 242." (*Id.* at p. 1293.) As noted above, respondent disagrees with the premise that a battery can be accomplished through a constructive touching. Other than *Thomas*,

respondent has found no case holding that a battery can be committed by constructively touching the victim.[5] Respondent submits that under the elements test, a lewd and lascivious act on a child can be committed without also necessarily committing the lesser crime of battery if the lewd act is committed by the defendant constructively touching the victim.

Furthermore, as discussed above, an offender may commit a lewd and lascivious act (by a touching committed with the intent to arouse), but not commit a battery (by ensuring that the touching is not deemed unlawful, offensive or harmful by the victim).

V. WHERE THE TOUCHING IS OBJECTIVELY INNOCENT AND THE VICTIM CONSENTS TO THE TOUCHING, A LEWD ACT CAN STILL BE COMMITTED WITHOUT A BATTERY OCCURRING

Appellant asserts that a battery is committed even when a child is not offended by the touching because lewd acts are always harmful to children. (AOB 38-40.) As noted above, respondent submits that a lewd act can occur without also committing a battery because a lewd act can be committed by an objectively non-offensive or harmful touching to which a victim consents, thus, making it both subjectively inoffensive to the victim and objectively inoffensive.

Appellant argues that batteries are not determined by whether the victim was subjectively offended by the touching. (AOB 38.) While

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[5] Appellant cites *People v. Wright* (1996) 52 Cal.App.4th 203, 210, to support his contention that battery can be committed by indirect force. (AOB 28; *People v. Wright, supra*, 52 Cal.App.4th at 210 ["A defendant can commit a battery indirectly by causing the force to be applied to the person of another [citation] and thus can be guilty of indirect assault as well."]) This language, however, was dicta because it was unnecessary to the court's analysis. The issue in *People v. Wright* was whether assault was a lesser included offense of robbery by force. The issue did not involve battery.

respondent agrees that there is an objective component to battery, respondent submits that there is also a subjective component as well.

As noted above, battery is a general intent crime. (*People v. Lara*, *supra*, 44 Cal.App.4th at p. 107.) The law requires only that a defendant "actually intend to commit a 'willful and unlawful use of force or violence upon the person of another.'" (*Ibid.*) Intent to cause injury and the subjective awareness of risk is not required to prove a battery. (*People v. Hayes* (2006) 142 Cal.App.4th 175, 180.) The test is objective and all that must be shown is that the defendant committed an

> intentional act and [had] actual knowledge of those facts sufficient to establish that the act by its nature [would] probably and directly result in the application of physical force against another.

(*People v. Williams* (2001) 26 Cal.4th 779, 790 [assault context]; *People v. Hayes* (2006) 142 Cal.App.4th 175, 180.) The defendant must have been aware of "facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*People v. Williams, supra*, at p. 788; *People v. Hayes, supra*, at p. 180.) It is of no consequence that the defendant might have honestly believed his intentional act was unlikely to result in a battery. (*People v. Williams, supra*, at p. 788, fn. 3.)

However, the victim's subjective intent becomes relevant in determining whether a battery was "unlawful." In order to show that the touching was unlawful, it must be shown that the victim did not consent to the contact. (*Barouh v. Haberman* (1994) 26 Cal.App.4th 40, 46; accord, *Fluharty v. Fluharty* (1997) 59 Cal.App.4th 484, 497 ["'contact is "unlawful" if it is unconsented to'"].) As noted above, a victim can consent to ordinary physical contact. Thus, in the context of a battery that involves ordinary physical contact, whether the victim is subjectively offended is

relevant in determining whether a battery has occurred because the touching has to be unlawful.

As appellant concedes, when a parent tickles a child's stomach or kisses a child without lewd intent there is no battery since the touching is not inherently harmful and the child does not take offense to the touching. (AOB 40.) However, appellant maintains that if the same acts (tickling or kissing a child) are done with a lewd intent then a battery is committed. (AOB 40.)

For numerous reasons this position is untenable. As noted above, battery is a general intent crime. Thus, the lewd intent of the defendant cannot be a basis for finding the touching harmful or offensive since it is not an element that is included in a battery. Second, the touching for a violation of section 288 does not have to be lewd; only the perpetrator's intent has to be lewd. (See CALCRIM No. 1110.) Third, under the elements test the offenses would be identical under appellant's scenario. There would be no additional element comprising a lewd act if the lewd act was what made the touching harmful or offensive. Thus, it would be inconceivable that a jury could acquit on the greater offense (§ 288, subd. (a)) and convict on the lesser offense (§ 242) because the defendant would be guilty of the lewd conduct or nothing at all.

Based on the foregoing, it is clear that a battery is not a lesser included offense to lewd acts with children (§ 288, subd. (a)).

VI. A FINDING THAT BATTERY IS NOT A LESSER INCLUDED OFFENSE TO SECTION 288, SUBDIVISION (A) WOULD NOT ALLOW A DEFENDANT TO ESCAPE LIABILITY FOR OTHER RELATED OFFENSES

Appellant asserts that if this Court does not find that battery is a lesser included offense to section 288, subdivision (a), individuals who touch children in a harmful or offensive manner without harboring a lewd intent would escape liability. (AOB 41.) This argument is unpersuasive because

the district attorneys have the authority to charge the crimes in the complaint or information, if they believe the facts warrant such charges.

> The district attorney of each county is the public prosecutor, vested with the power to conduct on behalf of the People all prosecutions for public offenses within the county. (Gov. Code, § 26500; *Hicks v. Board of Supervisors* (1977) 69 Cal. App. 3d 228, 240 [138 Cal. Rptr. 101].) Subject to supervision by the Attorney General (Cal. Const., art. V, § 13; Gov. Code, § 12550), therefore, the district attorney of each county independently exercises all the executive branch's discretionary powers in the initiation and conduct of criminal proceedings. (*People ex rel. Younger v. Superior Court* (1978) 86 Cal. App. 3d 180, 203 [150 Cal. Rptr. 156]; *People v. Municipal Court (Pellegrino)* (1972) 27 Cal. App. 3d 193, 199–204 [103 Cal. Rptr. 645, 66 A.L.R.3d 717].) The district attorney's discretionary functions extend from the investigation and gathering of evidence relating to criminal offenses (*Hicks v. Board of Supervisors, supra*, 69 Cal. App. 3d at p. 241), *through the crucial decisions of whom to charge and what charges to bring*, to the numerous choices the prosecutor makes at trial regarding "whether to seek, oppose, accept, or challenge judicial actions and rulings." (*Dix v. Superior Court, supra*, 53 Cal. 3d at p. 452; see also *People v. Superior Court (Greer)* (1977) 19 Cal. 3d 255, 267 [137 Cal. Rptr. 476, 561 P.2d 1164] [giving as examples the manner of conducting voir dire examination, the granting of immunity, the use of particular witnesses, the choice of arguments, and the negotiation of plea bargains].)

(*People v. Eubanks* (1996) 14 Cal. 4th 580, 589, italics added.)

Therefore, if a district attorney believed that based on the facts of a specific case a defendant committed both a lewd act and a battery on a child, the district attorney under his or her discretionary power, could charge both crimes. The same would be true if the prosecutor believed that a violation of section 647.6, subdivision (a), was committed. (See AOB 41.) Thus, appellant's concern that a defendant may escape criminal liability is unfounded.

VII. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO WARRANT AN INSTRUCTION ON BATTERY

Appellant asserts that there was substantial evidence presented at trial to instruct on battery. (AOB 42-49.) Even assuming, without conceding, that battery is a lesser included offense of committing a lewd act with a child, the trial court still should not have instructed the jury on battery because there was not substantial evidence to support such an instruction.

> "[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present." [Citation.] Conversely, even on request, the court "has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction."

(*People v. Cole* (2004) 33 Cal.4th 1158, 1215; see also *People v. Breverman*, *supra*, 19 Cal.4th at p. 154.) Substantial evidence exists where there is evidence from which a jury composed of reasonable persons could conclude that the defendant was guilty of the lesser crime. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) It is evidence that

> must reach a level sufficient to "deserve consideration by the jury, i.e., 'evidence from which a jury composed of reasonable [people] could have concluded'" that the particular facts underlying the instruction did exist. [Citations.] Thus, a trial court need not instruct [on lesser] offenses unless the evidence would justify a conviction of such offenses.

(*People v. Turner* (1983) 145 Cal.App.3d 658, 679, disapproved on other grounds in *People v. Majors* (1998) 18 Cal.4th 385, 411.)

Here, if appellant did in fact, French kiss Jane Doe, rub her stomach, or rub her vagina, as Jane Doe testified, he committed those touchings with the intent of arousing his "lust, passions, or sexual desires." If, as he claimed in his interview with Officer Nelson, he only "hugged her" and poked her belly without any intent of sexual gratification, he was not guilty

of any crime. Jane Doe had no objection to just being hugged and kissed by appellant, as shown by the fact that she voluntarily hugged and kissed appellant without objection when she saw him on other occasions. (CT 175, 199.) Thus, if the touching consisted of a simple kiss and poke to the stomach, then there was no battery because it was not "harmful or offensive."

Furthermore, appellant denied touching her vagina and insisted that Jane Doe must have said he touched her vagina because she was not thinking clearly due to the amount of caffeine she had while they were out. (RT 166-167, 176.) Therefore, there was no evidence presented for the jury to conclude that appellant touched her vagina for a non-sexual purpose. The jury was left to either believe appellant and acquit him or believe Jane Doe and find him guilty. As a result, the trial court was under no duty to sua sponte instruct on battery because there was insufficient evidence to support the instruction.

VIII. ANY ERROR IN FAILING TO INSTRUCT THE JURY ON BATTERY WAS HARMLESS

Appellant asserts that the trial court's failure to instruct on battery was prejudicial to his case. (AOB 50-55.) Even assuming the trial court erred in failing to instruct on battery, the error was harmless because it is not reasonably probable that appellant would have received a more favorable result if the instruction had been given. (*People v. Breverman, supra*, 19 Cal.4th at p. 178; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The evidence here indicated that appellant was motivated by an intent to arouse his lust or sexual desires. While he argues that the evidence can be interpreted to indicate that he innocently touched Jane Doe's stomach or merely was licking his lips when Jane Doe kissed him on the lips in the movie theater, this is belied by Jane Doe's testimony that appellant rubbed her stomach under her clothes and then began rubbing her

vagina for approximately five minutes. (RT 61, 64, 96.) As previously stated, appellant vehemently denied touching Jane Doe's vagina at any time. (RT 176.) He never claimed that he accidently touched her vagina or that he touched it for a non-sexual purpose.

Furthermore, Jane Doe stated that appellant French kissed her on her birthday, not at the movie theatre. Therefore, there was no evidence that the kiss on her birthday was an innocent, non-sexual act. From the facts presented at trial, the jury had persuasive evidence that appellant's acts were done for a lewd purpose. Jane Doe testified that appellant asked her to put her leg over his and then began rubbing her vagina for a long period of time. It would be impossible to argue that appellant French kissing Jane Doe was merely a battery, since the sexual component is implicit.

Appellant's defense rested on discrediting Jane Doe. (See Supp. RT 99-103.) His defense was not grounded in a claim that these acts were merely "offensive touchings" that were not sexual in nature. Instead, he argued that Jane Doe lied, and that he never French kissed her on her birthday or touched her vagina. (RT 99-103.) Although appellant attempts to discredit Jane Doe's testimony due to minor inconsistencies, the jury clearly believed her when they found appellant guilty. If the jury had disbelieved Jane Doe then appellant would have been acquitted. Thus, there is no reasonable probability that the jury would have returned a more favorable verdict to appellant had they been instructed on battery as a lesser included offense. There was no evidence presented that appellant committed a battery.

CONCLUSION

Respondent respectfully requests this Court reject appellant's arguments and affirm the holding of the Fifth District Court of Appeal.

Dated: September 19, 2011

Respectfully submitted,

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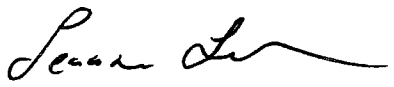

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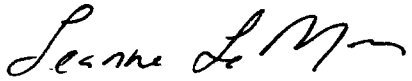
CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 9,747 words.

Dated: September 19, 2011

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Shockley**
No.: **S189462**

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 19, 2011, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, CA 93721, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 19, 2011, at Fresno, California.

Lynda Gonzales
Declarant

Lynda Gonzales
Signature