

CHAPTER TEN

CRIMINAL SEXUAL CONDUCT, ASSAULT AND BATTERY,
KIDNAPPING AND FALSE IMPRISONMENT

This chapter includes a variety of crimes against the persons, including Rape and related sexual offenses, Assault and Battery, Kidnapping and False Imprisonment.

For example, in California, the elements of the crime of rape include:

PC 261. Rape

(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

*(1) Where a person is **incapable, because of a mental disorder or developmental or physical disability, of giving legal consent**, and this is known or reasonably should be known to the person committing the act... the prosecuting attorney **shall prove, as an element of the crime**, that a mental disorder or developmental or physical disability rendered the alleged victim **incapable of giving consent**.*

*(2) Where it is accomplished **against a person's will** by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.*

*(3) Where a person is **prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance**, and this condition was known, or reasonably should have been known by the accused.*

*(4) Where a person is at the time **unconscious of the nature of the act**, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets one of the following conditions:*

*(A) Was **unconscious or asleep**.*

*(B) Was **not aware, knowing, perceiving, or cognizant that the act occurred**.*

*(C) Was **not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact**.*

*(D) Was **not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose**.*

(5) Where a person submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.

(6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

(7) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official.

(a) As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

(b) As used in this section, "duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.

(c) As used in this section, "menace" means any threat, declaration, or act which shows an intention to inflict an injury upon another.

Injuries clarified

Just what are the legal distinctions or differences in the types of injuries? Keep in mind that the type of injury and the seriousness of the injury can be used to either mitigate or to aggravate a case. California clarifies them in three separate terms:

- **"Injury"** means any physical injury, which requires professional medical treatment.
- **"Serious bodily injury"** means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.
- **"Great Bodily Injury" (GBI)** Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony which causes the victim to become comatose due to brain injury or to suffer paralysis of a permanent nature... "Paralysis" means a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism. (12022.7 PC) As used in PC 198.5, great bodily injury also means a significant or substantial physical injury.

Statutory Rape

In an interesting variation, in what used to be called "statutory rape," regardless that both parties are "consenting," the law merely says that they are incapable of that consent because of their age, and both are liable to punishment:

PC 261.5. Unlawful Sexual Intercourse With Person Under 18 yrs.

(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years and an "adult" is a person who is at least 18 years of age. Nothing in this section shall affect the admissibility of evidence or the burden of proof on the issue of consent.

One who assists, such as a principal or an accomplice, in a rape is also liable under PC 264.1:

PC 264.1. Punishment When Defendant Acted in Concert With Another Person to Commit Rape

The provisions of Section 264 notwithstanding, in any case in which the defendant, voluntarily acting in concert with another person, by force or violence and against the will of the victim, committed an act described in Section 261, 262, or 289, either personally or by aiding and abetting the other person, that fact shall be charged in the indictment or information

Consent under duress – the Condom Defense

What if the victim, knowing they cannot resist a rape, asks the offender for a condom? Is that sufficient legally to show from the offender's defense, that the victim actually consented?

No, it is not, although it actually was a defense issue in one state, but California law closed the door on this defense with PC 261.7:

PC 261.7. Sex Crime Victim; Request for Condom, Other Birth Control Device Not Sufficient to Constitute Consent. In prosecutions under (Sex offenses) Section 261, 262, 286, 288a, or 289, in which consent is at issue, evidence that the victim suggested, requested, or otherwise communicated to the

defendant that the defendant use a condom or other birth control device, without additional evidence of consent, is not sufficient to constitute consent.

In sexual offenses, there may be times when the victim is "unconscious of the nature of the act" We've seen this recently in the infamous case of Andrew Luster, heir to the Max Factor fortune, who drugged his victims using "date rape drugs," and then videotaped them for his own purposes. He's now in prison as a result of his actions. The issue is the victim's inability to even know what is occurring to them, much less whether or not there is any question of consent.

In California law this legal protection means since the victim is incapable of resisting, this does not constitute consent. This is because the victim meets one of the following conditions:

(1) Was unconscious or asleep.

(2) Was not aware, knowing, perceiving, or cognizant that the act occurred.

(3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.

These elements are included in several of the crimes related to sexual offenses.

One who would give someone else a drug to overcome their resistance and consent, could be liable for:

PC 222.Administering Controlled Substances or Anesthetic to Aid Felony

Every person guilty of administering to another any chloroform, ether, laudanum, or any controlled substance, anaesthetic, or intoxicating agent, with intent thereby to enable or assist himself or herself or any other person to commit a felony, is guilty of a felony.

Sentencing enhancements can also be incurred by the use of overcoming resistance by the use of drugs, etc.

PC 666.7. Sentence Enhancements – (h) (11)Administering by injection, inhalation, ingestion, or any other means, any specified controlled substance against the victim's will by means of force, violence, or fear of immediate and unlawful bodily injury to the victim or another person for the purpose of committing a felony (Sec. 12022.75, Pen. C.).

Other sex offenses include:

PC 220.Assault With Intent to Commit Mayhem, Rape, Sodomy, Oral Copulation

Every person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of Section 264.1, 288 or 289 is punishable by imprisonment in the state prison for two, four, or six years.

PC 286 Sodomy (By force, threat, or with minors)

(a) Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.

Illegal when: *Any person who commits an act of sodomy when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, or with a minor.*

PC 288. Lewd Act on Child or Dependent Person

(a) Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of

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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,

PC 288a. Oral Copulation (By force, threat, or with minors)

(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person.

This is illegal when: *Any person who commits an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, or a minor.*

PC 289. Sexual Penetration by Foreign Object

(a)(1) Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person

Assault and Battery

An assault, in California law, is defined in PC 240.

Assault Defined: *An assault is an **unlawful attempt**, coupled with a **present ability**, to commit a **violent injury on the person of another**.*

In Assaults, the elements include the *attempted* battery or any *threatened* battery, with the clear intent to injure or harm another. This can include the intent to threaten the person, and put them in fear of their life or great bodily injury. For one reason or another, the actual battery does not occur. In battery the contact or touching has occurred. It includes the actual unlawful contact or touching, with the intent to purposefully, knowingly, or recklessly or negligently, touch or make contact with the other person, which is against their will, and causes some, unwanted injury or pain to the victim.

Defining Battery:

PC 242. Battery

A battery is any willful and **unlawful use of force or violence** upon the **person of another**.

Battery can also include what may appear to be some very minor unlawful acts of touching, such as even a touch, a caress, a kiss, or it can escalate to a grab, a grope or fondle. However, remember that it is the victim's perception of what has occurred, and that that touching was unwanted and thus illegal. Even spitting at someone would be a battery, if the victim was actually hit by the spittle. What about spraying someone with water or pouring something over them, or throwing something into their face? What about tear gas or pepper spray? Would these be "legal" or "illegal?"

Battery occurs when an assault is complete. In effect, the assault is a swing and a miss, whereas the battery is when the swing connects. In addition, since the crime is starting to escalate from the assault to the actual physical connection or battery, the sentences can become more severe. This is particularly true in "special classes," such as assaulting or battery of a police officer. In addition, whether or not any weapons are used or the level of injury can increase sentences.

While some acts of battery may be actually legitimate, such as disciplining a child or a police officer having to wrestle a suspect to the ground during a legal arrest, or a person defending him or herself against an attack, the majority of the discussion will focus on the illegitimate uses of force that defines battery.

As in assaults, the penalty for battery ranges from misdemeanors to major felonies. Much of this depends

on the severity of the attack, if a weapon used, and the status of the victim, as we have seen with police officers, and other protected classes. The “severity” of the attack is decided largely on the types of injuries sustained by the victim. In law, there are differences in the types of injuries, between less serious, to more serious, and then life threatening injuries. Once injuries occur, or escalate to more serious or life-threatening injuries, the penalty will increase.

Using tear gas or tear gas weapons except in self-defense would be illegal. For example:

Use of Acid or any “caustic chemical.” - PC 244. Throwing Acid With Intent to Disfigure or Burn

Any person who willfully and maliciously places or throws, or causes to be placed or thrown, upon the person of another, any vitriol, corrosive acid, flammable substance, or caustic chemical of any nature, with the intent to injure the flesh or disfigure the body of that person...

As used in this section, "flammable substance" means gasoline, petroleum products, or flammable liquids with a flashpoint of 150 degrees Fahrenheit or less.

PC 244.5. Assault With Stun Gun or Taser

(a) As used in this section, "stun gun" means any item, except a taser, used or intended to be used as either an offensive or defensive weapon that is capable of temporarily immobilizing a person by the infliction of an electrical charge.

(b) Every person who commits an assault upon the person of another with a stun gun or taser shall be punished by imprisonment in a county jail for a term not exceeding one year, or by imprisonment in the state prison for 16 months, two, or three years.

(c) Every person who commits an assault upon the person of a peace officer or firefighter with a stun gun or taser...

Other major crimes associated with assaults and battery include:

Assault with a Deadly Weapon (ADW)

PC 245 Assault With Deadly Weapon, Firearm, Assault Weapon, or Machine gun, may sound misleading, since one says, “assault with a deadly” weapon, not “battery” with a deadly weapon. Of course if one is shot or stabbed, etc. with a “deadly weapon,” the charge most likely may include “attempted homicide.”

PC 245 (a)(1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury

(2) Any person who commits an assault upon the person of another with a firearm ...

(3) Any person who commits an assault upon the person of another with a machinegun, ... a semiautomatic firearm ...

(c) Any person who commits an assault with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury upon the person of a peace officer or firefighter,...

(d)(1) Any person who commits an assault with a firearm upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties...

(2) Any person who commits an assault upon the person of a peace officer or firefighter with a semiautomatic firearm and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties...

PC 203. Mayhem

Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.

PC 205. Aggravated Mayhem

A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an intent to kill. Aggravated mayhem is a felony punishable by imprisonment in the state prison for life with the possibility of parole

PC 206. Torture

Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury ... upon the person of another, is guilty of torture. Interestingly, it states also that, "The crime of torture does not require any proof that the victim suffered pain."

PC 206.1. Torture; Punishment

Torture is punishable by imprisonment in the state prison for a term of life.

Here's a sampling of other related battery charges:

PC 243.1. Battery Against Custodial Officer

PC 243.2. Battery Committed on Any Person on School or Park Property

PC 243.3. Battery Committed Against Public Transit Employee or Passenger

PC 243.5. Assault or Battery on School Property; When a Peace Officer May Arrest Without a Warrant

PC 243.6. Battery Committed Against School Employee

PC 243.7. Battery Committed Against Juror

PC 243.8. Battery upon Sports Official

PC 243.83. Unlawful Activities at Professional Sporting Event

PC 243.9. Battery by Gassing Upon any Peace Officer in Local Detention Facility

PC 243.10. Battery against Member of Armed Forces Because of Victim's Service

Domestic Violence

The law now also serves to protect a spouse or someone who is to be protected from an abusive relationship. When a battery is committed against a person with whom you have a relationship with, you're in the realm of *domestic violence*. This can include a spouse, a person with whom you're cohabiting or living with, children, a former spouse, fiancé, or fiancée, or even a person with whom you've had a previous dating or engagement relationship.

Domestic Violence: Since "rape" or other sex offenses can be inclusive of a situation where the victim is in a certain relationship with the offender, we'll add Domestic Violence here:

PC 13700. Domestic Violence Definitions

(a) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.

(b) "Domestic violence" means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, "cohabitant" means two

unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to:

- (1) sexual relations between the parties while sharing the same living quarters*
- (2) sharing of income or expenses*
- (3) joint use or ownership of property*
- (4) whether the parties hold themselves out as husband and wife*
- (5) the continuity of the relationship*
- (6) the length of the relationship.*

California Family Code – Domestic Violence

Domestic violence is abuse perpetrated against any of the following persons:

- (a) A spouse or former spouse.*
- (b) A cohabitant or former cohabitant, as defined in Section 6209.*
- (c) A person with whom the respondent is having or has had a dating or engagement relationship.*
- (d) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 commencing with Section 7600) of Division 12).*
- (e) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.*
- (f) Any other person related by consanguinity or affinity within the second degree.*

PC 243. Battery; (related to Domestic Violence) (e)(1) *When Battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship,...*

Spousal Rape

PC 262. Rape of Person Who Is Spouse of Perpetrator

- (a) Rape of a person who is the spouse of the perpetrator is an act of sexual intercourse accomplished under any of the following circumstances:*
 - (1) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.*
 - (2) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known, by the accused.*
 - (3) Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of giving consent.*

Sexual Battery

Other forms of battery can include unlawful touching, or contact, for sexual purposes, such as in “sexual battery.” While sexual battery does not address each of the separate sections that are related to sex offenses, such as rape, sodomy, etc., they may be related. For example, raping a spouse would still be rape, with the added dimension of domestic violence. There are some unique distinctions to sexual battery. Note the subtle differences in the sections, which the police and prosecution must be able to distinguish in order to make the correct decisions in making an arrest or deciding what charges should be made.

Using Calif. PC Section, **243.4 (a)**, sexual battery is described as, “Any person who **touches an intimate part** of another person while that person is **unlawfully restrained** by the accused or an accomplice, and if

the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery...

(b) Any person who touches an intimate part of another person who is institutionalized for medical treatment and who is seriously disabled or medically incapacitated, if the touching is against the will of the person touched, and if the touching is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery...

(c) Any person who touches an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse, and the victim is at the time unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose, is guilty of sexual battery...

(d) Any person who, for the purpose of sexual arousal, sexual gratification, or sexual abuse, causes another, against that person's will - while that person is unlawfully restrained either by the accused or an accomplice, or is institutionalized for medical treatment and is seriously disabled or medically incapacitated, to masturbate or touch an intimate part of either of those persons or a third person, is guilty of sexual battery...

(e)(1) Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery,...

Note that in this latter section, the requirement or element of “restraint” is missing, and that it is a misdemeanor.

Moreover, how do we define “touching” under the law? "Touches" means *physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim.*

Defining an “Intimate” Part in Sexual Battery

“Intimate part” means the sexual organ, anus, groin, or buttocks of any person, and the breast of a female. As a result, let us assume that a suspect grabbed the breast of a male. Would this be sexual battery? No, although it could still be a “battery,” if not suicidal!

Other Battery Sections:**Elder Abuse****PC 243.25 Battery against the Person of an Elder (one who is over 65) or a Dependent Adult.**

The elderly as well as dependent adults are also protected under law. This occurs when a battery is committed against the person of an elder or a dependent adult, with knowledge that he or she is an elder or a dependent adult. Obviously, if the crime is more serious, (injuries, weapons, etc.) the charges and sentence will also increase.

Elder and Dependent Adult defined:

Elder means any person who is 65 years of age or older.

A "dependent adult" means any person who is between the ages of 18 and 64, who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. "Dependent adult" includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility...

KIDNAPPING**THE CARYL CHESSMAN CASE**

In a famous 1951 case in California, Caryl Chessman was a serial rapist who has the dubious distinction of being the last person executed in California for a non-capital case. At the time, the death penalty was applied to several crimes that did not include murder, such as kidnapping. Chessman had moved a victim from her car to his, which was only about 22 feet away and this movement was sufficient to satisfy the asportation requirement. He was convicted of multiple counts of kidnapping, two alleged sexual assaults and robbery. The "Red Light Bandit" moniker came from the robber's "M.O." (Modus Operandi, or Method of Operation,) which included placing a blinking red police light atop his car during a series of lovers' lane hold-ups. He was convicted and, after a twelve year court battle for his appeals, was executed under the "Little Lindbergh Law," which, at the time required the death penalty for kidnapping. Today, in most states, non-capital crimes cannot be punishable by the death penalty.

THE PATTY HEARST KIDNAPPING CASE

It was 9:40 A.M. on the fifteenth day of April in 1974, tax day. Customers were going to the Hibernia Bank in the Sunset district of San Francisco to make their usual transactions. Suddenly four white women and a black man walked in and yelled, "It's a hold-up! Down on the floor! On your faces, you mother fuckers!" In less than four minutes, they robbed the bank of over \$10,000, wounded two bystanders, and fled in a getaway car.

When reviewing the videotape afterward, the police were surprised to recognize the face of a woman who had been missing for over two months. Among the hold-up gang, they saw Patricia Campbell Hearst. Not only that, she was brandishing a carbine and acting excited, as if she were one of them. It was to be one of the most incongruous events of that period, the truth of which is still controversial.

Patty is the granddaughter of the legendary newspaper publisher, William Randolph Hearst. Two black men and a white woman had kidnapped her at gunpoint from her Berkeley apartment on February 4th and had taken her captive. They identified themselves as members of the Symbionese Liberation Army (SLA). The kidnapping itself was a surprise to the nation, one rarely seen, - the political kidnapping of an heiress from a prominent family. Many feared a dangerous precedent had now been set. One must keep in perspective the time this occurred; the civil rights movement was in full swing, the anti-war protesters filled the streets, and groups such as the Black Panthers, Weather Underground, Brown Beret's, and many more, all clamored for their voice to be heard. Believing her to have "crossed over" to the criminal's side,

as a willing participant and not a hostage any longer, she was tried and, many felt unfairly, convicted of the bank robbery. Most of the other SLA members were killed in a shootout with LAPD, but Patty Hearst was not present, fortunately for her. During her trial, she testified that:

- She was isolated and made to feel that no one was going to rescue her.
- She was physically and sexually abused by various members of the gang.
- She was told that she might die.
- She was fed lies about how the gang was oppressed by the establishment.
- She was forced to record messages that blasted those she loved.

She had served 21 months when President Carter commuted her sentence in January 1979. Her conviction remained on record until President Clinton pardoned her on his final day of office in 2001. Her book, *“Every Secret Thing,”*¹ (1981) revealed much about the way she was treated during her captivity and days as a fugitive. And yes, she is the heir to the Hearst Castle in California, although she has since donated the castle to the State of California, as it is now a “state historical site”)

TYPES OF KIDNAPPING SITUATIONS

There can be a wide variety of the reasons why kidnappings occur. Some of the most common are:

- Kidnapping for ransom/extortion
- Kidnapping as a tactic or strategy
- Kidnapping for ideological reasons; political or religious
- Child abduction
- Sexual predators
- Custodial interference

California law, PC 207, articulates what kidnapping is:

Kidnapping Defined

(a) Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries (Asportation element) the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.

(b) Every person, who for the purpose of committing any act defined in Section 288, (Sex offenses against a child under the age of 14) hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping.

(c) Every person who forcibly, or by any other means of instilling fear, takes or holds, detains, or arrests any person, with a design to take the person out of this state, without having established a claim, according to the laws of the United States, or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell that person into slavery or involuntary servitude, or otherwise to employ that person for his or her own use, or to the use of another, without the free will and consent of that persuaded person, is guilty of kidnapping.

(d) Every person who, being out of this state, abducts or takes by force or fraud any person contrary to the law of the place where that act is committed, and brings, sends, or conveys that person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnapping.

(e) For purposes of those types of kidnapping requiring force, the amount of force required to kidnap an unresisting infant or child is the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent.

1 Hearst, Patty Campbell, (1981) *“Every Secret Thing.”* Doubleday; ISBN: 0385170564

(f) Subdivisions (a) to (d), inclusive, do not apply to any of the following:

Note that this subsection covers one who takes a child to protect the child:

(1) To any person who steals, takes, entices away, detains, conceals, or harbors any child under the age of 14 years, if that act is taken to protect the child from danger of imminent harm.

Asportation

The key to kidnap cases is not just whether or not the victim was moved in the course of the kidnapping, but was that movement *substantial* under the circumstances and not merely *incidental*. The term for this movement is called ***asportation***.

PC 209. Kidnapping for Ransom or Extortion

(a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another person by any means whatsoever with intent to hold or detain, or who holds or detains, that person for ransom, reward or to commit extortion or to exact from another person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or is intentionally confined in a manner which exposes that person to a substantial likelihood of death, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b)(1) Any person who kidnaps or carries away any individual to commit robbery, rape, spousal rape, oral copulation, sodomy, or sexual penetration in violation of Section 289, shall be punished by imprisonment in the state prison for life with possibility of parole.

(2) This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.

PC 209.5. Kidnapping Pursuant to Carjacking

(a) Any person who, during the commission of a carjacking and in order to facilitate the commission of the carjacking, kidnaps another person who is not a principal in the commission of the carjacking shall be punished by imprisonment in the state prison for life with the possibility of parole.

(b) This section shall only apply if the movement of the victim is beyond that merely incidental to the commission of the carjacking, the victim is moved a substantial distance from the vicinity of the carjacking, and the movement of the victim increases the risk of harm to the victim over and above that necessarily present in the crime of carjacking itself.

PC 210. Posing as Kidnapper, Etc.

Every person who for the purpose of obtaining any ransom or reward, or to extort or exact from any person any money or thing of value, poses as, or in any manner represents himself to be a person who has seized, confined, inveigled, enticed, decoyed, abducted, concealed, kidnapped or carried away any person, or who poses as, or in any manner represents himself to be a person who holds or detains such person, or who poses as, or in any manner represents himself to be a person who has aided or abetted any such act, or who poses as or in any manner represents himself to be a person who has the influence, power, or ability, to obtain the release of such person so seized, confined, inveigled, enticed, decoyed, abducted, concealed, kidnapped or carried away, is guilty of a felony and upon conviction thereof shall be punished by imprisonment for two, three or four years.

Nothing in this section prohibits any person who, in good faith believes that he can rescue any person who has been seized, confined, inveigled, enticed, decoyed, abducted, concealed, kidnapped or carried away, and who has had no part in, or connection with, such confinement, inveigling, decoying, abducting, concealing, kidnapping, or carrying away, from offering to rescue or obtain the release of such person for a monetary consideration or other thing of value.

PC 210.5. Taking Hostages

Every person who commits the offense of false imprisonment, as defined in Section 236, against a person for purposes of protection from arrest, which substantially increases the risk of harm to the victim, or for purposes of using the person as a shield is punishable by imprisonment in the state prison for three, five, or eight years.

FALSE IMPRISONMENT

The difference between kidnapping and unlawful imprisonment has to do with whether or not the “victim,” (the person or persons who have been seized) have been moved any substantial distance during the kidnapping or not.

The lesser of the two offenses include “Unlawful Imprisonment” is defined as simply confining a person against the person’s will. “Kidnapping,” however, is defined as unlawfully imprisoning a person, and then moving the person somewhere. The actual movement or “*asportation*,” must however, be of a “*substantial*” distance, and not a mere few feet.

According to the court in *People v. Allen*, 64 Cal. Reporter 2nd. 497 (1997), the court said that “*substantially*” implies something *more than only measured distance*. While “slight” is consistent with a quantitative analysis, the term “trivial” is a qualitative term suggestive of the conclusion that more is envisioned in determining whether a kidnapping occurs than simply how far the victim is moved.

PC 236. False Imprisonment

False imprisonment is the unlawful violation of the personal liberty of another. Note that it has no requirement for “asportation,” or for what purposes the false imprisonment is for.

PC 237. False Imprisonment; Penalty

(a) False imprisonment is punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail for not more than one year, or by both that fine and imprisonment. If the false imprisonment be effected by violence, menace, fraud, or deceit, it shall be punishable by imprisonment in the state prison.

(b) False imprisonment of an elder or dependent adult by use of violence, menace, fraud, or deceit shall be punishable as described in subdivision (f) of Section 368.

Review Questions

1. What are the major differences between the crime of assault and the crime of battery?
2. What are the differences between kidnapping and unlawful imprisonment?
3. Describe the range of “touching” that would be considered “battery
4. Would the use of pepper gas or “tear gas” be considered a “deadly weapon?”
5. What does “asportation” mean?

Web Resources

Alameda County District Attorney

<http://www.acgov.org/da/>

San Diego District Attorney

<http://www.sdcda.org/>

Rape Awareness

<http://www.sdcda.org/helping/rape.php>

Crime Victims Help

<http://www.sdcda.org/helping/index.php>

Elder Abuse

<http://www.sdcda.org/helping/elder.php>

Protecting Children On Line

<http://www.sdcda.org/protecting/children.php>

Orange County District Attorney

<http://www.orangecountyda.com/home/index.asp>

Child Abuse

<http://www.orangecountyda.com/home/index.asp?page=44>

Domestic Violence

<http://www.orangecountyda.com/home/index.asp?page=45>

Los Angeles County District Attorney

<http://da.co.la.ca.us/>

LADA Victim – Witness Information

<http://da.co.la.ca.us/vwap/default.htm>

San Francisco District Attorney

<http://www.sfgov.org/site/frame.asp?u=http://www.sfdistrictattorney.org/>

California Attorney General

<http://ag.ca.gov/>

California AG’s office – Victim Services

<http://ag.ca.gov/victimservices/index.htm>

Criminal Sexual Conduct, Assault and Battery, Kidnapping, and False Imprisonment

National Programs:

The Office for Victims of Crime (OVC) : established by the 1984 Victims of Crime Act (VOCA)
<http://www.ojp.usdoj.gov/ovc/ncvrv/welcome.html>

National Center for Victims of Crime

<http://www.ncvc.org/ncvc/Main.aspx>

National Organizations for Victims Assistance

<http://www.trynova.org/>

Kidnapping – Answers.com

<http://www.answers.com/topic/kidnapping-legal-term>

<http://www.answers.com/topic/federal-kidnapping-act>

Little Lindberg law: (Charles Lindberg's child was kidnapped and murdered)

http://en.wikipedia.org/wiki/Lindbergh_kidnapping

<http://www.nj.com/lindbergh/>

<http://www.fbi.gov/libref/historic/famcases/lindber/lindbernew.htm>

http://www.crimelibrary.com/notorious_murders/famous/lindbergh/index_1.html

<http://www.charleslindbergh.com/kidnap/index.asp>

<http://www.law.umkc.edu/faculty/projects/FTrials/Hauptmann/Hauptmann.htm>

<http://www.pbs.org/wgbh/amex/lindbergh/sfeature/crime.html>

http://www.courttv.com/onair/shows/forensicfiles/episodes/the_lindbergh_kidnapping.html

Caryl Chessman links:

<http://www.usc.edu/libraries/archives/1a/scandals/chessman.html>

http://en.wikipedia.org/wiki/Caryl_Chessman

<http://foia.fbi.gov/foiaindex/cchessman.htm>

Related issue:

Court TV – History of the Death Penalty

http://www.courttv.com/archive/national/death_penalty/history_dpenalty.html

Patty Hearst

http://en.wikipedia.org/wiki/Patty_Hearst

<http://www.crimelibrary.com/classics4/hearst/>

<http://www.pbs.org/wgbh/amex/guerrilla/>

http://www.courttv.com/trials/soliah/slahistory3_ctv.html

Hearst Castle

<http://www.hearstcastle.com/>

http://www.hearstcastle.com/history/suggested_readings.asp

<http://www.friendsofhearstcastle.org/reading.asp>

http://en.wikipedia.org/wiki/Hearst_Castle

Case Study #1: People v. Blake (2004) 117 Cal.App.4th 543

Discussion Question: Does chemical mace or its equivalent (i.e., pepper spray) qualify as a “*deadly or dangerous weapon*?”

In this case, the defendant, a “*transgender prostitute*,” who, although physically a male, dressed and acted like a female, committed a series of commercial robberies of women’s clothing stores, a couple of street robberies and a carjacking, in the Los Angeles area. Other than money on a couple occasions, defendant primarily took women’s clothes and other accessories, including a couple of wigs. Although defendant commonly used a knife or box cutter, on two occasions he sprayed his victims with pepper spray from a canister he carried in his purse. In one case, he sprayed his female victim in the eyes, causing her “eyes to tear. She could not see and could not breathe. She began coughing and gasping for air and her face became red. (She) screamed her eyes were burning.” Paramedics were called to the scene to help her. In another case, he sprayed another female victim with what was believed to be pepper spray into her eyes from about eight inches away. The victim ran outside; her eyes burning from the spray. She could not breathe for about ten minutes. Lastly, defendant brandished a canister and threatened to “mace” a male victim who had given him a ride, taking \$1.00 and a cell phone from the victim. When later arrested after a nine-day crime spree, defendant was charged with and convicted of ten counts of robbery and one count each of attempted robbery, carjacking, burglary, petty theft with a prior and vehicle theft.

As discussed earlier, PC 245 (c), can include virtually anything that can be used. See Also Penal Code §12403.7(g), (g)*Any person who uses tear gas or tear gas weapons except in self-defense is guilty of a public offense* (Wobbler).

Issue

The jury also found true numerous weapons-use enhancements. As for the three robberies described above involving the use, or threatened use, of pepper spray, the jury found that defendant personally used, or threatened to use, a “*deadly or dangerous weapon*” (i.e., pepper spray, or rather “*an unknown caustic substance*”), per P.C. §12022(b), (using a deadly weapon during a felony) in each case. Among the issues on appeal was whether “*pepper spray*” is legally a “*deadly or dangerous weapon*,” as described in the 12022(b) allegation.

Decision

The court held that “*tear gas, pepper spray or mace*” is a “*deadly or dangerous weapon*” (i.e., capable of producing death or great bodily injury). Defining “*great bodily injury*” as an “injury, which is significant or substantial, not insignificant, trivial or moderate,” the Court found that pepper spray may, depending upon the circumstance, be deadly or dangerous. The cases reviewed by the Court dealt with instances of people exposed to similar caustic chemicals suffering burns to their skin, chemical pneumonia, cornea damage, or serious asthma attacks. The effects do not have to be permanent. The effects of such exposures in the cases cited lasted in some cases for up to a year, which is enough. In this case, the Court found that “blindness, disorientation, breathing difficulty, and extreme discomfort sufficient in combination to induce panic for a period of ten to fifteen minutes . . . can rationally be viewed by a jury as more than an insignificant injury. The pepper spray, therefore, used by the defendant, qualifies under the circumstances here as a “*deadly or dangerous weapon*,” supporting the 12022(b) allegation. (Using deadly force during a robbery)

Case Study #2: In re John Z., (2003) 29 Cal. 4th 756

Discussion Question: If the female consents but then withdraws during intercourse, but the male continues, is this a rape?

We granted this case to settle a conflict in Court of Appeal decisions as to whether the crime of forcible rape (Pen. Code, § 261, subd. (a)(2)) is committed if the female victim consents to an initial penetration by her male companion, and then withdraws her consent during an act of intercourse, but the male continues against her will. (Compare *People v. Vela* (1985) 172 Cal. App. 3d 237 [218 Cal. Rptr. 161] (*Vela*) [no rape committed] with *People v. Roundtree* (2000) 77 Cal.App.4th 846 [91 Cal. Rptr. 2d 921] (*Roundtree*) [rape committed].) We agree with *Roundtree* and the Court of Appeal in the present case that a withdrawal of consent effectively nullifies any earlier consent and subjects the male to forcible rape charges if he persists in what has become nonconsensual intercourse.

The juvenile court, after holding a contested jurisdictional hearing on a unitary petition (Welf. & Inst. Code, §§ 602, 777, subd. (a)) filed on behalf of John Z. (defendant), found that he committed forcible rape (Pen. Code, § 261, subd. (a)(2)) and that his previous juvenile court disposition had been ineffective. (Further undesignated statutory references are to the Penal Code.) He was committed to Crystal Creek Boys Ranch. On appeal, defendant contends the evidence is insufficient to sustain the finding that he committed forcible rape. We disagree.

Facts

The following facts are largely taken from the Court of Appeal opinion in this case. During the afternoon of March 23, 2000, 17-year-old Laura T. was working at Safeway when she received a call from Juan G., whom she had met about two weeks earlier. Juan wanted Laura to take him to a party at defendant's home and then return about 8:30 p.m. to pick him up. Laura agreed to take Juan to the party, but since she planned to attend a church group meeting that evening she told him she would be unable to pick him up.

Sometime after 6:00 p.m., Laura drove Juan to defendant's residence. Defendant and Justin L. were present. After arranging to have Justin L.'s stepbrother, P. W., buy them alcohol, Laura picked up P. W. and drove him to the store where he bought beer. Laura told Juan she would stay until 8:00 or 8:30 p.m. Although defendant and Juan drank the beer, Laura did not.

During the evening, Laura and Juan went into defendant's parents' bedroom. Juan indicated he wanted to have sex but Laura told him she was not ready for that kind of activity. Juan became upset and went into the bathroom. Laura left the bedroom and both defendant and Justin asked her why she "wouldn't do stuff." Laura told them that she was not ready.

About 8:10 p.m., Laura was ready to leave when defendant asked her to come into his bedroom to talk. She complied. Defendant told her that Juan had said he (Juan) did not care for her; defendant then suggested that Laura become his girlfriend. Juan entered the bedroom and defendant left to take a phone call.

When defendant returned to the bedroom, he and Juan asked Laura if it was her fantasy to have two guys, and Laura said it was not. Juan and defendant began kissing Laura and removing her clothes, although she kept telling them not to. At some point, the boys removed Laura's pants and underwear and began "fingering" her, "playing with [her] boobs" and continued to kiss her. Laura enjoyed this activity in the beginning, but objected when Juan removed his pants and told defendant to keep fingering her while he put on a condom. Once the condom was in place, defendant left the room and Juan got on top of Laura. She tried to resist and told him she did not want to have intercourse, but he was too strong and forced his penis into her vagina. The rape terminated when, due to Laura's struggling, the condom fell off. Laura

told Juan that "maybe it's a sign we shouldn't be doing this," and he said "fine" and left the room. (Although Juan G. was originally a codefendant, at the close of the victim's testimony he admitted amended charges of sexual battery (§ 243.4) and unlawful sexual intercourse (§ 261.5, subd. (b)), a misdemeanor.)

Laura rolled over on the bed and began trying to find her clothes; however, because the room was dark she was unable to do so. Defendant, who had removed his clothing, then entered the bedroom and walked to where Laura was sitting on the bed and "he like rolled over [her] so [she] was pushed back down to the bed." Laura did not say anything and defendant began kissing her and telling her that she had "a really beautiful body." Defendant got on top of Laura, put his penis into her vagina "and rolled [her] over so [she] was sitting on top of him." Laura testified she "kept . . . pulling up, trying to sit up to get it out . . . [a]nd he grabbed my hips and pushed me back down and then he rolled me back over so I was on my back . . . and . . . kept saying, will you be my girlfriend." Laura "kept like trying to pull away" and told him that "if he really did care about me, he wouldn't be doing this to me and if he did want a relationship, he should wait and respect that I don't want to do this." After about 10 minutes, defendant got off Laura, and helped her dress and find her keys. She then drove home.

On cross-examination, Laura testified that when defendant entered the room unclothed, he lay down on the bed behind her and touched her shoulder with just enough pressure to make her move, a nudge. He asked her to lie down and she did. He began kissing her and she kissed him back. He rolled on top of her, inserted his penis in her and, although she resisted, he rolled her back over, pulling her on top of him. She was on top of him for four or five minutes, during which time she tried to get off, but he grabbed her waist and pulled her back down. He rolled her over and continued the sexual intercourse. Laura told him that she needed to go home, but he would not stop. He said, "just give me a minute," and she said, "no, I need to get home." He replied, "give me some time" and she repeated, "no, I have to go home." Defendant did not stop, "[h]e just stayed inside of me and kept like basically forcing it on me." After about a "minute, minute and [a] half," defendant got off Laura.

Defendant testified, admitting that he and Juan were kissing and fondling Laura in the bedroom, but claimed it was with her consent. He also admitted having sexual intercourse with Laura, again claiming it was consensual. He claimed he discontinued the act as soon as Laura told him that she had to go home.

Issue

Although the evidence of Laura's initial consent to intercourse with John Z. was hardly conclusive, we will assume for purposes of argument that Laura impliedly consented to the act, or at least tacitly refrained from objecting to it, until defendant had achieved penetration. (But see § 261.6 [defining the type of consent at issue under § 261 as "positive cooperation in act or attitude pursuant to an exercise of free will"].) As will appear, we conclude that the offense of forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection.

Vela, supra, 172 Cal. App. 3d 237, held that where the victim consents to intercourse at the time of penetration but thereafter withdraws her consent, any use of force by her assailant past that point is not rape. (*Id.* at pp. 242-243.) The court in *Vela* found "scant authority" on point (*id.* at p. 241), relying on two out-of-state cases which had held that if consent is given prior to penetration, no rape occurs despite the withdrawal of consent during intercourse itself. (See *Battle v. State* (1980) 287 Md. 675 [414 A.2d 1266, 1268-1270]; *State v. Way* 1979) 297 N.C. 293 [254 S.E.2d 760, 762].) According to *Vela*, these cases held that "the presence or absence of consent at the moment of initial penetration appears to be the crucial point in the crime of rape." (*Vela, supra*, 172 Cal. App. 3d at p. 242 [218 Cal. Rptr. 161].)

Vela agreed with these cases, reasoning that "the essence of the crime of rape is the outrage to the person and feelings of the female resulting from the nonconsensual violation of her womanhood. When a female willingly consents to an act of sexual intercourse, the penetration by the male cannot constitute a violation of her womanhood nor cause outrage to her person and feelings. If she withdraws consent during the act of sexual intercourse and the male forcibly continues the act without interruption, the female may certainly feel outrage because of the force applied or because the male ignores her wishes, but the sense of outrage to her person and feelings could hardly be of the same magnitude as that resulting from an initial nonconsensual violation of her womanhood. It would seem, therefore, that the essential guilt of rape as stated in . . . section 263 is lacking in the withdrawn consent scenario." (*Vela, supra*, 172 Cal. App. 3d at p. 243.)

With due respect to *Vela* and the two sister state cases on which it relied, we find their reasoning unsound. First, contrary to *Vela's* assumption, we have no way of accurately measuring the level of outrage the victim suffers from being subjected to continued forcible intercourse following withdrawal of her consent. We must assume the sense of outrage is substantial. More importantly, section 261, subdivision (a)(2), defines rape as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [P] . . . [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." Nothing in section 261 conditions the act of rape on the degree of outrage of the victim. Section 263 states that "[t]he essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime." But no California case has held that the victim's outrage is an element of the crime of rape.

In *Roundtree, supra*, 77 Cal. App. 4th 846, the court recognized that, by reason of sections 261 and 263, "[t]he crime of rape therefore is necessarily committed when a victim withdraws her consent during an act of sexual intercourse but is forced to complete the act. The statutory requirements of the offense are met as the act of sexual intercourse is forcibly accomplished against the victim's will. The outrage to the victim is complete." (*Roundtree, supra*, 77 Cal. App. 4th at p. 851.) *Roundtree* cited several cases from other states either criticizing *Vela* or reaching a contrary conclusion. (See *State v. Crims* (Minn.Ct.App. 1995) 540 N.W.2d 860, 865; *State v. Jones* (1994) 521 N.W.2d 662, 672; *State v. Siering* (1994) 35 Conn. App. 173 [644 A.2d 958, 963]; *State v. Robinson* (1985) 496 A.2d 1067, 1071; see also *McGill v. State* (2001) 18 P.3d 77, 84 [*Vela's* view that sexual assault statute is based on considerations of " 'outrage' " to victim's " 'womanhood' " represents "archaic and outmoded social conventions"]; Note, *Post-Penetration Rape--Increasing the Penalty* (1991) 31 Santa Clara L.Rev. 779, 804-808 [criticizing *Vela* and advocating legislation to punish forcible and nonconsensual postpenetration intercourse as second degree rape].)

As the Court of Appeal in this case stated, "while outrage of the victim may be the cause for criminalizing and severely punishing forcible rape, outrage by the victim is not an element of forcible rape. Pursuant to section 261, subdivision (a)(2) forcible rape occurs when the act of sexual intercourse is accomplished against the will of the victim by force or threat of bodily injury and it is immaterial at what point the victim withdraws her consent, so long as that withdrawal is communicated to the male and he thereafter ignores it."

In the present case, assuming *arguendo* that Laura initially consented to, or appeared to consent to, intercourse with defendant, substantial evidence shows that she withdrew her consent and, through her actions and words, communicated that fact to defendant. Despite the dissent's doubt in the matter (dis. opn., *post*, at pp. 764-765, 767), no reasonable person in defendant's position would have believed that Laura continued to consent to the act. (See *People v. Williams* (1992) 4 Cal.4th 354, 360-361 [14 Cal. Rptr. 2d 441, 841 P.2d 961] [requiring reasonable and good faith belief, supported by substantial evidence, that the victim voluntarily consented to intercourse]; cf. CALJIC No. 10.65 [same].) As the Court of Appeal below observed, "Given [Laura's testimony], credited by the court, there was nothing

equivocal about her withdrawal of any initially assumed consent."

Vela appears to assume that, to constitute rape, the victim's objections must be raised, or a defendant's use of force must be applied, *before* intercourse commences, but that argument is clearly flawed. One can readily imagine situations in which the defendant is able to obtain penetration before the victim can express an objection or attempt to resist. Surely, if the defendant thereafter ignores the victim's objections and forcibly continues the act, he has committed "an act of sexual intercourse accomplished . . . [P] . . . against a person's will by means of force . . ." (§ 261, subd. (a)(2).)

Defendant, candidly acknowledging *Vela's* flawed reasoning, contends that, in cases involving an initial consent to intercourse, the male should be permitted a "reasonable amount of time" in which to withdraw, once the female raises an objection to further intercourse. As defendant argues, "By essence of the act of sexual intercourse, a male's primal urge to reproduce is aroused. It is therefore unreasonable for a female and the law to expect a male to cease having sexual intercourse immediately upon her withdrawal of consent. It is only natural, fair and just that a male be given a reasonable amount of time in which to quell his primal urge . . ."

Decision

We disagree with defendant's argument. Aside from the apparent lack of supporting authority for defendant's "primal urge" theory, the principal problem with his argument is that it is contrary to the language of section 261, subdivision (a)(2): Nothing in the language of section 261 or the case law suggests that the defendant is entitled to persist in intercourse once his victim withdraws her consent.

In any event, even were we to accept defendant's "reasonable time" argument, in the present case he clearly was given ample time to withdraw but refused to do so despite Laura's resistance and objections. Although defendant testified he withdrew as soon as Laura objected, for purposes of appeal we need not accept this testimony as true in light of Laura's contrary testimony. (E.g., *People v. Johnson* (1980) 26 Cal.3d 557, 578 [162 Cal. Rptr. 431, 606 P.2d 738].) As noted above, Laura testified that she struggled to get away when she was on top of defendant, but that he grabbed her waist and pushed her down onto him. At this point, Laura told defendant that if he really cared about her, he would respect her wishes and stop. Thereafter, she told defendant *three* times that she needed to go home and that she did not accept his protestations he just needed a "minute." Defendant continued the sex act for at least four or five minutes after Laura *first* told him she had to go home. According to Laura, after the *third* time she asked to leave, defendant continued to insist that he needed more time and "just stayed inside of me and kept like basically forcing it on me," for about a "minute, minute and [a] half." Contrary to the dissent's concerns (dis. opn., *post*, at pp. 767-768), the force defendant exerted in resisting Laura's attempts to stop the act was clearly ample to satisfy section 261, subdivision (a)(2). (See *People v. Mom* (2000) 80 Cal.App.4th 1217, 1224 [96 Cal. Rptr. 2d 172], and cases cited [force "substantially different from or substantially greater than that necessary to accomplish the rape itself"].)

Although the dissent herein would prefer more guidance for future cases, this is an appeal from a juvenile court adjudication rather than a jury trial, and the briefing does not address what pinpoint instructions, if any, might be appropriate in these withdrawn consent cases. Accordingly, we do not explore or recommend instructional language governing such matters as the defendant's knowledge of the victim's withdrawal of consent, the possibly equivocal nature of that withdrawal, or the point in time at which defendant must cease intercourse once consent is withdrawn.

We disapprove *Vela, supra*, 172 Cal. App. 3d 237, to the extent that decision is inconsistent with our opinion. The judgment of the Court of Appeal is affirmed.

Case Study #3: People v. Castro (2006) , 138 Cal. App. 4th 137

Discussion Question: Should a child molester be convicted of false imprisonment or kidnapping?

Facts

During the week of October 13, 2003, around 6:50 a.m., then 16-year-old Diana N. was walking to a bus stop on her way to high school. She noticed that a white van was being driven slowly near her. The driver, whom Diana identified in court as appellant, called out to her, "Hey, hey," but Diana ignored him.

On October 21, as Diana was walking to her bus stop, appellant slowly drove by in a burgundy car. He kept asking Diana, "Hey, hey, do you want a ride? Do you want a ride?" Diana tried to ignore appellant, but eventually turned around and said, "No, no." She then heard appellant say, "I'll give you \$ 10 if you let me lick your thing." Very upset, Diana replied, "How could you say that? You're a dirty man." She kept walking, but then her arm was grabbed and she was pulled toward appellant.

Appellant was originally charged in count 1 with kidnapping (§ 207, subd. (a)). At the end of the preliminary hearing the prosecutor moved to amend the complaint to conform to proof to allege the charge of attempted kidnapping (§§ 207, subd. (a),664) in count 1. That was the charge alleged in count 1 of the information filed shortly thereafter.

Prior to submission of the case to the jury, the trial court agreed to provide requested instructions on what it termed the "lesser included" offenses of felony false imprisonment, assault and battery. The jury found appellant not guilty of attempted kidnapping but found him guilty of each of the lesser offenses. The court struck the convictions for assault and battery in lieu of appellant's conviction for felony false imprisonment.

Further facts will be presented in the discussion.

Issue

Appellant effectively admits there is sufficient evidence to establish that he was guilty of false imprisonment, but argues the evidence is insufficient to establish that he used more force than reasonably necessary to restrain the victim to elevate the crime of false imprisonment from a misdemeanor to a felony.

Section 237, subdivision (a), provides as follows: "False imprisonment is punishable by a fine not exceeding one thousand dollars (\$ 1,000), or by imprisonment in the county jail for not more than one year, or by both that fine and imprisonment. [Misdemeanor false imprisonment.] If the false imprisonment be effected by violence, menace, fraud, or deceit, it shall be punishable by imprisonment in the state prison. [Felony false imprisonment.]"

"Force is an element of both felony and misdemeanor false imprisonment. Misdemeanor false imprisonment becomes a felony only where the force used is greater than that reasonably necessary to effect the restraint. In such circumstances the force is defined as 'violence' with the false imprisonment effected by such violence a felony." (*People v. Hendrix* (1992) 8 Cal.App.4th 1458, 1462 [10 Cal. Rptr. 2d 922].)

"When a jury's verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it, and when two or

more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury. It is of no consequence that the jury believing other evidence, or drawing different inferences, might have reached a contrary conclusion." (*People v. Brown* (1984) 150 Cal. App. 3d 968, 970 [198 Cal. Rptr. 260].) We turn to a review of the evidence on the issue.

Diana testified about the encounter as follows:

"Q. So what did you do?

"A. I kept on walking. And when I came crossing through here, that's when I heard him say, 'Hey, hey, do you want a ride? Do you want a ride?'

"Q. Then what happened?

"A. I remember turning around and said, 'No, no,' and kept on ignoring him and trying to walk. And I heard him tell me, 'I'll give you \$ 10 if you let me lick your thing.'

"Q. How did you feel when the defendant said this to you?

"A. I was really upset.

"Q. Why was that?

"A. Because I didn't want him to talk to me that way.

"Q. And what did you do?

"A. I turned around and told him in Spanish, 'How could you say that? You're a dirty man.'

"Q. And then what did you do?

"A. I kept on walking. And that's when I felt something on my hand, on my forearm. [P] ... [P]

"Q. Now, what grabbed your arm?

"A. I felt an arm grab me and holding me around.

"Q. And which direction were you facing when you felt the person grab you?

"A. I was facing forward first, because I was walking.

"Q. And after the defendant grabbed you, what happened at that point?

"A. He turned me. *And then he, like, gave me like a little tug, like a pull toward him.* And I guess I as, like, looking at my hand. It was something in the matter of seconds. I just looked at my hand briefly, and I pulled away.

"Q. Now, when you say he turned you, *was that back towards the direction of his car?*

"A. Yes.

"Q. Were you turning--you're facing one direction. *Did you turn all the way so that you were facing in the opposite direction?*

"A. Yes.

"Q. *And were you moved at all towards the direction of the defendant's car?*

"A. I took a couple of steps, *because he did pull me.*

"Q. And once you were pulled in the direction of the car, what was your direction?

"A. I pulled away fast.

"Q. And what did you do then?

"A. *I started running.*" (Italics added.)

Appellant relies upon the case of *People v. Matian* (1995) 35 Cal.App.4th 480 [41 Cal. Rptr. 2d 459], to support his argument that his conviction should have been no more than misdemeanor false imprisonment. There, the defendant was convicted of three crimes: sexual battery by restraint, felony false imprisonment, and genital penetration with a foreign object. In the published portion of the opinion the Court of Appeal discussed only the conviction for felony false imprisonment, and it concluded the evidence was insufficient to support the conviction. It reduced the conviction to misdemeanor false imprisonment. Because the opinion was only partially published, it did not address all of the facts underlying each of the crimes apparently leading up to the false imprisonment. It summarized as follows: "The evidence supporting the conviction for felony false imprisonment consists of the just completed sexual assaults during which appellant squeezed Olga E.'s breast sufficiently hard to cause her pain, and possibly even bruising. She testified after the ordeal she had her husband take photos of her breast but the

photos did not turn out. After the assaults she prepared to go by gathering up her bookbag. Appellant then grabbed her arm and yelled at her not to go. He yelled at her, 'nothing happened' and told her to go wash her face. She then retreated to a chair and appellant went into an office nearby within view of Olga E. Each time she got up from her chair, appellant glared at her and got up out of his chair to approach her. She testified she was afraid, did not want him to touch her again and sat back down." (*Id.* at p. 485.) The court then discussed various cases addressing false imprisonment by menace. After reviewing the cases, it concluded as follows:

"The facts in the case at bar do not support a finding the false imprisonment was effected by menace. The only evidence of 'menace' or 'implied threat of harm' in this case would have to be based on appellant's earlier sexual assaults causing pain and possible injury and later glaring at her while getting out of his chair and approaching her each time she tried to leave. Based on the foregoing authorities however, this evidence is inadequate to establish an express or implied threat of harm. There was no evidence of a deadly weapon. Nor is there anything in the record to indicate the defendant ever verbally threatened Olga E. with additional physical harm. Similarly, there was no evidence to suggest appellant raised his fist or otherwise made any threatening movements suggesting harm each time Olga E. got out of the chair to leave.

"Based on the lack of evidence of either violence or menace in restraining Olga E. against her will, we must reverse appellant's conviction of felony false imprisonment." (*People v. Matian, supra*, 35 Cal.App.4th at pp. 486-487.)

Here, appellant argues that if the facts in *Matian* do not rise to the level of felony false imprisonment, his encounter with Diana cannot so qualify. We do not agree. We have trouble understanding the conclusion the Court of Appeal reached in *Matian*. While the opinion does not discuss the underlying sexual crimes, it is clear that the false imprisonment followed immediately after the forcible sexual assaults during which appellant squeezed the victim's breast so hard as to cause her pain and possibly even bruising. Thereafter, the perpetrator yelled at the victim "nothing happened" attempting to intimidate her into not reporting the incident. He then told her to wash her face and she took a seat nearby, within view of the perpetrator who was in his office. When the victim attempted to leave, the perpetrator glared at her and got out of his chair as if he was going to approach her. Given the immediately preceding sexual assaults, and the command to her that "nothing happened," it is reasonable to conclude the victim was intimidated by the perpetrator. In fact, she testified that she was afraid and did not want him to touch her again. We have no problem with concluding the evidence addressed in the published portion of the opinion supported the conviction for felony false imprisonment by menace, if not violence. Thus, we do not agree with the result in *Matian*, or with appellant's argument that comparison with the facts in *Matian* requires reversal of his conviction for felony false imprisonment.

In the present case, appellant grabbed the victim and turned her around. If that is all that had happened, we would agree with appellant that his conduct amounted only to misdemeanor false imprisonment. But appellant pulled her toward his car, an act more than what was required to stop her and keep her where she was located. The record is silent whether the victim, when testifying, used body language which may have given the jury additional information than what is contained in the sterile record we have to review. In any event, we conclude the evidence that appellant used force to pull the victim toward his car was sufficient to establish force above that required for misdemeanor false imprisonment. Thus, the conviction for felony false imprisonment is supported by sufficient evidence.

Jury Instruction on Misdemeanor False Imprisonment

Appellant argues that the trial court committed prejudicial error by not including in its charge to the jury an instruction on the lesser offense of misdemeanor false imprisonment.

During oral argument we inquired of counsel whether the allegations of the information were sufficient to bring misdemeanor false imprisonment within the scope of lesser included offenses to the offense charged, attempted kidnapping. Appellant's counsel pointed out that the information alleges that appellant "did unlawfully, attempt to forcibly and by instilling fear, steal, take, hold, detain and arrest DIANA [N.] ... and *did take* the said DIANA [N.] into ... another part of Los Angeles County." (Italics added.) He argued this was sufficient to trigger the court's *sua sponte*² duty to instruct on misdemeanor false imprisonment as well as the other lesser offenses for which instructions were given. We requested that the parties file supplemental briefs on this issue. They have done so.

"Under the accusatory pleading test, ... we look ... to whether the accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime." (*People v. Moon* (2005) 37 Cal.4th 1, 25-26 [32 Cal. Rptr. 3d 894, 117 P.3d 591].) Respondent concedes that test has been met here, and we accept the concession. Respondent argues that the failure of the trial court to instruct on misdemeanor false imprisonment was harmless. We cannot agree.

Reversal is warranted if "it appears 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred. [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 149 [77 Cal. Rptr. 2d 870, 960 P.2d 1094].) We have previously concluded there is sufficient evidence to support the conviction for felony false imprisonment. But the facts contained within the sterile record are not so strong as to permit us to conclude the error was not prejudicial. The facts are sufficiently ambiguous that a conviction for misdemeanor false imprisonment might also have been justified, depending on the actual force appellant used in drawing the victim toward himself. Thus we cannot say that the instructional error in this case is harmless. Accordingly, we reverse the conviction on count 1.

Decision

Defendant Rodolfo Castro was convicted of felony false imprisonment (Pen. Code, § 236) as well as child molestation (§ 647.6, subd. (a)). He appeals his conviction for felony false imprisonment on the ground that there was insufficient evidence at trial to support the conviction. In the alternative, he contends the trial court erred in failing to instruct, *sua sponte*, on the lesser included offense of misdemeanor false imprisonment. We agree the court erred in failing to provide an instruction on misdemeanor false imprisonment, a point conceded by respondent, and we cannot conclude the error was harmless. The judgment is reversed and the matter is remanded to the trial court for further proceedings with regard to count 1, and resentencing.

² *Sua Sponte*: Latin for "of one's own accord; voluntarily." Used when the court addresses an issue without the litigants having presented the issue for consideration. Most frequently used when the court determines that jurisdiction is not proper even though both parties have agreed to appear in the court. http://www.law.cornell.edu/lexicon/sua_sponte.htm

Answers to Review Questions

Chapter 10

1. What are the major differences between the crime of assault and the crime of battery?

A. An assault, in California law, is defined in PC 240.

*Assault Defined: An assault is an **unlawful attempt**, coupled with a **present ability**, to commit a **violent injury on the person of another**. In Assaults, the elements include the attempted battery or any threatened battery, with the clear intent to injure or harm another. A battery is **any** willful and **unlawful use of force or violence upon the person of another**. Battery can also include what may appear to be some very minor unlawful acts of touching, such as even a touch, a caress, a kiss, or it can escalate to a grab, a grope or fondle. However, remember that it is the victim's perception of what has occurred, and that that touching was unwanted and thus illegal.*

2. What are the differences between kidnapping and unlawful imprisonment?

A. *Kidnapping includes forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person... and carries.(asportation). them (off) for specific purposes. Unlawful Imprisonment does not include the movement portion or "asportation."*

3. Describe the range of "touching" that would be considered "battery."

A. *It can be virtually anything, that is "unwanted" touching.*

4. Would the use of pepper gas or "tear gas" be considered a "deadly weapon."

A. *Yes, they can be, since the victim is at least temporarily disabled and unable to defend themselves or escape. People v. Blake (2004) 117 Cal.App.4th 543*

5. What does "asportation" mean?

A. *The key to kidnap cases is not just whether or not the victim was moved in the course of the kidnapping, but that the movement must be beyond merely incidental and thus must be "substantial." The term for this movement is called **asportation**.*