Sex Case Law

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By

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Thanks to wild white tigers, and hiders; out there. Dog, A.C., Alexandria, Anaconda, Cobra, snakes of all kinds, players, ® dog, MW, the Bridge, V.P., Ing, j&t, tats, taters, and reptiles. Trees, Chops, and Stickie. All ships and forms.

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INTRODUCTION

Sex is a craft, like family and ethics. Case law is also a craft. A craft is developed at its inception from fibers of truth, fairness, and desire. To craft an object is to assemble well-fashioned parts to produce a final element, product, or design. Truth reflects actuality; fairness embodies harmony; and desire may be effectuated. Truth counterposes misrepresentation; fairness negates dissonance; and desire overcomes disregard. Cases are pieced together within the court system. Sex can be socialized, and is subject to legal regulation (e.g., criminalization). In the legal arena, sex becomes a matter of civil and criminal agendas.

Law may be used to facilitate social unity. For example, it may cause some people to conform to group mentalities about sex and sexuality. Sociosexuality, emotions, intimacy, and enforcement strategies may be fragile. Family life, including marriage, decency, and privacy, must be preserved. Erotic displays have been alleged to harm traditional notions of sexuality. Although sex itself may not be harmed, it may be misunderstood and used to harm. Erotica and pornography may be tolerated in free societies; and they are brought into acceptable limitations for the greater good of humanity.

Society wishes to be seen as a tapestry. Sexual conduct may not be without limitations despite the fact that individual sexual conduct may not fit into majoritarian patterns. Private individual sexual conduct may be protected. Yet, it may be seen as a weak link in the social fabric, a turning point, a dark spot, or an unpolished edge. Fringe sexual conduct and sexualities may confront norms, and therefore, seem untruthful, undeserving, and harmful. Deviants may perturb some people, who wish for others to follow forbearers.

Sex Case Law is a collection of cases in which courts grapple with the United States Constitution. They rely on the First, Fifth, Tenth, and Fourteenth Amendments to find and uphold privacy rights while maintaining public decorum using state police power (e.g., morality) and municipal authority. The Amendments relied on by courts are the following:

> Amendment I
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or

of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment X
The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Amendment XIV
Section 1
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Courts concisely crunch these Amendments to prevent the public from taking offense to sexual conduct or impeding constituents' freedoms. The law protects individuals and classes of people (e.g., minors) from emotional, physical, and social harm.

Six chapters in *Sex Case Law* provide abundant cases directly addressing sex and conduct in private and the public sphere. Chapter One introduces consent and presents aspects of sexual authority affecting many people; for example, use of birth control and nonconsensual insemination (No Coin); conjugal visits in prison; sodomy; and digital penetration. Chapter Two presents courts' persuasive and binding rulings on public indecency, sexual harassment, sexual conduct, and public speech. The public's interests are considered in light of officers' testimony, celebrities, family values, and good taste. Chapter Three's cases show how far courts and legislatures will go to defend minors. Minority is prized in America, and law enforcement, protective services, and parents strenuously attempt to conserve minors' innocence. This chapter presents cases dealing with sensitive topics, such

as child pornography, sexual abuse, consent, and right to have access to nude pictorials. Right to privacy is explained in Chapter Four in specialized subtopics, including ownership of animals' sexual organs; domestic violence; and sexual expectations. Fantasy is an unsettled area of law discussed throughout Chapter Five. It is a frontier, in part, because of the expansion of obscenity, accessibility of pornography, and Internet. Courts have been forced to deal with fantasies, such as necrophilia. The court continues to uphold the right privately to fantasize (e.g., view obscenity), but not nonconsensually act out fantasies. Chapter Six presents authoritative case law on obscenity. The court has been instrumental in advocating for morality and limiting protected speech. These are key cases.

ONE

CONSENT AND AUTHORITY

Condoms

Chapter One discusses sexual authority, voluntariness, and consent. Condom use correlates with consent and nonconsent. Courts have long weighed the significance of condom use in cases of rape. Evidence may persuade juries that condoms were requested or used because nonconsensual or consensual sexual relations occurred. Case law dating to early last century has consistently demonstrated that use of condoms is not direct evidence that a sex crime occurred or that a victim consented to sexual intercourse.

Seaton v. State
151 Ark. 240 (1921)

[*241] Calvin Seaton prosecutes this appeal to reverse a judgment of conviction against him under sec. 2720 of Crawford & Moses' Digest for carnally knowing a female under the age of sixteen years.

At the trial below, the defendant denied that he had had sexual intercourse with the prosecuting witness, and now earnestly insists that the evidence for the State is not sufficient to warrant a conviction.

The prosecuting witness was the step-daughter of the defendant, and was past 14 years of age when she [*242] testified at the trial of the case in September, 1921. According to her testimony she was past thirteen years of age when the defendant, who was her step-father, had sexual intercourse with her. She had gone with her step-father to pick huckleberries near their home in Lonoke County, Ark., in July, 1920, when the offense was committed. She testified further that her step-father had intercourse with her in their pasture on another occasion. She also testified that her step-father had had intercourse with her once or twice a week at other times in Lonoke County, Ark.

On cross-examination she admitted that she was mistaken about this last statement, but reaffirmed her testimony to the effect that her step-father had

had intercourse with her on the two occasions named in her examination-in-chief.

Her testimony was sufficient to warrant a conviction. It is well settled in this State that in the prosecution for carnally knowing a female under sixteen years of age, a conviction may be had upon the uncorroborated testimony of the prosecutrix alone. *Ragsdale* v. *State,* 132 Ark. 210, 200 S.W. 802, and *Jackson* v. *State,* 142 Ark. 96, 218 S.W. 369.

The next assignment of error is that the judgment should be reversed because the court allowed a sister of the prosecuting witness to testify to statements made to her by the prosecuting witness.

No objection was made by the defendant in the court below to the evidence in this respect, and we cannot consider any alleged error on this account on appeal. *Cegars* v. *State,* 150 Ark. 648, 235 S.W. 36.

Error is also assigned with regard to the admission of testimony of the sister of the prosecuting witness as follows:

> Q. Did Mr. Seaton ever exhibit any rubbers or condoms to you?
> A. Yes, sir.
>
> Q. How many did you ever see?
> We object to that.
> [*243] COURT--Let her answer.
> Exceptions saved by defendant.
>
> Q. Did you ever see him with any rubbers?
> A. Yes, sir.
> A. He bought some twice.
>
> Q. Do you know what he did with them--tell the jury what he did with some of them.
> COURT--Not unless they were used with reference to the other witness, Maggie Mae Parker.

It will be observed that defendant objected only to the testimony as to the number. The witness never answered the question propounded to her relative to how many she saw. She did not tell what he did with them. All other questions and answers were not objected to, and defendant has no right to complain of the admission of the testimony at this time.

We find no prejudicial error in the record, and the judgment will be affirmed.

State v. Hart
186 N.C. 582 (1923)

Criminal prosecution tried upon an indictment charging H. S. Hicks and Robert J. Hart with having carnal knowledge of a female child over 12 and under 14 years of age, who had never before had sexual intercourse with any person. C. S., 4209.

The alleged offense of which the defendant was convicted occurred on 6 February, 1923, while the Superior Court of Granville County was in session. There was a preliminary hearing on the following day, before a justice of the peace, and both Hicks and Hart were bound over to the Superior Court. The case against Hart was tried in the Superior Court at the term then in session. Hicks, who was engaged in some highway work at Oxford, failed to appear and forfeited his bond. The material facts are as follows:

On the night of the alleged offense the defendant Hart, a boy 16 years of age, was returning to his work at Lyon's Drug Store, when he saw Hicks and a companion named Gill engaged in a conversation on the street. He stopped to talk with them, and very soon Gill mentioned the name of the prosecutrix. Hicks asked the defendant Hart if he knew the girl, and requested that he go with him in his one-seated Ford coupe to her home and they would bring her to the drug store for a drink. This Hart agreed to do.

When they reached the home of the prosecutrix, Hicks remained in the automobile while Hart went to the door and asked for the girl. They had some conversation about going to the drug store; and, after obtaining her mother's consent, the prosecutrix got into the car with Hicks and Hart, she sitting on the seat between them, and Hicks drove away. When they reached the corner at which it was necessary to turn in order to go to the drug store, Hicks drove his car in the opposite direction. Hart asked if they were not going to the drug store. Hicks said they did not want a drink, and the prosecutrix said that she would just as soon ride around.

As they were riding out College Street, Hicks and the prosecutrix engaged in a conversation which Hart could not hear on account of the noise of the machine. When they had passed out beyond the hospital and across the railroad, Hicks stopped the car on the side of the road and asked Hart if he had a rubber. (The prosecutrix said on her direct examination in the Superior Court that Hart asked Hicks about a rubber, but on her cross-examination she said she did not know which one asked the question. On her examination before the magistrate she said Hicks made the inquiry, and this is in accord with Hart's testimony.)

From this point on there is a conflict in the evidence for the State and that of the defendant.

The prosecutrix testified that Hicks offered to get out of the car first, but that Hart said no, he would get out, and he did. Hicks then had sexual intercourse with the prosecutrix without any resistance on her part, as she testified: "I did not attempt to resist. He was in the car with me about seven minutes. Hicks got up and did not say anything. Robert Hart was then standing at the door of the car. Hicks got out of the car. Hart got in the car. He said he was going to do what Hicks did. I told him that he was not, and he blew the horn and Hicks got in and turned the car around and we came back to town."

Hart testified that he had no knowledge of Hicks' ulterior purpose until he asked about a rubber, and that he then told Hicks that if he was going to do anything like that he would get out of the car and go back to town. He did get out and had started back when he decided that, as he had gone to the girl's home and asked her to go with them for a drink, he ought not to leave her; whereupon he turned around and went back to the car and they all three came back to Oxford. When they reached the home of the prosecutrix, Hart helped her out of the car and went to the door with her. She asked him what excuse she should give her mother for staying out so late. Hart suggested she might say they were detained at the store on account of a rush and he was busy waiting on customers.

The prosecutrix told her mother, soon after she reached home, that she had been abused, but she stated to her father that Hart had treated her like a gentleman. He did not have intercourse with her. The prosecutrix further testified that she was 13 years old and had never had intercourse with any other person; that she had not been introduced to Hicks before that night, though she had talked with him on the street.

Hart was convicted of aiding and abetting Hicks in the commission of the alleged offense and sentenced to five years in the State's Prison.

Consent to penetrate may be conditioned. Consent to have sex is freely given and may be understood to be withdrawn when the terms of an agreement to have sex have been violated. Unprotected sex vitiates consent when consent is conditioned on it. Nonpayment also vitiates consent when payment is stipulated to be a condition of consent. Consent granted in advance may be vitiated by implied threats; and therefore, withdrawal of consent may not be expressed. Request that an aggressor wear a condom or withdraw prior to insemination does not grant consent for sex. Consent to inseminate may not be presumed in the absence of expressed consent or nonconsent; and may or may not correlate with consent to penetrate. Penetration during ejaculation may be rape; insemination may be rape or

object rape; and ejaculate may be used to sexually assault. An aggressor's promise to prevent (e.g., vasectomy) or avoid procreation (e.g., *douche*) is not the equivalent of withdrawal after a victim has stipulated, requested, or demonstrated that sexual contact (e.g., penetration) should conclude. The force of penetration is sufficient to constitute forcible penetration; and use of force (e.g., weapon) is one reason why a victim need not express withdrawal of consent. Males, females, trans-people, and animals may cause or be subjected to unwanted or nonconsensual insemination (No Coin).

People v. Enloe
2015 Cal. App. Unpub. LEXIS 3666 (2015)

Four very young prostitutes, who did not know each other, testified to a remarkably similar modus operandi: defendant Patrick Thomas Enloe picked them up in his car or van; drove them to a dark and secluded location against their will; verbally demeaned and threatened them; forcibly raped them, sodomized them, and/or digitally penetrated their vaginas, maybe with a weapon; refused to use a condom; and did not pay them. His defense was consent. He was charged with 18 counts and various weapons enhancements against the four victims for sexual assaults in 2008, 2009, and 2011. A discriminating jury convicted him of 12 counts against three of the victims, acquitted him of 3 counts but found him guilty of a lesser included offense on one of the acquitted counts, and hung on 3 counts against one of the victims. The trial court sentenced him to state prison for a six-year determinate term to be served consecutively to a 175-year indeterminate term. Defendant asserts instructional error, insufficiency of the evidence, prosecutorial misconduct, ineffective assistance of counsel, and sentencing [*2] error. Finding no reversible error, we affirm the judgment.

FACTS

Sadly, defendant preyed on young prostitutes. Not surprisingly, these young girls lied to the police, afraid that their children would be taken from them, they would be prosecuted for prostitution, or that the man who raped them would escape punishment. All but one had drugs in their systems when he raped them. The prosecutor explained to the jury that he could not choose his victims and he acknowledged their shortcomings. Nevertheless, each victim had a painfully disturbing story to tell the jury. We describe their ordeals chronologically.

A.D.—February 7, 2008

Sixteen-year-old A.D. placed an ad for her services as a prostitute on craigslist.com. On February 7, 2008, defendant responded by phone, offering her $100 for a "car date." A car date, according to A.D., meant he wanted to have sex in his car. Although she preferred a safer venue, she agreed but insisted that sex would be "covered," that is, he needed to use a condom. They agreed to meet at the intersection of Bell and Austin for a car date.

Defendant picked her up at the assigned intersection in a red car. Although their encounter seemed amiable at first, defendant's [*3] demeanor changed abruptly once he parked in a gated area between two buildings. According to A.D., defendant appeared angry and told her, "We can do it the easy way or the hard way." He reached for something in the backseat that was covered in a blanket and appeared to A.D. to be a bat. Then he climbed over the console and kneeled on the floorboard between her legs. He told her he was not going to pay her and she had to do what he told her to do.

Defendant pulled out his penis and demanded that A.D. remove her pants. As he started to pull them down, she stated, "[W]hoa, whoa, let me get the condom." He refused to use the condom and said, "[D]on't make me hurt you." He was playing with his penis with one hand and playing with her vagina with other. He put his fingers into his mouth to produce some kind of green spit or mucus on his fingers and then reinserted his fingers into her vagina.

Defendant told A.D. to suck his penis, but she refused. She explained she did not "suck dick." He became frustrated when he could not get an erection and demanded that she show him her breasts. He groped one of her breasts while he masturbated. He then inserted his penis into her vagina and, after five or six thrusts, [*4] removed his penis and ejaculated on his hand, the car seat, and A.D.'s leg. He got out of the car and put whatever was in the backseat into the trunk. He drove out of the complex and dropped her off.

A.D. walked home. On the way, she called the police. She candidly admitted at trial that many of the initial statements she made to the responding officers were lies. She did not admit she was a prostitute for fear that her assailant would not get into trouble for raping her. And she told a series of lies about how defendant got her number, the directions she gave him, how he entered the car from the passenger side after they parked, and that she had accepted cash for sex only from friends.

While performing a sexual assault examination, a nurse practitioner observed a four- to five-millimeter tear to the vaginal opening that was consistent with vaginal penetration.

Ashley D.—February 17, 2009

Twenty-year-old Ashley D. worked as a prostitute out of the Tradewinds Motel. She lived in a room at the motel with her child and the child's father, and needed money to pay for the room. They would leave the room when she was working. Shortly after 5:00 a.m. on a cold and rainy February morning in 2009, [*5] she walked out of a convenience store and saw defendant in the driver's seat of a red car parked in front of the store. He rolled down the window and asked her if she wanted a ride. Hoping that he was going to be a customer, she got into his car.

Ashley gave defendant directions to her motel room, but he ignored them, pointed a semiautomatic handgun at her, and said, "[S]hut the fuck up, do what the fuck I say, and I'll let you go, I'm gonna fuck you." He pulled into a secluded area behind some industrial buildings and parked in the loading dock behind a Tough Shed business. He parked so close to the wall that Ashley could not get out of the car when she tried to open the door.

Defendant instructed Ashley to take off her pants and to put her legs up on the dashboard. He climbed over to the passenger side and situated himself between her knees. He fumbled with his penis but was unable to put it into her vagina because he was not erect. He told her, "I'm going to fuck you, you little dirty black bitch." He penetrated her vagina with his penis for three to five minutes, but his semiflaccid penis fell out three or four times. He ejaculated and then put the barrel of the gun partially inside her [*6] vagina, far enough to make it hurt. He said, "You know you like it, you dirty little black bitch."

Defendant got back into the driver's seat, and when asked why he had raped her, he responded, "[B]ecause I can." As a garbage truck approached, defendant pulled out of the loading dock, stopped the car, and told Ashley to get out. She ran to the garbage truck after defendant drove away and told the truck driver she had been raped, asked for a pen and paper, and wrote down what she could remember of defendant's license plate number. She was anxious to get back to her room, and she called the father of her baby from a pay phone while en route to the motel. After meeting him, she used his cell phone to call the police. She reported the rape, but although she told the responding officers she was a prostitute, she lied to them about not working that morning and made up a story about whom she was with. She was afraid the police would think that her baby's father was her pimp.

The garbage truck driver corroborated Ashley's testimony that she had approached him, told him she had been raped, and asked for a pen and paper or cell phone to record the license plate number. A nurse practitioner testified that [*7] during a sexual assault examination, Ashley told her that defendant held the muzzle of the gun to her vagina but it did not go into the vaginal canal. A deputy sheriff found a knife in defendant's car, but he did not find a gun either in his car or at his house. A detective, executing a search warrant at the home of defendant's parents, found a semiautomatic pistol in a locked cabinet with a bill of sale dated January 22, 2009.

Ashley admitted that she did not stop prostituting after defendant raped her. She explained that she needed to continue prostitution in order to survive. She also admitted she had used marijuana, methamphetamine, and amphetamine prior to the rape.

Amanda D.—August 29, 2011

The mother of three young children, 22-year-old Amanda D. was prostituting herself to buy diapers on the night of August 29, 2011. Her husband had just been incarcerated. Defendant pulled into the parking lot where Amanda was advertising her availability and told her he was willing to pay $100 for vaginal and oral sex. She got into his van expecting to have sex with him for money.

Defendant started driving, but when Amanda told him she wanted to go in a different direction, he took out a knife [*8] and held it to her neck. Pulling into a business complex, he threatened, "Bitch, I'm going to fucking kill you. You're going to have sex with me. You're going to do this and everything I fucking say." They encountered a large yellow dog, barking loudly. Defendant appeared angry and threatened to kill the dog. Amanda was crying, explaining that she had three children and asking why he was doing this.

After parking, defendant ordered Amanda to the back of the van. He refused to use the condom Amanda offered. He grabbed her hair, told her to take off her black leggings, and demanded that she orally copulate him. She was crying, and continued to cry, as he forced his penis into her mouth and then into her vagina. Amanda estimated that during the initial rape, defendant's penis fell out about five times and he had to reinsert it.

After sexual intercourse, defendant announced that he would "fuck [her] in [the] ass." He put his penis into her anus, but because she was screaming and crying in pain, he put it back into her vagina and ejaculated. Defendant took her cell phone, refused to return it, and forced her out of the van before

she could put her shoes on. He threw her boots out of the window [*9] and sped away.

Hysterical, Amanda approached another driver, who had parked in a driveway across the street, and asked to borrow a phone. The driver called 911 as Amanda curled up in a fetal position on the driveway. Like A.D. and Ashley, Amanda denied she was working as a prostitute and concocted an elaborate, but false, story about how she had ended up in such a dangerous predicament. She testified that she told these lies because she was afraid child protective services would take her children if she were to admit she was a prostitute. At trial, she admitted to smoking marijuana the day of the rape and to having used cocaine two days earlier.

During an interview a few days later, Amanda agreed to tell the truth. She told the detective that defendant forced her to orally copulate him, put his fingers into her vagina, put his penis into her vagina, put his penis into her anus, and then put his penis back into her vagina. She also reported that during the rape, defendant forced her to expose one of her breasts and he grabbed it. At trial, she could not remember if he had put his finger into her vagina or grabbed her breast. The detective went to the scene and saw a dog in a trailer in [*10] the far corner of the complex. Surveillance video taken on the night of the attack provided additional corroboration—a van driving to the end of the complex and, after the van made a U-turn, a dog chasing the vehicle.

A sexual assault nurse examiner testified that Amanda told her defendant had, among other things, put his finger into her vagina. The examiner did not see any injuries to Amanda's vagina or anus.

An expert in DNA analysis testified that the major contributor to the sperm fractions found on the vaginal swabs taken from Ashley and Amanda matched defendant's DNA profile.

India H.—September 16, 2011

India H., a 16-year-old prostitute, advertised her services on an Internet site. She testified that defendant responded to her ad, breached the terms of their agreement, and forced her to orally copulate him and to have sexual intercourse. Defendant was charged with sexual battery, oral copulation, and raping India. The jury was unable to reach a verdict on those counts and the trial court declared a mistrial.

The Defense

The defense was consent. Defendant did not testify. His lawyer vigorously cross-examined each of the victims, exposing their drug use, their prior inconsistent statements, [*11] their involvement with prostitution before and after the alleged attacks, and their duplicity with the police. A criminalist testified about the adverse effects marijuana and cocaine can have on perception and memory. Defendant's father testified that he stored his handgun in a locked cabinet, and although he had shown it to defendant and defendant had been living at his parents' house, he had moved out by March 6, 2009.

Defendant appeals.

DISCUSSION

I

Sufficiency of the Evidence

Lack of consent is an element of sexual crimes, including rape, forcible sexual penetration, and sexual battery. (*People v. McCoy* (2013) 215 Cal.App.4th 1510, 1535, 156 Cal. Rptr. 3d 382; *People v. Ireland* (2010) 188 Cal.App.4th 328, 336, 114 Cal. Rptr. 3d 915 (*Ireland*); *People v. Babaali* (2009) 171 Cal.App.4th 982, 995-996, 90 Cal. Rptr. 3d 278.) Even when a woman initially consents to engage in sex, her consent may be vitiated or withdrawn. Defendant insists there is insufficient evidence that two of the prostitutes, A.D. and Amanda, effectively communicated the withdrawal of their consent to have sex with him before he engaged in the sexual conduct to which they had agreed. While the evidence may have been susceptible to the inferences defendant urges on appeal, we disagree that the record is devoid of evidence that is reasonable, credible, and of solid value such that a rational trier of fact could have found a lack of consent [*12] beyond a reasonable doubt.

In rearguing the evidence, defendant fails to abide by the limited scope of appellate review. Although we must review the entire record to determine if the evidence supporting the verdict is substantial in light of other facts (*People v. Holt* (1997) 15 Cal.4th 619, 667, 63 Cal. Rptr. 2d 782, 937 P.2d 213), we must view the evidence in the light most favorable to the prosecution and presume "in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053, 99 Cal. Rptr. 2d 1, 5 P.3d 68). "'Conflicts and

even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]'" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357, 75 Cal. Rptr. 3d 289, 181 P.3d 105.)

A similar challenge to the sufficiency of the evidence was raised and rejected in *Ireland, supra*, 188 Cal.App.4th at pages 335-338. In *Ireland*, as here, the defendant was charged with raping four prostitutes, each of whom had consented to engage in sex acts in return for money. (*Id.* at pp. 330-333.) He too contended there was insufficient evidence to establish that each woman withdrew her consent and communicated that withdrawal of consent to him. The court found otherwise.

The court reviewed the [*13] contours of consent. CALCRIM No. 1000, as given here and in *Ireland*, instructs that "'[t]o consent, a woman must act freely and voluntarily and know the nature of the act.'" (*Ireland, supra*, 188 Cal.App.4th at p. 336.) But "'[a]ctual consent must be distinguished from submission. [A] victim's decision to submit to an attacker's sexual demands out of fear of bodily injury is not consent [citations] because the decision is not freely and voluntarily made ([Pen. Code,] § 261.6). A selection by the victim of the lesser of two evils—rape versus the violence threatened by the attacker if the victim resists—is hardly an exercise of free will. [Citation.]' [Citation.]" (*Ireland*, at p. 336.)

If, however, the woman fails to communicate her lack of consent and it could not reasonably be detected, the court reminded us the accused might not be guilty of rape. (*Ireland, supra*, 188 Cal.App.4th at p. 336.) Indeed, it is a defense if the accused reasonably and in good faith believed the woman engaged in the act consensually. (*Ibid.*) It is important to note, particularly when the victims are prostitutes, however, that withdrawal of consent can occur at any time. (*Ibid.*)

Despite the frightening fact that the defendant held a knife to the neck of each of his victims, he argued his use of the knife did not automatically negate their consent. [*14] Instead, he contended that each victim was required not only to withdraw her consent but also to communicate that withdrawal to him, if not expressly, then at least by implication. The court rejected that notion as a matter of law. "When appellant used the knife and expressly or impliedly threatened his victims, and in the absence of any conduct by the victims indicating that they continued to consent, the previously given consent no longer existed, either in fact or in law." (*Ireland, supra*, 188 Cal.App.4th at p. 338, fn. omitted.) Moreover, even if the victims were required to communicate the withdrawal of their consent, the court found ample evidence they had. (*Ibid.*)

Defendant insists that the court's rationale in *Ireland* depends on the use of a deadly weapon. He argues that he did not use a weapon at all during his sexual encounter with A.D., and he touched Amanda's breasts before he displayed a knife. Thus, in his view, in the absence of a weapon to vitiate a woman's consent, she must affirmatively withdraw her consent and communicate her withdrawal to her customer. Not so.

We reject the notion that *Ireland* applies only when a man threatens his victim with a deadly weapon. While it is true that factually the defendant [*15] in *Ireland* used a knife, we do not believe that fact alone was dispositive and the case should be read so narrowly. The focus in *Ireland*, as here, is whether the sexual acts were consensual, and that issue is necessarily more complicated when prostitution is involved. But prostitutes do not forfeit the right to withdraw their consent by virtue of their line of work, and they retain that right whether or not a deadly weapon is displayed. To resolve an insufficiency challenge, we must look at all of the facts to determine whether there is evidence of credible, solid value that A.D. and Amanda had consented to engage in the sexual acts at the time they occurred. The absence of a deadly weapon is but one fact to consider, but it does not render *Ireland* irrelevant to our analysis.

A. A.D.

Sixteen-year-old A.D. conditioned her consent on defendant's willingness to use a condom and to pay her $100. She testified that although she and defendant initially had a lighthearted conversation, his mood changed dramatically as soon as they arrived in a secluded location, and he appeared angry. Before they engaged in any sexual acts, he reached for something in the backseat of the car that she believed [*16] to be a bat and told her he would not pay her. He threatened, "We can do it the easy way or the hard way." She testified he was bigger than she was, and she was too afraid to risk pulling out the knife she kept concealed in her purse. He told her to remove her pants, and when she failed to comply, he pulled them down. He also refused to use the condom as promised and again threatened to hurt her.

Defendant contends that these facts fall woefully short of what is necessary for a prostitute to withdraw the consent she previously gave to engage in sex acts. He emphasizes that he did not wield a knife, as in *Ireland*, or a gun, or, for that matter, any deadly weapon. His remarks at best were ambiguous. He also suggests that A.D.'s request for him to use a condom was a "reaffirmation of the consent to sexual relations previously given." And, he emphasizes that when asked to orally copulate him, A.D. refused and they proceeded to engage in other sexual acts. He argues that

her resistance is evidence that she was able to successfully communicate her boundaries and to refuse to engage in certain sex acts when they offended her. In his view, therefore, there is insufficient evidence she withdrew [*17] her consent and communicated that fact to him.

It is true that the facts of *Ireland* present a much clearer case. Once a weapon is drawn it is nearly impossible to imagine a scenario where a woman's consent could be said to be free and voluntary. Here it was certainly the jury's prerogative to accept the inference urged by defendant that A.D.'s gutsy refusal to engage in oral copulation on demand indicated a willingness to voluntarily participate in other sexual acts. But the jury rejected that inference and, presumably following a litany of instructions explaining the meaning of consent, concluded that once she was taken to a secluded location, threatened by a big, angry stranger that she would be hurt, possibly with a bat she believed was in the backseat, and was restrained by him on the floor between her legs, she withdrew her consent to have sex as previously agreed.

We believe this evidence constitutes substantial evidence to support the jury's findings that A.D. did not consent to defendant's putting his fingers into her vagina, touching her breast, or putting his penis into her vagina, particularly when taken with her direct testimony that she told defendant she did not want to [*18] have sex after he told her he would not pay her as agreed. Additionally, the jurors could have reasonably concluded that in those harrowing circumstances, A.D. simply could not freely and voluntarily consent to have sex with defendant, and the withdrawal of her consent could be implied once he threatened her and refused to honor the terms of their agreement.

Alternatively, a rational juror could conclude that A.D. was not required to communicate her lack of consent because defendant induced her cooperation through force and fear. Although defendant contends his remarks were ambiguous, the jurors could have found statements like "do it the easy way or the hard way" and "don't make me hurt you" to constitute threats and her subsequent submission obtained through fear. He did not sexually penetrate her until after he had issued those threats. Consent given "out of fear of bodily injury is not consent . . . because the decision is not freely and voluntarily made." (*Ireland, supra*, 188 Cal.App.4th at p. 336.) A withdrawal of consent could have been seen by defendant as a refusal to submit and could have caused him to inflict injury on A.D. In other words, defendant placed his victim in a situation where she could not have withdrawn [*19] consent without risking bodily harm. Thus, any advance consent was vitiated by his explicit or implicit threats.

Defendant pays particular attention to the sexual battery conviction, arguing on appeal that there is no evidence A.D. was unlawfully restrained against her will when he touched her breast. "[A] person is unlawfully restrained when his or her liberty is being controlled by words, acts or authority of the perpetrator aimed at depriving the person's liberty, and such restriction is against the person's will . . . ." (*People v. Arnold* (1992) 6 Cal.App.4th 18, 28, 7 Cal. Rptr. 2d 833.) Although unlawful restraint requires more than the exertion of the physical force needed to commit the battery, it may be accomplished by words or acts. (*People v. Pahl* (1991) 226 Cal.App.3d 1651, 1661, 277 Cal. Rptr. 656; *People v. Grant* (1992) 8 Cal.App.4th 1105, 1112, 10 Cal. Rptr. 2d 828.)

But this argument is yet another variant of the same theme, and defendant would have us usurp the role of the jury. Defendant rejects the inference a rational juror might have drawn that by the time he angrily threatened her in close proximity to what she believed to be a bat and positioned himself between her legs, he had unlawfully restrained her by both his words and his actions. While it is also true the jury could have found the circumstances did not constitute the requisite unlawful restraint, we [*20] cannot say there is insufficient evidence to support the jury finding.

B. Amanda

If the opening brief were closing argument and if, instead of appellate justices, we were jurors, we might be persuaded there was a reasonable doubt that defendant had brandished the knife before touching Amanda's breast. But, of course, it is not our role to second-guess the jury, only to insure that there is credible evidence of solid value to support the jury's finding. Evidence far less than compelling can be sufficient to uphold a jury verdict. Although the evidence of sexual battery consists of Amanda's secondhand account to an investigating police officer and the inferences drawn from the officer's testimony, as well as that officer's examination of Amanda about her initial fabricated account, we conclude it constitutes the quantum of evidence necessary to sustain the judgment.

We acknowledge there are inherent weaknesses in the evidence of sexual battery. At trial, Amanda testified that she did not remember if defendant ordered her to lift her bra or if he touched her breast. As a result, the prosecution relied on Amanda's hearsay statement to Detective Michelle Hendricks. Adding to the lack of clarity [*21] in the trial transcript, Detective Hendricks testified that she was relying, in part, on an earlier statement Amanda had given to Deputy Warren. But that initial statement was fraught with lies. We distill the following pertinent testimony from the

record, focused as defendant insists we must on the chronology of what transpired after Amanda got into defendant's van.

Detective Hendricks interviewed Amanda the day after defendant sexually assaulted her and again two days later. During the latter interview, Amanda agreed to tell the truth. In her first two statements, she had admittedly lied to conceal from the police that she was engaged in prostitution on the night defendant sexually assaulted her. Thus, Detective Hendricks asked a series of questions about what transpired in the van and how her current description varied from her earlier accounts.

During her various renditions of what happened on the night of August 29, 2011, and at trial, Amanda consistently reported that defendant pulled out a knife as soon as they passed a blue Adopt-a-Highway sign on Roseville Road. Holding the knife to her neck, defendant told her "he was going to have sex with her, and she was going to do everything [*22] he wanted." She described how they proceeded to a business complex, encountered a barking dog defendant threatened to kill, and how he backed up against a fence at the end of a building.

The prosecutor asked Detective Hendricks to recount what Amanda said had occurred once defendant parked the van. Amanda told Hendricks defendant ordered her to the rear of the vehicle. The prosecutor then asked, "What were the sexual acts that Amanda described occurring inside the van?" The detective described, "[i]n order of occurrence," oral copulation, digital penetration, rape, sodomy, and another rape, all of which were without Amanda's consent. Amanda recounted that "she was crying constantly and crying hysterically."

In this context, the prosecutor asked, "Did Amanda tell you whether or not the man, the suspect, ever touched her breasts?" Responding affirmatively, Detective Hendricks said, "She stated at one point he had her lift one of the cups of her bra, exposing one of the breasts and grabbed that breast."

Seizing on the detective's use of the phrase "at one point," defendant broadens the potential time horizon to which she was referring from the sex acts that occurred after defendant parked to [*23] encompass the entire time they were in the van. We agree with the Attorney General that a rational juror might have inferred that the detective was describing what occurred only after defendant parked in a secluded area, after he threatened her with the knife, and after he threatened to kill the dog. While defendant might have made a plausible argument to the contrary, the jurors were not compelled to accept it and clearly they did not.

But by dissecting the record further and extracting bits and pieces from here and there, defendant goes further in speculating that any touching of

Amanda's breast occurred before, and not after, he pulled out the knife. He relies on another part of Detective Hendricks's testimony. Whereas in the interrogation recited above the prosecutor had specifically asked Hendricks to describe what Amanda reported happened after they had parked, defendant now relies on questions the prosecutor asked about Amanda's cell phone. He cleverly pieces together another possible scenario, as follows.

In her initial statement, Amanda told Deputy Warren that her cell phone fell out when defendant ordered her to lift up her bra. In her later interrogation with Detective Hendricks, [*24] she said she took it out when she received a call and defendant took it from her once they passed the blue sign. Thus, based on when Amanda turned over her cell phone, defendant posits that the evidence shows he grabbed Amanda's breast "around the time that the phone fell out," and he concludes "[b]ecause the knife was pulled after they passed the blue sign, the evidence shows that the breast was grabbed *before* the knife was deployed." The jury might have accepted that version of what transpired, but it did not.

The question thus posed is whether a rational juror could draw a contrary inference based on the evidence before it. The answer is yes because the inference is reliant upon a statement that is fraught with lies. Amanda admitted that she lied repeatedly during her first two statements to the police. Yet defendant's argument is premised on the account Amanda gave to Deputy Warren that the cell phone fell out when defendant told her to lift up her bra and her later statement to Detective Hendricks that she gave the cell phone to defendant just after they passed the blue sign. The jury was certainly free to disregard the contents of her first statement since it was littered with lies and [*25] to credit the chronology recounted by Detective Hendricks when Amanda represented that she was telling the truth. If that account is to be believed, then the sexual battery occurred after defendant threatened her with the knife and consent is no longer a viable issue. While we agree with defendant the evidence is not a model of certitude, there is sufficient evidence to support the jury's verdict.

II

Instructional Error

A. Withdrawal of Consent

The court instructed the jury on consent as an essential element of each of the relevant charged offenses against A.D. As to sexual battery, the court explained, in the language of CALCRIM No. 935, that the jury needed to

find the "touching was done against [A.D.'s] will." The instruction further provided: "An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act." (*Ibid.*)

Similarly, the court instructed the jury that defendant was guilty of sexual penetration only if the "other person did not consent to the act." (CALCRIM No. 1045.) The court also explained: "The defendant is not guilty of forcible sexual penetration if he actually and reasonably believed that [*26] the other person consented to the act. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty." (*Ibid.*)

And, of course, to convict defendant of rape, the jury was required to find that "[t]he woman did not consent to the intercourse." (CALCRIM No. 1000.) The rape instruction further explains, "To *consent*, a woman must act freely and voluntarily and know the nature of the act." (*Ibid.*) "Evidence that the woman requested that the defendant use a condom or other birth control device is not enough by itself to constitute consent." (*Ibid.*)

"The defendant is not guilty of rape if he actually and reasonably believed that the woman consented to the intercourse. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman consented. If the People have not met this burden, you must find the defendant not guilty." (CALCRIM No. 1000.)

The jurors were therefore instructed on the principles of law closely and openly connected with the issue of consent as applied to each of the charged [*27] offenses. (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, 112 Cal. Rptr. 1, 518 P.2d 913.) But the evolution of the law can trigger some unintended consequences. Here defendant contends that the attempt to clarify the parameters of withdrawing consent during a rape leads to a mistaken implication that the same rules regarding the withdrawal of consent *during* penetration do not apply *before* penetration and *before* a sexual battery or forcible sexual penetration. We examine the evolution of the instructions given, assess how a reasonable juror would construe the instructions when taken as a whole, determine whether defendant's attorney should have requested a clarification and, if so, whether the failure to do so was harmless beyond a reasonable doubt.

Defendant identifies CALCRIM No. 1000 as the culprit. The instruction reads, in pertinent part: "A woman who initially consents to an act of intercourse may change her mind during the act. If she does so, under the law, the act of intercourse is then committed without her consent if:

"1. She communicated to the defendant that she objected to the act of intercourse and attempted to stop the act;

"2. She communicated her objection through words or acts that a reasonable person would have understood as showing her lack of consent;

"AND [*28]

"3. The defendant forcibly continued the act of intercourse despite her objection."

In *People v. Vela* (1985) 172 Cal.App.3d 237, 218 Cal. Rptr. 161 (*Vela*), the court held that "a victim may give consent during preparatory acts all the way up to the moment of penetration, but the victim may withdraw that consent immediately before penetration and if communicated to the perpetrator, the act of intercourse that follows will be a rape no matter how much consent was given prior to penetration." (*Id.* at p. 242.) But in *In re John Z.* (2003) 29 Cal.4th 756, 761, 128 Cal. Rptr. 2d 783, 60 P.3d 183 (*John Z.*), the Supreme Court rejected the apparent rule of *Vela* that penetration creates a boundary line changing the rules governing withdrawal of consent. The court held that a woman could withdraw her consent to sexual intercourse at any time, even during copulation, as long as that withdrawal was clearly communicated. (*John Z.*, at p. 763.) These cases recognize that the essence of consent is the exercise of free will at the time the sexual act is perpetrated. Because what begins as a consensual encounter can disintegrate into an unwelcome intrusion at any time, the courts have clarified that consent may be withdrawn, which is but another way to say that the victim's participation no longer remains an exercise of free will.

CALCRIM No. 1000 attempts to embody the nuances [*29] of consent based on the facts of the cases in which the rules evolved. *Vela* and *John Z.* both involved rapes. Moreover, the precise issue in those cases was whether consent could be withdrawn after penetration. Defendant insists that the standardized instruction is incomplete as applied to rape when A.D. arguably withdrew her consent *before*, and not *during*, the rape and simply does not address other sexual crimes, including sexual battery and forcible penetration. As a result, he contends the trial court had a sua sponte obligation to instruct the jury as follows:

"A woman who initially consents to an act of intercourse *[or other charged sexual act]* may change her mind *at any time before or* during the act. If she does so, under the law, the act of intercourse is then committed without her consent if:

"1. She communicated to the defendant that she objected to the act of intercourse *[or other charged sexual act]* and attempted to *prevent or* stop the act;

"2. She communicated her objection through words or acts that a reasonable person would have understood as showing her lack of consent; AND

"3. The defendant forcibly *initiated or continued* the act of intercourse *[or other charged sexual act]* [*30] despite her objection."

In the absence of these modifications, defendant contends CALCRIM No. 1000 would have misled the jurors by failing to inform them that if a victim changed her mind before intercourse, touching, or penetration, she must have communicated her objection to him. He argues the court's dereliction of duty to instruct the jury on all of the essential elements of the crimes requires reversal of the counts involving A.D. He points out that the court in *Ireland* recognized the instruction could have been confusing. (*Ireland, supra*, 188 Cal.App.4th at p. 340.)

But a "party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate amplifying, clarifying, or limiting language." (*People v. Farley* (1996) 45 Cal.App.4th 1697, 1711, 53 Cal. Rptr. 2d 702.) As described above, the court presented a panoply of instructions explaining consent as it related to each of the charges involving A.D. Those instructions were a correct description of the law. If, as defendant urges on appeal, the instruction was incomplete, he should have requested the amplifying language he now deems helpful.

Defendant insists that forfeiture is trumped by the court's sua sponte obligation to instruct and his lawyer's incompetence [*31] in failing to request the amplifying instruction. But defendant's argument fails on the merits as well. We return to the guidance provided by the court in *Ireland*.

In *Ireland*, the court held that where a woman's cooperation is induced by force or fear, she is not required to communicate her lack of consent. (*Ireland, supra*, 188 Cal.App.4th at pp. 337-338.) Here, after parking the car, defendant made it clear that he planned to rape A.D. He angrily told her they "could do it the easy way or the hard way." Refusing to wear a condom, he threatened: "I'm not gonna [*sic*] get you pregnant, don't make me hurt you." The jury heard A.D. recount that defendant's mood changed, he threatened her, and he reneged on their agreement. She saw what she thought was a baseball bat.

Thus the evidence showed that as in *Ireland*, A.D. submitted to defendant's demands, but her submission, induced by force or fear, did not constitute consent. The jury in *Ireland* was also instructed with CALCRIM No. 1000, which contained the identical language defendant challenges here. (*Ireland, supra*, 188 Cal.App.4th at p. 339.) And the defendant in *Ireland* also argued that the instruction failed to explain that a woman must

communicate her withdrawal of consent prior to penetration. (*Ibid.*) The court found the defendant's hair [*32] splitting between pre- and postpenetration withdrawal of consent immaterial given that the force or fear he used vitiated any need for his victim to communicate the withdrawal of consent. (*Id.* at pp. 339-340.)

We agree. Whether or not his victim is a prostitute, a defendant who employs force or fear to obtain submission is not entitled to a sua sponte instruction on a victim's responsibility to communicate her withdrawal of consent. As the court in *Ireland* pointed out, the timing of the withdrawal of consent is immaterial. What is material is the means the defendant uses to obtain submission, and when the means involves force or fear, whether or not he wields a deadly weapon, the victim does not consent and she need not communicate any withdrawal of consent previously given.

B. Concurrence of Sexual Acts and Specific Intent

The court gave the pattern jury instruction, CALCRIM No. 252, on the required union of act and specific intent when the defendant is charged with a combination of general intent and specific intent crimes, but there was a clerical error in the written instruction and an omission of sexual penetration in the oral version. Defendant argues the errors require reversal. The Attorney General concedes [*33] the error but contends the error is harmless. We agree.

The trial court read CALCRIM No. 252 to the jury twice. In both readings, the court instructed the jury on the crimes requiring specific intent as follows, with a few minor and insignificant transcription differences between the two: "The following crimes require specific intent or mental state: Willfully and unlawfully touch a person's breasts while unlawfully restraining that person for the purpose of sexual arousal, gratification or abuse, in violation of Penal Code Section 243.4(a), as charged in Counts 1, 6 and 15; kidnapping with the intent to commit rape, in violation of Penal Code Section 209(b)(1), as charged in Count 10; aggravated kidnapping, in violation of Penal Code Section 667.61(d)(2), as alleged in Counts 11, 12, 13 and/or 14; kidnapping, in violation of Penal Code Section 667.61(e)(1), as alleged in Counts 11, 12, 13 and/or 14; unlawfully and forcibly penetrating a person's genital opening by a foreign object, instrument or device for the purpose of sexual arousal, gratification or abuse, in violation of Penal Code Section 289(a)(1), as charged in Counts 5, 16 and 17….
Although no one disputes the written instruction contained a technical [*35] error, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S. Ct. 824, 17 L.Ed.2d 705]