
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 860 **Hearing Date:** June 16, 2015
Author: Daly
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Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: *Sex Crimes: Professional Services*

HISTORY

Source: Orange County District Attorney

Prior Legislation: AB 59 (Evans) -- Ch. 282, Stats. 2013
AB 65 (Achadjian) -- Ch. 259, Stats. 2013
SB 765 (Achadjian) – Held in Senate Public Safety, 2011
AB 2049 (Saldana) -- Amended to become a new bill, 2008
SB 1421 (Romero) – Ch. 302, Stats. 2002

Support: California District Attorneys Association; California Police Chiefs; Los Angeles County District Attorney; San Diego County District Attorney

Opposition: Legal Services for Prisoners with Children

Assembly Floor Vote: 78 - 0

PURPOSE

The purposes of this bill are 1) to provide that where a person is performing a professional service in which the person has access to the body of client or customer and the person touches an intimate part of the body of the client or customer, and the touching is against the will of the client or customer, the person is guilty of the alternate felony-misdemeanor of sexual battery; and 2) to provide that where a person who is performing a professional service under these circumstances engages in sexual intercourse, sodomy oral copulation, or sexual penetration against the will of the victim, the person is guilty of a felony.

Existing law:

Provides that rape or another specified sex crime is a sexual act accomplished under any of the following circumstances and is generally punished by a prison term three, six or eight years, unless a higher penalty is specified:

- 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:

- Rape - Pen. Code § 261(a)(1) to (6)
 - Sodomy § 286, subd. (c)(2)(A)-(C) - sodomy the penalty is three, six or eight unless the victim is a minor. If the victim is under 14, the prison term is 9, 11 or 13 year. If the victim is 14 or older, the penalty is 7, 9 or 11 years in prison
 - Oral copulation - Penal Code § 288a (c)(2)(1)-(3). Prison term is 3, 6, or 8 years unless victim is a minor. If victim is under 14, the penalty is 8, 10 or 12 years. If victim is 14 or older, the penalty is 6, 8 or 10 years.
 - Sexual penetration - 289 (a) Three, six or eight year prison term, unless the victim is a minor. Where the victim is under the age of 14, the prison term is 8, 10 or 12 years. Where the victim is a minor who is at least 14 years of age, the prison term is 6, 8 or 10 years.
- 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. Notwithstanding the existence of a conservatorship, as specified, 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. (Pen. Code §§ 261, subd. (a)(1); 286, subd. (g); 288a, subd. (h); 289, subd. (b).)
 - 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. Pen. Code §§ 261, subd. (a)(3); 286, subd. (i); 288a, subd. (i); 289, subd. (e).
 - 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" is defined as a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death. Pen. Code §§ 261, subd. (a)(1); 286, subd. (g); 288a, subd. (h); 289, subd. (b).)

Provides that where an act of sexual intercourse, sodomy, oral copulation or sexual penetration 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, the crime is a felony, punishable by a prison term of three, six or eight years. As used in this paragraph, "public official" is defined as 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. (Pen. Code §§ 261, subd. (a)(7); 286, subd. (k), 288a, subd. (k), 289, subd. (g).)

States that a sex crime is committed where a person is at the time unconscious of the nature of the sex act, and this is known to the accused. "Unconscious of the nature of the act" is defined as incapable of resisting because the circumstances of the incident meet one of the following conditions:

- The victim was unconscious or asleep.
- The victim was not aware, knowing, perceiving, or cognizant that the act occurred.

- The victim was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.
- The victim 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.
- The victim believed that the person committing the act was someone known to the victim other than the accused, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief. (Rape - Pen. Code §§ 261(a)(4)(A) to (D); Sodomy - 286, subd. (f); Oral Copulation - 288a, subd. (f); Sexual penetration - 289, subd. (d).)

Provides that any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and the touching is against the will of the person touched, and the touching is for the purpose of sexual arousal, gratification or abuse, is guilty of sexual battery. This offense is punishable by imprisonment in a county jail of up to one year, a fine not exceeding \$2,000, or both, or by imprisonment in the state prison for two, three, or four years; and by a fine not exceeding \$10,000. This form of sexual battery includes an element that the perpetrator touch the victim's bare skin. (Penal Code Section 243.4, subds. (a) and (f).)

Provides that where any person touches an intimate part of another person for the purpose of sexual arousal, gratification or abuse, and the touching is against the will of the person touched, the person is guilty of sexual battery. This offense is a misdemeanor, punishable by imprisonment in a county jail of up to six months, a fine not exceeding \$2,000, or both. The maximum fine is \$3,000 if the defendant employs the victim. For this form of sexual battery, the touching need not be on bare skin. (Penal Code Section 243.4, subd. (e)(1)-(2))

Provides that sexual battery includes the touching of an intimate body part where the perpetrator fraudulently claimed that it served a professional purpose. The crime is an alternate felony-misdemeanor, punishable by imprisonment in county jail for up to one year, a fine of up to \$1,000, or both, or by imprisonment in state prison for two, three or four year and a fine of up to \$10,000. (Pen. Code § 243.4, subd. (c)).

This bill expands the definition of sexual battery to include the following circumstances: A professional who performs services that entail having access to another person's body touches an intimate part of a client's or patient's body for the purpose of sexual arousal and against the will of the client or patient. This form of sexual battery is an alternate felony-misdemeanor, punishable by imprisonment for up to one year, a fine of up to \$1,000, or both, or by imprisonment in state prison for two, three or four years and a fine of up to \$10,000.

This bill expands the definition of rape, illegal sodomy, oral copulation and sexual penetration to include the following circumstances: A professional who performs services that entail having access to another person's body engages in sexual intercourse, sodomy, oral copulation or sexual penetration for the purpose of sexual arousal and "against the will" of the client or patient. Rape, sodomy, oral copulation or sexual penetration in this form is a felony, punishable by a prison term of three, six or eight years and a fine of up to \$10,000.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity." (Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

Providers of professional treatment services, who sexually assault their clients during the course of a treatment session, are typically charged with felony sex crimes. However, under certain circumstances, California law only allows particular offenders to be charged with misdemeanor sexual battery. As a consequence, some individuals who have clearly crossed the line and committed sexual assaults can only be charged with less serious crimes.

AB 860 adds provisions that will correct this oversight and classify the actions of these professional service providers as felonies. Sexual Assault is a serious crime, and perpetrators who use positions of trust to assault their clients should be prosecuted to the fullest extent of the law.

2. Contrast Between Sexual Battery Where the Victim is Unlawfully Restrained and Sexual Battery by Fraud

In circumstances other than the provision of professional services, sexual battery includes the elements of a touching of an intimate body part of the victim that is against the will of the victim. The element that the touching be against the will of the victim is equivalent to the touching being without consent of the victim. The crime is an alternate felony-misdemeanor if the victim of the unwanted touching was “unlawfully restrained.” If the victim was not unlawfully restrained, the crime is a misdemeanor.

It appears that in cases where a person providing a professional service touches an intimate part of a client’s or patient’s body without consent, prosecutors have not generally charged the services provider with a sexual battery of a person who is unlawfully restrained. Despite the fact that an unclothed person receiving a massage or medical examination is in a sense under the control of the service provider, prosecutors apparently believe that they could not prove that the victim was *unlawfully* restrained. Prosecutors charge these defendants with a form of sexual battery by fraud, under the theory that the service provider used some sort of deception or ruse to touch the victim for sexual gratification, not a legitimate professional purpose.

Unlawful restraint is not limited to the application of physical force. Psychological pressure or an assertion of authority can suffice. A decision of the Court of Appeal has described unlawful restraint as follows:

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; a restraint is not unlawful if it is accomplished by lawful authority and for a lawful purpose, as long as the restraint continues to be for a lawful purpose. The "unlawful restraint required for violation of section 243.4 is something more than the exertion of physical effort required to commit the prohibited sexual act." (*People v. Arnold* (1992) 6 Cal.App.4th 19, 28, citing and quoting *People v. Pahl* (1991) 226 Cal.App.3d 1651, 1661.)

This bill essentially treats the sexual exploiting of a patient or client's vulnerability during an examination, treatment or massage as being equivalent to non-consensual sexual touching of a person who is unlawfully restrained. The bill presents the issue of whether these two situations be punished in an equivalent manner:

- Sexual Battery in Professional Services, other than by Fraud
 - A person (a) is receiving a professional service;
 - The professional service provider has access to the person's body, such as during a medical examination or massage;
 - The service provider touches an intimate part of the person's body; and
 - The touching was against the will of the person (without consent).
- Sexual Battery of an Unlawfully Restrained Person
 - A person is being unlawfully restrained - stuck in against a wall in a crowded subway car, ordered to remain in her car by a person with apparent authority, severely intoxicated;
 - The perpetrator touches an intimate part of the person's body;
 - The touching was against the will of the person/victim.

It can be argued that where a person is in the care of a professional service provider, and the service provider has relatively easy and open access to intimate parts of the person's body, the person is in a vulnerable position equivalent to being unlawfully restrained. A person receiving a massage or a gynecological examination would have to get up from table, put on clothes and leave if they want to get away from the service provider. However, not all forms of professional services place clients or patients in equivalent vulnerable positions. A person who is unclothed in a closed massage room is in a more vulnerable position than a person in a dentist chair in a relatively open plan dental office with numerous other patients in and dentists in close proximity.

SHOULD THE NON-CONSENSUAL TOUCHING OF A PATIENT OR CLIENT DURING THE PROVIDING OF PROFESSIONAL SERVICES BE TREATED AS EQUIVALENT TO NON-CONSENSUAL TOUCHING OF AN UNLAWFULLY RESTRAINED PERSON?

3. Existing Law on Fraudulently Obtaining Consent for Sexual Conduct

Appellate courts have distinguished between "fraud in fact" and "fraud in inducement." Fraud in fact occurs where the defendant essentially lies about the actual character of the sex act. For example, in a 1987 case a gynecologist told two patients that he was examining them manually or with a medical device for diagnostic purposes. In each case, the patient was on the examining table, feet in stirrups and covered by a drape. She could not see what the doctor was doing. The doctor, after apparently performing a partial exam using a speculum, placed his penis in the patient's vagina. Only after the penetration had occurred did each victim understand what had

happened. The appellate court found that the defendant had used fraud in fact to accomplish the intercourse and that each victim had been unconscious of the nature of the act. (*People v. Ogunmola* (1987) 193 Cal.App 3rd 274, 279.)

In *People v. Minkowski* (1962) 202 Cal.App.2d 832 the defendant was a doctor who treated the two young victims (16 and 19 years old) for menstrual cramps. He directed each patient to turn away from him and bend over at the waist. He then placed a cold metal instrument in her vagina, but then inserted something that was not cold. In fact, the doctor had inserted his penis into their vaginas. This occurred on numerous occasions. The defendant was convicted of numerous counts of rape. The convictions were proper because each patient could not have consented to the Minkowski's insertion of his penis into her vagina because she was not conscious of the nature of the defendant's acts.

In many, if not most, circumstances, fraud in the *inducement* is not a crime. Essentially, fraud in the inducement occurs where one person lies to the other about why he or she should engage in a sex act. Nevertheless, the person who is persuaded to engage in the act knows that he or she is engaging in a sex act. For example, in one published case, a woman had intercourse with a man because she lost in a game of chance. The game was fixed, but no crime was committed because she was fully aware of the character of the sex acts and thus her consent was legally valid. (*People v. Harris* (1979) 93 Cal. App. 3rd 103, 114.)

There are a number of statutory exceptions to the rule that fraud in the inducement cannot support a criminal conviction. One exception is the crime defined in Penal Code section 266c, where the fraud in the inducement caused the victim to agree to engage in a sex act with the defendant because the defendant falsely induced her to be afraid. Penal Code section 266c was enacted in response to the reversal of the defendant's conviction in *Boro v. Superior Court* (1985) 163 Cal.App.3d 1224, 1226. In *Boro*, the defendant -- a purported doctor -- convinced a patient that she must engage in sexual intercourse with a "donor" who had been previously injected with a special serum. Contrary to the defendant's assertion, the patient's life was not in danger and the so-called donor was the defendant. Boro's conviction for rape was overturned on appeal because the woman's consent was obtained through fraudulent inducement, which did not nullify ("vitiates") consent. In response to the decision in *Boro*, the Legislature amended the law, as described above, effective in 1986.

In 2002, SB 1421 (Romero)¹ amended various sex crime statutes to cover cases where a physician or other professional obtained consent for intercourse or another sexual act through persuading the victim that the intercourse or other act served a professional purpose, although it did no such thing. (See, Pen. Code §§ 261, subd. (a)(4)(D); 289 (d)(4), and other sex crime statutes.) These new crimes did not require proof that the defendant obtained consent by fear. In the incident that prompted introduction of SB 1421 of 2002, an X-ray technician digitally penetrated patients during the course of obtaining X-ray images. The technician informed the women that the digital penetrations were necessary for the procedure, although the facts of the case are not discussed in any analysis of the bill.

In 2013, new forms of sex crimes by fraud were enacted by SB 59 (Evans) and AB 65 (Achadjian), Chapters 282 and 259 respectively. The two bills covered circumstances where the victim consented to engage in sexual acts with the defendant because the victim incorrectly

¹ SB 1421 (Romero) Ch. 392, Stats. 2002

believed the other person to be someone known to him or her. In these cases, the prosecution must prove that the defendant induced the victim's mistaken belief or "by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief."

In one case addressed by the 2013 legislation, a woman was asleep in her apartment bedroom when a man she believed was her live-in boyfriend began having sex with her. In fact, the defendant had entered the apartment through a window and the victim's boyfriend was in the living room. In another case - Morales - a woman had been to a party with some others. She went to bed when she got home. Her boyfriend left, but her brother's friend came into her room and engaged in intercourse with her until she realized that the defendant was not her boyfriend. Prior to enactment of SB 59 and AB 65, the crime of fraudulently obtained consent for a sex act through impersonation only applied to cases where the victim was induced to believe the perpetrator was her spouse.

4. *People v. Stuedemann* (2007) 156 Cal.App.4th 1 and *People v. Robinson* (2014) 227 Cal. App.4th 387

This bill appears, in large part, to address the reversal of convictions and attendant issues in *People v. Stuedemann* (2007) 156 Cal.App. 4th 1, and *People v. Robinson*² (2014) 227 Cal. App.4th 387.

Stuedemann

In *Stuedemann*, the defendant, a massage therapist, was charged with sexual penetration of an unconscious person and oral copulation of an unconscious person. In particular, the prosecutor alleged that the victim was "unconscious of the nature of the act" due to the perpetrator's fraud in fact. (Pen. Code §§288a, subd. (f)(3) and 289, subd. (d)(3).)

Defendant Stuedemann met victim Griselda while he was giving sample massages at a swap meet. Griselda made an appointment for a full massage at defendant's business. The scheduled one-hour massage had gone on for two hours before the conduct forming the basis for the charges occurred. The court in *Stuedemann* described the facts:

The massage began with Stuedemann instructing Griselda to lie face down on a table. He covered her with a sheet and began massaging her back. At one point, Stuedemann moved her panties to one side to massage her buttocks. When he was finished massaging her back, he instructed Griselda to lie on her back and, when she was face up, he put a mask over her eyes [ostensibly as part of aromatherapy]. While Griselda was on her back, Stuedemann initially kept the sheet in place to cover her while he massaged her. However, as the massage progressed, Stuedemann lowered the sheet and, without saying anything, massaged her breasts and nipples. She said nothing to him about it. He then lowered the sheet further and began massaging her abdomen. He pulled down her panties and twice inserted his finger into her vagina. He then orally copulated her, at which point Griselda sat up quickly and told him to stop. Stuedemann

² *Robinson* has been accepted for review by the California Supreme Court on an issue that is only marginally relevant to this bill. *Robinson* cannot be cited as authority for the opinions and findings expressed in the case, although those opinions and findings may be correct. *Robinson* is described in this analysis to illustrate the issues presented by the bill, not as a statement or reflection of existing law.

stopped, said "I'm sorry," and left the room. He did not tell her that he was going to digitally penetrate or orally copulate her. (*Id.*, at pp. 4-5.)

The court rejected the fraud in fact theory and stated: "There is no evidence Griselda consented or cooperated (was 'incapable of resisting') because of her ignorance of the true nature of the acts performed by Stuedemann. To the contrary, she did not permit Stuedemann to orally copulate or digitally penetrate her believing the copulation or penetration was something other than a sexual copulation or penetration; instead, she immediately recognized the acts for what they were and expressed her non-consent." (*Id.*, at p. 8.)

The court distinguished the *Ogunmola* case in which a doctor raped patients who initially believed he was performing a clinical examination, but actually inserted his penis into each victim's vagina:

Unlike *Ogunmola* ... there was no evidence Griselda consented to anything resembling the [sexual] acts undertaken by Stuedemann. Although Griselda consented to a massage, the result of which made her vulnerable to Stuedemann's [sexual] acts... the evidence showed she was fully aware of the nature of Stuedemann's [sexual] acts ... and was capable of (and did) express her non-consent and resistance to the conduct. ... Stuedemann's 'conduct, reprehensible though it was, did not [constitute criminal oral copulation and sexual penetration] because Griselda was not unconscious due to Stuedemann's fraud in fact, the only theory asserted by the prosecution. If there is a statutory oversight in this area of the penal law, the Legislature may address it [citation]. (*Id.*, at p. 14.)

Robinson

In *Robinson*, Lee Hoang Robinson induced two girls - sisters Dianna and Christine - to come to his beauty salon after business hours for free facials. Two other charged incidents involved adult women. In one, Robinson promised to pay 37-year-old Trang T. \$40 if she modeled for him while he demonstrated a facial for students. In the other, he offered a free facial to Odette M.

After Dianna and Christine came to Robinson's spa, they took off their tops and bras, but left their pants on, and put on robes. Robinson applied a heavy cream on their faces as the girls lay on massage tables in the same room. Robinson then told them he would give them a "European massage," but did not explain what that was. In succession, he massaged each girl's arms and breasts and then unbuttoned her pants. Dianna became frightened, but said nothing to Robinson as he lowered her pants several inches, slipped his hand beneath her underwear and rubbed her vaginal area. Christine put her hands on the button of her pants when Robinson tried to unbutton them. She relented when Robinson told her this was simply part of a European massage and that he did "this all the time for other girls." He lowered Christine's pants to mid-thigh, folded back her underwear and rubbed her thighs near her vagina. When Robinson attempted to place his finger in her vagina, Christine pushed his hand away and pulled up her underwear. Robinson then massaged Christine's arms, stomach and breasts. (*People v. Robinson, supra*, 227 Cal.App.4th 387, 390-392.)

Soon after Trang came to Robinson's salon, they were left alone. He told her that the students had not yet arrived, but he was going to start the facial. Robinson put some lotion on Trang's face, but quickly began massaging her arms, legs and feet with oil. Trang objected to the

massage, but Robinson opened her robe and placed his hands on her breasts. When Trang objected again, Robinson told her to relax because it was standard procedure. He then began rubbing her breasts and tried to put his hands beneath her underwear. When she objected, Robinson turned her over on her stomach and massaged her back and buttocks. She said nothing because she did not want him to become angry. Robinson then reached between her legs, touched her clitoris and digitally penetrated her vagina. When Trang told Robinson that she had to leave, Robinson began wiping her with a towel, and then digitally penetrated her with his hand and finger. She then grabbed her clothes and ran to the police. (*Id.*, at pp. 392-393.)

An incident involving 24-year-old Odette was very similar to the incident involving Trang T. After putting some cream on Odette's face, Robinson rubbed or squeezed her stomach, vaginal area and breasts. She protested each action. Robinson then wiped a towel over her body as she told him to stop. He left the room after telling her to leave the cream on for 10 minutes. She did so because she was afraid. When she left the salon a few minutes later she angrily confronted Robinson in the parking lot. She reported the incident to the police a week thereafter. (*Id.*, at pp. 393-394.)

The court in Robinson upheld the convictions as to Dianna and Christine for sexual battery by fraud, as based on an inducement that the sexual touching was for a professional purpose. The court found that the girls had relied on Robinson's assurances that his acts were a legitimate and normal part of a "European massage." The fact that neither girl objected until Robinson put his finger in Christine's vagina showed that they believed Robinson's conduct was legitimate. Thus, the girls were unaware that the touching did not serve a professional purpose.

The court reversed the sexual battery and digital penetration convictions as to Odette and Trang, however. The objections voiced by Trang and Odette clearly showed that they did not believe that Robinson's rubbing of their breast and vaginal areas, and the digital penetrations of Trang, served any legitimate professional purpose.

The reversal of the sexual battery by fraud as to victims Trang and Odette does not mean that Robinson could not have been convicted of sexual battery and sexual penetration by force had he been charged with those offenses. He was only charged with crimes committed by fraud. Once the trial began, jeopardy attached and he could not be charged with other crimes in these incidents.

However, had Robinson been charged with and convicted of sex crimes committed by force, those convictions would almost certainly have been upheld on appeal. Both victims told Robinson to stop his sexual touching. Yet, he persisted. That certainly appears to establish that the acts were accomplished without the consent - and against the will - of the victims. There was clearly sufficient evidence to support convictions, as convictions will be upheld against a claim of insufficient evidence only if no reasonable jury could have convicted the defendant upon the evidence at trial.

5. Prosecutions in Cases Similar to *Stuedemann* and *Robinson* if This Bill is Enacted

It is likely that many cases prosecuted under this bill would turn on the interpretation by the jury of ambiguous conduct by the parties during a professional service appointment, or an ostensible professional appointment. In such cases, the defendant would have touched the alleged victim's body and then went on to engage in some sort of sexual touching or conduct. The essential issue will be whether or not the defendant reasonably believed that the alleged victim was receptive to

his conduct and thus consented. (*People v. Mayberry* (1975) 15 Cal.3d 143, 153-158; CALCRIM. 1000.) In a case where the defendant sought consent and the victim refused, a sex act would be prosecuted as forced rape or another sex crime. As a practical matter, many cases will likely turn on whether jurors would find that a person in the place of the alleged victim would not expect the service provider to act as did the defendant. If so, jurors will likely convict. If the jurors find that the defendant's acts would have been expected, jurors are likely to acquit.

In *Stuedemann*, the victim did not express an objection when the defendant twice digitally penetrated her vagina. Rather, she did not object until the defendant orally copulated her. Had she objected upon the first vaginal penetration, the second penetration and the oral copulation would very likely have produced convictions for forced sexual penetration and forced oral copulation. The same can be said about the *Robinson* incidents involving Dianna and Christine. A different jury could well have found that the touching was not against their wills - essentially finding that they consented through their conduct.

6. Issue of Whether or not the Rape Provisions in this Bill Would Apply to Non-Professionals Who Offer a Professional Service or Purport to Offer a Professional Service

The sex crime provisions of this bill are defined in terms of the defendant performing professional services that entail having access to another person's body. The bill does not define a professional service. That raises the following question: Must the service be a legitimate or recognized professional service, or is a purported, but fraudulent, professional service covered by the bill? This issue could determine the outcome in many cases. For example, it appears that the defendant in *Stuedemann* truly was a massage therapist. He sexually touched and orally copulated the victim during what was otherwise a legitimate or standard massage. In contrast, it appears that the defendant in *Robinson* employed a ruse in claiming to perform a European massage, when he was actually just touching and digitally penetrating the victims for sexual gratification.

The court in *Robinson* held that the defendant need not be qualified or certified to perform the service he or she offer, just that the defendant claimed his actions served a "professional purpose," as stated in the governing statute.³ The *Robinson*, court would affirm a conviction for sexual acts committed during counterfeit services, if the victim believed the defendant's claims. The court found that "even though he was not a medical professional, the jury could reasonably conclude he had a purported 'professional purpose' for his actions." The court further explained: [T]he precise nature of the perpetrator's employment is less important... that the appearance of authority and of a legitimate purpose that allows the perpetrator to [sexually exploit]the victim without the victim's understanding of the true nature of the act. (*People v. Robinson, supra*, 227 Cal.App.4th at pp. 394-395; quoting and citing *People v. Bautista* (2008) 163 CalApp.4th 762, citations and internal quote marks omitted.)

WITHIN THE MEANING OF THIS BILL, WHAT IS A PROFESSIONAL SERVICE?

IF THE DEFENDANT CLAIMS TO OFFER A PROFESSIONAL SERVICE, BUT THE SERVICE IS NOT LEGITIMATE OR RECOGNIZED, COULD THE DEFENDANT BE CONVICTED UNDER THIS BILL?

³ Robinson claimed on appeal that the Dianna and Christine could not have reasonably believed that Robinson was actually performing a true professional service.

SHOULD THE BILL BE AMENDED TO SPECIFY THAT THE PROFESSIONAL SERVICE
NEED NOT BE LEGITIMATE OR RECOGNIZED, BUT THAT THE VICTIM MUST
REASONABLY RELY ON THE DEFENDANT'S ASSERTION THAT HE OR SHE IS
PERFORMING A TRUE PROFESSIONAL SERVICE?

-- END --