



TRAINING BULLETIN: LEGAL UPDATE

Defining Force in Child Molest Cases

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In a previous online article, I hoped to convince you of the significance of proving force in child molest cases. Assuming I succeeded, the next issue is how to define it and how to prove it.

The Definition of Force in Penal Code section 288(b) and Penal Code section 269

Both Penal Code section 288(b), forcible child molesting, and Penal Code section 269, aggravated sexual assault of a child, define force as “force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim or another person.” If touching of a child under age 14 is involved, Penal Code section 288(b) applies. If actual penetration of the child is involved, and the victim is at least ten years younger than the defendant, Penal Code section 269 can be charged. Each count of Penal Code section 288(b) has a DSL sentence of 3, 6 or 8 years in prison, while Penal Code section 269 carries a sentence of fifteen years to life.

Penal Code Section 288(b)

The jury instruction for this crime (CALCRIM No. 1111) gives the following definitions.

Force

“The *force* used must be substantially different from or substantially greater than the force needed to accomplish the act itself.” This language is taken directly from People v. Cicero (1984) 157 Cal.App.3d 465. In that case the defendant picked up the two young victims by the waist and carried them a short distance as part of a “game”, during which he fondled them. The court held that this was sufficient evidence of force.

Duress

“Duress means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished

by duress, consider all the circumstances, including the age of the child and his/her relationship to the defendant.” The inclusion of a threat of “hardship” as one type of duress in Penal Code section 288(b) is proper even though it does not apply to the definition of “duress” in rape cases, according to the California Supreme Court. “The Legislature may have wished to protect children against lewd acts committed by threats of hardship despite its determination that similar threats of hardship should not provide the basis for the crime of rape or spousal rape against an adult.” (*People v. Leal* [2004] 33 Cal.4th 999, 1008.)

What facts could constitute “hardship” in a child molest case? A good definition can be found in *People v. Cochran* (2002) 103 Cal.App.4th 8, 15: “The very nature of duress is psychological coercion. A threat to a child of adverse consequences, such as suggesting the child will be breaking up the family or marriage if she reports or fails to acquiesce in the molestation, may constitute a threat of retribution and may be sufficient to establish duress, particularly if the child is young and the defendant is her parent. We also note that such a threat also represents a defendant’s attempt to isolate the victim and increase or maintain her vulnerability to the assaults.”

In *Cochran* the defendant videotaped his nine year old daughter and himself engaging in sexual activity. After viewing the tape, the appellate court held noted, with classic judicial understatement, “It is clear the daughter is reluctant to engage in the activities and, at most, acquiesces in the conduct.” The victim testified she was “mad or sad” about what the defendant was doing to her, and that he told her not to tell anyone because he would get in trouble and go to jail.

Menace

“*Menace* means a threat, statement, or act showing an intent to injure someone.” Realistically, your cases are not going to include “menace” very often. It is much more effective to threaten a child with separation from her parents than physical injury.

Fear

“An act is accomplished by *fear* if the child is actually and reasonably afraid [or he/she is actually but unreasonably afraid and the defendant knows of his/her fear and takes advantage of it.” This definition looks a lot like duress, in that it emphasizes the relationship between the victim and the defendant. In *People v. Bergschneider* (1989) 211 Cal.App.3d 144, the defendant threatened to put his 14-year-old, mildly retarded stepdaughter “on restriction” if she refused, which the victim interpreted as meaning she would not be allowed to go anywhere.

Note that the statute requires force *or* duress *or* fear *or* menace, not all of the above.

Penal Code section 269

This is not forcible child molesting with penetration, it's rape of a child, and that's why the law of rape applies and not the law of child molesting. When you look at Penal Code section 269 it specifically refers to the section and subsection of the forcible adult sex crimes. CALCRIM No. 1123, the jury instruction for Penal Code section 269, does the same thing, by requiring the court to give the jury separate instructions on the elements of rape, forcible oral copulation, or whatever type of penetration is involved.

In the law of rape, as we have seen in *Leal*, the "hardship" form of duress disappears. The definition of "force" changes as well. Now, "force" means "physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim]", according to the California Supreme Court in *People v. Griffin* (2004) 33 Cal.4th 1015, 1023 and CALCRIM No. 1000, the jury instruction for rape.

The change in the definition of "force" means that "force" for a violation of Penal Code section 269 can be part of the sexual activity, such as pinning the victim's arms during the activity. It doesn't have to be separate from the sexual activity ("substantially different from or greater than"), as long as it is sufficient to overcome her will (not her resistance, as no victim is ever required to resist an attacker).

Factors Establishing Force

Physical force, particularly for Penal Code section 288(b), must be established by a detailed description of the suspect's activity. Was the victim physically carried, restrained, pushed, pulled, or otherwise physically manipulated?

Duress, particularly for Penal Code section 288(b), must be established by the suspect's statements to the victim. Did he tell what would happen if she didn't cooperate, or if she told anyone? Bear in mind that questions for a child victim should *always* be direct and open ended (not leading or suggestive), and framed in words appropriate for the age of the child. "Did he say anything about telling?" and, "Did he say anything about not telling?" are a lot more effective than "Did the suspect threaten any adverse consequences if you disclosed?"

Typically, suspects transfer the burden of keeping the family together to the child's shoulders, by making her cooperation and secrecy appear to be the price. The suspect tells the child, "If you tell...your Mom won't believe you / your Mom will be mad at you / the police will come and take me away and it will all be your fault / the police will come and take me away and you and your Mom will be out on the streets / the police will come and take you away and you'll have to live with strangers, etc."

A good interview of the victim is essential to establishing the elements of both Penal Code section 288(b) and Penal Code section 269.

About the Author: Michele McKay-McCoy is a veteran prosecutor who now teaches criminal law as an instructor for POST and as adjunct faculty for three colleges and one law school.

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