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MAY 5 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ANTHONY PAUL DE LA TORRIENTE, Defendant-Appellant.	No. 19-50237 D.C. No. 2:17-cr-608 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted April 16, 2021
Pasadena, California

Before: PAEZ and VANDYKE, Circuit Judges, and KORMAN,** District Judge.

Defendant-Appellant Anthony Paul De La Torriente appeals from a judgment of conviction entered after a jury convicted him of one count of sexual abuse of, and one count of abusive sexual contact with, victim A.B. During a cruise with their cheerleading team, De La Torriente and A.B. went ashore in Mexico with several

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

friends. A.B. drank heavily throughout the day and was "[e]xtremely intoxicated" by the time she re-boarded the ship. ER 142–43. A.B.'s friends helped get her back to her room and prepared her for bed. The group talked with A.B., who jumped between topics while "slurring her speech" and getting emotional. *Id.* at 151, 800. Eventually, the group decided to leave to get food. De La Torriente "volunteered to stay behind" with A.B., who fell asleep. *Id.* at 151–52, 248, 263, 800. Later, A.B. "woke up to [De La Torriente] pulling down [her] underwear" before committing a sexual act without her consent. *Id.* at 772, 774–78. Shortly after, De La Torriente was interrupted by the sound of their friends returning.

A.B. "tried to tell [her friends] that something had happened," but "was still intoxicated" and unable to articulate her thoughts. ER at 778–79. A.B. "stumbl[ed] through her words" several times before screaming that De La Torriente had hurt her. *Id.* at 157, 254–55, 779. Medical staff on the ship conducted a sexual assault exam on A.B., which recovered DNA traces matching De La Torriente's profile. De La Torriente denied that he had sex with A.B., a position he maintained during the subsequent federal investigation.

On appeal, De La Torriente argues that (1) the evidence was insufficient to convict him on the sexual abuse count, (2) the district court erred by giving a jury instruction on sexual abuse that was unduly confusing and impermissibly lowered the required showing, and (3) a new trial is warranted on both counts because the

prosecutor committed misconduct during closing arguments. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Viewed in the light most favorable to the prosecution, the evidence was sufficient to support De La Torriente's conviction for sexual abuse. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also United States v. Nevils*, 598 F.3d 1158, 1165–67 (9th Cir. 2010) (en banc). The statute prohibits "knowingly . . . engag[ing] in a sexual act with another person if that other person is . . . physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." 18 U.S.C. § 2242(2)(B). The jury had ample evidence from which it could rationally conclude that A.B. was "physically hampered due to sleep [and] intoxication and thereby rendered physically incapable" of declining participation in, or communicating unwillingness to engage in, the sex act that De La Torriente committed. *United States v. James*, 810 F.3d 674, 681 (9th Cir. 2016).

2. We review de novo whether a jury instruction accurately describes the elements of a crime, and for abuse of discretion whether an instruction is unduly confusing. *United States v. Heredia*, 483 F.3d 913, 921 (9th Cir. 2007) (en banc). The district court used a jury instruction that incorporated — nearly verbatim — language taken from *James*. Specifically, the judge charged that "[a] person need not be physically helpless to be physically incapable of declining participation in or communicating unwillingness to engage in a sexual act." ER 860; *cf. James*, 810

F.3d at 681.

The borrowing of this language in a jury instruction, where it lacked context and elaboration found in the opinion, may have been "less than artful," *United States v. Hegwood*, 977 F.2d 492, 496 (9th Cir. 1992), but it did not render the instruction "as a whole . . . misleading or inadequate to guide the jury's deliberation." *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010) (internal quotation marks and citation omitted). And while De La Torriente objected to the instruction at trial, he did not propose an alternative that better explained the language he argues was misleading. Instead, he requested that the district court remove the *James* language altogether and simply recite the statute. Finally, in light of all the evidence, any error that might have arisen from the jury instruction was harmless. *See United States v. Munguia*, 704 F.3d 596, 598, 604–05 (9th Cir. 2012).

3. De La Torriente argues that the prosecutor committed misconduct by attributing the words "I'll take care of her" to him during closing arguments because that precise quotation was not in evidence. ER 862, 869, 1329, 1346, 1362. We agree with the district court that the prosecutor's comments were a reasonable facsimile of testimony by other witnesses that fell within "the wide latitude both prosecutors and defense attorneys are allowed in closing argument." *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997) (internal quotation marks omitted).

One of A.B.'s friends testified that De La Torriente "volunteered to stay

behind" and another said that he "mentioned he would stay back just to watch over" A.B. while they were gone. ER 152, 248. The ship's Chief Security Officer testified that De La Torriente told him in an interview conducted on the night of the crime that De La Torriente "stayed with [A.B.] allegedly to assist her." *Id.* at 303. Even assuming that the prosecutor overstepped by framing the words as a quotation rather than a paraphrase of other testimonies, the error was harmless because this distinction in presentation could not have "materially affected the fairness of the trial." *United States v. Hermanek*, 289 F.3d 1076, 1102 (9th Cir. 2002).

AFFIRMED.

FILED

JUN 15 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ANTHONY PAUL DE LA TORRIENTE, Defendant-Appellant.	No. 19-50237 D.C. No. 2:17-cr-00608-DSF-1 Central District of California, Los Angeles ORDER

Before: PAEZ and VANDYKE, Circuit Judges, and KORMAN,* District Judge.

The panel has voted to deny the petition for rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ANTHONY PAUL DE LA TORRIENTE, Defendant.	CR 17-608-DSF ORDER RE JURY INSTRUCTIONS

The government is ordered to provide a "clean" set of jury instructions to the chambers email and in paper form in accordance with the directions set forth in this Order.

The instructions shall have a caption page, but no index. Citations to authority should be removed. Each instruction shall be titled "INSTRUCTION NO. ___," not COURT'S INSTRUCTION NO. ___." Joint Proposed Instructions 3A and 3B shall be placed on the same page. Joint Proposed Instruction 9 should be removed. Joint Proposed Instruction 13 should not be justified. The substantive instructions should not identify the statute allegedly violated. The code section is irrelevant. Joint Proposed Instruction 21 is confusing. It should be reworded and inserted in the order in which it should be given.

The Court will give the government's proposed reasonable doubt instruction. That instruction is clearly sufficient. The O'Malley instruction has been in existence since at least 2008. Although there have been numerous meetings of the Ninth Circuit Jury Instructions Committee since that time and numerous revisions to the instructions, the Committee has neither found fault with its own reasonable doubt instruction nor adopted the O'Malley version.

The Court will give the government's proposed instructions 2, 3, and 4, except it will include Defendant's mens rea language.[1] The paragraph defining "special maritime jurisdiction of the United States" should appear in a separate instruction. The Court sees no benefit in repeating that instruction 3 times (once with each instruction on the elements of the charges). The Court is confident that a single separate instruction will suffice.

The Court also finds it inappropriate to include the language "to the extent permitted by international law." In United States v. Neil, 312 F.3d 419 (9th Cir. 2002), the Ninth Circuit considered whether the district court properly exercised extraterritorial jurisdiction in a case alleging a violation of 18 U.S.C. § 2244(a)(3) with jurisdictional facts quite similar to those alleged here. The Circuit noted that "jurisdiction is a question of law that [the Circuit] review[s] de novo," and held that the United States properly exercised jurisdiction. Id. at 421. Therefore, in accord with Neil, the Court concludes it has subject matter jurisdiction over this case and the additional language suggested by the Defendant is not appropriate.

[1] The government agrees to this language for this case only. The Court therefore does not consider whether this is a correct interpretation of the statute.

The defense objects to the language, "A person need not be physically helpless to be physically incapable of declining participation in or communicating unwillingness to engage in sexual act."[2] Although United States v. James itself did not contain facts similar to those here, the panel specifically referred to the exact scenario here, and relied on previous Ninth Circuit case law in finding that a person need not be physically helpless to be physically incapable of declining participation in or communicating unwillingness to engage in the sexual act. 810 F.3d 674, 679 (9th Cir. 2016).

The "disputed" instructions, with the language approved by the Court, should be inserted into the "clean" set in the order in which they will be given.

IT IS SO ORDERED.

Date: January 30, 2019

Dale S. Fischer
United States District Judge

[2] The government quotes the bracketed language in Instruction 8.172 exactly, but there appears to be a typographical error in the instruction. As suggested by the comment, the word "the" should be inserted between "in" and "sexual."

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ANTHONY PAUL DE LA TORRIENTE, Defendant.	No. CR 17-608-DSF JURY INSTRUCTIONS

COURT'S INSTRUCTION NO. 13

The defendant is charged in Count One of the Indictment with sexual abuse and attempted sexual abuse. In order for the defendant to be found guilty of sexual abuse, the government must prove each of the following elements beyond a reasonable doubt:

First, defendant knowingly engaged in a sexual act with A.B.;

Second, defendant knew that A.B. was physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act; and

Third, the offense was committed within the special maritime and territorial jurisdiction of the United States.

In this case, "sexual act" means (a) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph, contact involving the penis occurs upon penetration, however slight; (b) contact between the mouth and the vulva, or the mouth and the anus; and (c) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

A person need not be physically helpless to be physically incapable of declining participation in or communicating unwillingness to engage in a sexual act.

COURT'S INSTRUCTION NO. 14

You also may find defendant guilty of the crime charged in Count One of the indictment, that is, sexual abuse, if you find that defendant attempted to commit sexual abuse. In order for the defendant to be found guilty of attempted sexual abuse, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to engage in a sexual act with a person who he knew was physically incapable of declining participation in, or communicating unwillingness to engage in that sexual act;

Second, the defendant did something that was a substantial step toward committing the crime of sexual abuse and that strongly corroborated the defendant's intent to commit that crime; and

Third, the offense was committed within the special maritime and territorial jurisdiction of the United States.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime.

In this case, "sexual act" means (a) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph, contact involving the penis occurs upon penetration, however slight; (b) contact between the mouth and the vulva, or the mouth and the anus; and (c) the penetration, however slight, of the

anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

A person need not be physically helpless to be physically incapable of declining participation in or communicating unwillingness to engage in a sexual act.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ANTHONY PAUL DE LA TORRIENTE, Defendant.	CR 17-608 DSF Order DENYING Motion for Judgment of Acquittal or for New Trial (Dkt. No. 181)

Defendant Anthony Paul De La Torriente was convicted of one count of sexual abuse and one count of abusive sexual contact after a jury trial. He now moves for a judgment of acquittal or, in the alternative, a new trial. For the reasons given below, the motion is denied.

A motion for judgment of acquittal under Rule 29 requires a court to "review the evidence presented against the defendant in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Lombera-Valdovinos, 429 F.3d 927, 928 (9th Cir. 2005).

There was ample evidence that A.B. was incapable of declining to participate or communicate her unwillingness to engage in sexual acts. The government was not required to prove that A.B. was "physically helpless." The standard is whether she was

"physically incapable," which includes situations "where the victim had some awareness of the situation and – while not completely physically helpless – was physically hampered due to sleep, intoxication, or drug use and thereby rendered physically incapable." United States v. James, 810 F.3d 674, 681 (9th Cir. 2016).

There was extensive evidence that A.B. was extremely intoxicated at the time of the alleged assault. From this evidence, the jury could have reasonably concluded that A.B. was physically incapable of declining sexual activity or communicating her unwillingness to engage in sexual activity. The jury was told that A.B. was unable to walk on her own to her cabin, was unable to change herself or to shower herself, and was so intoxicated that her friends induced vomiting to reduce her blood alcohol levels and propped her on her side in bed for fear that she would choke on her own vomit. In the light most favorable to the government, the overall picture was of a woman who was extraordinarily inebriated and incapable of even the most simple tasks. While Defendant attempted to rebut this through evidence of A.B.'s purported capacity and pointed to the passage of time to attempt to persuade the jury that A.B. had likely regained capacity, taking the evidence in the light most favorable to the government easily supports the jury's verdict.

And whether or not the government was required to prove that Defendant knew of A.B.'s incapacity, taking the evidence in the light most favorable to the government, there was sufficient evidence in the record to show that Defendant knew of A.B.'s incapacity. The evidence of Defendant's knowledge is basically the same as the evidence of A.B.'s incapacity. If the jury believed the government's version of the incapacity of A.B. at the time of the alleged assault, it was certainly within its rights to believe that Defendant would have been well-aware of her incapacity.

A.B.'s intoxication and the hindering of her abilities was specifically known to Defendant and it is reasonable to conclude that Defendant would have drawn the same conclusions about A.B.'s capacity as the jury did.

For the same reasons, viewing the evidence in the light most favorable to the government, the record supports a finding that the sexual contact at issue was without A.B.'s permission for the purposes of the abusive sexual contact charge. There is ample evidence that A.B. was very intoxicated and that the sexual contact took place without obtaining A.B.'s permission, implied or explicit.

A new trial is also not warranted. The Court may set aside the jury verdict and order a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). Motions for new trial should only be granted "in exceptional circumstances in which the evidence weighs heavily against the verdict." United States v. Chen, 754 F.2d 817, 821 (9th Cir. 1985).

Defendant's primary argument is that the government improperly misstated the evidence in its closing when it said that Defendant had said that he would "take care" of A.B. Instead, the record shows that the witness stated that Defendant said that he "would watch over" A.B.

First, the Court finds that Defendant waived his objection to the misquote in the government's closing argument. Defendant raised this issue immediately after the jury began its deliberations. It is undisputed that there is no evidence in the record that Defendant stated that he would "take care" of A.B. The most relevant testimony was from Zachary Harris: "[W]e were all concerned about [A.B.'s] well-being and [Defendant] mentioned he would stay back just to watch over her." Trial Tr. 385. After that testimony was read to counsel outside the presence of the

jury, defense counsel simply stated "Okay. Thank you for checking." Trial Tr. 1175. Defendant now attempts to argue that he did not intend to waive his argument, but instead believed that the Court had made up its mind based on the Court's previous statement – before the precise testimony was located – that "watch over her" was "a reasonable facsimile of ["take care of her"]. Trial Tr. 1174. This is unpersuasive, if for no other reason, because Defendant never gave any indication that he disagreed with the Court's assessment of the equivalence of the two phrases. It was not a situation where a court had heard argument, made a decision – even a tentative one – and counsel did not wish to belabor the point. No argument was ever raised by Defendant or addressed by the Court or the government.

Even if there was no waiver, "take care of her" and "watch over her" are substantially equivalent phrases in the context of this case. They mean the same thing – Defendant was going to stay behind in the cabin with A.B. to make sure nothing bad happened to her in her severely intoxicated state. Defendant also argues that the record does not support that Defendant said the words "watch over her," as opposed to those words being Harris's understanding of what Defendant was going to do. This is incorrect. Harris testified that "Anthony mentioned he would stay back just to watch over her." This is sufficient evidence that Defendant himself used those words.

In any event, had Defendant pressed the matter at the time, at most the Court would have given a specific corrective instruction that would have pointed out the slight difference in language. There is no reason to believe that this instruction would have had any chance of changing the result. Even if there is some minor difference between "take care of her" and "watch over her," there is no reason at all to believe that the verdict could have possibly been affected by that difference.

The other issues raised by Defendant also do not, individually or cumulatively, support a new trial. The government did not improperly appeal to the jury's emotions in its rebuttal closing. In closing, Defendant's counsel at the very least suggested that Defendant believed he had permission for sexual contact based on A.B.'s actions over the course of the day and the previous day – e.g., flirting, holding hands, kissing. The government's statement that the jury should be offended by that argument, while possibly unduly dramatic, was not misconduct. To the degree that the permission/consent issue relates to a "particular crisis in our society," it was *Defendant* who made that connection in his closing, not the government. The government's brief statements that A.B. is worthy of protection of law even though she may be flawed or unsympathetic in some ways were a direct response to the defense tactic of discussing A.B.'s various shortcomings that were mentioned at trial. None of the purported "vouching" or "denigration of the defense" cited by Defendant is correctly characterized. Defendant fails to cite to any statement that is even arguably vouching. The purported denigration of the defense is not any kind of attack on defense counsel, but a typical attack on counsel's arguments, which is what a rebuttal closing is for.

Defendant finally argues that there was some impropriety in the government's payment of $1,000 to a lay witness. The payment was not misconduct. The witness came from India to testify. He stated that he delayed a new job in order to come to the United States voluntarily and it was reasonable to compensate him for his loss. Further, the issue of the $1,000 payment was disclosed to Defendant and to the jury, yet Defendant made no objection until now.

The motion for a judgment of acquittal or for a new trial is DENIED.

IT IS SO ORDERED.

Date: July 16, 2019

Dale S. Fischer
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE DALE S. FISCHER, U.S DISTRICT JUDGE

- - -

UNITED STATES OF AMERICA, PLAINTIFF, vs. ANTHONY PAUL DE LA TORRIENTE, DEFENDANT.	No. CR17-608-DSF

REPORTER'S TRANSCRIPT OF JURY TRIAL

DAY 4, VOLUME II

FRIDAY, FEBRUARY 8, 2019

1:00 P.M.

LOS ANGELES, CALIFORNIA

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ALSO PRESENT:

MATTHEW PARKER, FBI SPECIAL AGENT

I N D E X

E X H I B I T S

TRIAL EXHIBITS *MARKED* *ADMITTED*

(None.)

AMBER BRYAN,

having been first duly sworn,

testified as follows:

DIRECT EXAMINATION

BY MS. PALMER:

Q. Good afternoon, Ms. Bryan.

What do you do?

A. Currently, I'm a receptionist at a law firm.

Q. And do you also go to school?

A. Yes. I go to school full-time.

Q. What are you studying?

A. I am getting my master's in marital and family therapy.

Q. And I want to take you to the time period of June and July of 2015. What were you doing for employment at that time?

A. At that time I was working at CheerForce part time, and I was also going to school full time.

Q. Where were you going to school?

A. Santa Monica College.

Q. And at CheerForce, what were you doing?

A. Coaching tumbling classes as well as all-star prep teams.

Q. And what age groups were you teaching?

A. It ranged in age from about 5 to 18.

Q. And is that the general age group that CheerForce -- is that the general age group for CheerForce students?

A. Yes.

A. I couldn't stand up on my own so I sat down.
Q. After you showered, did -- what did you do next?
A. Hannah and Marwin helped me take my clothes off. I had on my bathing suit underneath my tank top and shorts. They went and got me some clean clothes to put on.
Q. And when you came back -- when you all came back to the room, who was with you when you entered the room?
A. Marwin Lopez, Hannah Baral, Zack Harris, Juan Lopez, James Bernard and Anthony De La Torriente.
Q. And did all of those people come into your cabin?
A. I don't know if Juan Lopez came into my cabin, but the rest were.
Q. And the defendant was in your cabin?
A. Yes.
Q. And you said that Mr. Lopez and Ms. Baral helped you put on clothing?
A. Yes.
Q. Do you remember what the clothing was?
A. It was a black -- it was a black shirt and some boy short underwear.
Q. And is that what you like to wear to bed?
A. Yes.
Q. Were you able to dress yourself?
A. No.
Q. How did they dress you?

A. Marwin and Hannah helped me put my shirt on and my pants on.
Q. And once they dressed you, did they lay you on the bed?
A. Marwin and Hannah took me over to my bed and laid me down.
Q. And were you able to walk over to the bed yourself?
A. Not that I can remember.
Q. And once you were laying on the bed, what happened next?
A. They laid me on my left side, so I was facing the door that we had come in from, and we all sat down. Marwin Lopez, Hannah Baral, Zack Harris, Anthony De La Torriente and James Bernard, we sat down and just kinda talked for a while.
Q. And where was the defendant in the room at this point?
A. Sitting at the foot of my bed.
Q. And did you get upset while you were talking?
A. Yes.
Q. Did you start crying?
A. Yes.
Q. How long was the group in the room at this point approximately?
A. Possibly 20 to 30 minutes, maybe more.
Q. And after you had been crying a while, tell me what happened next.
A. I started to get tired, so I started to close my eyes.
Marwin, Hannah, Zack and James were talking about that they were hungry and they might want to go get some food.

Q. And did you -- did they eventually leave?
A. Yes.
Q. You said that when this was happening, were you falling asleep or --
A. I was in and out of sleep.
Q. And did you eventually fall into a deeper sleep?
A. Yes.
Q. Once you fell asleep, what's the next thing that you remember?
A. I woke up to someone pulling down my underwear.
Q. And what could you hear?
A. My underwear ripped as they tried to push my legs apart.
Q. And did it sound like they were ripping?
A. Yes.
Q. And can you describe the lighting in the room at that point?
A. It was dim. I think only a reading light was on but no overhead lights.
Q. Did you feel intoxicated?
A. Yes.
Q. And how did you feel at that point in general?
A. Scared and confused, upset.
Q. And as you felt someone pulling at your underwear and you heard it stretching, what happened next?
A. They tried to put their finger inside me.

Q. And when you say "inside me," do you mean your vagina?
A. Yes.
Q. And was the finger able to penetrate your vagina?
A. No.
Q. Why not?
A. Because I wasn't aroused, there was no lubrication.
Q. At this point did you know who the person was who was trying to penetrate your vagina?
A. No.
Q. And tell me what happened after that.
A. When the finger didn't work, he put his mouth on my vagina.
Q. And then what?
A. He tried to put his tongue inside me, and then he rolled me on my side so that I was facing the door again.
Q. And then what did he do?
A. He tried to insert his penis inside my vagina.
Q. And was he able to do so?
A. No.
Q. At some point were you able to see who this person was?
A. Yes.
Q. How did you -- how were you able to identify the person?
A. I turned my head and I saw his face.
Q. And who was that person?
A. Anthony De La Torriente.

Q. And after the defendant tried to penetrate your vagina with his penis while on your side, then what did he do?
A. Then he got off the bed, and I believe that's when he locked the door, and then he came back.
Q. And what did he do when he came back to the bed?
A. He pulled my bottom half off the bed so that I was facedown from the waist up on the bed.
Q. And so was your stomach on the bed?
A. Yes.
Q. And your legs were hanging off the bed?
A. Yes.
Q. And you were facedown?
A. Yes.
Q. And then what did he do?
A. He positioned himself and then he inserted his penis.
Q. And was he able to penetrate you at that point?
A. Yes.
Q. What were you feeling at that point?
A. Scared and confused. I didn't know why it was happening.
Q. And before he was able to successfully penetrate you, how many times had he tried unsuccessfully?
A. Two.
Q. How long approximately was the defendant penetrating you?
A. Maybe a minute or two.
Q. Was he interrupted?

A. Yes.
Q. Tell the jury about that.
A. I could hear people outside the door, and it sounded like Zack and Hannah and Marwin.
Q. You could recognize their voices?
A. Yes.
Q. And how did you feel when you heard your friends outside the door?
A. Relieved that they were coming back for me.
Q. What happened next?
A. They went to scan their card to get in the room, and I heard them ask why the light was orange instead of green.
Q. What was happening inside the room once the friends arrived at the door?
A. Anthony moved to go get a robe, and he threw it on me. He positioned my body back on the bed the way that they had left me.
Q. And what about your underwear?
A. He pulled them up quickly before he put me back on the bed.
Q. Did the group knock on the door?
A. They started to knock.
Q. What happened next?
A. Anthony went over to open the door and he pretended like he had been asleep.

Q. And what do you mean by that?
A. They asked what happened, and he said he didn't know, we had been asleep inside the room.
Q. Had he been asleep?
A. No.
Q. So you said you thought that the people who came back to the room were Zachary Harris, Marwin Lopez and Hannah Baral. Is that who, in fact, entered the room?
A. Yes.
Q. And once they came back in the room, how were you positioned?
A. On my side but facing the door, but there was a robe on me now.
Q. And while all this was happening, did the defendant touch your breasts?
A. Yes.
Q. And how did he do that?
A. After he had pulled my underwear down, when he tried to put his finger inside me, he had pushed my shirt up exposing my chest, and then he reached up and grabbed my breast.
Q. Once the group came back into the room, can you tell me what happened next?
A. Marwin sat down next to my bed. Hannah and Zack sat down on Hannah's bed. I believe Anthony was sitting at the foot of my bed. And I tried to tell them that something had happened.

Q. And were you able to articulate well at that point?
A. Not really.
Q. Why not?
A. I was still intoxicated, and I had just been woken up.
Q. What did you try to tell them -- or do you remember what you said?
A. I think I told them that I hurt in my vagina.
Q. And you said you tried to tell them -- what do you mean by that?
A. I think I just told them that, "I hurt down there."
Q. And what happened after you said that?
A. Marwin noticed that my shirt was still pushed up.
Q. And by that, do you mean your breast was out?
A. Yes.
Q. And what did Marwin say to you?
A. He told me, "Cover yourself up, you whore."
MS. POTASHNER: Objection. Hearsay.
THE COURT: Is it being introduced for the truth of the matter?
MS. PALMER: No, Your Honor.
THE COURT: What is it being introduced for?
MS. PALMER: The effect on the listener.
THE COURT: Counsel approach.
(The following proceedings were held at sidebar.)
THE COURT: What did he say?

MS. PALMER: He said, "You're a whore and a slut, and you should just admit it if you cheated on your boyfriend," at which time she --

THE COURT: Okay. Well, clearly that's nothing admitted for the truth of the matter. I'm not sure -- in other words, for some other purpose, but it's not for the truth, so I'll allow it.

(The following proceedings were held in open court.)

THE COURT: All right. You can answer.

BY MS. PALMER:

Q. What did Mr. Lopez say to you?

A. He said, "Cover up, you whore."

Q. And did he say something about you cheating on your boyfriend?

A. Yes.

Q. What?

A. He said if I cheated on my boyfriend, I should just admit it.

Q. And how did that make you feel?

A. Horrible.

Q. Why?

A. Because that's not what happened.

Q. Did you continue telling people what happened at that point?

A. I tried to look over at Hannah and Zack, and Zack gave me

a look like he understood what I was trying to say, and that's when he asked me if I wanted to take a walk outside.

Q. And what was the defendant saying, if anything, at this point?

A. He said he didn't know what I was talking about, that nothing had happened, we had been asleep.

Q. And did he say anything about the door, whether he locked it?

A. No.

Q. And at that point did you leave the room with Mr. Harris?

A. Yes.

Q. And where did you go?

A. We went out onto one of the decks so that he could -- so I could tell him what had happened.

Q. Without getting into the content of that, did you tell him what happened?

A. Yes.

Q. What did you do next?

A. We went to I believe it was his room and Marwin's room. Marwin and Hannah were there, and they asked me what did I want to do, if they should -- if we should go down to see a doctor.

Q. Were you hesitant to seek medical treatment?

A. Yes.

Q. Why?

A. Because I didn't want to believe that it had happened to