

No. A119420

In the Court of Appeal  
Of the State of California  
First Appellate District  
Division 4

THE PEOPLE OF THE STATE OF CALIFORNIA,  
Plaintiff and Respondent,

v.

ACHI BEN SHALOM,  
Defendant and Appellant.

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APPELLANT'S OPENING BRIEF

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Appeal from  
Contra Costa County Superior Court Case No. 050706374  
The Honorable Leslie Landau

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## INTRODUCTION

With the prosecutor, defense counsel and trial court all focused on whether appellant Achi Ben Shalom had violated Penal Code section 288, subdivision (a), the jury acquitted him on that charge, while convicting him of the lesser-included offenses of assault and battery. (5-CT 1335-1339.)

Considering the instructions provided to the jury, these convictions were almost inevitable -- there was no dispute that Ben Shalom had touched his guitar pupil on her stomach in a way that he later acknowledged was inappropriate, nor was there any dispute that the touch offended her. (2-RT 315-319, 346-346, 409-410; 4-RT 735-736, 791-795, 850-852, Exhibits 11-12.)

While there was also substantial evidence that the pupil had consented to the touch, or that Ben Shalom at least reasonably believed that she had consented to it (2-RT 315-318, 348-353; 4-RT 735-736, 756, 776-779, 791-792, 850-852), that evidence was essentially meaningless to the jury, which received no instruction on consent or mistake of fact as potential defenses in an assault and battery case. (*People v. Rivera* (1984)

157 Cal.App.3d 736.) On the contrary, the trial court instructed the jury that consent was not a defense to the section 288 charge, and the jury had no reason to believe that either consent or mistake had any bearing on their determination as to the other offenses.

The trial court had a duty *sua sponte* to instruct the jury on an affirmative defense that was supported by substantial evidence and consistent with the defense's theory of the case. (*People v. Salas* (2006) 37 Cal.4th 967.) Considering the compelling evidence of consent and mistake of fact, the failure to properly instruct the jury clearly prejudiced Ben Shalom.

In addition, defense counsel was ineffective for failing to request the instructions, and for failing to argue that either consent, or Ben Shalom's mistake of fact as to consent, precluded conviction on the lesser-included offenses.

#### **STATEMENT OF APPEALABILITY**

This appeal is taken from a final judgment including sentencing of the defendant, and is appealable pursuant to Penal Code section 1237.

## STATEMENT OF THE CASE

On April 27, 2007, following a Preliminary Hearing, the Contra Costa County District Attorney filed an Information alleging that on November 9, 2006, appellant Achi Ben Shalom had committed a lewd act on a child under the age of fourteen years in violation of Penal Code<sup>1</sup> section 288, subdivision (a). (Volume One - Clerk's Transcript on Appeal ("1-CT") 165.)

A jury found Ben Shalom not guilty of the section 288 violation, but guilty of the lesser-included offenses of simple assault and battery. (5-CT 1335-1339; Volume 6 - Reporter's Transcript on Appeal ("6-RT") 1109-1111.)

On September 21, 2007, the court dismissed the assault conviction and suspended imposition of sentence on the battery count during three year period of court probation, conditioned on Ben Shalom serving 90 days in county jail with credit for time served of 2 days. (5-CT 1375-1376; 6-RT 1169, 1188-1191.)

The court made a finding that Ben Shalom had been

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

motivated by sexual gratification, but did not order him to register pursuant to section 290 *et seq.*<sup>2</sup> (6-RT 1174-1175, 1183-1185.) In addition, the Court ordered Ben Shalom to receive 52 weeks of counseling at Crossroads, and further ordered that he: not teach or be in a position of trust with children; not be alone in the presence of minors except for his daughter; not use the Internet for pornography or possess pornography; and stay away from the victim and the school where the incident occurred. (5-CT 1376; 6-RT 1188-1191.)

Ben Shalom timely appealed on September 27, 2007. (5-CT 1377.)

## **STATEMENT OF FACTS**

### **A. BACKGROUND**

Achi Ben Shalom was a teacher, musician, band leader, choir director and music arranger. (3-RT 650-652.) Born on a kibbutz in Israel in 1954 (3-RT 652-653), he grew up near Tel Aviv and served for more than

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<sup>2</sup> The court reserved the issue in the event of a serious probation violation. (6-RT 1176, 1185.)

three years in the Israeli army. (3-RT 653-656, 659-660.) Ben Shalom completed a three-year program to become a music teacher and performer, and emigrated to the United States in 1983. (3-RT 657-660.)

In 1985, Ben Shalom began teaching music at a private Jewish school in El Cerrito called Tehiyah Day School and, with a few interruptions, continued teaching there until the November 2006 incident that led to his prosecution. (3-RT 662, 666-671, 4-RT 765-766, 774-776.) Beginning in 1997 he worked full-time at Tehiyah, visiting classrooms regularly, preparing students for performances, and performing as a part of every morning assembly. (2-RT 299, 303-304, 364-365, 372-373, 382-383, 426-429; 3-RT 663-664, 671-673; 4-RT 764-765, 775-776.)

During this time, Ben Shalom also gave guitar lessons to Tehiyah students who were in the fourth through eighth grades. (3-RT 664-665, 668-670, 4-RT 773-774, 881-882.) He normally taught groups, but also gave individual lessons. (4-RT 768-769.) All of the lessons took place in a room that served as an office, classroom, and storage area. (4-RT 868.) Ben Shalom

had put a piece of black paper over a window in the office door to keep his students from being distracted by activities taking place in the next room. (3-RT 673-674, 677-679; 4-RT 781-783.) There was a noisy Xerox machine outside the door which made it impossible to teach with the door open. (4-RT 767.)

Jane Doe<sup>3</sup> was a student at Tehiyah. (2-RT 297, 381-382.) Ben Shalom recalled her as a third-grader, when she was one of many students to whom he taught music one period per week. (3-RT 682.) Jane, who was born on October 29, 1995, had started taking guitar lessons from Ben Shalom when she was nine or ten years old, at the end of fourth grade. (2-RT 297, 299, 367, 383.) Although she initially attended group lessons with two other girls, Jane showed greater aptitude and began taking individual lessons. (2-RT 299-300; 3-RT 685-688; 4-RT 771-770.) (3-RT 687-689.) By the time of the incident in 2006, Jane had been taking weekly lessons for about two years. (2-RT 363-364, 428.)

Although Ben Shalom was not friends with Jane's

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<sup>3</sup> Pursuant to section 293.5, the complaining witness is identified only as Jane Doe throughout the record on appeal. (1-RT 105-106.)

parents and did not see her outside of the school setting, she began confiding in him at the start of her lessons about her social life and relationships. (2-RT 365-366; 3-RT 689-692; 4-RT 749.) She called Ben Shalom either "Achi" or "abba," which means "dad" in Hebrew (2-RT 305-306, 368-369; 3-RT 692-693, 4-RT 776.) He encouraged her musical ambitions, but expressed concern that she did not practice more. (3-RT 693-695, 4-RT 772, 778.) They also collaborated on music videos produced for her mother, which he hoped would prompt her to do more practicing. (2-RT 304, 438; 3-RT 695-696; 4 RT 720-722, 772-773.)

Jane normally came for her 45-minute lesson on Thursdays, right after school ended at 3:15. (2-RT 300, 383-385; 4-RT 749.) The door to the office was closed, and Jane and Ben Shalom were alone, but he never locked the door. (2-RT 303; 3-RT 799-800, 868-869.) After playing the guitar, they would search the Internet for songs to play or sing. (2-RT 303.)

Jane recalled that they sometimes both sat on the computer chair with her on Ben Shalom's lap, though sometimes she pulled up a separate chair. (2-RT 304-

305.) Ben Shalom recalled that Jane at times would try to sit on his knee, not his lap, when they were looking for music on the computer, and that he would suggest she sit on a separate chair. (4-RT 723-724, 777, 779, 853-855.)

The lessons typically ended with Jane giving Ben Shalom a hug. (2-RT 305; 4-RT 777-778.) At Tehiyah, there was a lot of hugging (3-RT 684-685), and Jane saw nothing unusual about the hugs, which her mother, Lior, sometimes observed. (2-RT 367-368, 436; 4-RT 876-877.) Ben Shalom enjoyed interacting with the students at school and often engaged in horseplay with them. (4-RT 762-764.) There was no official policy at the school regarding the appropriateness of physical contact between teachers and students. (3-RT 638-639.)

#### **B. OCTOBER 19 - NOVEMBER 2, 2006 LESSONS**

On October 11, 2006, Jane had her first period, and she celebrated with her mother and a few of her friends. (2-RT 306-307, 384.) During her lesson the next day on October 12<sup>th</sup>, Jane told Ben Shalom about getting her period, and he congratulated her. (2-RT

306-307.)

During the lesson that took place the next week, Jane said that while she was sitting on his lap, Ben Shalom rested the palm of his hand for about three seconds on one of her breasts, though she could not recall which one. (2-RT 307-308, 339-341, 440-441.) Ben Shalom did not grab her breast, but his arm moved up and down quickly for about a second. (2-RT 340-341.) Jane thought it was an accident, and did not tell anyone. (2-RT 308-309, 341.) Ben Shalom denied that Jane was sitting on his lap, or that he placed his palm on her breast. (4-RT 757, 779, 853-854.)

At the next lesson, which would have been October 26<sup>th</sup>, Jane recalled that she sat on Ben Shalom's lap and he again put his hand on her breast, this time for a half-second longer, but she told no one because she thought it was another accident. (2-RT 309, 341-342, 372-374, 377-378.) Documentation established that on that day, Ben Shalom was actually accompanying students on a field trip to Washington, D.C. that had begun on October 23 and ended on October 27, 2006. (4-RT 725-732, 776-777; Exhibits D-F.)

During the next lesson on November 2, 2006, the Thursday after she turned eleven on October 29, 2006, Jane testified that Ben Shalom put his hand on her breast again, and that she again thought it was an accident, though it made her feel strange. (2-RT 309-310, 342.) She felt that it lasted a second longer, though she was not sure. (2-RT 309-310, 352.) Ben Shalom denied that he placed his hand on her breast. (4-RT 757, 779.)

**C. NOVEMBER 9, 2006 LESSON**

Jane had her last lesson on November 9, 2006, the date specified in the Information. (1-CT 165; 2-RT 310, 385.) The school day ended at 1:00 that day due to parent-teacher conferences. (2-RT 310; 4-RT 749.) Ben Shalom recalled that Jane arrived for her lesson along with two friends at around 1:00, while Jane said that she saw Ben Shalom around then at the after-school program and he suggested that the lesson start at 2:00, which is when she and her friends arrived at his office. (2-RT 310-311, 385-387; 4-RT 749-750, 754-755.) Jane taught the other girls to play something on

the guitar, and they left after somewhere between ten and thirty minutes so her lesson could begin. (2-RT 312, 371, 442; 4-RT 755-756, 796.)

After playing guitar for the first half of the lesson, Jane recalled that she sat on Ben Shalom's lap, and both recalled they looked at music lyrics on the computer. (2-RT 312-313; 4-RT 796-797.) According to the computer history, this occurred at 2:47 p.m. (4-RT 797-798.)

According to Jane, Ben Shalom said his shoulders were hurting and may have asked Jane to give him a shoulder massage, though the massage may have been her idea. (2-RT 313, 345-346.) Ben Shalom recalled that Jane offered to give him a massage after he said his neck was hurting, and that she suggested she stand on a chair so that she could use her elbows on his shoulders, as she did with her father. (4-RT 779, 846-847.)

Jane recalled that Ben Shalom sat sideways on the computer chair while she stood on another chair and put her knees on his shoulders, but then both of them fell backwards. (2-RT 314-315.) Ben Shalom was not sure

how Jane fell because he had his eyes closed, but said that she fell sideways and he was able to catch her. (4-RT 780, 847-849.) Jane could not recall being caught by Ben Shalom. (2-RT 315.)

Jane was not hurt in the fall, but her stomach started hurting; when she told Ben Shalom, he offered to give her a stomach massage or rub, and she "didn't know what it was, so I said okay." (2-RT 315, 346; 4-RT 850-852; Exhibit 8.) Jane stood in front of Ben Shalom facing away from him, with no part of their bodies touching except for his hands on her stomach. (2-RT 315-316, 346-347; 4-RT 780.)

Jane recalled that Ben Shalom put his hand on her bare skin, and then slid both hands down into her pants, under her underpants, until the tips of his fingers were touching her skin and her pubic hair, moving in small circles, for about three to five seconds. (2-RT 316-317, 347-349.) He did not touch her genitals, and his hand kept moving. (2-RT 348, 353.) Jane felt what was happening, but did not look. (2-RT 347.)

Jane testified that she felt terrible, but simply

asked Ben Shalom to massage her shoulders so he would stop what he was doing. (2-RT 317-318, 348-349, 353.) After a very quick shoulder rub, Jane said she should go and gave Ben Shalom a hug to make it seem like she was fine, though she testified she did not want to do it. (2-RT 317-318.) She did not recall what time she left the office. (2-RT 318.)

Ben Shalom acknowledged touching Jane's stomach over her clothing but denied any of the other contact, except that he complied with her request for the shoulder or back rub. (4-RT 735-736, 756, 780, 791, 850-852; Exhibit 12.) She had asked for that after indicating she did not like the stomach pressure, but seemed to feel better after the massage, and they continued with the lesson. (4-RT 736, 791-792.)

Jane went to the gym but did not tell her mother because she was shocked and confused. (2-RT 318-319, 389.) Ben Shalom believed Jane left by 2:30, and that he also left 10-15 minutes later and saw her at the book fair, where they met again and discussed a pair of earrings that he wanted to buy for his wife. (4-RT 755-

760, 798-799, 867.) He then returned to his office.<sup>4</sup>  
(4-RT 798-799.) Jane did not recall speaking to Ben Shalom at the book fair. (2-RT 335.)

**D. ACTIVITIES FOLLOWING NOVEMBER 9<sup>TH</sup>**

Lior noticed nothing unusual about Jane's behavior on the night of November 9, 2006, though as the weekend progressed she seemed "angry" toward her family. (2-RT 390-391, 431-433.)

The next day, Jane went on an outing with the family of her best friend, Savyon. (2-RT 304, 335, 430, 439; 3-RT 608-614, 632-35.) That evening, Savyon and her family were planning to go to Ben Shalom's house

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<sup>4</sup> Much of the testimony at trial concerned evidence that Ben Shalom accessed a pornographic website beginning at 3:35 that afternoon on his office computer, briefly viewing a story about teenage incest. (2-RT 473-474, 483-489, 518-520, 526-527; 3-RT 558, 563-566, 601-607; 4-RT 801-809, 846, 860; Exhibits 3, 14.)

Ben Shalom had moved *in limine* to exclude the evidence (1-CT 200-208), but the court found it relevant as to Ben Shalom's intent on the section 288 charge and denied the motion, allowing redacted evidence regarding the website coupled with a limiting instruction. (4-CT 1185; 5-CT 1311; 1-RT 53-55, 225-233, 265-272; 2-RT 453-457, 483.)

The jury's acquittal of Ben Shalom on the section 288 charge (5-CT 1337) renders this issue moot on this appeal.

for Shabbat (Sabbath) dinner and singing. (3-RT 613-615, 635-636; 4-RT 761-762.) When Jane heard of the plans, she said that she really wanted to accompany them to Ben Shalom's house, and seemed disappointed when her parents did not give her permission to go. (2-RT 336-337, 439; 3-RT 611-617, 621-622, 636-637.) Jane claimed she did not really want to go to Ben Shalom's house, but just wanted to stay with Savyon. (2-RT 319-320, 335-336.)

On Sunday, Jane met at the park with Savyon, who had slept over the night before, and their boyfriends. (2-RT 304, 319, 430-431.) After her friends left she was in a bad mood, and became irritable with her parents. (2-RT 361, 432-34.)

As Lior was putting her to bed on Sunday night, November 12<sup>th</sup>, Jane for the first time told her that something had happened at the guitar lesson. (2-RT 320, 358-359, 362, 390-392, 450.) Jane had not told her mother earlier because she was too busy, and was still trying to understand what had happened. (2-RT 359-360.) Jane at first said she did not know whether it had been going on for a couple of months or a couple

of weeks, that Ben Shalom had touched her on her breasts and, on Thursday, put his hand in her underpants. (2-RT 392.) Lior helped "figure out" the dates, and Jane said it had started after she told Ben Shalom about getting her period, so they agreed it was a period of weeks. (2-RT 392-393, 418-419, 422.)

After Jane told her mother everything she could remember, Lior was upset and angry, and the two talked until 1:00 in the morning. (2-RT 321, 393.) At first Lior was devastated, then enraged, telling Jane she wanted to kill Ben Shalom. (2-RT 414.) Jane was sobbing and shaking uncontrollably, but eventually went to sleep. (2-RT 393-394.)

Lior and her husband contacted the Berkeley and El Cerrito police departments that night to ask for advise, and she spoke at more length with the El Cerrito police the next morning. (2-RT 394-396, 412-413, 441.) As a nurse practitioner, Lior was familiar with mandatory reporting requirements, but did not realize the call would result in prosecution. (2-RT 410-412.) She told the police everything her daughter had told her. (2-RT 416-417; 443.)

Instead of going to school on Monday, Jane went to the Children's Interview Center to be interviewed by a social worker. (2-RT 322, 396.) She did not recall going to school on Tuesday, though Lior believed she did go. (2-RT 322, 396.) Ben Shalom came into the computer lab where Jane was having a class on Wednesday and asked if he could help with anything; Jane left. (2-RT 322.)

On Thursday, November 16, 2006, Ben Shalom called the house to ask where Jane was when she did not appear for school, and her mother made up an excuse about her having a fever. (2-RT 322, 396-397, 420.) Jane was interviewed twice more at the Children's Center that day. (2-RT 323-325, 397-398; Exhibits 8 and 9.)

Between the two interviews, Jane remembered on her own something that she had forgotten during the first interview, and during her testimony in court. (2-RT 315, 326, 398.) She remembered that between the time that they fell and the stomach massage, Ben Shalom had held and rocked her in a way that did not feel good to her. (Exhibit 9.) She did not tell her mother about the rocking until a few months later. (2-RT 443-444.)

After Lior and Jane left the Children's Center on November 16, 2006, a detective asked Lior to participate in a pretext call to Ben Shalom, which she agreed to do. (2-RT 398.) Lior told Ben Shalom that she had seen an e-mail of her daughter's that made her uncomfortable, and asked him about touching her stomach. (2-RT 398-402, 403-404, 409-410; 4-RT 735, 791-795; Exhibit 11.)

Ben Shalom said that Jane had been massaging his shoulders and had complained that her belly was aching; initially he said that she felt better after he put his hand on her belly and pressed a little, but later acknowledged she had said the belly pressure did not feel good, though she seemed to feel better after the back rub. (2-RT 409-410; 4-RT 735-736, 791-792; Exhibit 11.) Ben Shalom agreed that he should not be touching her now that she was reaching puberty, admitting it was "not appropriate." (4-RT 793-795; Exhibits 11.)

While Ben Shalom was driving home following the pretext call, his wife called to tell him that the police were at their home. (4-RT 736-737.) When he

arrived home, the police handcuffed Ben Shalom and did not let him go inside while they searched the house. (4-RT 737-738.) They informed him he was being arrested for a lewd and lascivious act and, after twenty minutes, took him to the police station. (4-RT 738-739.) He remained in custody for 36 hours, and admitted to the police that his touching of Jane's stomach over her clothes was not appropriate. (4-RT 747-748; Exhibit 12.)

#### **ARGUMENT**

**A. THE TRIAL COURT'S FAILURE TO INSTRUCT *SUA SPONTE* ON THE DEFENSES OF CONSENT AND MISTAKE OF FACT DEPRIVED BEN SHALOM OF DUE PROCESS, REQUIRING REVERSAL**

**1. Despite Substantial Evidence That Jane Doe Consented To The Stomach and Shoulder Massages, The Jury Was Not Instructed That Consent Was A Defense to The Lesser Included Offenses of Assault and Battery**

As the prosecution and defense both noted during closing argument, there was no dispute at trial that Ben Shalom had intentionally touched Jane on November 9, 2006. (5-RT 955, 990, 1009-1010.) Jane and Ben Shalom both testified that he had touched Jane's

stomach after she said that it hurt, and had also given her a shoulder/back massage. (2-RT 315-316, 346-347; 4-RT 850-852, 780; 4-RT 735-736, 756, 780, 791-792, 850-852; Exhibit 8.) There was also no dispute that Jane was offended by the touching, which Ben Shalom acknowledged was "not appropriate." (2-RT 317-319, 321, 348-349, 389, 392-394, 353, 423-424; 4-RT 793-795; Exhibits 11-12.)

The main focus at trial was the section 288 lewd and lascivious conduct charge, a specific intent crime requiring proof that Ben Shalom willfully touched Jane "with the intent of arousing, appealing to or gratifying the lust or sexual desires of himself or the child." (5-RT 948-949; see also 5-CT 1319-1320, CALCRIM Nos. 252, 1110.) Regarding that charge, the court instructed the jurors that "it is not a defense that the child may have consented to the act" (5-CT 1320; 5-RT 949; see *People v. Cardena* (1994) 21 Cal.App.4th 927, 937 n.7), an instruction that is supposed to be given upon request "if there is evidence that the minor consented to the act." (Bench Notes, CALCRIM No. 1110.) The prosecution had requested

CALCRIM No. 1110. (4-CT 1224.)

Jurors were also instructed, without objection (5-RT 900-901), that if they unanimously found Ben Shalom not guilty of the section 288 charge, they could still convict him of the lesser-included offenses of assault and battery, which were general intent crimes. (5-CT 1319, 1321, 1323-1325; 5-RT 948-952.)

The trial court instructed jurors that Ben Shalom was guilty of assault if he:

did an act which, by its nature, directly and probably would result in application of force to a person; ... did the act willfully; ... was aware of facts that would lead a person to realize that the act, by its nature, would directly and probably result in the application of force to someone; and ... had the present ability to apply force to a person....

Someone commits an act willfully when he or she does it willingly or on purpose. It is not required he or she intend to break the law, hurt someone else or gain any advantage. The terms "application of force and "applied force" means to touch in a harmful or offensive manner. The slightest touching can be enough if done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not need to cause pain or injury of any kind.

The People are not required to prove that the defendant actually touched someone. The People are not required to prove that the defendant actually intended to use force against someone when he acted. No one needs

to actually have been injured by the defendant's act.

(5-RT 951-952; see also 5-CT 1323, CALCRIM No. 915.)

The jury was further instructed that Ben Shalom was also guilty of battery if he "willfully touched JANE DOE in a harmful or offensive manner," with "willfully" defined in the same way as for an assault.

(5-RT 951; see also 5-CT 1324, CALCRIM No. 960.)

In finding Ben Shalom not guilty of the section 288 charge but guilty of both assault and battery (5-CT 1335-1339; 6-RT 1109-1111), the jury could therefore have believed everything Ben Shalom said, and rejected everything Jane Doe said. Ben Shalom admitted he had not just attempted to touch Jane, but had touched her, on purpose, in an inappropriate way, and that she had complained about it. (2-RT 409-410; 4-RT 735-736, 791-795; Exhibits 11-12.) Even if the jury believed that Ben Shalom had only touched Jane over her clothes that was "enough" to convict him even if the touching did not cause pain or injury, as long as she found it offensive. (5-CT 1323-1324; 5-RT 951-952.)

As instructed, the jury had no choice but to find Ben Shalom guilty of assault and battery.

But the jury was entirely unaware that Ben Shalom had a complete defense to both charges. Although there was no dispute that Jane had given Ben Shalom permission to give her a stomach massage and had asked him to rub her shoulders (2-RT 315-318, 348-349, 353), the jury was never instructed that consent, and mistake of fact as to consent, are viable defenses to assault and battery. (5-CT 1284-1326; 5-RT 937-952, 1052-1056; *People v. Rivera* (1984) 157 Cal.App.3d 736, 742-743; *People v. Samuels* (1967) 250 Cal.App.2d 501, 513.)

Following its independent review (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584), this Court should find that the trial court's failure to instruct on these critical defenses requires reversal of Ben Shalom's conviction.

**2. Consent, And Mistake of Fact as To Consent, Are Defenses to Assault and Battery Charges**

Although a victim cannot consent to aggravated assault that results in great bodily injury (*People v. Alfaro* (1976) 61 Cal.App.3d 414, 429), consent is a complete defense to assault or battery "in a situation involving ordinary physical conduct." (*People v.*

*Samuels* (1967) 250 Cal.App.2d 501, 513.) It has long been clear that an assault "must be made without the consent of the person against whom it is made. If it be made with his consent, it will not constitute an assault." (*People v. Gordon* (1886) 70 Cal. 467, 468.)

[T]he law as a matter of public policy will allow a victim's consent to be effective only if the conduct, to which the consent refers, does not cause or threaten serious bodily harm or death.

(1 Wharton's Criminal Law (15<sup>th</sup> ed. 1993) § 46, pp. 304-305.)<sup>5</sup>

Even if there is no actual consent, a defendant who mistakenly but in good faith believes that the victim "impliedly consented and thereby would not be offended by the touching" is not guilty of assault or battery. (*People v. Sanchez* (1978) 83 Cal.App.3d Supp. 1, 3; see also sections 20, 26; *People v. Mayberry* (1975) 15 Cal.3d 143, 153-157; *People v. Rivera* (1984) 157 Cal.App.3d 736, 742-743.)

In *Rivera*, the jury had determined there was no actual consent to an alleged assault with intent to commit rape, but the conviction had to be reversed

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<sup>5</sup> But see 1 Witkin, California Criminal Law (3d ed. 2000) § 87, p. 426, misstating *Samuels*, Wharton.)

because the jury "was never asked to consider" the defendant's mistake of fact as to consent. (*Rivera*, 157 Cal.App.3d at 743.)

Where a defendant reasonably believes the touching constituting the alleged assault was consensual he cannot be guilty because there is nothing unlawful about the physical contact between the parties.... Even though assault is a general intent crime, an act committed under a mistake of fact which disproves any criminal intent is not a crime.... Thus an assault is not committed when a person has a reasonable and good faith belief that the touching was consensual.

(*Rivera*, 157 Cal.App.3d at 742-743.)

Although *Rivera* testified to his belief in the victim's consent and relied on it as his defense, "his testimony and argument on this point ... was essentially meaningless, since the jury did not have a legal framework against which it could apply his factual contentions." (*Rivera*, 147 Cal.App.3d at 744.)

Although Jane could not have consented to lewd and lascivious conduct (*People v. Cardena* (1994) 21 Cal.App.4th 927, 937 n.7), an eleven-year-old girl is perfectly capable of consenting to a stomach or neck massage. This is not a case where "by reason of infancy, insanity, or intoxication, the victim is

unable to make a reasonable judgment as to the harmfulness of the conduct in question.'” (*People v. Brock* (2006) 143 Cal.App.4th 1266, 1275, quoting Wharton’s § 46.)

But as in *Rivera*, the jury in this case did not have a legal framework against which to consider either defense to the assault and battery charges. The only legal instruction jurors received regarding consent was part of CALCRIM No. 1110, which set out the elements of the section 288 charge specifically states that consent was not a defense. (5-CT 1320; 5-RT 949.) The jury had no reason to believe that consent was a defense to assault and battery, or that Ben Shalom’s reasonable and good faith belief that Jane had consented was also a defense.

Under the instructions given, the jurors had no choice but to convict Ben Shalom of assault and battery.

**3. The Constitution Requires Trial Courts To Instruct Sua Sponte On Any Affirmative Defense Supported by Substantial Evidence, Unless That Defense is Inconsistent With Defendant’s Theory Of The Case**

Even in the absence of a request by the parties, a

trial court "must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and are necessary for the jury's understanding." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) As the California Supreme Court more recently explained:

It is well settled that a defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence ... unless the defense is inconsistent with the defendant's theory of the case ....

(*People v. Salas* (2006) 37 Cal.4th 967, 982; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 716.)

The failure to instruct on affirmative defenses deprives a defendant of his due process rights under the Fifth and Fourteenth Amendments (*Mathews v. United States* (1988) 485 U.S. 58, 63; *Bradley v. Duncan* (9<sup>th</sup> Cir. 2002) 315 F.3d 1091, 1098-1099), and also undermines the Sixth Amendment interest in "preserving the exclusive domain of the trier of fact." (*People v. Flood* (1998) 18 Cal.4th 470, 491 (discussing an instruction relieving prosecution of proving element of offense).)

In deciding whether an instruction is warranted, the trial court does not have to determine that the defendant is actually relying on a particular defense (*People v. Seden* (1974) 10 Cal.3d 703, 716), and does not make credibility determinations - the duty to instruct arises whenever "there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt . . . ." (*Salas*, 37 Cal.4th at 982, quoting *People v. Jones* (2003) 112 Cal.App.4th 341, 351.)

CALCRIM No. 3406, Mistake of Fact,<sup>6</sup> instructs the jury that the defendant is not guilty of a general intent crime if his conduct "would have been lawful under the facts as he reasonably believed them to be." In the context of consent, the mistake of fact defense usually involves evidence of "equivocal conduct that could be reasonably and in good faith relied on to form

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<sup>6</sup> The Bench Notes for CALCRIM No. 3406, explain the trial court's "Instructional Duty" as "a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case." This was also the holding in *People v. Russell* (2006) 144 Cal.App.4th 1415, 1427.)

a mistaken belief of consent.” (*People v. Williams* (1992) 4 Cal.4th 354, 364.)

While CALCRIM does not appear to include an instruction on consent, the “common law principles” underlying the defense were previously set out in CALJIC No. 1.23. (*People v. Brock* (2006) 143 Cal.App.4th 1266, 1276.)

To consent to an act or transaction, a person (1) must act freely and voluntarily and not under the influence of threats, force or duress; (2) must have knowledge of the true nature of the act or transaction involved; and (3) must possess the mental capacity to make an intelligent choice whether or not to do something proposed by another person. [Merely being passive does not amount to consent.] Consent requires a free will and positive cooperation in act or attitude.

(CALJIC No. 1.23.)

In this case, the trial court was required to give both instructions. While the defense did not overtly rely on consent or mistake of fact, substantial evidence supported both defenses. (*Salas*, 37 Cal.4th at 982; Bench Notes, CALCRIM No. 1406.) Jane and Ben Shalom had a very close, affectionate relationship that involved touching each other during weekly hugs and, according to Jane, sitting on Ben Shalom’s lap. (2-RT

304-305; 3-RT 692-693; 4-RT 776-779.) Jane had been giving Ben Shalom a shoulder massage before she complained about her stomach hurting. (2-RT 313, 315, 345-346; 4-RT 779, 846-847, 850-852.) Jane gave Ben Shalom permission to give her a stomach massage and asked him to rub her shoulders. (2-RT 315-318, 348-349, 353; 4-RT 735-736, 756, 791-792, 850-852; Exhibit 11.) Although Jane testified she was not sure what was involved in the stomach massage, she apparently did not question Ben Shalom about it. (2-RT 315.) Jane gave Ben Shalom a hug after the incident, and wanted to visit his house the next day. (2-RT 317-318, 336-337, 439; 3-RT 611-617, 621-622, 636-637.)

From this evidence, "a jury composed of reasonable persons could conclude that the facts underlying the particular instruction[s] exist." (*People v. Blair* (2005) 37 Cal.4th 686, 745.)

Not only was there substantial evidence supporting the defenses described in the instructions, but those defenses were in no way inconsistent with the defense's theory of the case. (*Salas*, 37 Cal.4th at 982; Bench Notes, CALCRIM No. 1406.) The defense theory was not

that Ben Shalom did not touch Jane, but that he did not touch her in the way she described, and did not touch her with the sexual intent required under section 288. (4-RT 735-736, 756, 780, 791, 846, 850-852, 861-862; 5-RT 990-1032.) Adding the defenses of consent and mistake of fact as to the touching would have been perfectly compatible with the defenses used at trial.

The trial court committed clear error in failing to instruct on these defenses.

**4. The Trial Court's Failure To Instruct On Affirmative Defenses Prejudiced Defendant Under Either Standard**

In cases involving the failure to instruct on an affirmative defense, the Supreme Court has not yet decided what test of prejudice to apply. (*People v. Salas* (2006) 37 Cal.4th 967, 984.) Under the more rigorous *Chapman* test, the prosecution must prove that the error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24), requiring the reviewing court to find the "error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*People v. Flood* (1998) 18 Cal.4th 470, 494.)

The *Watson* test, on the other hand, asks whether a more favorable result was reasonably probable in the absence of error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The prosecution simply cannot show that the instructional error was harmless beyond a reasonable doubt. This is not a case like *People v. Saavedra* (2007) 156 Cal.App.4th 561, where the jury was actually instructed on other defenses that would have led to acquittal if the jury believed defendant's testimony regarding the omitted defense. (*Saavedra* (2007) 156 Cal.App.4th at 569-570.) On the contrary, the jury was specifically instructed that consent was not a defense to the section 288 charge (5-CT 1320; 5-RT 949), and had no reason to believe it was a defense to the lesser-included offenses of assault and battery.

The evidence of mistake of fact was even stronger than in a case like *People v. Mayberry* (1975) 15 Cal.3d 143, where vaguely equivocal conduct by the complaining witness provided the only corroboration of defendant's testimony he mistakenly she had consented. (*Mayberry*, 15 Cal.3d 143 at 156-157.) Jane acknowledged she had

said "okay" to the stomach massage (2-RT 315), and the parties were not strangers - a reasonable jury could find that, based on their long, affectionate relationship and her actions that day, Ben Shalom reasonably and justifiably believed that she would not be offended when he touched her stomach. (2-RT 304-305; 3-RT 692-693; 4-RT 776-779.)

There was also prejudice under the *Watson* test, because there was "'such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.'" (*People v. Russell* (2006) 144 Cal.App.4th 1415,1432, quoting *People v. Mower* (2002) 28 Cal.4th 457, 484.) In acquitting him on the section 288 charge (5-CT 1337; 6-RT 1109), the jury presumably accepted Ben Shalom's denials regarding sexual intent, and considering the strong evidence that Ben Shalom mistakenly believed Jane consented to the stomach rub (2-RT 304-305; 3-RT 692-693; 4-RT 776-779), it is reasonably probable he would have obtained a better result if the jury had been properly instructed. (*Russell*, 144 Cal.App.4th at 1432-1433.)

Under either test of prejudice, the Court should reverse Ben Shalom's conviction.

**B. DEFENSE COUNSEL'S FAILURE TO REQUEST JURY INSTRUCTIONS ON CONSENT AND MISTAKE OF FACT, AND TO ARGUE THOSE DEFENSES TO THE JURY, CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL**

A criminal defendant has the right to reasonably effective assistance of counsel under both the Sixth Amendment and Article I, section 15 of the California Constitution. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

On an appeal, an ineffective assistance of counsel claim will be rejected if "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] ... unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Pope* (1979) 23 Cal.3d 412, 426.) If a court can "imagine no sound tactical reason why defense counsel would have done this" (*People v. Guizar* (1986) 180 Cal.App.3d 487, 492 n.3), then it can find ineffective assistance of counsel on appeal.

There can be no sound tactical reason for the failure of Ben Shalom's counsel to request jury

instructions on the defenses of consent and mistake of fact as to consent, and for his failure to argue those defenses to the jury. As discussed in section A.1, *supra*, jurors had no choice but to convict Ben Shalom of assault and battery under the instructions given to them, because even if they believed his testimony he had touched Jane on purpose in a way that offended her. There could be no tactical advantage to Ben Shalom in not advising the jury that, despite that evidence, it could acquit him on the lesser-included offenses as long as Jane consented, or he reasonably but mistakenly believed she had consented.

In order to prevail on a claim of ineffective assistance, a defendant must not only show that counsel "failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates" (*Pope*, 23 Cal.3d at 425), but also that, absent counsel's failings, there was "a reasonable probability of a more favorable outcome." (*In re Cordero* (1988) 46 Cal.3d 161, 180.) As discussed in section A.4, *supra*, there was a reasonable probability that a properly instructed jury would have acquitted Ben Shalom on the

assault and battery charges, as well as the section 288 charge.

Ben Shalom therefore asks the Court to determine that there could be no satisfactory explanation for his counsel's failure to raise the only viable defenses to the lesser-included charges, and to find that the failure prejudiced him.

Ben Shalom recognizes, however, that the Supreme Court has strongly recommended "'joining a verified petition for writ of habeas corpus'" to an appeal in cases such as this one where "'the record on appeal does not illuminate the basis for the attorney's challenged acts or omissions.'" (*People v. Wilson* (1992) 3 Cal.4th 926, 936-937, quoting *Pope*, 23 Cal.3d at 426-427.) The Court in *Wilson* approved of appellate counsel's decision to file a habeas petition "corresponding to the claim asserted on appeal." (*Wilson*, 3 Cal.4th at 936.)

Ben Shalom will therefore be filing a petition for writ of habeas corpus corresponding to and elaborating upon these claims.

**CONCLUSION**

For all the above reasons, Achi Ben Shalom asks this Court to reverse his conviction.

DATED: May 23, 2008

LAW OFFICES OF PAUL KLEVEN

By: \_\_\_\_\_  
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**CERTIFICATE OF COUNSEL**

I certify that this Appellant's Opening Brief contains 6685 words, as calculated by my WordPerfect 11 word processing program.

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