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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ELIAS ROJAS-DIAZ, Defendant and Appellant.	B283587 (Los Angeles County Super. Ct. No. BA438314)

APPEAL from a judgment of the Superior Court of Los Angeles County, Drew E. Edwards, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Elias Rojas-Diaz of possessing child pornography in violation of Penal Code section 311.11, subdivision (a).[1] Rojas-Diaz challenges his conviction on numerous grounds, including that the People withheld or failed to preserve exculpatory evidence, substantial evidence does not support the verdict, and the trial court failed to properly instruct the jury. Rojas-Diaz also argues the trial court abused its discretion in denying Rojas-Diaz's motion to reduce his offense to a misdemeanor. Because none of Rojas-Diaz's arguments has merit, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The FBI Finds Child Pornography on Rojas-Diaz's Work Computer*

In mid-2013 FBI Special Agent Timothy Alon downloaded several computer files containing child pornography using the peer-to-peer computer program "Ares," free software that allows users who download it to their computers to exchange files through the Internet.[2] Agent Alon identified the Internet Protocol (IP) address of the user who uploaded the files to Ares as 108.178.164.221. Agent Alon ultimately determined that someone had uploaded more than 50 files likely containing child

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1 Statutory references are to the Penal Code.

2 *Kelley v. Commonwealth* (Va. 2015) 771 S.E.2d 672, 673; see *United States v. Niggemann* (7th Cir. 2018) 881 F.3d 976, 978.

pornography to Ares from the IP address 108.178.164.221. Agent Alon served an administrative subpoena on the Internet service provider for the IP address 108.178.164.221 to obtain billing information for the subscriber assigned that IP address. The Internet service provider identified the subscriber as E.G. Brennan and Co., a company that repaired office equipment.

In September 2013 FBI Agent Tyson Walch confirmed that a computer associated with the IP address 108.178.164.221 had made 418 computer files containing child pornography available on Ares. On October 23, 2013 Agent Walch, accompanied by 11 other special agents and two forensic examiners, executed a search warrant at E.G. Brennan's office and warehouse. At that time, E.G. Brennan had five employees: an office manager, a receptionist, a salesman, an outside service technician, and Rojas-Diaz, a technician who repaired equipment in the warehouse.

Rojas-Diaz and several other employees were present when agents found and searched five computers and devices at the company. One computer in the warehouse where Rojas-Diaz worked contained evidence of child pornography. The office manager stated that all of the employees had access to the warehouse computer and that the warehouse computer, like other computers in the office, remained logged on for extended periods of time, even when Rojas-Diaz was out of the office.

Agent Walch questioned Rojas-Diaz about the warehouse computer, which Rojas-Diaz said he used to order parts. Rojas-Diaz said that he installed a password on the computer about a year earlier to prevent other employees from using it and that he never gave the password to any other employees. Agent Walch

did not ask Rojas-Diaz if other employees had access to the computer after Rojas-Diaz logged on.

Rojas-Diaz admitted using Ares to download music files, but denied downloading any child pornography. He said he had seen "some weird stuff" on the computer, which he deleted. Agent Walch told Rojas-Diaz that, based on the information Rojas-Diaz had provided, no one else could have been initiating the downloads of child pornography from Ares, to which Rojas-Diaz responded, "Sure." He also told Agent Walch he was responsible for what was on the warehouse computer.

B. *Federal Agents Examine the Computers*

United States Department of Homeland Security Special Agent Oladele Salaam conducted forensic examinations of the computers found in the front office, the back office, and the warehouse, as well as a "custom computer" and a thumb drive (also referred to as a flash drive). On the warehouse computer used by Rojas-Diaz, Agent Salaam found the Ares file sharing program and file names suggesting they contained child pornography. Based on Agent Salaam's findings, the Department of Homeland Security seized the warehouse computer.

Another Department of Homeland Security special agent and computer forensics analyst, Dennis Reneau, examined the warehouse computer. Agent Reneau first confirmed the computer had the IP address 108.178.164.221. He determined the operating system was registered to "Elias," a user with administrative rights named "Elias Rojas" set the computer's password, and the guest user profile allowing someone else to log into the computer as a guest was not activated.

Agent Reneau found the Ares program within the user account for "Elias Diaz,"[3] through which someone had searched the Ares network using the search terms "little girls rape," "PTHC" (which stands for "preteen hard core"), and other search terms indicative of child pornography. Agent Reneau found approximately 400 files containing evidence of child pornography stored in various user-created directories (as opposed to default directories created by the operating system) on the computer. Most of the 400 files were videos. One of the videos had been played only hours before FBI agents arrived to execute the search warrant.

Agent Reneau found several personal items on the computer, including Rojas-Diaz's cable bill and 700 photographs. He did not find any personal items associated with anyone other than Rojas-Diaz on the warehouse computer. Agent Reneau discovered that a cell phone with a number matching Rojas-Diaz's, a cell phone with a device name matching the name of Rojas-Diaz's wife, and a tablet with a device name matching the name of Rojas-Diaz's son had all been connected to the computer. He also determined that several external devices had been connected to the computer through its USB drive, but noted only one of the devices in his report because it was the only one that had transferred files "indicative of [child pornography]." The agents did not find that device at E.G. Brennan.

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[3] The record suggests this user account was the same as the one previously identified by Agent Reneau as "Elias Rojas."

C. *The Agents Initially Suspect a Coworker of Rojas-Diaz, but the People Ultimately Charge Rojas-Diaz*

Agent Walch researched E.G. Brennan and learned that one of its employees, Cordell Shear, was convicted of indecent exposure in 1996. Agent Walch had identified Shear as a "person of interest" before executing the search warrant. The agents began their search at the company with Shear's computer, but it did not contain any evidence of child pornography. Shear consented to a search of his home computers and devices, but agents did not find any child pornography there either. Three years later, the People charged Rojas-Diaz, not Shear, with one count of distributing matter depicting sexual conduct by a minor in violation of section 311.1, subdivision (a), and one count of possessing such matter in violation of section 311.11, subdivision (a).

Rojas-Diaz's defense focused on Shear's criminal history and evidence showing someone else could have downloaded child pornography on the warehouse computer. Rojas-Diaz argued that all E.G. Brennan employees, including Shear, had access to the warehouse computer and that, unlike Shear, Rojas-Diaz was "not the type of a person who fits the category of a sex offender." Rojas-Diaz also argued he was prejudiced by the prosecutor's failure to disclose and preserve certain evidence relevant to this defense, including details of Shear's criminal history, a worksheet created by Agent Salaam, and a thumb drive found during the search of E.G. Brennan.

D. *The Prosecution Discloses Some but Not All of Shear's Criminal History*

Before trial, the prosecutor provided counsel for Rojas-Diaz with a police report and other information about Shear's 1996 conviction for indecent exposure. During trial, counsel for Rojas-Diaz discovered Shear had additional arrests and a conviction the prosecutor did not disclose. These included arrests for carjacking and making a criminal threat and a conviction for robbery.

E. *The Prosecution Does Not Disclose a Worksheet and a Thumb Drive*

Agent Salaam testified he "previewed" five devices at E.G. Brennan to determine if they contained evidence of child pornography. He explained that a forensic preview is a preliminary analysis to determine whether a device falls within the scope of a search warrant. If it does, the FBI seizes the device for a full forensic examination. Agent Salaam identified one of the devices he previewed as a thumb drive. On cross examination, Agent Salaam stated he created a worksheet while he previewed the computers and devices that showed which devices he "touched" and "what state [he] found them in." Agent Salaam said he gave the worksheet to Agent Reneau. Counsel for Rojas-Diaz moved to strike Agent Salaam's testimony, arguing that, because she had just learned of the existence of the thumb drive and the worksheet, she could not effectively cross-examine Agent Salaam.

The trial court questioned Agent Salaam outside the presence of the jury to determine whether the prosecutor's failure to produce the worksheet and to disclose all the devices the FBI had searched had prejudiced Rojas-Diaz's defense. Agent Salaam

stated the worksheet indicated the make, model, and serial number of the hard drives in the computers he previewed and whether each computer was on or off when he found it. The worksheet did not indicate whether any device he previewed, including the thumb drive, had been connected to another device. Counsel for Rojas-Diaz argued the prosecutor's failure to produce the thumb drive was prejudicial because an analysis of the thumb drive could have shown that someone other than Rojas-Diaz used the warehouse computer.

The trial court agreed the People had failed to comply with their discovery obligations under section 1054.1, found the discovery violation prejudiced Rojas-Diaz, and stated the court would strike Agent Salaam's testimony.[4] Counsel for Rojas-Diaz moved for a mistrial, arguing "there was at least another item of evidence that was there and could potentially contain exculpatory [evidence] or result in exculpatory discovery." The prosecutor disputed counsel for Rojas-Diaz's characterization of the undisclosed evidence. She emphasized that the search warrant did not apply to any of the computers other than the warehouse computer because they did not contain child pornography, and therefore the agents could not seize them. Thus, the People could not have made the thumb drive available to Rojas-Diaz because they never had possession of it. The prosecutor also argued the People produced "a full forensic report" on the warehouse computer listing all other devices that had been connected to it, including cell phones and tablets. The trial court took the motion for mistrial under submission.

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[4] The transcript does not reveal whether the trial court's ruling was based on the People's failure to disclose or produce Agent Salaam's worksheet, the thumb drive, or both.

The next morning the trial court asked counsel for Rojas-Diaz whether a brief continuance would give her time to have an expert analyze the thumb drive and to prepare for a full and effective cross-examination of Agent Salaam. Counsel for Rojas-Diaz said she did not want a continuance, stating Rojas-Diaz had already "waited so long for his day in court." The prosecutor reiterated that the People did not have the thumb drive, the thumb drive tested negative for child pornography during the search, and the forensic examination of the warehouse computer showed the thumb drive had never been connected to it. The trial court denied Rojas-Diaz's motion for a mistrial.

Later that afternoon the trial court revisited the issue of Agent Salaam's testimony. The prosecutor argued the undisclosed evidence was not exculpatory or material because forensic tests on the warehouse computer showed which devices had been connected to that computer, counsel for Rojas-Diaz could cross-examine Agent Reneau about those devices, the thumb drive tested negative for child pornography, and the thumb drive had never been connected to the warehouse computer. She contended nothing in Agent Salaam's worksheet would have indicated any additional connections to the warehouse computer that the forensic examination did not discover. The trial court stated the worksheet was relevant and should have been produced, but, rather than striking Agent Salaam's testimony, the court decided to instruct the jury regarding discovery violations based on CALCRIM No. 306.[5]

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[5] CALCRIM No. 306 provides, in relevant part: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all

Agent Salaam returned to the witness stand for the completion of his cross-examination. Agent Salaam stated he remembered finding the thumb drive on a table near the warehouse computer. Photographs of Rojas-Diaz's workstation showed the thumb drive on top of the warehouse computer's keyboard.

F. *Rojas-Diaz Moves for Sanctions Based on Prosecutorial Misconduct*

On the last day of trial Rojas-Diaz filed a motion asking the trial court to find the prosecutor had committed misconduct by failing to disclose Shear's additional arrests and conviction and by failing to disclose or preserve the worksheet and thumb drive. Rojas-Diaz argued the prosecutor violated section 1054 and the United States Constitution by failing to disclose "[i]nformation on arrests and convictions" and "evidence favorable to the accused." He requested a complete record of Shear's prior arrests and convictions and asked the court to instruct the jury pursuant to CALCRIM No. 306.

The prosecutor argued, among other things, that section 1054.1, subdivision (d), requires the prosecutor to disclose only felony convictions of a material witness whose credibility is likely to be critical to the outcome of the trial. She noted the People did not call Shear as a witness, and, because his prior convictions had been reduced to misdemeanors and expunged, the People did not have a duty under section 1054.1 to disclose them. The court

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relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] . . . [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of . . . late disclosure." (See *People v. Riggs* (2008) 44 Cal.4th 248, 307.)

found there was no prosecutorial misconduct and denied the motion, but acknowledged it had previously agreed to instruct the jury pursuant to CALCRIM No. 306.

G. *The Jury Convicts Rojas-Diaz, and the Trial Court Sentences Him*

The jury found Rojas-Diaz not guilty of distributing child pornography under section 311.1, subdivision (a), but guilty of possessing it under section 311.11, subdivision (a). The trial court suspended imposition of sentence, placed Rojas-Diaz on felony probation for five years, ordered him to perform community service, and required him to register as a sex offender and complete a sex offender counseling course. Rojas-Diaz timely appealed.

DISCUSSION

A. *The Prosecution Did Not Improperly Withhold or Fail To Preserve Exculpatory Evidence*

Rojas-Diaz argues the People improperly withheld Shear's criminal history and failed to preserve the thumb drive and the worksheet. As he did in the trial court, Rojas-Diaz characterizes this conduct as prosecutorial misconduct. Rojas-Diaz's contentions, however, are more accurately described as arguments the prosecution violated its duty to disclose exculpatory evidence under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) and to preserve exculpatory evidence under *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*) and *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*).

1. *Applicable Law and Standard of Review*

Under *Brady*, *Trombetta*, and *Youngblood*, the prosecution has a duty under the due process clause of the United States Constitution to disclose and retain certain evidence. (*People v. Alvarez* (2014) 229 Cal.App.4th 761, 771.) "*Brady* is the leading case on the prosecution's duty to disclose exculpatory evidence." (*Alvarez*, at p. 771.) Under *Brady*, "'the prosecution has a duty to disclose to a criminal defendant evidence that is "'both favorable to the defendant and material on either guilt or punishment.'" [Citations]. The prosecution's withholding of favorable and material evidence violates due process "irrespective of the good faith or bad faith of the prosecution."'" (*People v. Williams* (2013) 58 Cal.4th 197, 255-256.) "Evidence is 'material' if there is a reasonable probability that the outcome of trial would have been different had the evidence been disclosed to the defense." (*People v. Clark* (2011) 52 Cal.4th 856, 982.) "'*Brady* does not require the disclosure of information that is of mere speculative value.'" (*Williams*, at p. 259.)

Trombetta and *Youngblood* concern the prosecution's duties to retain and preserve exculpatory evidence. Under *Trombetta*, "'[t]he state has a duty to preserve evidence that both possesses "an exculpatory value that was apparent before the evidence was destroyed" and is of "such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."'" (*People v. Carrasco* (2014) 59 Cal.4th 924, 960, quoting *Trombetta*, *supra*, 467 U.S. at p. 489.) Under *Youngblood*, if the exculpatory value of the evidence was not apparent before the evidence was destroyed or lost, a defendant can show a violation of due process only where authorities acted

in bad faith in failing to preserve the potentially useful evidence. (*Carrasco*, at p. 960.)

"Thus, there is a distinction between *Trombetta*'s 'exculpatory value that was apparent' criteria and the standard set forth in *Youngblood* for 'potentially useful' evidence." (*People v. Alvarez*, *supra*, 229 Cal.App.4th at p. 773.) "If the evidence's exculpatory value is apparent and no comparable evidence is reasonably available, due process precludes the state from destroying it. [Citations.] If, however, 'no more can be said [of the evidence] than that it *could have* been subjected to tests, the results of which *might have* exonerated the defendant' [citation], the proscriptions of the federal Constitution are narrower; 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.'" (*People v. Duff* (2014) 58 Cal.4th 527, 549; see *Youngblood*, *supra*, 488 U.S. at p. 58; *People v. Tafoya* (2007) 42 Cal.4th 147, 187; *People v. DePriest* (2007) 42 Cal.4th 1, 42.) The defendant has the burden of showing bad faith. (*People v. Chism* (2014) 58 Cal.4th 1266, 1300; *People v. Montes* (2014) 58 Cal.4th 809, 838.)

We normally review a trial court's order denying a motion for sanctions based on prosecutorial misconduct or a discovery violation for an abuse of discretion. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 951 ["courts have broad discretion in determining the appropriate sanction for discovery abuse"]; *People v. Bowles* (2011) 198 Cal.App.4th 318, 325 [same].) Whether a *Brady* violation has occurred, however, is reviewed de novo. (See *People v. Masters* (2016) 62 Cal.4th 1019, 1067 ["'[w]e independently review the question whether a *Brady* violation has occurred'"]; *People v. Whalen* (2013) 56 Cal.4th 1, 64 (*Whalen*)

[reviewing arguments that a prosecutor committed misconduct by failing to timely disclose certain evidence "under the rubric of *Brady*"], disapproved on another ground in *People v. Romero* (2015) 62 Cal.4th 1, 44, fn. 17.) We give "great weight" to the trial court's findings of fact that are supported by substantial evidence. (*People v. Letner* (2010) 50 Cal.4th 99, 176; see *People v. Salazar* (2005) 35 Cal.4th 1031, 1042.) In general, we review a trial court's ruling on a *Trombetta/Youngblood* motion for substantial evidence. (*People v. Montes*, *supra*, 58 Cal.4th at p. 837; *People v. Duff*, *supra*, 58 Cal.4th at p. 549.)[6]

2. *Shear's Undisclosed Criminal History*

Rojas-Diaz contends *Brady* required the prosecutor to disclose all of Shear's criminal history, not just his 1996 conviction for indecent exposure. Rojas-Diaz argues: "Misdemeanor convictions which have been expunged are still

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[6] Contrary to the People's assertion, Rojas-Diaz did not forfeit his arguments under *Brady*, *Trombetta*, and *Youngblood* by failing to raise them in the trial court. Rojas-Diaz's motion for sanctions invoked the federal Constitution and *Brady* in arguing the prosecutor failed to preserve and disclose certain evidence, and in their opposition the People analyzed the prosecution's duties in light of *Brady* and argued the undisclosed evidence was not material or exculpatory. To the extent Rojas-Diaz failed explicitly to make some or all of the constitutional arguments he makes on appeal, "'the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution.'" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809; see *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

discoverable and admissible because an expunged misdemeanor remains relevant for impeachment purposes." Perhaps, but because the People did not call Shear as a witness, there was no witness to impeach. (See *People v. Williams*, *supra*, 58 Cal.4th at p. 258 [no *Brady* violation where the prosecution failed to disclose "'a prior criminal incident committed by [a] prosecution witness . . . that could be used to potentially impeach her testimony' . . . [b]ecause there was no testimony to impeach"]; see also *People v. Clark*, *supra*, 52 Cal.4th at p. 982 [although a witness's misdemeanor conviction was favorable to defendant as impeachment evidence, it was not material because the witness was not a "primary prosecution witness"]; cf. *People v. Martinez* (2002) 103 Cal.App.4th 1071, 1079 [defendant demonstrated a *Brady* violation where the prosecutor withheld pending felony charges against "*the* pivotal witness in the case"].)

3. *The Thumb Drive*

Citing *Brady* and *Trombetta*, Rojas-Diaz argues the prosecution had a duty to preserve and produce the thumb drive found on top of the warehouse computer's keyboard. Neither *Brady* nor *Trombetta*, however, requires the prosecution to preserve or disclose speculative evidence. (See *People v. Williams*, *supra*, 58 Cal.4th at p. 259 [*Brady*]; *People v. Carrasco*, *supra*, 59 Cal.4th at p. 962 [*Trombetta*/*Youngblood*].)

For example, in *People v. Whalen*, *supra*, 56 Cal.4th 1, disapproved on another ground in *People v. Romero* (2015) 62 Cal.4th 1, 44, fn. 17, the Supreme Court rejected the defendant's argument that *Brady* required the prosecution to disclose seven rolls of film the prosecution's expert criminalist had developed but not printed. (*Whalen*, at pp. 62-65.) The

defendant argued his investigator "had not had an opportunity to determine the evidentiary or exculpatory value of the seven rolls of film." (*Id.* at p. 63.) The Supreme Court held that, "although defendant is likely correct that he lost the opportunity to attempt to match the photographs developed from the seven belatedly discovered rolls of film with [shoe prints left at the scene of the crime], the claim that he could have done so had the film been turned over earlier is speculative at best." (*Id.* at p. 65.) The criminalist had testified "the photographs probably could not be matched to a particular shoe," nor could he determine from the photographs "when the shoe prints were made; they could have been left before the crime or after the crime." (*Ibid.*) The Supreme Court concluded that the defendant could not establish "reasonable probability of a different result at trial" had the photographs been disclosed earlier. (*Ibid.*)

Similarly, the possibility the thumb drive would yield any material and exculpatory evidence even if Rojas-Diaz had the opportunity to test it was remote. Among the devices and computers the FBI previewed, only the warehouse computer contained evidence of child pornography. Agent Reneau determined several external devices had been connected to the computer through its USB drive, any one of which could have been used by someone other than Rojas-Diaz, but listed only one of them in his report because it was the only one containing child pornography files. Thus, even if the thumb drive could have shown that someone other than Rojas-Diaz accessed the warehouse computer, it would not have shown that any such person used the thumb drive to view, download, or upload child pornography. As in *Whalen*, Rojas-Diaz's inability to analyze the thumb drive does not establish a reasonable probability of any

different result at trial. (See *Whalen*, *supra*, 56 Cal.4th at p. 65; see also *People v. Williams*, *supra*, 58 Cal.4th at pp. 258-259 [*Brady* does not require the prosecution to disclose "'*potentially* material information'"].)

Because the thumb drive's exculpatory value was merely speculative, the prosecution's failure to retain it did not violate Rojas-Diaz's due process rights unless he showed the prosecutor or the federal agents acted in bad faith. (See *People v. Carrasco*, *supra*, 59 Cal.4th at p. 962.) Rojas-Diaz contends the prosecutor and the agents acted in bad faith by misrepresenting the location of the thumb drive and by failing to preserve the thumb drive "when it was an item listed in the search warrant" and the "agents were well aware . . . they needed to prove which individual at the company downloaded the child porn after they traced the IP address." Even if true, none of these contentions would demonstrate bad faith under *Youngblood* because Rojas-Diaz provided no evidence the prosecutor, the FBI, or Homeland Security knew the thumb drive could exonerate him. (See *People v. Montes*, *supra*, 58 Cal.4th at p. 838 ["'[t]he presence or absence of bad faith by the police . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed'"]; *People v. Alvarez*, *supra*, 229 Cal.App.4th at p. 777 [no bad faith unless "'the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant' [citation] and fail to preserve it"].)[7]

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[7] Rojas-Diaz also contends in his reply brief that "the prosecution had a duty to preserve and turn over the thumb drive attached to the warehouse computer where the child porn was found." Agent Salaam, however, did not testify that the thumb

4. *The Worksheet*

Also citing *Brady* and *Trombetta*, Rojas-Diaz argues the prosecution violated its duty to preserve and disclose Agent Salaam's worksheet. Rojas-Diaz argues the worksheet could have provided "[i]nformation linking other users to the warehouse computer where the child pornography was found [and] was key exculpatory evidence the defense was unable to fully examine." Although the trial court found the worksheet "relevant," no evidence supports Rojas-Diaz's contention the worksheet was exculpatory because information from the worksheet could have linked other users to the warehouse computer. The prosecutor asked Agent Salaam whether the worksheet would show that a particular device "had ever been connected with another device." Agent Salaam responded, "No. That would not be on that worksheet. No." Thus, the evidence did not support Rojas-Diaz's theory the worksheet was exculpatory, and he does not contend the prosecutor or the federal agents acted in bad faith by withholding the worksheet.

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drive was "attached" to the warehouse computer; he said only that it was found lying on the computer's keyboard. Agent Reneau testified that a thumb drive could only be "attached" to the computer through its USB drive.

B. *Substantial Evidence Supports the Verdict*

The jury convicted Rojas-Diaz of violating section 311.11, subdivision (a), which "prohibits either possession or control of any child pornography 'matter, representation of information, data, or image.'" (*Tecklenburg v. Appellate Div. of Superior Court* (2009) 169 Cal.App.4th 1402, 1418, italics omitted (*Tecklenburg*).) "By its plain terms, section 311.11 includes an image of child pornography as it is displayed on a computer screen as an object that can be knowingly possessed or controlled." (*Tecklenburg*, at p. 1418.) A defendant knowingly possesses or controls child pornography in violation of section 311.11, subdivision (a), by, among other things, "actively downloading and saving it to his or her computer." (*Tecklenburg*, at p. 1419, fn. 16.)

"'"On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."'" (*People v. Jones* (2013) 57 Cal.4th 899, 960; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 345.) "'"The standard of review is the same in cases in which the People rely mainly on circumstantial evidence."'" (*Jones*, at p. 960.) "'"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."'" (*People v. Casares* (2016) 62 Cal.4th 808, 823; see *People v. Clark* (2016) 63 Cal.4th 522, 626.) "'If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not

retry the case ourselves. [Citations.] . . . It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence.'" (*Tecklenburg*, *supra*, 169 Cal.App.4th at p. 1412.)

There was substantial evidence from which the jury could find Rojas-Diaz possessed or controlled child pornography on the warehouse computer. Agent Walch testified Rojas-Diaz told him he used the warehouse computer and installed a password on the computer more than a year earlier to keep others from using it. Rojas-Diaz also told Agent Walch he did not give anyone else the password. Rojas-Diaz admitted using Ares on the warehouse computer to download music files, and, when Agent Walch told Rojas-Diaz that, based on the information Rojas-Diaz had provided, no one else could have downloaded child pornography from Ares, Rojas-Diaz responded, "Sure." Rojas-Diaz also took responsibility for whatever FBI agents found on the warehouse computer.

Agent Reneau's forensic examination of the warehouse computer revealed its operating system was registered to "Elias," the computer's administrator was "Elias Rojas," the administrator created a password for the computer on January 4, 2011, and the computer's guest user profile was not activated. Agent Reneau confirmed the IP address for the warehouse computer matched the IP address Agent Alon identified as the source of more than 50 files containing child pornography on the Ares network. Agent Walch testified that between December 2012 and September 2013 approximately 418 files containing child pornography were publicly available at one time or another from the warehouse computer's Ares folder. Stored on the computer were approximately 400 files containing child

pornography, including videos, one of which had been viewed just hours before the agents arrived at E.G. Brennan. Agent Reneau's investigation also revealed that someone used the warehouse computer to search the Ares network for titles referencing "little girls rape" and "preteen hard core."

There was also evidence Rojas-Diaz was the only one who downloaded data or files from other sources to the warehouse computer. This evidence included the discovery that several of Rojas-Diaz's personal items were on the warehouse computer, and cell phones and tablets likely belonging to Rojas-Diaz, his wife, and his son had been connected to the computer. Agent Reneau did not find evidence of such personal items or use associated with anyone other than Rojas-Diaz on the warehouse computer.

Rojas-Diaz contends the evidence was insufficient to support the verdict because "no forensic evidence placed him behind the computer," and all E.G. Brennan employees, including Shear, had access to the warehouse computer. The jury, however, reasonably could have found from the evidence that Rojas-Diaz was the primary, if not the only, user of the warehouse computer and that he was responsible for the child pornography on that computer. There was no evidence any company employee other than Rojas-Diaz used the warehouse computer, and Rojas-Diaz told Agent Walch he installed a password on the warehouse computer to prevent others from using it. Viewed in the light most favorable to the judgment, there was substantial evidence Rojas-Diaz used the warehouse computer to find, access, and view child pornography. (See *People v. Petrovic* (2014) 224 Cal.App.4th 1510, 1512, 1517 [defendant's statement that he was "the only one who use[d]" a

computer supported an inference that the defendant was responsible for its pornographic content]; *Tecklenburg*, *supra*, 169 Cal.App.4th at p. 1419 [evidence that a firefighter whose home computer contained child pornography with file names matching the names of files on a firehouse computer accessible to many other firefighters, viewed in the light favorable to the judgment, demonstrated the defendant used his home and work computers to find, access, and view child pornography].)[8]

C. *The Trial Court Did Not Commit Instructional Error*

Rojas-Diaz argues the trial court erred by failing to instruct the jury on transitory possession and mistake of fact. Rojas-Diaz did not request these instructions at trial, and the trial court did not err in failing to give them sua sponte.

1. *Applicable Law*

"'In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case.'" (*People v. Anderson* (2011) 51 Cal.4th 989, 996 (*Anderson*); see *People v. Martinez* (2010) 47 Cal.4th 911, 953.) "That duty extends to '"instructions on the defendant's theory of the case, including instructions 'as to defenses '"that the defendant is relying on . . . , or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."'"'"'"

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[8] Rojas-Diaz also asserts his "transitory accidental viewing" of two videos before deleting them was insufficient to establish a violation of section 311.11, subdivision (a). The People's evidence, however, was not limited to those two files.

(*Anderson*, at p. 996; see *People v. Gutierrez*, *supra*, 45 Cal.4th at p. 824.) When a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, however, the defendant does not present "'"a special defense invoking *sua sponte* instructional duties."'" (*Anderson*, at p. 996, italics omitted; accord, *People v. Covarrubias* (2016) 1 Cal.5th 838, 873.) "'"While a court may well have a duty to give a "pinpoint" instruction relating such evidence to the elements of the offense and to the jury's duty to acquit if the evidence produces a reasonable doubt, such "pinpoint" instructions are not required to be given *sua sponte* and must be given only upon request."'" (*Covarrubias*, at p. 873; see *People v. Hill* (2015) 236 Cal.App.4th 1100, 1118-1119.)

2. *The Trial Court Did Not Have a Sua Sponte Duty To Instruct on Transitory Possession*

Rojas-Diaz contends the trial court should have instructed the jury sua sponte on the defense of transitory possession pursuant to CALCRIM No. 2305.[9] CALCRIM No. 2305 generally applies to the "transitory" or "'momentary' possession" of controlled substances. (*People v. Martin* (2001) 25 Cal.4th 1180,

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[9] CALCRIM No. 2305 provides, in relevant part, that the "possession [of a controlled substance] was not illegal if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that: [¶] 1. The defendant possessed [the controlled substance] only for a momentary or transitory period; [¶] 2. The defendant possessed [the controlled substance] in order to [abandon, dispose of, or destroy] it; [¶] AND [¶] 3. The defendant did not intend to prevent law enforcement officials from obtaining the [controlled substance]."

1185; see *id.* at pp. 1186-1191 [considering CALJIC No. 12.06, the counterpart to CALCRIM No. 2305].) The Supreme Court has recognized that the defense of "momentary possession" may apply to the possession of child pornography under section 311.11, subdivision (a). (See *In re Grant* (2014) 58 Cal.4th 469, 479.)

Rojas-Diaz, however, did not rely on the defense of transitory possession; his defense was that someone else had access to the warehouse computer. In her closing argument, counsel for Rojas-Diaz maintained the People "have the wrong person in court facing . . . charges," "the [warehouse] computer could be accessed by all employees," and "[w]e know that external devices were plugged into this computer to indicate that other people, in fact, accessed this computer." Rojas-Diaz did not argue he possessed any child pornography, even momentarily.

Rojas-Diaz nevertheless argues the defense of transitory possession was consistent with his defense at trial because Rojas-Diaz told the agents he deleted certain "weird" images when he saw them on the warehouse computer, and forensic evidence confirmed child pornography files had been deleted from the computer. That evidence, however, showed that only two files had been deleted; the People presented evidence of over 400 files containing child pornography on the warehouse computer. Rojas-Diaz did not at trial, and does not on appeal, argue he transitorily possessed those files. Thus, even if transitory possession was consistent with Rojas-Diaz's defense at trial, there was no substantial evidence giving rise to a sua sponte duty to instruct on the defense of transitory possession.

3. *Rojas-Diaz Forfeited His Argument the Trial Court Erred by Failing To Instruct on Mistake of Fact*

Rojas-Diaz also contends the trial court should have instructed the jury sua sponte on the "defense" of mistake of fact. Rojas-Diaz argues he merely "stumbled across weird stuff" on the warehouse computer "accidentally," thus negating the "knowing requirement" of section 311.11, subdivision (a).

Because mistake of fact "operates to negate the requisite criminal intent or mens rea element of [a] crime," however, the trial court did not have a duty to instruct on the issue sua sponte. (*People v. Lawson* (2013) 215 Cal.App.4th 108, 111; accord, *People v. Zinda* (2015) 233 Cal.App.4th 871, 881; see *In re Jennings* (2004) 34 Cal.4th 254, 277 ["a mistake of fact defense is not available unless the mistake disproves an element of the offense"]; *People v. Zamani* (2010) 183 Cal.App.4th 854, 886 ["[a] mistake of fact, by itself, is not a defense unless the mistake disproves an element of the crime"].) Because Rojas-Diaz did not request an instruction on mistake of fact, and does not argue the instructions the trial court gave were incorrect, he forfeited the argument the trial court erred in failing to give the instruction. (See *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 901; *People v. Simon* (2016) 1 Cal.5th 98, 143.)

Rojas-Diaz's argument also lacks merit because his mistake-of-fact theory was not closely and openly connected with the facts before the court, necessary for the jury's understanding of the case, or supported by substantial evidence. (See *People v. Lujano* (2017) 15 Cal.App.5th 187, 191; *People v. Hill*, *supra*, 236 Cal.App.4th at pp. 1118-1119.) As noted in connection with Rojas-Diaz's argument regarding transitory possession, his

"accidental stumble" upon two files he claimed he deleted addressed only a small portion of the child pornography found on the warehouse computer.

D. *The Trial Court Did Not Abuse Its Discretion by Denying Rojas-Diaz's Motion To Reduce His Conviction to a Misdemeanor*

Rojas-Diaz asked the trial court to reduce the conviction for possession of child pornography to a misdemeanor under section 17, subdivision (b). The trial court denied the motion, stating "the nature of the conduct in this case is, in my view, felony conduct." Rojas-Diaz contends the trial court abused its discretion. The Attorney General argues violation of section 311.11, subdivision (a), is a felony the trial court cannot reclassify as a misdemeanor under section 17, subdivision (b).

"Wobblers" are crimes that "are chargeable or, in the discretion of the court, punishable as either a felony *or* a misdemeanor; that is, they are punishable either by a term in state prison or by imprisonment in county jail and/or by a fine." (*People v. Park* (2013) 56 Cal.4th 782, 789.) "'A court [has] broad discretion under [section 17, subdivision (b)] in deciding whether to reduce a wobbler offense to a misdemeanor. [Citation.] We will not disturb the court's decision on appeal unless the party attacking the decision clearly shows the decision was irrational or arbitrary. [Citation.] Absent such a showing, we presume the court acted to achieve legitimate sentencing objectives.'" (*People v. Tran* (2015) 242 Cal.App.4th 877, 887; see *Park*, at p. 790; *People v. Lee* (2017) 16 Cal.App.5th 861, 866; *People v. Sy* (2014) 223 Cal.App.4th 44, 66.)

"Before November 8, 2006, section 311.11 was a 'wobbler,' . . . . The Sexual Predator Punishment and Control Act (Prop. 83, as approved by voters, Gen. Elec. (Nov. 7, 2006)) amended the statute, and describes the crime only as a felony." (*In re Grant*, *supra*, 58 Cal.4th at p. 475, fn. 3.) Section 311.11, subdivision (a), however, provides for a state prison sentence or a county jail commitment. "Ordinarily when an offense is punishable by either a state prison or county jail term, it is a wobbler." (*Grant*, at p. 475, fn. 3; see *People v. Corpuz* (2006) 38 Cal.4th 994, 997.) The Supreme Court acknowledged section 311.11, subdivision (a), contains a legislative "anomaly," but has not yet addressed whether a trial court has discretion to sentence a violation of section 311.11, subdivision (a), as a misdemeanor under section 17, subdivision (b). (See *Grant*, at p. 475, fn. 3.) Even if the trial court had such discretion, however, Rojas-Diaz has not shown the trial court abused its discretion by imposing a felony sentence on his conviction for possession of child pornography.

Rojas-Diaz argues "[t]here were significant mitigating factors which merited a reduction," but he does not show the trial court's decision to deny his motion to reduce his conviction to a misdemeanor was irrational or arbitrary. Nor does he show the court failed to consider the facts surrounding the offense and his characteristics in deciding whether to classify his conviction as a felony or a misdemeanor. (See *Tran*, *supra*, 242 Cal.App.4th at p. 885.)[10] Instead, Rojas-Diaz merely reargues his motion.

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[10] In denying Rojas-Diaz's motion, the trial court acknowledged "there were some mitigating circumstances in the fact that there was another individual who may or may not have been responsible for the conduct at issue here. Be that as it may, I do respect the jury's verdict in this case."

Even if we disagreed with the trial court's decision, we cannot substitute our judgment for the judgment of the trial court absent an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 377; *People v. Blackwell* (2016) 3 Cal.App.5th 166, 200.) Rojas-Diaz also suggests the trial court "punished" him for exercising his right to a jury trial after rejecting the People's plea deal, but he offers no evidence in support of this assertion.[11]

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

ZELON, Acting P. J. FEUER, J.*

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[11] Rojas-Diaz argues cumulative error undermined confidence in the verdict and requires reversal. Because we find no error, there is no cumulative error. (See *People v. Cordova* (2015) 62 Cal.4th 104, 150 [no cumulative prejudicial error where "there was no error to accumulate"].)

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.