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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE VALENCIA, Defendant and Appellant.	B294304 (Los Angeles County Super. Ct. No. LA087541)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory A. Dohi, Judge. Affirmed.

Spolin Law and Aaron Spolin for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jose Valencia (defendant) appeals from his conviction of multiple sex crimes against children. He contends that the judgment was unsupported by substantial evidence; that the information should have been dismissed since his preliminary hearing was set more than 60 days after arraignment; that he was denied a speedy trial; that the trial court abused its discretion in denying his pretrial motion to sever counts 1 and 2 from counts 3, 4, 5, and 6, resulting in a grossly unfair trial; and that the trial court should have suppressed his confession, although it was not used at trial. Finding no merit to defendant's contentions, we affirm the judgment.

BACKGROUND

Defendant was originally charged with eight felony counts.[1] Jennifer C. was the named victim in counts 4, 5, and 6. Count 4 alleged continuous sexual abuse between August 1, 2011 and June 30, 2012, in violation of Penal Code section 288.5, subdivision (a),[2] and counts 5 and 6 alleged sexual intercourse with a victim who was 10 years old or younger, between July 1, 2012 and December 31, 2013, in violation of section 288.7, subdivision (a). Carlos P. was the named victim in counts 7 and 8. Count 7 alleged attempted sodomy of the victim, who was under 14 years of age with a 10-year age difference, in violation

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[1] Counts 4 through 8 of the information were amended by interlineation to conform to proof of dates alleged. Count 3 was dismissed on motion of the prosecutor, and counts 1 and 2 were dismissed on motion of defendant pursuant to Penal Code section 1118.1, but the prosecution was later permitted to add counts 9 and 10 in their place. We summarize the charges as amended.

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

of sections 664 and 286, subdivision (c)(1), and count 8 alleged the commission of a forcible lewd act upon the victim in violation of section 288, subdivision (b)(1). Counts 9 and 10 each alleged a lewd act upon Melanie C., a child under the age of 14, in violation of section 288, subdivision (a). The information also alleged the special circumstance of multiple victims, within the meaning of section 667.61, subdivisions (a) and (e).

A jury convicted defendant of counts 4, 5, 6, 9, and 10, and found true the multiple victim allegation. Counts 7 and 8 were dismissed after the jury was unable to reach a verdict as to those counts. The trial court sentenced defendant to 50 years to life in prison, comprised of consecutive terms of 25 years to life for each of counts 4 and 9, and concurrent terms of 25 years to life on counts 5, 6, and 10.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Jennifer and Carlos (counts 4 through 8)

Jennifer C. was born in August 2003, and was 15 years old at the time of the October 2018 trial. In 2004, when Jennifer was a year old, her mother, Glenda C., arranged for her to be cared for by Socorro Valencia (Socorro), in Socorro's home while Glenda worked. Jennifer remained in Socorro's care until 2013, when she was 10 years old. Defendant was Socorro's husband and lived in the home during that period.

Jennifer testified that beginning when she was about eight years old and in the third grade, defendant began kissing her on the mouth, sometimes asking her to put her tongue in his mouth, and many times over the years putting his tongue in her mouth. About three or four months after the kissing began, defendant

began touching her in inappropriate places. Defendant touched her at least 15 times on the buttocks, the vaginal area, and her breast area, first over her clothing, and then both over and under her clothing. Defendant touched Jennifer's vaginal area under her clothing more than 10 times. She was not sure whether he inserted his fingers into her vagina. More than 15 times, defendant would unbuckle his belt or pants, expose himself, and place his own hand on his penis under his clothing. Sometimes he grabbed Jennifer's hand and placed it on his penis. Eventually defendant began putting his penis into her vagina, which she sometimes found painful. This happened more than 20 times.

Defendant would take off Jennifer's clothes, sometimes partially and sometimes completely. The abuse occurred in defendant's bedroom after Socorro had put Jennifer down for a nap on the bed. Sometimes defendant drove Jennifer to his daughter Isabel's house and abused her there, and sometimes he abused her in his car. Jennifer recalled that on at least one occasion, defendant touched her over and under her clothing while they were parked in a 99 Cent Store parking lot. When defendant put his penis into her vagina Jennifer was sometimes lying on her back and sometimes on her stomach, and she could feel the weight of his body on her. Jennifer tried to resist. She tried to push him away with her hands whenever he kissed her or put his penis in her vagina, and most of the time when he touched her body, but defendant would then hold her down so forcefully that she could not move. He would force her to put her hand on his penis and then make her move her hand back and forth. Her attempts to take her hand away and to kick defendant

never succeeded. The abuse continued until Jennifer stopped going to defendant's home for babysitting.

Jennifer had a vague memory of being hit by Socorro with a wooden spoon for misbehaving, but she could not remember when it happened or where on her body she was struck.

Jennifer's younger brother, Carlos P., was 11 years old when he testified at trial. He was also placed with Socorro for babysitting at her home. Carlos knew defendant and identified him in court. Once, when Carlos was four or five years old, not yet in school, he was taking a nap in Socorro's bedroom, when defendant entered, grabbed him by the legs, pulled down his pants and underwear, placed him stomach down on the bed, and rubbed his penis against the center of his buttocks several times. Defendant then pulled Carlos's pants back up, put him back on the bed on his back, and left the room.

Once in October 2017, when Jennifer was 14 years old, she stayed out late at a friend's house, despite her 9:00 p.m. curfew. Ana Segovia (Segovia), Glenda's mother and Jennifer and Carlos's grandmother, testified that she refused permission for Jennifer to stay later, and then accompanied by Carlos, drove to the friend's home to collect her. Once Jennifer was in the car Segovia scolded her, saying that it was dangerous to be out late because bad things happened late at night.

After they arrived home, Segovia followed Jennifer and Carlos into Jennifer's room, and repeated the warning about the dangers late at night, such as the danger posed by alcohol, drugs, and the risk of being raped. Jennifer responded, "That already happened to me" and told Segovia about defendant's sexual abuse. Carlos, who was sitting next to Jennifer, then said "Things also happened to me." Both children then broke into

tears and cried uncontrollably. Glenda was called, came home from work and called the police.

Glenda testified that when she took her children to Socorro's home in the morning, she rarely saw defendant, but he was there about 95 percent of the time in the afternoons. They spoke a few times. Until Socorro stopped babysitting Jennifer in 2013, Jennifer wet the bed about three or four times a week and would say things that Glenda did not understand. When Glenda visited the Valencia home once or twice a year to bring a holiday gift, if Jennifer was with her, Jennifer would refuse to get out of the car and go inside with Glenda. When Glenda inquired, Jennifer said something like, "I just don't want to be there." This happened maybe more than four times. The only time Jennifer went inside was when Glenda was pregnant with Brenda and considered having Socorro babysit her. When Brenda was born in 2014, Jennifer said, "Don't take Brenda to the house."

During the 10 years that Socorro cared for her children, Glenda worked at different locations of Payless Shoe Stores. Jennifer occasionally came to work with her. After that, Glenda worked at DD's Discount store, and Jennifer also went with her occasionally. Prior to Jennifer telling Glenda about defendant's actions, Socorro and defendant came into DD's two times while Glenda was working there. Jennifer was not present either time, nor were Glenda's other children.

Melanie C. (counts 9 and 10)

Elizabeth Paz (Paz) testified that her daughter Melanie was born in May 2004, and that Socorro cared for her in Socorro's home from the time she was two years old until she was three and a half years old and started pre-kindergarten. Melanie stopped wearing diapers around the same time she stopped going

to Socorro's home, but she wet the bed at night until she was 11 years old. Paz typically dropped off Melanie at 7:00 a.m. and picked her up about 3:15 p.m. four days per week, although the days varied depending on Paz's work schedule. Paz became acquainted with defendant. Melanie was not happy going there and did not want to stay. Paz noticed at some point that the skin around her "feminine parts" was red like a rash.

Melanie, who was 14 years old at the time of trial, testified that while she was in Socorro's home, defendant once gave her wet kisses on the lips or above the lips. They were in the backyard and she ran away from him. Four or five times defendant touched her vaginal area under and over her clothing. Melanie did not know whether defendant inserted his fingers, but she felt pain in her vagina when he touched her there. This occurred in in the living room of Socorro's house while they sat on the couch and no one else was in the room. Melanie was afraid to tell her mother, but at some point she told Socorro, who told her not to tell her mother. Socorro looked angry and raised her hand as though she wanted to hit her. Melanie recalled that Socorro hit her with a broom once and that she slapped her, but could not recall when that was or whether it happened when she reported defendant's behavior to Socorro.

Melanie felt sad and nervous, found it difficult testify, and could not remember some details. She testified that she had nightmares about what defendant did, and still had them once in awhile. She wet the bed until she was eight or nine years old.

An incident at school a few years before trial, prompted Melanie to tell her mother about the abuse. She was playing around with a boy and he touched her private part. She told him to stop and reported the incident to her teacher and then to the

principal, who called social services. The incident brought back memories of what had happened when she was younger, and she told her mother what Socorro's husband had done while she was under Socorro's care.

Paz testified that the incident at school occurred in 2015 and resulted in a home visit by a social worker. Melanie then disclosed the sexual abuse by defendant. This was the first Paz heard of it and had not heard about any other problems at Socorro's home.

Expert testimony

Patrick Wiita, a board certified forensic psychiatrist in child and adolescent psychiatry, testified as the prosecution's expert witness regarding early childhood memory and reporting of abuse. He testified that only about one-third of children report abuse while they are still children, and those who are abused by a stranger are more likely to disclose the abuse right away. When children disclose, often it is made at the child's school, where professionals are trained to ask questions. Victims frequently cited reasons for not reporting as fear of being considered responsible for their abuse, and feeling guilty or afraid of the adult's reaction, particularly when the abuser is a family member. Boys are even less likely to disclose abuse than girls if the abuser is a man, due to concern that people will think they are gay.

Dr. Wiita explained the concept of a "triggering event" which brings back memories. Often patients seek help because they feel depressed, are behaving in a harmful way but unable to change, and do not know why; or they may have full-blown posttraumatic stress disorder (PTSD), causing them to reexperience the trauma. These are known as events that can

trigger memories. Dr. Wiita also explained "implicit memory" as opposed to "autobiographical memory." Implicit memory is the earliest type of memory which starts practically at birth. Implicit memory is involved, for example, when babies remember their mothers' faces. Implicit memories are those learned by recognizing physical cues, body sensations like touch or smell, and include potty training, brushing teeth, riding a bike, and are associated with emotions or nausea. Thus, victims of sexual abuse typically feel fear, disgust, or shame without knowing why, when for example, their genitals are touched.

Autobiographical memory, on the other hand, is the story of one's life, for example what one ate for breakfast, what one did on a certain day. The earliest autobiographical memories that most people retain as adults relate to experiences which occurred when they were two, three or four years of age. Children retain those early memories, and the younger the child, the more clearly the memories can be accessed. Children and adolescents may retain memories made earlier than two to four years old, however by the time they reach adulthood, autobiographical memories acquired before one of those three ages will be completely degraded.

Defense evidence

Socorro testified that she had been married to defendant for 50 years. Though she used to babysit children in their home, she stopped doing so more than five years earlier. Socorro denied ever hitting any children. She claimed she never scolded Jennifer and knew of no reason that Jennifer, Carlos, Glenda, Melanie or Paz would have to be angry, hostile, or vindictive toward defendant.

Socorro looked after Melanie for a little over one year. Socorro could not recall what other children she cared for at the

same time other than her granddaughters. When Melanie was placed in her care, she was not yet potty-trained. Socorro changed Melanie's diapers, and never saw a rash on her vaginal area. Socorro testified that she had 11 grandchildren and had changed a lot of diapers, so she had seen rashes, but never on Melanie. Socorro claimed that Melanie was able only to say a few words, such as mom, dad, and water, during the time she was in Socorro's care, and that Melanie did not tell her that defendant sexually abused her. Socorro never saw defendant kiss Melanie on the lips or sit on the couch with her and put his hand into her diaper to touch her vagina. She never saw him do anything sexual to her. Socorro denied ever hitting a child with a broom or threatening to hit Melanie with a broom. She denied ever pulling Melanie's hair, calling her a liar, or hitting her with a wooden spoon.

Socorro babysat Jennifer in her home for approximately four years, until she was five years old and started kindergarten. After that, she babysat Jennifer on weekends, school holidays and vacations. Jennifer spent the night a few times. Socorro could not remember when she stopped looking after Jennifer entirely. At first, Jennifer wore diapers, and Socorro potty-trained her. Socorro claimed that she never saw defendant do anything sexual to Jennifer, that she never saw him kiss her or touch her vagina.

Socorro testified that Jennifer and defendant were very close, like grandfather and granddaughter, and from the time Jennifer started talking, she called him "abuelito," meaning grandfather. The time that Jennifer went with defendant to the 99 Cent Store, grandchildren were also with them. Socorro could not remember when that was or how old Jennifer was at the

time, but she remembered that Jennifer wanted to go and Socorro told him to take the kids with him. Socorro recalled that Jennifer went with defendant and the grandchildren to the 99 Cent store, but not alone with defendant. Socorro claimed that defendant never took Jennifer to any other place and that Jennifer never went with him to their daughter Isabel's home. Socorro denied that she or defendant had keys to Isabel's house. Socorro claimed that over all the years she babysat Jennifer, Socorro had eyes on her every moment of the day, and she was never alone with defendant. Socorro insisted that for the entire eight, ten, or twelve hours a day that Jennifer was under her care, she was never out of her sight. It was the same when she looked after Jennifer's brother Carlos, beginning when he was three months old until he was five years old, and when she cared for Melanie. At no moment of the day were the children outside her observation, and when they took their "very little" naps, she checked on them every 15 minutes.

Defendant and Socorro's daughter, Isabel V., testified that she has lived in same house for eight years, about six blocks from her parents' house. She lives with her three sons, Diego, Miguel, and Emmanuel, whom her parents have babysat all the boys' lives. Defendant regularly took care of her yard, took out the trash, sometimes in the morning when she was not there and sometimes in the evening when she was home. Defendant did not have a key to her house. Only her fiancé Carlos and cleaning lady, Dianita have keys to her house.

Isabel testified that she had never seen her mother use violence or hit anyone or threaten anyone with a broom. Her father never touched her in a sexual way, and she never saw him touch her three brothers in a sexual way. Her parents' house was

the hub of the family. Her children have their birthday parties there; they are there after school and during the summer. Defendant was a big part of her children's lives, and he picked them up from school or the bus stop. Her children have never told her that he touched them in a sexual way.

Socorro and two of her grandsons each testified regarding an incident they witnessed in 2016, when they accompanied defendant to the DD's store where Glenda worked. Socorro testified that it was in December around Christmas, and they went to buy floor mats and seat covers for defendant's truck. Though defendant and both grandsons came along, they remained in the car while she went into the store. Glenda checked out Socorro, giving her a discount, and Jennifer was also there. Jennifer told her mother that she was going to go out to see her *abuelito* and the boys, so Jennifer and Glenda walked Socorro out to the truck. Jennifer went to where defendant was sitting in the driver's seat, gave him a hug, and defendant patted her on the head without getting out of the truck. The encounter lasted three minutes, and there was no kissing. Socorro testified that she watched Jennifer go back into the store, and then they left.

Both boys testified about the time that defendant drove them to DD's in January 2016, after defendant and Socorro picked them up from school. They each testified that Socorro went into the store while they stayed in the truck with defendant. She came out a short time later with Jennifer and her mother. Emmanuel[3] testified that Jennifer first ran to the passenger side, greeted the boys, and then went around to the driver's side to hug

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[3] Emmanuel was 12 years old at the time of trial. Miguel was 13 years old at the time of trial.

defendant through the open window. Miguel testified that she ran to the driver's side of the truck to give defendant a hug. Both boys recalled that defendant did not say anything to Jennifer, just patted her on the head. Emmanuel testified that Jennifer then walked back to her mother without saying anything. Miguel testified that she ran back to her mother.

Both Emmanuel and Miguel testified that defendant never touched them on the penis or touched them in any way that made them feel uncomfortable, and that they had never been alone with defendant. Defendant's granddaughters Sophia (almost nine years old at the time of trial), Mia (10 years), Natalie (15 years), and Viviana (16 years) all testified similarly. None of the four girls had ever been alone with defendant, and all testified that defendant had never touched them on the breasts or vagina, in a sexual way, or in any other way that made them feel uncomfortable, and they had not seen him do so with their sisters.

Finally, Gilberto Z., the son of Isabel's housekeeper, testified that when he was five or six years old defendant and Socorro babysat him at their home. He testified that he was never alone with defendant, that defendant never touched his penis, never touched him in a way that made him uncomfortable, and he never saw him touch anyone else in a sexual way.

DISCUSSION

I. Substantial evidence

Defendant contends that none of the counts was supported by substantial evidence.

A. Legal principles and standard of review

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a

rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

"[B]ecause 'we *must* begin with the presumption that the evidence . . . *was* sufficient,' it is defendant, as the appellant, who 'bears the burden of convincing us otherwise.' [Citation.]" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430.) Reversal on a substantial evidence ground "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Testimony from a victim of child sexual abuse may be sufficiently substantial to support a conviction, so long as the victim describes "*the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). [T]he victim must [also] describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). . . , [and] [f]inally, the victim must be able to describe *the general time*

period in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period." (*People v. Jones, supra*, 51 Cal.3d at p. 316.)

B. Counts 4, 5 and 6: child victim age

Defendant contends that the evidence was insufficient to show that Jennifer was under 10 years of age during the entire time period during which defendant was alleged to have abused her.

Defendant's argument fails as to count 4, because count 4 alleged continuous sexual abuse of a victim under the age of 14 years in violation of section 288.5, subdivision (a), committed between August 1, 2011 and June 30, 2012. Section 288.5 does not require the jury to find that the victim was 10 years old or younger, but rather that the victim was under 14 years of age when the abuse occurred.

Counts 5 and 6, on the other hand did require proof that the victim was 10 years old or younger. The jury found defendant guilty of count 5, which alleged that he committed the crime of sexual intercourse with a child of 10 years of age or younger between July 1, 2012 and December 31, 2013, in violation of section 288.7 subdivision (a). The jury found defendant guilty of the same crime committed against Jennifer, also between July 1, 2012 and December 31, 2013, as charged in count 6 of the Information.

Defendant's premise for this argument is his assertion that the evidence showed that Jennifer was born in August 2002, and thus turned 11 in August 2013. Defendant's premise is faulty. Defendant relies on Glenda's testimony to support his conclusion

that Jennifer was born in 2002. At the outset of her testimony Glenda listed her three children, and stated that Jennifer was born in August 2002. However, Glenda also testified that she placed Jennifer in Socorro's care in 2004, when Jennifer was one year old, and that she remained in Socorro's care until 2013, when she was 10 years old. Jennifer testified that she was born in August 2003 and that she was 15 years old at the time of trial in October 2018. Jennifer's grandmother testified that Jennifer celebrated her 15th birthday in August 2018, which would have made her 10 years old in August 2003.

We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Nor do we substitute our evaluation of a witness's credibility for that of the jury. (*People v. Jones*, *supra*, 51 Cal.3d at p. 314.) Whether the court reporter misheard or transcribed incorrectly, whether Glenda misspoke, or whether Glenda's statement of Jennifer's birth year was more or less credible that Jennifer's statement of her birth year was for the jury to resolve, as it clearly did. We conclude that substantial evidence supported the jury's finding that Jennifer was born in 2003, that she turned 10 in 2013, and that she was thus no more than 10 years old between July 1, 2012 and December 31, 2013, when the unlawful sexual intercourse occurred.

C. Count 4: continuous sexual abuse

Defendant challenges the sufficiency of the evidence to support count 4 on the additional ground that the evidence failed to establish the required element that "three or more months passed between the first and last acts." He asserts that "Jennifer did not testify regarding a timeline for the alleged acts, including

when the first act allegedly occurred, or when the last act allegedly occurred."

Subdivision (a) of section 288.5 provides in relevant part: "Any person who . . . has recurring access to the child, who over a period of time, *not less than three months in duration*, engages in *three or more acts of substantial sexual conduct* with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct, as defined in Section 288, . . . is guilty of the offense of continuous sexual abuse of a child . . . ." (Italics added.)

As relevant here, section 1203.066, subdivision (b), defines "substantial sexual conduct" as "penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, . . . or masturbation of either the victim or the offender." Section 288, subdivision (a) defines "lewd or lascivious act" as an act committed on the child "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." "[S]ection 288 . . . require[s] no particular form of physical contact. . . . [T]he crime occurs whenever the trier of fact determines, based on all the circumstances, that an underage child was 'touched' with the requisite sexual intent." (*People v. Martinez* (1995) 11 Cal.4th 434, 438.) A lewd or lascivious act is therefore "'*any* touching' of an underage child committed with the intent to sexually arouse either the defendant or the child." (*Id*. at p. 442, italics added.)

The prosecution was not required to "prove the exact dates of the predicate sexual offenses in order to satisfy the three-month element. Rather, it must adduce sufficient evidence to support a reasonable inference that at least three months elapsed

between the first and last sexual acts. Generic testimony is certainly capable of satisfying that requirement, as the hypothetical examples listed by the Supreme Court in *Jones* illustrate. Indeed, as the *Jones* court held, despite the general acceptance of such generic testimony, 'the victim must be able to describe *the general time period* in which these acts occurred (e.g., "the summer before my fourth grade". . .), to assure the acts were committed within the applicable limitation period.' [Citations.] That is, while generic testimony may suffice, it cannot be so vague that the trier of fact can only speculate as to whether the statutory elements have been satisfied." (*People v. Mejia* (2007) 155 Cal.App.4th 86, 97, quoting *People v. Jones, supra*, 51 Cal.3d at p. 316.)

To illustrate his claim that there was insufficient evidence that at least three months elapsed between the first and the last unlawful act, defendant points to Jennifer's testimony that she was around eight years old and in the third grade when defendant began kissing her, and that the kissing continued for three or four months, but she could not estimate how much time passed until he made her touch his penis.

Defendant fails to explain just how this testimony renders the evidence insubstantial. Jennifer testified that the kissing started at age eight and went on for three or four months before defendant started touching her breasts, buttocks, and vagina, over and under her clothes, and the kissing continued more than 15 times during the entire remainder of the time she was cared for at defendant's house, which Glenda testified was until Jennifer was 10 years old. The evidence thus showed kissing occurred more than three times and continued for two years.

Defendant's argument implies an assumption that the kisses did not qualify as substantial sexual conduct. Defendant kissed Jennifer on the mouth, sometimes asking her to put her tongue in his mouth, and many times putting his tongue in her mouth. "Unlike kissing without the use of tongues, which is an important means of demonstrating parental love and affection for a child, there can be no innocent or lovingly affectionate tongue kissing of a child by an adult." (*In re R.C.* (2011) 196 Cal.App.4th 741, 750-751.)

The jury could reasonably infer sexual intent from Jennifer's description of defendant's kisses, as well as from defendant's conduct following the first three or four months of kissing: touching her breasts, buttocks, and vagina, having her masturbate him, and then having sexual intercourse. Even assuming that some of the kisses did not qualify as substantial sexual conduct, the same cannot be said of the many acts of touching the victim's breasts, buttocks, and vagina more than 15 times, having her masturbate him, and then having sexual intercourse with her more than 20 times after the three or four months of kissing, and continuing for more than a year. We agree with respondent that overwhelming evidence supports the jury's finding that at least three months passed between the first and last sexual acts.

D. Counts 4, 5, and 6: weight of defense evidence

Defendant further contends that substantial evidence failed to support counts 4, 5, and 6, because no red marks or scratches were observed on Jennifer's vaginal area; Jennifer refused a physical examination; defendant's wife and two of her grandchildren testified that Jennifer gave defendant a hug outside her mother's workplace; Jennifer reported the abuse after

she was threatened with punishment for staying out late; and finally, because Jennifer could not recall answers to many questions on cross-examination.

Contrary to settled principles of appellate review, defendant's argument essentially asks that we view the evidence in a light *unfavorable* to the judgment and to reevaluate the credibility of Jennifer and defense witnesses. We agree with respondent that we must decline to do so. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 37-38.)

E. Counts 9 and 10: lewd acts upon Melanie C.

Defendant was convicted of sexually abusing Melanie when she was somewhere between the ages of two years and three and a half years.

Defendant contends that "The testimony of a teenager as to events that allegedly occurred when she was between 2 and 3 years old is inherently unreliable, and cannot constitute sufficient evidence to convict . . . " without corroborating evidence. Defendant's contention is made without any citation to supporting authority. Indeed, defendant cites authority holding that "corroboration of the child's testimony is not a necessary element of proof in a prosecution for lewd acts on a child under 14. [Citations.]" (*People v. Harlan* (1990) 222 Cal.App.3d 439, 451.) Defendant also acknowledges that the California Supreme Court has rejected the supposition that the testimony of children is inherently unreliable. (See *People v. Jones*, *supra*, 51 Cal.3d at pp. 315, 320.) Defendant distinguishes these cases on the ground that they involved children who were under 14 years old and testified regarding abuse that occurred within five years of their testimony, whereas Melanie was a 14-year-old testifying about incidents which occurred more than 10 years earlier, when she

was two and three years old. He offers no authority or legal argument to support his contention.

Ordinarily, failure to develop an argument or cite any authority in support of a contention results in the forfeiture of the issue on appeal. (See *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2.) Moreover, we reject defendant's argument that Melanie's testimony was insubstantial because it was incredible that she would remember events that occurred when she was three years old. Substantial evidence supported her claim to have recalled events which occurred when she was three years old or younger. Prosecution expert, Dr. Wiita testified that while such memories degrade in adults, adolescents are more likely to retain memories made between two to four years old.

Dr. Wiita's explanation of the concept of a "triggering event" which brings back memories also supported Melanie's claim that she had occasional nightmares about what defendant did, and that a boy's improper touching while playing in middle school prompted her to report defendant's abuse. As Melanie's credibility was supported by substantial evidence, we decline to second-guess the jury's resolution of the issue. (See *People v. Jones*, *supra*, 51 Cal.3d at p. 314.)

II. Speedy Trial

A. Section 859b

Defendant contends that his preliminary hearing was not held within the statutory time limits mandated by section 859b, resulting in a denial of his constitutional right to a speedy trial. He also contends that he did not expressly waive his right to a speedy trial.

"Section 859b governs the timely conduct of preliminary hearings. The statute is 'supplementary to and a construction of

the constitutional right to a speedy trial.' [Citations.]" (*People v. Love* (2005) 132 Cal.App.4th 276, 283; Cal. Const. Art. 1, § 15.) Section 859b provides in relevant part: "The magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment [or] plea, . . . unless the defendant personally waives his or her right to a preliminary examination within the 60 days."

B. Background

Defendant was in custody when he was arrested on February 8, 2018, arraigned on a felony complaint on February 9, 2018, which would have made April 10, 2018, the 60th day after arraignment.[4] On April 16, 2018, the first day of the preliminary hearing, defense counsel moved to dismiss the complaint on the ground that the hearing had been continued to a date beyond the 60-day limit. Defense counsel stated that he had looked in his file, the court's notes, and the minute order of March 12, 2018, and did not "see that we ever gave a waiver of a 60-day restriction." After reviewing his notes, the magistrate stated that the 60-day limitation was waived on March 12, when both parties stipulated that that April 11 would be the 60th day and day 9 of 10.[5] The court also noted that the preliminary hearing was then

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[4] The appellate record does not include any proceedings prior to April 16, 2018, the first day of the preliminary hearing. When necessary to our discussion, we accept the facts conceded or undisputed by both parties, and we summarize or quote from the magistrate's statements reflecting his notes and memory.

[5] Section 859b additionally provides in relevant part that "[w]henever the defendant is in custody, the magistrate shall dismiss the complaint if the preliminary examination is set or continued beyond 10 court days from the time of the arraignment

continued under section 1050, subdivision (g). "The court is making a finding that since the 60[th]-calendar-day had been waived by way of the stipulation to April 11th, that the [section] 1050(g) was still applicable. If it's to be reviewed, that's why I want to make sure I've made a clear record of why I did it. So your objection -- your request for dismissal is denied based on the court's finding that the stipulation of April 11th exceeded 60 calendar days, and therefore, this court is finding applicable the [section] 1050(g) outside of the 60 days once it was waived by agreement and setting by both sides."

The magistrate also stated that the prosecutor had shown good cause to continue the hearing to April 16 under section 1050, subdivision (g), as he was engaged in a federal trial. The magistrate allowed the prosecutor to explain for the record what his good-cause showing had been. He stated that the federal trial was a general court martial at Fort Irwin, California, and that he was not aware on March 12 that he would be called to prosecute that trial. He received his orders to report to active military duty at the end of March, and then was later assigned to the court martial, which concluded April 11. Although he was second chair in the court martial, the judge ordered him to be there on all days. The magistrate stated that the record had been augmented by the explanation, confirmed that the previous order continuing the preliminary hearing was supported by good cause, and denied the motion to dismiss.

[or] plea, . . . and the defendant has remained in custody for 10 or more court days solely on that complaint, unless . . . [¶] (a) The defendant personally waives his or her right to preliminary examination within the 10 court days." Defendant concedes that he waived his right to a preliminary hearing within 10 days.

Defendant did not seek review of the denial of his motion to dismiss, and the preliminary hearing went forward. After defendant was held to answer, he filed a section 995 motion to dismiss the information, alleging that defendant never personally waived his right to have his preliminary hearing begin beyond 60 days of his arraignment, and alleging for the first time that the prosecutor's motion to continue the preliminary hearing had not been made upon two days' written notice as required by section 1050, subdivision (b).[6]

At the hearing on the section 995 motion, the trial court found that the parties had agreed to begin the preliminary hearing on April 11, 2018, a date beyond the 60-day limit, and that the court then granted the prosecutor a short continuance under section 1050, subdivision (g).[7] The court found that the prosecutor had shown good cause, in that he was engaged as a prosecutor in a federal court-martial trial required by his military duties. Defense counsel then objected on the ground that the prosecutor's motion to continue had not been made in writing two days prior to the motion, as required by section 1050, subdivision (b). The prosecutor explained that he was the co-prosecutor in the court martial and did not know until the night of April 10 that both prosecutors would be called in. His motion to continue was made by his office on the morning of April 11, it

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[6] Neither defendant's motion nor the prosecution's opposition included a declaration or other evidence. Our summary is made from the magistrate's findings in the preliminary hearing transcript, the trial court's findings in denying the section 995 motion, and conceded or undisputed facts.

[7] April 11, 2018, was a Wednesday; April 16 was a Monday.

was granted, and the preliminary hearing was continued to April 16.

The trial court denied the motion to dismiss the complaint. The court found that the verbal notice given by the prosecutor's colleague who made the motion on April 11 to continue the preliminary hearing was sufficient and that the prosecution's motion to continue was properly granted.

Defendant argues here that by stipulating to a specific date beyond the 60-day limit, he did not *permanently* waive his right to a preliminary hearing within 60 days of arraignment. He argues that the court was also required to obtain an express waiver of his constitutional right to a speedy trial, and that his agreement to begin on April 11 is ineffective as an implied waiver of the 60-day limit.

C. Inadequate record

There is no record of what defendant expressed or did not express prior to April 16, or what the parties intended or understood when they stipulated to a date certain beyond the 60 days, or when they called it day 60 and 9 of 10, because defendant has provided no reporter's transcript or minute order relating to the prior proceeding, and no settled statement. Nor have we found any agreement or concession from respondent as to what defendant expressed or understood. Defendant asserted in his section 995 motion that there was no express waiver of the 60-day limit, and the prosecutor alleged in his opposition that defendant had personally waived the 60-day limit.

At the time of the preliminary hearing, the court's review on the record of the notes and minute order of March 12 did not include any of the parties' discussions resulting in the stipulation. Later, at the outset of the section 995 motion, the

trial court found that defendant and his counsel "agreed to a date beyond the 60-day limit." The remainder of the discussion related to the issue of good cause to continue the hearing from April 11 to April 16. The court then permitted the parties to make a record regarding that issue. Defendant has not provided evidence showing that he did not personally and expressly waive the 60-day limit.

"'Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error.' [Citation.] . . . Not only does the defendant bear the burden of demonstrating an invalid waiver of [a constitutional right], but the defendant further bears the burden to provide a record on appeal which affirmatively shows that there was an error below, and any uncertainty in the record must be resolved against the defendant. [Citations.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) Absent a record showing the contrary, we must therefore presume that the court regularly performed its duty and that it obtained a valid waiver. (*Id*. at p. 550.)[8]

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[8] Defendant cites two inapposite civil cases, neither of which involved an accused's right to a speedy trial or an appellant's failure to provide an adequate record, claiming that they support the proposition that in cases where there is a doubt as to whether the defendant waived his right to a speedy trial, the issue must be decided against finding a waiver. (See *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31 [contract interpretation; no waiver by silence]; *Church v. Public Utilities Com*. (1958) 51 Cal.2d 399, 401 [no waiver by failure to assert the statute of limitations].)

D. No prejudice shown

Defendant does not claim that he was prejudiced by the five-day delay in the preliminary hearing. Relying on *Ramos v. Superior Court* (2007) 146 Cal.App.4th 719, defendant contends that he need not show prejudice as a result of a violation of the 60-day rule.

The California Supreme Court addressed a similar contention in *People v. Clark* (2016) 63 Cal.4th 522. The court noted that unlike the defendant in *Ramos*, the defendant did not seek a pretrial writ to dismiss the information, and that "'[t]he presence of a jurisdictional defect which would entitle a defendant to a writ of prohibition prior to trial does not necessarily deprive a trial court of the legal power to try the case if prohibition is not sought.'" (*Id*. at p. 552, quoting *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.) The high court further stated that under such circumstances, "nonjurisdictional irregularities in preliminary examination procedures do not require reversal unless the defendant establishes that he or she was deprived of a fair trial or otherwise suffered prejudice as a result. [Citation.] A denial of a defendant's right to trial within a prescribed statutory time period falls within this class of irregularities that are not jurisdictional in the fundamental sense and which, therefore, require a showing of prejudice. [Citation.] The same analysis applies to a violation of the 60-day rule in section 859b." (*People v. Clark*, at p. 552.)

As defendant has demonstrated neither error nor prejudice, reversal is not warranted.

III. Denial of severance motion

Defendant contends that the trial court abused its discretion in denying his pretrial motion to sever counts 1 and 2 from counts 3, 4, 5, and 6.

Section 954 permits the joinder of "two or more different offenses connected together in their commission, or . . . two or more different offenses of the same class of crimes or offenses, under separate counts." (§ 954.) "Sex offenses 'belong to the same class of crimes.' [Citations.]" (*People v. Huy Ngoc Nguyen* (2010) 184 Cal.App.4th 1096, 1112.) "Joinder is generally proper when the offenses would be cross-admissible in separate trials, since an inference of prejudice is thus dispelled. [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 126.)

Here, the trial court denied the motion upon finding that counts 1 and 2 alleged the same class of crime as the remaining counts, as well as on the ground that the evidence of counts 1 and 2 would be admissible in a trial of the other counts, under Evidence Code sections 1108 and 1101, subdivision (b), and that the potential for prejudice was not substantial.[9]

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[9] As relevant here, Evidence Code section 1101, subdivision (b), provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, [or] plan . . . ." Section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

Defendant's sole contention is that the court should have exercised its discretion to sever counts 1 and 2 because those were weaker claims, the evidence regarding Melanie was inflammatory, and stronger evidence of the other counts could have influenced the jury to convict him of the weaker counts.[10]

As defendant does not contend that the court erred in finding the crimes were of the same class or that the evidence would be cross-admissible under Evidence Code sections 1108 and 1101, he has not demonstrated that joinder was improper. Thus, to establish the trial court abused its discretion, it is defendant's burden to demonstrate a clear showing of prejudice. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) Cross-admissibility "'alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges.' [Citations.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 38.) Defendant made no clear showing otherwise.

IV. No gross unfairness

Defendant contends that because his motion to sever counts 1 and 2 was denied, he was deprived of a fair trial on those counts. When a motion to sever was properly denied, the "events *after* the court's ruling [may] demonstrate that joinder actually resulted in 'gross unfairness' amounting to a denial of defendant's

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10 In his reply brief, defendant suggests that the evidence regarding counts 1 and 2 would not be admissible at all in a separate trial because it was so weak. We need not consider his suggestion, as he cites no authority for support, and we found no objection to the admissibility of the evidence of defendant's abuse of Melanie on the ground that it was weak, in the record.

constitutional right to fair trial or due process of law. [Citations.]" (*People v. Merriman*, *supra*, 60 Cal.4th at p. 46.)

The motion to sever counts 1 and 2, was argued and denied approximately five days prior to trial. After the prosecution presented its case-in-chief, the trial court granted defendant's section 1118.1 motion and *dismissed* counts 1 and 2. The issue presented by a section 1118.1 motion is "'"whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged."' [Citation.]" (*People v. Stevens* (2007) 41 Cal.4th 182, 199-200.) Thus, by granting the motion, the trial court agreed with defendant that counts 1 and 2, as *originally charged* in the information, were weak. However, after the trial court granted defendant's section 1118.1 motion, the court allowed the prosecutor to amend the information to conform to proof by adding counts 9 and 10, which charged defendant with lewd acts upon Melanie.

Defendant does not argue that the trial court erred in allowing the amendment, that the evidence already adduced on counts 1 and 2 was not relevant to counts 9 and 10, or that any gross unfairness resulted from adding counts 9 and 10. In section I of our Discussion we rejected defendant's challenge to the sufficiency of the evidence to support defendant's conviction of counts 9 and 10. Instead, defendant claims that unfairness resulted because the joinder of counts 1 and 2 allowed the prosecutor to argue that defendant was a serial child molester and predator with a propensity for sexual assault. However, the prosecutor would have made this argument even if the counts had been severed, as the evidence of the sexual abuse inflicted upon Melanie would have been admissible under Evidence Code

sections 1108 and 1101 in a trial of counts 4 through 8, just as evidence of the abuse inflicted upon Jennifer and Carlos would have been admissible in a separate trial of the counts involving Melanie (1, 2, 9 and 10). Defendant does not claim the prosecutor's remarks would have been improper under those circumstances. As defendant has failed to demonstrate that separate trials would have had any likelihood of changing the outcome, he has demonstrated no gross unfairness.

V. *Massiah* and *Miranda*

Defendant contends that the trial court erred in denying his motion to suppress his confession, which alleged that he was interrogated without counsel in violation of *Massiah v. United States* (1964) 377 U.S. 201. Defendant also contends that his confession should have been suppressed on the ground that he was not given warnings prior to interrogation as required by *Miranda v. Arizona* (1966) 384 U.S. 436.

As respondent points out, defendant's confession was never admitted or even referenced at trial, and defendant has not claimed otherwise. Indeed, in reply to respondent's observation, defendant makes no denial, but continues to assert that his confession should have been suppressed. Defendant fails to explain just how it was within the trial court's capability to exclude a confession that was never offered into evidence. We conclude beyond a reasonable doubt that the trial court's refusal to enter an empty, unnecessary, and futile order was harmless to defendant.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT