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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. GARY STEVEN BELLOWS, Defendant and Appellant.	B265497 (Los Angeles County Super. Ct. No. VA127187)

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

Correen Ferrentino, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney

General, Shawn McGahey Webb, Supervising Deputy Attorney General, and Gary A. Lieberman, Deputy Attorney General, for Plaintiff and Respondent.

Gary Steven Bellows appeals his convictions of committing lewd acts and forcible lewd acts on two child victims, and possession of methamphetamine. Bellows argues that the trial court erred when it denied his motion for new trial based on ineffective assistance of counsel, and the prosecution violated his constitutional rights by failing to disclose evidence favorable to his defense. We affirm.

BACKGROUND

A jury found Bellows guilty of two counts of committing a lewd act upon a child (Pen. Code,[1] § 288, subd. (a); counts 1 & 2) and three counts of committing a forcible lewd act on a child (§ 288, subd. (b)(1); counts 6–8) against victim K.; and two counts of committing a lewd act on a child (counts 3 & 4) and three counts of committing a forcible lewd act on a child against victim Jo. (counts 9–11). Except for counts 2 (K.) and 4 (Jo.), the jury found true that the victims were under 14 years old at the time of the sexual offenses and that Bellows had substantial sexual contact with them. (§ 1203.066, subd. (a)(8).) The jury also found Bellows guilty of possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a); count 5.)

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

The trial court denied Bellows' motion for new trial, and sentenced Bellows to 48 years in state prison. He filed this timely appeal.

I. Evidence at trial

A. *Prosecution evidence*

K.

At trial, K. (then 24) testified that Bellows was her step-grandfather, married to her biological grandmother. Jo. was Bellows's granddaughter, the daughter of his son Ja. K. knew Jo., but they were not close.

When K. was a little girl, she visited her grandmother and Bellows a few times a month, and at first she and Bellows had a normal grandfather-granddaughter relationship. When she was nine or ten years old, K. and Bellows went into his bedroom to look at his collection of baseball cards. They were all laminated, and some were in a book; he had some gold ones "I thought were really cool at the time." She laid the cards on the bed to look at them. Bellows stood next to K. as she looked through the cards, and he grabbed her breast through her shirt. They said nothing to each other, and K. did not realize that he had done anything wrong. Bellows squeezed K.'s breast on two or three occasions, always in the bedroom.

When she was about the same age, K. again was looking at the baseball cards in Bellows's bedroom. He closed the door. Bellow unzipped his pants, exposed his erect penis, grabbed her hand, and made her touch his penis for about a minute. Bellows then used his hand to

masturbate. He ejaculated into a towel that he had on the bed, rolled the towel up, and threw it into the closet in the corner. Bellows told her not to say anything because he could get into a lot of trouble, and she said okay because she trusted him.

On two subsequent occasions, also in the bedroom, Bellows put his hands down K.'s pants and penetrated her vagina with his finger, for about five minutes. Neither said anything.

The touching ended when K. stopped going over to Bellows's house at age 11. She did not tell her parents about the touching, because she didn't want to think about it.

On cross-examination, defense counsel asked K. what she would say about photographs showing her visiting at her grandmother and Bellows's house many times when she was 11 to 17 years old and older. K. answered that she went over but not willingly. Her parents were unaware of what was going on and encouraged her to go see her grandmother, so she would go. Defense counsel asked what K.'s mother thought about Bellows, and K. answered that she "had her moments with him where she didn't want to be around him" because "he was into the wrong things," meaning drugs.

When K. was 22 years old, her grandmother called K.'s mother to tell her Bellows had been arrested. Her mother told K.'s father, and when he came home he asked K. and her siblings "if that ever happened to us and I broke down

and I told him."[2] Her father called the police. A deputy sheriff came to the house, and K. told him what had happened.

Jo.

Jo., then 16, testified that Bellows was her grandfather. She knew K. but was not close to her. When Jo. was between six and 10 years old, she and her brother Justin, who was two years younger, spent the night at Bellows's home between five and eight times a year. Jo. and Justin slept in Bellows's bed, and her stepgrandmother slept in another room.

Jo. first remembered Bellows touching her in bed when she was six years old. Bellows lay between Jo. and Justin when he reached over and touched her vagina under her clothing, moving his hand in a circular motion, for maybe 10 minutes. Bellows said nothing. Every time Jo. spent the night, Bellows touched her the same way. Justin usually was in the same bed but she never noticed him waking up. When Jo. pushed Bellows's hand away he paused and then continued until she "pushed it away for real," and then he stopped. Bellows would touch her again the next time she

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[2] K.'s father testified that K.'s mother called him at work and told him that Bellows had been arrested for sexually abusing Jo. When he got home from work, he told K. about the arrest, and asked her if Bellows had approached her. She broke down crying and said that yes he had, when she was nine or 10 years old.

visited. He also touched her breasts and her vagina over her clothing.

Once Bellows took Jo. and Justin to Chuck E. Cheese. While Jo. played games at a prize table nearby, Bellows sat next to Jo. in a booth. With his hand under the table, Bellows touched her vagina under her clothing with the same circular hand movement. She told him to stop and used her hand. Bellows stopped, but when Justin came back to the booth and then left again to play games, Bellows reached down again to touch her.

Bellows never said anything to her about the touching, and she did not confront him. Jo. did not tell her parents: "I was afraid that if I told them, my dad would lose his relationship with his father." Shown family photographs with Bellows in which Jo. was smiling, including one at a Chuck E. Cheese restaurant, Jo. explained, "I was afraid of what would happen if I said anything."

When Jo. was 10 or 11 years old, she and her family stopped seeing Bellows at all. She last saw him at her aunt's house two Thanksgivings before her testimony; she was frightened because she didn't expect to see him. Afterwards, Bellows called her father Ja. to say he would be at her aunt's for Christmas and asked to talk to Jo., but she refused.

Jo. told her best friend about Bellows's abuse during a sleepover when she was in seventh grade. Her friend asked her if Jo. would want to know if something like that happened to her daughter, and Jo. decided to tell her parents. A week or two later, Jo. told Ja. what had

happened, and deputies came to her home and interviewed her.

On cross-examination, Jo. testified that sometimes K. and her twin sisters would visit Bellows at the same time as Jo. and Justin, but they never spent the night. Jo. thought her father and Bellows had a normal father-son relationship.

Ja.

Bellows's son Ja., Jo.'s father, testified that Jo. seemed upset when he told her Bellows would be with the family on Christmas. Later that evening in the kitchen, Jo. broke down in hysterical tears, and told him and her mother about the abuse. Ja. texted Bellows that Jo. told him what had happened and they were reporting it to the police. Bellows did not respond. Ja. called his aunt and without giving details, asked her to exclude Bellows from the holiday event. Three or four days later Bellows called as if nothing had happened. Ja. confronted him and said they were going forward. Bellows was quiet and then said, " 'If that's how you feel.' "

On cross-examination, Ja. described his childhood relationship with his father as "wonderful." At Ja.'s college graduation, Jo. sat on Bellows's lap. Ja.'s mother-in-law told him that Bellows had his hands in Jo.'s groin area, and Jo. looked at her with a fearful expression as if to say, " 'Help me.' " Ja. talked to his wife and to Bellows about it. Bellows denied it, but their relationship was different after that, and Ja. kept his eye on Bellows around the children.

On redirect examination, Ja. testified that his college graduation was in 2008, and that Jo. was ten years old when overnight visits with Bellows slowed down and stopped. On recross, Ja. testified that the children continued to see Bellows maybe twice a year, but stopped spending the night after his mother-in-law told him about the incident at graduation. On a question from the court, Ja. clarified that Jo. was then about 10 years old.

Methamphetamine

A sheriff's deputy testified that when he searched Bellows on the day of his arrest on October 25, 2012, he found two Ziploc bags containing a usable amount of methamphetamine in Bellows's pants pocket.

II. Defense evidence

Bellows

Bellows denied that he molested K. and Jo. He loved his grandchildren and would never hurt them.

When K. and her younger sisters came over they slept in his bedroom, and when they were older, "they all, even myself, would sleep in the patio."

When Jo. and Justin came over, sometimes they slept with him and sometimes with their grandmother. Bellows had a baseball card collection in his bedroom closet, and he had showed them to K., but never alone in the bedroom. It would have been impossible for him to throw a towel into the bedroom closet, because it was too far away. When Ja. told Bellows that Ja.'s mother-in-law said Bellows touched Jo. at

Ja.'s college graduation, Bellows was "absolutely furious" and said he had done nothing wrong.

When Bellows was hitchhiking in his late 20's, a man who gave Bellows a ride drugged Bellows; when Bellows came to, the man was sexually assaulting him. Bellows said as a result of this experience, it was very hard for him to talk about the accusations that he had molested Jo. Bellows added, "I didn't know if I should bring it up or not because it happened to me so long ago and I just felt bad because of Jo. because she was going through it, you know. It affected me because of what she was going through."

On cross-examination, Bellows admitted he had methamphetamine in his pocket when he was arrested.

Bellows's family

Bellows's brother William testified that he last attended a family event with Bellows at Christmas in 2005, with Jo. present. William never saw Bellows act inappropriately.

Bellows's niece Kathleen (William's daughter) testified that she had known Bellows all her life. He often babysat her when she was young, and she would spend the night, always sleeping in the enclosed patio. Sometimes K., who was about the same age, would be there too, and would sleep in the patio with Kathleen. Nothing unusual or inappropriate ever happened when she was with Bellows, and she never saw him act inappropriately with other children.

III. Motion for new trial

New defense counsel filed a lengthy motion for new trial, arguing ineffective assistance by Bellows's trial counsel Laura Pesanti on 10 grounds, and contending the prosecution violated due process when it failed to disclose a social worker's report. No declaration from Pesanti was attached. Respondent filed an opposition. Bellows's reply brief added an argument that trial counsel had a conflict of interest, because at the time of trial she knew she was being investigated by the district attorney's office regarding her handling of cases and solicitation of clients. Respondent filed a surreply.

The trial court held a hearing on the new trial motion on May 22, 2015. The court stated that after reviewing the motion and all exhibits, nothing of real substance had been offered to impeach Jo., the opinion of an Orange County child evaluator was inadmissible, and trial counsel's failure to call additional witnesses was a legitimate trial decision. After extensive oral argument from counsel, the trial court denied the motion.

DISCUSSION

I. The trial court did not err in denying the motion for new trial.

"Where, as here, the trial court has denied a motion for a new trial based on an ineffective assistance claim, we apply the standard of review applicable to mixed questions of law and fact, upholding the trial court's factual findings to the extent they are supported by substantial evidence, but

reviewing de novo the ultimate question of whether the facts demonstrate a violation of the right to effective counsel." (*People v. Cervantes* (Mar. 9, 2017, A140464) ___ Cal.App.5th ___ [2017 WL 933028, p. *9]; *People v. Taylor* (1984) 162 Cal.App.3d 720, 724–725.)

Bellows must make "a showing of both deficient professional performance and prejudice. [Citation.] On the performance prong, we 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' [citation], and measure counsel's performance against an 'objective standard of reasonableness.' [Citation.] To establish deficient performance under *Strickland* [*v. Washington* (1984) 466 U.S. 668 (*Strickland*)], a defendant must show his or her attorney 'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' [Citation.] To show prejudice, he must show 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] 'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*People v. Cervantes*, *supra*, 2017 WL 933028, at p. *10.) "In the usual case, where counsel's . . . strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could

be no conceivable reason for counsel's acts or omissions." (*People v. Orloff* (2016) 2 Cal.App.5th 947, 955.)

"Although we usually require that claims of ineffective assistance of counsel be raised in a petition for writ of habeas corpus [citation], because the ineffective assistance of counsel claim was fully developed in the trial court on a motion for new trial, we shall entertain the issue in this appeal, applying the *Strickland* test." (*People v. Cervantes*, *supra*, 2017 WL 933028 at p. *10)[3] We address each allegation in turn.

A. *Conflicts of interest*

"In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest '*that affected counsel's performance*—as opposed to a merely theoretical division of loyalties.' " (*People v. Doolin* (2009) 45 Cal.4th 390, 417.) Conflicts include situations in which an attorney's loyalty to her client are threatened by her responsibilities to her own interests. (*Ibid.*)

Bellows's motion for new trial contended that Pesanti was ineffective for failing to advise him that she faced a disciplinary action from the California State Bar, and in his

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[3] We reject Bellows's assertion that he is entitled to a presumption of prejudice under *United States v. Cronic* (1984) 466 U.S. 648, which applies " 'only where counsel was either totally absent or was prevented from assisting the defendant at a critical stage. Neither factor is present here.' " (*People v. Brown* (2014) 59 Cal.4th 86, 115.)

reply he added that during trial, the district attorney was investigating her for improper solicitation of clients. On appeal, he argues that these were conflicts of interest that led to Pesanti's deficient performance. Had Bellows known of the disciplinary action, he would have sought other counsel, and during trial Pesanti was distracted and ill-prepared because she was preoccupied with her own defense.

Exhibits filed by Bellows with his new trial motion included a State Bar disciplinary decision and order filed December 3, 2012. The decision stated that Pesanti signed a stipulation filed November 14, 2011 admitting culpability in three counts of professional misconduct in one client matter (failing to perform legal services with competence, not promptly refunding an unearned fee, and appearing for a party without authority). The California Supreme Court issued an order returning the stipulation for further consideration of the recommended discipline. The State Bar court concluded that the original recommended discipline (one-year stayed suspension, and one-year probation) was sufficient, noting in mitigation that Pesanti had no prior disciplinary record in 12 years of practice, cooperated with the state Bar, and recognized her wrongdoing.

Bellows's jury trial began in May 2014, a year and a half after the State Bar decision, and more than two and a half years after Pesanti first stipulated to culpability. Bellows has not shown that Pesanti had an actual conflict of interest during trial, as there was no pending disciplinary action for Pesanti to defend. To the extent he argues that

Pesanti's conflict of interest occurred during preparation for trial, we note that the December 2012 State Bar decision also preceded the preliminary hearing in June 2013 and the filing of the information on July 1, 2013.

Pesanti's disciplinary history does not, without more, establish that she provided ineffective assistance during Bellows's trial. (*United States v. Ross* (2003) 338 F.3d 1054, 1056.) Bellows must "identify 'actual errors and omissions by counsel that a conscientious advocate would not have made,' and show that [he] suffered prejudice from those errors." (*Ibid.*) Bellows's contention that he would not have hired her, or would have sought other counsel, had he known of her disciplinary history, does not identify an error or omission by Pesanti resulting in prejudice.

The prosecution of a lawyer by the same entity prosecuting her client " 'may induce the lawyer to pull his punches' " in defending the client to avoid retaliation. (*Harris v. Superior Court* (2014) 225 Cal.App.4th 1129, 1141.) The prosecutor explained in his surreply to the new trial motion that a homicide defendant's claims that Pesanti had engaged in unethical and illegal dealings came before the trial judge on February 20, 2014, in a death penalty case in which Pesanti was one of several defense counsel. At the hearing, a member of the district attorney's office testified that the defendant told him he used to work for Pesanti, who he claimed was incompetent and had illegally solicited clients. The court took the matter under advisement.

The prosecutor represented that the district attorney's office never formally investigated those or any other claims made against Pesanti, and that she had never been investigated by the district attorney's office. Thus Pesanti was never under investigation, much less prosecuted, by the district attorney's office.

The evidence does not show that Pesanti represented Bellows under a conflict of interest because of her state bar discipline or the allegations of a criminal defendant that she improperly solicited clients.

B. *Failure to present evidence of Kathleen's interactions with Bellows*

Bellows claims Pesanti failed to present evidence of a normal relationship between Bellows, his niece Kathleen, and K. to support Bellows's good character and failed to request that the court instruct the jury with CALCRIM No. 350.

Pesanti did present such evidence. On direct examination, Kathleen testified that when she and K. spent time with Bellows they went to the pizza parlor and played games, went to the mall, or hung out at the house laughing and having fun. Nothing inappropriate ever happened when she was around Bellows and other children.

In closing, Pesanti argued that Kathleen spent time with Bellows, spent the night at the same time as K., and never saw Bellows say or do anything inappropriate, which supported his good character. The jury was instructed with

CALCRIM No. 350. This claim is not supported by the record.

C. *Evidence of uncharged sex offense*

Bellows contends that Pesanti's cross-examination of Ja. brought in evidence of an uncharged sex act against Jo. Pesanti asked Ja. if something had happened to alert him that Bellows touched Jo. before Jo. told him and his wife about the sexual abuse. Ja. replied by describing what happened at his graduation, when Jo. sat on Bellows's lap and his mother-in-law told him she saw Bellows's hands in Jo.'s lap, and Jo. gave her a beseeching look. Ja. testified that he talked to Bellows, who denied it. Ja. kept his eye on Bellows thereafter. Jo. did not testify to any touching at the graduation.

In closing, Pesanti argued that the rest of the family talked negatively about Bellows, and perhaps the girls had heard their parents talking about Bellows. Jo. had testified that it was no secret what her mother thought about Bellows, and Ja. testified about what his mother-in-law told him about the graduation. "So we know there is influence on both sides of this family and influence that can create the need for attention," although the girls would not have understood the consequences of making these kinds of allegations.

Pesanti's trial strategy included suggesting that Jo. and K. were both influenced by the family's dislike for Bellows, and that strategy included bringing in evidence that the family suspected Bellows after Ja.'s graduation.

This move seems less than wise in retrospect, but Pesanti did have a strategic reason for eliciting the testimony from Ja. In his rebuttal, the prosecutor pointed out that Jo. never accused Bellows of doing anything during the graduation, and to counter Pesanti's argument, denied that there was deep-seated animosity between Ja. and Bellows.

Bellows argues that Pesanti should have requested CALCRIM No. 1191 as a limiting instruction, but that instruction is appropriate only where the prosecution has presented evidence of an uncharged sex act. Finally, given Jo.'s compelling testimony about Bellows's sexual abuse, Bellows does not show that he was prejudiced by Ja.'s testimony.

D. *Failure to pursue discovery*

Bellows argues that Pesanti was ineffective in failing to pursue relevant pretrial discovery, which would have alerted her that further investigation was necessary.

1. Therapy records

Bellows faults Pesanti for failing to request records from the therapist visited by Ja. "and possibly [Jo.]" In its opposition to the new trial motion, the prosecution pointed out that it did not have the records or even the name of Jo.'s therapist, and in any event such records were presumptively privileged under the psychotherapist-patient privilege and not discoverable. "[T]he trial court was not required, at the pretrial stage of the proceedings, to review or grant discovery of privileged information in the hands of third party psychotherapy providers." (*People v. Hammon* (1997)

15 Cal.4th 1117, 1119.) Pretrial disclosure of therapy records presents the risk of a serious invasion of the patient's statutory privilege, and the defendant's right of confrontation and cross-examination does not authorize such disclosure. (*Id.* at pp. 1127–1128.)

2. Banuelos report

Bellows argues that Pesanti should have obtained the report by Orange County DCFS social worker Rudy Banuelos, who interviewed Jo. after the reported abuse. Bellows's new counsel obtained the report and attached it as an exhibit. Bellows presents no evidence that Pesanti did not obtain the report. Even if she did not, however, Bellows has not demonstrated that he was prejudiced by Pesanti's failure to have Banuelos's report in hand.

The report did not undermine Jo.'s credibility. Banuelos reported that Ja. told him that Jo. first told a friend about the abuse, the friend urged her to tell her parents, and when Jo. did, she initially told her parents she would refuse to make a statement, because she did not want to get Bellows in more trouble. But Jo. did eventually tell Banuelos about the abuse and gave statements to the sheriff's deputies, and she testified at trial that she had told a friend. The report is consistent with Jo.'s testimony.

Bellows argues that Jo. did not tell Banuelos about the abuse in the booth at Chuck E. Cheese, but Jo. did tell the deputies about it, in Banuelos's presence, as Banuelos summarizes in his report. Bellows also points out that the report includes an interview with Jo.'s younger brother

Justin, who told Banuelos that Bellows was always appropriate, although Jo. stated that he was in bed on the other side of Bellows. Bellows argues that had she known this, Pesanti would have called Justin to testify. As reflected in Banuelos's report, however, the sheriff's report states that Justin remembered sleeping in bed with Jo. and Bellows, and never saw any touching. Bellows does not argue that Pesanti did not review the sheriff's report. Further, Pesanti argued in closing that the prosecution did not call Justin because they knew that nothing had happened and Justin would so testify. The prosecutor admitted in rebuttal that Justin would probably say he did not recall anything happening when they were in the bed. Pesanti could have made a tactical decision not to put Justin on the stand to testify that he did not see the abuse, which might seem an effort to use her little brother to contradict Jo.'s wrenching testimony.

Bellows argues that Pesanti would have learned from the report that Banuelos found Jo.'s claims inconclusive. But as the trial court found, the social worker's decision to close the case "is one person's opinion. It's not even admissible." A lay witness may not express an opinion about the truthfulness of another person's statement; that is for the jury to decide. (*People v. Houston* (2012) 54 Cal.4th 1186, 1221.)

Bellows argues that Banuelos's report would have allowed Pesanti to cross-examine Ja. about Jo.'s body language when (as Ja. told Banuelos) she said, " 'oh great,' "

when Ja. told her Bellows would be present at the family Thanksgiving. First, there is nothing in the report about Jo.'s body language. Second, the report states that Ja. thought Jo.'s response was "not normal and kind of odd" and asked her if anything was wrong, which makes it evident that " 'oh great' " did not mean she was happy that Bellows would be there.

3. Bellows's daughter Jennifer Toro

Bellows contends that Pesanti was ineffective when she failed to interview or subpoena Bellows's daughter Jennifer Toro, attaching a declaration in which Toro stated that her three sons and one daughter spent time with Bellows, including overnight visits, and he never touched them inappropriately. This testimony would have been cumulative of Kathleen's and William's testimony that Bellows was never inappropriate with children, including K. and Jo. Failure to produce exculpatory evidence that would be cumulative of other evidence presented to the jury is not ineffective assistance. (*People v. Stewart* (1985) 171 Cal.App.3d 388, 396.)

4. False memory expert

Bellows argues that Pesanti was ineffective for failing to consult and call as a witness a false memory expert. Pesanti requested and received fees for such an expert before trial. The record contains no evidence that Pesanti did not consult such an expert. In any event, the declaration from a false memory expert that Bellows attaches as an exhibit to the new trial motion demonstrates that expert testimony

would not have helped Bellows's defense. The declaration states: "False memories come about when individuals discuss their own recall with others who may unknowingly add information or contaminate the memory with the new information during the discussion. . . . This is the concept of contamination by repeated discussion or suggestion by others." No one else witnessed the abuse testified to by K. and Jo. They were not close, and there was no evidence they discussed the abuse with each other. Although the declaration also states that "an individual may add new meaning to old behavior" to reinterpret innocuous behavior as molestation, Bellows's touching of the two girls was unambiguously sexual. Counsel was not ineffective for failing to present expert testimony on false memory.

E. ***Failure to prepare Bellows***

Bellows contends that Pesanti failed to prepare him properly to testify in his own defense. In a declaration attached to the new trial motion, he stated that Pesanti asked him if he wanted to testify a few minutes before he took the stand, and did not discuss his proposed testimony or prepare him for her questions. If she had, he never would have testified about Ja.'s graduation. He also would have known that it was prejudicial to testify about his prior victimization.

After the prosecution rested, Pesanti told the court that William and Kathleen would testify first, followed by appellant. The next day, the court asked Pesanti if she needed a few minutes with Bellows, and took a recess.

When trial resumed with Bellows's testimony, Pesanti asked Bellows about what happened after Ja.'s graduation. Bellows testified tearfully about his conversation with Ja., and then Pesanti asked him about something that happened to him in his twenties. The prosecutor objected. At sidebar, Pesanti explained that Bellows had told her that he was drugged and awoke to a sexual assault, and "I wanted him to tell the jury . . . that the outrage of having that done, he would never do that to anyone." The court stated, "I think I understand what it's offered for," and allowed Bellows to testify about the hitchhiking incident. Pesanti used this testimony in her closing argument, comparing Bellows's "honest emotion" with Jo. and K.'s straightforward testimony, "as if it wasn't happening to them." Pesanti made a deliberate and tactical decision to elicit Bellows's emotional testimony about his experience, using it to argue that Jo. and K. were less credible.

Bellows argues that the evidence that he was a victim of sexual assault in his 20's is prejudicial because the jury would think that because he had been sexually assaulted, he would assault Jo. and K. There was no testimony to that effect, and no such argument by the prosecutor.

F. ***Failure to seek severance of the drug charge***

Bellows argues that Pesanti was ineffective for failing to seek a severance of the drug charge, because his possession of methamphetamine would make the jury think he was a drug addict and not credible.

K. testified that her mother thought Bellows was "into the wrong things" (drugs). When the trial court later suggested a severance of the drug charge, the prosecutor resisted, pointing out that drugs had been brought in as part of the family strife, and the court agreed that the door had been opened on the family animosity and its effect on the alleged victims' state of mind ("I can see why the defense explored that. That's part of their whole approach"). Bellows admitted his drug use. In closing, Pesanti stated that the only credible evidence was of methamphetamine possession, and it was no secret that the rest of the family did not like Bellows, which influenced K. and Jo.

The failure to move to sever the charge of possession of methamphetamine was not deficient performance. The circumstances of Bellows's arrest, including the methamphetamine found in his pocket, would have been relevant and admissible at trial (subject to objection) even if there had been no charge of possession. (*In re Ponce de Leon* (2004) 117 Cal.App.4th 1116, 1121.) Further, at the new trial hearing the trial court acknowledged the tactical value of Bellows's admission of possession, because he was able to "admit and avoid. [¶] . . . [¶] He could say 'Yes, I did possess

that,' enhancing his credibility. There's that tactic too that is done sometimes."

Substantial evidence supports the trial court's conclusion that Bellows did not establish ineffective assistance by Pesanti. The court did not err in denying the motion for new trial.

II. No *Brady* violation occurred.

Bellows contends that the prosecution violated his right to due process under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), by failing to provide the defense with social worker's Banuelos's report. We disagree.

The due process clause of the Fourteenth Amendment requires the prosecution to disclose "material exculpatory evidence" to the defense. (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 709.) "The duty extends to evidence known to others acting on the prosecution's behalf, including the police. [Citations.] . . . For *Brady* purposes, evidence is material if it is reasonably probable its disclosure would alter the outcome of trial." (*Id.* at pp. 709–710.) The three elements of a *Brady* violation are: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Id.* at p. 710.)

As we explained above in discussing Bellows's claim of ineffective assistance, the report did not have impeachment value or other material exculpatory information. The report

therefore was not favorable to Bellows, and the *Brady* claim has no merit. We point out that the prosecution did not have the report in hand and so did not suppress it; there is no evidence the sheriff had the social worker's report; and as made clear by Banuelos's summary of the sheriff's report, the sheriff's report states that Banuelos was present throughout the entire interview with Jo. Third, given that the report was not exculpatory, no prejudice ensued.

As we find no error, cumulative error did not render Bellows's trial fundamentally unfair.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.