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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DAVID A. COHN, Defendant and Appellant.	B233515 (Los Angeles County Super. Ct. No. BA343414)

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis B. Rappe, Judge. Affirmed.

Edward J. Haggarty, for Defendant and Appellant.

Kamala D. Harris, Attorney General; Dane R. Gillette, Chief Assistant Attorney General; Lance E. Winters, Senior Assistant Attorney General; Steven D. Matthews, Supervising Deputy Attorney General; Roberta L. Davis, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant David Cohn was arrested after sending sexual communications to an undercover FBI agent posing as a 13-year old girl in an internet chat room. Cohn was charged with attempted contact with a minor with the intent to commit a sexual offense (Pen. Code, § 664, 288.3, subd. (a))[1]; arranging a meeting with a minor for lewd purposes (§ 288.4, subd. (a)(1)); possession of matter depicting a minor engaging in sexual conduct (§ 311.11, subd. (a)); five counts of attempting to send harmful matter with the intent to seduce a minor (§ 644, 288.2, subd. (b)); and four counts of attempted lewd act upon a child under the age of 14 (§ 664, 288, subd. (a)). A jury found Cohn guilty on all counts.

On appeal, Cohn challenges his conviction and sentence on numerous grounds, including, in part, insufficiency of the evidence, admission of improper expert testimony, prosecutorial misconduct, instructional error, violation of section 1009 and violation of section 654. In addition, he contends that sections 288.2, subdivision (b) and 288.3, subdivision (a) violate the United States Constitution. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Summary[2]

FBI agent Adrienne Mitchell was assigned to a federal task force investigating crimes related to "the sexual exploitation of children." In an effort to identify suspects attempting to commit crimes against minors on the internet, Mitchell developed an undercover America Online (AOL) "persona" named "Sillycatncali." Mitchell also created an AOL profile for Sillycat indicating that her name was Catherine and that she was a 13-year old female living in California. On July 17, 2007, Mitchell used the Sillycat persona to enter a "special interest" chat room called "cuties," which she

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1 Unless otherwise noted, all further statutory citations are to the Penal Code.

2 Where necessary, we include a more detailed discussion of the facts in our legal analysis of the individual issues raised on appeal.

believed would appeal to a 13-year old girl. Upon entering the chat room, her user name and profile became viewable to other individuals participating in the chat room.

Approximately fifteen minutes after entering "cuties," defendant David Cohn, using the user name "Girldoctor4U," contacted Sillycat through a private instant messaging feature. Cohn addressed Sillycat as "Catherine," indicating that he had reviewed her profile, and asked if she was really 13 years old. Catherine responded, "yeppers." Cohn provided his true first name (David) and age (49) and then began asking a series of sexually suggestive questions, including: "Have you . . . been to your mom's doctor like a gynecologist before?"; "Has any doctor looked between your legs"; "Do you ever still get your temperature taken the baby way?"; "You're a virgin?"; "Have you touched a penis?"; "Have you seen a penis?" After Catherine responded to these inquiries, Cohn asked her for a picture. Mitchell then sent Cohn a photograph of a female Los Angeles County Sheriff's Deputy that was taken when she was 13 years old. Cohn described her as "cute" and asked if she wanted to talk on the phone. Catherine stated that she might talk to Cohn after she got to know him better.

Cohn then asked Catherine whether she wanted to "touch a grown man's penis" and whether she "knew about the nasty stuff involved." When Catherine asked "Like touching?", Cohn stated "First, of all, the guy will want to lick your vagina for sure and . . . maybe your butthole too." He also told Catherine that, because she was a virgin, "the guy will probably put a finger in your butt instead of your vagina so you won't get hurt." He then asked if she was in the Los Angeles area. Catherine responded, "Yep . . . S-F-V [San Fernando Valley]."

Cohn asked whether he could conduct an exam on Catherine, which would include taking her clothes off, touching her breasts, "looking at [her] bottom and vagina," putting a "finger in [her] bottom" and "licking her vagina." Cohn also asked Catherine whether she knew about ejaculation, whether she would "be okay with the goo going in [her mouth]" and whether she knew how to stimulate a male's prostate gland. He then sent her links to diagrams and videos showing the proper method to "stimulate [his] prostate."

Catherine asked Cohn if he was "serious about doing this" and he stated "I am if you are."

Cohn then asked Catherine if her "pussy [was] wet." When she said she did not know, Cohn repeatedly instructed her to "touch it for me." Catherine told him that she "did already" and Cohn asked "what does your finger smell like?" Cohn also asked if there were any nearby hotels where they could meet. Catherine responded that, after her mother went out of town, Cohn could call her and come to her apartment. Cohn then told her that she should send him an email if she was "serious about seeing [him]." Later that day, Catherine emailed Cohn at the address attached to his user name.

On July 19 and 20, Cohn sent Catherine emails asking for her phone number and address, and stated that he wanted to meet her on Tuesday, July 24. They eventually agreed to meet at 6:00 p.m. on Wednesday, July 25. On the day of July 25, Cohn sent Catherine an instant message asking if she still wanted an exam and they confirmed their plans to meet that evening. Later in the afternoon, Cohn asked Catherine if she understood that he was going to "be putting a finger in her bottom" and directed her to smell her "cunt" on "her fingers." At approximately 4:30 p.m., Cohn emailed Catherine and told her he was in a meeting and would not be able to see her.

On July 27, July 30, July 31 and August 2, Cohn and Catherine had further communications, which included a phone conversation, email exchanges and instant message "chats." During each of these communications, Cohn asked Catherine a series of sexually graphic questions and repeatedly told her to put her fingers in her vagina. During an August 2nd instant messaging conversation, they discussed meeting at Catherine's apartment when her mother went out.

On August 3, 2007, Agent Mitchell caused a search warrant to be executed on Cohn's car, his office and his residence. Officers seized a desktop computer, a laptop computer, a cell phone, a thumb drive and an "air card." The thumb drive contained over 5,000 saved "online chats" and images of partially unclothed females who appeared to be minors. Additional images were found on his laptop and his desktop computers.

B. Indictment and Trial

The Los Angeles district attorney filed an information charging Cohn with one count of attempted contact with a minor with the intent to commit a sexual offense (Pen. Code, § 664, 288.3, subd. (a)), one count of arranging a meeting with a minor for lewd purposes (§ 288.4, subd. (a)(1)), one count of possession of matter depicting a minor engaging in sexual conduct (§ 311.11, subd. (a)), five counts of attempting to send harmful matter with the intent to seduce a minor (§ 644, 288.2, subds. (a) & (b)) and four counts of attempted lewd act on a child under the age of 14 (§ 664, 288, subd. (a)).

At trial, Agent Mitchell testified about her conversations with Cohn and described the images she observed on his electronic devices. After the prosecution presented its evidence, Cohn called several character witnesses, which included his 18 year old daughter, two of his daughter's 17-year-old friends and two of his co-workers. Cohn's daughter and her friends testified that Cohn had never engaged in any form of sexually explicit talk or conduct while in their presence. His co-workers testified that they had never seen Cohn act inappropriately with his daughter or any female staff or clients of the firm.

Cohn also called an expert witness, James Herriot, who had received a Ph.D. degree in human sexuality from an unaccredited institution in San Francisco. Herriot testified that he had conducted research regarding sexual communications between adults during online chatting. According to Herriot, sexual online chatting was a form of role playing entertainment similar to improvisational theater. Herriot claimed that participants in online sex chatting rooms frequently created exaggerated personas that included false information about their age and gender. Herriot also stated that one of the goals of these role playing games was to "demask" other participants by eliciting information demonstrating that they were not who they claimed to be. Herriot stated that people communicating in sex chat rooms raise the subject of sex much faster than people having face-to face conversations and use more vulgar language.

Cohn also testified in his defense. Although Cohn admitted that he engaged in the internet and telephone communications described by Agent Mitchell, he asserted that he

believed "Catherine" was actually an adult role playing as a thirteen year old girl. Cohn testified that, prior to his contact with Catherine, he had engaged in numerous "cybersex" conversations in online chat rooms. After trying out several different personas, Cohn created a character who was an "obnoxious . . . kind of doctor character" who tried to get other online users to "relive[] their discovery of sexuality."

Cohn's "doctor" persona was based in part on his first sexual experiences as a child. Cohn stated that, when he was a young child, he had access to medical books, including "Masters and Johnson studies on human sexuality." Cohn described the books as being "very, very graphic but in a clinical way." As a child, Cohn became fascinated with medical exams and experienced his "first orgasm while reading a Masters and Johnson book because the clinical nature of it was a turn-on." Cohn also stated that he engaged in sexual acts with his sister while playing "doctor," which included oral copulation. Cohn felt that, "in a sense," his sexual chats were meant to recreate the "play that [he] had with his sister."

Cohn contended that he did not believe anyone he had spoken to in an internet chat room was actually a child. Cohn stated that he thought all of the individuals were engaging in role play as a form of entertainment. As part of this role playing game, it was important for people to try to maintain their false identities. To further that goal, users frequently provided photographs of themselves that were consistent with the roles that they were trying to portray. When engaging in these sexual chats, Cohn would try to "unmask the other person through . . . various questions" and try to "make someone blink." Cohn stated that, normally, people engaged in role playing would not announce their intent to role play because "that's like lying your cards down at the beginning of a game. It defeats the purpose." He also stated that when he spoke with Catherine on the phone, he believed her voice sounded fake, which caused him to believe she was trying to simulate a teenage identity.

Cohn admitted that he had engaged in thousands of online chats, but stated that none of these chats had ever crossed over "from communication into anything physical." He also admitted that, in the course of his online chats, he had received images that

appeared to be children. After receiving the images, he looked up child pornography statutes and concluded that possessing images of children who were merely nude or bare breasted was not illegal. Cohn also claimed that he mistakenly believed he had deleted most of the images that were found on his computers by clicking a red "X" in the top right hand corner of each image.

After Cohn had presented his defense, the prosecution called expert Gordon Plotkin as a rebuttal witness. Plotkin testified that child predators do not share a common age, ethnicity, or social demographic and that he would not expect a child predator to prey on relatives or other close acquaintances. Plotkin also stated that not all online chatting involves role playing, which generally requires anonymity. According to Plotkin, people engaged in role play activities normally wouldn't reveal their true identity. Finally, Plotkin testified that although it was normal for children eleven years old and younger to engage in playing "doctor," which was a nonsexual game in which children show each other their genitalia, he stated that the game became abnormal when it occurred beyond pre-puberty or was done for a sexual purpose.

The jury found Cohn guilty on all counts. The trial court sentenced Cohn to nine years and four months in state prison. Appellant filed a timely appeal.[3]

DISCUSSION

Cohn appeals his conviction and sentence on numerous grounds, including, in part: insufficiency of the evidence, admission of improper expert testimony, instructional error, prosecutorial misconduct and violations of Penal Code sections 1009 and 654. He

[3] In addition to his appeal, Cohn has filed a petition for habeas corpus arguing that he was denied effective assistance of counsel because his attorney failed to call an expert to explain how Cohn's childhood sexual conduct with his sister had contributed to his subsequent use of false personas in sexual chat rooms. The petition was not accompanied by a declaration or any other evidence from his trial counsel. On March 5, 2012, we entered an order stating that the petition would be considered with Cohn's appeal. By separate order, we will deny the petition.

also argues that we must reverse his convictions under sections 288.2, subdivision (b) and 288.3, subdivision (a) because those statutes are unconstitutional.

A. The Record Contains Substantial Evidence Supporting Cohn's Conviction for Attempted Lewd Act Upon a Child Under the Age of 14

Cohn argues that the prosecution presented insufficient evidence to support his conviction for attempted lewd act upon a child under the age of 14 (§ 664, 288, subd. (a)). Specifically, he contends that the prosecution failed to show that he took any "direct step" toward the completion of a lewd act.[4]

1. Standard of review

"To assess the evidence's sufficiency, we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict–i.e., evidence that is reasonable, credible, and of solid value–such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]

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4 Although Cohn was convicted of four separate counts of attempted lewd act upon minor under the age of 14, his appellate brief does not address each count individually. Instead, he argues that the evidence, considered as a whole, does not support a conviction for any count of attempted lewd act on a child.

"The same standard governs in cases where the prosecution relies primarily on circumstantial evidence. [Citation.] We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]' [Citation.] 'Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]' [Citation.] Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358.)

2. The prosecution introduced substantial evidence demonstrating that Cohn took a direct but ineffectual step toward committing a lewd act

Section 288, subdivision (a) states that "any person who willfully and lewdly commits any lewd or lascivious act . . ., upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . ." To prove this crime, the prosecution must show that: (1) the defendant either touched the child or "caused the child to touch (his/her) own body . . ."; (2) the defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child; and (3) the child was under the age of 14 years at the time of the act. (CALCRIM. No. 1110.)

"An Attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (CALCRIM No. 21a.) Thus, "[t]o sustain a conviction of attempted violation of section 288(a), the prosecution has the burden of demonstrating (1) the defendant intended to commit a lewd and lascivious act with a child under 14 years of age, and (2) the defendant took a direct but ineffectual step toward committing a lewd and lascivious act with a child under 14 years of age." (*People v. Singh* (2011) 198 Cal.App.4th 364, 368.)

Cohn argues that the prosecution failed to introduce sufficient evidence to show that he took a direct but ineffectual step toward touching Catherine. The prosecution may prove the "touching" element of section 288 by demonstrating a "constructive touching," which occurs when the defendant "instigat[es]" a child to touch his or her own body. (*People v. Meacham* (1984) 152 Cal.App.3d 142, 153 (*Meacham*) [disapproved on other grounds in *People v. Brown* (1994) 8 Cal.4th 746, 756-759]; *People v. Lopez* (2010) 185 Cal.App.4th 1220, 1229 ["Violation of section 288 requires the defendant to either touch the body of a child or willfully cause a child to touch her own body"]; *People v. Imler* (1992) 9 Cal.App.4th 1178 [ordering 14-year-old over the phone to masturbate was sufficient to prove touching]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114 [section 288 satisfied where defendant "cause[d] the child to . . . do the . . . touching upon or with itself"].)

Cohn was charged with four counts of attempted lewd act upon a child under the age of 14 (§ 664, 288, subd. (a)), which were predicated on communications that he made to Catherine on July 17, 2007 (count eleven), July 25 (count twelve), July 31 (count thirteen) and August 2 (count fourteen). In regards to count eleven, the evidence showed that, on July 17, Cohn asked Catherine "Is your vagina wet right now?" When Catherine said she did not know, Cohn told her "touch it for me and see." Later in the conversation he repeated these statements, asking Catherine "How wet is your pussy?", and then telling her "Touch it for me." When Catherine said she "did already," Cohn asked her, "What does your finger smell like?"

The evidence for count twelve showed that, on July 25, Cohn asked Catherine "Have you thought about me licking your cunt?" When Catherine said she had never done that, Cohn asked "[Is] [y]our cunt is stinky right?" and told her to "Smell it on [her] fingers." Catherine responded "LOL" and Cohn asked "Did you do it? . . . Stinky?" When Catherine said "yes", he said "Good."

In regards to count thirteen, the evidence showed that, on July 30, Cohn asked Catherine "Does your pussy get very wet during our conversations?" Catherine stated that she "hadn't checked" and Cohn immediately told her to "check." When Catherine

asked “How?”, Cohn told her “put your finger there” and asked if her “scent” was “noticeable.”

Finally, for count fourteen, the evidence showed that, on August 2, Cohn asked Catherine, “Do you know what your clit is?” Catherine asked “why”, and Cohn responded, “Okay, You have to take your panties off for me right now please.” Later in the conversation, Cohn told Cat to pull her panties down “a little.” When Catherine said she had complied, Cohn told her “now get as much vagina juice on your finger as you can.” When Catherine asked if he was serious, he told her “Please do it” and instructed her to type the letter “Y” when her finger was wet. He then instructed her to “feel above her vagina and find the piece of skin sticking out above it.”

This evidence shows that, on all four days in question, Cohn specifically directed Catherine to touch her vagina. Based on this evidence, a reasonable jury could infer that Cohn took a direct step in “instigating ” Catherine, who had identified herself as a 13-year-old girl, to touch herself. (*Meacham, supra,* 152 Cal.App.3d at p. 153.)

Cohn, however, argues that his requests that Catherine “touch her vagina[] constituted mere solicitation and nothing more than preparation and not substantial evidence of a direct step toward completion of the alleged sexual acts with a child under 14 years of age.” Cohn contends that his conduct did not amount to an attempted “constructive touching” because he “never ordered [Catherine] to touch herself nor did he threaten her in any way. Instead he simply requested or encouraged [Catherine] to engage in masturbatory activities.”

However, to demonstrate a constructive touching under section 288, the prosecution need not prove that the defendant ordered the child to touch herself or himself through a physical threat. Instead, the prosecution must show only that the child touched himself or herself “at the instigation of” (*Meacham, supra,* 152 Cal.App.3d at p. 153) or “at the direction of” (*Lopez, supra,* 185 Cal.App.4th at p.1233) a defendant

acting with the requisite intent.[5] (See also *Austin, supra*, 111 Cal.App.3d at pp. 115-116.) Based on statements that Cohn made during the four internet chats in question, the jury could reasonably conclude that his communications to Catherine were intended to persuade her to touch herself.

B. The Prosecution Presented Sufficient Evidence to Convict Cohn of Attempting to Send Harmful Matter With the Intent to Seduce a Minor

Cohn argues that the prosecution failed to introduce sufficient evidence to convict him of attempting to send harmful matter over the internet with the intent to seduce a minor. (§ 644, 288.2, subd. (b).) To prove a violation of section 288.2, subdivision (b), the prosecution must show that the defendant knew the recipient of the harmful matter was a minor. Cohn contends that, based on this knowledge requirement, we must overturn his conviction for attempting to violate section 288.2 because the undisputed evidence shows that the recipient of his communications, Agent Mitchell, was actually an adult. Whether a person may be convicted of attempting to violate section 288.2 when the recipient of the material is an adult presents a legal question that we review de novo. (See *People v. Cromer* (2001) 24 Cal.4th 889, 894; cf. *Trujillo v. North County Transit Dist*. (1998) 63 Cal.App.4th 280, 284 [when reviewing an order granting motion for judgment notwithstanding the verdict, court applies de novo standard if the motion presents a legal question based on undisputed facts].)

In *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170 (*Hatch*), the court considered and rejected the exact argument that Cohn raises here. As in this case, the defendant in *Hatch* sent graphic sexual communications to an adult user who was posing as a 13-year-old girl in an internet chat room. The defendant was subsequently convicted of attempting to violate section 288.2, subdivision (b). (See *id*. at pp. 177-178.) On

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5 Cohn has not argued that the prosecutor failed to show that he acted with the requisite intent, which requires that "the defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of [himself] or the child." (See CALCRIM No. 1110.)

appeal, the defendant argued that "a necessary element of the charges [was] proof the victims were under the age of 18 years." (*Id*. at p. 185.)

The appellate court rejected the argument, explaining: "[The defendant] is not charged with violating section . . . 288.2, subdivision . . . (b); instead, he is charged with attempting to violate [that] section[]. A defendant is guilty of an attempt when he harbors a specific intent to commit the target crime and does a direct, although perhaps ineffectual, act toward its commission. [Citation.] The act need not be an element of the substantive offense, but only an immediate step in the present execution of the criminal design. [Citation.]

"The fact the prosecution cannot show that [the defendant's] intended victims were in fact under [the required age] is irrelevant to his culpability for attempting the charged crimes. If [defendant] had the specific intent to complete the target crimes, the impossibility of completing the crimes does not exonerate him from attempting those offenses. . . . . 'The courts of this state have not concerned themselves with the niceties of distinction between physical and legal impossibility, but have focused their attention on the question of the specific intent to commit the substantive offense. The hypothesis of the rule established in this state is that the defendant must have the specific intent to commit the substantive offense, and that under the circumstances, as he reasonably sees them, he does the acts necessary to consummate the substantive offense; but because of circumstances unknown to him, essential elements of the substantive crime are lacking. [Citations.] It is only when the results intended by the actor, if they happened as envisaged by him, would still not be a crime, then and only then, can he not be guilty of an attempt.' [Citation]." (*Id*. at pp. 185-186; see also *People v. Reed* (1996) 53 Cal.App.4th 389, 369-397 [defendant guilty of attempted molestation of a child under age 14 despite the fact that his intended victims were fictitious constructs of a detective posing as the mother of 12 and nine-year-old victims].)

Cohn has provided no argument explaining why we should not follow *Hatch*, which is indistinguishable from the facts of this case.

C. The Trial Court Did Not Abuse its Discretion When it Permitted Alford Plotkin to Provide Expert Rebuttal Testimony

Cohn argues that the trial court erred when it permitted expert witness Alford Plotkin to testify that he would not expect child predators to abuse relatives or other minors with whom they regularly associate. According to Cohn, this testimony constituted improper "psychological 'profile' evidence designed to depict Cohn as possessing characteristics of a child sexual predator." We review a trial court's decision to admit expert witness testimony for abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1222 (*Prince*).)

"A profile ordinarily constitutes a set of circumstances–some innocuous–characteristic of certain crimes or criminals, said to comprise a typical pattern of behavior. In profile testimony, the expert compares the behavior of the defendant to the pattern or profile and concludes the defendant fits the profile." (*Prince, supra*, 40 Cal.4th at p. 1226.) In other words, the expert "'attempts to link the general characteristics of [a particular type of criminal] to specific characteristics of the defendant." (*Ibid*.)

"'Profile evidence,' however, is not a separate ground for excluding evidence; such evidence is inadmissible only if it is either irrelevant, lacks a foundation, or is more prejudicial than probative." (*People v. Smith* (2005) 35 Cal.4th 334, 357 (*Smith*).) "'[P]rofile evidence is objectionable when it is insufficiently probative because the conduct or matter that fits the profile is as consistent with innocence as guilt.' [Citation.]" (*Prince, supra*, 40 Cal.4th at p. 1226.) Generally, profile evidence is "inadmissible to prove guilt." (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084 (*Robbie*).)

In this case, Plotkin's testimony was offered in response to statements by Cohn's character witnesses. Specifically, Cohn's daughter and her friends testified that Cohn had never subjected them to any sexually explicit conversation or conduct. The trial court then permitted the prosecution to rebut this evidence with testimony from Plotkin, who explained that, based on his experience, he would not expect child predators to prey on someone within the predator's own "sphere of life."

In *People v. McAlpin* (1991) 53 Cal.3d 1289, the California Supreme Court considered whether a trial court had abused its discretion in admitting analogous expert testimony. The defendant in *McAlpin* was charged with lewd conduct with a child under the age of 14 (Pen. Code, § 288, subd. (a)) based on allegations that he had molested the daughter of a woman he had been dating. At trial, the defendant introduced evidence demonstrating that he was a 36-year-old, college educated male who had served in the navy and been employed by several major companies. In addition, two character witnesses testified that the defendant had a reputation for "'being very honest.'" (*Id*. at p. 1297.) The prosecution called an expert witness who testified that there was "no profile of a 'typical' child molester," explaining that a child molester "can be of any social or financial status, any race, any age, any occupation, any geographical origin, and any religious belief or no religious belief at all." (*Id*. at p. 1299.) The expert also testified that "such offenders can . . . be persons of good or even impeccable reputations in the community." (*Ibid*.)

"The Supreme Court held the trial court did not abuse its discretion in admitting this evidence because it served to refute a commonly held stereotype. The court observed that 'it is reasonable to conclude that many jurors would tend to rely not so much on their personal intuition but on the widespread public image of the child molester as an old man in shabby clothes who loiters in playgrounds or schoolyards and lures unsuspecting children into sexual contact by offering them candy or money.' [Citation.]" (*Robbie, supra*, 92 Cal.App.4th at p. 1086.) The Court noted that numerous studies had concluded that although this stereotype was false, it was "deeply ingrained in the public consciousness." (*McAlpin, supra*, 53 Cal.3d at p. 1302.) Thus, according to the court, the expert testimony was properly admitted to "'assist the trier of fact' [citation] by giving the jurors information they needed to objectively evaluate the People's evidence." (*Id*. at p. 1303.)

In *Robbie, supra*, 92 Cal.App.4th 1075, the First District explained why the expert testimony in *McAlpin* did not constitute improper profile evidence: "Profile evidence is unfairly relied upon to affirmatively prove a defendant's guilt based on his match with

the profile. The jury is improperly invited to conclude that, because the defendant manifested some characteristics, he committed a crime. The evidence in *McAlpin* was not admitted for this improper purpose. It was not offered to establish a stereotype, then condemn the defendant for fitting it. Instead, the *McAlpin* evidence was admitted in recognition that a misleading notion existed in the public consciousness and to disabuse jurors of the misconception. The faulty syllogism attacked in *McAlpin* ran as follows: child molesters share certain characteristics; the defendant did not manifest these characteristics; therefore, the defendant is not a child molester. The testimony of the *McAlpin* expert was admitted not to establish the major premise, but to refute it by explaining that there is no profile of a 'typical' child molester. There was no argument that *McAlpin* must be guilty because he fit a profile. Instead the jury was correctly informed that no such uniformity exists and they should not acquit the defendant merely because he did not fit some nonexistent mold." (*Id*. at pp. 1086-1087)

Like the expert testimony in *McAlpin*, Plotkin's statement that he would not expect child molesters to prey on a family members or acquaintances was not offered to prove Cohn's "guilt based on his match with [a] profile." (*Robbie, supra*, 92 Cal.App.4th at p. 1086.) Instead, it was offered to rebut Cohn's character evidence that he had not engaged in any sexual conduct toward his daughter, who was 18, or her friends, who were minors. The obvious inference that Cohn intended the jurors to draw from this evidence was that, because he had never subjected his daughter or her friends to inappropriate sexual conduct, he was not a child predator. Plotkin's testimony, in turn, was admitted to refute this "faulty syllogism." (*Ibid*.)

Cohn, however, argues that this case is controlled by *People v. Walkey* (1986) 177 Cal.App.3d 268 (*Walkey*), and *Robbie, supra*, 92 Cal.App.4th 1075. In *Walkey*, "the prosecution introduced expert evidence that the most important factor in the profile of a child abuser was that he had himself been abused as a child, elicited an admission from the defendant that he had been abused as a child, then argued that the defendant was guilty because he fit the profile of a child molester. [Citation.] The Court of Appeal held

the evidence inadmissible and the prosecution's argument improper. [Citation.]" (*Smith, supra,* 35 Cal.4th at pp. 357-358.)

In *Robbie, supra,* 92 Cal.App.4th 1075, "a prosecution expert testified that many rapists use only minimal force, and described in detail a scenario in which the rapist is in effect acting as if he thinks of the sexual acts as consensual. [Citation.] Not coincidentally, the behavior the expert described matched the testimony of the alleged victim. The expert conceded that the same behavior would be consistent with a truly consensual encounter. The Court of Appeal in *Robbie* characterized this evidence as inadmissible 'profile evidence.'" (*Smith, supra,* 35 Cal.4th at p. 358.)

The facts of this case have little in common with *Walkey* or *Robbie*. First, Plotkin's testimony was admitted only after Cohn had himself offered evidence suggesting that he was not a child predator because he had never engaged in sexual conduct toward his daughter or her minor friends. Second, the prosecution did not offer Plotkin's testimony to show that Cohn was guilty because he exhibited a certain characteristic; rather, the prosecutor used Plotkin's testimony to show that Cohn's conduct toward the young females with whom he was acquainted did not necessarily mean that he acted the same way toward strangers on the internet. We find no abuse of discretion in the trial court's decision to admit this evidence.

D. The Trial Court's Instructional Error Regarding Section 288.4 Was Harmless Beyond a Reasonable Doubt

Cohn contends that the trial court erred when it provided conflicting instructions that effectively negated one of the elements necessary to convict him of arranging a meeting with a minor for lewd purposes in violation of section 288.4. "'[A]ssertions of instructional error are reviewed de novo.'" (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469.)

To prove a violation of section 288.4, the prosecution must prove three elements: (1) the defendant arranged to meet a person he believed to be a minor; (2) when the defendant did so, he was motivated by an unnatural or abnormal sexual interest in

children; and (3) at that meeting, the defendant intended to engage in lewd or lascivious conduct. (CALCRIM No. 1125.) Although the trial court properly instructed the jury on the elements required to prove a violation of section 288.4, it also provided the jury a general instruction on motive (CALCRIM 370): "The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive." Cohn contends that, because this general motive instruction indicated that it applied to all counts, the court effectively gave the jury conflicting instructions as to whether, for the purposes of the section 288.4 charge, it was required to find Cohn was "motivated" by an unnatural or abnormal sexual interest in children at the time he arranged to meet with Catherine.

The Attorney General concedes that the trial court erred. (See *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126-1127 [trial court erred when it provided separate instructions informing the jury that: (1) to convict the defendant of child annoyance, the prosecution was required to prove that the defendant's conduct was "'motivated by an unnatural or abnormal sexual interest in [the child]'"; and (2) "'Motive is not an element of the crime charged and need not be shown'"]; see also CALCRIM No. 370, bench notes [stating that the instruction should not be given "if motive is an element of the crime charged"].) It argues, however, that the instructional error was harmless.

As the Attorney General acknowledges, we apply the federal harmless error standard (*Chapman v. California* (1967) 386 U.S. 18, 24) to instructional error that improperly describes or omits an element of an offense. (*Neder v. Untied States* (1999) 527 U.S. 1, 4, 9; *Maurer, supra,* 32 Cal.App.4th at pp. 1128-1129.) In making this determination of harmlessness, "'[w]e ask whether it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error.' [Citations.]" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1159.)

Given the evidence and the jury's findings in this case, we conclude that the court's instructional error was harmless beyond a reasonable doubt. The evidence at trial demonstrated that Cohn sent numerous graphic sexual communications to Catherine. In

these messages, he repeatedly told Catherine that he wanted to engage in a wide array of sexual activities with her, including, in part, oral copulation and sodomy. He also repeatedly directed her to engage in masturbatory activities. Cohn admitted sending these messages, but alleged that he believed Catherine was an adult. The jury necessarily rejected that defense when it convicted him on every count charged in the information.

To convict Cohn of the various other criminal counts on which he was found guilty, the jury was required to find, among other things, that: (1) he contacted Catherine with the intent to commit a lewd or lascivious act on a child under the age of 14 (§§ 288.2, subd.(b); 288.3, subd. (a)); (2) his communications were intended to "sexually arouse, appeal to, or gratify the lust, passions, or sexual desires of himself or of the minor" (§ 288.2, subd. (b)); (3) his communications were intended to "seduce the minor" (§ 288.2, subd. (b)); and (4) the communications described sexual conduct in an "obviously offensive way" and exhibited a "shameful or morbid interest in nudity, sex or excretion." (§§ 288.2, subd. (b), 313.) Moreover, by convicting Cohn of violating section 288.4, the jury necessarily concluded that the prosecution proved the two elements of the crime that did not conflict with the court's general motive instruction, which required a showing that: (1) Cohn arranged to meet Catherine, whom he believed to be a minor, and (2) at the meeting, he intended to engage in lewd or lascivious conduct. (See CALCRIM No. 1125.)

Given the extensive and highly graphic nature of the communications that Cohn sent to what he believed was a 13-year-old child, combined with the jury's other findings in this case, it is clear beyond a reasonable doubt that, absent the instructional error, the jury would have found Cohn was motivated by an unnatural or abnormal sexual interest in children when he arranged to meet with Catherine.

E. Cohn Has Forfeited His Prosecutorial Misconduct Claims

Cohn argues that the prosecutor engaged in misconduct during closing argument Specifically, Cohn alleges that the prosecutor: (1) "improperly commented" on his decision to "testify [on his own behalf]" and to call "his daughter as a witness"; (2)

"denigrat[ed]" Cohn by calling him a liar, describing him as a "fat old spider waiting for a fly to enter his web" and stating he that he "liked little girls"; and (3) "accus[ed] defense counsel of misstating the law."

Cohn concedes that his counsel "did not object to the prosecutor's improper arguments nor did he request an admonition of the jury." The California Supreme Court has explained that: "'"[a]s a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety."' [Citation.] 'Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion [citations], defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry.' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 216.) To the extent the prosecutor committed any misconduct in this case, it could have been easily rectified by a simple objection and admonition. As a result, Cohn has forfeited his prosecutorial misconduct claims.[6]

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6 Cohn argues that, to the extent he has forfeited his prosecutorial misconduct claims, his trial counsel provided ineffective assistance of counsel by failing to object to the prosecutor's conduct in a timely manner. "'To prevail on a claim of ineffective assistance of counsel, defendant "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice."' [Citation.] Prejudice occurs only if the record demonstrates 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.] 'When . . . the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons. . . . Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, not on appeal.' [Citation]." (*People v. Lucero* (2000) 23 Cal.4th 692, 728-729.) In this case, Cohn does not discuss whether the record sheds light on why the counsel failed to object. Accordingly, we conclude that if Cohn wishes to pursue the ineffective assistance claim, he must do so in a habeas petition.

F. The Trial Court Did Not Violate Section 1009 or Infringe on Cohn's Constitutional Rights When it Permitted the Prosecution to Prove the Section 311.11 Charge with Photographs That Were Not Presented in the Preliminary Hearing

Cohn argues that the trial court violated section 1009 and his Sixth Amendment rights when it allowed the jury to convict him of possession of matter depicting a minor engaging in sexual conduct (§ 311.11, subd. (a)) based on images that were not presented during the preliminary hearing.

1. Factual summary

At the preliminary hearing, Agent Mitchell testified that, on August 3, 2007, she recovered various electronic storage devices from Cohn's car and his residence. Mitchell also testified that she reviewed the contents of those devices and observed "numerous" images of children, including an image depicting "a girl approximately 12 to 15 years of age posed for the camera such that one of her breasts [and buttocks were] exposed"; an image depicting "a nude girl approximately 12 years old lying on the ground with her breasts and genitalia exposed"; and two images that Mitchell recognized from "a child pornography series." The prosecution then introduced six specific photographs that, according to Mitchell's testimony, had been recovered from Cohn's electronic devices.

Based on the evidence at the preliminary hearing, the district attorney filed an information alleging that "on or about August 3, 2007," Cohn was in possession of matter depicting a minor engaging in sexual conduct in violation of section 311.11, subd. (a).) Prior to trial, the prosecution filed a motion to admit any "child erotica and child pornography images found on the defendant's computers and digital media . . . to show not only that Cohn knew of the existence of child pornography on his computer, but also to demonstrate that the images' presence on his computers was not inadvertent." Cohn did not oppose the motion.

On the second day of trial, the court asked the prosecution whether it had reviewed Cohn's proposed jury instructions, which argued that the jury should only be permitted to

consider the six images introduced at the preliminary hearing when deciding whether he violated section 311.11. The prosecution informed the court that it had not had a chance to review the proposed instructions.

Later in the proceedings, the parties revisited the issue. The prosecution argued that the jury should be able to convict Cohn of violating section 311.11 based on his possession of any of the 32 images that were introduced during the trial. Cohn, however, asserted that permitting the jury to convict him based on images not introduced at the preliminary hearing would effectively add a count that had not been substantiated at the preliminary examination, thereby violating Penal Code section 1009.

The trial court rejected Cohn's argument and ruled that the prosecution could rely on images that were not presented at the preliminary hearing to prove the section 311.11 count. According to the court, the prosecution was not attempting to "add[] counts"; rather, it was requesting that the jury be permitted to consider "additional evidence on the same counts." The court also noted that if the defendant felt prejudiced if "could have made a motion for continuance."

The final jury instruction on the section 311.11 count listed 32 images that the prosecution had introduced at trial and instructed the jury that it could not convict Cohn unless "you all agree that the People have proved that the defendant possessed or controlled at least one of these [32] images and you all agree on which image he possessed or controlled."

2. The trial court did not violate Penal Code section 1009

Cohn argues that the trial court's decision to allow the jury to convict him under section 311.11 based on images not presented at the preliminary hearing violated section 1009, which states, in part: "[a]n indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

We agree with the trial court's conclusion that allowing the jury to convict Cohn of violating section 311.11 based on photographs that were not introduced at the

preliminary hearing did not "change the offense charged" or "charge an offense not shown by the evidence taken at the preliminary examination." The information charged Cohn with a single count of violating section 311.11, subdivision (a). This charge was supported by evidence introduced at the preliminary hearing, which included: (1) Agent Mitchell's testimony that Cohn's electronic devices contained "numerous" images of children, several of whom were partially naked; and (2) six specific images of children that Mitchell had observed on the devices. (See § 866, subd. (b) ["It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony"].) The court's decision to allow the jury to convict Cohn of violating section 311.11 based on images first introduced at trial did not add a charge to the information; it merely allowed the jury to consider additional evidence in assessing whether Cohn had committed an offense that had already been charged. The state is not required to disclose at the preliminary hearing all of its evidence relating to the commission of the offense. It is only required to submit sufficient evidence to establish probable cause. (§ 866, subd. (b).)

Cohn, however, argues that three cases–*People v. Graff* (2009) 170 Cal.App.4th 345 (*Graff*), *People v. Burnett* (1999) 71 Cal.App.4th 151 (*Burnett*) and *People v. Kellin* (1962) 209 Cal.App.2d 574 (*Kellin*)–demonstrate that the trial court's conduct in this case constituted a violation of section 1009. These cases are inapposite. In *Graff*, *supra*, 170 Cal.App.4th 345, the district attorney filed a seven-count complaint alleging that the defendant had committed lewd acts upon a child. Each count was based on a specific act committed on a specific date. (*Id*. at p. 349.) At the preliminary hearing, the court dismissed counts three and four, which were predicated on the defendant's alleged observation of the child masturbating. The court concluded that the prosecution had introduced no evidence supporting those specific counts. After the preliminary hearing, an information was filed conforming to the court's ruling. (*Id*. at pp. 349-351.)

Although the third and fourth counts were dismissed from the information, the district attorney was permitted to introduce evidence of these two incidents to prove motive and intent related to the charged conduct. During closing argument, the

prosecution argued to the jury that it could convict the defendant of the lewd act counts if it found that he had observed the child masturbate. The defense moved for a mistrial, but the trial court denied the motion.

The appellate court concluded that the district attorney's arguments had effectively amended the information to allege the same counts that were dismissed at the preliminary hearing for lack of evidence. The court explained that there were two reasons this constructive amendment was improper. First, it stated that "late amendments are not permitted where the defendant would be prejudiced. Appellant was prejudiced by the failure of the prosecution to make its theory clear prior to the last phase of closing argument." (*Graff, supra,* 170 Cal.App.4th at p. 362.) Second, it explained that the amendment "did not correspond to the charges established at the preliminary hearing." (*Ibid*.)

Unlike *Graff*, however, the information in this case did not charge Cohn with multiple counts of section 311.11 predicated on his possession of specific, individual images of children. It charged only one count of violating section 311.11. Mitchell's testimony at the preliminary hearing indicated that this single count was based on the "numerous" images found on Cohn's electronic devices. Although the prosecution introduced six images at the preliminary hearing, it did not state, nor did the information allege, that Cohn's violation of section 311.11 was based solely on his possession of those six images.

In the second case cited by Cohn, *Burnett*, *supra*, 71 Cal.App.4th 151, the prosecution "presented evidence at the preliminary hearing that the defendant, a felon charged with possession of and brandishing a firearm, had committed those offenses with a .38 caliber revolver during an altercation with two witnesses/victims. [Citation.] At trial, an acquaintance of the defendant testified that shortly before the charged incident, the defendant possessed a .357 magnum, which the acquaintance had previously taken from him and returned that day. [Citation.] At the prosecution's request, the trial court amended the information to strike the words '".38 caliber"' from the description of the handgun. [Citation.] The jury was informed that the defendant could be convicted based

on either incident, and the prosecutor urged the jurors to convict whether they believed the acquaintance or the other two witnesses. [Citation.]"

"The Court of Appeal reversed. The court held that because the evidence at trial was of 'two completely different incidents' which 'could have supported two charges,' but the evidence presented at the preliminary hearing encompassed only one of those incidents and the other 'was never the subject of a preliminary hearing at which it could be determined whether there was probable cause to believe that offense had occurred,' the defendant could not legally be convicted of the latter offense. [Citation.]" (*Graff, supra,* 170 Cal.App.4th at pp. 362-363 [discussing *Burnett*].)

The third case cited by Cohn, *Kellin, supra,* 209 Cal.App.2d 574 involved a similar situation. "The defendant was charged with grand theft on or about November 10, 1960; the evidence at the preliminary hearing showed theft of a $2,093 check on November 10, 1960. At trial, the prosecution offered evidence of theft of three additional checks on October 23 and December 8. After the prosecution's case, the district attorney successfully moved to amend the information to charge theft 'on or about the 28th day of October through the 28th day of December, 1960.' [Citation.] Reversing the conviction, *Kellin* held the amendment 'allowed the defendant to be charged and perhaps convicted of an offense not shown by the evidence at the preliminary examination.' [Citation.] The court noted that each of the checks represented a 'separate and distinct transaction,' not related to the check which was the basis of the order of commitment after the preliminary hearing and offered to show a distinct theft. [Citation.]" (*Burnett, supra*, 71 Cal.App.4th at p. 166 [discussing *Kellin*].)

Burnett and *Kellin* are distinguishable from this case. In both decisions, the information charged the defendant with committing a crime based on one specific act: the defendant in *Burnett* was charged with brandishing a .38 caliber pistol on a specific date; the defendant in *Kellin* was charged with cashing a check on November 10. The evidence at the preliminary hearings, in turn, provided probable cause that the defendants had committed those specific acts. However, at trial, the prosecutors were permitted to amend the information to allege that the defendants had committed the charged crimes by

engaging in entirely different acts that were never discussed in the preliminary hearing – brandishing a .357 magnum on a different date and cashing checks on October 23 and December 8. That has not occurred here. The information alleged that, on August 3, 2007, Cohn possessed child pornography. The evidence at the preliminary hearing, in turn, demonstrated that his electronic devices contained numerous different images of children. The fact that the prosecution elected to introduce six specific images at the preliminary hearing does not mean that it was limited to those six images in proving the charge at trial.

3. The trial court did not violate Cohn's Sixth Amendment Right

Cohn also argues that the trial court's decision to allow the jury to convict him based on images that were not introduced at the preliminary hearing violated his Sixth Amendment right to receive notice of his criminal charges.

"Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them. [Citations.]" (*People v. Seaton* (2001) 26 Cal.4th 598, 640.) "'So long as the evidence presented at the preliminary hearing supports the number of offenses charged against defendant and covers the timeframe(s) charged in the information, a defendant has all the notice the Constitution requires. The defendant may demur if he or she believes the lack of greater specificity hampers the ability to defend against the charges. [Citation.]'" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 904.)

As discussed above, the information alleged that, on August 3, 2007, Cohn was in possession of images of children that violated section 311.11. The evidence at the preliminary hearing supported this charge. Mitchell testified that, on August 3, 2007, she seized electronic devices from Cohn's residence and car that contained numerous images of partially clothed children, six of which were introduced into the record. The information and the evidence at the preliminary hearing therefore provided Cohn notice that he was being charged with violating section 311.11 based on images found on the

electronic devices seized August 3. This was sufficient to satisfy constitutional notice requirements.[7]

G. Penal Code Sections 288.2, Subdivision (b) Does Not Violate the United States Constitution

Cohn contends that we must reverse his convictions under section 288.2, subdivision (b) because the statute violates the federal Dormant Commerce Clause and the First Amendment.

1. Section 288.2, subdivision (b) does not violate the Dormant Commerce Clause

Cohn argues that section 288.2, subdivision (b) violates the Dormant Commerce Clause because the statute: (1) regulates lawful conduct beyond California's borders; (2) places a substantial burden on legitimate interstate commerce activity that outweighs any benefit of protection to minors; and (3) effectively regulates a type of instrumentality (the Internet) that is better regulated by the federal government. In support, he cites *American Libraries Ass'n v. Pataki* (S.D.N.Y 1997) 969 F.Supp. 160 and the dissenting opinion in *Hatch, supra,* 80 Cal.App.4th 170, which adopted the reasoning of *Pataki*.

As Cohn acknowledges, however, the majority opinion in *Hatch* held that section 288.2, subdivision (b) does not violate the Dormant Commerce Clause. The majority

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7 Appellant cites *Gray v. Raines* (9th Cir.1981) 662 F.2d 569 in support of his contention that he did not receive adequate notice of the charges against him. There the defendant, who was charged with forcible rape, testified he had engaged in consensual sexual relations with the complaining witness. Near the close of evidence the prosecution sought an instruction on statutory rape and the defendant was convicted of that offense. On appeal, he successfully argued the belated change in the prosecution's theory denied him adequate notice of the charges against him. The prejudice to the defendant in *Gray* was obvious: prior to the charge of statutory rape, to which consent is not a defense, the defendant argued he had engaged in consensual sex with the victim. Thus he was effectively denied any defense on the statutory rape charge. Here, however, the defendant was on notice that he was being charged with possessing child pornography based on images found on the electronic devices seized on August 3. The prosecutor did not take any actions that effectively precluded Cohn from preparing an adequate defense to those charges.

noted that "section 288.2(b) differs materially from the New York statute at issue in *Pataki*" because it includes an element requiring the prosecution to show that the defendant sent the harmful matter "with the intent to seduce the minor." (*People v. Garelick* (2008) 161 Cal.App.4th 1107, 1121 (*Garelick*).) According to the *Hatch* majority, this intent element "greatly narrows the scope of the law and its concomitant effect on interstate commerce." (*Ibid*.)

Since *Hatch* was decided, two additional California appellate courts have ruled that section 288.2, subdivision (b) does not violate the Dormant Commerce Clause. (See *Garelick, supra,* 161 Cal.App.4th at pp. 1121-1122; *People v. Hsu* (2000) 82 Cal.App.4th 976, 984-985 (*Hsu*).) Cohn has identified no California decision (and we are aware of none) that has found section 288.2, subdivision (b) to violate the Dormant Commerce Clause or otherwise endorsed the reasoning in *Pataki* or the dissent in *Hatch*.

Cohn "fails to convince us that *Hatch*, . . . *Hsu* [and *Garelick*] were wrongly decided. Moreover, we agree with those cases . . . and conclude that the statute does not place an undue burden on interstate commerce in violation of the commerce clause." (*Garelick, supra,* 161 Cal.App.4th at p.1122.)

2. Section 288.2, subdivision (b) does not violate the First Amendment

Cohn also argues that section 288.2, subdivision (b) violates the First Amendment because it is a content-based regulation that is not narrowly tailored to achieve the asserted state interest of protecting minors from harm. Again, the primary authority Cohn cites in support of this argument is the dissent in *Hatch*. Cohn "acknowledges that three California appellate court decisions have rejected First Amendment . . . challenges to section 288.2, subdivision (b)," but asserts that those cases were "incorrectly decided and thus should not be followed."

In *Hatch*, the majority held that section 288.2, subdivision (b) "primarily regulates conduct, not speech, and thus does not violate the First Amendment." (*Garelick, supra,* 161 Cal.App.4th at p. 1122.) "The majority . . . further reasoned that section 288.2(b)'s knowledge and intent requirements so narrowed the statute's applicable scope that it

would not have a chilling effect on nonspecific communications in general Internet forums. 'While one might argue that . . . adults are free to address indecencies to an Internet audience while indifferent to the presence of children in that audience, it is only when the focus has shifted to the use of such communicated indecency in the attempted seduction of a child, a process we apprehend will be accomplished by direct, one-to-one communication that the present statute's prohibitions are violated. Thus, the only chilling effect of section 288.2 is on pedophiles who intend that their statements will be acted upon by children. Given the intention with which they are made, such statements are not entitled to the extraordinary protection of the First Amendment." (*Id.* at pp. 1122-1123 [citing and quoting *Hatch, supra*, 80 Cal.App.4th at p. 203].)

In *Hsu, supra,*82 Cal.App.4th 976, "the court disagreed with the *Hatch* majority on whether or not section 288.2(b) was a content-based regulation of speech," but agreed "that section 288.2(b) was not impermissibly overbroad and found that the statute passed the strict scrutiny test." (*Garelick, supra*, 161 Cal.App.4th at p.1124.) Finally, in *Garelick, supra*, 161 Cal.App.4th 1107, the court adopted the reasoning of *Hsu* and held that "section 288.2(b) is sufficiently tailored to serve a compelling state interest and is therefore constitutional." (*Id.* at p. 1124.) As with Cohn's Dormant Commerce Clause argument, we are not aware of any California decision that has found section 288.2, subdivision (b) to violate First Amendment right to free speech.

We join *Hsu* and *Garelick* in concluding that, even if section 288.2, subdivision (b) is construed as a content-based regulation, it does not violate the First Amendment.

H. Section 288.3, subdivision (a) Does Not Violate the United States Constitution

Cohn contends that we must reverse his conviction under section 288.3, subdivision (a) because the statute violates his Fifth and Fourteenth Amendment rights to due process and the First Amendment right to free speech. Section 288.3, subdivision (a) states: Every person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a

minor, with intent to commit an offense specified in Section 207 [kidnapping], 209 [kidnapping for the purposes of extortion], 261 [rape], 264.1 [rape], 273a [infliction of physical or mental suffering on a child], 286 [sodomy], 288 [lewd act] , 288a [oral copulation], 288.2 [sending harmful matter to a minor], 289 [sexual penetration], 311.1 [distribution of child pornography], 311.2 [distribution of obscene material], 311.4 [production of child pornography] or 311.11 [possession of child pornography] involving a minor shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense."

1. Section 288.3, subdivision (a) is not unconstitutionally vague

Cohn first asserts that the language of section 288.3, subdivision (a) is "unconstitutionally vague" because it fails to define the terms "contact" or "communicate." According to Cohn, "as written, the statute requires law enforcement authorities to evaluate whether casual words, looks, glances or smiles constitute contact or communication with a minor."

As Cohn acknowledges, in *People v. Keister* (2011) 198 Cal.App.4th 442, the court rejected this exact argument. The defendant in *Keister* asserted that "section 288.3 is void for vagueness because it 'allows for the personal predilections of law enforcement officials to establish standards for what constitutes "contact with a child" and how the required intent is shown.' [Defendant] claims that a glance, wink, or smile could suffice . . ." (*Id.* at p. 448.)

The court disagreed, explaining "'[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.' [Citation.] [¶] There is no such indeterminacy here. The statute requires the defendant to contact or communicate with a minor or attempt to do so with the specific intent to commit an enumerated sex offense. [Citation.] Those are questions of fact. Whether a defendant made the contact or communication and had the requisite intent are yes-or-no determinations, not subjective judgments. 'To be sure, it may be difficult in some cases

to determine whether these clear requirements have been met. "But courts and juries every day pass upon knowledge, belief and intent–the state of men's minds–having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred."' [Citation.]" (*Keister, supra,* 198 Cal.App.4th at p. 449.)

We agree with *Keister's* analysis and conclude that section 288.3 is not so vague as to violate constitutional due process rights.

2. Section 288.3, subdivision (a) does not violate the First Amendment

Cohn also argues that section 288.3, subdivision (a) violates the First Amendment because it is an overbroad, content-based regulation of free speech. Cohn asserts that the statute is "overbroad" because it "effectively prohibits potential child molesters from communicating with children at anytime, anywhere and under virtually any circumstance. If a person is sexually attracted towards children, he violates the statute whenever he communicates with a child because he has the constant intent to molest children if given the opportunity."

Again, this same argument was presented (almost verbatim) in *Keister,* and the court rejected it, explaining: "Defendant is wrong on his factual assertion and on his legal conclusion. [¶] His factual assertion–a person who is sexually attracted to children violates section 288.3 anytime he communicates with a child–is not true. The only time the communication is criminal is if it is motivated by a specific intent to commit an enumerated sex crime. [Citation.]

"While there is a limit on free speech to the extent that section 288.3 criminalizes otherwise protected communications with a minor, the statute has been written in a way that does not unconstitutionally restrict protected speech. Before the statute is violated, the defendant must know or reasonably should have known the other person was a minor, have the specific intent to commit an enumerated sex offense, and then contact or communicate with that minor or attempt to do so. [Citation.] Thus, without the

unlawful sexual intent, the statute is not violated." (*Keister, supra,* 198 Cal.App.4th at pp. 449-450.)

We agree with *Keister's* analysis and conclude that section 288.3 does not violate the First Amendment.

I. The Trial Court Did Not Violate Section 654 By Imposing Separate Sentences for Attempted Lewd Act Upon a Child Under the Age of 14 and Attempted Sending of Harmful Matter With the Intent to Seduce a Minor

Cohn argues that section 654 prohibited the trial court from imposing separate sentences on his convictions for attempted lewd act upon a child under the age of 14 (§§ 664, 288, subd. (a)) and attempt to send harmful matter with the intent to seduce a minor (§§ 664, 288.2 (subd. (b).)

1. Procedural summary

The information charged that Cohn's internet communications with Catherine on four dates – July 17, July 25, July 31 and August 2 – qualified as both an attempted lewd act upon a child under the age of 14 (§§ 664, 288, subd. (a)) and an attempt to send harmful matter with the intent to seduce a minor (§§ 664, 288.2 (subd. (b).) The evidence at trial showed that, on each of the four days in question, Cohn made numerous sexually explicit statements to Catherine and asked whether she would be willing to meet him. During the course of each of these four conversations, Cohn also asked Catherine to touch her vagina.

At sentencing, the trial court discussed at length whether section 654 applied to the section 288.2 and 288 counts that were predicated on internet communications that occurred on the same day: "With respect to Penal Code section 654 the court makes the following comments and observations: First, the defendant was convicted in counts six, seven, nine and ten of attempted showing or sending or distributing harmful matter to seduce a minor, in violation of Penal Code section 664 and 288[.2], subsection (b), on July 17th, 25th, 31st and August 2nd, 2007 respectively. Paralleling these counts the defendant was also convicted in counts eleven through fourteen of attempted committing

a lewd or lascivious act on a child under the age of 14 in violation of Penal Code sections 664 and 288(a) on July 17th, 25th, 31st and August 2nd, 2007 respectively.

"Each of the two counts relating to each of the four dates was based on comments in a chat between the defendant and the undercover special agent of the FBI but related to different aspects of the relevant chat. . . .

"At the outset the court notes that the court in [*People v. Jensen* (2003) 114 Cal.App.4th 224, 239-240 (*Jensen)*] discussed the intent required for a 664/288.2(b) charge as follows: 'the seducing intent element of the offense requires that the perpetrator intend to entice the minor to engage in a sexual act involving physical contact between the perpetrator and the minor. Intending to entice a male minor to masturbate himself doesn't satisfy this seducing element of penal code section 288.2 subdivision (b).' "However, . . . in [*Meacham*, *supra*, 152 Cal.App.3d at p. 153] the court said the following [in regards to a violation of section 288:] 'we hold the children's touching of her own genitalia at the instigation of appellant was a constructive touching by appellant himself . . .' And this doctrine applies to remote instigation by the defendant . . .

"Now the court finds that counts eleven through fourteen were based on the defendant's request that the supposed child under the age of 14 touch her genitalia with her fingers and tell him if the fingers smelled stinky. The jury by its guilty verdicts necessarily found that the defendant committed the acts with the intent of arousing, appealing to or gratifying the lust passions or sexual desires of himself or the child. In other words, the defendant's intent and objective were directed at immediate vicarious sexual gratification.

"Although counts eleven through fourteen were based on the same chats as counts six, seven, nine and ten respectively, in these counts the defendant's intent and objectives were directed at deferred gratification through direct, physical sexual contact with the supposed victim, therefore the court finds no basis to apply section 654."

Based on its conclusion that Cohn had operated with separate objectives during the four "internet chats," the court elected to impose separate sentences for each of the section 288 violations (counts eleven through fourteen) and each of the section 288.2

violations (counts six, seven, nine and ten). The court imposed the upper term of four years on the first section 288 count (count eleven), and consecutive sentences of one year (one-third the midterm of three years) on the remaining three section 288.2 counts (counts twelve through fourteen). In addition, it imposed consecutive four month sentences (one-third the midterm) on each section 288.2 count (counts six, seven, nine and ten).

2. The trial court did not abuse its discretion in concluding that Cohn acted with multiple objectives during each of the four "internet chats"

Section 654, subdivision (a) states that "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Section 654 has been interpreted to "preclude[] multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the 'intent and objective' of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citations.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct." (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268 (*Cleveland*).)

"Whether [section 654] 'applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable

to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*People v. Yang Vang* (2010) 184 Cal.App.4th 912, 915-916.)

The two statutes at issue, section 288, subdivision (a) and 288.2, subdivision (b), prohibit two different forms of conduct. Section 288 proscribes individuals from touching a child, or instigating the child to touch himself or herself, for the purposes of sexual arousal. Section 288.2, on the other hand, prohibits any person from sending obscene matter to a minor "with the intent to arouse . . . sexual desires of that person or of a minor," and with the additional intent "to entice the minor to engage in a sexual act involving physical contact between the perpetrator and the minor." (*Jensen, supra*, 114 Cal.App.4th at p. 240.) As explained by the trial court, although remote communications intended to induce a child to touch his or her own genitalia may qualify as a violation of section 288 (see *Meacham, supra*, 152 Cal.App.3d at p. 153), such conduct is insufficient to prove a violation of section 288.2, subdivision (b), which requires that the defendant acted to seduce the child to engage in "a sexual act involving physical contact between the [defendant] and the minor." (*Jensen, supra*, 114 Cal.App.4th at p. 240.)

The evidence at trial demonstrated that during the four internet chats in question, Cohn sent communications describing numerous sexual acts he wanted to engage in with Catherine and repeatedly asked her when and where they were going to meet. In the course of these discussions, he also asked her to touch her vagina. The court did not abuse its discretion in concluding that these communications demonstrate that Cohn harbored "multiple or simultaneous objectives, independent of and not merely incidental to each other." (*Cleveland, supra*, 87 Cal.App.4th at p. 268.) Cohn's description of various sexual activities and inquires about whether Catherine would meet him demonstrated an intent to "seduce" the child to engage in future physical sexual acts. Cohn's statements directing Catherine to touch her vagina, on the other hand, demonstrated an intent to obtain immediate sexual gratification.

Cohn, however, asserts that the evidence shows the "internet chats" occurring on July 17, July 25, July 31 and August 2nd had a "single animus," which was "the

seduction of [Catherine]." According to Cohn, "part of the effort at seducing [Catherine] included the solicitations and requests that she touch herself . . ." He further asserts that the record "is devoid of any evidence that Cohn derived sexual pleasure from ordering [Catherine] to masturbate." We disagree. It is reasonable to infer that Cohn was acting for the purpose of immediate sexual gratification when he requested Catherine to touch her vagina and smell her fingers. Indeed, to convict Cohen of attempted lewd act on a child under the age of 14, the jury had to concluded that he intended to gratify the sexual desires of himself or Catherine when he ordered her to touch herself. (See § 288, subd. (a); CALCRIM NO. 1110 [prosecution must prove "defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of [himself] or the child"].)[8] This conduct was reasonably viewed as being not "merely incidental" to the additional obscene communications that were made with the intent to seduce the child.

DISPOSITION

The trial court's judgment of conviction is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.

[8] Cohn has not argued that the prosecution failed to prove this specific intent element of section 288, subdivision (a). (See *infra* at p. 12, fn. 5.)