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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| THE PEOPLE,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>WILLIAM EDWARD BURCH,<br><br>Defendant and Respondent. | B264333<br><br>(Los Angeles County Super. Ct. No. NA094098) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Affirmed.

Edward H. Shulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Following his convictions of several sex-related offenses, Burch appeals from the judgment, alleging that (1) the search warrant affidavit did not establish probable cause to search his home and effects; (2) the denial of his motion to sever the charges pertaining to separate victims infringed his due process rights; (3) the exclusion of certain defense evidence was prejudicial error; (4) the trial court's refusal to limit the scope of the prosecutor's cross-examination of Burch was reversible error; (5) the imposition of the upper term for a lewd act upon a child was an abuse of discretion; and (6) the failure to stay the sentence for misdemeanor child annoyance or molestation violated Penal Code section 654.[1] We affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. *The Offenses Involving Victim Natalie*

On the evening of October 25, 2011, four-year-old Natalie carved pumpkins with her father, his friend Burch, and Burch's young son. After the pumpkins were carved, Natalie showered, changed into her pajamas and went into her bedroom. Burch entered the bedroom and locked the door. He told Natalie to pull down her pajama pants and to open her vagina, which he photographed using his cell phone. He also touched the outside of her vagina with his hand. Burch then pulled down his pants and had Natalie lick his penis. Burch cautioned Natalie not to tell anyone what had occurred, claiming that her father would no longer love her if she did.

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[1] Statutory references are to the Penal Code unless otherwise indicated.

II. *The Offense Involving Victim Casey*

On February 24, 2013, nine-year-old Casey encountered Burch, whom she did not know, at a snack bar while she and her family were watching a baseball game at the park. Burch spoke to her. Feeling uncomfortable, Casey ignored him and returned to her mother in the bleachers.

Later, Burch tossed a water bottle at Casey's back and apologized. Casey began playing a game on her cell phone, and Burch made additional comments to Casey about her video gaming and her cell phone. Casey did not respond and left the bleachers to play with her siblings. Burch approached and whispered that she should talk to him if she wanted to make some money. Casey again ignored Burch, who then told Casey that he liked her eyeglasses and reminded Casey that she could make "$40, $60, $80, $100, and we can work it out." Burch added, "Modeling, keep it between us." Casey continued to ignore Burch, and he slowly walked away.

Casey's mother noticed Burch's repeated attempts to converse with her daughter, became concerned and began walking toward him. Burch saw her approaching, and he walked away. Casey's mother telephoned the police.

Officers arrived, arrested Burch and seized a cell phone they found in his possession. A subsequent search of the cell phone yielded approximately 20 photographs of Casey taken that day at the park. Neither Casey nor her mother were aware Burch had been photographing Casey.

III. *The Search of Burch's Home and Seizure of His iPad*

Long Beach Police Officers obtained a warrant to search Burch's home and vehicle for evidence concerning attempts "to contact and meet a minor for the purpose of committing lewd and lascivious act." The evidence included, but was not limited to, "cell phones, cameras, computers and related items registered to William Burch"; "digital media files, correspondence or computer generated stored media" containing "child pornography and/or child erotica"; and "depictions of partially clothed children or children clothed or posed in a manner that is sexually suggestive."

In executing the warrant, officers seized various items, among them an iPad registered to Burch. The iPad contained a pornographic video downloaded from a website entitled "Live Leak Video." There were also approximately 70 images of children between the ages of five and 16 years, some of whom were nude, wearing swimsuits or in sexual positions. The source of some of the images was a Russian child pornography website that had been bookmarked on the iPad. The device also contained an "I-Shredder" application, which permanently deleted images and documents, and a "Busted Virgin 2.2" application, which notified designated recipients of the sender's pending arrest.

IV. *The Defense*

Burch testified in his own defense that on the night of October 25, 2011, he and his son were carving pumpkins with Natalie and her father. Afterwards, the children went upstairs while he and Natalie's father cleaned up. Because it was a school

night, Burch and his son left for home before 9:00 p.m. Burch denied going into Natalie's bedroom, touching her vagina or having her lick his penis.

In an interview with Long Beach Police Detective Jennifer Kearns, Burch denied molesting Natalie or being alone with her on the night of October 25, 2011. He handed Kearns his cell phone, and she scrolled through his saved photographs from that night.[2]

Burch was not questioned about the Casey incident in his direct testimony. On cross-examination, over defense objections, the prosecutor elicited Burch's admission that he had photographed Casey without her permission and had spoken to her three or four times at the baseball game on February 24, 2013. Burch also acknowledged telling police he had not spoken to any child in the park that day.

V. *The Verdict and Sentence*

A jury found Burch guilty as charged of engaging in oral copulation with a child under 10 years old (§§ 288.7, subd. (b), 289), using a minor to produce a pornographic film or image (§ 311.4, subd. (c)), committing a lewd act upon a child under the age of 14 years (§ 288, subd. (a)) and misdemeanor annoying or molesting a child under the age of 18 years (§ 647.6, subd. (a)(1)). The trial court sentenced Burch to an aggregate state prison term of 24 years eight months to life.

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[2] Detective Kearns testified on rebuttal that Burch never gave her the cell phone. Instead, Burch held the cell phone during the entire interview while showing her selected photographs.

At the sentencing hearing, defense counsel, noting the conviction for engaging in oral copulation with a child under 10 years old has a mandatory life term, urged the trial court to impose concurrent rather than consecutive terms or the lower consecutive terms as recommended by the probation department on the remaining felony counts.

The trial court found as aggravating circumstances that the young victims were particularly vulnerable (Cal. Rules of Court, rule 4.421(a)(3)) and that Burch was in a position of dominance or leadership as an adult, able to induce the participation of a child under the age of 10 years (Cal. Rules of Court, rule 4.421(a)(4)). The court determined the aggravating circumstances were "so substantial that each independently justifies the maximum term allows by law."

The trial court sentenced Burch to an indeterminate term of 15 years to life for engaging in oral copulation with a child under 10 years old; and to consecutive determinate terms of eight years (the upper term) for committing a lewd act upon a child under the age of 14 years, eight months (one-third the two-year middle term) for using a minor to produce a pornographic film or image and one year for misdemeanor annoying or molesting a child under the age of 18 years.[3]

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[3] The abstract of judgment omitted the consecutive one-year term imposed for misdemeanor annoying or molesting a child under the age of 18 years (count 3). We order the trial court to amend its order following hearing and the abstract of judgment to conform to the trial court's oral pronouncement. (*People v Mitchell* (2001) 26 Cal.4th 181, 185-187.)

## DISCUSSION

I. *The Search Warrant*

A. *The suppression hearing and trial court's ruling*

Burch moved to suppress the iPad and its contents on the ground the search warrant affidavit failed to demonstrate probable cause. [4] At the suppression hearing, defense counsel argued Burch's request that Casey model for him in the park did not suggest he intended to take photographs of her and store them in his home. In denying the motion, the trial court explained because modeling and photography "go hand in hand," it was reasonable to infer, by offering Casey money for modeling, that Burch had planned to photograph her and to save the photographs on electronic devices at home.

B. *The governing law*

In determining whether a search warrant affidavit demonstrates probable cause, the issuing magistrate must make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238 [103 S.Ct. 2317, 76 L.Ed.2d 527]; accord *People v. Bryant* (2014) 60 Cal.4th 335, 369-370 (*Bryant*).) "'The showing required in

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[4] Burch did not seek to suppress the digital contents of the cell phone found on his person. Although the suppression motion additionally sought to exclude at trial the digital contents of the two cell phones also found in Burch's home, it appears Burch refused to surrender the password to these cell phones, and the police were otherwise unable to access their contents.

order to establish probable cause is less than a preponderance of the evidence or even a prima facie case.'" (*Bryant*, at p. 370.) A magistrate's determination of probable cause is entitled to deferential review, and is to be sustained by a reviewing court as long as there was "a 'substantial basis for conclude[ing]'" that probable cause existed. (*Illinois v. Gates, supra*, 462 U.S. at p. 236.) The determination will not be overturned unless the supporting affidavit fails as a matter of law to support the finding of probable cause, and doubtful or marginal cases are resolved in favor of upholding the warrant. (*Fenwick & West v. Superior Court* (1996) 43 Cal.App.4th 1272, 1278.) Burch bears the burden of showing the invalidity of the search warrant. (*Ibid*.)

C. *The search warrant affidavit*

In his statement of probable cause, Detective Sean Irving of the Long Beach Police Department recited his education, training and experience as a police officer for 14 years, as a detective for two years in the Violent Sexual Predator Unit, and in his current position in the Sex Crimes Detail. Irving attended a 40-hour POST mandated Sexual Investigator's course, completed sexual assault and other sex-related criminal investigations, and interviewed suspects arrested for these offenses.

From police interviews with Casey, her mother and younger brother, Irving described Burch's various comments to Casey and his repeated offers to pay her to secretly model for him. Irving also stated that in November 2011, Burch was a suspect in an uncharged case in which Burch told the four-year old victim (Natalie) to taste his penis, and then allegedly instructed her not to report the incident.

D. *Probable cause supported the search warrant*

On appeal, Burch contends the search warrant affidavit was insufficient to establish probable cause. Specifically, he argues it failed to show there was a fair probability that evidence of sex crimes against children would be found in his home or personal effects, particularly in any electronic devices he may have possessed. According to Burch, "the affidavit merely describe[d] three brief, innocuous encounters between [him] and Casey in a fully public place that involved no sexual comments or acts and no use or suggested use of memorializing devices, including electronic devices." Burch also argues the affidavit improperly relied on information that was stale, making it less than substantially probable the evidence sought would still be located in his home at the time of the search. (See *Bryant, supra,* 60 Cal.4th at p. 370.)

The purpose of the search warrant was to recover digital or other evidence in Burch's home and vehicle related to his attempts to contact children to commit lewd and lascivious acts. Given all the circumstances set forth in the affidavit, there was a fair probability that such evidence would be found in Burch's home.

The affidavit stated Burch had sexually abused four-year-old Natalie fewer than 18 months before he approached nine-year-old Casey in the park. Despite Burch's characterization of his encounters with Casey as "innocuous," his attempts to befriend Casey while pressuring her to agree to model alone for him as he avoided any contact with her mother strongly suggested his plans for Casey included lewd and lascivious acts.

We also reject Burch's assertion the episode with Natalie was "stale" or too remote to be probative. There is "[n]o bright-

line rule" defining the point at which information becomes stale. (*People v. Carrington* (2009) 47 Cal.4th 145, 163.) "[T]he question of staleness depends upon the facts of each case. (*Ibid.*) Standing alone, as the basis for the warrant, Burch's reported molestation of Natalie might have been considered stale, but the nature of his contacts with Casey demonstrated that Burch's illegal activity had persisted. Conversely, Casey's description of what had occurred in the park corroborated the earlier account by Natalie of molestation. (*Id.* at pp. 163-164 ["'If circumstances would justify a person of ordinary prudence to conclude that an activity had continued to the present time, then the passage of time will not render the information stale.'"].)

From these circumstances, the magistrate could have reasonably concluded Burch was a serial sex offender, whose victims were young girls. Support for this conclusion was provided by Detective Irving's opinion that "often times, offenders who annoy children have committed this crime on prior occasions. These offenders tend to continue to offend until they are caught. I know that based on this information there could be additional victims and/or not yet identified co-conspirators identified with the issuance of this warrant." (See *People v. Varghese* (2008) 162 Cal.App.4th 1084, 1103 [magistrate may rely upon the special experience and expertise of the affiant officer in the probable cause determination].)

It is true, as Burch argues, the search warrant affidavit did not mention he had used a cell phone to photograph Natalie and Casey during his encounters with them. Nonetheless, the absence of these facts did not undermine the finding of probable cause to search electronic devices in Burch's home. It was reasonable for the court to conclude Burch's offer of money to

Casey to model for him logically implied he intended to photograph or film her, and his request that she keep the offer secret implied a predatory interest in taking and storing photographs and films. "[B]ased on ""the nature of the crimes and the items sought, a magistrate [could] reasonably conclude that a suspect's residence is a logical place to look for specific incriminating items."""" (*Carrington, supra,* 47 Cal.4th at p. 163; accord, *Bryant, supra*, 60 Cal.4th at p. 370.).)

Finally, Burch is incorrect in concluding the affidavit provided no facts to establish Irving's expertise in the areas of child sex abuse. Burch's assessment of Irving's stated background is contrary to the requirement the magistrate read the affidavit in a commonsense fashion. (See *Illinois v. Gates, supra,* 462 U.S. at p. 462.) Irving, a 14-year veteran officer, was currently assigned to the Sex Crimes Detail. His duties for this assignment, and for his prior assignment to the Violent Sexual Predator Unit, included investigating sex crimes and arresting and interviewing sex offenders, violent sex offenders and habitual criminals. Although Irving did not highlight his training and experience in the area of child sexual abuse, the trial court reasonably could have concluded Irving's expertise in sex crimes included sex crimes committed against children.

II. *The Motion To Sever*

Burch argues the trial court abused its discretion when it denied his pretrial motion to sever the counts involving Natalie (Natalie counts) from the count involving Casey (Casey count). He also asserts the alleged error violated his federal constitutional rights to due process and a fair trial.

A. *The governing law*

"'The law favors the joinder of counts because such a course of action promotes efficiency.'" (*People v. Scott* (2015) 61 Cal.4th 363, 395.) Section 954, which governs the joinder of criminal counts, states in pertinent part: "An accusatory pleading may charge two or more different offenses connected together in their commission, . . . or two or more different offenses of the same class of crimes or offenses, under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately. . . ." (§ 954.) Where the threshold statutory requirements for joinder are met, the "'"defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying [the] defendant's severance motion."' [Citation.] That is, [the] defendant must demonstrate the denial of his motion exceeded the bounds of reason." (*People v. Capistrano* (2014) 59 Cal.4th 830, 848.)

"In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges, 'we consider the record before the trial court when it made its ruling.'" (*People v. Soper* (2009) 45 Cal.4th 759, 774; accord, *People v. Thomas* (2012) 53 Cal.4th 771, 778.) "'Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any

one of the charges carries the death penalty or joinder of them turns into a capital case.'" (*People v. Scott, supra,* 61 Cal.4th at pp. 395-396.)

If the trial court did not abuse its discretion in denying a severance motion, relief is available to a defendant only if the joinder "'resulted in gross unfairness depriving the defendant of due process of law.'" (*People v. Soper*, *supra*, 45 Cal.4th at p. 783.)

B. *The denial of the severance motion was proper*

1. *The statutory requirements were met*

The statutory requirements for joinder were satisfied in this case. The Natalie counts and the Casey count belong to the same "class of crimes": they are sex crimes against children. (See *People v. Moore* (1986) 185 Cal.App.3d 1005, 1013 [for purposes of section 954, misdemeanor counts of child annoyance or molestation "shared common element of 'lewd conduct toward young female minors'" with felony counts of child molestation and endangerment charge].) Because section 954's threshold requirements for joinder were met, Burch can only establish error in the denial of his severance motion by making a clear showing of prejudice.

2. *The trial court did not abuse its discretion*

In arguing the trial court's denial of his severance motion was an abuse of discretion, Burch does not dispute the cross-admissibility of the evidence supporting the Natalie counts and the Casey count in separate trials. Indeed, evidence of his conduct toward each girl would be cross-admissible under

Evidence Code section 1108,[5] as sex offense propensity evidence, and under Evidence Code section 1101,[6] as demonstrating a common scheme or plan to photograph and molest young girls. Because the evidence supporting the Natalie counts and the Casey count would have been cross-admissible in separate trials,

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[5] Evidence Code section 1108 provides, "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." As is relevant here, the statute defines "sexual offense" as a crime involving any conduct proscribed by sections 288, 289 and 311.4, among others. (Evid. Code, § 1108, subd. (d)(1)(A).)

[6] Evidence Code section 1101 provides, "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

"(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

dispelling any likelihood of prejudice, "[f]or that reason alone, no abuse of discretion would have occurred in denying severance." (*People v. Maury* (2003) 30 Cal.4th 342, 393.)

However, Burch argues at length that the "spillover effect" of joining the significantly stronger but less serious Casey count with the much weaker but more serious Natalie counts of child molestation inflamed the jury's passions and compromised the ability of jurors to objectively consider the evidence as to each count. Burch points to the fact that only after he was arrested on the misdemeanor charge of child annoyance or molestation did the district attorney decide to pursue the felony child molestation charges.

"In assessing a claimed abuse of discretion, we assess the trial court's ruling by considering the record then before the court." (*People v. Myles* (2012) 53 Cal.4th 1181, 1200.) When the trial court denied the severance motion, it reasonably concluded the Natalie counts and the Casey count were of approximate equal strength. Both young girls testified at the preliminary hearing. They each identified Burch in court and described his behavior in detail. Although Natalie was six years old when she testified at the preliminary hearing, there were no significant challenges to her credibility. While no physical evidence existed to corroborate Natalie's testimony—the photograph Burch took of her vagina was never found—there was no question as to Burch's identity. It was well within the court's discretion to find the relative strengths and weaknesses of the counts did not weigh in favor of severance.

3. *There was no due process violation*

Burch also argues joinder actually resulted in gross unfairness at trial, amounting to a denial of due process. (*People v. O'Malley* (2016) 62 Cal.4th 944, 969-970.) He contends the trial court's denial of his severance motion allowed the prosecutor to persuade the jury during closing argument to rely improperly on the aggregate evidence of the counts rather than to consider the evidence separately as to the counts for each victim. However, because evidence of the Natalie counts and the Casey count was cross-admissible, the prosecutor was permitted to argue the probative value of that evidence pursuant to Evidence Code sections 1101 and 1108.

Moreover, the jury was instructed that each charge is a distinct crime that must be decided separately (CALCRIM No. 17.02), and we presume the jury understood and followed that instruction. (*People v. Hinton* (2006) 37 Cal.4th 839, 864.)

III. *The Exclusion of Defense Evidence*

Burch asserted he did not commit the molestation reported by Natalie. Before trial, defense counsel sought to introduce a video recording and the testimony of two defense witnesses to cast doubt on Natalie's credibility by showing her sexually explicit testimony was the product of her home environment, rather than a true account of any conduct by Burch. The trial court excluded the evidence primarily on relevance and Evidence Code section 352 grounds.

A. *The governing law*

All relevant evidence is admissible except as otherwise provided by a statutory or constitutional exclusionary rule. (See Cal. Const., art. I, § 28, subd. (f)(2); Evid. Code, § 351.) Relevant

evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The general test of relevance "'is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.'" (*People v. Bivert* (2011) 52 Cal.4th 96, 116.) However, if evidence leads only to speculative inferences, it is irrelevant. (*People v. Morrison* (2004) 34 Cal.4th 698, 711.)

Relevant evidence may be excluded if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352; *People v. Lee* (2011) 51 Cal.4th 620, 643.) A trial court has broad discretion in determining whether evidence is relevant and whether Evidence Code section 352 permits its exclusion. (*People v. Mills* (2010) 48 Cal.4th 158, 195; *People v. Williams* (2008) 43 Cal.4th 584, 634.)

We review for abuse of discretion a trial court's rulings on the admissibility of evidence, including those turning on the relevance or probative value of the evidence in question. (*Lee*, *supra,* 51 Cal.4th at p. 643; *People v. Hamilton* (2009) 45 Cal.4th 863, 930.)

B. *The exclusion of defense evidence was not an abuse of discretion*

1. *The video recording of Natalie's father and other adults*

Defense counsel sought to introduce a video recording of Natalie's father and other adults placing toys in sexual positions. No children were depicted in the video. The trial court properly

excluded the video as irrelevant. Natalie was not in the video, and counsel did not suggest she was present when it was recorded or had seen the video at any time prior to her sexual encounter with Burch.

2. *The testimony of Rob Riley*

Defense counsel represented that Rob Riley would testify to having found his daughter inside a closet with Natalie's brother, who had his hand down her pants. The trial court did not abuse its discretion in finding this evidence irrelevant and lacking probative value under Evidence Code section 352. As with the video, Natalie was apparently not present during the incident at her home and, even though Riley purportedly told Natalie's father about it, there was no indication Natalie was aware of the incident before her encounter with Burch.

3. *The testimony of Natalie Butcher*

Defense counsel sought to introduce the testimony of Burch's former wife, Natalie Butcher, that in June 2012 their son Billy was playing with some friends in his bedroom. One of the boys said, "Billy is about ready to lick my P.P." When Butcher inquired, the boy said he had learned about it from Natalie's brother.

Defense counsel argued the "lick my P.P." phrase attributed to Natalie's brother was almost identical to the words Natalie had used in reporting the incident with Burch. Because Natalie used "penis" and "P.P." interchangeably in describing the incident, counsel posited that she may have acquired the phrase from her brother, who may have been acting out sexually in front of her. Counsel theorized that because "Billy" was the name of Burch's son, and Burch was also known as "Billy," Natalie may

have confused Burch with his son in reporting what had occurred on October 25, 2011.[7]

Noting there was no connection between Natalie and the incident involving Butcher's son and the charged molestation of Natalie had occurred eight months earlier, the trial court excluded the evidence. This was not an abuse of discretion; any probative value the testimony may have had was outweighed by the risk of confusing the issues under Evidence Code section 352.

C. *The rulings did not preclude Burch from offering a defense*

Burch contends the trial court's rulings violated his federal constitutional right to present a defense with affirmative evidence that Natalie was not truthful and that her claim Burch molested her was influenced by her father's and brother's sexual activities. As set forth above, the excluded evidence was either not relevant or properly excluded under section 352. The exclusion of irrelevant or tangential evidence does not offend the Sixth Amendment. "A defendant has the general right to offer a defense through the testimony of his or her witnesses [citation], but a state court's application of ordinary rules of evidence—including the rule stated in Evidence Code section 352—generally does not infringe upon this right." (*People v. Cornwell* (2005) 37 Cal.4th 50, 82, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

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[7] Natalie's mother testified that she had asked her daughter whether "Little Billy" (Burch's son) was the person who had made her lick his penis. Natalie responded, "No Mommy, it was his daddy."

## IV. *The Refusal To Limit Cross-Examination*

Before Burch testified, defense counsel informed the trial court that he would only question Burch about the Natalie counts, thereby seeking to prevent the prosecutor from cross-examining Burch on the Casey count. The court denied the request and advised counsel that if Burch elected to testify, the court would not bar the prosecutor from cross-examining him "as to all counts." Over defense objections, the prosecutor did exactly that when Burch testified. Contrary to Burch's claim, the ruling did not violate his Fifth Amendment right against self-incrimination.

### A. *The governing law*

The permissible scope of cross-examination of a defendant is generally broad. (*People v. Cooper* (1991) 53 Cal.3d 771, 822.) It is well-settled that "'a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. . . .'" (*Jenkins v. Anderson* (1980) 447 U.S. 231, 236, fn. 3 [100 S.Ct. 2124, 65 L.Ed.2d 86].) Accordingly, a defendant may not restrict cross-examination to a limited review and rebuttal of the "precise facts" about which he testifies. (*People v. Gates* (1987) 43 Cal.3d 1168, 1185, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 409.) Wide-ranging inquiry also is permitted when the defendant testifies by making a general denial of the crime (*People v. Lynn* (1971) 16 Cal.App.3d 259, 271) or when the prosecutor questions the defendant about credibility. (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 507.)

B. The *trial court properly allowed cross-examination on all counts*

When Burch testified on direct examination, he denied the molestation counts. Cross-examination as to the Casey count, which demonstrated a common scheme or plan to photograph and molest young girls similar to that in the Natalie, counts was therefore proper. (See e.g. *People v. Perez* (1967) 65 Cal.2d 615, 620-621 [cross-examination of defendant on robbery counts he omitted on direct examination was proper because they disclosed plan and pattern similar to those counts about which defendant did give direct testimony]; *People v. Ing* (1967) 65 Cal.2d 603, 610-611.)

Furthermore, cross-examination of Burch on the Casey count was permissible for purposes of impeachment. On direct examination, Burch testified he was "freaked out" upon learning from Child Protective Services he had been reported for child molestation, explaining, "I'm really good with kids." Burch also testified, "I don't try to be alone with kids." This testimony opened the door to further inquiry concerning Burch's behavior toward children. (See e.g. *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1147].)[8]

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[8] Burch contends the cumulative impact of the alleged errors violated his federal due process rights. (See *People v. Loy* (2011) 52 Cal.4th 46, 47 ["[s]ometimes the cumulative effect of errors that may be harmless in themselves can be prejudicial"].) In light of our determination of the issues, we find no cumulative error.

## V. *The Imposition of Upper Term Sentence for a Lewd Act Upon a Child*

Burch challenges his upper term sentence for committing a lewd act upon a child under the age of 14 years on the ground that the remarks by the trial court demonstrate the sentence was imposed as punishment for failing to admit his criminal acts in violation of his constitutional rights to jury trial and to appeal.

### A. *The relevant proceedings*

Before he was sentenced, Burch was given permission to address the court. In his statement, Burch (1) conveyed his sympathy for "everyone involved"; (2) expressed his love for family members, particularly his son; (3) maintained he was "not the monster the prosecution has portrayed," but rather a well-liked friend and neighbor; (4) blamed his former defense counsel for losing exculpatory cell phone photographs of Natalie, her brother and Burch's son, smiling on the night of the pumpkin carving; and (5) described his varied volunteer work while incarcerated. Burch concluded his statement by asking for the court's "compassion" on behalf of his mother and son.

After listening to Burch's statement, the trial court remarked, "A couple of things struck me about Mr. Burch's comments. While he has empathy for all the families, there was not an apology, there was no acceptance of responsibility and no remorse. Most of the comments he made were about him, about his son, about his mother about his father and about his life." The court added the missing photographs could not have been very important or were likely incriminating because Burch did not save them. In any event, the court stated it appeared Burch

was blaming others rather than accepting responsibility for his conduct.

B. *The governing law*

A trial court violates a defendant's due process rights when it imposes a harsher sentence based on the defendant's election to exercise constitutional rights. (*In re Lewallen* (1979) 23 Cal.3d 274, 278, citing *Bordenkircher v. Hayes* (1978) 434 U.S. 357 [98 S.Ct. 663, 54 L.Ed.2d 604].) Nonetheless, "there must be some showing, properly before the appellate court, that the higher sentence was imposed as punishment for exercise of the right." (*People v. Angus* (1980) 114 Cal.App.3d 973, 989-990; see e.g. *In re Lewallen, supra*, 23 Cal.3d at p. 279 [trial court responded to defense counsel's suggestion at sentencing that informal probation would suffice by saying, "'You mean whether or not there's a disposition or not after a jury trial?'"]; *In re Edy D.* (2004) 120 Cal.App.4th 1199, 1202 ["juvenile court's statement that if the minor inconvenienced witnesses by having them come to court for an adjudication hearing, the option of a disposition under Welfare and Institutions Code section 725, subdivision (a) would no longer be available to him"]; *People v. Morales* (1967) 252 Cal.App.2d 537, 542, fn. 4 [trial court said prison inmate defendants "have the same rights as anyone else . . . , but I don't think it's fair for an inmate, or anyone else, to come to Court and demand a jury trial, demand the services of the public defender . . . when there really isn't any defense to this case, and there was no effort to put on a defense because there couldn't be [one]"].)

C. *The upper term was not a retaliatory sentence*

The record fails to support Burch's claim the trial court's decision to impose the maximum sentence for committing a lewd act upon a child under the age of 14 years was predicated on Burch's election to proceed to trial and to appeal. Burch's statement to the trial court was an attempt to gain leniency at sentencing. The court's response was that Burch had failed to show either remorse or acceptance of responsibility for his conduct. Viewed in the context in which it was made, the court's response was clearly a rejection of Burch's statement for purposes of mitigation, not a reflection of the trial court's decision to retaliate with a harsher sentence. Nothing in the record shows the court imposed the eight-year upper term for reasons other than the two aggravating circumstances it articulated at sentencing, namely, the particular vulnerability of the victims and Burch's position of dominance and leadership over them.

VI. *The Trial Court Did Not Violate Section 654*

Burch contends the trial court violated section 654 by imposing an eight-month prison term on his count for using a minor to produce a pornographic film or image, which was to be served consecutively to his eight-year sentence for committing a lewd act upon a child under the age of 14 years. According to Burch, because the acts underlying the two counts—touching Natalie and photographing her vagina—occurred "virtually at the same time," the eight-month sentence should have been stayed.

Section 654, subdivision (a) provides that "[a]n 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." The protections of section 654 extend to situations in which several offenses are committed during an indivisible course of conduct. (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.) To determine whether a course of conduct is indivisible, the court looks to "defendant's intent and objective, not the temporal proximity of his offenses." (*People v. Harrison* (1989) 48 Cal.3d 321, 335; see also *People v. Hicks* (1993) 6 Cal.4th 784, 789.) If all the offenses are incidental to, or the means of accomplishing or facilitating a single objective, the defendant may be punished for any one offense but not more than one. (*Harrison*, at p. 335.)

Alternatively, "if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. . . . Each case must be determined on its own facts. . . . The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136, citations omitted.) A separate intent and objective may be found "when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous." (*People v. Britt* (2004) 32 Cal.4th 944, 952.)

"[M]ultiple sex acts committed on a single occasion can result in multiple statutory violations. Such offenses are generally 'divisible' from one another under section 654, and separate punishment is usually allowed." (*People v. Scott* (1994)

9 Cal.4th 331, 344, fn. 6.) In the context of sex crimes, "a 'defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act.'" (*People v. Harrison*, *supra*, 48 Cal.3d at p. 336.) Burch was convicted of committing a lewd act upon a child under the age of 14 years based on his touching of Natalie's vagina or her touching it at his direction. Burch's conviction for using a minor to produce a pornographic film or image was based on his act of photographing Natalie while she held her vagina open. The trial court could have reasonably found Burch harbored separate and distinct intents in committing these two acts.

## DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to include Burch's one-year sentence imposed on count 3, misdemeanor child annoyance or molestation (count 3), and to send a copy of the modified abstract of judgment to the Department of Corrections and Rehabilitation.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.