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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOAQUIN LINARES, Defendant and Appellant.	B281309 (Los Angeles County Super. Ct. No. KA111360)

Appeal from a judgment of the Superior Court of Los Angeles County, David C. Brougham, Judge. Reversed in part, affirmed in part, and remanded with directions.

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul R. Roadarmel, Jr. and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Joaquin Linares appeals from the judgment after a jury convicted him on one felony count of possession of child pornography, six misdemeanor counts of annoying or molesting a child, and six misdemeanor counts of invasion of privacy. The trial court sentenced Linares to three years in state prison plus, consecutively, 728 days in jail. Linares challenges his convictions on numerous grounds. We reverse his conviction for possession of child pornography, the six convictions for annoying or molesting a child, and five of the six convictions for invasion of privacy.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Police Arrest Linares at His Home*

In December 2015 officers responded to a family disturbance at the home Linares shared with, among others, his fiancée, Catherine W., and her 13-year-old autistic daughter, Alyssa. The officers arrested Linares on an outstanding misdemeanor warrant. They denied Linares's repeated requests to retrieve his cell phone.

B. *Videos and Photographs Are Discovered on Linares's Phone*

Later on the day of Linares's arrest, Catherine discovered on his cell phone four videos, taken in the family's living room, that included prolonged close-ups of Alyssa's clothed buttocks and crotch. In the first video, Alyssa is wearing jean shorts and a shirt, and she is on the living room sofa watching television. Other voices can be heard, and Alyssa is laughing. Linares

filmed the video from behind and above Alyssa, and the camera focuses on her crotch and upper legs. The second video shows Alyssa in the living room with Catherine, who is playing with a cat. Alyssa's younger brother Isaiah (Catherine's son with Linares) can be heard in the background. The camera focuses on Alyssa's buttocks until she sits down on the floor. In the third video Alyssa is wearing a tank top and stretch pants. She is sitting on the living room couch looking at her cell phone. Music is playing, and Alyssa asks Linares to lower the music. Linares says, "No, that's fine." The camera focuses on Alyssa's crotch. In the fourth video, Alyssa is sitting and then lying down on the living room floor watching a video with Isaiah. Linares zooms in on Alyssa's buttocks and crotch.

The following morning, Linares called Catherine from jail, and she confronted him about the four videos. Linares did not deny taking the videos, react to Catherine's accusations, or respond to her statement that he could never be near Alyssa again. The People introduced a recording and a transcript of the conversation at trial.

Later that morning, Catherine and her niece, Elizabeth Hammons, and other family members went to the police station, where they insisted Officer Daniel Armas view the videos. Hammons also discovered and showed to Officer Armas an additional video taken in the bathroom, which the parties refer to as the "shower video," where Alyssa undresses in preparation for taking a shower. Linares had placed his cell phone camera in the master bathroom, angled it to capture the sink area and shower, and hid it from view. Alyssa entered the bathroom, brushed her hair, and sang and danced as she disrobed. Her breasts, pubic area, and buttocks were visible. According to Hammons, Alyssa's

vagina was also visible: "You [could] see the vulva and maybe the tip of the clitoris and maybe the tip of the lips, but not the vaginal opening." The shower video was lost prior to trial, but six witnesses (four family members and two police officers) testified about its contents.

A subsequent cell phone search, conducted pursuant to a warrant, uncovered one more video of Alyssa in the living room. Alyssa is wearing jean shorts. Linares focuses and then zooms in on Alyssa's buttocks, including when she bends down to pick something up. At trial, Catherine identified Linares's briefly visible jean-clad leg and sneaker. The post-warrant search of Linares's phone also revealed multiple photographs of Alyssa that focused on her clothed lower torso, buttocks, and crotch. Several captured her lying on the couch in a bikini.[1]

C. *The People Charge Linares with Multiple Crimes*

The People charged Linares with 12 misdemeanors and one felony. Five counts of misdemeanor annoying or molesting a child in violation of Penal Code section 647.6, subdivision (a)(1),[2] (counts 2, 4, 6, 8, and 12) and five counts of misdemeanor invasion of privacy in violation of section 647, subdivision (j)(3)(A), (counts 3, 5, 7, 9, and 13) were based on the videos of Alyssa, clothed, in the living room. One count of misdemeanor

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[1] Four photographs are of Alyssa on the couch in her bikini, with one of them focusing on her lower torso. In a fifth photograph Alyssa is sitting on the couch in her pajamas, and the photograph captures her lower torso and legs. There were additional photographs of Alyssa's clothed buttocks and crotch.

[2] Undesignated statutory references are to the Penal Code.

annoying or molesting a child (count 10), one count of misdemeanor invasion of privacy (count 11), and one count of felony possession of child pornography in violation of section 311.11, subdivision (a), (count 1) were based on the shower video.

At trial, Linares admitted taking the videos in the living room but denied intentionally focusing on Alyssa's crotch or buttocks. He explained he was blind in one eye, sleepy or not wearing his glasses when he took the videos, or the camera zoomed in "by itself." Regarding the shower video, Linares said he placed the camera in the bathroom because he expected Catherine to take a shower and he was looking for evidence on her body ("hickeys, bite marks") to support his suspicions of her infidelity. Linares said that, upon discovering Alyssa and not Catherine was in the shower, he retrieved the cell phone, shut off the camera, and deleted the video.

The trial court denied Linares's motion to suppress the evidence obtained from the initial viewing of the videos on his cell phone. The court also denied Linares's motion to dismiss count 1 under *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed2d 413] (*Trombetta*) and *Arizona v. Youngblood* (1988) 488 U.S. 51 [109 S.Ct. 333, 102 L.Ed.2d 281] (*Youngblood*) for failure to preserve the shower video.

D. *The Jury Convicts Linares*

The jury convicted Linares on all counts. The trial court sentenced Linares to a prison term of three years on count 1, consecutive terms of 364 days on each of counts 2 and 4, and concurrent terms of 364 days on each of counts 6, 8, and 12. The court also imposed and stayed execution under section 654 of a

364-day term on count 10 and terms of 180 days on counts 3, 5, 7, 9, 11, and 13. The court also ordered Linares to register as a sex offender and entered a protective order protecting Alyssa. Linares timely appealed.

DISCUSSION

A. *The Trial Court Did Not Err in Denying Linares's Motion To Suppress Evidence Obtained from the Warrantless Viewing of Videos on Linares's Phone*

The trial court denied Linares's motion to suppress evidence obtained from Officer Armas's viewing of Linares's cell phone, ruling there was no government action. Linares argues the trial court erred because Officer Armas directed Catherine and Hammons to conduct an illegal search while in a secure area of the police station and stood idly by as they violated Linares's rights. Because the facts on this issue are undisputed, our review is de novo. (See *People v. Simon* (2016) 1 Cal.5th 98, 120 ["[i]n reviewing a trial court's ruling on a motion to suppress, we defer to the trial court's factual findings, express or implied, where supported by substantial evidence," and "in determining whether, on the facts so found, the search was reasonable for purposes of the Fourth Amendment to the United States Constitution, we exercise our independent judgment"].)

1. *Relevant Proceedings*

Officer Armas testified at the pretrial hearing on Linares's motion to suppress. He stated that Catherine and other family members, including Alyssa, arrived at the police station to report possible child abuse. In the lobby of the station Catherine told

Officer Armas she had discovered four videos on Linares's cell phone "of her daughter that she felt [were] intrusive on her daughter's breasts and vagina." Catherine was upset, angry, and crying, and she repeatedly demanded that Officer Armas view the videos. She started to play a video, but the officer stopped her without looking at it. Because of the nature of the alleged crime, however, he felt he had to view the videos. Officer Armas brought Catherine into a secure area of the station, and she played all four videos while he watched. Officer Armas never touched or searched the cell phone.

Officer Armas briefly reviewed Linares's criminal record to determine whether he was in custody or whether he had any previous "sexually-related" allegations or arrests. When he returned to the lobby, Officer Armas met with Hammons, who said there was another video (the shower video) she wanted to show him. Hammons and Catherine were both very excited and upset. Officer Armas returned to the secure area with the two women, and Hammons played the additional video while he watched. Again, Officer Armas did not hold or search the phone, nor did he access the phone to watch the video. At some point Officer Armas subsequently took possession of the phone and, as noted, obtained a search warrant and discovered additional still photographs of Alyssa.

2. *There Was No Fourth Amendment Violation*

Warrantless cell phone searches by law enforcement officers violate the Fourth Amendment. (*Riley v. California* (2014) 573 U.S. __, __ [134 S.Ct. 2473, 2482, 189 L.Ed.2d 430, 439]; *People v. Macabeo* (2016) 1 Cal.5th 1206, 1210.) A search conducted by a private individual not acting as an agent of

the government or with the participation or knowledge of a government official, however, does not violate the Fourth Amendment. (See *United States v. Jacobsen* (1984) 466 U.S. 109, 113 [104 S.Ct. 1652, 80 L.Ed.2d 85] [Fourth Amendment search and seizure protection is "wholly inapplicable" to a search or seizure by a private individual not acting as a government agent or with knowledge of a government official]; *People v. Otto* (1992) 2 Cal.4th 1088, 1112 [the exclusionary rule "does not preclude the state from using the fruits of illegal searches and seizures by private citizens"]; *People v. Wilkinson* (2008) 163 Cal.App.4th 1554, 1564 ["[t]he Fourth Amendment's prohibition against unreasonable searches and seizures does not apply to searches by private citizens, even if the private citizens act unlawfully, unless the private citizen can be said to be acting as an agent for the government"]; *People v. Warren* (1990) 219 Cal.App.3d 619, 622 ["[i]t is well settled that the 'Fourth Amendment's prohibition against unreasonable search and seizure does not apply to searches by private citizens'"].) A law enforcement agent may conduct a warrantless search of what a private party has previously found without violating the Fourth Amendment, so long as that search does not exceed the scope of the private search. (See *Walter v. United States* (1980) 447 U.S. 649, 656-657 [100 S.Ct. 2395, 65 L.Ed.2d 410] ["there was nothing wrongful about the Government's . . . examination of [the packages'] contents to the extent that they had already been examined by third parties"]; *People v. Wilkinson*, at p. 1569 [law enforcement officer did not exceed scope of private search when he viewed compact disc images the boyfriend of the defendant's roommate had already seen].)

Catherine and Hammons searched Linares's cell phone and viewed the videos before showing them to Officer Armas. They were not acting as agents of the government; they searched and discovered the videos before ever going to the police station or contacting law enforcement. Officer Armas testified he viewed the videos at the request of Catherine and Hammons. Catherine or Hammons held and controlled Linares's cell phone at all times while playing the videos for the officer. Officer Armas did not touch, access, or search Linares's phone because he believed he needed a search warrant. And his search did not exceed the scope of the prior searches by Catherine and Hammons: He looked only at the videos Catherine and Hammons had already found and seen. The trial court properly ruled that under these circumstances the Fourth Amendment did not apply. (See *People v. Wilkinson*, *supra*, 163 Cal.App.4th at p. 1566 ["'[i]n order to run afoul of the Fourth Amendment . . . the Government must do more than passively accept or acquiesce in a private party's search efforts'"; "'[r]ather, there must be some degree of Government participation in the private search'"].)

Linares also argues the search was improper because the shower video was not stored on the cell phone "but was placed there from a remote server outside the United States." Linares, however, forfeited this argument by not making it in the trial court, despite the People's position and the trial court's tentative ruling that there was no state action because the family put it "in plain view in front of the officer." (See *People v. Williams* (1999) 20 Cal.4th 119, 130 ["once the prosecution has offered a justification for a warrantless search or seizure, defendants must present any arguments as to why that justification is inadequate"]; accord, *Davis v. Appellate Division of Superior*

Court (2018) 23 Cal.App.5th 387, 392.) Moreover, there is no evidence the video was stored on a remote server. Hammons told Officer Armas she found the shower video "under a different application than the [living room] videos." There was no testimony or other evidence the shower video was stored on a server in another country.

B. *The Trial Court Did Not Err in Denying Linares's Motion To Dismiss Under* Trombetta *and* Youngblood

Linares argues the trial court erred in denying his motion to dismiss because the police officers did not preserve the shower video. Substantial evidence, however, supported the trial court's ruling. (See *People v. Montes* (2014) 58 Cal.4th 809, 837 ["[a] trial court's ruling on a *Trombetta* motion is upheld on appeal if a reviewing court finds substantial evidence supporting the ruling"]; *People v. Duff* (2014) 58 Cal.4th 527, 549 [same].)

Under *Trombetta*, "'[t]he state has a duty to preserve evidence that both possesses "an exculpatory value that was apparent before the evidence was destroyed" and is of "such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."'" (*People v. Carrasco* (2014) 59 Cal.4th 924, 961, quoting *Trombetta*, *supra*, 467 U.S. at p. 489.) Under *Youngblood*, if the exculpatory value of the evidence was not apparent before the evidence was destroyed or lost, a defendant can show a violation of due process only where authorities acted in bad faith in failing to preserve the potentially useful evidence. (*People v. Carrasco*, at p. 961.)

According to the four members of the family who viewed the shower video before it was lost, Linares placed the camera in

the bathroom and then told Alyssa it was time to take a shower.[3] Linares argues the video might have been helpful to his mistake of fact defense that he thought Catherine and not Alyssa was going into the shower. Substantial evidence, however, supported the trial court's ruling that the shower video's potential exculpatory value would not have been apparent to a reasonable officer before the video was lost. Nothing in the video would have alerted anyone to the possibility it might support a potential mistake of fact defense. (See *People v. DePriest* (2007) 42 Cal.4th 1, 42 [three unidentified fingerprints taken from a car that the police failed to preserve "had no discernible value favoring the defense before it disappeared" where the "fingerprints 'may or may not have been defendant's and may or may not have been the perpetrator's'"]; cf. *People v. Alvarez* (2014) 229 Cal.App.4th 761, 774-777 [police and prosecutors were aware of the potential usefulness of video to defense because the video showed an officer encouraging the victim to identify the defendants as the perpetrators].) By all appearances, the shower video was inculpatory, not excupatory.

Moreover, Linares had access to comparable evidence by reasonably available means. (See *People v. Chism* (2014) 58 Cal.4th 1266, 1299 [for a violation under *Trombetta* and *Youngblood*, the evidence """"must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means"""""].) The six witnesses who viewed the video testified at trial. Counsel

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[3] Neither Officer Armas nor a detective who viewed the shower video recalled whether there was any audio on the recording.

for Linares cross-examined them about the content of the video. (See *id.* at p. 1300 [comparable evidence existed where the defendant was able to cross-examine the recipient on the contents of the defendant's lost letter and the defendant could have testified himself].)

In addition, there was no evidence of bad faith on the part of the officers, and Linares does not contend there was. After viewing the shower video, Detective Matthew Quinteros delivered Linares's cell phone to Jack Furay, an electronic crime special agent with the United States Secret Service. Furay was unable to open the shower video. Furay and Detective Quinteros thought the video was probably deleted not from the cell phone but from Linares's email "cloud" account.

Finally, counsel for Linares argued the effect of the video's absence to the jury. (See *People v. Alexander* (2010) 49 Cal.4th 846, 879 ["[b]ecause defendant failed to prove the destruction of the items made his trial fundamentally unfair, the failure to preserve them became an issue for the jury to weigh in its decision"]; *People v. Cooper* (1991) 53 Cal.3d 771, 811-812 [defendant is entitled to "present evidence regarding deficiencies in the investigation to try to discredit the case against him"].) Counsel argued: "I submit that the absence [of the shower video] is a crucial piece of evidence that you do not have. Why? Why? Because some witnesses testified that they heard a voice on that shower video. . . . And the voice said words to the effect, 'Alyssa, come and take your shower,' or 'It's shower time'. . . ." [¶] . . . He thought he was going to get Catherine, but didn't, and got [Alyssa]. . . . [¶] . . . It was a mistake. It was a mistake that that child was in that shower when [Linares] was laying the trap for Catherine. Once he realized it wasn't Catherine, he did

everything he could, as fast as he could, to get that video off the face of the earth."[4]

C. *Substantial Evidence Supports Only One of Linares's Convictions*

Linares argues none of his convictions is supported by substantial evidence. He is wrong about one of his convictions, but right about the others.

1. *Standard of Review*

"'To determine whether sufficient evidence supports a jury verdict, a reviewing court reviews the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.'" (*People v. Hardy* (2018) 5 Cal.5th 56, 89.) "'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence.'" (*People v. Brooks* (2017) 3 Cal.5th 1, 57.)

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[4] The record does not reflect that counsel for Linares requested an instruction on destruction or loss of evidence. Even if he had, "that instruction need not be given where, as here, no bad faith failure to preserve the evidence was shown." (*People v. Cook* (2007) 40 Cal.4th 1334, 1351; see *People v. Cooper*, *supra*, 53 Cal.3d at p. 811.)

2. *Substantial Evidence Does Not Support Linares's Conviction for Possession of Child Pornography (Count 1)*

Linares argues the shower video does not portray Alyssa engaging in or simulating any sexual act, a required element of possession of child pornography. The People argue there was substantial evidence to support the conviction because Alyssa was naked, her breasts, pubic area, and buttocks were visible, and she "sang and danced about." Linares has the better argument.

Section 311.11, subdivision (a), makes it a felony for any person to "knowingly possess[ ] or control[ ] any . . . image, including . . . videotape, . . . the production of which involves the use of a person under 18 years of age, knowing that the matter depicts a person under 18 years of age personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4." (See *In re Grant* (2014) 58 Cal.4th 469, 475.) Section 311.4, subdivision (d)(1), provides that "'sexual conduct' means any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer, any lewd or lascivious sexual act as defined in Section 288, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct." Section 311, subdivision (f), states:

"'Exhibit' means show." The only potential sexual conduct here is "exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer." (§ 311.4, subd. (d)(1); see *People v. Cantrell* (1992) 7 Cal.App.4th 523, 543-545 ["rectal area" refers to "the exterior area of the body near the rectum," including the buttocks].)

"Sexual conduct" under section 311.11, subdivision (a), "does not require that the images depict any actual sex activity." (*Shoemaker v. Harris* (2013) 214 Cal.App.4th 1210, 1224; see, e.g., *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1755-1756 (*Kongs*) [photographer posed minors and zoomed in on clothed pubic and genital areas].) The factors for determining whether material portrays sexual conduct are "1) whether the focal point is on the child's genitalia or pubic area; [¶] 2) whether the setting is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; [¶] 3) whether the child is in an unnatural pose, or in inappropriate attire, considering the age of the child; [¶] 4) whether the child is fully or partially clothed, or nude; [¶] 5) whether the child's conduct suggests sexual coyness or a willingness to engage in sexual activity; [and ¶] 6) whether the conduct is intended or designed to elicit a sexual response in the viewer." (*Kongs,* at pp. 1754-1755, 1757; accord, *In re Ulysses D.* (2004) 121 Cal.App.4th 1092, 1096.) "With the exception of factor No. 6, which is a required element of a Penal Code section 311.4 violation, a trier of fact need not find that all of the first five factors are present to conclude that there was a prohibited exhibition of the genitals or pubic or rectal area: the determination must be made based on the overall content of the visual depiction and the context of the child's conduct, taking into account the child's age." (*Kongs,* at p. 1755.)

Only factors 4 and 6 are present here. Even viewing the evidence in the light most favorable to the judgment, it was insufficient to support Linares's conviction for possession of child pornography. Although Alyssa was nude, the unattended, stationary camera did not focus on her breasts or her pubic or rectal areas. Linares positioned the camera to capture Alyssa unattired, but he did not manipulate the camera to focus on any particular body part. Alyssa sang and danced as she disrobed, but she never struck an unnatural or sexually suggestive pose. Alyssa's conduct did not suggest sexual coyness or a willingness to engage in sexual activity; she merely undressed in order to shower. No one who watched the video described her singing and dancing as sexually suggestive. And a bathroom's principal use is for nonsexual activity such as using the toilet, bathing, and showering. Alyssa was not exhibiting her genitals or pubic or rectal area; she was taking her clothes off so she could take a shower.[5]

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[5] The Legislature added the language "exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer" to section 311.4 in 1984, as one of several amendments to the statute designed primarily to eliminate the requirement that the defendant produce the pornographic material for commercial purposes. (Sen. Com. on Judiciary, Background Information, Sen. Bill No. 968 (1983-1984 Reg. Sess.) as amended Apr. 18, 1983, p. 2; see Assem. Com. on Criminal Law and Public Safety, Analysis of Sen. Bill No. 968, p. 3; Legis. Counsel's Dig., Sen. Bill No. 968, 2 Stats. 1984 (1983-1984 Reg. Sess.) Summary Dig., p. 536; Assem. Com. on Criminal Law and Public Safety, Analysis of Sen. Bill No. 968 as amended June 13, 1983, p. 2.) Nothing in the legislative history of the 1984 amendments explains, discusses, or addresses the meaning of the phrase "exhibition of the genitals or pubic or

Kongs, supra, 30 Cal.App.4th 1741 is distinguishable. The defendant in that case posed child models in positions (sitting, bending over, and holding their legs up) that allowed him to capture their underwear-clad pubic and rectal areas and zoom in for sustained close-ups. The court held this evidence was sufficient to prove the defendant possessed child pornography. (*Id.* at pp. 1756-1757.) The court stated, "A trier of fact could find that the seized material, with its unrelenting focus on the area between the models' legs, constituted an exhibition of the genital, pubic or rectal area for the purpose of sexually stimulating the viewer." (*Id.* at p. 1757.) Unlike Linares, however, the defendant in *Kongs* actively posed the models in unnatural, sexually suggestive positions and focused on their pubic areas. Linares did not manipulate Alyssa's positions, and there was no

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rectal area for the purpose of sexual stimulation of the viewer." Its placement in a list of conduct such as sexual intercourse, oral copulation, anal intercourse, and bestiality, however, suggests the Legislature did not intend it to apply to taking a shower. (See *People v. Garcia* (2016) 62 Cal.4th 1116, 1124 ["[c]anons of construction—such as the *noscitur a sociis* canon underscoring the value of considering terms in a list in their statutory context—are . . . tools that can help us do what we always aspire to do when construing a statute: avoid redundancies, reach a reasonable conclusion about the meaning of terms, and give effect to the Legislature's purpose"]; *People v. Hernandez* (2017) 10 Cal.App.5th 192, 200 [under the "'rule of statutory construction, *noscitur a sociis*, a word takes meaning from the company it keeps,'" and a "'"word of uncertain meaning may be known from its associates and its meaning 'enlarged or restrained by reference to the object of the whole clause in which it is used'"'"].)

testimony Alyssa struck an unnatural or sexually suggestive pose.

A reasonable trier of fact could conclude Linares intended to use the video for sexual stimulation. But that inference, together with Alyssa's nudity, does not, without more, violate section 311.11. Linares's conduct was reprehensible, even criminal (count 11), but it did not support a conviction for possessing child pornography.[6]

3. *Substantial Evidence Does Not Support Linares's Convictions for Annoying or Molesting a Child (Counts 2, 4, 6, 8, 10, and 12)*

Aimed at protecting children from interference by sexual offenders (*People v. Carskaddon* (1957) 49 Cal.2d 423, 425; *In re D.G.* (2012) 208 Cal.App.4th 1562, 1571), section 647.6, subdivision (a)(1), makes it a misdemeanor to "annoy[ ] or

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[6] *People v. Macias* (2018) 26 Cal.App.5th 957 involved a different statute, section 311.4, subdivision (c), and the defendant in *Macias* did not challenge the sufficiency of the evidence to support his conviction. *Macias* did not involve the meaning of "sexual conduct" or any other issue of statutory interpretation. The only issue in *Macias* was whether the trial court had a sua sponte duty to instruct on invasion of privacy under section 647, subdivision (j)(3)(A), as a lesser included offense of section 311.4, subdivision (c). (See *Macias* at pp. 961-963.) That is not an issue in this case: The trial court here instructed the jury on invasion of privacy under section 647, subdivision (j)(3)(A), the jury convicted Linares of committing that crime in connection with the shower video, and we affirm that conviction. Thus, the Legislature has enacted a statute criminalizing Linares's conduct, and Linares stands convicted of it.

molest[ ] any child under 18 years of age." The elements of a violation of section 647.6, subdivision (a)(1), are "1. The defendant engaged in conduct directed at a child; [¶] 2. A normal person, without hesitation, would have been disturbed, irritated, offended, or injured by the defendant's conduct; [¶] 3. The defendant's conduct was motivated by an unusual or abnormal sexual interest in the child or in children generally; and [¶] 4. The child was under age 18 at the time of the conduct." (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1161; see *People v. Lopez* (1998) 19 Cal.4th 282, 289 (*Lopez*) [a violation of section 647.6, subdivision (a), requires "(1) conduct a '"normal person would unhesitatingly be irritated by"' [citations] and (2) conduct '"motivated by an unnatural or abnormal sexual interest"' in the victim"].)

The words "annoy" and "molest" are synonymous; they "generally refer to conduct designed to disturb, irritate, offend, injure, or at least tend to injure, another person." (*Lopez, supra,* 19 Cal.4th at p. 289; accord, *Ruelas v. Superior Court* (2015) 235 Cal.App.4th 374, 379.) "'Annoy' and 'molest' ordinarily relate to offenses against children, with a connotation of abnormal sexual motivation. The forbidden annoyance or molestation is not concerned with the child's state of mind, but rather refers to the defendant's objectionable acts that constitute the offense." (*Lopez,* at p. 290.) The test is objective: "whether the defendant's conduct would unhesitatingly irritate or disturb a normal person." (*Ibid*.) "[W]e may not consider either the defendant's intent or the child's subjective discomfort." (*People v. Valenti, supra,* 243 Cal.App.4th at p. 1162.) "The deciding factor for purposes of a [section] 647.6 charge is that the defendant has engaged in offensive or annoying sexually motivated *conduct* which invades a child's privacy and security, conduct which the

government has a substantial interest in preventing . . . ." (*Kongs, supra,* 30 Cal.App.4th at p. 1752.)

Linares argues, among other things, that he did not violate section 647.6, subdivision (a), because "Alyssa was unaware she was being photographed or videotaped" and that, even under an objective standard, a victim cannot be annoyed by what he or she does not see. We agree and conclude that, although Linares's conduct in filming Alyssa may have been criminal, it did not violate section 647.6, subdivision (a).

As we stated in *People v. Phillips* (2010) 188 Cal.App.4th 1383 (*Phillps*), "under Penal Code section 647.6, subdivision (a)(1) there must be evidence that the perpetrator 'directed' the conduct toward a child," and the "intent to be observed while engaging in the offensive conduct is subsumed in the element that the offender 'directs' his conduct toward a child." (*Id.* at p. 1394.) A person who engages in annoying conduct but "*does not intend* to be observed by any child, but instead merely intends to watch a child or children while engaging in the offensive conduct," does not violate the statute. (*Id.* at pp. 1394-1395.) Such a person "may be accused of a number of things, including bad timing, poor judgment and perhaps the violation of other laws," but not a violation of section 647.6, subdivision (a). (*Id.* at p. 1395.) To the extent a person "has not directed his conduct towards a child because he lacks the intent to be observed, . . . the defendant has not violated section 647.6, subdivision (a)." (*Id.* at p. 1395, fn. 10.)

Linares is that person. There was no evidence he intended to be, or was, seen by anyone when he filmed and photographed Alyssa in the living room and in the shower. To the contrary, Linares took efforts to avoid detection and to make sure he was

not seen photographing Alyssa. As we explained in *Phillips*, "Penal Code section 647.6, subdivision (a)(1) is not a victimless crime. There must be proof that some child or group of children observed the perpetrator's offensive conduct." (*Phillips*, *supra*, 188 Cal.App.4th at 1393, fn. 10.) Here, there was no such proof.

The People do not argue the child need not be aware of the defendant's conduct, nor do they cite any case affirming a conviction for a violation of section 647.6 where the child did not observe or otherwise become aware of the defendant's conduct. In the cases where the defendant violated section 647.6 by taking photographs or videotapes of children, the children knew the defendant was photographing or filming them. (See *Kongs*, *supra*, 30 Cal.App.4th at pp. 1746-1747; *People v. Wallace* (1992) 11 Cal.App.4th 568, 572-573, disapproved on another ground in *People v. Martinez* (1995) 11 Cal.4th 434, 452.) The children may not have known the conduct was wrongful and they may not have been actually annoyed or uncomfortable, which, as stated, are not elements of the crime. (See *Lopez, supra,* 19 Cal.4th at p. 290; *Kongs,* at p. 1750; *People v. Valenti, supra,* 243 Cal.App.4th at p. 1162.) But, unlike Alyssa, the children were aware the defendant was doing something.

Citing our opinion in *Phillips*, *supra*, 188 Cal.App.4th at p. 1396, the People argue a defendant may violate section 647.6, subdivision (a), "by conduct intended to be observed by some child or children, rather than a specific child." The People argue the facts that "Alyssa['s] brother was present for all of the video recordings but one" and that Linares "let the children in the family use his cell phone . . . , where all of the video recordings and photographs were stored or accessible *after* he made them," create a "reasonable inference that he intended to be observed."

There is no evidence, however, that Alyssa's brother (or anyone else) saw Linares photographing or videotaping Alyssa or that her brother or any other child saw the photographs or videotapes of Alyssa on Linares's phone. And the People cite no authority for the proposition that storing photographs and videotapes in a place where others may access them evidences an intent to be observed while taking the photographs or recording the videotapes.

4. *Substantial Evidence Does Not Support Linares's Convictions for Invasion of Privacy in the Living Room (Counts 3, 5, 7, 9, and 13)*

Linares argues his invasion of privacy convictions under section 647, subdivision (j)(3)(A),[7] for taking photographs and videotapes of Alyssa in the living room cannot stand because he did not conceal the camera when he made the recordings and took the photographs. Linares does not raise the same challenge to his conviction on count 11 for taking the shower video.

Section 647, subdivision (j)(3)(A), makes it a misdemeanor for a person to use "a concealed . . . camera . . . to secretly videotape, . . . [or] photograph . . . another, identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room,

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[7] The parties refer to the offense defined in section 647, subdivision (j)(3)(A), as invasion of privacy. The statute describes the offense as misdemeanor disorderly conduct. The subdivisions of section 647 criminalize various kinds of conduct, such as invasion of privacy, that constitute disorderly conduct.

dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person."

The word "concealed" in section 647, subdivision (j)(3)(A), modifies the word "camera." The statute therefore requires that the defendant conceal the camera. "The word 'conceal' simply means to hide or cover something from view." (*People v. Hill* (1997) 58 Cal.App.4th 1078, 1090; see *People v. McGinnis* (1942) 55 Cal.App.2d 931, 936 ["[t]he common definition of the word 'conceal' is 'to hide or withdraw from observation; to cover or keep from sight'"].) The statute also requires the defendant "secretly" photograph, videotape, or record the victim. Thus, in order to avoid superfluous statutory language (see *Shorts v. Superior Court* (2018) 24 Cal.App.5th 709, 720; *People v. Samuels* (2018) 21 Cal.App.5th 962, 966), not only must the recording be done secretly, the camera must be concealed.

There was no evidence Linares covered his camera or otherwise hid it from view when he videotaped or photographed Alyssa in the living room.[8] Indeed, the evidence suggests Linares did not conceal the camera when he photographed or videotaped her in the home. Catherine testified that in November or December 2015 she saw Linares in the living room with his cell phone "up," but as soon as he saw her enter the room, he "put it down." Linares's convictions on counts 3, 5, 7, 9, and 13 for

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[8] The People cite no authority for their assertion that Linares's camera use was "effectively concealed" because Alyssa did not know Linares was recording her. The statute says "concealed," not "effectively concealed" or "concealed as a practical matter."

misdemeanor invasion of privacy disorderly conduct under section 647, subdivision (j)(3)(A), must be reversed.[9]

D. *The Trial Court Did Not Commit Any Prejudicial Instructional Error*

Linares argues the trial court made several errors in instructing the jury. None of Linares's arguments requires reversal.

1. *The Trial Court Did Not Err in Instructing the Jury on Uncharged Sex Offenses*

Linares contends the trial court erred "by directing the jurors to the uncharged massage evidence to prove the charged offenses." Linares argues: "The trial court stated, 'As to those two sets of crimes, the People presented evidence that the defendant committed the crime of lewd or lascivious act that was not charged in this case. This refers to the evidence regarding massages. This crime is defined for you in these instructions.' . . . Rather than simply read the standard CALCRIM No. 1191 regarding evidence of uncharged acts next, which would have

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[9] Contrary to Linares's contention, any error by the trial court in failing sua sponte to define the words "identifiable person" in the jury instruction in connection with the remaining invasion of privacy conviction was harmless. The trial court instructed the jury: "To prove the defendant is guilty of [unauthorized invasion of privacy] the People must prove that: [¶] 1. The defendant used a concealed [camera] to secretly videotape, film, photograph, or record by electronic means, another identifiable person who may be in a state of full or partial undress[.]" It was undisputed Alyssa was the other "identifiable person."

been appropriate, the trial court modified the standard instruction and specifically directed the jury to use the massage evidence to prove the offenses in counts 1, 2, 4, 6, 8, 10 and 12. . . . When standard instructions are complete, it is risky for the court to deviate from the standard instructions. (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) [¶] The court's comments favored the prosecution, and lowered its burden of proof on the charged offenses by telling the jurors the massage evidence which had to be proven by a preponderance could spill over and prove the charged offenses."

It is not clear what Linares is arguing. The reporter's transcript reflects that, after stating "This crime is defined for you in these instructions," the trial court read CALCRIM No. 1191.[10] Linares has not explained how the trial court purportedly modified the pattern instruction or what comments allegedly favored the prosecution. Moreover, contrary to Linares's assertion, the trial court did not instruct the jurors that they could rely on the massage evidence to prove the charged offenses. Instead, the trial court properly instructed the jurors that they could, but did not have to, consider the propensity evidence, that the propensity evidence was not sufficient to prove Linares was guilty of the charged offenses, and that "[t]he People must still prove each charge beyond a reasonable doubt." These were correct statements of the law. (*People v. Reliford* (2003) 29

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[10] "In March 2017, CALCRIM No. 1191 was modified to distinguish uncharged offenses offered as propensity evidence from charged offenses offered for that purpose. CALCRIM No. 1191A now applies to the former, while CALCRIM No. 1191B applies to the latter." (*People v. Gonzales* (2017) 16 Cal.App.5th 494, 496, fn. 1.)

Cal.4th 1007, 1013; *People v. Kerley* (2018) 23 Cal.App.5th 513, 529; see *People v. Cromp* (2007) 153 Cal.App.4th 476, 480 [CALCRIM No. 1191 does not violate a defendant's due process rights]; *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87 [CALCRIM No. 1191 does not "'wholly swallow[ ] the "beyond a reasonable doubt" requirement'"].) As instructed, no reasonable juror would have believed he or she could convict Linares of the charged offenses solely based on the uncharged conduct and without finding the People had proved each charged offense beyond a reasonable doubt. (See *People v. Reliford,* at pp. 1013-1014 ["[n]o reasonable juror would believe those requirements could be satisfied solely by proof of uncharged offenses"].)

2. *The Trial Court's Error in Reading the Instruction on Invasion of Privacy Was Harmless*

The trial court misspoke when it read the invasion of privacy instruction to the jury. The court said "defendant must prove," rather than, as reflected in the written instruction, "the People must prove." The error was harmless under any standard. The trial court instructed the jury orally and in writing on the presumption of innocence and the requisite beyond a reasonable doubt standard of proof. Moreover, "[t]he risk of a discrepancy between the orally delivered and the written instructions exists in every trial, and verdicts are not undermined by the mere fact the trial court misspoke." (*People v. Mills* (2010) 48 Cal.4th 158, 200; accord, *People v. Grimes* (2016) 1 Cal.5th 698, 729.) The trial court instructed the jury to "[o]nly consider the final [written] version of the instructions in your deliberations." The correctly worded written instructions, which

the trial court provided to the jury, controlled. (*People v. Mills,* at p. 201; *People v. Wilson* (2008) 44 Cal.4th 758, 803-804.)

E. *The Trial Court Did Not Abuse Its Discretion in Declining To Excuse the Jury Foreperson*

Linares argues the court should have removed the jury foreperson for misconduct. The trial court found the juror had committed misconduct, but found no grounds to remove him.

Section 1089 provides in pertinent part, "If at any time, whether before or after the final submission of the case to the jury, . . . upon . . . good cause shown to the court [a juror] is found to be unable to perform his or her duty . . . the court may order the juror to be discharged . . . ." ""Before an appellate court will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a 'demonstrable reality.' The court will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence."" (See *People v. Martinez* (2010) 47 Cal.4th 911, 943.)

The jury foreperson encountered Officer Armas in the courthouse hallway. The juror said to the officer, "I know you guys have a hard job, and you guys do a hell of a job doing it." He also asked, "Where did you get [your vest]?" The juror later explained, "My wife works for U.S. Armor which provides bullet proof vests, ballistics. . . . I always ask police officers, as I like to know, because my wife has something to do with making it." The juror assured the court there was "absolutely" no discussion about the trial. Officer Armas confirmed he did not discuss the case with the jury foreperson.

The trial court correctly found the juror had committed misconduct. (See § 1122, subd. (a)(1) [jurors are prohibited from conversing with witnesses]; *People v. Cowan* (2010) 50 Cal.4th 401, 507 ["[a] juror's unauthorized contact with a witness is improper"].) However, "[c]ontact between a juror and a witness . . . may be nonprejudicial if . . . there is no showing that the contact related to the trial . . . ." (*People v. Jackson* (2016) 1 Cal.5th 269, 334; accord, *People v. Cowan,* at p. 507; see *People v. Chavez* (1991) 231 Cal.App.3d 1471, 1485 ["no presumption of prejudice arose from the police officer/witness's conversation with a juror regarding matters unrelated to the cause being tried"]; see also *People v. Pierce* (1979) 24 Cal.3d 199, 207-209 (*Pierce*) [contact between juror and witness involving "mere social amenities unrelated to the trial" is not necessarily prejudicial, but reversal is required where the juror discussed the case with the police officer witness].) The trial court is in the best position to evaluate juror bias. (*People v. Debose* (2014) 59 Cal.4th 177, 202; see *People v. Lomax* (2010) 49 Cal.4th 530, 590 [reviewing courts should defer to the trial court's factual determination regarding a juror's bias].)

Here, the jury foreperson spoke with Officer Armas in the hallway, but the juror did not discuss the case with the officer. The juror thanked the officer for his service and inquired about his vest. They did not discuss the case. The trial court could reasonably conclude the contact was not prejudicial and there was no reason to remove the jury foreperson. Because the court and counsel did not inquire, during voir dire or at the hearing on whether the court should remove the foreperson, whether the juror was biased in favor of law enforcement, the trial court could not have excused the foreperson on that ground.

The cases cited by Linares, *In re Hitchings* (1993) 6 Cal.4th 97 and *Pierce*, *supra*, 24 Cal.3d 199, are distinguishable. In *Hitchings* a juror discussed the case with a co-worker. (*Hitchings*, at pp. 116-117, 123.) In *Pierce* the juror discussed the case with a police officer witness who was also a neighbor. (*Pierce*, at pp. 205-207.) The foreperson here did not discuss the case with Officer Armas at all.

F. *The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of Other Sexual Conduct*

Over Linares's objection, the trial court allowed the People under Evidence Code sections 1108, subdivisions (a) and (d)(1)(A), and 352 to introduce evidence that on two occasions Linares had massaged Alyssa's buttocks. Linares argues the trial court abused its discretion by admitting this evidence because it was unduly prejudicial, inflammatory, "contradictory," and "completely unreliable." Linares points to Alyssa's uncertainty about the timing of these incidents and Catherine's testimony that Alyssa never told her Linares had touched her (Alyssa's) buttocks.

Evidence Code section 1108 allows the prosecution, subject to Evidence Code section 352, to introduce evidence a defendant previously committed an uncharged sex offense including, as relevant here, lewd and lascivious acts with a minor within the meaning of section 288, subdivision (a). (See *People v. Villatoro* (2012) 54 Cal.4th 1152, 1166 [""[b]y subjecting evidence of uncharged sexual misconduct to the weighing process of [Evidence Code] section 352, the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed""].) In ruling on the admissibility of

evidence under Evidence Code section 1108, subdivision (a), the trial court "must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 823-824.) The trial court is in the best position to evaluate the evidence under Evidence Code sections 1108 and 352. (*People v. Falsetta* (1999) 21 Cal.4th 903, 918.)

Alyssa testified Linares offered her a massage when she complained of back pain or could not sleep. When she asked him to stop touching her buttocks, "he did it again." Alyssa was uncertain when the massages occurred. Initially she said "last night," but later she said Linares massaged her twice between the ages of eight and eleven. According to Alyssa, her mother was "furious" when Alyssa told her about the massages. Catherine testified Alyssa told her about one massage but did not say Linares touched her buttocks. Alyssa told her grandmother that Linares had rubbed her back, pulled her underwear down, and massaged her buttocks. Alyssa said it happened when her mother was at work and Alyssa could not sleep.

The trial court did not abuse its discretion. Discrepancies in the testimony of Alyssa and Catherine went to the weight of the evidence, not its admissibility, and were for the jury to

resolve. (*People v. McKinnon* (2011) 52 Cal.4th 610, 670, fn. 35; *People v. Sully* (1991) 53 Cal.3d 1195, 1242; see *People v. Hernandez* (2011) 200 Cal.App.4th 953, 967 [under Evidence Code sections 1108 and 352, "any dissimilarities in the alleged incidents relate only to the weight of the evidence, not its admissibility"].) Alyssa, while uncertain about the exact dates, never wavered from her statements that Linares massaged her buttocks. Alyssa's maternal grandmother corroborated Alyssa's testimony. Moreover, although the uncharged acts involved actual touching, they were not more inflammatory than the charged offenses. Although admissibility under Evidence Code section 1108 does not require similarity (*People v. Jones* (2012) 54 Cal.4th 1, 50), here the uncharged and charged acts were similar: They involved the same victim and occurred in the same family home.

People v. Disa (2016) 1 Cal.App.5th 654, 673-674, on which Linares relies, is distinguishable. The defendant in that case was convicted of first degree murder after he admitted killing his girlfriend by putting her in a chokehold during a verbal and physical altercation, but he denied he intended to kill her. The Court of Appeal held that the trial court abused its discretion in allowing highly inflammatory and extensive evidence of prior domestic violence, which, unlike the charged offense, "involved planning, hours of waiting, and a bloody knife attack on sleeping victims." (*Id.* at p. 658.) The court in *People v. Disa* held that, given the relatively weak evidence of premeditation, the evidence of the uncharged acts created a substantial risk the jury would improperly use the prior act evidence to find premeditation and deliberation. (*Id.* at pp. 673-674.) In contrast, the evidence of Linares's prior uncharged conduct was not highly inflammatory

compared to evidence of the charged crimes and did not create such a risk.

Linares argues for the first time on appeal that the trial court's rulings violated his federal constitutional rights. As a general rule, however, "violations of state evidentiary rules do not rise to the level of federal constitutional error." (*People v. Benavides* (2005) 35 Cal.4th 69, 91; accord, *People v. Henriquez*, *supra*, 4 Cal.5th at p. 29; see *People v. Thompson* (2016) 1 Cal.5th 1043, 1116 [""""routine application of state evidentiary law does not implicate [a] defendant's constitutional rights"""""]; *People v. Panah* (2005) 35 Cal.4th 395, 482, fn. 31 ["because we conclude the trial court's [evidentiary] rulings were correct, the constitutional claims fail"]; *People v. Benavides,* at p. 95 [defendant's "federal [constitutional] claim fails because, as we have concluded, the trial court's exclusion of this evidence was not in error"].) Moreover, the Supreme Court has held that Evidence Code section 1108 does not violate a defendant's due process rights. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 916.)

DISPOSITION

The judgment is reversed with respect to count 1 (possession of child pornography), counts 2, 4, 6, 8, 10, and 12 (annoying or molesting a child), and counts 3, 5, 7, 9, and 13 (invasion of privacy), and affirmed with respect to count 11. The matter is remanded for resentencing.

SEGAL, J.

I concur:

ZELON, Acting P. J.

WILEY, J., concurring in the result.

I

This case presents an interpretive issue of classical proportions.

A man hides a spy camera to videotape an unsuspecting 13-year-old autistic girl undressing and showering. The video exhibits her naked breasts, pubic area, vulva, and buttocks. Joaquin Linares made the video for viewers' sexual stimulation. He proposes to interpret California's child pornography felony statute in a way that effectively creates an exception for spy cameras.

The interpretive issue is whether Linares violated Penal Code section 311.11, which outlaws videotaping a minor engaging in "sexual conduct, as defined in subdivision (d) of Section 311.4," which in turn states "'sexual conduct' means . . . *exhibition* of the *genitals* or pubic or rectal area *for the purpose of sexual stimulation of the viewer* . . . ." (Italics added.)

Linares and his video did *exhibit* Alyssa's *genitals for the purpose of sexual stimulation of the viewer*. Given the jury verdict, that was Linares's only objective and the only intended use for his video. For him and other audience members, be they viewers of his phone or of the World Wide Web, Alyssa's unwitting actions were "sexual conduct" for which there is a global market. *Alyssa* did not want to expose her genitals or pubic or rectal area. *She* had no purpose of sexually stimulating anyone. From her perspective, her shower nudity was not "sexual conduct," but her furtive viewers thought otherwise.

So which perspective rules? Should we read the statutory words from Alyssa's unwitting perspective, or from the

voyeuristic perspective "of the viewer"? (Pen. Code, § 311.4, subd. (d)(1).) The first interpretation excludes spy cameras. The second condemns them. Both interpretations are conceivable.

II

The challenge of this case is that two rules of interpretation conflict.

A

Language contains inevitable ambiguity. When someone says, "Go to work on a bike," do they mean that you should begin repairing a broken-down bicycle? Or that you should pedal to the office? Identical words have different meanings: when a master bicycle mechanic uses these quoted words to direct a subordinate to get busy, the words have a different meaning than in a conversation about commuting. Context reveals meaning.

The context here is California's child pornography statute. The purpose of a statute against child pornography is to protect children from exploitation by people who create works for sexual stimulation. (*New York v. Ferber* (1982) 458 U.S. 747, 757-759, fns. 9-10; *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1748-1749; *Shoemaker v. Harris* (2013) 214 Cal.App.4th 1210, 1230.)

"The dominant mode of statutory interpretation over the past century has been one premised on the view that legislation is a purposive act, and judges should construe statutes to execute that legislative purpose. This approach finds lineage in the sixteenth-century English decision *Heydon's Case*, which summons judges to interpret statutes in a way 'as shall suppress the mischief, and advance the remedy.'" (Katzmann, Judging Statutes (2014) p. 31.)

The fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (E.g., *Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 135.)

To effectuate the purpose of this statute, one should read it from the standpoint "of the viewer." (Pen. Code, § 311.4, subd. (d)(1).) This protects Alyssa and other child victims. Linares, however, rejects the standpoint "of the viewer" and instead favors the standpoint of the unwitting child victim, which has the practical effect of interpreting California's child pornography statute to create an exception for spy cameras.

Linares never explains what statutory purpose there could be in creating an exception for clandestine exploitation of children. I can think of none.

The legislative history refutes the notion the Legislature had the purpose of excluding surreptitious abuse of children from this statute's reach. (E.g., Legis. Analyst, analysis of Sen. Bill No. 968 (1983-1984 Reg. Sess.) pp. 1-2, 42-43 of 203 of legislative history [prepared by Cal. Atty. Gen.] [this bill "expands the list of sexual acts covered by the prohibition"].) The legislative history uniformly speaks of the purpose of protecting children. There is no discussion about limiting protection based on whether the child is witting or unwitting. That limitation counters the statute's purpose of protecting children, which was embraced by all.

Thus, the rule of "effectuate the purpose of the statute" means one should reject Linares's proposed interpretation.

B

A different rule decisively points in the opposite direction. The rule of lenity dictates that ambiguity in criminal laws will be construed in favor of the defendant. (E.g., *People v. Soto* (2018) 4 Cal.5th 968, 979-980.)

The rule of lenity itself is not without ambiguity. (E.g., Pen. Code, § 4 ["The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."]; Bentham, A Comment on the Commentaries: A Criticism of William Blackstone's Commentaries on the Laws Of England (1776) p. 141 (Charles Warren Everett ed. 1928), quoted in Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) p. 296 & fn. 3 [rule of lenity is "'the subject of more constant controversy than perhaps of any in the whole circle of the Law'"].)

Our Supreme Court routinely reiterates this rule. I therefore join the majority result.

WILEY, J.*

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