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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANAND JON ALEXANDER, Defendant and Appellant.	B220072 (Los Angeles County Super. Ct. No. BA327190)

APPEAL from a judgment of the Superior Court of Los Angeles County. David S. Wesley, Judge. Affirmed.

Angelyn Gates for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Anand Jon Alexander of seven counts of committing a lewd act on a child (counts 3-5, 30-32, 57) (Pen. Code, § 288, subd. (c)(1)),[1] contributing to the delinquency of a minor (count 6) (§ 272, subd. (a)(1)), sexual battery by restraint (count 7) (§ 243.4, subd. (a)), attempted forcible oral copulation (count 8) (§§ 288a, subd. (c)(2), 664), forcible rape (count 9) (§ 261, subd. (a)(2)), two counts of sexual penetration by a foreign object (counts 10, 33) (§ 289, subd. (a)(1)), using a minor for sex acts (count 11) (§ 311.4, subd. (c)), possession of child pornography (count 12) (§ 311.11, subd. (a)), and misdemeanor sexual battery (count 56) (§ 243.4, subd. (e)(1)). The jury found with respect to counts 9, 10, and 33 that appellant committed crimes against multiple victims within the meaning of section 667.61, subdivision (b).

The trial court sentenced appellant to 14 years plus 45 years to life in prison. The sentence consisted of the following: in counts 9, 10, and 33, three consecutive terms of 15 years to life; in counts 7-8, four years each; in counts 3-5, 11-12, 30-32, and 57, eight months each; in the misdemeanor counts 6 and 56, terms equal to time served.

Appellant appeals on the grounds that: (1) the trial court erred in failing to recuse the district attorney's office; (2) the trial court erred in failing to grant immunity to Juror No. 12; (3) the trial court erred in failing to grant appellant a new trial due to juror misconduct and/or prosecutorial misconduct; (4) the prosecution committed misconduct by effectively destroying evidence; (5) the trial court erred in not allowing further investigation in relation to appellant's new trial motion; (6) the trial court erred in admitting the testimony of the Evidence Code section 1108 witnesses; (7) the trial court erred in admitting computer evidence under Evidence Code sections 1101 and 1108; (8) the evidence was insufficient to convict appellant of the charges absent the evidence admitted under Evidence Code section 1108; and (9) in sentencing appellant, the trial court failed to specify that counts 33 and 10 were to be served consecutively.

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[1] All further references to statutes are to the Penal Code unless stated otherwise.

FACTS

Appellant was a fashion designer who lived in an apartment on North Palm Drive in Beverly Hills during most of the time periods relevant to the charges in this case. As described *infra*, appellant engaged in sex acts with young women and girls who met appellant in connection with their aspirations of entering the fashion industry. In addition to his convictions for the sex acts described by the victims, appellant was convicted in count 12 of possession or control of child pornography in connection with video he recorded of underage victims.

I. Prosecution Evidence Regarding Named Victims

A. Jessie B., Counts 7-9: Sexual Battery by Restraint, Attempted Forcible Oral Copulation, Forcible Rape

In November 2006, Jessie B. was 18. She lived in Washington state and had posted modeling photos online. Appellant contacted her and invited her to Los Angeles for a photo shoot. Appellant paid her airfare and told her he had arranged for a hotel room and a driver to meet her at the airport. When Jessie arrived at the Los Angeles airport on March 4, 2007, she called appellant, who instructed her to take a taxi to the Four Seasons Hotel in Beverly Hills. Upon arriving at the hotel, she called appellant again. He told her to come to his apartment building on North Palm Drive. Appellant brought her into his apartment and offered her a drink, which she declined. He suggested that she change into pajamas. Although she found this strange, Jessie went to the bathroom and changed into pajama pants and a T-shirt. Appellant led her to his bedroom, which contained a deflated air mattress rather than a bed. Appellant kissed Jessie, and she pushed him away and told him to stop. Appellant pulled off her pants and kissed her breasts. Then he sat on her chest and demanded she suck on his penis. When she refused, he removed her tampon and inserted his penis into her vagina. Jessie asked him to stop, but he ignored her. He ejaculated inside her. Appellant then went to sleep. Jessie dressed herself and also went to sleep.

When Jessie awoke the next morning, Holly G. and Lori, appellant's assistants, were in the apartment also. Jessie modeled clothing for appellant. Jessie later went to get

food with Holly and Lori. Jessie called her friend, Meredith, who promised Jessie that she would call her sister, who lived in Los Angeles. Jessie also spoke to her parents, but she did not mention that appellant had raped her. Jessie then called for a taxi to pick her up at the apartment building. While Jessie was getting her luggage together at the apartment, appellant repeatedly told her that she could not leave because he had spent money on her ticket. Jessie left and called Meredith, who told her to go to Sony Studios in Culver City, where Meredith's sister, Chris, worked. Jessie arrived at the studios and spoke with Chris and Chris's coworker, Kim Skeeters. Jessie told Skeeters that appellant had raped her. Jessie also told her that appellant said he came from a prominent family and would harm her if she reported him. Skeeters took Jessie to the police. The police took Jessie to the hospital to be examined. Appellant's semen was found in Jessie's vagina.

B. Katie S., Counts 30-32: Lewd Act Upon a Child

In 2002, Katie S. was a 14-year-old model living in Texas. In August of that year, her manager introduced her and some fellow models to appellant. The models were videotaped wearing clothing provided by appellant. The videos were supposed to air on MTV. In November 2002, when appellant invited Katie to attend a party in his honor, Katie and her mother flew to Los Angeles. Appellant, his mother (Shashi Abraham), and his sister (Sanjana Alexander) picked Katie and her mother up at the airport and drove them to a hotel in Beverly Hills. Katie and her mother went to a nightclub in Los Angeles with appellant that evening. After Katie's mother left and returned to the hotel, appellant began to rub Katie's leg. He invited her back to his hotel, but Katie declined. Appellant took Katie back to her hotel and said to Katie's mother something to the effect that age did not matter in a relationship. Katie and her mother attended another event with appellant the next day. Katie was photographed. On the third day in Los Angeles, Katie and her mother went to appellant's hotel. Katie tried on dresses while Katie's mother sat on a bench in the hallway. When Katie asked to change in the bathroom, appellant became angry and told her that if she wanted to model, she would have to become comfortable changing in front of other people. As Katie was attempting to pull

on a dress that was too small, appellant touched her breasts and vagina. Katie went to the bathroom and changed back into her own clothing. Katie then went with her mother and appellant to a boutique where Katie modeled a dress and was photographed. She and her mother then returned to Texas.

Katie received e-mails from appellant in which he expressed a romantic interest in her. He said that their age difference was irrelevant. In December 2002, appellant asked Katie to meet him at her manager's office in Texas. Katie went, and appellant gave her a glass of wine. After drinking it, Katie lost control over her body. Appellant inserted his penis into her mouth and vagina. Katie lost consciousness. When she awoke, she went home. Appellant called her at least once after that incident. She did not report the crimes to her mother until March 2003. She reported the crimes to the police in 2006, when appellant's arrest became publicized. Katie acknowledged that she discussed the case with other people on various occasions. She had discussed the possibility of going on television. During one conversation with the police, Katie said that she had used GHB recreationally when she was 16.

C. Autumn A., Counts 3-6: Lewd Act Upon a Child and Contributing to the Delinquency of a Minor

On February 23, 2007, 15-year-old Autumn A. was a model living in Riverside. She met appellant at an event hosted by her modeling agency. Appellant asked her to appear in one of his modeling shoots. Autumn accepted the offer, and her mother and stepfather later took her to appellant's apartment on North Palm Drive. Appellant asked Autumn's mother to sign an authorization form, and he told her to say that Autumn was 18 on the form. Autumn and her parents went with appellant and his assistants to the beach, and Autumn posed for appellant there. Autumn wore a transparent shirt in some of the photographs. Appellant told Autumn that her breasts would be edited out of the pictures before they were published. Appellant's assistant, Holly G., testified that Autumn told her that she was 15.

Appellant told Autumn he could make her a famous model. He said that Autumn could only be successful if she moved to Los Angeles, and he said she could stay in his

apartment. He explained to Autumn and her mother that his assistants, Holly and Lori, would also be in the apartment. Autumn agreed to try the arrangement on the weekends.

A few days later, Autumn's parents took her to appellant's apartment. Appellant gave Autumn a dress and heels to wear, and he took her to an event attended by several celebrities. Autumn mentioned to someone there that she was still in high school. When they left the event, appellant told Autumn not to mention that she was in high school. Appellant and Autumn went to a party where he gave her an alcoholic drink. Autumn tasted it and poured it out when appellant was not looking. Appellant and Autumn then left for another event attended by various celebrities.

When appellant and Autumn returned to his apartment, appellant told his assistant Lori to go to sleep. Appellant gave Autumn an alcoholic drink and told her to drink it quickly. When appellant was not looking, Autumn poured it down the sink. Autumn changed into her pajamas, but appellant informed Autumn that they were going to Paris Hilton's birthday party. Autumn changed back into the black dress. At that point, appellant brought her into his bedroom. He reminded her to tell people she was 18 and began filming her with a video camera. He asked Autumn her age, and she said she was 18. He asked her to take off her clothing and show her body. After she did so, appellant asked her to "do a show." This made Autumn feel uncomfortable. She put her clothes back on and covered herself with a blanket. Appellant told her she would have to sacrifice to become a model and proceeded to touch her chest and insert his finger in her vagina. He took her hand and placed it against his groin. Autumn pushed appellant away and left the room.

Autumn texted her friend and went to sleep on a couch. She was awakened when appellant tried to lie down beside her. She pretended to be asleep and pressed her body against the couch to prevent appellant from lying down. Appellant left.

Autumn went with appellant and his assistants to a market the next day. Appellant told her it was a good place to be seen. He gave her a shirt to wear, and she removed her bra at appellant's suggestion. Autumn spent the day with appellant until her parents

came to take her home. Appellant encouraged her parents to let Autumn stay in Los Angeles more often.

Autumn decided not to tell her parents about appellant's conduct. When appellant telephoned the following day, Autumn told her mother that she was not interested in doing another fashion shoot with him. Autumn did allow her mother to e-mail appellant some additional photographs of Autumn, as appellant had requested.

Not long after these events, Holly called Autumn and informed her of appellant's arrest. Holly gave her a number to call if anything had happened to her. Autumn then told her mother what appellant had done to her. Autumn spoke to the police on the following day.

D. Nicole G., Count 33: Sexual Penetration by a Foreign Object

In October 2004, Nicole G., a 21-year-old model, was contacted by someone who identified herself as Rebecca Dean. Dean wanted to know if Nicole would be interested in modeling for appellant. Nicole eventually spoke with appellant himself, and he invited her to participate in Fashion Week. Appellant told her she would be staying at the studio with the other girls. Because he was so vague, Nicole reserved a hotel room.

On October 28, 2004, Nicole arrived at her hotel. She was told to go to appellant's "studio," which turned out to be appellant's apartment. Nicole brought her friend Allan H. as a security precaution. As soon as they arrived at the apartment, appellant told Allan to go out and purchase boots for Nicole, which Allan did. There were numerous models at the apartment. Their ages ranged from 15 to 17. Appellant gave the models clothing to change into, and then they took part in a fashion show in Beverly Hills. Afterwards, Nicole and some of the other models went to dinner and a club with appellant. Nicole and Allan returned to their hotel for the night.

On the following day, Nicole attended a charity dinner with appellant and Sanjana. After the dinner, Nicole went to appellant's apartment with appellant and Sanjana. Appellant invited Nicole into his bedroom. Nicole did not find this unusual, since the bedroom had been used for meetings the prior day. Appellant told her that she could become famous like Paris Hilton, and he encouraged her to live in his apartment.

Appellant then exposed his penis. He pushed Nicole down, and inserted his finger into her vagina. Nicole told him to stop, and he eventually did. Nicole left the room. Appellant told her not to contact him again

Nicole returned to her hotel and told Allan that she did not want to see appellant the next day as had been planned. Instead, she and Allan flew home. Nicole reported the crimes to the police after the case was publicized. Allan was called as a witness for the defense. He testified that Nicole was crying when she returned to the hotel. She told him about appellant's behavior on the following day.

E. Eve M., Count 57: Lewd Act Upon a Child

In December 2000, Eve M.,[2] was 15 and living in Santa Barbara. She modeled during Fashion Week in New York City. There, she met appellant, and they became "more than friends." They engaged in some kissing. Eve returned to Santa Barbara and kept in regular contact with appellant. He encouraged her to move to New York to further her modeling career. In August 2001, appellant asked Eve to meet him. Because her mother would not approve, Eve, who was still 15, met with appellant in Santa Barbara after making up an excuse to her mother. Appellant drove to a secluded spot. They kissed, and appellant touched her breasts. He told her to suck on his penis, which Eve did. While she was doing this, appellant pushed on her head, which caused her pain.

Appellant drove Eve back to the movie theater where he had picked her up. They were kissing again when a police officer and Eve's mother interrupted them. Appellant was arrested. The police interviewed Eve, who lied and said that she and appellant had only kissed. She did not want appellant to be punished.

Eve kept in contact with appellant. At trial, she still did not think that appellant had done anything to her that deserved punishment. At some point, at appellant's direction, she wrote him a letter in which she denied that anything other than kissing occurred between them. Eventually, Eve told her mother and the police about the oral sex.

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2 The indictment identified Eve incorrectly as "Eve C."

F. B.O., Counts 51-55: Sexual Penetration by a Foreign Object, Oral Copulation of a Person Under 18, Unlawful Sexual Intercourse, Contributing to the Delinquency of a Minor[3]

B.O. met appellant in February 2007 when she was 17 years old. Appellant found B.O. on a website and contacted her. Appellant told B.O. he was a fashion designer in Beverly Hills and was looking for somebody new. B.O. told appellant she was 17. On February 1, 2007, after talking with appellant for six days, she drove to Beverly Hills from San Luis Obispo County with her friend, Janice Z. Appellant had offered to pay for B.O. 's train ride and suggested they could have a romantic weekend. The two girls missed their train, and appellant talked Janice into driving. The girls planned to stay at appellant's apartment.

When they arrived, appellant's assistant gave B.O. a book with his press clippings. That night they went to a restaurant called Toi's. After dinner they returned to the apartment, and appellant made B.O. a drink. B.O. thought the drink tasted like straight vodka. B.O. began to feel "really out of it." Appellant placed a blanket over the two of them as they sat on the sofa and watched a movie. After B.O. finished the drink, appellant removed her tights and "somehow [her] head was like pushed under the blankets and his pants were down." Appellant's penis was in her mouth. Appellant asked B.O. if she wanted to go to his room and she thought she said, "Sure." B.O. had not intended to have sex with appellant on that trip. After he led her into the bedroom, she lost consciousness. She remembered smelling something "really bad, absolutely disgusting" the first time she regained consciousness. She opened her eyes and saw that appellant's "butt" was in her face and his penis was in her mouth. She blacked out again. She heard appellant tell her she had a tight pussy. She felt him "grinding up on top of [her]." The next morning, she and Janice told appellant they had to go. B.O. admitted that she sent appellant "provocative pictures" because appellant wanted them. She did

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3 The jury acquitted appellant in counts 51 through 54, and it deadlocked in count 55. B.O. 's testimony is included because it is referred to during other portions of the facts and procedural history.

not recall telephoning appellant seven times after leaving his apartment. She did not remember texting appellant many times on that day.

B.O. 's friend Janice testified that she saw appellant's hand was moving B.O. 's head up and down when they sat on the sofa. Later, Janice went to sleep on a couch and was awakened by appellant being on top of her. He put his fingers in her vagina and got on top of her. He pulled down his pants and was going to have sex with her, but she told him, "No." Janice stated that appellant told B.O. and her that he wanted to do a photo shoot of them, but they refused. They both left the apartment the next day and drove home. Janice gave a statement to an investigator named Laurie Devine in 2008. Janice talked to a hotline in June 2007.

B.O. discussed the case with Holly on various occasions prior to trial. B.O. also tried to contact victims and people talking about the case. B.O. posted comments to websites, asking people to contact her about the case. B.O. was contacted by an individual who identified himself as "Qusling Kismet." He said he was interested in appellant because appellant had assaulted a friend of his. Kismet claimed that he had managed to hack into appellant's computer. He gave B.O. a document listing the victims and their e-mails in this case. B.O. testified that she forwarded this information to the police.

G. Stacey F., Count 56: Misdemeanor Sexual Battery

Stacey F. was 17 in December 2006. She was a model and put pictures of herself on a modeling website. She responded to a mass posting on the same site that advertised jobs for lingerie models. The ad said the models would work with appellant. She spoke with a Lisa Martinovic, who wanted Stacey to have a conversation with appellant before an interview was set up. After Stacey spoke with appellant, Lisa told Stacey the details of the interview and advised her to wear a skirt or dress rather than jeans or shorts, and to look sexy. Stacey was led to believe the meeting place would have a receptionist and a hallway waiting area. She wanted to know this because she planned to bring someone with her for safety.

Stacey went to the address given her, which was appellant's North Palm Drive apartment, with Adam Bracamonte. She wore a dress that reached to her mid-thigh, and she wore underwear. She was let in the building by another resident, and she went to the rooftop as instructed. Bracamonte waited in the car. Appellant met her there and, since it was cold and dark, they went downstairs to the apartment, which was "a complete mess." Stacey was uncomfortable because it was an unprofessional setting. However, it "was a good opportunity," and she did not "really know how it was supposed to work." Appellant asked her to sit and offered her a drink three or four times, which she refused. He kept asking her if she wanted to take a shower to relax or to dance around, but she refused at least 15 times.

Appellant mentioned that he needed a date for the Oscars. Stacey told him she was 17 and it would probably not be appropriate. Appellant wanted to take pictures of her with a camera, and appellant asked her to take off her dress. She did this, and appellant told her to loosen up. Afterwards, she sat on the sofa again and flipped through appellant's press clippings that he wanted her to look over.

Appellant began to make phone calls, and because Stacey's dress was on the other side of the room, she felt uncomfortable about getting up and going to put it back on. She thought it was rude. Appellant came over and tried to sit next to her on the couch. At that point, Stacey got up to go and get her dress. While she was sitting up, appellant grabbed her waist and pulled her back down on the couch. He put his hand on her thigh. Half of her was on his lap and other half was on the couch. Appellant tried to kiss her on the mouth. She moved her head and the kiss landed half on her mouth and half on her cheek. Stacey got up to get her stuff and leave. She told appellant she had someone waiting for her in the car. As soon as appellant found this out, he became anxious. He got her stuff and handed her the dress. He then escorted her downstairs. Appellant told her to come back when she had lost about 10 pounds. Bracamonte later informed Stacey about appellant's arrest. Stacey eventually contacted the Beverly Hills police.

H. Amanda C., Counts 10-11: Sexual Penetration by a Foreign Object, Using a Minor for Sex Acts

In February 2007, Amanda C. was 17 years old and living in Pennsylvania. She was registered on a website for models as being in the age bracket of 15 to 22. She received various e-mails and phone calls encouraging her to fly to Los Angeles to model jeans for appellant. She was told that she would be staying in a hotel with two of appellant's female assistants. She was to be reimbursed for the airfare.

Amanda arrived in Los Angeles on the morning of March 6, 2007. Appellant told her to take a shuttle to the Four Seasons Hotel. Amanda called appellant from the hotel, and appellant met her in the lobby. He took her luggage and directed her to follow him. He led her to his apartment a few blocks away on North Palm Drive. Amanda was unable to talk to appellant during the walk because he was on the phone. She had believed she would be staying at the hotel.

Appellant and Amanda entered appellant's apartment, and Holly and Lori were there. Appellant immediately took Amanda to his bedroom. He told her she could be "the next 'it girl'" like Paris Hilton. He also said that, if she did not follow his instructions, she would have to find someplace else to stay that night. Amanda told appellant that she was 17 years old, and appellant replied that she should tell people she was 18 years old. Appellant began filming Amanda with a video camera and asked her how old she was. Because of appellant's instruction, Amanda said she was 18. Appellant told her to take off her clothing. When she hesitated, appellant told her that models had to be comfortable doing that. Amanda removed her dress, and then complied when appellant told her to fully disrobe. Appellant approached Amanda and commented that she was visibly shaking. He then inserted his finger into her vagina and touched her buttocks. The touching is visible on the videotape, at which point the video ends. Amanda pulled away from appellant and ran to the bathroom. Amanda dressed and left the bathroom to find appellant and his assistants using their computers. Appellant asked Amanda to walk to a nearby market and buy some cookies for him. While she was out,

Amanda called and texted her mother and boyfriend, but did not tell them what had occurred.

That evening, Amanda went out to dinner with appellant, Holly, Lori, and another individual. While they were at dinner, the Beverly Hills police arrived at appellant's apartment pursuant to their investigation of Jessie's claims. The police had an arrest warrant for appellant. Detective Dale Drummond, Jr., or one of the officers with him, found Amanda's suitcase and called her cellular phone number. The police told her they had found it in the hallway after an apparent burglary, hoping that the call would prompt her and appellant to return to the apartment. When appellant and Amanda returned, appellant was arrested. The police interviewed Amanda, who did not report appellant's conduct. Amanda flew home that night. Officers searching the apartment found the videotapes of Amanda and Autumn. Both videos were played for the jury. Amanda denied that she e-mailed photographs of herself wearing little clothing to appellant on March 14, 2007, after the incident with appellant.

II. Computer Evidence

Evidence of the contents of several computers was introduced in relation to counts involving Jessie B. and B.O. O. (whose accusations did not result in convictions). One computer was found by police on the mattress in appellant's bedroom. In the living room, the officers found four more computers. A G4 laptop had a hard drive labeled "Anand Jon One" that contained numerous photographs and documents related to appellant and his business. There was a 15-page password-protected document on the G4 laptop entitled AJCQST.DOC. It was created on January 14, 2002, and was last accessed on December 20, 2006. This document begins with the words, "Research on Boy 2 man journey-through sexcapades-mainly fantasy-THIS IS NOT REAL!!!" and describes sexual encounters. Some examples of the entries included: "Cindy []: Parsons life model, liked the violence"; Elissa: Italian, Parsons/promoterspice, border line pain. Ravaged her. Lots of blo. Scent of a woman was strong"; Joanna []: oral service ugly/great lips to be serived [*sic*] by." Analysis of the G4 computer revealed numerous

documents indicating it was owned by appellant. On that computer, officers found three documents that were similar in content to the "AJCQST" document found on the laptop.

An examination of the Vaio laptop found in appellant's bedroom revealed numerous documents indicating it was owned by appellant. On that laptop, officers found numerous pornographic images of women with penises in their mouths. In some of the images, the women appear to be choking or crying. Some of the women were restrained. The laptop was used for numerous visits to pornographic websites. The internet history for the period from February 26, 2007, to March 4, 2007, showed visits to websites with titles such as Misterstiff, Teen Tits and Ass, YoungThroats, GaggingWhores, ThroatPokers, Facial Humiliation, and Messiest Facials. The internet history indicated that at 11:56 p.m. on March 4, 2007, appellant visited Jessie's MySpace page. He then visited several pornographic websites. This was shortly before her arrival.

An examination of the Vaio with the Hitachi hard drive indicated that it was not used by appellant, but by Holly and her relatives. That computer's internet history revealed visits to pornographic websites, but only on one date in 2006. This pornography was different than the pornography found on appellant's laptop

III. Evidence Code Section 1108 Witnesses

A. Courtney S.

In 2005, Courtney S., was 19 years old and was studying fashion design and merchandising. She responded to an online job advertisement that appellant had placed. Courtney accepted a position as an intern for appellant. Courtney's first day of work was in June 2005 at appellant's apartment on North Palm Drive. On the evening of her first day of work, Courtney went to a party with appellant and Lori. Courtney drank a great deal of alcohol. Upon returning to appellant's apartment, she accepted appellant's invitation to sleep in his bed. Appellant persistently tried to have sex with Courtney. He touched her vagina and breasts, and acted as if sex "was expected." He finally relented. On the next day, Courtney again accepted appellant's invitation to spend the night, and appellant again attempted to have sex with her. She resisted, and he eventually gave up because he needed her unpaid assistance. She continued to work for appellant for the

next six months, at least five days a week. She was excited to be working in fashion, which she had been wanting to do for a long time. After Courtney made clear that she would not have sex with appellant, he treated her "like garbage." He was verbally abusive and criticized her appearance. Courtney was told not to speak with Lori and Holly, who were living in appellant's apartment and not to speak with potential models who came to the apartment. According to Courtney, when a modeling hopeful arrived with parents, appellant would take them to the rooftop patio. As for the hopefuls who arrived without parents, appellant would take some of them to his bedroom and close the door. Some of the hopefuls that came to the apartment were only 13 years old. Sometimes appellant told Courtney to leave the apartment when a hopeful arrived. Appellant received "a top award" for being "a top fashion designer" in Canada during this time period.

B. B.D.

On March 19, 2003, B.D. went with her mother to the L'Ermitage hotel in Beverly Hills for a modeling audition for appellant. B.D. was 14. The other models there were noticeably taller and "more professional" than B.D. Appellant had B.D. and the other models show him how they walked. Appellant directed the taller models to leave, and invited only B.D. and another short model named Heather to remain, telling them they would attend a pre-Oscars party with him. While Brigit's mother waited, appellant led B.D. and Heather into another room to try on clothing. Appellant attempted to kiss B.D. while she was changing, but she ducked, and he kissed her forehead. Appellant invited B.D. to return. Appellant mentioned that he had to leave to speak to Susan Sarandon about using something of his at the Academy Awards.

B.D. and her mother returned to the hotel a few days later. Various other people arrived at the hotel, and there was a party. A photographer took photographs of B.D. Appellant led B.D. to a balcony where he kissed her and told her he could make her career. B.D. pushed him away and returned to the party. B.D. posed for more photographs. She tried to speak to her mother, but appellant told her to keep moving through the party. At one point, appellant followed B.D. into the bathroom, and kissed

her and touched her buttocks. B.D. pushed him away. Appellant invited B.D. to participate in a fashion shoot the next day. B.D. told her mother that she was not interested in doing any further modeling.

Appellant repeatedly asked B.D.'s mother for another photo shoot. B.D.'s mother told appellant that B.D. was not interested. Two days later, B.D. told her mother about appellant's conduct. She also reported the touching to the police.

C. Tara S.

In the fall of 2002, Tara S., was 17 years old. She met appellant through a mutual friend. In November 2002, Tara took the train from her home in New Jersey to New York to meet appellant and other friends. She first went to his apartment, where she dined with appellant and his mother. After dinner, appellant invited Tara into his bedroom and closed the door. Appellant told her that she could be a model, and he asked her to remove her clothing so that he could photograph her. Tara reluctantly took off everything but her underwear. She refused appellant's request to take it off. She allowed appellant to massage her. He took off all of his clothes except his underwear. He straddled her and began rubbing her back, and he pressed his erect penis against her lower back. Tara told appellant that she did not want to have sex with him. Appellant pulled down her underwear and inserted his penis into her anus, which made her scream. She was in a lot of pain. Appellant then pinned Tara on her back and forced his penis into her mouth. He moved her head up and down until he ejaculated. Tara grabbed her clothing, and ran out of the apartment. She returned to New Jersey on the train.

Appellant called and texted Tara "obsessively" after that. He said he could turn her into a New York socialite. Tara did not report the crimes to anyone until late 2006 or 2007, when the case received media attention.

D. Kristi W.

In 2002 or early 2003, Kristi W. was 15 years old and a model. She met appellant at her modeling studio in Texas. Appellant invited her to come to New York to observe Fashion Week and be photographed. Kristi said that she was too short to be a runway model. Appellant nevertheless encouraged her to come to New York.

Soon after that meeting, appellant invited Kristi to dinner. Kristi and her mother arrived at appellant's hotel room and knocked on the door for a long time. Eventually, appellant opened the door. A girl, whom Kristi and her mother did not know, came out of the bathroom and clung to Kristi's mother. The girl then called her mother and asked her to pick her up.

On approximately February 6, 2003, Kristi, who had recently turned 16, went with her mother to attend Fashion Week in New York. They went with a group of other models, all of whom were much taller than Kristi. Kristi and the other models went to appellant's apartment. Kristi understood that she would be performing clerical work for appellant during Fashion Week. In appellant's office, appellant gave Kristi a dress and asked her to put it on. Kristi changed in the bathroom and returned to the office. Appellant closed the door, and kissed Kristi. She pushed him away. He inserted his penis into her vagina, and she again pushed him away. Appellant dragged her to a bed in the office. He told her that he knew the mob and would "get rid" of her if she resisted. He covered her mouth and inserted his penis into her vagina. She attempted to resist, but he held her down and inserted his penis into her anus. Eventually someone knocked on the door. Appellant again warned Kristi not to say anything.

Kristi returned to the apartment to work for appellant on the following two days, but did not enter the room with the bed. She did not report the crimes to anyone, other than a close friend, until appellant's arrest was publicized. During an August 2008 interview with the police, Kristi did not mention that appellant put his penis in her anus.

Evidence was presented that Kristi posed for "sexy photos" in her lingerie when she was 15. Kristi testified that she did not recall having subsequent contact with appellant, but phone records indicated that appellant called her twice in February 2003.

E. Kristen S.

In the summer of 2005, Kristen S. was 19 years old and living in North Carolina. Appellant contacted her through MySpace. Appellant told Kristen that he was going to be mentioned in a magazine, and he invited her to be his guest at the related party in New York City. It happened that the sister of Kristen's friend, Sonie, lived in New York and

was celebrating her birthday that weekend. Kristen told appellant that she could fly to New York and attend the party. On approximately September 8, 2005, Kristen flew to New York with Sonie. Kristen planned to stay at the home of Sonie's sister after the party. At the airport, Kristen was met by a limousine, and driven to a restaurant, while Sonie went to her sister's.

Upon arriving at the restaurant, Kristen sat at a table with appellant and the manager of a famous group of musicians, who had provided the limo. After Kristen used the restroom, appellant told her that she had to ask his permission the next time she wished to do so. She and appellant rode in the limousine to appellant's apartment. During the drive, appellant kissed her, which made her feel uncomfortable. At the apartment, Kristen called Sonie and asked her to come get her, but Sonie said that it was too late. Appellant's sister and mother, Sanjana and Abraham, were both in the apartment. Because she had no money and did not know where else to go, Kristen accepted appellant's offer that she sleep on a couch in the apartment's main room. Appellant was going to sleep on the other couch. Sanjana and Abraham were in the apartment's bedroom. Appellant asked Kristen to go into the bathroom. When she entered, he closed the door, grabbed her head, and pushed it down next to his penis. Kristen resisted. Appellant left the bathroom in disgust and went to sleep.

On the following day, Kristen assisted Sanjana with a fashion show, and then attended a party with appellant. She did not know where else she could go. She eventually left the party and went with Sonie to get her luggage from appellant's apartment. She and Sonie returned to North Carolina the next day.

Kristen did not remember subsequently calling or e-mailing appellant, but records showed that she e-mailed him on September 14, 2005, saying that it was "very nice meeting" him. She also called him in September, October, and December 2005. In December 2006, appellant contacted Kristen. He said he had seen her name on a list of victims, and he warned her against cooperating with the police. He promised to arrange for her to visit a tiger refuge if she did not help the prosecution. Kristen had told appellant that she loved animals.

F. Holly G.

Holly G. was 19 in 2005, and she went to a modeling audition at appellant's apartment in New York. She was given jeans that were too small for her, and she declined to wear a transparent dress. Appellant led her to a bedroom and asked her if she was "a bad girl like Paris Hilton." He said that "only bad girls" became famous models. Appellant kissed Holly and exposed his penis. He pushed her head down and forced his penis into her mouth. Holly pushed appellant away, and left the room. Appellant warned her that if she told anyone what had occurred, he would ruin her modeling career.

Holly's aunt was supposed to pick her up, but Holly could not reach her. She at first said she had a dead battery and then said she did not know her aunt's telephone number. She decided to stay in appellant's apartment. Eventually, the other models left. Holly went to the gym with appellant and then returned to his apartment. At appellant's suggestion, Holly changed into pajamas and drank something. She then lost consciousness. She awoke to find appellant inserting his penis into her anus. Holly told appellant to stop and again lost consciousness. During one discussion with the police, Holly did not mention that appellant put his penis into her anus.

After waking at appellant's apartment, Holly took a taxi to a restaurant she knew her aunt frequently called, and obtained her aunt's number from the restaurant. There was evidence that Holly's phone records indicated she used the phone to make various calls, including to her aunt, during the time she claimed it had been inoperable.

During the next month, Holly attended various events with appellant. A few months later, Holly went to India on an AIDS awareness tour with Sanjana. In January 2007, Holly moved into appellant's apartment on North Palm Drive and started working as his assistant. She would contact models and arrange for them to fly to Los Angeles. On some occasions, appellant would take the models to his bedroom. The models would sometimes spend the night in the bedroom. Appellant told her not to speak to some of the models.

Holly testified that the Sony Vaio laptop with a Hitachi hard drive was hers. The other computers belonged to appellant.

Holly was contacted online by someone identifying himself as "Qusling Kismet." Kismet sent Holly a list of the alleged victims in the instant case. A transcript of an exchange Holly had with this individual appeared on the gossip website, TMZ. Beverly Hills Police Detective George Elwell (a defense witness) testified that Holly gave him this information during the grand jury proceedings. Detective Elwell did not investigate the matter.

Beverly Hills Police Sergeant Mark Miner, the prosecution's computer expert, was informed that appellant claimed to be a victim of hacking. Sergeant Miner examined appellant's computers but found no evidence of hacking. The jury was instructed that evidence regarding the alleged hacking was admitted not for the truth, and it could be considered only as it related to witness bias.

IV. Defense Evidence

Deputy District Attorney Liliana Gonzalez confirmed that Eve M. reported to police that only kissing had occurred between her and appellant in Santa Barbara. Gonzalez did not "get her to change anything." Gonzalez did not recall when Eve first mentioned the oral copulation. B.O. did not tell Gonzalez that she had obtained the password to appellant's private e-mail account. B.O. did not tell her about Qusling Kismet's hacking activity. Gonzalez did not suggest to B.O. that she had been drugged.

Adam Stahnke, a police officer for the City of San Luis Obispo, interviewed Stacey F. She did not say that appellant touched her thigh. She said that the only physical contact occurred when appellant grabbed her waist and tried to kiss her. At the end of his report, he wrote, "No crime committed."

Alicia H. testified that she was B.O. 's boss at a retail store during the summer of 2008. She heard B.O. say that she needed to get her story straight with Janice. B.O. said she hoped her involvement in the case would lead to financial gain. Alicia believed that B.O. was a habitual liar. Alicia did not contact the police about B.O. but instead informed appellant's attorneys.

The defense presented evidence indicating that Amanda C. changed her account login after her testimony for the prosecution, when it was revealed that she had e-mailed

photographs of herself in various stages of undress to appellant. Amanda denied the e-mails and denied that the e-mail account was hers.

Beverly Hills Police Investigator Nicole Cranham testified that Holly did not mention during their interview that appellant inserted his penis into her anus. Cranham testified that she interviewed Janice Z. Janice said she really did not see appellant do anything to B.O. because there was a blanket covering the both of them. Cranham was not aware of who Qusling Kismet was and of his claim to have hacked into appellant's computer.

Detective Elwell testified that he lacked adequate training to handle the case. This was the first sex crime he investigated. He advised the victims not to file any civil lawsuits until the criminal case had run its course. He read only portions of the "chat" Holly G. gave him regarding Qusling Kismet in reference to hacking appellant's computer. He did not do any further investigation of B.O. 's contacts with Qusling Kisment. He would have handled interviews of the victims differently if he had the opportunity to do them again. He regretted failing to ask his superiors for more assistance. He stated that Cranham, who was to assist him, had failed to perform the duties assigned to her. She had been reassigned.

When appellant was arrested he said to the police, in reference to Jessie B., "I had a date with that person, she was supposed to spend the night, how is that rape?"

DISCUSSION

I. Trial Court's Refusal to Recuse District Attorney's Office Postverdict

A. Appellant's Argument

Appellant contends that "[t]he trial court should have recused the District Attorney's Office after they exposed their inability to handle this case in a fair and even-handed manner." He argues that "[a]ny neutral arbiter of the facts must clearly see that the District Attorney employees acted with bad faith intent to cover up [the juror's] misconduct in order to protect their guilty verdict."

B. Proceedings Below

On November 6, 2008, the jury foreperson wrote a note to the court in which he stated that Juror No. 12, Alvin Dymally, was refusing to discuss the law and evidence with the other jurors. On November 10, 2008, the trial court questioned the jurors about the note. The jurors expressed their concern that Dymally was not deliberating as he should. The prosecutor asked that Dymally be discharged. The defense argued that Dymally should remain on the jury. The trial court ruled that the jury could resume deliberations as constituted.

Final verdicts were returned on November 13, 2008.[4] On January 28, 2009, the defense filed a motion to recuse the Los Angeles District Attorney's (DA's) office, claiming that the DA's office had a vested interest in maintaining appellant's conviction. This vested interest clouded the office's ability to fairly investigate the accusation of juror misconduct by Dymally. This inability was shown by the DA's office stopping a planned meeting between Dymally and Sanjana Alexander, appellant's sister. Appellant claimed he would not receive a fair hearing on his new trial motion.[5] The motion stated that the DA's acts were outrageous and extreme in nature. Also, the defense intended to call appellant's prosecutors and the senior investigators involved as witnesses in the new trial motion based on juror misconduct.

At the hearings on the recusal motion on April 1, April 17, and April 27, 2009, the trial court emphasized that the focus was on protecting the defendant's rights. The trial court heard testimony from witnesses called by the defense team: Mara McIlvain and Frances Young, the trial prosecutors; Brian Bennett, a supervising DA investigator; Laurie Devine and Cristina Turpen, senior investigators for the DA's office; Chandrea

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4 The jury found appellant not guilty in counts 51-54, and it deadlocked in counts 28, 29, and 55.

5 The new trial motion was based on the ground that juror misconduct denied appellant the right to have the charges against him determined by a fair and impartial jury and on the actions taken by the prosecution in investigating the issue of juror misconduct, which "effectively destroyed potentially exculpatory evidence."

Parker and Ronald Valdivia, DA investigators; Richard Doyle, a deputy DA and director of special prosecutions; and Curtis Hazell, the assistant DA. The prosecution called Sanjana.

The testimony revealed that, on November 24, 2008, Leonard Levine, one of appellant's trial attorneys, had an unreported ex parte meeting with the trial court. He informed the court that Sanjana and Dymally had contacted each other during trial. Mr. Levine asked the court to appoint the Attorney General to investigate the matter. The trial court informed Mr. Levine that it had a planned vacation beginning the following day, and that the matter would have to be discussed with the prosecutors first. In the meantime, the trial court decided to issue an order stating that "[n]either the prosecution nor the defense, directly or indirectly, or through any third party, is to have any contact whatsoever with any of the trial jurors or alternates in this case, except upon prior written order by the Court."

The prosecutor received a copy of the trial court's order on approximately December 3, 2008. On January 6, 2009, after the trial court had returned, defense counsel contacted the court and asked for another ex parte conference. The court refused to meet without the prosecutor being present, and defense counsel contacted the prosecutor that afternoon, stating that she had to appear before the trial court on the following morning. Counsel did not explain the purpose of the appearance.

Prosecutors McIlvain and Young and defense counsel, Mr. Levine and Donald Marks, appeared before the court late in the morning on January 7, 2008. The defense gave the prosecutors a copy of the motion for new trial and told them for the first time of the contact between Sanjana and Dymally. Mr. Levine said that Sanjana had arranged to meet Dymally that afternoon at 3:00 p.m. at a Starbucks and the meeting was to be secretly recorded. It was revealed that Sanjana had spoken to Dymally at least three times on January 6. Defense Investigator Russell Greene had been aware of these conversations.

The prosecutors were concerned about the meeting and asked the court for guidance. The court commented that the meeting might lead to useful information, but it

declined to direct the parties on how to investigate the matter. The court stated it would rule on motions filed by the parties after their investigations. The trial court also stated that its prior no-contact order no longer applied.

After the meeting with the trial court, the prosecutors attempted to consult their supervisor for guidance but were unable to find the supervisor. They then contacted the head deputy, Lisa Gomez. It was determined that the prosecutors should consult Richard Doyle. This occurred at approximately 12:00 p.m.

The prosecutors explained to Doyle that the defense team was going to record a meeting between Sanjana and Dymally. In light of past misconduct by Sanjana, Doyle was highly suspicious of the defense team's motives. He believed the meeting was a "show." At the motion hearing, Doyle summarized the various acts of misconduct by the defense and Sanjana during trial. He specifically mentioned an incident where the prosecution was going to search appellant's jail cell for certain records, and it appeared to Doyle that one of the defense attorneys had removed the records before they could be found. Doyle thought that the meeting setup was very suspicious, since the defense had the information for some time and had notified the prosecution only a few hours before the plan was to be put into operation. He stated he had no time to analyze or prepare, adding, "So to me it smelled—it smelled—it smelled of a trap." The prosecutors asked Doyle for permission to use an investigator. Because the prosecutor's supervisor was not available, Doyle gave authorization. Assistant DA Hazell testified that he briefly joined the prosecutors and Doyle, but he did not participate in the discussion related to tactics.[6] He recalled a discussion of how rushed the decision had to be.

After consulting Doyle, the prosecutors spoke to Investigator Bennett. They gave him a copy of appellant's new trial motion with declarations by defense counsel and Sanjana. Bennett contacted prosecution Investigators Devine and Turpen, who had worked on the case previously. They arrived at approximately 12:45 p.m. McIlvain left

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6 The trial court allowed the defense team to go up the chain of command to Assistant DA Hazell because it believed the defense was entitled to know whose decision it was to intercept the juror.

Bennett's office at that point and had no further involvement in that day's investigation. Bennett was also suspicious of the defense motives due to the prior misconduct and the late disclosure. Bennett suspected that the phone records the defense had presented were Sanjana's way of creating a paper trail. He also believed the meeting was meant to be a show by Sanjana.

Bennett believed that a Starbucks was not a good place to create a recording. He doubted that the defense team possessed the competence to record the meeting. Bennett therefore determined that prosecution investigators would interview Sanjana on her own. They would also intercept Dymally and interview him. They would then allow Dymally to meet with Sanjana if he wished. Bennett said the goal was to interview the sister separate and interview the juror when he showed up, lock them into their stories, and conduct an investigation from there. This was a standard and effective investigation technique that the investigators used "every day." The purpose was to confirm that they were not "in cahoots." Bennett informed Young and McIlvain that Dymally would be intercepted, and they neither approved nor disapproved. Young believed McIlvain had left before Bennett said he would have investigators intercept Dymally.

During his questioning of Bennett, Mr. Levine quoted from the recording made when Dymally was stopped. Mr. Levine asked Bennett if he knew that the investigators asked Dymally, "Do you have any weapons on you?" The investigators told Dymally, "Keep your hands where we can see them." They told him that "the reason . . . [they] wanted to speak to [him] . . . this is in regards to Sanjana Alexander"—"to the Anand Jon Alexander case." They said, "Okay . . . you haven't done anything wrong, that we're aware of." They stated, "We rather hear the story from you rather than you have to go before the judge or anybody—other officers—that come around and question you . . . ." And, "I understand where you're coming from . . . we're investigating this case . . . any possible dealing with tampering with the jury." When asked if he did not think this might intimidate Dymally about meeting with Sanjana, Bennett replied that it was not intentional.

The defense motion and declarations made no claim that Dymally was attempting extortion, which might have required a different procedure. It appeared to Bennett that Dymally simply had a romantic interest in Sanjana. If there had been an indication of extortion, Bennett would have proceeded differently.

Prosecutor Young had no involvement in advising the investigators as to how to proceed. Young testified that she was not in a position to direct that type of investigation and micromanage it. Her job was to tell Bennett to find out the reason for the contact. There was no plan to stop the meeting. The plan was that the meeting would take place after Dymally was questioned. Young believed the plan was a fair way to get to the truth—by surprising Dymally and asking him point-blank why he was contacting this woman. The expectation was that he would meet her. Young was driven over to look at the Starbucks location but left before Dymally arrived. She went only out of curiosity, and no one sought advice from her while she was there.

Doyle was not present for the meeting with Bennett and was not involved with the decision to intercept Dymally. At approximately 3:00 p.m., Doyle called Young and asked for an update. Young reported that the investigators had decided to intercept Dymally.

Investigators Devine and Parker went to Sanjana's apartment building at approximately 2:30 p.m. They interviewed Sanjana in the presence of Defense Investigator Greene for about 20 minutes. Parker stated they did not intend to interfere with the meeting, only to observe it. Shortly before 3:00 p.m., the investigators walked over to the Starbucks. It was understood that Greene would place a wire on Sanjana before she went to the Starbucks. Sanjana and her friend, Lauren Boyette, entered the Starbucks a few minutes later. The DA investigators did not inform the defense of their plan because they did not want the defense to interfere.

Investigators Turpen and Valdivia waited near the Starbucks and intercepted Dymally. They identified themselves and spoke to Dymally for approximately 15 minutes. Valdivia said he was never told specifically what to do. He was given information, and with that information he used his own judgment as to what needed to be

done. He did not consider how intercepting Dymally might affect the defense's ability to have a surreptitiously recorded conversation of first impression. When Bennett, who was in a nearby vehicle, alerted Valdivia that Dymally was approaching, Valdivia and Turpen crossed the street and stopped Dymally. Valdivia showed Dymally his badge. Dymally said he wanted to talk to friends of his, and later said his friend was a police officer. Valdivia wanted to put Dymally at ease. Dymally said he would call the investigators by noon the next day. Valdivia did not tell Dymally that their conversation was being recorded. The investigators allowed Dymally to leave. Dymally did not show up at the Starbucks.

Turpen testified at the hearing that the deputy DA's had no input into how the investigation was to occur or what they wanted to achieve in that investigation. Bennett and the other investigators did not discuss the plan with them or inform them of their decision. The purpose of conducting separate interviews was to find out what was going on. Turpen believed Valdivia asked Dymally if he had any weapons.

During his questioning of Turpen, Mr. Levine quoted from the recording made when Dymally was stopped, and asked if she remembered Valdivia asking "Do you think it's unusual that we would intercept you?" and Dymally replying, "Yes. Oh, yes." Turpen was then asked if she really believed that after informing Dymally of their investigation he would go ahead and meet with Sanjana and discuss what he might have discussed previously. Turpen replied that it was his choice. Mr. Levine then quoted Valdivia stating, "Is it your intention to speak with your police officer friends before you met with what's her name? Sanjana? Before Sanjana, or are you gonna speak with Sanjana prior to speaking with your police officers [*sic*]?" Dymally replied, "No, I'm not going with speak with her. I'm not going to speak with her." Turpen said to Dymally, "Okay, so you've changed your mind?" Dymally said, "This is weird to me." Turpen stated, "Understand my point . . . it's weird enough . . . to the point where you've decided . . . you're not gonna speak with her?" Dymally replied, . . . "I'm—no—no, of course not, 'cause I don't know what's going on . . . . You understand? I don't know." Turpen stated, "We're not telling you how to conduct yourself." Dymally replied, "No. I know

that." Turpen said, "we're not telling you what to do . . . ." Dymally stated, "I know you're not . . . but from my understanding, you're doing an investigation . . . . I understand 100 percent that [*sic*]. I'm just completely freaked out about this." Turpen was then asked if it was not her goal that Dymally not go ahead and meet with Sanjana, and Turpen replied that it was not.

Bennett testified that, when Turpen and Valdivia learned that Dymally was not going to the meeting, they called the two investigators inside the Starbucks to notify them. They did not tell Sanjana because they were conducting an investigation. They did not want to tip their hands, since they still planned to contact and talk to Dymally.

At a hearing on January 13, 2009, the prosecutors informed the defense that prosecution investigators had intercepted Dymally. On January 28, 2009, the defense then filed their motion asserting that the entire Los Angeles County DA's office must be recused on the grounds that the office had a vested interest in preserving appellant's conviction, and that the manner in which the prosecution had investigated the claim of juror misconduct reflected bias. On the same day, the defense filed a supplemental motion for new trial on the grounds of juror misconduct and prosecutorial misconduct (related to the prosecution's investigation of the juror misconduct).

On February 23, 2009, the California Attorney General filed an opposition to the recusal motion. The prosecution filed a response to the recusal motion and a response to the motion for new trial. The prosecution's response was supported by a declaration by McIlvain, who described her recollection of events, and denied that the prosecution had engaged in unethical behavior or violated any court order.

Sanjana also testified at the hearings on the recusal motion. She stated that on approximately October 21, 2008, she was in the courthouse cafeteria with her mother when Dymally handed her a piece of paper with a phone number and said, "You have to call us." She did not mention this incident to anyone. A few days later, Sanjana was driving through Glendale with her husband, and she told him to stop at a pay phone. She called the number given her by Dymally from the pay phone because she was afraid and did not want Dymally to learn her phone number. Sanjana's next contact with Dymally

was on approximately October 31, 2008, on what Sanjana believed was the last day of closing argument. Dymally spoke to her on the elevator in the presence of her mother and Boyette. That same evening, Sanjana called Dymally's number from another pay phone.

On January 6, 2009, Dymally called Sanjana and said it was important that he speak to her and, "You have to know what really happened because, you know, this is not what was to have happened." He asked her where she wanted to meet, and Sanjana suggested the Starbucks because there would be a lot of people. She told him to call in an hour so that they could agree on a time. She said she would have someone with her and he said that was fine. Sanjana called Greene and Levine and informed them of the call. She acknowledged that "after they came with the verdict" she had told Mr. Levine about the conversations she had had with Dymally.

When Dymally called back, Sanjana told him to meet her on the following day. Dymally said something "wrong" had happened, but did not explain. Sanjana hoped that Dymally would tell her something about the verdict in appellant's trial.

During the argument for the People (by the Attorney General) the trial court ruled that there was clearly not a disabling conflict that mandated recusal of the entire DA's office of over a thousand attorneys. Ultimately, the trial court ruled that the recusal motion was denied in its entirety. Although the trial court did not like the fact that the DA investigators had intercepted Dymally, the court found no misconduct on the part of the prosecutors. Even the defense agreed that the decision to intercept Dymally was not made by the two prosecutors. The trial court's order to both sides not to contact the juror was no longer in effect at the time of the interception. The trial court found the defense's argument that the prosecutors showed they were not disinterested was without merit, since only the court and the jury must be truly disinterested. The prosecutor's interest in bringing a defendant to justice was not inappropriate, and no district attorney had been involved in suppressing evidence. Therefore, there was no reason to disqualify the individual DA's, and certainly not the entire office. The trial court also determined that

there had been no evidence of extortion. The trial court noted that the court, the prosecution, and defense counsel all were skeptical of Sanjana's trustworthiness.

C. Relevant Authority

In *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, the court held that the disqualification of a district attorney's office was proper "when the judge determines that the attorney suffers from a conflict of interest which might prejudice him against the accused and thereby affect, or appear to affect, his ability to impartially perform the discretionary functions of his office." (*Id*. at p. 269, fn. omitted.) In apparent response to an increase in unnecessary prosecutorial recusals after *Greer*, the Legislature enacted section 1424, which provides that a motion to recuse a district attorney "[shall] not be granted unless [it is shown by] the evidence [] that a conflict of interest exists [such as] would render it unlikely that the defendant would receive a fair trial." (See *People v. Lopez* (1984) 155 Cal.App.3d 813, 824.)

Although section 1424 does not specify whether there must be an actual disqualifying conflict or merely the appearance of one, "the conflict must be of such gravity as to render it unlikely that defendant will receive a fair trial unless recusal is ordered." (*People v. Conner* (1983) 34 Cal.3d 141, 147.) "In our view a 'conflict,' within the meaning of section 1424, exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner. Thus, there is no need to determine whether a conflict is 'actual,' or only gives an 'appearance' of conflict." (*Id*. at p. 148.) In any event, however the conflict is characterized, recusal is required only when the conflict is "so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings." (*Ibid*.)

When a defendant wishes to recuse an entire prosecutorial office, the evidence of a conflict of interest must be "particularly persuasive." (*People v. Alcocer* (1991) 230 Cal.App.3d 406, 414; *People v. Hamilton* (1988) 46 Cal.3d 123, 139.) The disqualification of an entire prosecutorial office is, moreover, disfavored due to the substantial burden it places upon the People. (*People v. Hernandez* (1991) 235

Cal.App.3d 674, 679-680; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1156.) "In most circumstances, the fact one or two employees of a large district attorney's office[] have a personal interest in a case would not warrant disqualifying the entire office. [Citations.]" (*People v. Vasquez* (2006) 39 Cal.4th 47, 57, fn. omitted.) On appeal, the reviewing court must "'determine whether there is substantial evidence to support the [trial court's factual] findings [citation], and, based on those findings, whether the trial court abused its discretion in denying the motion [citation].'" (*People v. Eubanks* (1996) 14 Cal.4th 580, 594.) Defendants "bear the burden of demonstrating a genuine conflict" by a motion for recusal of the prosecutor and/or the prosecutor's office. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 709.)

D. Motion Properly Denied

We conclude that the trial court's findings were supported by substantial evidence, and its ruling was correct. The first step in the analysis of a motion to recuse a prosecutor is to determine whether the district attorney has a conflict of interest, i.e., whether there is a reasonable possibility the district attorney will not fairly exercise its discretionary function. (*Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at p. 713.) In the instant case, there was very little discretion to be exercised, since the case was over. The prosecutor had only to file a recommendation for sentencing, which traditionally is a recommendation for the highest sentence possible. But it is the trial court that is responsible for sentencing decisions. (*People v. Towne* (2008) 44 Cal.4th 63, 85-86, fn. omitted.) The second half of the inquiry asks whether the possibility of unfair treatment is so great that it is more likely than not the defendant will be treated unfairly during some portion of the criminal proceedings. Since, as the trial court found, there was no conflict, there was no need to proceed to determine if the conflict was disabling to this degree. Even if the trial court had found a conflict, however, there was no evidence of any actual likelihood of bias justifying recusal in the proceedings that remained in this case—the new trial motion and sentencing.

Moreover, "'[r]ecusal of an entire district attorney's office is an extreme step. The threshold necessary for recusing an entire office is higher than that for an individual

prosecutor.'" (*Polanski v. Superior Court* (2009) 180 Cal.App.4th 507, 562.) To recuse an entire district attorney's office, the trial court must consider, among other relevant factors, the size of the district attorney's office, the extent of the communication of the incident to coworkers, the seriousness of the incident, and the impact on the district attorney involved. (*People v. Conner*, *supra*, 34 Cal.3d at p. 148.) Appellant failed to present any evidence that would justify disqualifying the entire DA's office. There was no evidence that the prosecuting attorneys had discussed their case with other DA's. The large size of the Los Angeles County DA's office suggests otherwise. The hearing revealed that appellant's particular prosecutors in the DA's office were not the decision-makers in the interception of Dymally. Therefore, there could be no conflict of interest, regardless of the degree of gravity appellant assigns to the event.

In *People v. Parmar* (2001) 86 Cal.App.4th 781, 809, the court held that a prosecutor's conduct in pursuit of his or her duties, even if erroneous, does not support disqualification. The trial court here echoed this sentiment. (See also *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 843 [prosecutors "'are necessarily permitted to be zealous in their enforcement of the law].'") The trial court also indicated that it was guided by the principle expressed in *Parmar* that "the interest to be served by a motion to disqualify a prosecutor is the defendant's interest in fair treatment." (*Parmar*, at p. 797.) Here, no conflict of interest was revealed by the evidence presented at the motion hearing, and there was no abuse of discretion.

II. Trial Court's Refusal to Grant Immunity to Dymally

A. Appellant's Argument

Appellant asserts that, after Dymally exercised his Fifth Amendment right at the hearing on appellant's new trial motion, and the prosecutor refused to grant him immunity, the trial court "apparently" denied appellant's in propria persona motion to grant Dymally immunity. Appellant asserts that the trial court had the authority to grant such immunity and should have done so in order to allow the truth of Dymally's actions to be brought to light in order to decide the new trial motion. The failure to do so resulted in a denial of due process.

B. Proceedings Below

On June 12, 2009, and July 6, 2009, during the hearing on the new trial motion argued by defense counsel, Dymally refused to testify and asserted his Fifth Amendment privilege. After the new trial motion was denied, appellant sought and received permission to represent himself during posttrial proceedings. On August 17, 2009, appellant filed a motion in propria persona requesting the trial court to grant Dymally immunity. The trial court told appellant at a hearing on August 20, 2009, that, although it *might* have the ability to grant Dymally immunity, it would not do so. The trial court noted that it had already cited Dymally for contempt and had set the matter for hearing.

C. Relevant Authority

The California Supreme Court has "characterized as 'doubtful' the 'proposition that the trial court [possesses] inherent authority to grant immunity.' [Citations.]" (*People v. Stewart* (2004) 33 Cal.4th 425, 468; *People v. Lucas* (1995) 12 Cal.4th 415, 460 (*Lucas*).) The court has also stated that it is "possible to hypothesize cases where a judicially conferred use immunity might possibly be necessary to vindicate a criminal defendant's rights to compulsory process and a fair trial." (*People v. Hunter* (1989) 49 Cal.3d 957, 974 (*Hunter*); see also *People v. Samuels* (2005) 36 Cal.4th 96, 127.) The great majority of cases reject the notion that a trial court has the power to confer immunity on a witness called by the defense. (*In re Williams* (1994) 7 Cal.4th 572, 610.) The case of *Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d 964 (*Smith*) is the case in which *Hunter* and subsequent decisions found a series of elements useful in determining whether judicially conferred immunity is necessary. (*Hunter*, *supra*, 49 Cal.3d at p. 974.) "[T]he *Smith* court . . . recognized that 'the opportunities for judicial use of this immunity power must be clearly limited; . . . the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity . . . . [¶] [T]he defendant must make a convincing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case. Immunity will be denied if the proffered testimony is found to be

ambiguous, not clearly exculpatory, cumulative or it is found to relate only to the credibility of the government's witnesses.'" (*Hunter*, *supra*, 49 Cal.3d at p. 974, quoting *Smith*, *supra*, 615 F.2d at p. 972.)

D. Immunity Properly Withheld

Assuming, as the courts did in *Lucas* and *Hunter*, that judicial authority to grant immunity exists, we conclude, as did the trial court, that the circumstances in this case did not meet the stringent requirements described in *Hunter* and *Smith* that would allow for a grant of immunity to Dymally. Appellant's offer of proof "fell well short of the standards set forth in the one case which has clearly recognized such a right." (See *Hunter*, *supra*, 49 Cal.3d at p. 974.)

The trial court's ruling is adequately supported by the record. Immunity should be granted only when the witness in question could provide clearly exculpatory testimony. (*People v. Williams* (2008) 43 Cal.4th 584, 622-623.) Such is not the case here. Dymally's testimony was not clearly exculpatory, since there was no indication that his interest in Sanjana influenced his votes or those of the other jurors. Dymally had already testified regarding his contacts with Sanjana and there remained only his examination regarding the contents of the October 27, 2008 telephone call Sanjana made to Dymally. Considering that the call had been made approximately eight months earlier, Dymally could have added very little to the recorded contents of that call, of which the trial court and the parties heard three versions. In his testimony, Dymally gave no indication that any other person was involved in his attempts to communicate with Sanjana. Appellant has thus failed to show that the lack of further testimony by Dymally was prejudicial. The key issue in an analysis of defense use immunity is whether the defendant was denied a fair trial. (*U.S. v. Lord* (1983) 711 F.2d 887, 892.) Appellant had a fair hearing on his motion for new trial, and the trial court did not err in denying appellant's motion for court-ordered immunity.

III. Denial of New Trial Motions

A. Appellant's Argument

Appellant filed two new trial motions. One was filed and argued by his attorneys, and the other was filed in propria persona. Appellant contends the trial court erred when it ruled in regard to the first motion that Dymally's misconduct as a juror did not prejudice him. Appellant also claims the trial court erred in denying the pro. per. motion when appellant presented an enhanced recording of a telephone conversation between Dymally and Sanjana.

B. Proceedings Below

Appellant's counsel filed a new trial motion on the basis of misconduct by Dymally on January 7, 2009. At the hearing on the first new trial motion, the trial court heard testimony from Dymally (for the defense), and Sanjana and Abraham (appellant's mother) for the prosecution. The motion was also supported by a declaration by Mr. Levine, one of appellant's attorneys, in which he asserted that on an unspecified date after the verdicts, Sanjana first informed him that she had spoken to Dymally. Mr. Levine declared that on January 6, 2009, Sanjana told him that Dymally had asked to meet with her, and he suggested the meeting take place on January 7.

The new trial motion was also supported by a declaration by Sanjana. She stated that on October 22, 2008, Dymally gave her a piece of paper in the courthouse cafeteria. It contained a phone number, and stated that "it was important." This frightened her. Around October 27, 2008, Sanjana called the number from a pay phone and spoke to a man who said, "We know this is a difficult time for you and your family, tell your mother and brother not to worry, we know he is innocent so don't worry everything is going to be okay." On October 29, 2008, Sanjana noticed Dymally and Juror Nos. 1 and 11 looking at her, and they nodded at her. On October 30, 2008, Sanjana was getting on an elevator in the courthouse with her mother and Boyette, when she noticed Dymally get off a different elevator. The doors to Sanjana's elevator closed and she and her companions rode down until the elevator stopped on the fifth floor. Dymally was waiting. He got into the elevator with Sanjana. When she got out, Dymally said, "You

have to call us." At 9:00 p.m. that night, Sanjana called the same number as before from a pay phone. A man said, "You know we can help, we need to meet with you alone." Sanjana said "no," and ended the call. On October 31, 2008, Sanjana noticed "that [Dymally and Juror No. 11] did not appear to be friendly with each other any longer. In addition, [Juror No.] 11 no longer made eye contact with me." During jury deliberations, Sanjana and her friends positioned themselves to observe the jurors when they entered and exited the courtroom. On one of these occasions, Dymally gestured to her, but she turned away from him.

Defense counsel informed the court that he had determined that the phone number on the paper given to Sanjana belonged to Dymally. A check of the phone records for the Glendale pay phone used by Sanjana confirmed that the phone had been used to place a call to Dymally's number on the evening of October 27.

On May 29, 2009, Dymally testified. He said that during trial he knew Sanjana was appellant's sister. He denied speaking to Sanjana, gesturing to her, or giving her his phone number before the verdicts were returned. He stated that he regretted voting "not guilty" on some of the counts and therefore wanted to ask Sanjana a few questions. He was hoping that their discussion would make him feel better about not convicting appellant on every count. That is why he gave Sanjana his phone number in the courthouse cafeteria. Sanjana called him from a blocked number and they agreed to meet at Starbucks.

Dymally was startled when the prosecution's investigators intercepted him outside Starbucks. During their brief interview, Dymally said he had not yet spoken to Sanjana. He meant that they had not had an extended conversation. Dymally told the investigators he wished to get advice from someone he knew in law enforcement, and he promised to contact them on the following day. Dymally did not actually contact anyone for advice. Dymally believed the investigators were extremely nice to him. He also believed Sanjana must have told the police that he had done something wrong and that she had arranged the meeting "to set something up." That is why he did not meet her.

On the following day, prosecution investigators went to Dymally's workplace without advance warning. Dymally was again surprised and confused.

After Dymally denied speaking to Sanjana prior to the verdicts, the defense revealed that they possessed a recording of Dymally and Sanjana's October 27, 2008, conversation. Defense counsel asserted that he first learned of the recording's existence in January. The defense stated that it had devoted considerable effort to augmenting the audiotape so that it would be intelligible. The quality was still very poor, however, and the hearing was continued to permit both parties to attempt to further augment the recording. The prosecution submitted the recording to the FBI. At the next hearing, the enhancements of the phone call recording had not been completed. At that hearing, Dymally declined to answer any further questions on the advice of his counsel.

On June 12, 2009, Sanjana testified at the hearing on the new trial motion. She stated that, after she had been excluded from the courtroom, she sat outside in the hallway as close as possible to where the jurors entered and exited. She would also go inside the courtroom during recesses and would exit when Judge Wesley entered. Sanjana denied greeting the jurors. She acknowledged that she would hold the door open for them.

She stated that she did not report her contact with Dymally to anyone, including her own family. She did not think anyone would believe her. After the verdicts, however, she told her husband, her mother, and Boyette. She also reported the contact to Mr. Levine either on November 13 or November 14. She hoped that Mr. Levine would report the contact to the court, and that an investigation would ensue. With respect to the October 27 phone call, she recorded it because she thought Dymally might ask her for money, but he did not. Sanjana asserted that Dymally said, "We know he's innocent," but later said she was not sure he made that statement. Sanjana claimed that she did not remember Dymally complimenting her appearance during that conversation. Sanjana claimed she was too "scared" to ask Dymally any questions during the conversation. She stated she was also too scared to think about the rule forbidding her from speaking to jurors.

With respect to the October 30, 2008 elevator encounter, Sanjana claimed Dymally said, "You have to call us. It's very important." Although Abraham and Boyette were present, Sanjana did not believe they heard this. Sanjana said again that she did not report this because she did not think anyone would believe her. She did not record the second pay phone call she made to Dymally on November 3, 2008. She acknowledged that during this call Dymally mentioned her attractiveness. He said she would have been a credible witness. He also said, "They wrote about your fragrance filling the room. And, you know, it's true." Dymally never asked Sanjana for money or sex. When asked why she had not asked Defense Investigator Greene to record the calls, Sanjana replied that she lacked the authority, and she did not have access to Greene. She later acknowledged that her family was paying Greene.

Although Sanjana initially testified that she did not report the contact with the juror because she thought no one would believe her, she later admitted that she believed Dymally would vote not guilty. She did not report him because she did not want him to be removed from the jury. After the verdicts, however, Sanjana told her husband that she had used the pay phones to call Dymally. She also reminded her mother about the elevator encounter with Dymally. Sanjana denied that she told defense counsel about the contacts because she hoped the contacts would lead to a new trial.

Abraham testified that she first learned of Sanjana's contacts with Dymally after the verdicts. Abraham said she was present when Sanjana informed Mr. Levine. She then stated that she was not sure she had been present. Abraham said she remembered seeing Dymally on the elevator.

Another hearing was held on July 6, 2009. The trial court listened to the enhanced recording of the October 27 call provided by the FBI and the prosecution investigators. Defense counsel did not argue that the enhanced recording was inaccurate and did not otherwise object to it. The enhanced recording established that Dymally first asked Sanjana if she was married. He then complimented her appearance. Sanjana thanked him and "giggl[ed]." She did not answer Dymally's question as to whether she was married. Dymally then said, "I know you don't want to say much but maybe afterwards

I'll speak to you . . . I'll do every possible thing I can do . . . to help, every possible thing." Dymally suggested they meet after the trial. Sanjana replied, "Definitely we will." When Dymally was recalled as a witness, he again asserted his Fifth Amendment rights. The parties then argued the motion for new trial.

After hearing argument, the trial court stated that there was admissible evidence under Evidence Code section 1150, subdivision (a) that substantiated the defense's claim of misconduct. Thus, there was a presumption of prejudice. The trial court stated that its analysis was therefore focused on whether the presumption of prejudice had been rebutted. The trial court had reviewed the entire record to determine whether there was a reasonable probability of actual harm to appellant, whether the prosecution's burden of proof was lightened, and whether any asserted defense was contradicted.

The trial court stated that, after its review, it had determined that the calls and the contacts that occurred reflected Dymally's romantic interest in Sanjana and obvious attempts to flirt with her and get together with her after the trial. There was no attempt to extort money or sex for his vote, no proof that Dymally was in a conspiracy with other jurors to extort money or votes, and no request for additional extrinsic information to take back to other jurors for use in the deliberating process. All the court had heard was speculation about these purported goals of the contacts, two of which were initiated by Sanjana. The court stated, "It is settled law in this state that a new trial will not be granted on the grounds where there is misconduct of such a trifling nature, that it could not, in the nature of things, have been prejudicial to the moving party and that where it appears from all of the evidence that fairness of the trial has been in no way affected by such impropriety, the verdict will not be disturbed. The verdicts themselves indicate that—and I agree with the People here—that there was no prejudice to the defendant by the misconduct that occurred. . . . The court finds the misconduct that occurred to be of such a nature as to not have affected the juror's ability to be fair nor the fairness of the trial and the other jurors."

A week after the denial of the new trial motion, appellant filed his *Faretta*[7] motion. He told the court he thought he could come up with compelling evidence. The trial court remarked it had heard that Mr. Levine intended to have more work done on the recording of the October 27 telephone conversation between Sanjana and Dymally. The trial court stated it was possible appellant could file a motion for reconsideration if new evidence were found. At a later proceeding, the trial court informed appellant he was not entitled to a sound expert for his sentencing hearing, which was the only proceeding remaining. Appellant said he just needed to have the recording enhanced. In the end, the trial court allowed appellant to have the lab work, and appellant had the original recording turned over to him.

Appellant filed the second new trial motion on August 24 and August 26, 2009. The grounds were ineffective assistance of counsel, prosecutorial misconduct, outrageous government conduct, and juror misconduct. The trial court heard the motion on August 31, 2009. Appellant offered a presentation on the differences he heard in the recording. Appellant's mother testified that Dymally spoke to her during trial, as well. Appellant argued passionately and at length and asserted that Dymally was prejudiced against him and he therefore did not have 12 impartial jurors. He pointed to evidence that Dymally had also spoken of his case to his tenant named Leila and to someone named Ray, whose name was heard in one of the recorded conversations.[8] Appellant argued that Dymally's interest was not just romance, and it was Dymally's behavior and not Sanjana's that was at issue. He believed his last enhancement of the telephone

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7 *Faretta v. California* (1975) 422 U.S. 806, 834 (*Faretta*).

8 The motion was supported by a declaration signed by someone named Leila Lovell on August 27, 2009. Lovell declared that she was Dymally's tenant between May 2008 and June 2009. Dymally told her that he was a juror in the case and went on to say it was a rape case and the girls were very promiscuous. Dymally said, "it's like 50 girls this guy raped" and that he felt this guy was a slimeball. He told her he felt the girls on the stand all seem to have the same similar stories and he felt maybe they had all collaborated. Lovell told Dymally that she did not think he was supposed to be discussing the case with anyone.

conversation recording showed that. He pointed out there was evidence from Dymally's remarks to Sanjana that he had read the L.A. Weekly article (where Sanjana's perfume was mentioned) about appellant's trial, which also constituted juror misconduct.

The trial court found there was no merit to appellant's claim of ineffective assistance of counsel. Appellant had retained counsel, and the trial court refused to second-guess their tactics and strategy, especially since appellant had no complaints about their representation until trial was over. Appellant then gave the court an exhaustive list of items he believed were *Brady*[9] material and that substantiated his prosecutorial misconduct claim, followed by lengthy argument. The trial court listened and repeatedly asked for argument on the actual *Brady* issue, which appellant finally made. Appellant called his audio expert to the stand, who explained the long hours he put in to enhance the recording. The trial court listened to the new version of the CD.

The trial court stated it had reviewed the moving papers and the recording and that it had heard much of appellant's lengthy arguments in prior postconviction proceedings. The trial court did not agree that appellant was in court because of a nationwide conspiracy by law enforcement officers, or because of a vendetta by the prosecution and young women from all over the country who had made up stories and colluded with each other. Appellant's lawyers had made these arguments to the jury and failed to convince it. The jury listened to each of the victims, who were thoroughly cross-examined by the defense. The trial court found no *Brady* violations and believed that appellant's arguments on this point were speculation, conjecture, and hearsay. The trial court noted that it had previously found that there was no prosecutorial misconduct and it would maintain that finding.

The trial court told appellant that the case had nothing to do with the color of his skin, as appellant had argued, but everything to do with appellant's conduct with the victims. The trial had been expertly litigated by appellant's selected lawyers and the

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9 *Brady v. Maryland* (1963) 539 U.S. 607 (*Brady*).

prosecutors. None of the issues appellant presented would have changed the results of the trial had they been presented at trial. If Dymally had a vendetta against appellant, he would have voted guilty on every count, and if he had wished to help appellant, he would have voted not guilty on everything. Dymally hung the jury on only some of the counts; therefore, the trial court believed Dymally voted his conscience. The trial court had listened to all versions of the recorded telephone conversation and found that the latest version did not convince it that its decisions at the initial hearing were in error. The trial court had allowed appellant to make a full record. Nothing that appellant had submitted convinced the court to change its original rulings or grant the motion for new trial. The trial court denied the new trial motion.

C. Relevant Authority

Every criminal has a right to a trial by an unbiased, impartial jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16.) A criminal defendant may move for a new trial on specified grounds, including juror misconduct. (§ 1181, subds. 3 & 4; *People v. Ault* (2004) 33 Cal.4th 1250, 1260.) When a party seeks a new trial based on jury misconduct, the court undertakes a three-step inquiry. First, the court must determine whether the declarations offered in support of the motion are admissible under Evidence Code section 1150. If they are, the court must next consider whether the facts establish misconduct. Finally, assuming misconduct is found, the court must determine whether it was prejudicial. (*People v. Duran* (1996) 50 Cal.App.4th 103, 112-113; *People v. Hord* (1993) 15 Cal.App.4th 711, 724.) Juror misconduct raises a rebuttable presumption of prejudice, subject to proof no prejudice actually resulted. (*People v. Pinholster* (1992) 1 Cal.4th 865, 925.)

In determining whether juror misconduct occurred we accept the trial court's credibility findings and findings of historical facts if supported by substantial evidence. (*People v. Mendoza* (2000) 24 Cal.4th 130, 195.) "Juror misconduct raises a rebuttable presumption of prejudice. The presumption may be rebutted by proof that prejudice did not actually result." (*Ibid*.) Whether a verdict must be overturned for jury misconduct is resolved by employing the substantial likelihood test, which is an objective standard. (*In*

re Hamilton (1999) 20 Cal.4th 273, 296; *People v. Marshall* (1990) 50 Cal.3d 907, 951.) "'Whether prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court's independent determination.'" (*People v. Danks* (2004) 32 Cal.4th 269, 303.)

D. Trial Court's Ruling Correct

We agree with the trial court that, although Dymally committed juror misconduct, no prejudice to appellant resulted. Appellant's case is analogous to *People v. Miranda* (1987) 44 Cal.3d 57 (*Miranda*), disapproved on another point in *People v. Marshall*, *supra*, 50 Cal.3d at p. 933, fn. 4.) In that case, after the guilty verdict and the penalty verdict of death had been rendered, a woman named Ramona Escareno, who claimed to be the defendant's girlfriend, notified defense counsel that she had had several conversations during the trial with a male juror named Cunningham. (*Miranda,* at p. 115.) Miranda moved for a new trial on the basis of juror misconduct. (*Ibid*.) At the hearing on the new trial motion both Escareno and Cunningham testified and gave contradictory accounts. (*Id*. at pp. 115-116.) Escareno said Cunningham had first approached her at the courthouse, and when they later met, she gave him her phone number. He called her five or six times during trial and asked her to go out. He talked about Miranda's testimony and other evidence. He winked at her during trial. He told her he was sorry to vote for the death penalty "but he did not want to delay things." (*Id*. at p. 116.) Cunningham said that Escareno first approached him, handed him a note, and suggested he call her. He admitted calling her several times despite knowing she was defendant's friend, but he denied they discussed the case. After the death penalty verdict, Cunningham called her and she refused to go out with him. (*Ibid*.) Before Cunningham testified, he had denied speaking with Escareno. He said he had lied because he did not want to be called to court or to have his girlfriend find out. (*Ibid*.)

Miranda's trial court stated it did not entirely believe Escareno's testimony, although it was without question there had been telephone conversations between the two individuals. (*Miranda*, *supra*, 44 Cal.3d at p. 116.) Although Cunningham lied at first, he came to court and admitted the telephone conversations under oath. "'And it does

appear to the court to be some kind of a romantic attachment. And I'm more inclined to believe that they did not discuss the case.'" (*Id*. at p. 117.)

The reviewing court stated that the trial court was in the best position to evaluate the conflicting testimony and determine the prejudicial effect of Cunningham's conduct. The court noted that the trial court had found that Escareno's testimony was not credible and that the telephone conversations reflected a romantic interest. The court found substantial evidence supported the trial court's findings. Significantly, the reviewing court held there was no showing that the juror had received any information on matters pending in the case. (*Miranda*, *supra*, 44 Cal.3d at p. 117.)

Likewise, in this case, Sanjana's conversations with Dymally did not influence the jury deliberations in any way, as the verdicts show. We agree with the trial court that Dymally had a romantic interest in Sanjana, but that this interest did not affect jury deliberations or the fairness of appellant's trial. There was no evidence that Dymally had received any information from Sanjana about the case, or that Sanjana had imparted any information to Dymally. Substantial evidence supports the findings of the trial court, which was in the best position to evaluate the testimony.

Finally, appellant urges that this court should assess whether appellant suffered prejudice from juror misconduct not under the California standard of "substantial likelihood," but under the federal standard of a "reasonable possibility." In *People v. Loker* (2008) 44 Cal.4th 691, the California Supreme Court stated, "we have consistently adhered to the 'substantial likelihood' standard . . . [citations]. Defendant provides neither controlling authority nor persuasive argument that we should alter this settled approach." (*Id*. at p. 747.) In any event, as in *Loker*, we conclude that there is no reasonable possibility that appellant was prejudiced by juror misconduct, whether his claims are considered individually or cumulatively. Upon independent review of the record, we uphold the trial court's ruling.

IV. Denial of New Trial Motion Based on Prosecutorial Misconduct Under *Trombetta*[10]

A. Appellant's Argument

Referring to the interception of Dymally by DA investigators prior to the meeting with Sanjana, appellant also contends the prosecutor committed misconduct under *Trombetta* by taking intentional action to sabotage the truth-seeking process. According to appellant, this court should grant him a new trial on this basis.

B. Relevant Authority

In *Trombetta*, the United States Supreme Court held the prosecution's duty to preserve evidence is limited to matters "that might be expected to play a significant role in the suspect's defense." (467 U.S. at p. 488, fn. omitted; *People v. Beeler* (1995) 9 Cal.4th 953, 976; *People v. Zapien* (1993) 4 Cal.4th 929, 964 (*Zapien*).) "'To fall within the scope of this duty, 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."'" (*People v. Catlin* (2001) 26 Cal.4th 81, 159-160.) The evidence or testimony in question must affect the judgment. (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 873-874 [examining the loss of testimonial evidence due to Government action]; *Trombetta*, *supra*, 467 U.S. at p. 488.)

Although the state's good or bad faith in failing to preserve evidence is ordinarily irrelevant to assessing whether its conduct amounted to a due process violation (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57 (*Youngblood*)), it is of great significance when the challenge to the state's conduct is based on the failure to preserve potentially exculpatory evidence—that is, "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Ibid*.) In such a case, "'"unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of

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10 *California v. Trombetta* (1984) 467 U.S. 479, 488 (*Trombetta*).

due process of law."'" (*People v. Catlin*, *supra*, 26 Cal.4th at p. 160, quoting *Youngblood*, at p. 58; see also *People v. Cooper* (1991) 53 Cal.3d 771, 810-811 [adopting the standard set forth in *Trombetta* and *Youngblood* to evaluate due process challenge under state law]; accord, *Zapien*, *supra*, 4 Cal.4th at p. 964.)

"The presence or absence of bad faith by the police for purposes of the Due Process Clause . . . necessarily turn[s] on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." (*Youngblood, supra*, 488 U.S. at pp. 56-57, fn. *; *People v. Beeler*, *supra*, 9 Cal.4th at p. 1000.) A due process violation occurs when the state is aware that the evidence could form a basis for exonerating the defendant and fails to preserve it as part of a conscious effort to circumvent its constitutional discovery obligation. (*Trombetta*, *supra*, 467 U.S. at p. 488; *Beeler*, at p. 1000; *Zapien*, *supra*, 4 Cal.4th at p. 964.) Negligent destruction of (or failure to preserve) potentially exculpatory evidence, without evidence of bad faith, will not give rise to a due process violation. (*Youngblood*, at p. 58.) We examine the ruling below in the light most favorable to the trial court's findings to determine whether substantial evidence supports the ruling. (*People v. Roybal* (1998) 19 Cal.4th 481, 510; see also *People v. Carter* (2005) 36 Cal.4th 1215, 1246.)

C. No* Trombetta *Violation

We agree with the trial court that the prosecutors did not violate its order and that their act of intercepting Dymally did not have the effect of destroying exculpatory evidence. Any claim that Dymally was about to reveal information that would have led to a new trial is pure speculation. As stated in *People v. Alexander* (2010) 49 Cal.4th 846, 878-879, mere speculation as to the exculpatory value of destroyed evidence is inadequate to establish a *Trombetta* claim. (See *People v. Cook* (2007) 40 Cal.4th 1334, 1348-1351.)

Furthermore, we conclude there was no bad faith on the part of the prosecution. As the evidence showed, the prosecutors were alerted to the meeting mere hours before it was scheduled to occur. They sought out the investigators in their department for guidance as to how to proceed. Investigator Bennett determined that the DA's office

could not participate as mere bystanders in the recording of Dymally's meeting with Sanjana and risk lending credence to a setup by the defense seeking to invalidate the verdict. Given the history of interference by Sanjana during the trial, this was not an unfounded belief. The investigators fully intended to allow Dymally to proceed to meet with Sanjana. The fact that Dymally became leery of the meeting after speaking with the investigators, who, according to Dymally, were very nice to him, was not an intended consequence. Substantial evidence supports the trial court's decision.

V. Alleged Failure to Investigate Recording and Claim that Dymally Read Article

We reject appellant's cursory argument that two of appellant's claims should have been investigated more. Appellant makes this claim in a short paragraph without citation to authority. Respondent interprets this claim as a contention that the trial court erred in not granting appellant a continuance. In any event, we do not believe the trial court abused its discretion in not continuing the new trial motion hearing and sentencing hearing in order to further investigate the newly enhanced recording and Dymally's mention of a phrase regarding Sanjana's perfume, which was attributed to an L.A. Weekly article that Dymally should not have read.

The record shows that the trial court paused the proceedings in order to listen to the newest version of the tape and read the transcript, which were provided by appellant. The trial court found no great difference. The trial court took into consideration appellant's evidence and argument regarding the L.A. Weekly article. The trial court clearly bent over backwards to allow appellant to investigate his case and augment yet again the recording. The trial court's indulgence is evidenced by the fact that 10 months elapsed between the verdicts and sentencing. There was no need for more investigation. A trial court has broad discretion to grant or deny a request for a continuance, which will only be granted for good cause. (§ 1050, subd. (e); *People v. Frye* (1998) 18 Cal.4th 894, 1012-1013.) Under the circumstances of the instant case and considering the reasons for the request, we conclude the trial court did not abuse its discretion. (See *Frye*, at p. 2013.)

VI. Admission of Evidence Under Evidence Code Section 1108

A. Appellant's Arguments

Appellant contends the trial court should have barred the introduction of some, if not all, of the witnesses who testified regarding appellant's prior acts "due to the untimely disclosure." Also, the evidence was not relevant. The trial court should have barred the testimony of witnesses Tara S. and Kristi W. because the defense was unable to obtain documents regarding their testimony before a New York grand jury. Appellant further argues that the trial court did not sufficiently determine the prejudicial effect of the evidence under Evidence Code section 352. Appellant also claims that the admission of this testimony violated his federal constitutional rights.

B. Relevant Authority

Evidence Code section 1108 provides in pertinent part, that "[i]n 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." Subdivision (d)(1)(A) of Evidence Code section 1108 provides that, for purposes of this section, a sexual offense includes "[a]ny conduct proscribed by Section 243.4, 261, . . . 288, 288a . . . 289, or subdivision (b), (c), or (d) of Section . . . 311.4 . . . of the Penal Code." Evidence Code section 1108 "does not supersede other provisions of the Evidence Code, such as normal hearsay restrictions and the court's authority to exclude evidence presenting an overriding likelihood of prejudice under [Evidence Code] section 352. [Citation.]" (*People v. Soto* (1998) 64 Cal.App.4th 966, 984 (*Soto*).)

"In enacting Evidence Code section 1108, the Legislature decided evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitations of Evidence Code section 1101." (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 405.) A trial court's exercise of discretion with regard to an Evidence Code section 352 determination will not be disturbed on appeal "'*except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of

justice.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124, original italics.) The presumption is in favor of admission. (*Soto, supra,* 64 Cal.App.4th at p. 984.)

The criteria for admission of evidence under Evidence Code section 1108 are broader than that for admission of prior acts for the purpose of showing a common design or plan under Evidence Code section 1101, subdivision (b). (*People v. Falsetta* (1999) 21 Cal.4th 903, 911(*Falsetta*); *Soto*, *supra*, 64 Cal.App.4th at p. 984.) Admission of evidence under Evidence Code section 1108 does not demand the similarity between the charged offense and the prior offenses that is required in varying degrees by Evidence Code section 1101, subdivision (b). (*Soto*, at p. 984; *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403 (*Ewoldt*).) Under Evidence Code section 1108, evidence of prior sexual offenses to show disposition is "'"no longer treated as intrinsically prejudicial or impermissible."'" (*Soto*, at p. 984.) Thus, when evidence is admitted under Evidence Code section 1108, an analysis of its admissibility under Evidence Code section 1101 is unnecessary. (*Soto*, at pp. 983-984, 992.)

C. No Abuse of Discretion

In *Falsetta*, the court explained that, in weighing the probative value of "propensity evidence" under Evidence Code section 1108 against its prejudicial effect, the 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." (*Falsetta, supra*, 21 Cal.4th at p. 917.)

We believe the trial court acted within its discretion in admitting the evidence of appellant's prior sex offenses. The prior acts appellant committed were relevant to show motive, intent, and a common scheme or plan. The evidence was not unduly prejudicial or cumulative of other evidence the People could have used for the same purposes.

1. Lack of Notice

As respondent points out, appellant's claim on this point is perfunctory and lacks citation to authority. For these reasons, it could be deemed forfeited. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11; *People v. Hardy* (1992) 2 Cal.4th 86, 150.) In any event, this claim lacks merit. Subdivision (b) of Evidence Code section 1108 provides: "In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal Code." Section 1054.7 requires notice "at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred."

As *Soto* explained: "Section 1108, subdivision (b) provides for the prosecution to provide prior notice of its intent to introduce such evidence . . . . The notice and disclosure requirements were designed to 'protect the defendant from unfair surprise and provide adequate time for preparation of a defense.' [Citation.]" (*Soto, supra*, 64 Cal.App.4th at p. 980.) At the hearing on September 2, 2008, the defense argued that it had not received actual written notice 30 days in advance. As the trial court noted, the defense had received written notice on August 21, 2008, and testimony was not set to begin until September 15, 2008. The defense had all but one of the Evidence Code section 1108 witnesses named as witnesses as of August 4, 2008. The trial court observed that the trial was projected to last three months, and the defense had adequate time to investigate each of the witnesses over the following two or three months. We conclude the trial court ruled correctly and did not abuse its discretion.

2. New York Witnesses' Grand Jury Testimony

Appellant complains that he was unable to cross-examine Tara S. and Kristi W. about their testimony before a New York grand jury because their sealed testimony was not provided to the defense. He claims this was a violation of his right to cross-examine these witnesses. The trial court found that, in lieu of the testimony, there was nothing preventing a New York police officer, should he or she be subpoenaed, from bringing

notes to refresh his or her memory. The court also found that the defense was merely assuming that the New York testimony consisted of prior inconsistent statements.

Restrictions on cross-examination pertaining to the credibility of a witness do not violate a defendant's Sixth Amendment right to confrontation unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680; *People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.) "'[N]ot every restriction on a defendant's desired method of cross-examination is a constitutional violation.'" (*People v. Ayala* (2000) 23 Cal.4th 225, 301; *People v. Clair* (1992) 2 Cal.4th 629, 656, fn. 3.) In the instant case, appellant has not shown that favorable evidence was contained in the grand jury testimony such that the jury might have received a significantly different impression of the witnesses' credibility had the grand jury testimony been available. The defense cross-examined both witnesses thoroughly. They elicited that Tara S. failed to report the alleged crimes against her for five years and only did so when the case became highly publicized. Moreover, the cross-examination elicited that Tara continued to communicate with appellant after the incidents she reported. The defense elicited that Kristi W. had waited four years to report the crimes against her, and she even worked for appellant afterwards. The defense brought out the fact that appellant telephoned Kristi two times in February 2003. Moreover, the defense questioned her about her failure to mention to police officers that appellant put his penis inside her anus when she was interviewed in August 2008. We conclude appellant suffered no violation of his right to confront witnesses.

Appellant complains that the fact that he was deprived of the New York grand jury testimony was also a *Brady* violation. The record shows that the prosecution, defense counsel, and the trial court attempted to obtain copies of the grand jury testimony, but these efforts were not wholly successful. Holly G.'s grand jury testimony was provided. That of Tara S. and Kristi W. was not. The trial court found that all parties were diligent in their attempts to obtain whatever they could from New York. The court found that the defense *Brady* argument was unfounded. The prosecution had no jurisdiction outside the

state of California and could not get the material either, nor could the court. The court ruled that the fact that somebody is indicted in another state and the related materials are not available does not affect the prosecution's right to call that person as a witness under Evidence Code section 1108.

We agree with the trial court. In order to succeed on a claim of *Brady* error, appellant must establish that the prosecutor withheld favorable and material evidence. (*In re Sassounian* (1995) 9 Cal.4th 535, 543.) "Favorable" evidence includes evidence that either helps the defendant or hurts the prosecution, such as by impeaching a prosecution witness. (*Id*. at p. 544.) Evidence is "'material'" only if there exists a reasonable probability that, had it been disclosed to the defense, the result would have been different. (*Ibid*.) This "'reasonable probability'" is a probability sufficient to "'undermine[] confidence in the outcome' on the part of the reviewing court." (*Ibid*.) We must assess this probability by considering the evidence under the totality of the relevant circumstances and not in isolation or in the abstract. (*Ibid*.) The United States Supreme Court has stated that the standard for materiality when assessing a claim of *Brady* error is the same as the standard for prejudice in a claim of ineffective assistance of counsel. (*United States v. Bagley* (1985) 473 U.S. 667, 682.) The standard was further explained in *Kyles v. Whitley* (1995) 514 U.S. 419, which stated that the test of materiality is not whether "the defendant would more likely than not have received a different verdict with the [exculpatory] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (*Id*. at p. 434.) As the trial court stated, appellant failed to show that the grand jury testimony contained material, exculpatory evidence even to the degree that it could be used to impeach a prosecution witness. Furthermore, any such evidence was clearly not in the prosecution's possession.

3. Evidence Code Section 352 and the Uncharged Acts Evidence

Appellant contends the evidence presented pursuant to Evidence Code section 1108 was not relevant to any material issue. Appellant's intent and identity were not at issue. The evidence was also prejudicial and superfluous. There were no convictions

obtained in regard to this evidence, leading to the possibility that the jury may have punished appellant for them. The evidence required mini-trials, and the victims made claims of sodomy, which the named victims in appellant's case did not. Their actual testimony was more inflammatory than the prosecutor stated it would be before trial. The trial court should have evaluated the cumulative effect of all of the other-acts witnesses. Appellant also claims without specificity that his federal constitutional rights were violated, adding that the trial court's ruling cannot be disturbed on due process grounds unless the admission of the evidence was arbitrary or so prejudicial that it caused appellant's trial to be fundamentally unfair.

The record shows that the trial court was aware of and carefully considered all of the *Falsetta* factors in determining whether to admit appellant's other uncharged acts. The trial court found that the charges were not remote, and the defense conceded this point in any event. The trial court limited the Evidence Code section 1108 witnesses to 10, finding that having more than 10 witnesses testify would be an undue consumption of time. The defense actually requested that Holly G. be called, since the defense had her grand jury testimony, even though appellant's conduct with her was arguably more inflammatory and did not match the charges. The prosecution agreed to include her in the 10 witnesses. As for the inflammatory nature of sodomy in some of the other Evidence Code section 1108 witnesses, counsel argued that the prosecution should choose alternative witnesses, especially since the sodomy was unlike the charged offenses. The court stated that it did not find the allegation of sodomy to be so heinous and so much different from rape and forced oral copulation, since these were all violent acts. As far as the *Falsetta* criterion of confusion of issues, the court found it to be a nonfactor, since the number of counts and the number of Evidence Code section 1108 witnesses had been reduced.[11] The trial court found under Evidence Code section 352

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11 The prosecutor said she was sure of six section 1108 witnesses: Holly G., Kristi W. Kristen S., Tara S, B.D. D., and Janice Z. The prosecutor said she needed more time to decide on four more. Ultimately the jury heard from these witnesses and Courtney S.

that the probative value outweighed any potential prejudice, that there was no undue consumption of time, and there was no danger of confusing the jury in appellant's case.

With respect to appellant's claim that the actual testimony of the Evidence Code section 1108 witnesses was more inflammatory than had been described by the prosecution, we note that appellant failed to make an objection on this basis during trial. Therefore, this issue is not valid on appeal. (Evid. Code, § 353; *People v. Partida* (2005) 37 Cal.4th 428, 433.)

Moreover, appellant seeks to confuse the issues while accusing the trial court of being confused. Evidence admitted under Evidence Code section 1108 is properly admitted as propensity evidence. The defense strategy in this case was to sully the character of the victims and imply that they had lied about consensual conduct or had made up the charges. Appellant admits in his opening brief that "the defense was simply that either the alleged assaults on the minors did not take place at all . . . or the sexual contact with the adult 'victims' was consensual." Defense counsel pointed out, for example, that Stacey F. was there to do lingerie modeling and "was walking around the apartment for an hour and a half in her bra and panties, first time she's met this man. She's alone. It's probably 9:00, 9:30 at night. . . . What is she doing there? What is she doing there? Why is she sitting there?" Therefore, the evidence that appellant had engaged in the same conduct several other times was highly probative that the defense claims were unfounded. As for the probative value, even though there is no requirement that the charged and uncharged offenses be so similar that evidence of the prior acts would be admissible under Evidence Code section 1101, it is logical that uncharged prior offenses that are very similar in nature to the charged crime have more probative value in proving propensity to commit the charged offense. (*People v. Branch* (2001) 91 Cal.App.4th 274, 285.) In this case the charged and uncharged offenses bear significant similarities. In any event, any dissimilarities in the alleged incidents relate only to the weight of the evidence, not its admissibility. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 660.)

In addition, the trial court instructed the jury with CALCRIM No. 1191 regarding the evidence of uncharged sex offenses.[12] The jury was told that it could consider this evidence only if it found it more likely than not that it was true and that it must weigh the evidence together with all the other evidence. The jury was told to remember that the evidence of these offenses was not sufficient on its own to find the defendant guilty of the charged offenses and that the People had to prove each element of the charged offenses beyond a reasonable doubt. We presume jurors understand and follow instructions. (*People v. Morales* (2001) 25 Cal.4th 34, 47.) These instructions, combined with the fact that the prior offenses were no more inflammatory than the charged offenses, precluded the danger that the jury would consider the evidence for a prohibited purpose.

In sum, we conclude the trial court properly discharged its duty, conducted the appropriate analysis and found the evidence of the uncharged sex crimes more probative than prejudicial. Appellant has not demonstrated that the court abused its discretion and no error has been shown. The trial court's analysis under Evidence Code section 352 was not inadequate, as appellant claims.

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12 Although the listed sex offenses for each victim in CALCRIM No. 1191 inaccurately included forcible oral copulation for Kristi W. and forcible rape for Holly G., these inaccuracies did not invalidate the prophylactic effect of CALCRIM No. 1191. The instruction required the People to prove the listed crimes were committed by appellant and admonished the jury to disregard the evidence if the People did not meet their burden.

VII. Admission of Computer Evidence Under Evidence Code Sections 1108 and 1101

A. Appellant's Arguments[13]

Appellant contends the trial court abused its discretion under Evidence Code section 352 by its superficial consideration of this evidence. By allowing the prosecution to introduce pornographic photographs, it gave the prosecution license to label appellant a child molester and to mislead and mischaracterize the evidence and issues in this case. Furthermore, the photographs were not relevant to prove any issue in dispute. The age difference and difference in physical appearance between the photographed girls and the victims in this case are too great to be probative of intent. Appellant argues it is unclear under which evidentiary rule the trial court admitted this evidence, since it stated it was evidence of appellant's "state of mind," which is an exception to the hearsay rule and "willingness to commit the acts depicted in the videos," which is inadmissible propensity evidence. The trial court should not have admitted the titles alone of certain pornographic websites because these were not relevant or admissible. Appellant also contends the admission of his "conquest list" denied him his right to confront and cross-examine witnesses, since there were no witnesses to the acts on the list.

B. Relevant Authority

"Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]'" (*Ewoldt*, *supra*, 7 Cal.4th at p. 404.) Consequently, other crimes evidence, as a general proposition, is inadmissible to prove a defendant's disposition. (Evid. Code, § 1101, subd. (a).) This general rule is designed to

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13 Appellant begins the section of his opening brief dedicated to the computer evidence with two paragraphs describing the testimony elicited by the defense on cross-examination of Sergeant Miner, who testified for the prosecution about the pornography he found. In these paragraphs, appellant appears to be asserting a foundational argument that the evidence did not show that it was appellant and not someone else who accessed the pornography. Appellant does not go so far as to make this claim, and we do not regard these paragraphs as a cogent argument made by appellant.

ensure that a defendant is convicted for what the defendant has done, not for who the defendant is.

Nonetheless, Evidence Code section 1101, subdivision (b), carves out an exception to this rule. It provides that such evidence is admissible if it is relevant to an issue other than disposition to commit the act. Admissibility of other misconduct evidence depends upon (1) the materiality of the facts the evidence seeks to prove, (2) the tendency of the uncharged act to prove those facts, and (3) any policy requiring exclusion, such as Evidence Code section 352. (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379; see *Ewoldt*, *supra*, 7 Cal.4th at p. 404 ["[T]o be admissible such evidence [of other misconduct] 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352'"].)

We review the trial court's relevance and Evidence Code sections 352 and 1101 rulings under the abuse of discretion standard. (*People v. Lewis* (2001) 25 Cal.4th 610, 637 [Evid. Code, § 1101]; *People v. Rodrigues*, *supra*, 8 Cal.4th 1060, 1124 [Evid. Code, § 352]; *People v. Brown* (2003) 31 Cal.4th 518, 577 [relevance].) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) "'[I]n most instances the appellate courts will uphold [the trial court's] exercise [of discretion] whether the [evidence] is admitted or excluded.'" (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532.)

C. Evidence Properly Admitted

1. Pornography

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) Relevant evidence is 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.)

Evidence Code section 1101, subdivision (b) permits prior misconduct evidence on the issue of intent. "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]'" (*Ewoldt*, *supra*, 7

Cal.4th at p. 402.) "The least degree of similarity between the crimes is needed to prove intent. [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1244.) If prior misconduct shares common features with the charged offense, it can be admitted to show motive. (*People v. McDermott* (2002) 28 Cal.4th 946, 999.)

A "plea of not guilty puts in issue every material allegation of the accusatory pleading, except those allegations regarding previous convictions of the defendant to which an answer is required by Section 1025." (§ 1019; see *People v. Steele, supra*, 27 Cal.4th at p. 1243.) In the instant case, the trial court allowed the evidence only in relation to B.O. O. and Jessie B., since the offenses against them corresponded to known dates when appellant accessed the sites.

"In certain circumstances, evidence of sexual images possessed by a defendant has been held admissible to prove his or her intent. In *People v. Memro* (1995) 11 Cal.4th 786 (*Memro*), the defendant was charged with first degree felony murder based upon a violation of [Penal Code] section 288, which prohibits the commission of a lewd and lascivious act upon a child who is under the age of 14 years. The defendant in *Memro* enjoyed taking photographs of young boys in the nude, and he had escorted his victim, seven years of age, to the defendant's apartment with the intent of taking photographs of the victim in the nude. When the victim said he wanted to leave, the defendant strangled him and attempted to sodomize his dead body. The trial court admitted magazines and photographs possessed by the defendant containing sexually explicit stories, photographs, and drawings of males ranging in age from prepubescent to young adult. [The Supreme Court] concluded the trial court did not abuse its discretion, because 'the photographs, presented in the context of defendant's possession of them, yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction. [Citation.] The photographs of young boys were admissible as probative of defendant's intent to do a lewd or lascivious act with [the victim].' [Citations.]" (*People v. Page* (2008) 44 Cal.4th 1, 40.)

In the charges related to Jessie B., appellant was accused of sexual battery (§ 243.4, subd. (a)), attempted forcible oral copulation (§§ 664, 288a, subd. (c)(2)), and

forcible rape (§ 261, subd. (a)(2)).[14] Sexual battery is a specific intent crime. (*People v. Chavez* (2000) 84 Cal.App.4th 25, 29.) Attempted forcible oral copulation by definition requires the intent to commit the attempted crime. (*People v. Booker* (2011) 51 Cal.4th 141, 175.) Forcible rape is a general intent crime; intent to commit this crime may be inferred from all acts, conduct and circumstances connected with the offense. Evidence of such intent may be established by the circumstances of the offense, or other circumstantial evidence. (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1043.) As noted, appellant's not guilty plea placed his intent at issue.

The fact that appellant viewed pornographic photographs depicting forced oral copulation was strongly probative of his intent when he invited Jessie into his room. The defense argument focused at length upon Jessie B. Defense counsel flatly stated that Jessie lied under oath about her desire for a relationship with appellant. She went willingly to appellant's apartment late at night and got into pajamas. She went to his bed because she wanted a relationship with appellant. She told appellant she was having her period, and he pulled out his penis for oral sex. When she said, "No," he stopped, which showed there was no force, violence, or intent to humiliate. Counsel pointed out that Jessie hung around the next day and told no one she was raped, and he theorized that Jessie later realized she was just another girl and felt used. He posited that Jessie believed that she had gone too far and had invited what happened—that it was consensual, and she felt foolish and angry.

Though there are obvious differences between a defendant looking at pornography and actually attempting to force a young girl to orally copulate him and, not succeeding, forcing sexual intercourse upon her, absolute similarity has never been required. In this case, there is an overriding similarity; both the possession of the type of pornography appellant favored and the acts he committed on Jessie exhibited an inappropriate and deviant sexual interest in performing humiliating sex acts on young girls. We believe the

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14 The evidence was also admitted with respect to the counts charging appellant with certain acts against B.O. O. The jury found appellant not guilty on all but one of the counts, and it hung on that remaining count, which the People dismissed.

eight images shown to the jury had significant relevance to the issue of appellant's intent with respect to Jessie.

As for prejudice, the computer images were not the focus of the prosecution case when viewed in the context of the entire trial, and the thumbnail images were not significantly inflammatory when compared with appellant's conduct. Moreover, any inflammatory capacity was mitigated because only the smaller images were admitted in evidence. The evidence did not present an "'intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation],'" as shown by the fact that appellant was not convicted of the charges related to B.O. O. (*People v. Lindberg* (2008) 45 Cal.4th 1, 49.) Even if the trial court erroneously permitted admission of this evidence, any such error was harmless as it is not reasonably probable that a different verdict would have occurred but for the error. (Evid. Code, § 353; see *People v. Welch* (1999) 20 Cal.4th 701, 749-750; *People v. Watson* (1956) 46 Cal.2d 818, 836-837; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018-1019.) Without the challenged evidence, there was still abundant evidence in support of the verdicts, notably the videos appellant took of Autumn and Amanda. There was also evidence that appellant was caught by a police officer and Eve's mother kissing Eve, who was underage, in a car.

Moreover, the trial court instructed the jury with CALCRIM No. 375 before presentation of the evidence, which told the jury that, if it did not believe that the viewing of pornography was evidence of the defendant's intent towards Jessie B. or was evidence of a common plan or scheme, it could disregard the evidence entirely. The trial court also gave another instruction after the evidence was presented.

2. Titles of Websites

Appellant makes several claims regarding admission of the titles of the pornographic web sites that the evidence showed he visited. The titles related mainly to oral copulation. Appellant asserts that the trial court gave this issue only superficial consideration, and it did not even view the sites before allowing the People to present the evidence. The record shows that the trial court offered to view the websites, but the defense agreed with the court that it was not necessary. Therefore this issue cannot be

raised on appeal. Defense counsel actually said that if the court wished to view the subject matter before making a ruling, the defense would just let the evidence come in.

Appellant also criticizes the grounds upon which the trial court allowed this evidence to be presented. The record shows that the evidence was clearly offered for the purposes of showing intent and common plan or scheme. The defense argued that appellant had sex with many models with whom he worked, but "nothing was ever planned," and "no criminal offenses [were] planned in advance." The prosecutor pointed out that appellant committed his sexual acts very soon after the girls arrived at his apartment.

The record also shows the trial court did not give the issue only superficial consideration. The trial court required the People to put on a foundation with Sergeant Miner's testimony as to where he found the computer from which the websites had been accessed. The trial court stated that it would not have allowed the showing of the actual videos, but it believed that the offer of the titles that appellant was viewing over a long period of time were not so prejudicial that they outweighed their probative value. The trial court required the prosecution to provide a limiting instruction and to narrow the evidence to certain victims based upon the time frame of when the videos were viewed.

3. Conquest or "Hit" List

Appellant claims that the trial court erred in allowing evidence of appellant's "conquest list" that was found on a computer he used. Appellant disputes the trial court's ruling that admission of this evidence did not violate the corpus delicti rule. Appellant also claims admission of this list denied him the right of confrontation and cross-examination of the alleged conquests.

As the trial court ruled, the corpus delicti rule did not apply to uncharged acts. (*People v. Davis* (2008) 168 Cal.App.4th 617, 636-638.) Although the trial court stated that the evidence was admitted solely to show the defendant's state of mind at the time of the charged offenses, it is clear from the context that the trial court used "state of mind" to mean "intent" in this ruling. "State of mind" equates to "mental state," which equates to intent. (See *People v. Steele, supra,* 27 Cal.4th at pp. 1243-1244.) The trial court

noted that the offer of proof was that the writings showed appellant met women on the Internet, performed various sex acts with them, described their proficiency at oral sex, and engaged in sex acts with minors. Because the defendant was currently charged with luring women to him on the Internet, forcing them to perform various sex acts, including forcible oral copulation, and because many of the victims were minors, the documents showed appellant's intent. The trial court disagreed with counsel that intent was not placed at issue, especially in light of the defense's announced strategy to argue that there was consent. The court also found that the evidence was probative of modus operandi, i.e., the luring of the victims to Los Angeles to ostensibly participate in fashion shows and eventually sexually assaulting them. The evidence was thus admissible under Evidence Code section 1101, subdivision (b).

We agree with the trial court that, as held in *Memro*, *supra*, 11 Cal.4th 786, appellant placed his intent at issue when he pleaded not guilty. The evidence was also relevant to appellant's method of meeting young women whom he could acquire as conquests. We also agree with the trial court that, under Evidence Code section 352, the inflammatory nature of the information was not so great considering the nature of the charges and the numerous acts that were alleged. Also, the information would not lead to confusion of the issues, and there would be no large consumption of time required to look through the few pages of the documents. The trial court ordered the People to prepare a limiting instruction for the jury indicating that the documents were not being shown to prove that appellant committed any other offenses.

4. Harmless Error

As we have noted, the jury was repeatedly instructed to consider the computer images only with respect to Jesssie B. and B.O. O. The jury is presumed to follow the trial court's instructions, and the jury actually did not convict appellant on any of the counts involving B.O. . It is clear that the jury carefully evaluated evidence and that it did not convict appellant because of an emotional bias caused by the computer evidence.

VIII. Insufficiency of the Evidence

Appellant makes a perfunctory claim that the evidence was insufficient because the "testimony of the alleged victims [was] highly suspect and replete with inconsistencies, contradictions, and implausible assertions." Were it not for the evidence admitted under Evidence Code section 1108, he asserts, he would most probably have been acquitted of all charges.

We have concluded that the evidence was properly admitted under Evidence Code section 1108. The claims that the witnesses gave inconsistent testimony and lacked credibility are merely attempts to have us reweigh the evidence, which we cannot do. (*People v. Culver* (1973) 10 Cal.3d 542, 548 [it is not the function of an appellate court to reweigh the evidence].) We conclude the evidence was sufficient.

IX. Failure to Specify Sentences Were Consecutive

Appellant argues that the transcript of the sentencing hearing does not show a clear intent to impose consecutive sentences of 15 years to life in counts 9, 10, and 33. The record shows that the trial court stated, "The offenses alleged in counts 9, 10, and 33 involve three separate victims, as I've indicated. Therefore, the court must impose separate and consecutive sentences for those offenses." The trial court then went on to recite the 15-to-life terms. Appellant's contention is without merit.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J. ASHMANN-GERST, J.