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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND PACHECO, Defendant and Appellant.	B269689 (Los Angeles County Super. Ct. No. KA106213)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Raymond Pacheco (defendant) was convicted by jury of 10 counts of sexual offenses against V., beginning as early as V.'s seventh birthday in 2001 and continuing until her 16th birthday in 2010. The convictions, in chronological order of their commission, are: oral copulation of a child under 14 (Pen. Code,[1] § 288a, subd. (c)(1); count 7); lewd act on a child under 14 (§ 288, subd. (a); count 8); continuous sexual abuse of a child under 14 (§ 288.5, subd. (a); count 1); oral copulation of a child under 14 (§ 288a, subd. (c)(1); count 2); lewd act on a child under 14 (§ 288, subd. (a); count 3); sexual penetration by a foreign object of a child under 14 (§ 289, subd. (j); count 9); forcible rape (§ 261, subd. (a)(2); count 6); oral copulation of a child under 16 (§ 288a, subd. (b)(2); count 4); lewd act on a child 14 to 15 years old (§ 288, subd. (c)(1); count 5); and sexual penetration by a foreign object of a child under 16 (§ 289, subd. (i); count 10).

The trial court sentenced defendant to a total term of 29 years four months, consisting of the midterm of 12 years for the count 1 continuous sexual abuse conviction, the full midterm of six years for the count 6 forcible rape conviction, two years (one-third the midterm) each for counts 2, 3, 7, 8 and 9 and eight months (one-third the midterm) each for counts 4 and 10. An eight month sentence was imposed concurrently for count 5.

Defendant appeals from the judgment of conviction, contending there is insufficient evidence to support the count 7 oral copulation conviction which was alleged to have occurred between V.'s seventh and ninth birthdays and the count 1 continuous sexual abuse conviction which was alleged to have occurred between her ninth birthday and the end of 2005. Defendant also contends the trial court abused its discretion in denying his motion to reopen his case to call

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[1] Further undesignated statutory references are to the Penal Code.

an additional witness and in denying his motion for a new trial on the grounds that the jury relied on extra-judicial evidence.

V.'s testimony relating defendant's acts to events in her life, and relating those life events to calendar dates, is substantial evidence which supports the counts 1 and 7 convictions. The trial court did not abuse its discretion in denying either of defendant's motions. The additional witness identified by defendant would have offered cumulative and immaterial testimony. The jury did not rely on an extra-judicial evidence. We affirm the judgment of conviction.

BACKGROUND

V. was born on August 24, 1994. By the age of five, V. lived with her grandparents, Stella and Richard Sanchez[2] in their house in La Puente. V. turned five in 1999. She believed defendant and his wife Laura Pacheco moved into the house when she was five.[3] Laura is Richard's niece.

V. started kindergarten shortly after her fifth birthday, in the fall of 1999. She completed one grade per year. V. testified she had Guillan Barre Syndrome between the ages of eight and 10. She also testified that defendant and Laura lived in the La Puente house until V. was in the sixth grade. V. believed the couple moved directly to a house in Chino. They lived in the Chino house until V. was in high school, and about 15 or 16 years old. They then moved to a house in Norco.

V. gave a chronology of defendant's sexual abuse that was linked to significant events in her life. She explained that defendant began coming into her room at night about six months to a year before she contracted Guillan

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[2] Because many witnesses share last names, we refer to them by their first name for the sake of clarity. No disrespect is intended.

[3] Stella estimated they moved in when V. was around six.

Barre Syndrome. He would kiss her, touch her thigh, move his hand up to her vagina, and make a circular motion there with his fingers. She described these visits as occurring every night to every other night.

V. described this conduct as continuing and escalating after she contracted Guillan Barre Syndrome. Once V. contracted Guillan Barre Syndrome, she was unable to move or speak, and could not get up on her own to use the bathroom. Accordingly, Stella put diapers on V. at night. V. specifically described defendant moving her diaper aside and inserting his fingers into her vaginal lips on some occasions and using his tongue on the inside of her vaginal lips on other occasions. He made circular motions with his fingers and tongue.

V. began to recover from Guillan Barre Syndrome about a year after she contracted it V. explained that during the first six months of her recovery, she remained unable to speak. She did not offer testimony which clearly related to those months. V. described an occasion after she regained her speaking ability when she started to tell her grandmother about defendant's conduct, but was interrupted by defendant. V. then said that defendant "continued" to visit her every night or every other night while he lived in the La Puente house, unless he was out of town for work. She also testified that once defendant moved to the house in Chino when V. was in the sixth grade, "the same incidents were occurring"' and "the same things that were happening at the other house, the same nights" would happen there. She described these "things" as defendant touching her on her vagina with his fingers and tongue, and making circular motions with both.

Stella provided a different timeline for V.'s illness and defendant's and Laura's residency in the La Puente house. Stella testified that defendant and Laura moved out in late 2003, just before V. contracted Guillan Barre Syndrome. Stella indicated that defendant and Laura first moved to an apartment and then to a house in Chino.

Under both Stella's and V.'s timelines, defendant and Laura were living in the Chino house by some point in 2005. The counts 2, 3, 6 and 9 offenses were alleged to have occurred between January 1, 2005 and August 24, 2008, and so in the Chino house. Defendant does not challenge the sufficiency of the evidence to support those offenses and so we omit the details of his conduct.

V. acknowledged that she voluntarily visited defendant at the Chino house and spent the night there. The house had a pool, and V. loved to swim. Defendant often wanted V. to spend the night, and he would tell her that if she did, she could wake up and jump in the pool the next morning. Defendant's acts of sexual abuse occurred at night after everyone else was asleep.

At some point when V. was 15 or 16, defendant and Laura moved to a house in Norco. The counts 4, 5 and 10 offenses were alleged to have occurred between August 24, 2008, when V. turned 14 and August 23, 2010, the day before she turned 16. V.'s testimony indicates that the offenses took place in the Norco house. Defendant does not challenge the sufficiency of the evidence to support those offenses and so we omit the details of his conduct.

At some point, probably when V. was in high school, she confided in a friend, Francisco, about defendant's sexual abuse. He urged her to tell someone, but she did not do so immediately. At some point, V. told her mother, who was in and out of V.'s life, about the sexual abuse. Her mother called the police. The initial report was taken by police in August 2012, shortly before V.'s 18th birthday.

At trial, the prosecution offered expert testimony about child sexual abuse accommodation syndrome (CSAAS). CSAAS is a model which explains the behavior of children who may have been sexually abused. That behavior may be different than what nonexperts would expect. There are four main components of the syndrome: (1) secrecy, (2) helplessness, (3) accommodation, and (4) delayed and conflicted disclosure. It is very uncommon for children to

disclose abuse immediately. Children often behave normally around their abuser in family situations. To so otherwise could lead to questions and put the child in the position of having to disclose or make something up. It is easier for children to "just go along . . . and be nice and do what you're supposed to do."

Defendant called several witnesses to testify on his behalf at trial. Defendant's wife Laura testified that she and defendant moved out of the La Puente house in January 2004, and V. had not yet become sick at that time. They moved to an apartment and then in September or October 2004 to the house in Chino.

When defendant and Laura moved to the house in Chino, their daughter Margaret Troelstrup, Margaret's husband and her son moved in with them. V. frequently spent the night. V. initiated the overnight visits.

In April, 2011, Laura, defendant and their family moved to a house in Norco. V. continued to visit but not as frequently as when the family lived in Chino. She usually stayed the night.

According to Laura, V. was happy when she was around the family. She never acted scared or unhappy about spending time with defendant. She never seemed reluctant to drive with defendant alone in his truck. Laura never saw any indication of sexual behavior between V. and defendant.

Laura first heard of V.'s allegation in 2012, and she was in shock. She knew defendant well and did not believe the allegations could be true.

Defendant's daughter Margaret also testified on his behalf. Margaret believed that she was close to V, who often asked Margaret to talk to her grandmother so that V. could come to the Chino house. According to Margaret, V. would sometimes want to visit because she was in trouble with her grandparents. V. never showed any reluctance to be around defendant. She did not appear to be afraid of him and seemed comfortable around him. When V. spent the night, Margaret often stayed up late with V. and talked. Sometimes,

V. would ask Margaret to lie for her, for example when V. got bad grades or sneaked out of the house.

Yolanda Riboni and her husband Leo Riboni often socialized with defendant and his family. Both confirmed that defendant was often out of town on trucking jobs. Leo estimated defendant was gone as much as 80 percent of the time. Leo never saw anything unusual in the interaction between defendant and V.

Laura's mother Deborah Sanchez had observed defendant and V. together for years and had never seen anything unusual. V. did not try to avoid defendant and did not seem afraid of him.

In rebuttal, V. denied that she got bad grades or sneaked out of the house; she had never asked Margaret to lie for her. Stella confirmed that V. did not get bad grades and rarely got into trouble.

DISCUSSION

I. Sufficiency of the evidence

Defendant contends there is insufficient evidence to support his count 1 conviction for continuous sexual abuse of a minor and his count 7 conviction for oral copulation of a minor. The count 7 offense was alleged to occur between August 24, 2001 and August 23, 2003. Defendant contends he could not have committed the act as described by V., because in her account, the act occurred while she was immobilized with Guillan Barre Syndrome and the evidence was uncontroverted that he moved out of the La Puente house before V. contracted Guillan Barre Syndrome. The count 1 offense was alleged to have occurred between August 24, 2003 and December 31, 2008. Defendant again contends he could not have committed the acts which V. described as occurring while she had Guillan Barre Syndrome because he no longer lived in the house. He further contends that once he moved out of the house, he no longer had the recurring access required for count 1. In addition, he contends V.'s testimony

about this time period was too vague and general to show that the first and last acts of abuse occurred at least three months apart.

A. Law—sufficiency of the evidence

"'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]'" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

"In our limited role on appeal, '[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]'" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 162.)

B. Law—sex acts

Section 288.5, subdivision (a) provides: "Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three

or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct, as defined in Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child."

"Generic" testimony from the victim can be sufficient to support a conviction under section 288.5. The victim "must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*People v. Jones* (1990) 51 Cal.3d 294, 316.) "As many of the cases make clear, the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction. [Citations.]" (*Id*. at pp. 315-316.)

"Time is only an essential allegation if the defense is one of alibi; otherwise, the prosecution need only prove the act alleged was committed before the filing of the information and within the statute of limitations." (*People v. Moore* (1989) 211 Cal.App.3d 1400, 1414.) "[O]nly infrequently can an alibi or

identity defense be raised in resident child molester cases. Usually, the trial centers on a basic credibility issue—the victim testifies to a long series of molestations and the defendant denies that any wrongful touchings occurred. (E.g., *People v. Moreno* [1989] 211 Cal.App.3d [776,] 787-788; *People v. Obremski* [1989] 207 Cal.App.3d [1346,] 1353; *People v. Dunnahoo* [1984] 152 Cal.App.3d [561,] 572.) As indicated in *Dunnahoo*, if the defendant has lived with the victim for an extensive, uninterrupted period and therefore had continuous access to the victim, neither alibi nor wrongful identification is likely to be an available defense. (152 Cal.App.3d at p. 572.)" (*People v. Jones, supra,* 51 Cal.3d at p. 319.)

C. Analysis

Defendant's claim is based on the testimony of Stella and Laura concerning when V. contracted Guillan Barre Syndrome and when defendant moved out of the house. V.'s testimony provided a completely different timeline, and is substantial evidence to support the counts 1 and 7 convictions.

Count 7 covered the period from August 24, 2001 to August 23, 2003. Viewing the evidence in the light most favorable to the verdict, V. testified that she had Guillan Barre Syndrome when she was eight years old, and was severely incapacitated by Guillan Barre Syndrome during that time. V. was eight years old from August 23, 2002 to August 23, 3003. V. described an act of oral copulation by defendant while she was unable to go to the bathroom by herself and so was wearing diapers at night, due to Guillan Barre Syndrome. Thus, this act occurred between August 2002 and August 2003, during the period alleged for count 7, and a time when defendant was undisputedly still living in the La Puente house.

Count 1 covered the period from August 24, 2003 to December 31, 2005. Viewing the evidence in the light most favorable to the verdict, V.'s year of recovering from Guillan Barre Syndrome occurred when she was nine years old,

and so took place from August 24, 2003 to August 23, 2004. V. testified that defendant moved out when she was in sixth grade. V. started that grade in the fall of 2005. Thus, the count 1 dates include a year when V. was recovering from Guillan Barre Syndrome but still suffering after-effects, a period of time when V. had recovered from Guillan Barre Syndrome and a period of time when defendant had moved to the Chino house.[4]

V.'s testimony shows that she regained her ability to speak about a year and a half after she first contracted Guillan Barre Syndrome, which would have been when she was nine and a half years old, in or around February 2004. She described an occasion when she started to tell her grandmother about defendant's conduct, but was interrupted by defendant. V. then said that defendant "continued" to "visit" her every night or every other night, unless he was out of town for work.[5] She also testified that once defendant moved to the house in Chino, "the same incidents were occurring"' and "the same things that were happening at the other house, the same nights" would happen there. She described these "things" as defendant touching her on her vagina with his fingers and tongue, and making circular motions with both. Thus, viewing the evidence in the light most favorable to the verdict, V. described sexual acts by defendant which occurred repeatedly from February 2004 through the end of

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[4] The prosecutor argued in closing that count 1 covered acts which occurred "when defendant was in the house" and acts which occurred when V. went to defendant's house in Chino.

[5] V.'s testimony about defendant's earlier visits provides context for her testimony that defendant "continued" to visit her after she regained her ability to speak. She testified that during those visits he would kiss her, touch her thigh, move his hand up to her vagina, and make a circular motion. V. described this conduct as continuing after she contracted Guillan Barre Syndrome, then escalating to include touching her vaginal area with his fingers and tongue and making a circular motion.

2005, at the La Puente house and the house in Chino. This is sufficient specificity to show that there were more than three sexual acts, and the first and last acts occurred three months apart.

To the extent that defendant contends acts committed after he moved out of V.'s house do not qualify, he is mistaken. The statute is also satisfied if a defendant has "recurring access" to a child. V.'s testimony indicated that defendant had recurring access to her at the Chino house. "Recurring access" does not have a technical meaning. (*People v. Rodriguez* (2002) 28 Cal.4th 543, 547.) The term simply means "an ongoing ability to approach and contact someone time after time." (*Ibid.*)

Similarly, defendant's reliance on *People v. Mejia* (2007) 155 Cal.App.4th 86 to show insufficiency of the evidence is misplaced. The facts of *Mejia* are unusual and are not helpful in analyzing this case. "Reviewing the sufficiency of evidence . . . necessarily calls for analysis of the unique facts and inferences present in each case, and therefore comparisons between cases are of little value. (*People v. Thomas* (1992) 2 Cal.4th 489, 516.)" (*People v. Rundle* (2008) 43 Cal.4th 76, 137-138, disapproved of by *People v. Doolin* (2009) 45 Cal.4th 390.)[6]

Defendant contends the trial court abused its discretion in denying his request to reopen his case to present one additional witness, Jackie Gonzalez,

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6 The charging date for the section 288.5 offense in *Mejia* was June 1 to September 17, 2004, a period of three and a half months. The victim testified that the sexual acts began in June; she turned 14 on September 18. (*Mejia, supra*, 155 Cal.App.4th at pp. 91, 93-94.) Thus, at a minimum, some evidence permitting an inference that the molestation began not just in the month of June, but before June 17, was necessary to show that the first and last acts occurred three months apart. The constraints of such a short period are not present here. V. described sexual acts occurring every day or so for a period of almost two years. That is more than sufficient evidence to support the inference that the first and last act occurred at least three months apart.

the landlord of the Chino house. He claims this denial violated his constitutional rights to due process and a fair trial, and his right to present a defense.

Respondent counters that defendant has forfeited his federal constitutional claims by failing to object on that specific ground in the trial court. The claim would be forfeited only if defendant were attempting to raise a completely different claim from his abuse of discretion claim. (See *People v. Riggs* (2008) 44 Cal.4th 248, 292; see also *People v. Gonzalez* (2006) 38 Cal.4th 932, 948-949.) Here, the claims are interrelated.

A. Law

Section 1093 sets forth the general order for conducting a trial. Section 1094 provides: "When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order prescribed in Section 1093 may be departed from." Section 1093 and 1094 give the trial court "'broad discretion to order a case reopened and allow the introduction of additional evidence [citations].'" (*People v. Riley* (2010) 185 Cal.App.4th 754, 764.)

"In determining whether a trial court has abused its discretion in denying a defense request to reopen, the reviewing court considers the following factors: '(1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence.' [Citation.]" (*People v. Jones* (2003) 30 Cal.4th 1084, 1110.)

As a general rule, "'"the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the

admission of evidence in the interests of orderly procedure and the avoidance of prejudice.'" [Citation.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 155.)

B. Analysis

Three of the four factors to be considered in assessing the trial court's ruling are evenly balanced. The defense request came fairly soon after the close of evidence, and before instructions or arguments had begun, which weighs slightly in favor of allowing reopening. The defendant offered no explanation for his delay in calling Gonzalez witness and so made no showing of diligence.[7] This factor weighs against allowing reopening. There was some slight risk that the jury would accord Gonzalez's testimony extra weight, simply by virtue that the proceedings were altered to let her testify. However, the change would have been minimal, since the next phase of the trial (instructions and argument) had not yet begun. This factor is neutral. Thus, the fourth factor, the significance of the witness, is the determinative one.

Defendant characterizes Gonzalez as a highly significant witness. He contends that due to the vague nature of V.'s testimony, he had "very few avenues for presenting a defense." He argues that presenting an alibi defense was "out of the question" because there was no way to show that over a period of years he had no opportunity to be alone with V. He contends that all he "can present by way of defense is his own good name and character, as well as the testimony of people who observed him and [V.] together."[8] Gonzalez would have testified about her observations of defendant and V. together at the Chino house.

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[7] Gonzalez's name is listed on the defense's September 28, 2015 witness list.

[8] Defendant also attacked V.'s character as part of his defense.

Defendant may well be correct in describing his best defense to the charges in this case, but Gonzalez was not necessary to present that defense. Defendant offered the testimony of several witnesses who observed him and V. together: Laura, Margaret, Yolanda Riboni, Leo Riboni and Margaret Sanchez. Defendant acknowledged that he did not know "if there's anything new that might come out from this witness. But it would be consistent with the other witnesses that we've had on the defense side regarding that issue." In some circumstances, cumulative or duplicative testimony might be necessary to overcome credibility problems with a particular witness. Here, however, the prosecutor chose to essentially concede that defendant's interactions with V. were normal when others were present. The prosecutor offered an expert witness to explain this behavior as being consistent with being abused.

Since Gonzalez's testimony would not have been significant, the trial court did not abuse its discretion in denying defendant's motion to reopen. For this same reason, defendant was not denied his right to present a defense by his inability to call a cumulative witness to testify on an essentially conceded issue: that testimony would not have called the reliability of the prosecution's evidence into doubt. (See *Davis v. Alaska* (1974) 415 U.S. 308 [a defendant has a federal constitutional right to present evidence which calls into doubt the reliability of the evidence on which the state is relying].)

Further, even assuming the delay and disruption caused by reopening would have been so minor that the trial court abused its discretion in denying the motion, the error would be harmless: there is no reasonable probability or possibility that defendant would have received a more favorable result if he had been able to offer the cumulative testimony of Gonzalez.

III. Motion for new trial

Defendant moved for a new trial on the ground that the court erred by failing to declare a mistrial "when it became clear that jury deliberations were

being influence by matters outside the evidence presented in court." Defendant identified these matters as (1) an Excel spreadsheet used by the prosecutor in opening statements and closing arguments and (2) e-mails compiled by defendant's wife Laura. To show that the jury relied on these two items, defendant pointed to the jury's request during deliberation to see the spreadsheet and the e-mails. The trial court informed the jury that these items were not evidence. Defendant argued perfunctorily that this use of extra-judicial evidence was prosecutorial misconduct. Defendant cited section 1181, subdivisions 2, 3 and 5.

The trial court denied the motion, stating, "certainly the spreadsheet was not evidence, and I told [the jury] that at the time. In the Laura e-mail, I find no bad faith on [the prosecutor's] part. It's perfectly legitimate cross-examination to find out who actually compiled those actual words that were used in the e-mail list of what the witnesses might say."

On appeal, as in the trial court, defendant focuses on the ground of extra-judicial information, and treats as self-evident the claim that the prosecutor committed misconduct by referring to such information. Respondent contends defendant has forfeited this claim by failing to object in the trial court to this evidence or to the prosecutor's questions and argument. Defendant's claims depend in large part on the jury's response to the evidence and argument, as manifested by the jury's questions during deliberations. At that point it was any objections would have been futile. Accordingly, the claims are not forfeited.

A. Law

Section 1181 provides in pertinent part: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial . . . 2. When the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property; 3. When the jury has separated without leave of the court

after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented; . . . [or] 5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury."

"'We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard.' [Citations.] "'A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.'"" (*People v. Thompson* (2010) 49 Cal.4th 79, 140.)

B. Analysis—Spreadsheet

During opening statement and the initial closing argument, the prosecutor showed the jury an Excel spreadsheet which correlated V.'s age and school with the corresponding calendar years. In addition, the spreadsheet listed the counts from the information and showed which years each count matched. For example, the chart showed that the count 1 offense, continuous sexual abuse of a child, occurred between 2003-2005. Defendant did not object to this chart at any point.

In his motion for a new trial, defendant argued that there was no "proper foundation laid for any of the information in the prosecution's spreadsheet" and the "improper use of the spreadsheet led to a belief on the part of the jurors that there was strong evidence presented that tied the dates and alleged conduct of the defendant to each charge."

The Excel spreadsheet used by the prosecution was permissible. "The purpose of the opening statement "'is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect" [citation].' [Citation.]" (*People v. Fauber* (1992) 2 Cal.4th 792, 827.) The use of

posters, photographs, and similar items containing information which is "intended later to be admitted in evidence, as visual or auditory aids is appropriate." (*Ibid*., citing *People v. Green* (1956) 47 Cal.2d 209, 215.)[9]

The prosecutor introduced a document which was very similar to the Excel spreadsheet as exhibit 1 during trial. Exhibit 1 correlated V.'s age, grade and school with the corresponding calendar years, but did not refer to the counts from the information. V. testified that the document was accurate. Defendant did not object to this document when it was shown to V. or when it was admitted into evidence.

Although the verdict forms in this case were not "evidence," the jury was clearly required to consider the contents of the forms in order to reach its verdict. The verdict form for each count showed the dates the offense was alleged to have occurred. Thus, the Excel spreadsheet did not contain any extra-judicial information. The prosecutor could, and did, properly correlate the dates for the charges with V.'s age, grade and school. Putting that argument in written form did not somehow make it improperly persuasive. (See *People v. Fauber, supra*, 2 Cal.4th at p. 827 ["mere appearance" of poster used in opening statement, which was an enlarged page from the preliminary hearing transcript, could not have been so "official" that it caused the jury to prejudge the evidence].)

On appeal, defendant contends that the spreadsheet was improper because it "tracked the offenses by the charged timeline perfectly" but the evidence presented by the prosecutor did not match the charged timeline in the information. The only specific example defendant provides is the count 1

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9 Even where a visual aid such as a "map or sketch is not independently admissible in evidence it may, within the discretion of the trial court, if it fairly serves a proper purpose, be used as an aid to the opening statement." (*People v. Green, supra*, 47 Cal.2d at p. 215.)

continuous sexual abuse charge, which defendant claims could not have occurred during the time period alleged in the information. As we explain above, there is sufficient evidence to show the offense did occur when charged. Thus, the spreadsheet did not misstate the evidence; the prosecutor did not commit misconduct by using the spreadsheet; and the trial court did not abuse its discretion in denying defendant's motion for a new trial.

C. Analysis—Laura's e-mails

Before trial, the prosecutor requested and received offers of proof for each defense witness summarizing the expected testimony of those witnesses. Four of the summarized statements were virtually identical, including the statements for Yolanda Riboni and her husband Leo Riboni.

During trial, the prosecutor questioned defendant's wife Laura about her role in obtaining statements from witnesses. She agreed that she spoke with the witnesses and explained: "I got them together. I sent them a guideline . . . and they responded." Laura indicated that the responses were in the forms of e-mails, and she forwarded the information in the e-mails to defendant's attorney without making any changes. Laura believed that she still had the e-mails. At no point did the jury see any e-mails sent to Laura.

The prosecutor subsequently showed the Ribonis a copy of the offer of proof document and asked them if the statements were the exact words each sent to Laura. Yolanda and Leo both agreed that the statements contained their exact words.[10] Yolanda and Leo agreed that their statements were virtually identical. Leo explained that he had conferred with Yolanda, his wife, before writing his statement. At no point did the jury see the offer of proof document.

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[10] The prosecutor also asked Deborah Sanchez if she sent an e-mail to Laura, but did not question her about the contents of the e-mail.

Defendant argues that questioning witnesses about the offer of proof statements was improper because the underlying document (1) was not entered into evidence, (2) was improperly used to suggest that Laura had manipulated witness statements and (3) was improperly used to make the defense witnesses sound like they were being untruthful and in collusion with each other.[11]

Documents which are not entered into evidence may be used in the examination of witnesses. A document may be used to refresh a witness's recollection, for example, even though the document is never entered into evidence. Defendant does not offer any argument or authority to support his claim that the use of the offer of proof document in this case was improper.

The prosecutor's questioning of Laura about her role in obtaining witness statements was a reasonable and good-faith attempt by the prosecutor to establish collusion, which is simply an attack on witness credibility. Laura denied changing any statements, but that denial does not render the prosecutor's questions improper. Further, the jury was properly instructed that the questions of counsel are not evidence.

Once Laura testified that she did not change the witnesses' e-mails, it was reasonable for the prosecutor to question the witnesses about their preparation of the e-mails. Once Leo and Yolanda agreed that the statements were their own exact words, it was reasonable for the prosecutor to inquire if the couple had written the statements together. Leo testified that he wrote his own statement, but acknowledged that he and Yolanda conferred before writing their statements.

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[11] Defendant also argues the witness statements were "defense work product" but provides no argument or authority to support that claim. Accordingly, the claim is forfeited.

Even assuming for the sake of argument that the prosecutor should have asked his questions without mentioning the existence of the offer of proof document, there was no prejudice to defendant from the document references. Any loss of credibility to defense witnesses came from Leo's admission that he conferred with his wife about their expected testimony. The jury's request to see the e-mails is indicative of curiosity, but there was no way for the e-mails to have influenced the jury because the jury never saw the e-mails.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

CHAVEZ, Acting P.J.

HOFFSTADT, J.

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