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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. DIJON O'NEAL, Defendant and Appellant.	B278787 (Los Angeles County Super. Ct. No. MA065840)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Strassner, Temporary Judge.[1] Affirmed.

Louisa B. Pensanti for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

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[1] Pursuant to California Constitution, article VI, section 21.

Appellant Dijon O'Neal was convicted by a jury of oral copulation by force (Pen. Code, § 288a, subd. (c)(2)(A), count 1),[2] penetration by foreign object (§ 289, sub. (a)(1)(A), count 2), and false imprisonment (§ 236, count 3). He appeals from the judgment, raising issues of *Brady*[3] error, evidentiary error, erroneous release of a trial witness (the victim), and insufficiency of the evidence. We conclude his contentions lack merit, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The crimes in this case occurred on April 19, 2015. At 2:06 a.m., the complaining witness, Ms. M., called 911, stating that a man had tried to kidnap her, and that he had punched her in the face and tried to rape her before running off with her keys. She clarified that she had not been raped, but had been forced to perform oral sex.

Deputy Delling and his partner, Deputy Livingston, responded to the 911 call. Based on Ms. M.'s statements and demeanor, Deputy Delling believed she might have been engaged in prostitution when the assault occurred. After he assured her that a person engaged in prostitution could still be a victim of sexual assault, she admitted she had been working as a prostitute when her client (later identified as defendant) suddenly hit her in the face, forced her to perform oral sex, and inserted his finger in her vagina. She said she managed to get

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[2] All further undesignated statutory references are to the Penal Code.

[3] *Brady v. Maryland* (1963) 373 U.S. 83.

away from defendant when he got out of the car in order to change positions for sexual intercourse.

While Ms. M. was showing the deputies the text messages she had exchanged with defendant earlier that night, defendant sent her a new text message stating that her keys were in a dirt field near her car. (Based on this information, Ms. M.'s keys were recovered and returned to her by another deputy.) A few minutes later, Ms. M. received a call from defendant, and the deputies instructed her to answer the call while they arranged to have it traced. While Ms. M. kept defendant on the line, the call was traced to defendant's cell phone, and led to the discovery of his name and home address. During their telephone conversation, Ms. M. told defendant that police would be coming for him. After the call ended, Deputy Delling showed Ms. M. a DMV photograph of defendant, and she identified him.

The information provided by Ms. M. was related to Deputy Waldron. He went to defendant's home at 4 a.m. that morning. After receiving a *Miranda* warning, defendant spoke with Deputy Waldron about his recent encounter with Ms. M. Defendant said he had gone with Ms. M. to a secluded area in order to have consensual sex. After she performed oral copulation, he wanted to have sexual intercourse, and because he was too large to have sex in the back seat, he got out of the car. (At booking, defendant weighed 290 pounds and was 6 feet 3 inches tall.) Defendant said that Ms. M. became upset and accused him of trying to leave without paying her. He claimed that Ms. M. began pushing and hitting him, and because he was afraid that someone would call police he grabbed his things and ran away. When he realized he had taken Ms. M.'s keys, he called her cell phone to let her know her keys were in the desert. He denied hitting Ms. M.

After he provided these statements, defendant was arrested and taken to the station. His cell phone was booked into evidence.

Ms. M. underwent a rape kit examination on the night of the crimes. She told the forensic nurse, Deshara Bullett, that she had been working as a prostitute when a client became violent, hit her in the face, took her keys, and threatened to kill her. She told Ms. Bullett that the man forced her to perform oral sex before inserting a finger in her vagina. During the rape kit examination, Ms. Bullett found two fresh vaginal scrapes or lacerations that were consistent with digital penetration. Ms. Bullett thought the lacerations were consistent with either consensual or non-consensual sexual activities. Photographs taken of Ms. M. during the rape kit examination depicted a swollen abrasion or bruise on her nose.

The following day, April 20, 2015, Detective MacLean interviewed defendant at the station. After waiving his rights, defendant explained that on April 19, he had tried to contact a prostitute named Dream who advertises on a website called Back Page. Another woman, Ms. M., called him back, and Ms. M. agreed to meet him for a car date. Defendant claimed that Ms. M. voluntarily engaged in oral sex in the back seat of her car, but when he got out of the car in order to have sexual intercourse, Ms. M. became upset that he was trying to leave without paying her. He said that when Ms. M. began searching for something in the front seat of the car, he became afraid she had a gun and was going to shoot him. He explained that he quickly grabbed his things and ran home, but accidentally took Ms. M.'s car keys with him. When he realized this, he texted and called Ms. M. to let

her know her keys were in the desert. He denied hitting Ms. M. or inserting a finger in her vagina.

At the conclusion of the April 20, 2015 interview, defendant inquired about a rape kit examination of Ms. M. Detective MacLean told him the examination would show whether his DNA was on Ms. M.'s vagina, and if defendant had touched her there, it would be better to admit it. Defendant then admitted to Detective MacLean that he had touched Ms. M.'s "pussy" and inserted his finger "a little bit." He also admitted deleting some text messages from his cell phone.

The pretrial statements by Ms. M. and defendant were introduced at trial through the testimony of Deputy Delling, Deputy Waldron, and Ms. Bullett. The prosecution played for the jury the recordings of Ms. M.'s 911 call and defendant's April 20, 2015 interview. A summary of Ms. M.'s trial testimony is provided below.

Ms. M.'s Trial Testimony

During a pre-trial Evidence Code section 402 hearing, defense counsel (Ms. Pensanti) argued that evidence of Ms. M.'s prior sexual history, particularly the number of times she had engaged in prostitution, was relevant to impeach her credibility. The prosecutor (Ms. Knittel) disagreed, arguing the prior sexual history of a sexual assault victim is irrelevant to the issue of consent. Ms. Knittel also argued that prostitution is a misdemeanor that does not involve moral turpitude, and therefore is inadmissible for impeachment purposes. However, Ms. Knittel acknowledged Ms. M.'s history of prostitution might become relevant if her direct testimony showed she had other negative encounters with clients who refused to pay her. After considering these arguments, the trial court reasoned that

because Ms. M. was expected to testify she initially agreed to have sex in exchange for money, her initial consent was undisputed and, therefore, her previous prostitution activities were not relevant. However, depending on her direct testimony, the court found that Ms. M. might open the door to cross-examination on her previous prostitution activities.

In her direct testimony, Ms. M. admitted she advertised her prostitution services and cell phone number on a website called Back Page. She testified that on the night of the assault, she agreed to meet defendant for oral and vaginal sex in exchange for $80. She said that after defendant got into her car, he directed her to a secluded location near a school and a vacant lot. When they both got into the back seat, she asked for payment up front, which is her usual custom. She testified that defendant seemed to be reaching for his wallet when he suddenly punched her in the nose, grabbed her by the back of her neck, and threatened to kill her, saying he had just lost his brother and did not care. Ms. M., who weighs 120 pounds, claimed that she was afraid for her life and started to cry. She testified that defendant demanded everything she had, and snatched her car keys. She said that she begged him not to hurt her because she would do whatever he wanted. He told her, "just do what I want and you will be fine."

Ms. M. testified that she followed defendant's instructions. After placing a condom over defendant's erect penis (she had brought the condom with her), she orally copulated him. She did this while defendant pushed down on her head and held her wrist.

Ms. M. testified that defendant eventually pulled down her shorts and underwear, and inserted a finger in her vagina. She explained that she managed to back away from defendant when

he loosened his grip on her wrist while he exited the car to change positions for sexual intercourse. She testified that she got out of the car on the opposite side and dialed 911 on her cell phone. She said that as she ran away from her car, she saw defendant running into the desert.

Ms. M. admitted on direct examination that some of the statements she made during her 911 call were not true. She testified that, contrary to her 911 call, no one had approached her in front of her friend's house and forced her to drive somewhere. She explained that she had lied about these details in order to hide her illegal prostitution activities, but the other parts of her statements were true.

In anticipation of defendant's theory that Ms. M. was lying about the sexual assault, Ms. Knittel asked Ms. M. if she had argued with defendant about not being paid. Ms. M. denied arguing with defendant or with any other client who had refused to pay in advance. She testified that when previous clients refused to pay in advance, she simply left them. She testified that she never reported a client to police before this incident.

Limitation on Cross-Examination

During cross-examination, Ms. Pensanti sought permission (outside the jury's presence) to ask Ms. M. three questions: the length of time she had worked as a prostitute; the number of times she had used a condom with other clients; and whether she had engaged in sexual activity during the 72-hour period before this incident.

The court excluded the first two questions. It found the first was irrelevant, and excluded the evidence under Evidence Code section 352. As to the second, the court found the undisputed evidence already established the condom belonged to

Ms. M., thus dispelling any inference that defendant had brought the condom with him.

As to the third question, the court allowed defense counsel to inquire about Ms. M.'s previous sexual activities, but only during the 48-hour period preceding this incident. It found that 48 hours was a reasonable period to explore alternative explanations for the scratches on Ms. M.'s vagina. When the question was posed on cross-examination, she denied having sexual contact with anyone during that period.

Disclosure of Ms. M.'s Prior Misdemeanor Convictions

Just before Ms. M. began her testimony on redirect, Ms. Knittel acknowledged outside the jury's presence that she had made an error. She explained a colleague had just informed her that prostitution is a crime of moral turpitude, and, therefore, Ms. M.'s previous prostitution activities were admissible for purposes of impeachment. Based on her new understanding, Ms. Knittel disclosed Ms. M.'s two prior misdemeanor convictions related to prostitution. As a result of these new disclosures, the trial court permitted Ms. Pensanti to ask two additional questions: whether Ms. M. had been convicted of disorderly conduct by prostitution in October 2011 (§ 647, subd. (b)), and loitering with intent to commit prostitution in July 2015 (§ 653.22).[4] When these two questions were posed to her in front of the jury, Ms. M. replied yes to both. Ms. M. also testified that the July 2015 conviction was based on her arrest on April 3,

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[4] Detective MacLean testified that although he was aware of Ms. M.'s prior arrests, he did not learn of her convictions until the previous day. He explained that his ignorance of the prior convictions had no impact on his investigation.

2015. No further questions were asked regarding either prior conviction.

Excusal of Ms. M.

At the conclusion of Ms. M.'s testimony, defense counsel asked that she be placed on recall. The trial court initially granted this request. However, after being informed by Ms. Knittel that Ms. M. lived out of state and was scheduled to fly home the next day, the court changed its ruling and excused Ms. M.

Closing Arguments, Jury Instructions, and Verdict

After the prosecution rested, defendant moved to dismiss all counts. (§ 1118.1.) The motion was denied. Defendant presented no defense witnesses.

In closing argument, Ms. Knittel argued that a person's initial consent to have sexual intercourse may be withdrawn upon being subjected to threats and violence. Ms. Knittel described Ms. M. as a credible witness who had withdrawn her consent after being punched in the nose and threatened with death. Her story was corroborated, Ms. Knittel argued, by photographic evidence of a bruise on Ms. M.'s nose, forensic evidence of fresh scratches on her vagina, defendant's flight through the desert and erasure of cell phone messages, and his inconsistent statements regarding digital penetration.

Ms. Pensanti argued that the encounter between defendant and Ms. M. was entirely consensual. Ms. Pensanti accused Ms. M. of bringing false allegations in order to punish defendant for not paying her. Citing Ms. M.'s prior prostitution convictions and fabrications during the 911 call, Ms. Penanti argued it was not reasonable to believe defendant sexually assaulted Ms. M. and then sent a text message about her car keys. The more

plausible explanation, Ms. Penanti claimed, was Ms. M. had lied about the attempted kidnapping in order to hide her own criminal prostitution activities, and also had lied about the alleged sexual assault. Ms. Pensanti contended that Ms. M.'s story had evolved, but defendant had maintained his innocence throughout this case.

In rebuttal, Ms. Knittel argued that if Ms. M. had been fearful of being arrested she would not have called 911 to summon police. Ms. Knittel argued the majority of Ms. M.'s statements during the 911 call were truthful and consistent with her testimony at trial.

The court provided several jury instructions on witness credibility. These included:

- Among the factors the jury may consider in assessing the credibility of a witness are the witness' prior inconsistent or consistent statements; the witness' testimony at trial; an admission by the witness of untruthfulness; and *any past criminal conduct of a witness amounting to a misdemeanor*. (Italics added.)
- A witness who is willfully false in one material part of his or her testimony may be distrusted as to his or her entire testimony.
- If a witness is found to have provided false testimony on a material point, the jury may reject his or her entire testimony unless the jury believes the witness was telling the truth as to the other matters.

Following a brief deliberation, the jury returned a guilty verdict on each count.

Sentencing Hearing

At the sentencing hearing, defendant argued his right to confrontation had been violated due to his inability to cross-examine Ms. M. on her newly disclosed prior convictions. He sought a continuance in order to bring a motion for new trial based on the confrontation violation. The court denied a continuance, finding defendant had cross-examined Ms. M. on her prior convictions and had provided no indication of his desire to investigate other avenues of impeachment.

The court imposed a prison sentence of 10 years and 8 months. This timely appeal followed.

DISCUSSION

I

Defendant contends the disclosure of Ms. M.'s prior misdemeanor convictions was untimely and constituted *Brady* error. We disagree.

Under *Brady*, "the prosecution has a constitutional duty to disclose to the defense material exculpatory evidence, including potential impeaching evidence. (*People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696, 709.) The duty extends to evidence known to others acting on the prosecution's behalf, including the police. (*Ibid.*) A *Brady* violation occurs if three conditions are met: "'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [the] evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." [Citation.] Prejudice, in this context, focuses on "the materiality of the evidence to the issue of guilt or innocence."

[Citations.]' (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043.)" (*People v. Harrison* (2017) 16 Cal.App.5th 704, 709.)

Defendant attributes the alleged suppression of Ms. M.'s prostitution convictions to Ms. Knittel's erroneous belief at the beginning of trial that prostitution is not a crime of moral turpitude. After being alerted to her error by a colleague, Ms. Knittel admitted her mistake to the trial court and opposing counsel. The remainder of the trial was conducted under the correct legal theory that "[p]rostitution is a crime of moral turpitude. (*People v. Alvarez* (1996) 14 Cal.4th 155, 58; see also, *People v. Hayes* (1992) 3 Cal.App.4th 1238.)" (*People v. Chandler* (1997) 56 Cal.App.4th 703, 709 (*Chandler*).) "Evidence the victim participated in a form of prostitution is conduct involving moral turpitude which is admissible for impeachment purposes. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 297, fn. 7, [allowing the admission of past criminal conduct involving moral turpitude amounting to a misdemeanor absent a conviction to impeach the credibility of witnesses and parties].)" (*Id.* at p. 708.)

On appeal, respondent concedes disclosure of Ms. M.'s prior convictions related to prostitution was required under *Brady*, but argues there was no suppression because the evidence was admitted at trial. We agree. "'[E]vidence that is presented at trial is not considered suppressed, regardless of whether or not it had previously been disclosed during discovery.' (*People v. Morrison* (2004) 34 Cal.4th 698, 715.)" (*People v. Verdugo* (2010) 50 Cal.4th 263, 281.)

II

Defendant contends the trial court erred by denying his request to place Ms. M. on recall. He points out that as a result

of her excusal, he could only recall Ms. M. with leave of court. (See Evid. Code, § 778 ["After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion."].) However, the record does not reflect that defendant sought to recall Ms. M.

Defendant argues that because the disclosure of Ms. M.'s prior convictions came at the end of her cross-examination testimony, his trial counsel was "stunned" by the "late revelation" and unable to formulate a new defense strategy before being directed to ask only "two questions" concerning the prior convictions. He argues that because the trial court "limited the scope of cross examination for impeachment to two questions," he was deprived of a rich source of cross-examination, thus violating his right of confrontation.

Because defendant did not provide an offer of proof at trial, we are left with the bare assertion in his opening brief that his trial counsel would have cross-examined Ms. M. on her April 3, 2015 arrest. (This was the arrest that led to her July 2015 conviction for loitering with intent to commit prostitution.) The trial court found at the sentencing hearing that following the disclosure of Ms. M.'s prior convictions, Ms. Pensanti did not request a continuance or express a desire to inquire about other avenues of impeachment. The record supports this finding. On this record, it is unclear what relief, if any, may be provided on appeal.

Defendant's assertion that the trial court erred by not granting a continuance on its own motion is unsupported by legal authority and requires no discussion. "'This court is not required to discuss or consider points which are not argued or which are

not supported by citation to authorities or the record.' (*MST Farms v. C. G.* 1464 (1988) 204 Cal.App.3d 304, 306.)" (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [same].)

III

Defendant challenges the limitations imposed on evidence of Ms. M.'s prior sexual conduct. We review the trial court's rulings under the abuse of discretion standard. (See *People v. Daggett* (1990) 225 Cal.App.3d 751, 757 (*Daggett*) [trial court has discretion under Evid. Code, § 352 to limit evidence of victim's prior sexual conduct].)

In prosecutions under section 288a, "Evidence Code section 782 provides for a strict procedure that includes a hearing outside of the presence of the jury prior to the admission of evidence of the complaining witness's sexual conduct. (*Chandler*, [*supra*, 56 Cal.App.4th] at p. 708; [*Daggett*, *supra*,] 225 Cal.App.3d [at p.] 757.) Evidence Code section 782 is designed to protect [sexual assault] victims . . . from 'embarrassing personal disclosures' unless the defense is able to show in advance that the victim's sexual conduct is relevant to the victim's credibility. (*People v. Harlan* (1990) 222 Cal.App.3d 439, 447.) If, after review, 'the court finds the evidence relevant and not inadmissible pursuant to Evidence Code section 352, it may make an order stating what evidence may be introduced and the nature of the questions permitted.' (*Daggett*, at p. 757.) 'A trial court's ruling on the admissibility of prior sexual conduct will be overturned on appeal only if appellant can show an abuse of discretion.' (*Chandler*, at p. 711.)" (*People v. Bautista* (2008) 163 Cal.App.4th 762, 781–782 (*Bautista*).)

As previously discussed, defendant sought to question Ms. M. on her sexual activities during the 72-hour period preceding this incident. The court allowed this question, but only as to a 48-hour period. The court imposed this limitation in order to strike an appropriate balance between Ms. M.'s right to privacy[5] and defendant's right to explore other possible explanations for Ms. M.'s vaginal scrapes. (See *People v. Fontana* (2010) 49 Cal.4th 351, 363–364 (*Fontana*) ["Where the prosecution has attempted to link the defendant to physical evidence of sexual activity on the complainant's part, 'the defendant should unquestionably have the opportunity to offer alternative explanations for that evidence, even though it necessarily depends on evidence of other sexual conduct.'"].) The limitation was appropriate under *Fontana*, *supra*, 49 Cal.4th at p. 362 ("[e]vidence of the sexual conduct of a complaining witness is admissible in a prosecution for a sex-related offense only under very strict conditions"]; Evid. Code, §§ 782, 1103, subd. (c).)[6] We find no abuse of discretion.

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[5] Under the rape shield law, "[a] defendant generally cannot question a sexual assault victim about his or her prior sexual activity. (*People v. Woodward* (2004) 116 Cal.App.4th 821, 831.) However, a limited exception is applicable if the victim's prior sexual history is relevant to the victim's credibility. (Evid.Code, § 1103, subd. (c)(4) . . . .)" (*Bautista*, *supra*, 163 Cal.App.4th at pp. 781–782.)

[6] "The Legislature's purpose in crafting these limitations is manifest and represents a valid determination that victims of sex-related offenses deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. (*People v. Rioz* (1984) 161 Cal.App.3d 905, 916–917; accord,

Defendant also sought to question Ms. M. on the number of times she had engaged in prostitution. The court excluded this evidence under Evidence Code section 352, finding its probative value was slight. The record supports the trial court's ruling. Her testimony regarding her internet advertisements and customary practice of requiring payment in advance showed she had considerable experience in prostitution, thus diminishing the probative value of the excluded evidence. The court reached a similar conclusion in *Chandler*, *supra*, 56 Cal.App.4th at p. 711, stating "[i]t is not the discrepancy in the victim's testimony concerning the *number of times* which is of impeachable importance, but the fact the victim engaged in this form of conduct involving moral turpitude which arguably places her veracity in dispute." We agree with the *Chandler* court's reasoning that "to the extent the victim's credibility might be

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Michigan v. Lucas (1991) 500 U.S. 145, 149–150.) By affording victims protection in most instances, these provisions also encourage victims of sex-related offenses to participate in legal proceedings against alleged offenders. (Letwin, '*Unchaste Character': Ideology, and the California Rape Evidence Laws* (1980-1981) 54 So.Cal. L.Rev. 35, 40 (Letwin); accord, Advisory Com. Note to Fed. Rules Evid., rule 412, 28 U.S.C.) Accordingly, our courts have properly exercised the discretion afforded by Evidence Code section 782 'narrowly' (*People v. Chandler* (1997) 56 Cal.App.4th 703, 708), and we emphasize that '[g]reat care must be taken to insure that this exception to the general rule barring evidence of a complaining witness' prior sexual conduct . . . does not impermissibly encroach upon the rule itself and become a "back door" for admitting otherwise inadmissible evidence.' (*People v. Rioz*, *supra*, 161 Cal.App.3d at pp. 918–919.)" (*Fontana*, *supra*, 49 Cal.4th at pp. 362–363.)

affected by evidence she had engaged in an exchange of sex for drugs previously, that evidence was already before the jury from the victim's own admission at trial." (*Ibid.*)

As to the exclusion of evidence regarding Ms. M.'s practice of using condoms with other clients, the record supports the trial court's finding that this issue had been adequately covered. Ms. M. testified she had brought a condom with her in anticipation of having sexual intercourse with defendant. Because there was no danger the jury would find the condom belonged to defendant, the court properly exercised discretion under Evidence Code section 352 to foreclose further inquiry on an undisputed issue.

IV

Defendant challenges the sufficiency of the evidence to establish a sexual assault. He argues that neither his interview statements nor Ms. M.'s testimony supported a finding of nonconsensual sex. He contends that where there are two equally plausible conflicting inferences to be drawn from the evidence, the prosecution has failed to satisfy the burden of proof. We disagree. We conclude that Ms. M.'s testimony and corroborating evidence provided substantial evidence to support the jury's verdicts.

"In a criminal proceeding, ""[t]he functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts."" (*People v. Ross* (1953) 120 Cal.App.2d 882, 886, quoting *Curley v. U.S.* (1947) [160 F.2d 229, 232].) In contrast, on review for the existence of substantial evidence, appellate courts 'determine, without reweighing the

evidence, whether there was sufficient evidence to permit a rational jury to convict.' (*People v. Salgado* (2001) 88 Cal.App.4th 5, 15.)" (*People v. Spicer* (2015) 235 Cal.App.4th 1359, 1378.)

Because there is substantial evidence to support defendant's convictions, regardless whether another fact finder could reach a different conclusion based on the same record, defendant is not be entitled to a reversal. In rejecting a similar contention, the Supreme Court stated: "When the evidence supports the jury's findings, a reviewing court may not reverse the judgment because the evidence might also support a contrary finding. [Citation.] Defendant's claim therefore fails." (*People v. Thompson* (2010) 49 Cal.4th 79, 126.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.