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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK RANDALL THIBODEAUX,

Defendant and Appellant.

A129757

(Alameda County
Super. Ct. No. H45256)

Mark Randall Thibodeaux appeals his conviction after a jury trial on one count, for continuous sexual abuse of a child under 14 years of age in violation of Penal Code section 288.5, subdivision (a).¹ Defendant argues the trial court prejudicially erred by admitting evidence of his possession of child pornography, in violation of Evidence Code section 352 and his federal constitutional rights to due process. He also challenges the constitutionality of sections 288.5 and 868.5 (pursuant to which the complaining witness, Lauren Doe, testified with a support person's assistance), and CALCRIM instructions Nos. 301 and 1190.

We conclude all of defendant's arguments lack merit save one. We agree that, under the circumstances, the trial court abused its discretion by admitting into evidence a sealed envelope containing images of child pornography without reviewing them. However, we conclude the error was harmless. Accordingly, we affirm the judgment.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

BACKGROUND

Defendant began dating Lauren's mother when Lauren was nine years old. Two years later, Lauren and her mother moved in with defendant in Hayward, California. When Lauren was 19 years old, she told her father that defendant had molested her. Her father contacted the police and an investigation followed. Defendant was charged with violating section 288.5, subdivision (a) between March 31, 1998 and October 31, 2001. He pleaded not guilty and a jury trial followed.

Lauren's Testimony

Lauren, 22 years old at the time of trial, testified that defendant sexually abused her on four occasions before she was 14 years old. The first incident took place when she was nine years old, when she and her mother spent the night at defendant's apartment. The three slept together in a twin-bed, with Lauren in the middle. During the night, Lauren felt defendant move her underwear to the side and touch her bare bottom with what she thought was his wet, hard penis. At the time, she knew he had not touched her with his hand, but she did not know what he touched her with until later, when she "started learning more from him." Lauren did not tell her mother at the time about it. She waited a couple of years before she mentioned anything about it to someone.

When she was 11, she, her mother, and defendant moved in together to a house in Hayward. The second incident took place when Lauren was 11 years old. One evening while her mother was out, defendant asked Lauren to sit with him in front of his computer. Lauren sat on defendant's right knee as he masturbated to ejaculation while viewing still images of "naked" children "around my age" on a computer. Lauren told her mother about the incident the next day, but it did not lead to any changes. Lauren did not tell her father because she was afraid he would "go after" defendant and "end up in jail," and did not tell other adults because she was afraid they would "blow it off," like her mother did.

The third incident occurred when defendant entered Lauren's room and asked to give her a foot massage. During the massage, Lauren felt something strange and discovered defendant was rubbing his erect penis on one of her feet. She immediately

demanded, “ ‘What the hell are you doing?’ ” Defendant responded, “ ‘Don’t act like you didn’t know what I was doing.’ ” Lauren ran from the room. Lauren told her mother about the incident the next week, but, again, nothing happened.

The fourth incident took place when Lauren was still in middle school and she was still living with her mother and defendant in the Hayward house. Defendant called to her after he had taken a shower. Lauren responded, and found defendant standing completely naked, fully exposed to her, his pubic hair shaved off. Defendant asked Lauren to touch his erect penis, saying that “he wanted [her] to feel what it felt like.” Disgusted but frightened, Lauren touched it and “freaked out,” at which point the incident ended. Lauren did not tell anyone about the incident because she had given up hope that anything would be done.

Lauren further testified that when she was 19, around the time she decided to tell her father what had happened, her mother had agreed to get her an apartment so that Lauren could get away from defendant. However, when the day came, her mother did not want to look at apartments with her.

Lauren said she told her father, who called the police and arranged for her to speak with them the next day, which she did. She told officers about what defendant had done to her between the ages of 10 and 14. Sergeant Dickson told her to search for documents and records so that she could be accurate with her testimony. As a result, she reviewed some photographs that indicated her ages when she lived at the house in Hayward and in her next residence. She went back and told Sergeant Dickson about the photographs she found. She turned 14 at the second residence.

Lauren acknowledged, in response to cross-examination questions, that, after her parents split up, she did not want her mother to date other men and that she did not trust other men. She was not happy with anyone replacing her father.

The Recorded Telephone Call

During their investigation, the police recorded a call between Lauren and defendant. An audio recording of the call was played for the jury. In the recorded call,

Lauren asked defendant if he remembered “half of the crap” he had done to her, which led to the following exchange:

“[Lauren]: Like when I was—you don’t care about when like I was 13 years old and you put your dick on my feet in a massage?”

“[Defendant]: Um, that one I remember. That was um, that was unfortunate.

“[Lauren]: Why would you do that?”

“[Defendant]: Um, I think I was—I’m trying to recall what happened but I think it just fell out.

“[Lauren]: Or when [my boyfriend²] like a year ago found all that kiddy porn on our computer. What was that?”

“[Defendant]: How do you know it wasn’t his?”

“[Lauren]: I’m—I know [my boyfriend]. And I know you like—like to look at little girls like that. You used to pull it up and try to jack off when I sat on your lap Mark. Do you remember that?”

“[Defendant]: That was a long time ago. Maybe it was still—maybe it was still sitting there. I didn’t realize it wasn’t gone yet.”

The prosecution argued in closing that this phone call corroborated Lauren’s testimony about the second and third incidents. The defense argued that the references to child pornography were about an incident when Lauren was 18 and not about anything that took place between 1999 and 2001.

Evidence of Images of Child Pornography

After Lauren testified, the prosecution indicated it intended to call as their next witness, Sergeant Kyle Ritter of the Alameda County Sheriff’s Office, who would testify regarding the discovery of “hundreds, if not thousands” of images of child pornography on a computer connected to defendant. The prosecution also wanted to introduce into evidence via Ritter a sealed envelope containing a “representative” sampling of these images, which would be opened in the event the jury wanted to view them.

² Lauren testified that her boyfriend had lived with her, her mother, and defendant.

The defense objected that this evidence was unduly prejudicial under Evidence Code section 352 and lacked foundation, since the images could not be proven to have existed until at least four years after the last date of the charged misconduct. The defense acknowledged there were allegations of an incident occurring around 2000 “where pornography was on a computer, and [Lauren] sits on defendant’s lap and observes pornography,” but emphasized the proposed evidence related to the time period between 2005 and 2007 only. He contended there was “a significant risk of prejudice” if evidence of “hundreds or thousands or any images of pornography” were received or viewed or placed into a file between 2005 and 2007.

The trial court pointed out to the defense that motions in limine were heard before trial, and that there had been no question that pornography had been seized in the case.³ The court then focused on the source date for the pornography, and received confirmation from the prosecutor that the evidence was not being introduced to argue it was the same material Lauren had viewed with defendant. The prosecution indicated Ritter would testify that it was impossible to know when the photographs were “imaged.”

The court then focused on the proposed sealed envelope of images. It stated it did not know what the images looked like or if they were disturbing, and did not know what child pornography looked like. The prosecutor responded that she had not seen the images either, indicating that they had been selected by Ritter. The court then concluded, “it’s relevant, and it’s going to be offered only for the limited time period, and it’s not offered for the fact that this [Lauren] saw any of the images back to whatever period of time she alleges to have sat on [defendant’s] lap.”

Sergeant Ritter’s Testimony

Ritter, an expert in computer forensics, testified about the child pornography images and movies recovered from a Dell 4100 computer, which the parties stipulated

³ The defense did not request exclusion of the child pornography evidence in its pretrial motion in limine. The prosecutor referred to the evidence in her opening statement without objection by the defense.

was seized from defendant's home in June 2007.⁴ He said that a Windows XP operating system was installed on the computer in 2005 and the registry settings indicated that there were three registered users: Lauren, her mother, and defendant. He examined files stored in all three users' registry, known as allocated files. He also accessed files that had previously been deleted, known as unallocated files, but could not conclusively determine to which user these files belonged.

Ritter testified that the computer's hard drive contained roughly 1,100 images depicting children between the ages of 5 and 18, engaging in sexually explicit conduct. Some of these files were found in defendant's user account, while others had been deleted and were, therefore, unallocated to any particular user. Ritter also found approximately 100 digital videos containing similar pornographic content.

Ritter further testified that, since the Windows XP operating system was installed in 2005, the files containing child pornography could only be confirmed to have existed on the computer from that time onward. There was no way to ascertain that the files existed on the computer at the time the charged misconduct occurred.

Ritter also testified that, at the prosecution's request, he had brought an envelope with him containing a random 24 images taken from defendant's user account or the unallocated area. The record indicates the envelope was sealed with the Alameda County Sheriff's Office criminalistics laboratory evidence tape, and that Ritter's business card was taped to the front. Ritter testified that the images in the envelope were random selections of children of different ages, "anywhere from 5 to probably 14, 15 years old."

As we have indicated, the sealed envelope was admitted into evidence. The prosecution referred to the child pornography evidence at trial and argued that Ritter's testimony corroborated Lauren's testimony.

⁴ Lauren testified that a photograph shown to her depicted a computer at the Hayward house. Ritter, looking at the same photograph, testified that it depicted a computer "similar" to the one he analyzed.

The record does not make clear whether or not the jury ever viewed the images in the sealed envelope.⁵ The record contains only the following statement by the court to counsel: “I will let the jury know if the evidence is going into the actual jury room, and the envelope itself is sealed with the photos that he described that’s in there. If they want to look at them, it’s up to the jury to make that determination. It’s been described what it is, and so it’s not necessary they have to see them.”

Defense Evidence

Sergeant David Dickson of the Alameda County Sheriff’s Department testified that Lauren reported to him on June 26, 2007 that she was 14 or 15 years old when appellant walked out of the bathroom in their residence in Hayward and asked her to touch his erect penis. He also testified that Lauren was not certain how old she was at the time of the incident. She provided Dickson with five photographs at a subsequent interview.

It was also stipulated that a police officer would testify that Lauren told her on June 25, 2007, that she was the victim of a series of sexual assaults between the ages of 11 and 15 years old.

The Limiting Jury Instruction

The parties and the court briefly revisited Ritter’s testimony in discussing jury instructions. Defense counsel said the evidence was “not received for the purposes of whether or not the pornography was on the computer in the charging period.” The court responded that the parties were to work out a stipulation on the issue, and that the court’s understanding was that Ritter testified about images viewed by Ritter with a “log-in date” from 2005 to 2007. The prosecutor stated, “I have no intention of arguing that any of those images were the exact thing that [Lauren] saw, that it’s simply corroborative of her testimony.”

⁵ Defendant states in his reply brief that “[a]n attorney associated with appellant’s counsel’s office has inspected the envelope admitted as People’s Exhibit 12. The seal on the envelope is still intact and the envelope does not appear to have been opened by the trial court, parties or jury.”

The court subsequently instructed the jury as follows, to which counsel stipulated: “Counsel, also there’s a stipulation as it relates to Inspector Ritter that—ladies and gentlemen, that Inspector Ritter testified yesterday that—and the purpose of his testimony was that between the dates of the year 2005 and 2007, that the items seized, the images of child pornography on that computer, for that period of time only”

The jury found defendant guilty as charged and the court sentenced him to 12 years in state prison. Defendant filed a timely notice of appeal.

DISCUSSION

I. *The Child Pornography Evidence*

Defendant argues the trial court abused its discretion pursuant to Evidence Code section 352 and violated his federal constitutional rights to due process in admitting the evidence of child pornography.

The People argue defendant’s claim regarding Ritter’s testimony (but not the images themselves) was forfeited for lack of objection below, and also is meritless. We conclude defendant’s claim was preserved for appeal and that the court did not err by admitting Ritter’s testimony. We also conclude that, although the admission of Ritter’s testimony was not error, the trial court abused its discretion in admitting the images themselves without reviewing them under the circumstances. However, this error was harmless.⁶

A. *Forfeiture*

An appellate court will not reverse a judgment for an erroneous admission of evidence unless the record reflects that an objection was made in a timely manner and was based on a specific legal ground for exclusion. (Evid. Code, § 353; *People v. Morris*

⁶ Defendant acknowledges by his citation to *People v. Partida* (2005) 37 Cal.4th 428, that because he did not raise a constitutional objection below, “he may not argue on appeal that due process required exclusion of the evidence for reasons other than those articulated in his Evidence Code section 352 argument.” (*Id.* at p. 435.) He also gives us no reason to diverge from the general rule that “violations of state evidentiary rules do not rise to the level of federal constitutional error.” (*People v. Benavides* (2005) 35 Cal.4th 69, 91.) Therefore, we do not further address defendant’s constitutional claim.

(1991) 53 Cal.3d 152, 187.) Defense counsel’s objection requires no particular form. (*Morris*, at p. 190.) The failure to so object results in forfeiture on appeal. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 19-20.)

The People contend that the trial court did not rule specifically about Ritter’s testimony. However, the court’s ruling, vague as it was, responded to the defense objection that undue prejudice would occur should the jury “hear” that defendant had possessed and/or viewed “hundreds or thousands” of child pornography images. Reasonably interpreted, this objection referred to both the child pornography images *and* Ritter’s testimony. The court’s later formulation of a limiting instruction regarding Ritter’s testimony that tracked the discussion of defendant’s objection is a further indication that the objection, and the court’s ruling, extended to Ritter’s testimony.

The People cite *People v. Doolin* (2009) 45 Cal.4th 390 and *People v. Williams* (2008) 43 Cal.4th 584 to argue the objection did not extend to Ritter’s testimony. However, in each case, unlike here, no reasonable interpretation of the record supported the argument that an objection was sufficiently raised at trial. (*Doolin*, at p. 437; *Williams*, at p. 620.) Therefore, these cases are inapposite.

In short, the People’s forfeiture argument is unpersuasive. Defendant’s objection was sufficient to preserve his appellate claim.

B. Ritter’s Testimony

Evidence Code section 352 allows the court, in its discretion, to exclude evidence “if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352, subd. (b).) As defendant acknowledges, the weighing process “depends upon the trial court’s consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules.” (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

We review the trial court’s ruling for abuse of discretion and will not reverse it unless “the court has exercised its discretion in an arbitrary, capricious or patently absurd

manner that resulted in a miscarriage of justice.” (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

1. Probative Value

As the People urge, Ritter’s testimony was relevant and material because it corroborated Lauren’s testimony regarding the second incident.

Generally, “[t]he chief elements of probative value are relevance, materiality and necessity. [¶] Before permitting the jury to hear evidence of other offenses the court must ascertain that the evidence (a) ‘tends logically, naturally and by reasonable inference’ to prove the issue upon which it is offered; (b) is offered upon an issue which will ultimately prove to be material to the People’s case; and (c) is not merely cumulative with respect to other evidence which the People may use to prove the same issue.” (*People v. Schader* (1969) 71 Cal.2d 761, 774-775, fns. omitted.)

Because the prosecution did not attempt to establish the images found by Ritter were the same ones that Lauren saw during this incident, defendant argues this evidence had “no direct nexus to the event” and, therefore, lacked the requisite relevance. We disagree.

As argued, albeit summarily by the People, the child pornography evidence was very probative in light of Lauren’s testimony about the second incident. At the core of the defense was an attack on the general credibility of the sole eyewitness against defendant, Lauren; his trial counsel declared in opening statement, for example, that her testimony was the product of “distortion or embellishment.” The trial court could rationally view the evidence of defendant’s possession of child pornography as very probative because it corroborated part of Lauren’s account of the second incident, during which she testified, defendant, having had Lauren sit in his lap, exposed his penis and masturbated as he viewed digital images of child pornography on a computer. The evidence that at least some of the images found by Ritter were in defendant’s own user account had additional relevance in light of defendant’s suggestion during the recorded telephone call with Lauren that any child pornography she had found on a computer the year before the telephone call belonged to her boyfriend.

Defendant's arguments for why the child pornography evidence is not probative are unpersuasive. He argues that the existence of child pornography on a computer years afterward had no material relation to the charged offense, based on language contained in *People v. Gunder* (2007) 151 Cal.App.4th 412, 416. However, the *Gunder* discussion relates to inapposite case law regarding the admissibility of evidence of a defendant's post-homicide possession of other deadly weapons when the actual weapon used is known. (*Ibid.*) Indeed, one of the cases cited by the *Gunder* court, *People v. Cox* (2003) 30 Cal.4th 916, 956 states, “ ‘When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed.’ ” (*Ibid.*)

This same logic applies to the current case—in favor of admitting the child pornography evidence. The People did not argue that the child pornography found was the same as that viewed by defendant during the second incident, nor did they argue that it was not. Instead, the prosecutor, in response to the court's questions, indicated the People did not know when the photographs were “imaged.” Under these circumstances, it was within the court's discretion to conclude the evidence had significant probative value or, as the court put it, was “relevant.”⁷

Defendant also contends that he confirmed in his recorded telephone call with Lauren that he had possessed child pornography both in the past and in more recent years and, therefore, that any further evidence of this fact was cumulative. However, the telephone call transcript does not contain such an unambiguous confirmation by defendant; to the contrary, as we have mentioned, he suggested to Lauren that the child pornography images she had found on a computer the year before belonged to her

⁷ The argument by counsel and the court's questions suggest the court found the evidence relevant as corroboration of Lauren's account of the second incident, but the court did not state the specific reasons for its ruling. Of course, we can uphold the admission of the evidence on any proper theory, whether or not relied on by the court. “It is axiomatic that we review the trial court's rulings and not its reasoning.” (*People v. Mason* (1991) 52 Cal.3d 909, 944.)

boyfriend. Defendant's response to Lauren's subsequent reference to his having looked at such images when she sat on his lap as a child, while it appears to confirm something about what she said, was not clear. ("That was a long time ago. Maybe it was still— maybe it was still sitting there. I didn't realize it wasn't gone yet." Our own research indicates that "[e]vidence that is identical in subject matter to other evidence should not be excluded as 'cumulative' when it has greater evidentiary weight or probative value." (*People v. Mattson* (1990) 50 Cal.3d 826, 871.) Ritter's testimony was more probative of defendant's possession of child pornography than was defendant's ambiguous statement in the recorded telephone call and, therefore, defendant's argument is unpersuasive.

In his opening brief, defendant also responds to anticipated arguments by the People that the child pornography evidence was admissible under Evidence Code section 1101 or 1108, and argues why we should reject these arguments. However, the People do not raise section 1108 in their respondent's brief and only obliquely refer to a section 1101 argument by contending the evidence supported a theory for defendant's motive. Furthermore, defendant's objection below did not implicate either provision, and we need not address them to determine the probative value of the evidence. Therefore, we do not address these issues further.

2. Prejudicial Nature

Defendant argues that even if Ritter's testimony about the child pornography evidence was of some probative value, its prejudicial nature was simply too great to merit its admission. He characterizes the child pornography evidence as "uncharged crime evidence" and argues that "[t]here are few categories of people more reviled in our society than those who possess and view child pornography for sexual arousal." We disagree that Ritter's testimony was unduly prejudicial in light of the considerable probative value of Ritter's testimony in this particular case.

Prejudicial evidence, as referred to in Evidence Code section 352, is that which " "tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, 'prejudicial' is

not synonymous with ‘damaging.’ ” ” ” (*People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1098, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 320.)

Our own research indicates that our Supreme Court has found evidence of child pornography admissible in analogous circumstances. In *People v. Memro* (1995) 11 Cal.4th 786, 864, the California Supreme Court sanctioned the admission of child pornography “to show defendant’s intent to molest a young boy in violation of section 288.” On appeal, the defendant argued that the magazines and pictures were barred by Evidence Code section 352. (*Memro*, at p. 865.) However, the court found no abuse of discretion, stating “[t]o be sure, some of this material showed young boys in sexually graphic poses [and] [i]t would undoubtedly be disturbing to most people. But we cannot say that it was substantially more prejudicial than probative, for its value in establishing defendant’s intent to violate section 288 was substantial.” (*Ibid.*)

Similarly, while Ritter’s testimony arguably was capable of engendering antipathy towards the defendant, this did not substantially outweigh its probative value as corroboration of Lauren’s testimony, particularly when the defense put Lauren’s credibility at the center of the defense. Although defendant emphasizes the prejudicial nature of the child pornography evidence as that of a purported uncharged crime in his appeal, his trial counsel did not argue this issue to the trial court, nor did the prosecutor attempt to establish the evidence as such during the trial. Therefore, this argument, if it has not been forfeited, is unpersuasive.

In addition, the court gave the jury an appropriate limiting instruction about Ritter’s testimony. Defendant argues this limiting instruction was unintelligible. We disagree. The court instructed the jury that “there’s a stipulation as it relates to Inspector Ritter that—ladies and gentlemen, that Inspector Ritter testified yesterday that—and the purpose of his testimony was that between the dates of the year 2005 and 2007, that the items seized, the images of child pornography on that computer, for that period of time only.” Although the trial court’s statement was inartful, it communicated effectively that Ritter testified about images that were found to have been on the computer only during the time period stated.

Defendant makes additional arguments why the child pornography evidence was more prejudicial than probative. He contends the act of owning child pornography was not probative because he was accused of a sufficiently dissimilar act, the lewd act of touching (referring to Lauren's sitting on his lap). This ignores that Lauren testified that defendant was viewing digital images of child pornography on a computer while he openly masturbated to ejaculation. For this same reason, we reject defendant's argument that Ritter's description of the titles of videos found on the computer, which referenced young children and explicit sexual acts, was overly prejudicial because it was far more graphic than Lauren's description of the images she saw.

Defendant also claims the evidence testified to by Ritter was very weak because there was little evidence establishing a chain of custody from the seizure of the computer at his home to its arrival two years later at the lab where Ritter inspected it. Defense counsel did not make any argument about the chain of custody to the trial court when objecting to the admissibility of the evidence and, therefore, it is arguably forfeited. Regardless, defendant's argument goes to the weight of the evidence and not its admissibility or probative value.

Finally, defendant argues there was little evidence that he knew about, or viewed the images on the computer that were in the unallocated areas of the computer's hard drive. Defense counsel also did not make this argument to the trial court when objecting to the admissibility of the evidence and, therefore, it too was arguably forfeited. Regardless, the court could reasonably conclude the evidence was relevant in light of the images of child pornography found in defendant's password-protected allocated area.

In short, the trial court did not abuse its discretion in admitting Ritter's testimony. Accordingly, we do not address defendant's claim of prejudicial error.

C. The Sealed Envelope of Images of Child Pornography

1. The Court Abused Its Discretion

We would also conclude that the trial court did not abuse its discretion by admitting the sealed envelope of child pornography images prepared by Ritter except for one fact: the record affirmatively shows neither the prosecutor nor the trial court

reviewed the images, and the court indicated it knew nothing about them. Under these circumstances, we agree with defendant that the court did not conduct a meaningful balancing analysis pursuant to Evidence Code section 352 regarding these images and, therefore, abused its discretion in admitting them, regardless of whether or not the jury ever viewed them.

As our own research indicates, although “a court need not expressly weigh prejudice against probative value or even expressly state that it has done so,” the record still must reflect that “the court was aware of and performed its balancing functions under Evidence Code section 352.” (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.) The record affirmatively indicates the trial court did not review the images, nor have any knowledge about their content. In response to defense counsel’s Evidence Code section 352 objection to their admission via a sealed envelope, the court stated, “I don’t know what [the pictures] look like. I don’t know if they’re disturbing. I mean, I don’t know any of this stuff. I don’t know what child pornography actually looks like, to tell you the truth.” Following the court’s statement, the prosecutor stated, “I haven’t seen these images either. That’s why I’ve had Sergeant Ritter do them.”

The record further indicates the images were entered into evidence via sealed envelope during Ritter’s direct examination without trial court or prosecutor reviewing them. Under these circumstances, we can only conclude the trial court did not conduct a meaningful, balanced review of the probative value versus the potential prejudicial effect of the images themselves and, therefore, abused its discretion by admitting them. (*People v. Taylor, supra*, 26 Cal.4th at p. 1169; *People v. Riel* (2000) 22 Cal.4th 1153, 1187-1188.)⁸

⁸ Defendant also argues the trial court abused its discretion because it did not understand the evidence involved a distinct uncharged crime, based on the fact that when his trial counsel later asked that the jury be instructed pursuant to CALCRIM No. 1191, the trial court stated there was “no crime before us on child pornography.” Defendant does not explain why the court should have considered this issue when defendant’s objection to the admission of the evidence, and the parties’ arguments generally, did not implicate it. Therefore, we find the argument unpersuasive.

2. The Court's Abuse of Discretion Was Harmless

Defendant argues the court's abuse of discretion was prejudicial, even if the jury did not look at the images in the sealed envelope. We disagree.

Defendant argues, without citing any law, that the "beyond a reasonable doubt" standard for federal constitutional due process error applies. However, "the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of [*People v.*] *Watson* [(1956)] 46 Cal.2d [818,] 836." (*People v. Marks* (2003) 31 Cal.4th 197, 227.) Although we apply *Watson*, we would reach the same result under the federal standard prescribed in *Chapman v. California* (1967) 386 U.S. 18, 24.

In support of his prejudicial error argument, defendant contends the evidence of the four incidents was not particularly strong, and that the admission of a sealed envelope was itself inflammatory. We disagree.

Lauren's testimony and corroborating evidence provided ample evidence of defendant's guilt and rendered harmless any error caused by the court's admission of the sealed envelope. Defendant could not credibly deny that something had occurred between him and Lauren in light of his statements in the recorded telephone call; however vague and whether or not they established criminal liability by themselves, they did indicate he had touched one of Lauren's feet with his penis and suggested, albeit somewhat ambiguously, that he was aware that images of child pornography had at one time been on a computer in the home, giving credence to Lauren's account regarding the second and third incidents, and supporting her overall credibility.

Instead, defendant attempted to generally disparage Lauren's motives, contending that she did not want her mother to date defendant and had wanted him to move out. He did not offer any evidence to support these theories, other than testimony elicited from Lauren on cross-examination. This evidence was not compelling; to the contrary, Lauren's inclinations were understandable in light of the abuse Lauren testified about.

Defendant makes several unpersuasive arguments in an effort to undermine the otherwise undisputed evidence about each incident. Regarding the first one, when, Lauren testified, defendant touched her bare bottom with his wet, hard penis in the middle of the night as they slept in the same bed, defendant contends a reasonable juror could have concluded that Lauren simply misconstrued the event and that defendant was asleep at the time. This is unpersuasive in light of Lauren's testimony that defendant moved her underwear aside before touching her.

Regarding the second incident, when, Lauren testified, defendant had her sit in his lap as he masturbated to digital images of child pornography, defendant offered nothing to directly contradict Lauren's account. Also, Ritter's testimony, which was admissible, corroborated it.

Regarding the third incident, when, Lauren testified, defendant rubbed his erect penis on one of her feet, defendant contends a reasonable juror could have concluded that Lauren was mistaken because she looked first in the unclear reflection of a bed knob. This also is unpersuasive because Lauren also testified that she turned around and saw defendant's penis on her feet, and defendant acknowledged in the recorded telephone call that he touched her feet with his penis.

Regarding the fourth incident, when, Lauren testified, defendant instructed her to touch his naked penis, defendant focused on establishing that Lauren first reported to police that this incident occurred after she turned 14, a statement she changed after viewing photos indicating it occurred before she had moved to a new home. Defendant offered nothing to establish that Lauren's correction was wrong.

Defendant also argues the jury's request for a read-back of the testimony of the officer to whom Lauren first reported the fourth incident, when she said it had occurred after she turned 14, indicates the case was a close one. This argument is unconvincing in light of the jury's short deliberation. The record indicates the jury deliberated about two and a half hours in the afternoon of the first day of their deliberations. At the beginning of their deliberations the next morning, the read-back was provided as requested by the jury, and the jury reached a verdict about 36 minutes later. Given this timing, the jury's

request for a read-back indicated diligence, not a close case. (See *People v. Houston* (2005) 130 Cal.App.4th 279, 301.)

Last, but not least, we conclude the images of child pornography, which this court has reviewed, are not more prejudicial than Ritter's testimony, making it even more unlikely that they prejudicially affected the jury.

In short, we conclude it was not reasonably probable that the defendant would have achieved a better outcome but for the court's abuse of its discretion in admitting the images of child pornography, and that the court's abuse of discretion was harmless beyond a reasonable doubt as well. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *Chapman v. California, supra*, 386 U.S. at p. 24.)

III. Section 288.5

Defendant also argues section 288.5, the "continuous sexual abuse of a child" statute under which he was convicted, is unconstitutional because the due process and jury trial clauses of the California and federal Constitutions require that the jury unanimously agree on which three incidents took place. We disagree.

Subdivision (a) of section 288.5 states: "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 . . . or three or more acts of lewd or lascivious conduct . . . 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." (§ 288.5, subd. (a).)

Subdivision (b) of the statute states: "To convict under this section the trier of fact, if a jury, need unanimously agree only that the requisite number of acts occurred not on which acts constitute the requisite number." (§ 288.5, subd. (b).)

Consistent with the terms of section 288.5, the court instructed the jury pursuant to CALCRIM No. 1120, to unanimously find that three such acts occurred, but also that they "[did] not all need to agree on which three acts were committed."

After the jury reached its verdict, defendant moved for a new trial, arguing that unanimity regarding each act was required and that instructing the jury pursuant to CALCRIM No. 1120 violated his rights to a unanimous verdict and to have all charges proven beyond a reasonable doubt. The motion was denied.

Defendant argues that here, where the prosecution argued four distinct incidents of abuse had taken place, 12 jurors could agree on two of them and disagree on which of the remaining two constituted the requisite third act. Therefore, he argues, based on numerous cases discussing federal constitutional law (including one decided on statutory grounds, as he acknowledges, *Richardson v. United States* (1999) 526 U.S. 813, his constitutional rights were violated because section 288.5 fails to require unanimity.

As defendant acknowledges, however, the United States Supreme Court has recognized that section 288.5, as well as foreign statutes regarding sexual abuse, “represent an exception; they do not represent a general tradition or rule” and “may well respond to special difficulties of proving individual underlying criminal acts.” (*Richardson v. United States, supra*, 526 U.S. at pp. 821-822.) Defendant attempts to characterize the court’s discussion as merely descriptive. However, he ignores that the court’s discussion indicated no disagreement with this exception, the court noting that “[t]he cases are not federal but state, where this Court has not held that the Constitution imposes a jury-unanimity requirement.” (*Id.* at p. 821)

Furthermore, as the People point out, consistent with this recognized exception, numerous California appellate courts have determined section 288.5 does not violate a defendant’s state or federal constitutional rights to a unanimous jury verdict. (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1123-1126 [Fourth Appellate District; citing *Richardson* as support]; *People v. Adames* (1997) 54 Cal.App.4th 198, 206-208 [Second Appellate District]; *People v. Whitham* (1995) 38 Cal.App.4th 1282, 1295-1298 [Fifth Appellate District]; *People v. Gear* (1993) 19 Cal.App.4th 86, 89-94 [Fourth Appellate District]; *People v. Avina* (1993) 14 Cal.App.4th 1303 [First Appellate District] (*Avina*); *People v. Higgins* (1992) 9 Cal.App.4th 294 [Third Appellate District].) For example, one case has held, “ ‘The continuous-course-of-conduct crime does not require jury

unanimity on a specific act, because it is not the specific act that is criminalized. The *actus reus* of such a crime is a *series* of acts occurring over a substantial period of time, generally on the same victim and generally resulting in cumulative injury. The agreement required for conviction is directed at the appropriate *actus reus*: unanimous assent that the defendant engaged in the criminal course of conduct.’ ” (*Gear*, at p. 93.)

Defendant also cites *People v. Jones* (1990) 51 Cal.3d 294 (*Jones*) and *People v. Alva* (1979) 90 Cal.App.3d 418 (*Alva*), cases dealing with section 288, for the proposition that the California Constitution requires a unanimous jury verdict on the individual predicate charges under section 288.5. We disagree. Other courts have rejected similar arguments. “The problem . . . is that it is akin to comparing apples with oranges.” (*People v. Gear*, *supra*, 19 Cal.App.4th at p. 93 [rejecting the argument that section 288.5 is unconstitutional on the basis of *Jones*].) “Because *Jones* does not concern the continuous-course-of-conduct offense defined by the Legislature in section 288.5, its directive that the jury must unanimously agree that the defendant committed all the acts described by the victim does not apply to [section 288.5].” (*Cissna*, *supra*, 182 Cal.App.4th at p. 1125.) For this same reason, we do not think *Alva*’s analysis applies here either.

Defendant also argues that, since the cases cited by respondent are based on the erroneous assumption that section 288.5 relates to a continuous-course-of-conduct crime, rather than a crime for which three separate crimes must be proven, their holdings are wrong. We disagree, based on the analysis of Division Three of this district in *Avina*, *supra*, 14 Cal.App.4th 1303, cited by the People.

Avina argued that section 288.5’s “three acts” requirement indicates it defines a composite crime rather than a statute addressing a course of criminal conduct and, therefore, was not exempt to the unanimity requirement. (*Avina*, *supra*, 14 Cal.App.4th at p. 1310.) Division Three disagreed for three reasons. First, several other course-of-conduct statutes had similar requirements. (*Ibid.*) Second, section 288.5 was “aimed not at a stranger who happens to encounter the same victim three times, but at the molester, often a relative, family friend or lodger, who subjects a child to an extended course of

repetitious abuse.” (*Avina*, at p. 1311.) In this context, the “three acts” requirement merely set a “baseline” for determining when a person engages in actions that properly amount to a course-of conduct. (*Ibid.*) Third, generally a defendant can only be charged with one count for each victim under the statute. (*Ibid.*) We adopt this same analysis and conclusion here.

Based on the case law we discuss herein, we conclude section 288.5 is not unconstitutional as defendant argues. Therefore, we have no need to, and do not, address defendant’s arguments regarding prejudicial error.

IV. The Attendance of a Support Person During Lauren’s Testimony

Defendant argues that the trial court’s allowing Lauren to testify with a support person in attendance was improper because section 868.5 on its face violated his federal Sixth Amendment right to confront witnesses against him and his Fourteenth Amendment right to the presumption of innocence, and also argues that section 868.5, as applied to his case, violated the latter as well. He also urges that, to the extent we agree with the People that he forfeited these claims for failure to object to the use of the support person below, we conclude he received ineffective assistance of counsel. We find no reason to reverse the court’s judgment based on his arguments.

A. Section 868.5

Section 868.5 permits a prosecuting witness in certain cases to testify with up to two support persons in attendance, one of whom may accompany the witness to the stand. (§ 868.5, subd. (a).) Prior to trial, the People filed a motion in limine to allow Lauren to have up to two support persons present in the courtroom during trial, and to allow one to accompany her to the stand pursuant to section 868.5. The court granted the motion after defense counsel declined the opportunity to raise any issues about it at hearing. Defense counsel also did not object when Lauren was accompanied to the stand by a support person who was identified as “advocate” Vicki Hart from the Alameda County District Attorney’s Office, who sat next to Lauren during her testimony. Lauren identified Hart, in response to defense cross-examination, as a “victim counselor” with whom she had discussed the case three times.

The People first argue this appellate claim was forfeited because defendant did not raise it at trial. (*People v. Stevens* (2009) 47 Cal.4th 625, 641 [finding waiver for lack of objection to a support person’s presence at trial; *People v. Lord* (1994) 30 Cal.App.4th 1718, 1719, 1722 [finding waiver of an appellate claim that the trial court should have held a hearing on the necessity of a support person].)

Defendant argues that forfeiture does not apply to his claim that section 868.5 is unconstitutional on its face, based on *People v. Valladolid* (1996) 13 Cal.4th 590, 606, and that we should exercise our discretion to consider his “as applied” claim because it is closely related to his facial challenge. The People’s cited cases do not address a facial challenge. We agree that, as the *Valladolid* court determined, a facial challenge to a particular statute is at least “arguably” raised properly on appeal in the absence of an objection. (*Ibid.*)

That said, as appellant concedes, several appellate courts “have rejected arguments that the use of a support person is inherently prejudicial or requires a case-specific showing of necessity in all cases. (See *People v. Adams* (1993) 19 Cal.App.4th 412, 443; *People v. Patten* [(1992)] 9 Cal.App.4th [1718, 1727 (*Patten*)]; *People v. Johns* (1997) 56 Cal.App.4th 550, 555-556.)” Instead, as the *Patten* court stated, “individualized variables affect whether the presence of a support person violates a defendant’s due process rights.” (*Patten*, at p. 1731.) Defendant’s legal analysis, which relies heavily on *Adams*, gives us no reason to take a different approach here. Therefore, we conclude defendant’s facial challenge to section 868.5 is without merit.

As for defendant’s claim that section 868.5, as applied to his case, violated his constitutional rights, we agree with the People that defendant forfeited this claim by failing to object to the procedure, or request a hearing regarding the necessity of a support person, in the court below. (*People v. Stevens, supra*, 47 Cal.4th at p. 641; *People v. Lord, supra*, 30 Cal.App.4th at p. 1722.)

B. Ineffective Assistance of Counsel Claim

Defendant argues in the alternative that he received an ineffective assistance of counsel claim for lack of his counsel's objection to the support person at trial. Again, we disagree.

“ ‘To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that this deficient performance caused prejudice in the sense that it “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” ’ ” (*People v. Sapp* (2003) 31 Cal.4th 240, 263; *Strickland v. Washington* (1984) 466 U.S. 668, 686.) The standard on direct appeal is highly deferential; the claim must be rejected unless “there could be no satisfactory explanation” for counsel's conduct. (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

We conclude defendant's trial counsel's performance was not deficient because there could be a satisfactory explanation for his failure to object. In light of the circumstances of the present case and the individualized considerations discussed in the case law, his trial counsel could reasonably conclude that the trial court would overrule any objection to Lauren's use of a support person, regardless of whether a hearing on the question of necessity was held, and that the jury would not be adversely influenced by the procedure employed. This was particularly the case in light of defendant's statements in the recorded phone call and Ritter's testimony, which provided evidence that Lauren, a young adult, was, as a girl, exposed by defendant, her mother's live-in boyfriend, to matters of a sexual nature that could well have been traumatizing, whether or not these matters amounted to criminal conduct as charged by the People and regardless of whether, as the defense argued, her testimony was the product of “distortion or embellishment.”

In short, defendant's ineffective assistance of counsel claim lacks merit. In light of our conclusion, we have no need to discuss whether defendant was prejudiced by

counsel's failure to object. We note only that nothing in the record indicates any prejudice occurred as a result of the procedure employed.

V. CALCRIM Nos. 301 and 1190

Defendant argues that, when read together, CALCRIM Nos. 301 and 1190 suggested to the jury that Lauren's testimony should not receive the same scrutiny typically applied to other forms of evidence and, therefore, violated his constitutional due process rights. As he also acknowledges, our Supreme Court has rejected an argument sufficiently similar that we must do so as well pursuant to *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.

The trial court instructed the jury, pursuant to CALCRIM No. 301, that "[t]he testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." The court also instructed, pursuant to CALCRIM No. 1190, that "[c]onviction of a sexual assault crime may be based on the testimony of a complaining witness alone."

Defendant argues the court's giving of these two instructions together violated his due process rights under the Fourteenth Amendment. Defendant acknowledges that our Supreme Court has disposed of such an argument regarding similar CALJIC instructions in *People v. Gammage* (1992) 2 Cal.4th 693, and that we are bound to follow their decision under *Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at page 455. He nonetheless argues that *Gammage* "was wrongly decided and should be disapproved because the majority justices in *Gammage* failed to consider the constitutional infirmity created by similar CALJIC instructions."

DISPOSITION

The judgment is affirmed.

Lambden, J.

We concur:

Kline, P.J.

Richman, J.