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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY RUSSELL RYAN, JR.,

Defendant and Appellant.

A130775

(Mendocino County
Super. Ct. No. CRCR-08-85681)

A jury convicted defendant Timothy Russell Ryan, Jr., of furnishing marijuana to Katie W., a minor child, and molesting her. The trial court excluded defendant’s supposed evidence that Katie had fabricated two prior accusations of molestation. Later, during closing argument, the prosecutor asked, if Katie’s “constantly throwing molest accusations around . . . [w]here is the proof of that?” On appeal, defendant challenges the trial court’s evidentiary ruling and the prosecutor’s conduct. He also asserts the trial court erred by not sua sponte giving a “unanimity” instruction on the drug charges, and by imposing a longer sentence than he claims was appropriate, given that the drug charges, according to defendant, were incidental to the molestation charges. The Attorney General, in turn, identifies an apparent clerical error in the sentence on the abstract of judgment and asks us to correct it. We reject defendant’s arguments and affirm the judgment with directions to correct the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2008, the Mendocino County District Attorney filed an information charging defendant with providing drugs to and molesting Katie between

February and April 2008. At that time, Katie was 13 years old. Katie's mother was dating defendant, and defendant, Katie, her mother, and her brother Devon were living in the same house. Counts 1 and 2 of the information charged defendant with two instances of furnishing marijuana to a child in violation of Health and Safety Code section 11361, subdivision (a). Counts 3 through 5 charged defendant with three instances of lewd and lascivious conduct with a child under the age of 14 in violation of Penal Code section 288, subdivision (a).

A jury heard defendant's case between October 4 and 7, 2010.

There was no direct physical evidence to support the molestation charges, no third party eye witnesses, and defendant did not testify. Therefore, the trial on the molestation charges hinged to a significant degree on Katie's credibility. Katie described several specific incidents of molestation between February and April 2008. On one occasion, she testified, defendant touched the outside of her vagina while she, defendant, defendant's five-year-old son P., and her brother Devon were all watching a movie in a bedroom at home. She also testified to engaging in intercourse with defendant on more than one occasion in the home's detached garage. She also testified to performing oral sex on defendant on yet another occasion. Katie believed defendant had a wart on the left side of his penis (if facing defendant). The investigator, Detective Byrnes, took photos of defendant's groin and testified there was a slightly raised, "little bit broken," reddish "wart, a birthmark, something that's out of the ordinary" on defendant's right side near his penis. Katie also testified defendant bought condoms at her request because she was afraid of pregnancy.

Katie did not accuse defendant of molestation until a counselor at a program for troubled teens caught her with marijuana, which she had taken from defendant and her mother. The counselor confronted Katie about the marijuana. Katie was "really upset" about getting caught and what was happening at home, and "it [the molestation accusation] came out." She had not told anyone about the molestation earlier, because defendant forbade her. If she spoke out, defendant threatened, Katie and her family

would be homeless, alluding to the fact defendant's mother owned the house they were living in.

Defendant's cellmate from March and April 2010, Samuel Galindo, also testified against defendant. Defendant told Galindo about his sexual exploits with Katie on a daily basis. Defendant described one evening when he and Katie were watching TV on a couch: Katie began playing footsie with him, defendant then "finger[ed]" her, Katie grabbed his penis, and they orally copulated each other. Defendant also told Galindo of other instances of sex. Galindo testified defendant had pictures of young girls from a clothing advertisement and a picture of Miley Cyrus with him in his cell, but a search of the cell did not reveal any of these items.

Just before the defendant began to present his evidence, defendant sought a ruling from the court on the "admissibility of prior false allegations of sexual misconduct." Defendant claimed Katie falsely accused her brother Devon of molesting her in 2007, about one year before her alleged encounters with defendant, and falsely accused her brothers Andrew and Will of molesting her in 2005, about three years before.¹ Defendant told the court he had a witness, Feather Fallis, who would testify she saw Devon sleeping when Katie claimed he molested her. As to accusations against Andrew and Will, defendant told the court: "We have evidence that those are false, because she recanted. She said they're false. I take them back. [¶] . . . I respectfully submit that we ought to be able to introduce those."

The prosecution opposed introduction of any of these incidents. Concerning Katie's alleged recantation of her accusations of Andrew and Will, the prosecutor noted a complete lack of discovery materials or other potential evidence indicating a retraction. The prosecutor also argued a recantation of a domestic abuse accusation does not always mean the original accusation was false.

¹ Two witness interview summaries attached to a prosecution motion in limine contain statements by third parties that Katie accused Andrew and Will of abuse. There appears to be no dispute that Katie made these accusations.

In rebuttal, defendant contended: “As far as producing evidence [of the incidents], I don’t have to. It’s impeachment. . . . [¶] [W]hat greater probative value is there than the supposed victim saying, I lied, I made it up, I recant?”

The court allowed defendant to present evidence of the possibly false accusation regarding Devon, but not Andrew or Will. “[U]nder 352,” stated the trial court, the situation with Devon “has some probative value and I think it does—although there is substantial prejudice potentially there, I do think it outweighs it because of the family circumstances and the report of it.” The court continued: “As to the other two, I think given the time and given the circumstances, at least so far as I pick up at this stage and establish whether false accusations or what was taking place, they’re removed enough in time this three years and given the age of the girl and the other event that took place, I think the relevance under 352 is removed.” The court’s decision was unaffected by the parties’ stipulation allowing mention of the alleged molestation by Andrew, apparently for the limited purpose of allowing Katie’s mother to explain why Katie lived apart from her siblings at certain times.

The court then permitted defendant to recall Katie as part of his case to face questions about Devon. Katie admitted she had falsely accused Devon of molesting her, but claimed she made the accusation because she dreamt the molestation and thought it was real when she first woke up, but soon realized it was not.

Defendant put on other witnesses to undermine Katie’s credibility. Defendant’s father testified Katie lied about playing with a fireplace fire. He was watching Katy play in the fireplace when defendant told Katie to stop. Katie said she was not playing in the fireplace. Defendant’s father said, “ ‘Katie, I sat here and watched you do it.’ ” Katie responded by saying she hated defendant and “ ‘I’d do anything in my power to get him out of my life.’ ” Feather Fallis, defendant’s former girlfriend, testified Katie “would lie about simple things sometimes and a lot about, like, accusations” and also “serious things.” Defendant also elicited an admission from Katie’s mother that Katie “occasionally fabricated things, but not—nothing extreme.”

During closing argument, the prosecution raised the issue of truthfulness on several occasions:

“You saw her body language. You heard the tone of her voice. You saw how she answered the questions. . . . she answered them truthfully, and she answered them to the best of her memory. She wasn’t trying to hide anything.”

“[Galino] got up here and he testified truthfully to the best of his ability.”

“[B]ased on Katie’s interview with him [Detective Byrnes], he testified that her demeanor was consistent with someone telling the truth”

“You know in your hearts Katie’s not lying.”

“Think about everything that shows she’s telling the truth. You sat here, you know she’s telling you the truth.”

Also at closing, the prosecutor commented on the lack of evidence showing Katie made any false molestation accusations:

“The defense would have you believe she’s constantly throwing molest accusations around when she wants to get someone in trouble. Where is the proof of that? Anywhere? Where is the evidence of that? She gets in trouble for marijuana, she’s going to say she was molested. If that were the case, they would have paraded in person after person that Katie has accused of molestation. There’s no evidence of that. Just because they want you to think that’s what happened, doesn’t make it so.”

Further, the prosecutor mentioned at closing Katie’s molestation by her brother Andrew to explain why she would have a dream about Devon molesting her.

On October 7, 2010, the jury found defendant guilty on all five counts. On December 15, 2010, the court sentenced him to one year eight months on each of the drug charges, the second sentence running concurrent with the first; and to eight years, two years, and two years on the three molestation charges, each running consecutively. Added up, defendant’s sentence was 13 years 8 months in state prison. Defendant filed a notice of appeal on December 23, 2010.

DISCUSSION

Evidence of Prior False Accusations

The trial court, relying on Evidence Code section 352, denied defendant's request to present evidence that Katie falsely accused her brothers Andrew and Will² of molesting her and then recanted those accusations.

“Section 352 provides: ‘The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’ ‘[A] trial court’s exercise of discretion under Evidence Code section 352 will not be reversed on appeal absent a clear showing of abuse. [Citations.] It is also established that “ ‘Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense.’ ” [Citations.] This does not mean that an unlimited inquiry may be made into collateral matters; the proffered evidence must have more than ‘slight-relevancy’ to the issues presented. [Citation.] . . . [Citation.] The proffered evidence must be of some competent, substantial and significant value. [Citations.]’ (*People v. Northrop* (1982) 132 Cal.App.3d 1027, 1042, . . . , disapproved on other grounds in *People v. Smith* (1984) 35 Cal.3d 798, 807-808, . . . , italics omitted.) A trial court’s exercise of discretion under section 352 ‘will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]’ (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10)’ (*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1457 (*Tidwell*)).

A prior false accusation of sexual molestation is relevant on the issue of the molest victim’s credibility, but only if those prior accusations were actually false. (*Tidwell*,

² At times, defendant’s briefs mention notes from an interview of a potential witness, Gonzalez, and argue Katie also falsely accused Gonzalez of molestation. Defendant never sought to introduce evidence of this alleged false charge and has never suggested Katie recanted allegations against Gonzalez.

supra, 163 Cal.App.4th at p. 1457.) “The trial court has discretion under Evidence Code section 352 to exclude evidence of prior reports of sexual assault if proof of the falsity of the prior complaint ‘would consume considerable time, and divert the attention of the jury from the case at hand.’ ” (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1424, fn. omitted (*Miranda*)). Or, put another way, the trial court may exclude evidence of alleged false reports if “the evidence [is] weak on the issue of [the witness’s] credibility and would require an undue consumption of time.” (*Tidwell, supra*, 163 Cal.App.4th at pp. 1456-1457.)

Tidwell affirmed a trial court’s decision under Evidence Code section 352 to exclude evidence showing a rape victim, R.C., had possibly fabricated two prior rape accusations. (*Tidwell, supra*, 163 Cal.App.4th at pp. 1457-1458.) “Although there was some evidence that R.C. made inconsistent statements,” about the prior alleged rapes, she did not recant and “there was no conclusive evidence that her prior rape complaints were false.” (*Id.* at p. 1458.) “The defense was unable to obtain evidence from the men that R.C. accused, and inferences could be drawn either way from the circumstances of the prior incidents and R.C.’s statements concerning the incidents. In addition to the weaknesses in the evidence concerning falsity of the rape complaints, admitting the evidence would have resulted in an undue consumption of time as the defense attempted to bolster its view and the prosecution introduced evidence that Crawford had raped another female student.” (*Ibid.*) The court could not “say that the trial court abused its discretion in excluding the evidence.” (*Ibid.*)

Miranda likewise affirmed a trial court’s exclusion of evidence showing a sexual assault victim, Jane, had made a prior, false accusation of assault. (*Miranda, supra*, 199 Cal.App.4th at p. 1426.) The court concluded “[t]he probative value of the proffered evidence” of the prior complaint “was questionable, as the prosecutor insisted [a] report from Riverside County contained no [accusatory] statements from Jane, and although defense counsel argued otherwise, he never quoted a statement from her from the report (which, as noted earlier, is not in the appellate record).” (*Id.* at p. 1425.) In addition, there was no clear showing the report, if made by Jane, was false. “The conclusion that

the claim was unfounded was an opinion of a social worker, and the admissibility of that conclusion is doubtful. Not only was the evidence showing a prior false complaint uncertain, delving into the issue had the potential for confusing the jury and consuming an undue amount of time.” (*Id.* at pp. 1425-1426.)

In this case, we start with an issue that troubled the courts in *Tidwell* and *Miranda*—a serious shortcoming in the probative value of the evidence defendant proffered to support his false accusation claims. Defendant’s offer of proof, particularly like the one in *Miranda*, lacked specificity and indicia of credibility. Defense counsel baldly asserted Katie had recanted, but did not explain how he knew this or tell the court what testimony he would elicit about the asserted recantations. He asked rhetorically “what greater probative value is there than the supposed victim saying, I lied, I made it up, I recant?,” but never asserted or made an offer of proof Katie would actually say these things. Even when the prosecutor expressed surprise at defendant’s claim and stated she had seen no evidence of recantation, defense counsel offered no further details or explanation, stating “[a]s far as producing evidence of it, I don’t have to. It’s impeachment.”

Defendant’s lacking offer of proof not only lends supports to the trial court’s section 352 decision but, standing alone, failed to preserve the issue for review. “An offer of proof should give the trial court an opportunity to change or clarify its ruling and in the event of appeal would provide the reviewing court with the means of determining error and assessing prejudice. [Citation.] To accomplish these purposes an offer of proof must be specific. It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued.” (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.) Thus, “[a]n offer of proof must consist of material that is admissible, and it must be specific in indicating the name of the witness and the purpose and content of the testimony to be elicited.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1176 (*Rodrigues*); *McMillian v. Stroud* (2008) 166 Cal.App.4th 692, 704 [offer must “ ‘indicat[e] the purpose of the testimony, the name of the witness and the content of the answer to be elicited’ ”].)

In *People v. Foss* (2007) 155 Cal.App.4th 113, 127 (*Foss*), defendant stated he would question the victim to establish the victim's " 'morbid fear of sexual matters' " and that " 'the charges are a creature of that morbid fear.' " The court concluded "defendant did not give a specific offer of proof of evidence to be produced. His offer was conclusory and concerned only the area of questioning. It did no more than speculate as to what might be proven, reciting the 'morbid fear' language from [another case]. This speculation and lack of specificity was inadequate to preserve the issue for consideration on appeal." (*Id.* at pp. 127-128; cf. *People v. McAlpin* (1991) 53 Cal.3d 1289, 1304 [warning against "ambiguous or conclusory" offers of proof, which may be "unsatisfactory"].)

People v. Adams (1988) 198 Cal.App.3d 10, 18, a case defendant cites in his reply brief, did, on a "sparse" offer of proof, reverse a conviction when the trial court excluded evidence of prior fabricated rape allegations. But it is distinguishable. There, the defense propounded questions about the false allegations to a particular witness who was not the victim, enabling the appellate court to discern who would be presenting testimony and about what on retrial. Therefore, *Adams* fits within the requirement of *Rodrigues* and *Foss*, that an offer of proof specifically identify witnesses and their testimony. Here, defendant's offer of proof did not meet this requirement.

Instead, defendant's offer was conclusory and lacking in explanation. It left "us with a record that is all too uncertain to warrant reversal." (*Rodrigues, supra*, 8 Cal.4th at p. 1177; cf. *People v. Eid* (1994) 31 Cal.App.4th 114, 126-127 [insufficient offer of proof at preliminary hearing; offer "was based on nothing more than optimistic expectation Heidi would admit her statements to Jenkins were false"].) We cannot, on this record, determine what evidence of recantation and falsity defendant would have presented, and we therefore cannot satisfactorily review the trial court's decision to exclude evidence for error or prejudicial effect.

Even if we were in a position to review the trial court's section 352 decision, we would find no abuse of discretion. As discussed, defendant's proffered evidence lacks sufficient probative value because of its conclusory nature. It also lacks probative value

because evidence of *recantation* is not necessarily evidence the original accusation was false, which is the sort of evidence *Tidwell* and *Miranda* require. There is a “tendency of victims of domestic violence later to recant or minimize their description of that violence.” (*People v. Brown* (2004) 33 Cal.4th 892, 896; see *id.* at p. 899 [reasons why victims give conflicting statements]; accord, *Commonwealth v. Scanlon* (1992) 412 Mass. 664, 676 [“No evidence was proffered which would create a basis to conclude that any prior accusation was made falsely. A mere hope of recantation is not a justification for a fishing expedition”].) Further, defendant had the opportunity to present other instances of Katie’s lack of truthfulness, including her accusation against her brother Devon, and the trial court may have reasonably believed, given the weakness of the offer of proof, mini-trials on the somewhat more stale accusations against Andrew and Will would confuse the jury and unduly consume time.

Given our conclusions that defendant’s unsatisfactory offer of proof makes the trial court’s evidentiary ruling unreviewable, and defendant, in any event, fails to show an abuse of discretion under section 352, let alone a prejudicial abuse of discretion, we need not consider defendant’s additional arguments that exclusion violated his due process rights to a fair trial and violated his Sixth Amendment right to confront his accuser. Even if we were to do so, we would reject them.

In support of his due process argument, defendant cites *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1272, overruled on another ground in *Payton v. Woodford* (9th Cir. 2002) 299 F.3d 815, 829, footnote 11. In *Franklin*, the Ninth Circuit granted habeas relief on the ground exclusion of a false accusation by the victim, the sole percipient witness, was not only an abuse of discretion under Evidence Code section 352 (as determined by California Court of Appeal), but also a due process violation. (*Franklin*, at pp. 1272-1273.) However, this case, unlike *Franklin*, involved Katie’s description of her assailant’s genitals, which was corroborated,³ as well as a substantiating witness,

³ Katie’s description of a wart on the left side of defendant’s penis (if facing defendant), was consistent with Detective Byrnes’ testimony that photos of defendant’s

Galindo. As for his Sixth Amendment argument, defendant forfeited it by failing to make it in the trial court, where he advanced only a probative versus prejudicial analysis under Evidence Code section 352. “[T]o the extent defendant asserts a different theory for exclusion than he asserted at trial, that assertion is not cognizable.” (*People v. Partida* (2005) 37 Cal.4th 428, 438; see also *People v. Thornton* (2007) 41 Cal.4th 391, 427 [Sixth Amendment argument forfeited].)

Prosecutorial Misconduct

Defendant also urges reversal based on purported prosecutorial misconduct. He made no objection to the challenged conduct in the trial court, and thus has waived any asserted errors in this regard. (*People v. Brown* (2003) 31 Cal.4th 518, 553 [“To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury.”].) Nevertheless, given his claim of ineffective assistance of counsel, we review the challenged conduct.

Defendant first faults the prosecutor for commenting, during closing argument, on defendant’s failure to present evidence of false accusations even though the trial court had excluded such evidence. (See *People v. Varona* (1983) 143 Cal.App.3d 566, 570 [“argu[ing] the ‘lack’ of evidence where the defense was ready and willing to produce it” goes “beyond the bounds of any acceptable conduct”].) However, when “the prosecutor’s argument constituted fair comment on the evidence, following evidentiary rulings we have upheld, there was no misconduct and, contrary to defendant’s claim, no miscarriage of justice.” (*People v. Lawley* (2002) 27 Cal.4th 102, 156 [distinguishing *Varona*].) Because we have upheld the trial court’s evidentiary ruling, defendant’s claim fails.

Defendant also faults the prosecutor for “vouching” for the truthfulness of Katie and Galindo. “[A] prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence

groin showed a slightly raised, “little broken,” reddish “wart, a birthmark, something that’s out of the ordinary” on *defendant’s* right side near his penis.

outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of [his] office behind a witness by offering the impression that [he] has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," [his] comments cannot be characterized as improper vouching. [Citations.] [Citation.]" (*People v. Ward* (2005) 36 Cal.4th 186, 215-216 [finding no fault with statements such as: " 'The only thing I have ever told him is to tell the truth, nothing but the truth, and that's what he did for you' ").) The prosecutor here never led the jury to believe she had drawn conclusions about Katie's truthfulness based upon evidence outside the trial record. Her challenged remarks—all essentially some version of "Katie and Galindo are truthful and you know they are telling the truth"—were well within the bounds set by *Ward*.

Finally, defendant faults the prosecutor for eliciting and commenting upon testimony from Detective Byrnes about Katie's consistent story and her likely truthfulness. After Byrnes testified he interviewed Katie twice, the prosecutor asked Byrnes if it was "common for persons to remain consistent in their statements . . . depending on the situation." He answered: "A truthful person is going to be consistent" The prosecutor then asked if he felt Katie was being consistent with him, and he answered yes. At closing, the prosecutor stated: "[B]ased on Katie's interview with him [Detective Byrnes], he testified that her demeanor was consistent with someone telling the truth."

Testimony about another witnesses' truthfulness is generally inadmissible. (*People v. Melton* (1988) 44 Cal.3d 713, 744-745; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39.) Soliciting inadmissible testimony may be prosecutorial misconduct. (*People v. Warren* (1988) 45 Cal.3d 471, 481.) Even if Byrnes' testimony was inadmissible, however, we will not disturb the judgment unless it was " 'reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted.' " (*People v. Fuiava* (2012) 53 Cal.4th 622, 679.) No such

probability exists here. The alleged misconduct centers on a small number of brief statements of common wisdom whose gist were embodied in an unchallenged instruction given to the jury in this case. The court told the jury “you alone must judge the credibility or believability of the witnesses” and told them they may consider factors such as “[d]id the witness make a statement in the past that is consistent or inconsistent” The court also told them to “not automatically reject testimony just because of inconsistencies or conflicts.” Further, Byrnes’ problematic testimony opines on whether truthful people tend to be consistent and whether Katie was consistent, not whether Katie was truthful. In this context, a different result would not have been reasonably probable absent the supposed misconduct.

Because we find no prejudicial error based on prosecutorial misconduct, we need not address defendant’s ineffective assistance of counsel claim.

Failure to Give Unanimity Instruction

Turning to the two drug counts, defendant faults the trial court for not giving, sua sponte, a “unanimity” instruction⁴ to the jury.

“A criminal defendant is entitled to a verdict in which all 12 jurors concur as a matter of due process under the state and federal Constitutions. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132) In any case in which the evidence would permit jurors to find the defendant guilty of a crime based on two or more discrete acts, either the prosecutor must elect among the alternatives or the court must require the jury to agree on the same criminal act. (*Id.* at pp. 1132-1133) Where it is warranted, the court

⁴ Defendant identifies two possible “unanimity” instructions, CALCRIM Nos. 3500 and 3501. Each applies when the prosecution presents “evidence of one or more act to prove that the defendant committed” one or more offenses. No. 3500 tells the jury it cannot convict “unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed.” No. 3501 tells the jury it cannot convict unless: “1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed [for each offense]; [¶] OR [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period [and have proved that the defendant committed at least the number of offenses charged].”

must give the instruction sua sponte. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199) The omission of a unanimity instruction is reversible error if, without it, some jurors may have believed the defendant guilty based on one act, while others may have believed him guilty based on another. (*Russo*, at p. 1133.)” (*People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1588-1589.)

During defendant’s trial, the prosecutor elicited testimony that defendant provided marijuana to Katie more than once and on “a regular basis.” In fact, Katie linked smoking marijuana with defendant to each of the molestations she described. A recorded “pretext call” to defendant caught him admitting he got Katie “friggen high.” The People concede, however, the prosecutor did not elect any two particular instances of providing drugs to correlate with the two charged drug counts. The People also concede the trial court gave no unanimity instruction on the drug counts. Defendant’s sole defense, meanwhile, was Katie was lying.

There was no error in the court’s failure to give a unanimity instruction. A unanimity instruction is not required when, as here, the defendant offers the same defense to the different acts constituting the charged crime, so no juror could have believed he committed one act but disbelieved that he committed the others. (See *People v. Schultz* (1987) 192 Cal.App.3d 535, 539-540.) Defendant raised the same defense—Katie’s lack of truthfulness—to all acts that could have constituted the drug offenses. The defense never distinguished between the various alleged instances of providing marijuana, never explaining any and never providing a unique defense to any. The case came down to whether the jurors accepted or rejected Katie’s testimony. Under these facts, a unanimity instruction was not necessary.

Even assuming the failure to give a unanimity instruction was error, the error would have been harmless under any standard of prejudice. “The erroneous failure to give a unanimity instruction is harmless if disagreement among the jurors concerning the different specific acts proved is not reasonably possible.” (*People v. Napoles* (2002) 104 Cal.App.4th 108, 119 & fn. 8 [split in authority whether such error is reviewed under *Chapman v. California* (1967) 386 U.S. 18, 24, or, *People v. Watson* (1956) 46 Cal.2d

818, 836, standard of prejudice; error harmless under either standard].) Further, “[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless.” (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.) As discussed, defendant’s defense was that he never supplied marijuana to Katie and Katie’s testimony was not truthful. Defendant did not dispute some but not all of those acts, and thus there was “ ‘no reasonable likelihood of juror disagreement as to particular acts.’ ” (*People v. Napoles, supra*, at p. 120.) Ultimately, the jury necessarily credited Katie’s testimony that defendant provided her marijuana more than once and on a regular basis, and “would have convicted him of any of the various offenses shown by the evidence.” (*People v. Thompson, supra*, 36 Cal.App.4th at p. 853.)

Accordingly, whether analyzed as a lack of error or lack of prejudice, there is no ground for reversal due to lack of an unanimity instruction.

Sentencing for the Drugs and Molestation Counts Under Section 654

Defendant also asserts his sentence on the drug counts should be stayed under Penal Code section 654 because the drug and molestation offenses were part of a single course of conduct.

Section 654 provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.” (Pen. Code, § 654, subd. (a).)

“The ‘act’ necessary to invoke section 654 need not be an act in the ordinary sense of a separate, identifiable, physical incident, but may instead be a ‘course of conduct’ or series of acts violating more than one statute and comprising an indivisible transaction punishable under more than one statute. [¶] The divisibility of a course of conduct depends upon the intent and objective of the defendant. If all the offenses are incidental

to one objective, the defendant may be punished for any one of them, but not for more than one. On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple. Each case must be determined on its own facts. [Citations.] The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.)⁵

Defendant asks us to view the drug and molestation offenses as one "act." The only purpose behind providing marijuana to Katie, he argues, was to render Katie more vulnerable to defendant's advances.

At the outset, we cannot accept defendant's premise that his sole objective in furnishing marijuana to Katie was to soften her for abuse. Katie testified she and defendant smoked marijuana on numerous occasions using a water bong or pipe. The trial court therefore had substantial evidence from which to conclude defendant had a different, or at least a second, criminal objective, namely to enjoy consumption of

⁵ This judicial gloss on section 654 remains the law, despite reservations and limitations our Supreme Court has expressed and imposed in *People v. Latimer* (1993) 5 Cal.4th 1203, 1211-1217 (*Latimer*). The court in *Latimer* expressed concern that "the gloss defeats its own purpose. We have often said that the purpose of section 654 'is to insure that a defendant's punishment will be commensurate with his culpability.'" [Citation.] The [gloss] . . . does not, however, so ensure. A person who commits separate, factually distinct, crimes, even with only one ultimate intent and objective, is more culpable than the person who commits only one crime in pursuit of the same intent and objective. A grand criminal enterprise is more deserving of censure than a less ambitious one, even if there is only one ultimate objective. . . . A rapist should not be insulated from punishment for separate crimes such as kidnapping even if part of the same criminal venture." (*Id.* at pp. 1211, 1216-1217 [nonetheless holding kidnapping could not be separately punished when it led to a rape]; see also *People v. Correa* (2012) 54 Cal.4th 331, 338, 341 [noting continuing viability of *Latimer* and gloss].)

marijuana with a minor. (See *Latimer, supra*, 5 Cal.4th at pp. 1211-1212 [multiple punishment permitted if the defendant harbored separate, although simultaneous, criminal objectives].)

Theoretically, furnishing drugs solely as part of a scheme to molest the victim, might militate staying sentence on the drug charges. (See *People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1041-1042 [furnishing narcotics offenses “leading to the felonious sexual acts were not punishable, because they were incident to the criminal objectives”].)⁶ But that is not the case if drug charges “are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the” molestation. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935; see also *Latimer, supra*, 5 Cal.4th at p. 1216 [“consecutive, and therefore separate, intents” may be individually punished].) Thus, even if a defendant commits multiple acts with the same aim, “a course of conduct divisible in time, although directed to one objective, may [still] give rise to multiple violations and punishment.” (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11.)

Here, Katie testified defendant provided her with marijuana on a “regular basis,” as well as smoking it together before each instance of molestation. Thus, the evidence, while showing a link between marijuana use and molestation, supports the trial court’s implicit finding that defendant had enough time between plying Katie with marijuana and molesting her to reflect on and renew his criminal intent, making Penal Code section 654 inapplicable. (See *Latimer, supra*, 5 Cal.4th at p. 1216 [“consecutive, and therefore separate, intents” may be individually punished].) We therefore find no error as to section 654 to this case. Nor could we understand a sentencing regime that prohibited trial courts from imposing a greater sentence on a child molester who used drugs to soften a victim than on one who did not.

⁶ We also note *Goldstein* predates *Latimer*’s limitations on the “course of conduct” doctrine by more than 10 years.

Agreed Error in Sentence

At defendant’s sentencing hearing, the trial court imposed the “midterm” sentence for count 2. The abstract of judgment, however, reflects a one-year, eight-month sentence, which is only one-third of the five year midterm sentence specified for violation of Health and Safety Code section 11361, subdivision (a). The prosecution claims the “one-third” sentence is unauthorized by law and asks us to give effect to the trial court’s clear intent to impose a five-year, concurrent sentence. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 886-887; *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1156, fn. 3.) Defendant agrees “the concurrent term for [c]ount 2 was incorrectly calculated.” We will therefore order a modification of the abstract of judgment.

DISPOSITION

The judgment is affirmed, with directions to correct the abstract of judgment to state a five-year concurrent sentence on count 2.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.