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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.

MICHAEL RAYMOND COPITHORNE,

Defendant and Appellant.

A136373

(Napa County
Super. Ct. No. CR157523)

Appellant Michael Raymond Copithorne was convicted, following a jury trial, of one count of oral copulation of a person under age 16 and three counts of committing a lewd and lascivious act upon a child. On appeal, he contends (1) because the victim testified that two of the charged incidents occurred on specific dates and appellant presented an alibi defense as to those dates, the trial court violated state law and deprived him of the effective assistance of counsel when it provided the jury with verdict forms stating the offenses occurred “on or around” a range of dates; (2) the trial court erred when it excluded demonstrative defense evidence showing the limits of appellant’s physical abilities; (3) the trial court violated appellant’s right to a fair trial by permitting the 16-year-old victim to testify with a support person present, without first holding a hearing to determine whether the victim needed support; (4) because the prosecution introduced no evidence showing that the victim was 10 years younger than appellant, the trial court should have ordered a judgment of acquittal on its own motion at the end of the prosecution’s case in chief; (5) the trial court erred in refusing to release the victim’s

psychological records; and (6) the cumulative effect of the errors raised on appeal requires reversal of the judgment.

We conclude (1) the trial court prejudicially erred when it provided the jury with verdict forms stating the offenses alleged in two of the lewd act counts occurred “on or around” a range of dates, where prosecution evidence showed that those offenses took place on two particular dates and appellant presented a complete alibi as to those dates; (2) the trial court prejudicially abused its discretion when it refused to permit appellant to engage in a demonstration regarding his physical abilities, when that evidence was extremely relevant to a crucial issue related to the oral copulation count and its probative value far outweighed any risk of undue prejudice; and (3) because the cumulative effect of errors committed during trial unfairly bolstered Jane’s credibility and undermined appellant’s, reversal of the entire judgment is required.

PROCEDURAL BACKGROUND

On December 2, 2011, appellant was charged by information with one count of oral copulation of a person under age 16 (Pen. Code, § 288a, subd. (b)(2)—count 1),¹ and three counts of committing a lewd act upon a child, i.e., kissing (§ 288, subd. (c)(1)—counts 2, 3, and 4).

On June 19, 2012, a jury found appellant guilty on all counts.

On August 9, 2012, the trial court sentenced appellant to a total of five years in state prison, including an upper term of three years on the oral copulation count and a consecutive term of one-third the midterm of eight months on each of the three counts of lewd acts upon a child.

On August 21, 2012, appellant filed a notice of appeal.

FACTUAL BACKGROUND

Prosecution Case

“Jane Doe,” who was 16 years old and in high school at the time of trial, testified that she had lived in group homes and foster homes until she was adopted by her parents

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

at the age of six. Jane had known appellant from the time she was in kindergarten, when she became a student at Napa Christian School (Napa Christian), until she left for high school after the eighth grade. Appellant was Jane's physical education and Bible class teacher in sixth grade, and was her primary teacher for all subjects except music and math in seventh and eighth grades. Appellant was a good teacher and a good friend. He had a great sense of humor and "was kind of like the dad [she] never had."

When Jane was in sixth grade, she was depressed due to "things outside of school" and her grades fell to B's and C's. She went into the girl's bathroom at school and was about to attempt suicide by swallowing an object that she hoped would obstruct her airway when a friend came into the bathroom, saw what she was doing, dragged her out of the bathroom, and told appellant. The next day, Jane asked appellant to keep what had happened a secret, but learned that he was required to report it. Appellant talked with her, prayed with her, and helped her to accept God.

When Jane was in seventh grade, she went on an outdoor education trip to Nevada with fellow students, chaperones, and appellant. During the trip, after visiting some sand dunes, Jane wanted to ride back to the hotel with appellant in his truck, which the students had taken turns doing. Appellant, who had used a wheelchair in all the time Jane knew him, had a lift for the wheelchair on the back of his truck and used hand controls to drive.

Jane got to sit next to appellant in the truck for about an hour while he drove her back to the hotel. At first they talked about "random things," but, about halfway through the ride, she touched his hand. They held hands for the rest of the trip, and appellant told her that she was "really special to him" and that "nobody would ever understand their relationship." She "agreed with him because I had said that before myself, too." After a while, appellant "said that he had like a little special thing for me that he wanted to do and then he kissed my hand and then I did it back to him." She kissed his hand "a little longer." Appellant told Jane that she should not "tell people about that kind of thing or write it down in my journals or stuff because if people found out then they wouldn't understand, they would take it the wrong way and then . . . my parents would be mad at

me” and “he could lose his job.” After the Nevada trip, Jane saw appellant every day at school, but neither one brought up what had happened in his truck.

During eighth grade, when Jane was again in appellant’s class, the students would leave his classroom each day at 1:45 p.m. to go to math class. Jane had a routine in which she would return to appellant’s classroom at 2:00 p.m. to take her attention deficit hyperactivity disorder (ADHD) medication and then go back to math class. One day in March 2010, Jane was feeling low and, when she returned to appellant’s classroom to take her medication, appellant asked if she was okay. She told him about an issue at home and he consoled her. Also, since it was towards the end of her eighth grade year and she would be graduating, Jane told appellant that she would “miss him a lot,” and appellant said he would miss her too.

Jane was kneeling next to appellant when she said she wished she could “give him something special,” and she kissed him on the hand. He then said, “it’s okay if you want to,” which seemed like “he was indicating more,” so she gave him a kiss on the cheek. She then went to give him a quick “peck” on the lips, but appellant gave her a “full on” French kiss, in which he put his tongue in her mouth. She was surprised, but she “liked it,” and so “just repeated the behavior back to him.” They “kissed for a long time.” The French kiss lasted about two minutes, and took place at 2:00 p.m., when no one else was present. After appellant stopped kissing her, she gave him a hug. Appellant said Jane had better go back to class, and reminded her not to say anything about what had happened. The kissing took place in the back of the classroom, near appellant’s desk. There were windows on one side of the classroom that faced out onto the front of campus. There was a walkway beside the windows and anyone who was walking by could have seen inside the classroom.

Two or three days after this incident, Jane was in appellant’s classroom after school. Everyone had left the classroom except for her and appellant. She said she “wished he could do it again,” and they kissed again, for a little longer than the first time. This time, the kissing took place in the front of the classroom. When they finished kissing, Jane again gave appellant a hug and they had a talk about nobody understanding

their relationship, with him telling her not to tell people about it “because it could get him in trouble.” She agreed not to say anything and told him “how I wouldn’t want to get him into trouble because I loved him so much.” She also did not want her parents to know. Jane liked and savored what had happened, and wished it could happen again.

Jane’s eighth grade graduation took place on June 6, 2010, at Napa Seventh Day Adventist Church. Towards the end of the reception, Jane found appellant in the hall and he said to wait for him in the back parking lot behind the trash cans where nobody could see them, and he would come out to say goodbye to her. Although she waited for him for half an hour, appellant did not come. Her parents eventually found her and said it was time to go. As she got into her parents’ car, appellant came up and said goodbye. Jane was crying and he said he was sorry it did not work out.

A couple of weeks after graduation, appellant called students to say that their diplomas had arrived and to pick them up at the school office. Jane talked to him when he called her house and told him that she missed him. Appellant said he missed her too. Jane then said, “I know you have something else to say, so just say it,” and appellant said, “I’m sorry I didn’t say goodbye the right way.” Jane responded, “well, maybe we still can,” and they planned to meet. But appellant “chickened out or something” and said “it wouldn’t be a good idea.”

About two weeks later, when Jane and her mother went to the school to pick up her diploma, they visited appellant in his classroom. Jane and her mother were standing next to appellant, and the three of them were talking. “[W]hat my mom didn’t notice is we were writing on a Post-it note back and forth about trying to arrange something so he really could come see me.” Exchanging the Post-it note a few times, they arranged for appellant to come to her house on July 7, after her parents left for work “so he could say goodbye the right way.”

On July 7, 2010, around 9:00 a.m., Jane was watching through the window of her house when appellant drove up in a black car he did not usually drive and parked down the street. He got into his wheelchair and came into the house. They sat together on the couch after appellant moved there from his wheelchair. While they were talking, Jane

gave appellant a letter she had written to him a few days earlier. She had given him several letters previously, which all “had something to do with me loving him.” After reading the letter aloud to appellant, Jane said she had “always wanted to do something. Appellant said, “what?” and she said, “sit on your lap.” He said she could, so she sat on his lap on the couch.

They kissed for a long time. Appellant then started “feeling [her] up”; he put his hand up her skirt and touched her leg. He put his other hand down her shirt, though he did not actually touch her breasts. She had dressed up because “she wanted to be pretty,” and felt it was kind of her fault because she “shouldn’t have tempted him.” Eventually, appellant took his hands away and Jane said she loved him. She stayed on his lap for a while and then scooted back over next to him. Before appellant left, he said that he “finally got to say goodbye the right way” and that he loved her and would miss her. He also reminded her not to say anything. As he was going out the door, appellant “said he felt like he was losing me already.”

Jane started ninth grade at the public high school in mid-August of 2010. About a week later, she received a cell phone from her parents as a birthday present. Appellant was the first person she called on her new phone and she gave him the number. She and appellant began texting each other. At first, Jane kept the text messages, but when “things started getting a little inappropriate,” appellant said she should erase the texts so her parents would not see them. They therefore began automatically erasing all the texts they sent to each other.

At some point, Jane mentioned that she “just wanted to see [appellant] one last time,” and they arranged a meeting through text messages. The plan was for him to come to pick her up for school one day in the middle of September, right after her parents left for work, “and we would say goodbye and he would drop me off at school.” In mid-September, appellant picked Jane up in his truck. He waited for her down the street from her house. He told her to get into the back of the truck, so she got in and sat behind the driver’s seat on a blanket that was lying there. She thought she recalled appellant’s wheelchair being behind her in the bed of the truck, but it could have been on the front

passenger seat. Appellant said to lie down so nobody could see her, and two minutes later they arrived at a Lucky's supermarket parking lot.

When the truck stopped, Jane looked around and saw an empty car right next to them and, one parking space away, she saw a man getting out of his car. After that, she saw no one nearby. The windows of appellant's truck were tinted so she could see out, but it would be hard for anyone to see in. Appellant told Jane to scoot over and, once she did, he got into the back of the cab by using his hands to hoist himself over the center console between the front seats, "and his legs followed." He then "obviously fell on the blanket." He landed on his stomach, turned over, and pulled himself "up into a sitting position as best he could." He then slid next to her.

Jane, who was wearing a dress, gave appellant a letter that "had something to do with loving him," and which she read aloud. Appellant thanked her and said, "that was really sweet." They started French kissing; occasionally appellant would stop and say "how I kiss good." After a while, appellant said, "can I, and I said yes, not really sure what he was meaning, but kind of having an idea." Appellant then put his hand down her shirt and fondled her breasts under her bra. Appellant told her to lay on top of him and to put her leg over him; he moved her leg over his legs. They kissed some more while she was on top of him.

A couple of minutes later, he asked again if it was okay, and then loosened up her dress and took her underwear off. Appellant was lying on his stomach and he had reversed his position so that his head was by her feet. He then began licking Jane's vagina. A few minutes later, she put her underwear back on and saw that they had to go or she would be late. So appellant, who "[a]cted like nothing happened," dropped her off at school. As she left the truck, he said "have a good day," and she said, "thanks for your special gift" Jane had been in the truck for slightly less than an hour when appellant dropped her off at school just before 8:00 a.m. She did not recall there being a hump or raised portion in the middle of the floor of the truck; it would have been covered up by the blanket.

Shortly before Christmas break, when Jane had not seen or talked to appellant for two months, her physical education class started a sex education unit. During the class, her teacher described what oral sex was and “it dawned on me all of a sudden exactly what had happened.” After the class, she was “a wreck” and “felt conflicted” because “I realized what had happened to me and I had words to put to what had happened, and I just broke me down [*sic*] because I realized that yet again I had been hurt.”

Later that day, Jane’s classmate, Alyssa, asked if Jane was okay. She said she was fine, but Alyssa said, “I know you’re not fine,” and insisted that Jane tell her what was wrong. Jane said she just realized after the sex education class that she had been taken advantage of. Alyssa said Jane had to tell her parents, but when Jane said no to that, Alyssa, who was in a hurry, said they should talk more the next day. Later that day, when Jane got home, she was really mad. She called appellant and told him, “you lied to me.” He asked her what she was talking about, and she said that she had realized that she “wasn’t still a virgin.” His “reply was quote, you can have all the oral and anal sex you want and still be a virgin.”

Over the course of the next week, Alyssa pressured Jane to tell someone about what appellant had done, and suggested she talk to her youth pastor. Jane therefore spoke to her youth pastor during youth group. He said this was more than he could handle and went to get the pastor of the church, Ron Driscoll. Jane then had to tell the whole story to Driscoll, who insisted she call her parents. She cried and said she could not do it, and the pastor called them for her. Her parents came to the church and she had to tell the story again to them.

Later that month, appellant texted Jane, “Merry Christmas.” When she did not respond, he texted something about her being off her medication. Also in December, Jane was interviewed by Detective McDonald and she told him what had happened with appellant. A few days later, she helped McDonald place a phone call to appellant.

In early December 2010, at McDonald’s request, Jane used her journals and a calendar to prepare a list of the dates of her various sexual encounters with appellant. She was able to pinpoint all of the dates except the date of the encounter at Lucky’s,

which she only knew was on a Wednesday in the middle of September. Therefore, in her list of encounters, she noted the month and year of that incident, but left the date blank.

On cross-examination, Jane testified that she had written the specific dates when the classroom kissing incidents took place on a list she later prepared for the police. Those dates were March 17, and March 19, 2010. She was able to pinpoint those dates, as well as the date of the kissing at her house, from looking at what she had written in her journals.

Also on cross-examination, Jane acknowledged that, while she was in appellant's class, he asked her "a number of times" not to stand so close to him and to give him more space. He also asked her not to hug him. He later explained to her that it was because he felt like what was happening between them was inappropriate, though he also said, "quote/unquote but I can't deny the way I feel about you."

Mrs. Doe, Jane's mother, testified that she and her husband had adopted Jane when Jane was six years old, more than a year after she was placed with them for foster care. When she was in first grade, Jane was diagnosed with ADHD and given medication.

Jane attended Napa Christian for nine years, from kindergarten through eighth grades. Appellant was her primary teacher for seventh and eighth grade. Mrs. Doe thought appellant was charming and she "never saw him without a bunch of kids who all seemed really fond of him." Appellant was eager to help kids learn and Jane was excited to have him for a teacher. At some point, while Jane was in his class, appellant met with Mrs. Doe and Jane and expressed concern that Jane had been writing notes in which she said how much she loved him and how important he was to her. He thought that this was inappropriate and that she should not be writing these kinds of notes to him. He also said that she was "a little clingy" and had a hard time letting go of him after a hug. They talked about how her repeated hugging of him was inappropriate.

Jane had always been in therapy. Mrs. Doe recalled talking to teachers and administrators at school about concerns regarding Jane telling the truth, particularly about whether she had homework.

After Jane's eighth grade commencement, Mrs. Doe remembered looking for her at the church where the ceremony had taken place. A couple of kids said she was with appellant, but Mrs. Doe could not find either of them. Eventually Jane came up to her outside the building and said somebody had told her that her mother was looking for her. Mrs. Doe asked Jane where she had been; Jane responded that she was with appellant.

After Jane graduated, Mrs. Doe took her back to Napa Christian two or three times because she missed the people there. The first time, they went to pick up Jane's "honors cord," and both she and Jane visited appellant in his classroom. Later that summer, Mrs. Doe took Jane to the school because Jane said she wanted to see appellant. Mrs. Doe waited in the car for 15 to 20 minutes while Jane visited appellant in his classroom.

In mid-August 2010, Jane started ninth grade at the public high school. She played trumpet in the band there and earned high grades. For her birthday, shortly after she started high school, Jane's parents gave her a cell phone. She texted appellant frequently and Mrs. Doe was concerned because Jane seemed to have "a bad case of hero worship." Mrs. Doe talked to her about it, but Jane said Mrs. Doe did not understand.

On December 8, 2010, while Jane was at a weekly church youth group meeting, Mrs. Doe and her husband got a call from the pastor. He said something important had come up and they needed to come to the church. They met with Pastor Ron; Pastor Ken, the youth pastor; and Jane. Jane then told them that appellant had molested her, and offered a few details about his picking her up in September, taking her to the Lucky's market, asking if he could play with her breasts, going behind the seats, licking her in her private area, and dropping her off at school. When they got home from the church, Mrs. Doe called the police. Jane and her parents subsequently met with Detective McDonald.

After they made the police report about the molestation, Jane's family stopped visiting Napa Christian and people from the school they ran into would pretend not to know them. Other children blamed Jane for appellant losing his job at the school.

On cross-examination, Mrs. Doe acknowledged that Jane was a child who sometimes needed more than an average amount of attention and that she sometimes said things that were not true "as a means of getting out of something." She recalled talking

to Jane's sixth grade English teacher, Jan Leigh, about concerns related to homework and Jane not telling the truth. She also might have told another parent, Cheryl Boyles, that Jane was "not getting along with her father right now." Once, when Jane was in fifth grade, she and her father were yelling at each other. Mrs. Doe came into the room, saw them both "flailing around," and told them to "knock it off." The next day at school, Jane had a bruise on her arm and said her father had hit her. An investigation followed this incident, but there was no finding of abuse.

Mrs. Doe recalled that, during the "Can You Dig It" field trip to Nevada, Jane rode in appellant's truck. Kids took turns having the "special treat" of riding with him in his truck.

Alyssa D. testified that, when she was a junior and Jane was a freshman, they were in the high school marching band together. One day in November or December of 2010, Alyssa was walking to her car after school when she saw Jane with a terrified look on her face. Alyssa asked if Jane was okay and Jane said that she had just come from sex education where another student had "asked the teacher if you were touched inappropriately does that mean you're still a virgin. And I guess the teacher said no and [Jane] had this terrified look on her face." Because Alyssa was in a hurry, they agreed to talk the following day.

The next day, Jane told Alyssa that, when she was in eighth grade, she and a teacher, "Mr. C.," liked each other and that he came to her house one day and they were kissing. Then, another day, "he wanted to give her a proper goodbye because she was leaving the school." Alyssa said that he took her to the back of the Lucky's parking lot, pulled down her pants, and licked her private parts. Alyssa immediately told Jane that she needed to tell someone about what had happened both because it was not appropriate and to keep it from happening to anyone else. Alyssa encouraged her to tell her pastor or youth minister. Jane felt guilty and scared about what could happen, but Alyssa explained that it was not her fault and she needed to get help. Alyssa talked to Jane for two or three days before Jane finally told someone at her youth group what had happened.

Ron Driscoll, senior pastor at the church Jane's family attended, testified that he had known Jane and her family for about five years. On an evening in December 2010, he came to the church at the request of the youth pastor. Jane told Driscoll that "she had a teacher at school who had an improper relationship with her and that some sexual contact had happened." She said that the teacher had taken her panties down and kissed her private parts. She also said this had taken place in the parking lot of a grocery store. Driscoll called Jane's parents, who came to the church. Jane told them the same story. She seemed shaken and upset, and kept asking if she was still a virgin. Driscoll described Jane as "a good girl" and "a good Christian," but also "a bit quirky" and "a loner."

Mike Walund, a detective with the Napa County Police Department, testified that he assisted in the investigation in this matter and took photographs of appellant's classroom and vehicle. In the classroom, he found a diary in a desk drawer. In the vehicle, he found a "wadded up" letter on the floorboard under the driver's seat.

John McDonald, a former detective with the Napa County Police Department who was assigned to the case, testified that he contacted Jane's parents and set up an interview with Jane. He interviewed Jane on December 22, 2010, after which Jane agreed to make a pretext phone call to appellant. On the call, a recording of which was played for the jury, Jane said she needed to talk to appellant "about what happened between us . . . in your truck at Lucky's" and asked whether he was sorry that they had oral sex. Appellant told her he did not know what she was talking about and, though he wanted to be friends, they could not talk "until this calms down." He also referred to a dream she had shared with him. When Jane expressed confusion about whether she was still a virgin after appellant had oral sex with her, appellant told her she needed to talk to a female teacher about that; he also asked about her boyfriend.

When Jane pressed appellant about whether he was sorry that they had oral sex, he responded that he could not "comment on that," that he was sorry, but it was "not something I'm . . . involved with." When Jane said she wanted to be his friend, but wanted him to promise that he would never have oral sex with her again, appellant said, "it's not going to happen—it's not going to happen. I didn't want it—I don't want it to

happen, you know? I still don't. We need to be friends." He said that was why they had not been talking, because they were Christian people and he had "worked really hard to make sure that . . . nothing, you know, would even look suspicious—would go on." He said that he had been "praying about it," had asked for forgiveness for "anything that . . . I've done in my past," and believed that God had forgiven him. Appellant also asked if Jane was on her medication; she said she was.

McDonald was not able to retrieve text messages Jane said she had previously deleted from her cell phone, but was able to gain access to some prior text messages from appellant's cell phone between December 7 and December 23, 2010. The text messages and applicable dates were as follows:²

On December 7, 2010, appellant texted the following:

Appellant ("C"): "[w]hat are you talking about?"

C: "[C]all me."

C: "I was going to invite you to the Christmas concert and also wanted to clear something up."

C: "Call me."

On December 14, appellant texted:

C: "Merry Christmas."

C: "I see how it is, you go off your meds and send me some ludicrous texts and when I text you something nice you don't even respond. What's up with that?"

On December 23, the following texts were sent from appellant's cell phone:

C: "Sure."

C: "Sorry, just got your text."

C: "[S]ure."

C: "Can you talk now."

C: "K [okay] cool."

² Although McDonald testified that there were misspellings in the texts, the reporter's transcript for the most part does not reflect those typographical errors.

C: “No worries, merry Christmas.”

C: “That’s fine milady.”

C: “G [good] night.”

C: “Unless you want to go walk the dog for a while.”³

Thereafter, from late December 2010, through late January 2011, McDonald used Jane’s cell phone to text appellant, with McDonald pretending to be Jane, in the hope that appellant would make incriminating statements. He and appellant exchanged approximately 300 texts in that time period.

Following the pretext call, appellant and McDonald, posing as Jane, exchanged the following text messages.

On December 24, 2010, appellant texted to Jane:

Appellant (“C”): Did you like growing up without your real dad. What you were saying will ruin your reputation and mine as well as make [appellant’s son] grow up with no daddy. Why would you do that to me, why would you do that to you?”

C: “I regret that I let you get to the point where you thought talking about that with me was okay.”

C: “This is why I told [your parents] that you shouldn’t be hugging me the way you were. I was glad you stopped. What does that—”

C: “I don’t understand why you would say that after I supported you and kept kids from picking on you every day.”

C: “I know you’ve had a tough life. I want to be there for you, but until you move on, I can’t. I’m sorry for any pain that you have, I wish I could take it all.”

On December 27, 2010, appellant texted the following to Jane:

C: “It depends on what you want to talk about.”

C: “I’m driving right now, text you in a while.”

C: “Hey senorita.”

³ McDonald testified that Jane had said that she and appellant used that term to describe her taking her dog for a walk so they could have privacy to talk on the phone.

C: "You wanted a chat."

C: "K [okay], have fun milady."

On December 29, 2010, there was a text exchange between appellant and McDonald, posing as Jane, while appellant was on a trip with his family, during which he invited her to attend a concert with other students and a colleague from Napa Christian.

After McDonald, posing as Jane, texted that she hoped she could go, the following exchange ensued:

C: "Talk to mom and dad, Mrs. C and I don't mind helping you go if you need it."

McDonald, posing as Jane ("M"): "Okay. So when you coming back from your trip anyways.

C: "Sooner or later, feels like forever."

M: "I have something I want to give you when you get back."

C: "Oh, okay, sounds good. . . ."

M: "About the thing I wanted to give you, it is a letter."

C: "Oh, okay."

M: "So when can I give you the letter?"

C: "I will be back on Saturday."

M: "I have another favor to ask of you. I'm sorry but when I wrote about us in my diary, I just couldn't help it so could I give you my diary along with the letter. So my parents don't find out about it."

C: "It's up to you."

M: "Will you keep my diary safe? It means a lot to me."

C: "I understand, whatever makes you feel better. I'd be happy to do . . . that if that is what you want."

M: "I still think about you and miss you. . . ."

C: "I really miss you, too, unbearably so. I miss you too, little lady, believe that."

M: "I really miss you, too, unbearably so."

C: "I just asked God to hug you for me."

M: "I felt it. I wish I could have the real thing."

C: "Hee, hee, hee, you will get one from me and [appellant's son] next time you see me."

M: "Nice."

On December 30, 2010, McDonald initiated the following text message exchange:

M: "Hi."

C: "Hey. . . ."

M: "Just thinking about you."

C: "[smiley face]"

M: "Can I ask you something."

C: "Sure."

M: "I told you need [*sic*] . . . to talk to someone about what happened between us. I'm afraid if I tell my counselor they will tell CPS."

M: "[Y]ou there?"

C: "Yep, what's up."

M: "Did you understand my question."

C: "I'm not sure why I'm involved in this. What happened between you and your 17 year old boyfriend doesn't involve me. You can talk to whoever you need to about that, preferably a girl your age."

M: "No, I am talking about what happened between you and me."

C: "I don't know what you're talking about, [Jane]. I defended you when Bradley wanted to beat you up. Paid my own money so you could go on the class trip. Got you from Cs and Ds to straight As. You are like a daughter to me. Nothing like that is going to happen between us. Are you trying to ruin both our lives."

M: "No, I am feeling guilty and you are the only one I can talk to. I wanted to be a virgin until I got married, now I am so confused."

C: "You still are."

C: "You still are a virgin unless more happened than you told me. God has already forgiven me you [*sic*]. You just need"

M: "What do you mean I told you? You were there."

C: "What?"

M: "I'm talking about you and me."

C: "[Jane], you need to knock it off seriously. I'm going to have to get a lawyer if you keep talking like this. Do you want your family to lose your house or my family? I will lose my job even if nothing happened. Is that how you repay me?"

C: "I don't know why you are doing this."

M: "Why would you say that if I only talk to you about it?"

C: "I can't talk to you about this kind of thing, it isn't right. I know your past has been difficult but I am trying to do the right thing. You deserve that."

M: "We talked about it before, why not now."

C: "We have talked, prayed and cried about lots of things together. That was before you told me about your dream about me. I had to draw the line. There are lines that shouldn't be crossed. I'm sorry."

M: "I'm not talking about a dream or another boy. We are talking about what we did in your truck. Why can't you talk about it now."

C: "I have no friggin idea what you are talking about. I am about to block you from my phone."

C: "Is that what you want?"

M: "Can we talk when you get back?"

C: "Not about this. I'm sorry but I have nothing else to say. Talking about what you seem to want to talk about is a sin for me. Is that what you want."

M: "No, can't you understand that I am upset and confused."

C: "I understand that just fine. I can't change anything in your life. I would if I could. Satan is trying to bring you down and the sad thing is you are helping him by telling on it. You got over it quick when you lied to me when you were my student. Just forgive and forget and tell Satan to get away from you."

M: "It's hard to forget that."

C: "So ruin every ones lives, especially yours instead. That doesn't make a darn bit of sense at all."

On January 2, 2011, appellant returned from his trip and texted Jane, but received no reply.

On January 8, 2011, McDonald initiated a text message exchange, which included, inter alia, the following:

C: "We miss seeing you."

M: "Me, too."

M: "Do you remember I need you to hold on to my diary."

C: "I texted you about that but you never answered that."

M: "I've been busy with friends and church. How should I get it to you? I am nervous about parents snooping."

C: "Hmm, could you leave it . . . for me somewhere."

M: "Maybe Monday when parents are at work."

C: "Whatever you think."

C: "You could come to Napa Christian and give it to me there, we would all like to see you."

M: "I have a letter I want to give you too."

C: "Okay, I have one for you, too."

M: "Do you work Monday? Can you pick it up at my house."

C: "Can you walk it to NC [Napa Christian]."

M: "No, I don't think so."

C: "I'm working Monday [sad face]."

M: "Can you pick it up on the way to school?"

C: "Probably could."

M: "What time."

C: "Just before 8:00."

M: "Do you want me to meet you where we met before or what."

C: "I will just text you and you can come out front."

M: "One more thing. I kept my panties from that day, what should I do with them."

C: "What."

C: "You aren't starting with this again, are you."

M: "What do you mean? [S]hould I throw them away or give them to you."

C: "You can throw away whatever you want."

M: "I was keeping them because that was a special day for me."

C: "The day you accepted Jesus in your heart was a special day to me."

M: "That was a different kind of special."

On January 9, 2011, McDonald texted that Jane's father was sick and would be home all day, so she could not meet him at her house. When appellant suggested meeting at Starbucks, Jane said that would not work. Appellant responded, "Hmm, I'm bummed. I was really looking forward to seeing you and having time to talk." On January 11, they arranged, via text, for Jane to leave her diary and letter under the mat of her house's side porch a couple of days later. She also indicated that her parents would let her go to the concert to which appellant had invited her. When McDonald, posing as Jane, asked appellant where he was going to leave her letter, he texted, "Same spot."

On January 12, 2011, McDonald left Jane's diary at her house. He also included a letter he had her write documenting their sexual contact and a list of dates and times of their sexual contact that she had prepared the day before, taped to the inside cover. He put the underwear Jane was wearing on the day of the Lucky's incident in a plastic bag and set it on top of the diary. Later that morning, in response to a text from McDonald, posing as Jane, appellant texted that he had just left her house; he had left a concert ticket on the porch for her and really hoped she could come.

The letter McDonald wrote and had Jane copy in her handwriting said, "My dearest most precious daddy. I was thinking about, you know, some certain days. Aren't you glad we didn't chicken out after all? Look at what we both would have missed. . . . [(sighs contentedly with a great smile and warm heart)]. Look, I'm so sorry, we have to keep part of our relationship hidden from the public view. But when you're the only one I can talk about the things we have done together [*sic*]. Then when I try to talk to you about it you try to change the subject and pretend like it didn't happen.

“I want to keep this between you and me and you know that if I tell my counselor or another adult about you kissing at my house or what we did at Lucky’s they will report it to CPS or my parents and it will not be good for both of us. It hurts my feelings when you won’t talk to me about the guilt that I am feeling about what happened in your truck at Lucky’s.

“I know, . . . I promised that we wouldn’t talk about it again, but it’s not easy for me. What do I do? Who do I get advice from if not you? I know we can’t be together but we can still have memories of our past.

“Also I kept my panties from that day at Lucky’s because, no matter what, they meant something special to me. You can have them or do anything you want with them. I just want to be able to talk [to you] like we used to. I miss that. Just quit hurting my feelings by telling me I’m off my medication and I’m dreaming because you know that is not true.

“Please keep my diary safe. All of my writings are important to me and I will get it back from you someday. I can’t read your letter [*sic*]. With all my love, your daughter and little baby girl, [Jane Doe].”

McDonald testified that he watched Jane’s house that morning and another detective videotaped appellant as he picked up the diary, letter, and panties, and dropped off the invitation to a concert. The video was played for the jury.

Later that day, January 12, 2011, the following text message exchange took place:

C: “The things you said in the letter were beautiful. I wish I could give you a hug when I read them. You are really sweet girl. Text me when you can.”

M: “That was nice. I would like a hug from you. . . .”

M: “I thought you were gonna write me a letter.”

C: “I did but I think I would rather tell you instead.”

M: “Tell me.”

C: “In person, silly.”

M: “What did you think about my letter to you.”

C: “It was beautiful, I loved it.”

M: "What did you do with my panties."

C: "[Jane]."

M: "What? Why are you acting like that."

C: "I would love to sit down and talk with you in person not over the phone or text, sorry."

M: "Why not."

C: "Try to trust me."

M: "You know it would be hard to see you."

C: "It is up to you."

M: "I don't understand why I can't text you about this when it is between us and I delete my text."

C: "Because people can grab information out of the air. You just need to trust me."

M: "But why were you so cold to me when I talked to you on the phone? That hurt my feelings."

C: "I am sorry for that. I was frustrated and you're not listening to me. When I say something and you don't listen then it isn't cool."

M: "But I am confused and looking for answers from the only one I can ask without us getting in trouble."

C: "Please never mistake this for not caring."

C: "I am sorry but you just aren't getting the point."

M: "You are hurting me."

C: "I pray for you all the time and care deeply. I don't want to cause you pain one bit. Unfortunately life is difficult sometimes."

M: "You just don't understand what it's like not to be able to talk to you about what happened between us. . . ."

C: "I understand that your life is hard, I am sorry for that."

M: "You aren't making it easier."

C: "Sorry."

M: "Okay."

C: "I read 1 Peter 57 this morning and it encouraged me."

M: "Discouraged but I will read it."

C: "Good."

M: "Do you think of me."

C: "All the time."

M: "Nice. Me too."

C: "Hardly a single day goes by that I don't think of you."

M: "I miss being with you and talking to you."

C: "I miss it all, too."

M: "Can I say XOXOXOXO which I meant was hugs and kisses."

C: "Probably not best if you were talking to me. Since when do you actually have to say things for me to know it already."

C: "Know what you would say, I know."

M: "Yeah, I know."

Four days later, on January 16, 2011, McDonald, posing as Jane, initiated a text exchange with appellant, in which they discussed a hike appellant was planning to go on with friends. The following exchange then occurred:

M: "I am missing you a lot."

C: "I miss you too. You drove me crazy sometimes as I am sure I did to you but it was fun, too."

M: "I want to kiss you again."

M: "Where did you go. . . ."

M: "I want to kiss you again, why don't you take me on a hike and kiss me."

C: "Whoa, Nelly."

C: "Unfortunately I only do hugs and side hugs at that. Sorry to disappoint."

M: "Oh, something new."

C: "No. I gotta go."

M: "Why."

M: "Why."

C: "Please don't say that. Don't get me wrong, you are a beautiful girl and as flattering as your offer is, I'm the adult and I have to do the right thing."

M: "You were the adult when we did stuff, too, no one needs to know."

C: "I don't know what you're talking about. But this has got to stop. I'm sorry but we can't text anymore."

M: "Why?"

C: "God has told me this is the best thing for you right now. I'm sorry."

M: "I'm sorry you feel that way because I miss you and I want to have you in my life."

C: "I want you too, just can't seem to talking like that [*sic*] and feeling the way you do. I understand why, I just can't go there."

M: "I will try to keep my feelings to myself. It is hard. I just wish you could express yourself to me more. I won't tell anyone."

M: "Hello."

C: "It isn't about who you would tell. I trust you. It just isn't right. You don't want to hurt my relationship with God, do you?"

M: "No, but you can't deny what we had."

This was the last text exchange between McDonald, posing as Jane, and appellant.

On February 2, 2011, McDonald went to Napa Christian and requested that appellant come to the police department to talk. Appellant agreed to go. He used his hands to transfer himself from his wheelchair into the back seat of the police vehicle and then got out of the vehicle at the police department by using his hands to transfer himself back into his wheelchair. During the videotaped interview at the police station, which was played for the jury at trial, appellant denied kissing or orally copulating Jane. Also on February 2, search warrants were executed on appellant's classroom, residence, and truck. Nothing of note was found at his home. Jane's journal was found in appellant's classroom desk. However, the letter from Jane, "the history of sexual intimate

encounters,” and the underwear that had been placed on the porch with the journal were missing.

McDonald eventually arrested appellant in June 2011. Appellant asked what had taken McDonald so long to arrest him.

Defense Case

At defense counsel’s request, the jury was taken outside the courthouse to view the exterior and interior of appellant’s truck.

Numerous witnesses, including teachers, parents, and the principal from Napa Christian testified about appellant as a teacher and about his reputation for truthfulness and honesty. These same witnesses testified about Jane’s personality and her reputation for truthfulness and honesty.

Teacher Susan Alexander testified that appellant was one of the best teachers at the school and that he had a reputation for truthfulness and honesty. Jane, on the other hand, had a reputation for not being truthful; this was one of her “struggles.” Jane also “wanted to be close to people” and, with respect to appellant, she tried to stay close to him.

Parent Cheryl Boyles testified that Jane always wanted to be the center of attention and “would say what she needed to say to get the attention.” She had a reputation for not being honest; “she fabricated a lot.” Boyles had a conversation in 2008 or 2009 with Jane’s mother in which Mrs. Doe was upset and told Boyles that Jane had lied to a counselor about “things that were going on at home that were not going on.” Boyles also testified that appellant was “a very good teacher” and “a really good man.”

Principal Gregory Coryell testified that Jane was a good student academically. She also would get physically close to teachers and they would have to tell her that she was in their physical space. Appellant was aware of this tendency and Coryell saw appellant try to move away from her or ask her to not be so close to him. Jane was very creative and imaginative. There was a time when Child Protective Services came to the school to interview Jane based on an accusation she made against her father. Jane later told Coryell that she was embarrassed she had made that accusation because it was a lie.

Coryell, who visited all of the classrooms unannounced nearly every day, testified that there was a sidewalk outside of the windows of appellant's classroom, which led from the parking lot to the main entrance of the school. He described appellant as "one of my finest" teachers and as "a man of integrity."

Amy Hebert, parent and yearbook editor, testified that Jane was usually in a good mood and liked to write. Jane was known for "elaborating and making stories up." Hebert also observed Jane hugging people, including appellant, who seemed uncomfortable with her desire to be near him. She described appellant, whom she had known for 19 years, as "one of the best teachers I have ever come across." He was "honest" and "true"; "what you see is what you get."

Janice Leigh, a former teacher at Napa Christian, who had taught reading and English when Jane was in sixth grade, testified that Jane was sweet, generally good natured, and a fairly good student. She did not make friends easily and her behavior was sometimes immature. Leigh believed Jane "was an attention seeking child and she did tell lies in order to get attention." Leigh described appellant as "one of the best teachers that I've ever had the privilege of teaching with," who "successfully walked the line of being a friend and a teacher."

Karen Lewis, parent and school volunteer, testified that Jane sometimes exhibited unusual behavior, such as pretending to be a horse. She also told Lewis that she had a crush on appellant. Lewis had observed appellant as a teacher and believed he was a good teacher who was able to connect with his students.

Kelly Thomas, parent and school volunteer, testified that Jane was a very creative and artistic girl. She tended not to be aware of personal space in terms of hugging and being close to people, including appellant, who seemed frustrated by this tendency. Thomas once was talking with appellant when Jane, who was in seventh or eighth grade, came up from behind and gave appellant "a full bear hug," and appellant had to ask her twice to let go of him. Also, whenever Jane told her something, Thomas "always had to talk to somebody else to make sure it was true."

Carolyn Kearbey, a former teacher at Napa Christian, testified that Jane had been a math student of hers. Jane was intelligent, but could be manipulative and dishonest. For example, Jane claimed that a boy she did not like did things to her, in order to get him in trouble, while the other students said he had not done anything. Kearbey observed appellant to be a good, caring teacher, who would take the boys in his class out skateboarding or fishing.

Karen Travis, parent and school volunteer, testified that she had observed Jane to be very outspoken, articulate, creative, and intelligent. Jane also “tended to do what she could to obtain and maintain attention, whether it was negative or positive.” Travis also saw Jane wrap her arms around appellant from behind during class; when appellant told her to go sit down, she did so. Travis described appellant as “the character of love and truth” who had done a great deal for her son as his teacher.

Appellant’s wife, Carrie Copithorne, testified that she was a sixth grade teacher at Napa Christian, where she had worked for 12 years. Jane was very intelligent and could be sweet, but could also behave bizarrely. She was quirky, was confrontational with other students, and liked being in the spotlight. She liked attention, whether it was good or bad. Jane, who had been Carrie’s student, had a problem with truthfulness at times. Carrie had talked to Jane’s mother regarding Jane making up stories about why her work was not getting done. Her mother agreed about the dishonesty and seemed very frustrated.

Carrie had known appellant since her senior year in high school. Appellant, who had been very athletic, became a professional wake boarder and snowboarder. His career ended when he broke his back while snowboarding in April 2000, and became paralyzed. She and appellant were married a year later. He had shattered his vertebrae, and had surgery in which metal rods were placed in his back to stabilize it. He therefore could not lie flat with his legs straight; they were almost continually at a bent angle. He also would not be able to sit on a hard surface because, due to muscle atrophy, he had to sit on a gel cushion to avoid pressure sores. Nor could he have lain on his back over the hump in the back of his truck without running the risk of ripping his back due to the metal rods.

Appellant drove using hand controls, with one hand on the steering wheel and the other hand operating the gas and brake.

Carrie and appellant's son was conceived through an IVF procedure. Appellant was not capable of normal sexual function in that he could not get an erection, and so could not have sex. Oral sex was not really an option for them because appellant had a terrible gag reflex.

Carrie knew that Jane had appellant's cell phone number. It was not uncommon for students at the school to have teachers' cell phone numbers. Carrie and appellant's phone records reflected that, between August and December 2010, there were 19 phone calls between appellant and Jane, with all but two initiated by Jane. Two of the calls lasted approximately 30 minutes each. In early September 2010, Carrie was aware that Jane had contacted appellant, and knew about some of the calls. Appellant told Carrie that Jane was having a difficult time with the transition from Napa Christian to public high school. Appellant did not tell her that Jane had raised some sexual issues, but did know that they "were going to hold onto" Jane's journal for her because she was having a hard time.

Carrie was aware of phone calls between appellant and Jane in December 2010 and overheard parts of some calls. She thought appellant sounded stressed and asked if everything was okay. He said Jane was having a really hard time and asked if Carrie would talk to her. Carrie declined and suggested that Jane talk to someone at her new high school. Carrie was also aware that appellant and Jane were exchanging text messages, but had no concern about it.

On cross-examination, Carrie acknowledged that appellant had not told her about taking Jane to Lucky's either beforehand or on the day he drove her there. Nor did he tell her that he had picked up Jane's journal after he did so.

Napa Christian Principal Gregory Coryell testified that school records showed that, on March 16, 2010, appellant submitted a request to take the school day off on Friday, March 19, and that the request was approved. On Fridays, the school is in session for only half a day.

Sylvia Davis, an administrative assistant in the education department of the Northern California Conference of Seventh Day Adventists, testified that her department keeps records of absences for teachers. Her records showed that appellant was absent from his school on March 17, 2010. She further testified that if Napa Christian did not hire a substitute for appellant on March 19, his absence would not show up on the records she kept. It was not uncommon for someone in the school office to fill in if a teacher was out for less than a full day of school. In addition, if appellant had taken a trip to Belize from March 19 to March 28, 2010, it would not show up in her records because it sounded like that was spring break.

Don Muelrath, owner of an exotic fly-fishing booking agency, testified that he organized a group trip to Belize for appellant and several other men. They were booked on a ship from March 19 to March 28, 2010. Muelrath supplied appellant with an airline ticket for the trip, which departed from San Francisco at 6:00 a.m. on March 19. Muelrath's April 2010 fly-fishing newsletter included a photograph of appellant with a fish on that trip.

Appellant testified that he had been a professional wake boarder for two years, until he was injured in April 2000. He had back surgery in which metal rods were placed in his back to stabilize his spinal column. As a result of the injury, he has no function from an inch above his navel though the lower part of his body.

Appellant described Napa Christian as a very close family school community where teachers cared a great deal about their jobs and the impact they had on students. He taught at the school for 10 years, starting in 2001.

Jane Doe was in his class in seventh and eighth grades. She was very intelligent, creative, and imaginative, and could be kind and thoughtful at times. He also described areas of concern with Jane, such as her needing and relishing attention. He recalled her often coming to physical education class "on all fours and barking like a dog" or "neighing like a horse," which was disruptive. Also of concern, Jane did not seem to understand social norms and appropriate conversation. For example, she would "fly off the handle when confronted and be uber-dramatic." She was prone to fantasizing and his

biggest concern “was her tendency to seeming to [*sic*] lie without even thinking.” In addition, Jane did not have normal self-awareness regarding personal space. She seemed to need to be inside appellant’s personal space and exhibited a desire to be near him and hug him more than other students did. Appellant found this disconcerting and he tried to tell her to stop, backed away, and even had meetings with her mother about it. He also shared with Jane’s parents issues related to her tendency to lie.

Appellant attempted to connect with students by finding out each one’s interests. All of his students had his cell phone number. As a teacher, he “walked a line between being a professional person and being a friend.” Jane “really wanted someone to get her and to try to understand what she was going through.” She would look for attention, whether positive or negative. Appellant’s work supporting Jane’s personal and academic development was difficult and challenging, “but the end result was fantastic.” She “made tremendous strides socially, academically. Spiritually.”

Appellant testified that he had never kissed Jane in his classroom. He was not at school on March 17 and March 19, 2010, the two dates on which Jane testified the kisses occurred. In July 2010, when Jane and her mother came to school to pick up Jane’s diploma and honor cord, they came to appellant’s classroom to say hello. They stayed for 10 or 15 minutes and there was no exchange of green Post-it notes between him and Jane.

Within a week after the classroom visit, Jane called appellant about coming to her house because she had something to give him. He asked if her parents would be home and she said yes. Appellant therefore went to Jane’s house. Once inside, he learned that her parents were not there. He said he had to leave, but she gave him a letter and asked him to read it first. He therefore read the letter, in which Jane expressed her appreciation for what appellant and his wife had done for her and the relationship with God she had developed at Napa Christian. Appellant stayed at Jane’s house 10 minutes at most. He never sat on the couch with her and “made out.” She never sat on his lap, which would have been very uncomfortable due to his issues with pressure sores. He used a gel

cushion to sit on, and even sitting on Jane's couch could have caused medical complications for him.

Appellant also denied holding Jane's hand during the "Can You Dig It" school trip to Nevada. While he did give her a ride in his truck after her mother said she had been begging for a ride, they were in a caravan of cars driven by other people on the trip for the 30-minute drive back to their hotel. He and Jane did not kiss each other's hands or hold hands during the drive. He needed both hands to drive his truck and the cruise control was not functional at that time.⁴

Appellant acknowledged that there were about 20 calls between him and Jane, with him initiating about two of them in response to text messages from her. They talked on the phone a few times between late August and early October 2010, and the rest of the calls were from December 7 on.

In early September 2010, Jane called appellant and they talked for a long time. She seemed to be in a bad way and said she "absolutely had to talk" to him about something that was going on in her life. She said that there was no one else she could talk to and that she was "at the end of [her] rope." She was crying, which was unusual, and she mentioned that there were some boys at her school who were harassing her, that she wanted to see her birth mother, and that there were "some swinging matches" at home. After she refused to talk to his wife or a counselor, appellant agreed to meet with her, and first suggested she come to Napa Christian. She said she could not, so he decided to pick her up and take her to school. He was concerned that something had happened with her parents that he might have to report to Child Protective Services. He was also concerned about a boyfriend she had and her history of suicide attempts at Napa Christian.

A few days after that phone call, in mid-September, appellant picked Jane up around 7:00 a.m., but did not park right in front of her house. Appellant's wheelchair

⁴ Appellant testified that the truck's cruise control was repaired about a month before trial.

was on the front passenger seat and his son's car seat was behind the passenger seat. The wheelchair lift in the truck was broken and he had injured his shoulder putting the wheelchair into the back of the truck, so he had to keep it in front with him. Jane put her school things in the bed of the truck and got into the back of the truck's cab. There was no blanket inside the truck when appellant drove to the Lucky's parking lot and parked in a handicapped spot.

Jane then talked about her academic success in high school, issues at home, and her need to meet her birth mother. Appellant never got into the back of the truck with her. It would have been physically impossible for him to do so. He could not have pushed himself up and over the center console and could not have sat on it due to the danger of pressure sores. Nor could he have bent in the direction necessary because of the metal rods in his back. Even if he could have gotten his head and shoulders on top of the console, his legs would have been pinned between the steering wheel and his hand controls. Thus, he could not have gotten to the center console, "let alone the back seat." In addition, appellant could not have lain on his back in the rear area of the truck because there was a hump that would have been in the middle of his back. That would have been excruciatingly painful and, moreover, the rods in his back would have kept him from lying flat. Finally, he could not have reversed position in the confines of that space, as Jane testified he did.

Appellant drove out of the Lucky's parking lot between 7:20 and 7:40 a.m. and dropped Jane off at her school before driving to Napa Christian. He adamantly denied engaging in the sexual activities that Jane alleged had occurred in his truck.

Later in September 2010, Jane called appellant and told him about a dream she had had in which she and appellant had kissed and had sex. Appellant told her this was grossly inappropriate and he was concerned about having any contact with her. He said he did not think he could be involved in her life and told her she needed to talk with a female counselor or her psychologist, who could help her deal with her feelings. In the first week of October, Jane called him and "apologized profusely for what she had divulged."

Then, on December 7, 2010, appellant responded to a text message from Jane that had shocked him, in which she wrote that he had lied to her about her virginity and that they had had sex.

Appellant explained several of the subsequent text messages he wrote to Jane from December 2010 to January 2011, in which he tried to stop her from discussing sexual matters with him and suggested she talk to a female counselor or friend. He had shifted from being worried about her “to being gravely concerned about the implications about this fantasy that she’d developed, her airing that fantasy that she’d developed . . . as reality even though it was not.” He became worried about his job and family. He also realized in hindsight that it was not appropriate for him to have a conversation with Jane about her virginity and similar issues.

As appellant explained it, when, on January 2, 2011, he texted, “hey senorita, you have something you want to give me,” he was referring to the journal that she had said she wanted him to keep for her. He had already discussed the journal with his wife at that point, who had expressed reluctance about working with Jane. Appellant wanted to obtain the journal because he was concerned about what might be in it, regarding the potential for entries about both suicide and untrue things about him. Once he picked up the journal from Jane’s porch, he took it back to his classroom and read it. He saw nothing written about him in the journal but found a piece of paper inside with a history of sexual contacts, which was not true. He took the list, along with a pair of undergarments and a letter, and put them in a garbage can outside of his classroom. When appellant picked up the journal from Jane’s house, he had also left an invitation to a Christian musician’s concert, which he hoped Jane would attend, along with him, his wife, and other students, so that she could feel their support and be reminded of her commitment to God.

Appellant acknowledged that later on the day he retrieved the journal and other items, he texted Jane that “the things you said in the letter were beautiful. I wished I could give you a hug when I read them. You are really a sweet girl, text me when you

can.” He had not read the letter, but explained that, when he wrote the text, it was “at the end of one of the worst days of my life.”

Appellant further testified that he responded to Jane’s January 12, 2001 text that said, “Can I say XOXOXOXO?” with a text saying, inter alia, “Since when do you have to actually say things for me to know it already?” because he was trying to make light of the fact that she was angry with him. On January 16, after appellant texted that he did not know what Jane was “talking about, but this has got to stop, I’m sorry, we can’t text anymore,” Jane responded that she was sorry he felt that way because she missed him and wanted to have him in her life. He explained his response—“I want you, too. You just can’t seem to [keep from] talking like that and feeling the way you do. I understand why, I just can’t go there,” explaining that, “[a]s difficult as it was at times with [Jane], I wasn’t opposed to continuing to be . . . a part of her support network.” He did not, however, want to be involved with her fantasies and desperate attempts for attention any longer, and was trying to do anything he could to get out of engaging in that conversation with her.

Appellant further testified that, in late November or early December 2010, he found a letter from Jane somewhere in the back of his truck. After reading the letter, he crumpled it up and threw it as hard as he could against the glass in his truck; he had no idea where the letter ended up and did not recall it being under the driver’s seat.⁵

⁵ Appellant agreed that the letter from Jane, which he found to be “disgusting,” read as follows: “[A]ll my love, all myself. If you were to let me sit on your lap and lay my head against your shoulder I would close my eyes and relax, possibly even fall asleep. You would put your hand on my chest and feel for my pulse. You would sit there for a while, feel my heart beat. Then I would wake up and you’d smile and say hey there, precious and then I’d cry out daddy.

“And you’d suddenly hold me tight, close as possible and whisper oh, baby with slight emotion in your voice and cradle me. We just sit there for a while holding each other while you rocked me back and forth. Finally what seemed like an eternity we break apart for a split second and then our eyes would meet and I would look away but you gently turn my face back to yours and by turning my chin and say look at me, sweetheart. I would open my eyes, look at you and give a weak smile and then it would happen.

On cross-examination, appellant testified that he did not notice the significance of the dates of March 17 and March 19—the dates Jane claimed the kissing in his classroom took place—until almost a year after his arrest. This was because the quality of the copy of her list of dates of sexual encounters that the defense had received in discovery was so bad that he could not read it. It was not until just after the trial had begun when, during a meeting with defense counsel, appellant looked at the dates again and “felt like [he] got slapped in the face” when he realized that he had alibis for both of those dates.

Appellant further testified that the only times he gave a female student a ride alone in his truck were when he drove Jane in his truck on the Nevada trip in May 2009, and when he drove her to high school in September 2010. As a professional, he was concerned about having Jane in his truck alone in September 2010, but he “felt that her situation at that particular time was dire enough that it warranted . . . extraordinary efforts.” He acknowledged that when he picked Jane up before taking her to Lucky’s, he parked down the street rather than picking her up in front of her house because he felt that if a neighbor saw him, her parents “would ask her about it and would cause more fights and stuff at home.”

Appellant also explained his December 18, 2010 text to Jane in which he wrote, “I see how it is, you go off your meds and send me some ludicrous text and when I text you something nice you don’t even respond. What’s up with that?” as a result of his desperation for her continued harassment of him to stop. He also acknowledged that, in hindsight, it was probably not a good idea to agree to keep Jane’s diary for her or to text, “I miss you too, little lady. Believe that,” five days after she accused him of having oral sex with her in the Lucky’s parking lot. He wrote many of his text messages to Jane

“Our faces would draw closer and closer together until our lips met and then, then, our mouths would meet together as we tenderly, passionately, intimately and lovingly kissed and kissed and kissed. Then you’d stroke my face and say I’ve never loved you so much before as I do now. And I’d reply by kissing you uncontrollably, unstoppably. And you’d kiss me with such passion that I would faint back into your arms lovesick and shaking from pure pleasure, love and joy. And then last of all I would give you all my love, all myself and well, you know what happens next. [Jane Doe], love ya.”

because he was concerned both about her well-being as well as his own and his wife's well-being; he was also concerned about losing his job. He continued texting her because he wanted "to keep her at bay," while still offering support so that she would not harm herself or tell others about her fantasies about him. He texted about wanting to meet with her in person, instead of leaving her a letter, because he hoped he would be able to tell whether or not she was suicidal and what the ramifications would be of his ending their communications entirely.

Rebuttal

Psychologist Anthony Urquiza, a professor and director of a child abuse program in the Department of Pediatrics at the University of California at Davis Medical Center, described the five components of child sexual abuse accommodation syndrome: (1) secrecy, in which a child may be threatened or manipulated into keeping quiet about the abuse; (2) helplessness, in that the child is vulnerable and feels that he or she must comply; (3) entrapment and accommodation, where the child feels trapped by this secret relationship and copes by dissociating; (4) delayed and unconvincing disclosure, in that most children delay telling about the abuse, sometimes for years; and (5) retraction, in which a minority of children "take back" the abuse allegation.

DISCUSSION

I. The "On or Around" Language on the Verdict Forms for Counts Two and Three

Appellant contends that, because the victim testified that two of the charged incidents occurred on specific dates and appellant presented an alibi defense as to those dates, the trial court violated state law and deprived him of the effective assistance of counsel when it provided the jury with verdict forms stating the offenses occurred "on or around" a range of dates.

A. Trial Court Background

The information charged appellant, in counts two and three, with two separate lewd acts on a child described as "kissing in classroom." These acts were alleged to have occurred "on or about February 2010 and May 2010."

In his opening statement, the prosecutor stated that the evidence as to these two counts would show that appellant kissed Jane in his classroom on two occasions in March 2010. In support of this theory, Jane testified that appellant had kissed her twice in his classroom, once during school hours and once after school in March 2010. She further testified that Detective McDonald had asked her “to try to pinpoint the dates of when each encounter happened.” She prepared a list of dates (entitled “History of sexual/intimate encounters”) for him, which she came to by leafing through her various journals and looking at a calendar, to see if she could jog her memory. She was able to pinpoint all of the dates except the date of the encounter at Lucky’s, which she only knew was on a Wednesday in the middle of September. Therefore, in her list of encounters, she noted the month and year of that incident, but left the date blank.

On cross-examination, Jane testified that the classroom kissing incidents took place on two specific dates: March 17 and March 19, 2010. She explained that she had written complete dates for the three charged kissing incidents on the list of sexual encounters she had prepared because she “was able to pinpoint them better because there was more about them that I could pinpoint, whereas the one in September [the oral copulation at Lucky’s] I specifically tried . . . to write as little as I could about it and therefore had a hard time pinpointing the date. And a lot of things that I did write about it were not on the same date that it happened.” She had written so little about that incident “[b]ecause this of all the other encounters [appellant] definitely said not to tell anybody.”

Jane further explained that she had written in her journals about the earlier incidents even though appellant had said not to, but she did not do so with the Lucky’s incident because “this one was more serious than the rest and I just so happened not to really write so much about it because after that there was definitely more confusion. . . . And the other ones, even, you know, I didn’t expect them to be looked at and that’s why I thought it would be safe to mention it in my journal, anyway.” Also, around the time of the Lucky’s incident, her “parents were getting to be a little more snoopy” than before. Her earlier journal entries about the kisses were “hidden within the confines of a journal”

and she “just hinted around that subject” anyway, so she was not as worried about her parents seeing those entries.⁶

The defense theory for counts two and three was that appellant never kissed Jane and, in particular, he had an alibi that showed that he could not have kissed her on March 17, and March 19, 2010, the two dates on which she said the kisses in the classroom took place. Four witnesses, including appellant, Sylvia Davis, Gregory Coryell, and Don Muelrath, provided testimony and supporting documentation showing that appellant was not at school on either of these dates. Defense counsel’s closing argument focused on the prosecution evidence that the kisses took place on March 17, and March 19, and on the alibi evidence, which demonstrated that appellant was not at school on those dates. The prosecutor, on the other hand told the jury that Jane knew the classroom kisses had “happened in March” and that she had been “trying to remember when things happened.” He emphasized that a period of time was alleged for when those counts took place rather than any particular date.

After instructing the jurors, the trial court gave them written verdict forms. The verdict forms for counts two and three described each of the two lewd acts in the classroom as occurring “on or around February 2010 to May 2010.”

B. Legal Analysis

As a preliminary matter, respondent argues that appellant forfeited this issue on appeal due to defense counsel’s failure to object to the “on or around” language in the verdict forms. (See *People v. Toro* (1989) 47 Cal.3d 966, 976, fn. 6, disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3 [“An objection to jury verdict forms is generally deemed waived if not raised in the trial court”].)

⁶ From Jane’s testimony, it is apparent that the journal she was using at the time of the Lucky’s incident, which was found in appellant’s desk drawer, was not the same as the one in which she had written about the earlier kissing incidents with appellant. As she explained, she had other earlier journals, but kept the journal she gave to appellant “[d]uring the fall and beginning of winter of 2010.” During closing argument, defense counsel noted that Jane had testified that she had other journals that she looked in to help her determine the dates of the kisses.

Appellant is not, however, challenging a mere technical defect in the verdict form. Rather, he is arguing that the language in the verdict form served as the equivalent of a jury instruction that permitted the jury to convict him of two of the charged offenses despite (1) prosecution evidence that the offenses charged in counts two and three occurred on particular dates, and (2) defense evidence that provided a complete alibi for both of those dates. (See CALJIC No. 4.71 [to be given only when “on or about” language is appropriate]; CALCRIM No. 207 [same].) Hence, even though no actual instruction was given on this point, the challenged language in the verdict form was, nonetheless, “in the nature of a jury instruction.” (*Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 151-152 [“In our view, the confusing language used in the verdict form, which obviously is in the nature of a jury instruction, was prejudicial to the County”]; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 427 [“[A] verdict form may not state principles ‘contrary to the instructions given’ [citation], for doing so might cause the jury to disregard or discount those principles”].)

Because we are permitted to “review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby” (§ 1259), we will review appellant’s claim on the merits. (Cf. *People v. Osband* (1996) 13 Cal.4th 622, 689 [addressing issues related to verdict form on merits after declining to decide whether failure to notify court of such problems waived issue on appeal, citing section 1259].)⁷

Ordinarily, “[t]he precise time at which the offense was committed need not be stated in the accusatory pleading . . . except where the time is a material ingredient of the offense.” (§ 955.) CALJIC No. 4.71 and CALCRIM No. 207 inform the jury of the general rule that, where a charged crime is alleged to have been committed “on or about”

⁷ Because we are resolving this issue on the merits, we need not address appellant’s related argument of deprivation of counsel and/or ineffective assistance of counsel.

a certain date, it is not necessary for the prosecution to prove that the crime was committed on that precise date, but only that it happened reasonably close to that date.⁸

It is only “when the prosecution’s proof establishes the offense occurred on a particular day to the exclusion of other dates, and when the defense is alibi (or lack of opportunity), [that] it is improper to give the jury an instruction using the ‘on or about’ language. [Citation.]” (*People v. Jennings* (1991) 53 Cal.3d 334, 358-359; accord, *People v. Richardson* (2008) 43 Cal.4th 959, 1027; see also *People v. Wrigley* (1968) 69 Cal.2d 149, 157 “[r]equiring the jury to limit its consideration of the time of the offense to that shown by the evidence precludes them from speculating that it may have occurred at a time other than that shown by the evidence”].) Moreover, when the defense is alibi, “the exact time of commission becomes critically relevant to the maintenance of the defense. An instruction which deflects the jury’s attention from temporal detail may unconstitutionally impede the defense. “The defendant is entitled as a matter of due process to have the time of commission of the offense fixed in order to demonstrate he was elsewhere or otherwise disabled from its commission.” (*People v. Barney* (1983) 143 Cal.App.3d 490, 497 (*Barney*); accord, *People v. Jones* (1973) 9 Cal.3d 546, 556-557 (*Jones*), overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

The bench notes and comments to CALCRIM No. 207 and CALJIC No. 4.71 also describe the circumstances in which the use of “on or about” language is improper. A bench note to CALCRIM No. 207 states that the instruction should not be given, inter alia, “when the evidence demonstrates that the offense was committed at a specific time

⁸ CALJIC No. 4.71 provides: “When, as in this case, it is alleged that the crime charged was committed ‘on or about’ a certain date, if you find that the crime was committed, it is not necessary that the proof show that it was committed on that precise date; it is sufficient if the proof shows that the crime was committed on or about that date.”

CALCRIM No. 207 similarly provides: “It is alleged that the crime occurred on [or about] <insert alleged date>. The People are not required to prove that the crime took place exactly on that day but only that it happened reasonably close to that day.”

and place and the defendant has presented a defense of alibi or lack of opportunity.” Likewise, the comment to CALJIC No. 4.71 states that the instruction “is improper if the people’s evidence fixes the commission of the offense at a particular time to the exclusion of any other time and the defendant has presented evidence of an alibi as to that particular time.”

Here, although the jury was not instructed with either CALJIC No. 4.71 or CALCRIM No. 207, appellant argues that the language in the verdict forms for counts two and three similarly informed the jurors that they need only determine that the offenses occurred “on or around February 2010 to May 2010” to find appellant guilty as to those counts. He further argues that such language erroneously permitted the jury to convict him of twice kissing Jane in the classroom on dates other than those established by the prosecution evidence and regarding which the defense presented a complete alibi. We agree.

In *Jones, supra*, 9 Cal.3d at pages 556-557, a police officer testified that he had purchased illegal narcotics from the defendant on three occasions. Initially, he gave one date for the last purchase but, after reviewing his notes, testified that the purchase in fact took place a week later and emphasized that date on cross-examination. The majority of the defense evidence was intended to establish that the defendant was in another state on that latter date. (*Id.* at p. 557.) In light of these facts, our Supreme Court found that the trial court prejudicially erred by instructing the jury with CALJIC No. 4.71. (*Jones*, at p. 557, citing, inter alia, *People v. Waits* (1936) 18 Cal.App.2d 20, 21 [where prosecution evidence fixed date of crimes and defendant offered an alibi for that day, court held that, “[i]n light of [defendant’s] alibi defense, the time the alleged offenses were committed became material, and it was the duty of the trial court to limit the jury in its consideration of the evidence to the period which the prosecution selected as the time of the commission of the offenses”]; *People v. Morris* (1906) 3 Cal.App. 1, 10 [where complaining witness in a rape case fixed commission of offense to a particular time and day and defendant offered an alibi for that time, court erred in failing to instruct jury to

confine its consideration to time prosecution evidence showed offense had been committed].)

In *Barney, supra*, 143 Cal.App.3d at page 497, the defendant was charged with two lewd acts, one of which was alleged to have occurred “ ‘on or about’ ” February 8, 1981. The victim’s testimony at trial made clear that the act must have occurred sometime on the weekend of February 7 and 8. “Accordingly, the People’s evidence fixed the commission of the offense to that period to the exclusion of any other time.” (*Id.* at p. 498.) The defendant presented evidence showing a lack of opportunity to commit the offense on either of those dates. (*Ibid.*) There was also testimony that the defendant had committed other lewd acts on the victim in the months before the February 7 or February 8 offense. (*Ibid.*) The appellate court found that, in the circumstances, there was “a substantial possibility the jury was misled concerning the necessity to agree defendant molested the child during the weekend of February 7 and 8. [¶] . . . The [trial court’s] instruction that the prosecution need not specifically prove the time of the charged offense, coupled with the prosecution argument it need prove only a last act, not the time of the last act, was error. This error was not harmless. The jury may well have believed defendant’s witnesses concerning his lack of opportunity on the weekend in question or, because of its vagueness and alteration, disbelieved [the victim’s] testimony of the terminal act. The jury may have convicted him on the erroneous assumption it was proper to conclude *some* terminal act in the unrebutted series occurred near the weekend in question.” (*Ibid.*, fn. omitted.)

Similarly, in *People v. Seabourn* (1992) 9 Cal.App.4th 187, 192, 194 (*Seabourn*), the victims testified to the exact dates and times at which the offenses had occurred and the defendant provided alibis for those dates and times. The appellate court therefore found that the trial court had erred in instructing the jury with CALJIC No. 4.71. The court also found, however, that the error was harmless beyond a reasonable doubt in light of the “overwhelming” evidence of guilt and the fact that the prosecution’s entire case, including closing argument, was focused on specific dates and places such that the jury

would not have been confused. (*Seabourn*, at p. 194, citing *Chapman v. California* (1967) 386 U.S. 18, 24.)

Here, Jane’s list entitled “History of sexual/intimate encounters,” in which she wrote that the two classroom kissing incidents took place on March 17, and March 19, 2010, was admitted into evidence at trial. Jane also testified that, unlike the incident in the truck, which she did not write about in her journal, she was able to pinpoint that the two kissing incidents in the classroom took place on those specific dates, based on entries in an earlier journal in which she did write about those incidents. Thus, the prosecution evidence established that these two offenses were committed on specific dates, that is March 17, and March 19. In addition, appellant’s central defense to these charges was alibi evidence: he demonstrated through both witness testimony and documentary evidence that he was not at school on either date specified by Jane. Defense counsel’s closing argument as to these two counts also focused on those particular dates and appellant’s alibis.⁹ It was therefore error to provide the jury with verdict forms permitting them to find appellant guilty of counts two and three if it found the acts took place “on or around February 2010 to May 2010.” (See *Jones*, *supra*, 9 Cal.3d at p. 557; *Seabourn*, *supra*, 9 Cal.App.4th at p. 194; *Barney*, *supra*, 143 Cal.App.3d at p. 497.)

We further find that the error was prejudicial. (See *Jones*, *supra*, 9 Cal.3d at p. 557; *Barney*, *supra*, 143 Cal.App.3d at p. 498.) In contrast to *Seabourn*, in which the error was found harmless, we conclude the “on or around” language in the verdict forms in this case likely confused the jurors, permitting them to ignore both the exact dates provided by Jane and appellant’s complete alibi for the offenses charged in counts two and three. This in turn allowed the jury to find appellant guilty of those offenses based

⁹ While there was other more general evidence showing that the windows in the classroom looked out onto a walkway into the school and that the principal regularly visited the classrooms unannounced, the central defense theory plainly focused on countering Jane’s allegations in counts two and three through extensive alibi evidence. Similarly, while defense counsel touched on the windows evidence during closing argument, he primarily discussed the particular dates on which, according to Jane, the kisses at school had taken place, and appellant’s alibi evidence as to those dates.

on speculation that they occurred on other unspecified dates. Of particular concern in this regard is the prosecutor's closing argument, in which he attempted to minimize Jane's testimony on this point and appellant's alibi evidence by reminding the jury that the lewd acts charged in those counts were alleged to have taken place "between February and May." Indeed, the prosecutor discounted Jane's testimony regarding her ability to recall those dates in an apparent attempt to undermine appellant's alibi evidence. For example, he stated that Jane "knows that these kisses happened in March. She was still in the school year. And she looked at things that helped . . . remind her of when these dates were. [¶] But you notice the date on the allegation is not a particular day. It's a particular period, because this is the time period that [Jane] is trying to remember when things happened." (Compare *Seabourn*, *supra*, 9 Cal.App.4th at p. 192 [where prosecution presented facts and argument specifying exact dates and times when crimes occurred, no jury confusion likely from "on or about" language].)

Also, in contrast to *Seabourn*, the evidence of guilt was *not* overwhelming in this case, which essentially came down to a credibility contest between appellant and Jane, and in which the jury asked many questions and requested to review numerous exhibits before reaching its verdicts. (See *Scott v. County of Los Angeles*, *supra*, 27 Cal.App.4th at p. 152 [among factors considered in assessing prejudice of erroneous or misleading jury instruction is, inter alia, degree of conflict in the evidence on critical issues]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["Juror questions and requests to have testimony reread are indications the deliberations were close"]; compare *Seabourn*, *supra*, 9 Cal.App.4th at p. 194 [where court described evidence of guilt as "overwhelming"].)

Finally, in *Seabourn*, *supra*, 9 Cal.App.4th at page 193, the trial court gave CALJIC No. 4.50, which informs the jury that the defendant "has introduced evidence for the purpose of showing that [he] [she] was not present at the time and place of the commission of the alleged crime for which [he] [she] is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, you must find [him] [her] not guilty." No

such instruction was given in this case. The only instruction that related to appellant's alibi evidence was given at the prosecutor's request and informed the jury that "the defense failed to disclose: evidence of the Belize Fishing Trip within the legal time period" and that, "[i]n evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure." (See CALCRIM No. 306.) Hence, the jury was, if anything, deterred from fully considering appellant's alibi evidence as it deliberated appellant's guilt on the offenses charged in counts two and three.¹⁰

In light of all of these circumstances, we cannot conclude that the error in including the "on or around" language in the verdict forms was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Reversal of the judgment as to counts two and three is required.

II. Exclusion of Demonstrative Evidence of Appellant's Physical Abilities

Appellant contends the trial court erred when it excluded demonstrative defense evidence showing the limits of his ability to get into and out of and move around inside his truck.

¹⁰ Appellant testified at trial that the copy of Jane's list of sexual encounters the defense had received in discovery was of such poor quality that he had been unable to read the dates she wrote regarding when each encounter took place, and that it was not until he looked at the list again during trial that he saw the two dates for the alleged classroom kissing and realized he had alibis for both of them. The record also reflects that on June 11, 2012, the day before the attorneys gave their opening statements, defense counsel told the court that, in his copy of the list of sexual encounters, "the photograph is very blurry and so I'd like to get a copy from" the prosecutor. The prosecutor agreed to give counsel a better copy.

The Bench Notes to CALCRIM No. 306, state: "While the court has discretion to give an instruction on untimely disclosure of evidence [citation], the court should not give this instruction unless there is evidence of a prejudicial violation of the discovery statute. [Citations.] The court should consider whether giving this instruction could jeopardize the defendant's right to a fair trial if the jury were to attribute a defense attorney's malfeasance to the defendant."

In the circumstances, in which the disclosure of evidence apparently was untimely because the discovery received from the prosecution was illegible, the propriety of giving this instruction is questionable.

A. Trial Court Background

During trial, Jane Doe testified that, after driving to the Lucky's parking lot, appellant moved out of the driver's seat; hoisted himself up and over the center console between the two front seats, with his legs "follow[ing]"; "fell" onto a blanket on the floor of the cab; landed on his stomach; turned over and sat up "as best he could"; scooted next to Jane; lay down on his back on the floor of the truck; pulled Jane on top of him; moved onto his stomach; and reversed the direction of his body before taking off Jane's underwear and orally copulating her. According to Jane, to get back into the driver's seat before driving to her high school, appellant "pulled himself over [the center console] by going head and shoulders first again. . . . So he would have pulled himself up and then once he got most of himself up he would have grabbed his legs, twisted them over, slide them over [*sic*] like that so he could be in the driver's seat again."¹¹

Detective McDonald testified that when appellant went with him to the police department for an interview in February 2011, appellant first transferred himself into the back seat of the police SUV from his wheelchair and then moved from the SUV into his wheelchair once they arrived at the police department. The trial court also admitted into evidence a video, secretly recorded by police, which showed appellant getting out of his truck, approaching Jane's house in his wheelchair, and then returning to his truck.

Both appellant and his wife, Carrie Copithorne, testified that, due to the rods in his back and the muscle atrophy in his legs and buttocks, it would have been physically impossible for appellant to perform the acts described by Jane without risking serious injury. Carrie testified that, due to atrophy of the muscles in appellant's buttocks, he sat on a special gel cushion to avoid pressure sores. Were he to sit on a hard surface, he would face serious injury, which had occurred in the past. She also testified that, if appellant had tried to lie over the hump in the back of the truck, he would have risked "ripping in his back from the metal."

¹¹ Jane also testified that she did not notice a hump or raised area that went down the middle of the truck's cab from front to back.

Appellant testified that he could not have pushed himself up and over the center console in the truck because, first, even if he could have gotten his head and shoulders on top of the console, his legs would have been pinned between the steering wheel and his hand controls. He also could not have sat on the hard console due to the danger of pressure sores and could not have bent in the direction necessary to get into the back of the truck because of the metal rods in his back. Nor could he have lain on his back in the cab of the truck because the hump would have been in the middle of his back, which would have been excruciatingly painful due to the metal rods, which also would have kept him from lying flat. Finally, he testified that he could not have reversed position in the small area of the cab.

During a discussion with both attorneys prior to the jury viewing of the truck, the trial court stated: “Counsel and I have off the record discussed the viewing of the truck, the court allow a viewing [*sic*] since Defense is requesting that Mr. Copithorne be allowed to demonstrate how he gets in and out of the truck and puts his wheelchair inside the truck. [¶] I indicated that we probably should delay it until he testifies based on the court’s assumption that he is going to testify because you’ve indicated he is going to testify. I’m not requiring him in any way to testify, obviously, and based on his direct examination I can make a better finding of relevance. [¶] . . . [¶] I’ll give you—we’ll arrange it then after that. Okay.”

Subsequently, the jury was taken outside of the courthouse to view the exterior and interior of appellant’s truck. However, no demonstration by appellant was permitted.

Although both the original discussion related to the defense request for a demonstration by appellant and the court’s ultimate denial of that request were made off the record, appellant’s motion for a new trial and the court’s ruling on that motion make clear the nature of appellant’s request and the fact that the court had denied that request. Specifically, defense counsel wrote in his motion for a new trial: “Defendant sought and was denied permission to demonstrate to the jury the extent to which his entry and exit to and from his truck, and his ability to move therein, were compromised on account of being paralyzed from the navel level downwards.”

Likewise, at the hearing on the motion for a new trial, the court stated that it had denied the defense request and explained its rationale: “I did already rule on the viewing of the car. We did allow a view of the car. We allowed the jurors to look inside the car. Not car but truck. To see every aspect of it and look at it. I did not allow a demonstration by the defendant in the matter because I think it’s subject to a lack of control as to all of the circumstance [*sic*] that it would not be a reliable piece of evidence and it could cause an undue prejudice because of the lack of reliability. And I did not find that it was proper demonstrative evidence because of its unreliability before the jury, and I believe that my ruling is correct.”

Also during trial, the jury asked the trial court numerous questions, approximately half of which related to the configuration of the truck, including the position of the driver’s seat, and appellant’s physical abilities.

In closing argument, the prosecutor described appellant as “very athletic,” “very strong,” “very able,” and expressed doubt about his testimony that he “[c]ouldn’t have twisted into the back of the truck.” For his part, defense counsel spoke at length on this topic, arguing, *inter alia*, that, “perhaps a central fact in this case is Mike’s sheer physical inability to get into the back of the truck through the opening between the seats. Now I can say that until the cows come home. Mike can say that. But it’s the truck, and what you think of it. I don’t know how he’s going to hoist himself, and get back through that opening. You’ve seen the brief surveillance video, and he does get around. He’s made excellent accommodations, but how is he going to get those dead legs that he can’t move out from under the steering wheel, and through that opening? Maybe he can twist and get his shoulder and head through the opening. How are they going to come out from under the steering wheel? In order to do that, he would—he is going to have to sit for a moment on top of the hard cover of the center console, risking serious injury, that he sustained in the shower, which Carrie told you about. Because there’s nothing between what that bone called the ischium, what you sit on, the lower part of that hip, nothing between that bone but skin.

“And even if [he] could somehow have materialize[d] himself into the back seat, and even if [his son’s] child seat is not back there, . . . how could he do the things she said he did? Completely turning himself around in that narrow space? Where would his legs have gone? . . .”

B. Legal Analysis

Except as otherwise provided by statute, all relevant evidence is admissible. (Evid. Code, § 350.) “ ‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) Under Evidence Code section 352, a trial court may exclude relevant 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.”

Evidence Code section 352 permits the trial court “to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption.” It also requires, however, “that the danger of these evils substantially outweigh the probative value of the evidence. This balance is particularly delicate and critical where what is at stake is a criminal defendant’s liberty.” (*People v. Lavergne* (1971) 4 Cal.3d 735, 744; accord, *People v. Wright* (1985) 39 Cal.3d 576, 588; see also *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599 [“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” where proffered evidence has “more than slight relevancy to the issues presented”].)

These same rules of evidence apply to demonstrative evidence. “ ‘Evidence of demonstration engaged in to test the truth of testimony that a certain thing occurred is admissible only where (1) the demonstration is relevant, (2) its conditions and those existing at the time of the alleged occurrence are shown to be substantially similar and (3) the evidence will not consume undue time or confuse or mislead the jury. [Citation.] The party offering the evidence bears the burden of showing that the foundational

requirements have been satisfied.’ [Citation.] . . . [¶] ‘ “Within these limits, ‘ “the physical conditions which existed at the time the event in question occurred need not be duplicated with precision nor is it required that no change had occurred between the happening of the event and the time” ’ ’ ’ of the reenactment. (*People v. Carpenter* (1997) 15 Cal.4th 312, 386)” (*People v. Rivera* (2011) 201 Cal.App.4th 353, 363 (*Rivera*)).

We review the trial court’s decision to exclude appellant’s proposed demonstrative evidence pursuant to Evidence Code section 352 for abuse of discretion. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070 (*Minifie*); *Rivera, supra*, 201 Cal.App.4th at p. 362; cf. *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297 [to constitute an abuse of discretion, a trial court’s action need not rise to the level being “whimsical, arbitrary or capricious”]; accord, *People v. Jacobs* (2007) 156 Cal.App.4th 728, 736-738.)

In the present case, the trial court found that the proposed demonstration would not be relevant because it was “subject to a lack of control as to all of the circumstance[s]” such “that it would not be a reliable piece of evidence.” The court thus believed that “it could cause an undue prejudice because of the lack of reliability.”¹²

The intended meaning of the court’s ruling is obscure. We agree with respondent that the most reasonable inference is that the court found the evidence inadmissible because “appellant had ample motive to emphasize the limitations of his physical movement and easily could have feigned difficulty getting in and out of and moving

¹² Respondent asserts that appellant has forfeited this issue on appeal because (1) the record does not show that he followed up with the court after his direct testimony to obtain a ruling, and (2) during trial, appellant only asked to demonstrate getting into and out of his truck, not moving around inside. We disagree.

The record reflects that, during the hearing on appellant’s motion for a new trial, defense counsel, the prosecutor, and the trial court understood that the court had denied appellant’s request to demonstrate his mobility with respect to the truck. Indeed, the court reiterated the reasoning of its prior ruling and expressed the belief that it had been correct. Likewise, defense counsel’s new trial motion and the discussion at the hearing on the motion for a new trial reflect an understanding that appellant was asking to demonstrate not only getting into and out of the truck, but also his ability to move around inside the truck.

inside his truck.” Whether we construe the court’s ruling as respondent suggests or understand it to mean that the circumstances of the demonstration would not be sufficiently similar to those existing at the time of the alleged crime to be reliable, or both, we conclude that the ruling constituted an abuse of discretion.

First, whether or not appellant could have moved as Jane testified he did was extraordinarily relevant. It went to the heart of the question of appellant’s guilt or innocence of the offense charged in count one, and the demonstration would have been extremely probative of his physical abilities inside the truck.¹³

In addition, the purported unreliability of the evidence does not demonstrate a danger of undue prejudice under Evidence Code section 352. “ ‘ “The prejudice referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against . . . [one party] . . . and which has very little effect on the issues.” [Citation.]’ ” (*Minifie, supra*, 13 Cal.4th at pp. 1071-1070; accord, *Rivera, supra*, 201 Cal.App.4th at p. 362 [“ ‘ “ [e]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction’ ” ’ ”].) Here, the proposed evidence plainly was not of the sort likely to inflame the emotions of the jurors or to invoke in them an emotional bias against the prosecution. (See *ibid.*)

Nor would the proposed evidence have been cumulative to other defense evidence, as respondent argues. (See § 352.) That appellant and Carrie testified regarding appellant’s physical limitations does not render this evidence extraneous. On the

¹³ Appellant quotes from the affidavits of three jurors, submitted with his motion for a new trial, to support his claim that the proposed demonstrative evidence would have been important to the jury in assessing the prosecution’s case against appellant. As the trial court found, such evidence, which detailed jurors’ thought processes and comments during deliberations, was not admissible. (See Evid. Code, § 1150; *People v. Steele* (2002) 27 Cal.4th 1230, 1261 [“ ‘ “[A] verdict may not be impeached by inquiry into the juror’s mental or subjective reasoning processes, and evidence of what the juror ‘felt’ or how he understood the trial court’s instructions is not competent” ’ ”].)

contrary, this was critical evidence regarding a central issue in the case and a demonstration would have “ ‘test[ed] the truth of’ ” appellant and Jane’s testimony on this issue. (*Rivera, supra*, 201 Cal.App.4th at p. 363.)¹⁴

Moreover, demonstrative evidence regarding appellant’s ability to get into and out of and move around in his truck “ ‘would not have “confused the issue.” [Rather,] [i]t would have further illuminated the situation the jury was required to evaluate.’ ” (*Minifie, supra*, 13 Cal.4th at p. 1071; cf. *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1656 [requiring defendant to reenact “the act of grabbing” victim was not unduly prejudicial under section 352 because “[t]he demonstration was important to a full understanding of [victim’s] testimony, and to her identification of [the defendant]”].)

We also agree with appellant that the trial court’s decision to exclude the proposed demonstrative evidence because it believed the evidence would not be reliable “is a stark invasion of the role of the jury.” The possibility that appellant would emphasize his physical limitations as he got into and out of and moved around the truck—just like the possibility that he was not truthful in his testimony on this point—went to his credibility and the weight of the evidence, which was a question for the trier of fact. As Division Four of this District has stated: “It is the duty of the trier of fact to assess credibility. ‘Objection, your honor, this could be perjury!’ has not yet made it into the Evidence Code.” (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1679 (*Jackson*); cf. *People v. Cudjo* (1993) 6 Cal.4th 585, 609 [“[e]xcept in the rare instances of demonstrable falsity,

¹⁴ Respondent argued for the first time at oral argument that this evidence would have been cumulative in light of the video of appellant picking up Jane’s diary at her house. That video, which the prosecution offered in part to show appellant’s physical abilities and which apparently did not show appellant in his truck in any detail, was not a substitute for the proposed demonstration of appellant’s physical abilities and limitations inside his truck. Likewise, respondent claimed for the first time at oral argument that the evidence would have necessitated an undue consumption of time. (See § 352.) The additional time required to provide the demonstration during the jury’s view of the truck would have been minimal, however, particularly given its relevance and probative value. We also note that neither of these arguments offered by respondent formed the basis of the trial court’s ruling.

doubts about the credibility of the in-court witness should be left for the jury's resolution"]; *People v. Alcalá* (1992) 4 Cal.4th 742, 790 ["the circumstance that [an eyewitness's] testimony readily was subject to impeachment did not afford the court a legitimate basis for excluding this evidence" on relevance and Evidence Code section 352 grounds]; *People v. Torrez* (1995) 31 Cal.App.4th 1084, 1092 [whether defendant's admission to witness "was reliable in the sense of being credible goes to its weight and not its relevance"].)¹⁵

In viewing the demonstration, the jurors would have been able to observe appellant's demeanor and movements, and judge for themselves whether he was feigning less physical ability than he had. Moreover, as with any evidence, the prosecutor would have had the opportunity to cast doubt on the credibility of appellant's demonstration during closing argument. (See *Jackson, supra*, 235 Cal.App.3d at p. 1679 [possibility that defense evidence was fabricated was not a "matter of concern" to appellate court, "given the obvious talent of the prosecutor in alerting the jury in respect to the credibility of witnesses"].)

The trial court thus applied the wrong legal standard when it foreclosed the jury from considering the proposed evidence based on its purported unreliability. This was an abuse of discretion. (See *Jackson, supra*, 235 Cal.App.3d at p. 1679. [no legal rule permits exclusion of "testimony on the ground that it could be a fabrication"]; see also, e.g., *People v. Knoller* (2007) 41 Cal.4th 139, 156 ["abuse of discretion arises if the trial court based its decision on impermissible factors"]; *People v. Jacobs, supra*, 156 Cal.App.4th at p. 738 [legal component of discretion is " "to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice" ' '"]; *City of Sacramento v. Drew, supra*, 207 Cal.App.3d at p.

¹⁵ Appellant notes that the trial court's refusal to allow his demonstrative evidence purporting to show the limitations on his physical abilities was made even more problematic by the admission of the prosecution's demonstrative evidence that purported to show the opposite: his physical *abilities*.

1297 [“Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an ‘abuse’ of discretion”].)

In addition, to the extent the trial court intended, by its statement regarding unreliability and “lack of control” of the circumstances, to say that the conditions during the demonstration would not be substantially similar to those existing at the time of the alleged offense, it was incorrect. The demonstration would involve the same truck and the same person who were with Jane at Lucky’s, and would have been extremely probative of appellant’s ability to move in the ways Jane testified he did inside the truck’s cab. Any minor differences, such as seat position, could have been dealt with by showing the driver’s seat in both a forward and back position, as well as through argument to the jury. (See *Rivera, supra*, 201 Cal.App.4th at p. 363 [physical conditions existing at time prior event occurred need not be duplicated with precision]; compare *People v. Jones* (2011) 51 Cal.4th 346, 378 [where prosecutor had argued that bushes and trees could have substantially changed in two years since crime and where extensive evidence—including photographs taken on day of crime and other evidence concerning the area—was admitted, trial court did not abuse its discretion in refusing to permit jury view of crime scene].)

We observe that prosecution evidence requiring defendants to reenact their alleged crimes have routinely been found to be admissible, even when there was a danger of prejudice to the defendant. (See, e.g., *People v. Milner* (1988) 45 Cal.3d 227, 251 [no error in requiring defendant to don bloodstained pants he wore on night of murder to demonstrate how knife was situated in his pocket and how it fell out where “prejudicial [effect] of the sight of the pants on the defendant did not outweigh the probative value of having the defendant demonstrate his version of what happened on the night of the murder”]; *People v. Atchley* (1959) 53 Cal.2d 160, 173 [no error where, on cross-examination, defendant was required to put on shirt he had worn on night his wife was killed, to show how he had carried gun, and to demonstrate with help of prosecutor his and his wife’s movements during alleged struggle].) The proposed demonstration here was no less admissible because it was offered by the defense. As our Supreme Court

explained in *People v. Adamson* (1946) 27 Cal.2d 478, 486, “except in rare cases of abuse, demonstrative evidence that tends to prove a material issue or clarify the circumstances of the crime is admissible despite its prejudicial tendency.” (Accord, *People v. Robillard* (1960) 55 Cal.2d 88, 99; *People v. Fitzgerald* (1972) 29 Cal.App.3d 296, 316.)

For all of the reasons discussed, we conclude the trial court abused its discretion in excluding the proposed evidence as unreliable pursuant to Evidence Code section 352. (*Minifie, supra*, 13 Cal.4th at p. 1070; *Rivera, supra*, 201 Cal.App.4th at p. 362.)

We further find that the error was prejudicial.¹⁶ As previously discussed, this was an extremely close case, which centered on the credibility of appellant and Jane Doe. Appellant’s proposed demonstration would have provided important, relevant evidence regarding whether he was physically able to do all of what Jane testified he did inside the truck, about which the prosecution had already introduced demonstrative evidence in the form of the video of appellant picking up Jane’s diary from her house. We therefore conclude that, in the particular circumstances of this case, it *is* reasonably probable the verdict would have been more favorable to appellant absent the evidence’s erroneous exclusion. (See *People v. Watson* (1956) 46 Cal.2d 818, 836; compare *People v. Russell* (2010) 50 Cal.4th 1228, 1257 [any possible error in denial of defendant’s request for jury view of crime scene at night was harmless, considering ample other evidence was presented regarding lighting conditions and defendant failed to show how a jury view of scene would assist jury in determining guilt]; *Rivera, supra*, 201 Cal.App.4th at pp. 365-366 [“overwhelming” evidence of guilt and “exceedingly weak” defense evidence rendered harmless court’s error in permitting prosecution’s demonstration].)

Reversal of the judgment as to count one is therefore required.¹⁷

¹⁶ Appellant points out that, in its brief, respondent argues only that no error occurred. It did not argue that, if error occurred, it was harmless.

¹⁷ Because we have found reversible error under state law, we need not address appellant’s contention that the exclusion of this evidence also constituted error under the federal Constitution.

III. Presence of a Support Person for Jane

Appellant contends the trial court violated his right to a fair trial by permitting 16-year-old Jane Doe to testify with a support person present without first holding a hearing to determine whether she needed support.

A. Trial Court Background

During trial, the prosecutor requested that two support people be present for Jane during her testimony, one of whom “would be sitting behind her on the stand. And one would be somewhere in the audience.” After confirming that Jane in fact wanted a support person to accompany her to the witness stand, the court agreed to the request, “[a]s long as there’s not communication between them, nothing where the support person is giving, by nonverbal conduct, an opinion on the testimony.” The prosecutor said that “Ms. Bergness [*sic*],” the support person who would accompany Jane to the witness stand, had been Jane’s advocate before, and the court responded that it had seen her in other cases “and she’s very professional” Defense counsel then said, “The court’s answered my concerns about it. This is fairly normal procedure in cases of this type.” The court responded, “It’s become very standardized and I don’t have a problem with it as long as it’s done professionally.”¹⁸

Subsequently, when Jane took the witness stand, the prosecutor stated, “And for the record, your Honor, Shara Mae Bringas is there accompanying. [¶] She will not be a witness in the case.”

B. Legal Analysis

Section 868.5, subdivision (a), provides that a prosecuting witness in the trial of a defendant accused of certain offenses, including child molestation, may have up to two support persons of his or her own choosing present during the trial testimony of the witness. Pursuant to subdivision (b) of section 868.5, if a chosen support person is also a

¹⁸ Defense counsel and the trial court both expressed concern about the prosecutor’s plan for Pastor Driscoll, who could be a rebuttal witness, to be Jane’s second support person. The prosecutor therefore agreed to look for another person to take on that role and Jane ultimately chose someone else as her second support person.

witness, “the prosecution shall present evidence that the person’s attendance is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness.” Once this is shown, “the court shall grant the request unless information presented by the defendant or noticed by the court establishes that the support person’s attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony.” (§ 868.5, subd. (b).)

Here, defense counsel did not object to Jane having a support person with her when she testified. Indeed, counsel stated that his concerns had been answered and noted that it was “a fairly normal procedure in cases of this type.” Respondent therefore argues that appellant has forfeited his challenge on this issue. Appellant responds that, because he is arguing that section 868.5 is unconstitutional on its face in that it violates a defendant’s right to confrontation and due process, no objection was required to preserve the issue. (Cf. *People v. Lord* (1994) 30 Cal.App.4th 1718, 1722, fn. 2 [rule that constitutionality of a criminal statute may be challenged for first time on appeal did not apply in that case because defendant was asserting that he was denied his constitutional right to a necessity hearing, which may be waived].) Although appellant is challenging the constitutionality of section 868.5 generally, he also challenges the statute as applied to him in the circumstances of this case. Such a challenge is forfeited absent an objection in the trial court. (See *Lord*, at p. 1722, fn. 2; see also *People v. Myles* (2012) 53 Cal.4th 1181, 1214 (*Myles*) [defendant’s failure to object when a victim-witness advocate accompanied witness to stand forfeited his claim that presence of support person violated his constitutional rights].) Furthermore, even if the issue were preserved on appeal, we would find it to be without merit.

First, with respect to appellant’s facial challenge to the constitutionality of section 868.5, our Supreme Court rejected a similar challenge, explaining: “Absent improper interference by the support person, . . . no decision supports the proposition . . . that the support person’s mere presence infringes [the defendant’s] due process and confrontation clause rights. ‘ “The presence of a second person at the stand does not require the jury to infer that the support person believes and endorses the witness’s testimony, so it does not

necessarily bolster the witness's testimony." [Citation.]' [Citations.]" (*Myles, supra*, 53 Cal.4th at p. 1214.)

Second, with respect to appellant's claim that the presence of a support person during Jane's testimony violated his constitutional rights in the circumstances of this case, our Supreme Court's discussion of the defendant's similar argument in *Myles* is applicable here as well. The court observed that "the record does not disclose any circumstances indicating that [the prosecuting witness's] support person improperly influenced the jury's assessment of her testimony. [Citation.]" (*Myles, supra*, 53 Cal.4th at p. 1214.) The court added that there was no indication that the support person had done anything "suggesting to the jury that she believed [the prosecuting witness's] account of the incident. [Citation.]" (*Id.* at pp. 1214-1215.) In addition, the trial court had informed the jury that the witness was entitled by law to the presence of a support person and that the support person was not the witness. "This admonition, coupled with the court's instruction directing the jury to base its decision in the case solely on the evidence received at trial and not to be swayed by sympathy or prejudice further undermines any suggestion of improper interference by the support person. [Citation.]" (*Id.* at p. 1215.)

Likewise, in the present case, there is no indication in the record that Jane's support person influenced the jury's assessment of her testimony in any way. In granting the prosecutor's request for a support person for Jane, the trial court made clear that there could not be any communication between them, including showing, "by nonverbal conduct, an opinion on the testimony." The court also said that it had seen Bringas in other cases and observed that "she's very professional." The court further stated that it did "not have a problem with [the presence of a support person] as long as it's done professionally." Finally, the prosecutor told the court that Bringas would be sitting behind Jane.

The court's comments and the fact that neither it nor defense counsel indicated any concern about Bringas's conduct during Jane's testimony lead us to conclude that nothing problematic took place. (See *Myles, supra*, 53 Cal.4th at p. 1214; see also *People*

v. Ybarra (2008) 166 Cal.App.4th 1069 (*Ybarra*), overruled on another ground in *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1370-1371 [nothing in record even intimated that support person did anything that might influence witness or jury].) In addition, although the court here did not admonish the jury about the presence of the support person, it did instruct the jury to base its decision on the evidence presented and not to “let bias, sympathy, prejudice or public opinion influence [its] decision.” (See *Myles*, at p. 1215.) This instruction, coupled with the prosecutor’s announcement that Bringas was not a witness and was merely “accompanying” Jane, further removed the possibility that Bringas’s presence could have influenced the jury. Hence, appellant has failed to show that his constitutional rights were violated by the presence of a support person at the witness stand during Jane’s testimony. (*Ibid.*)

Appellant nevertheless argues that the trial court should have held a hearing to determine whether a support person’s presence during Jane’s testimony would be prejudicial. Appellant cites *People v. Patten* (1992) 9 Cal.App.4th 1718, 1729 (*Patten*), in which the appellate court examined several factors to determine whether the trial court should have conducted a preliminary inquiry before allowing a support person to be present. As the *Patten* court explained, to determine whether the presence of a support person violated a defendant’s due process rights, important considerations include the relationship of the support person to the witness, the location of the support person in relation to the witness, the witness’s age, whether the support person did anything that might influence the witness or the jury, and whether the court admonished the jury to disregard the support person’s presence. (*Id.* at pp. 1731-1732.)

We have already addressed most of these factors in relation to the present case. (See Discussion, *ante.*) As to the relationship between Jane and Bringas, it is true that Bringas was not a family member whom the jury would expect to be sympathetic to the victim. However, Bringas’s relationship to Jane was not specified and any inferences “the jury might have drawn about her identity and relationship to [Jane] are entirely speculative.” (*Ybarra, supra*, 166 Cal.App.4th at p. 1078; see also *Patten, supra*, 9 Cal.App.4th at pp. 1731-1732.) As to Jane’s age, although she was not a young child, she

was a minor who was the alleged victim of sexual misconduct, which makes it more likely that the jury would understand the presence of a support person during her testimony. (See *Ybarra*, at p. 1078; *Patten*, at p. 1732.)

Accordingly, we conclude that the known factors do not, either separately or in combination, support appellant’s assertion that the trial court was obligated to conduct a preliminary inquiry regarding whether Bringas’s presence violated appellant’s due process rights. (See *Patten, supra*, 9 Cal.App.4th at p.1732.)

**IV. Alleged Lack of Evidence that Jane Was
10 Years Younger than Appellant**

Appellant contends that, because the prosecution introduced no evidence showing that Jane was 10 years younger than he was, the trial court should have ordered a judgment of acquittal on its own motion at the end of the prosecution’s case in chief, pursuant to section 1118.1.

Section 1118.1 provides in relevant part: “In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal.”¹⁹

“The standard on review of a denial of a motion for acquittal is ‘the same as that applied by an appellate court in reviewing a conviction—whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged. [Citations.]’ [Citation.]” (*People v. Castaneda* (1994) 31 Cal.App.4th 197, 202, quoting *People v. Ainsworth* (1988) 45 Cal.3d 984, 1022.)

¹⁹ Respondent mistakenly discusses the provisions of another statute—section 1181—rather than section 1118.1, on which appellant relies.

Appellant was charged with three counts of committing a lewd act upon a child in violation of section 288, subdivision (c)(1), which includes the provision that “the victim is a child of 14 or 15 years, and [the defendant] is at least 10 years older than the child.”

Appellant asserts that, during its case in chief, the prosecution established Jane’s birth date, but did not establish that appellant was at least 10 years older than Jane. Therefore, according to appellant, the prosecution did not establish every element of the offense, and the trial court should have ordered a judgment of acquittal on its own motion pursuant to section 1118.1. We disagree.

During the January 12, 2011 videotaped police interview with appellant, which was played for the jury at trial, the following exchange took place:

“[Detective McDonald]: Okay. But if nothing happened, why are you curious [about content of journals]? You’re a 35-year-old man. You see where I’m coming from.

“[Appellant]: Yeah, I mean I understand that—

[¶] . . . [¶]

“[Detective McDonald]: I mean, you go pick her up before school and go take her to the Lucky’s parking lot? I mean, what—what 35-year-old teacher does that with a 15-year-old student?

“[Appellant]: I—I don’t know—apparently a crazy one. I—what—what do you want me to say?”

[¶] . . . [¶]

“[Detective Winegar]: Thirty-five-year-old teacher, you know what I’m saying?

“[Appellant]: I understand—yeah, I do.”

Based on this evidence, the jury could reasonably have inferred that appellant was at least 10 years older than Jane. (See, e.g., *People v. Castaneda*, *supra*, 31 Cal.App.4th at p. 202 [defendant’s physical appearance was sufficient circumstantial evidence to support jury’s finding that he was at least 10 years older than child victim].) Accordingly, appellant’s claim of error cannot succeed.

**V. *The Trial Court’s Refusal to Release Most of
Jane’s Psychological Records***

Appellant contends the trial court prejudicially erred in refusing to release most of Jane’s medical records related to her psychological and mental health. He asserts that records regarding Jane’s “mental health, the side [effects] of any medications she was taking and any history of other false allegations, would certainly have been relevant to the accuracy and reliability of her testimony.”

A. *Trial Court Background*

Before trial, defense counsel attempted to subpoena Jane’s psychiatric medical records from Kaiser Hospital. The prosecution opposed disclosure of any of the documents prior to a decision by the trial court regarding the necessity for review and disclosure of the documents.

At the request of both defense counsel and the prosecutor, on May 2, 2012, the trial court conducted a pretrial, in camera review of the medical records in question. The court found that some of the records, which were from when Jane was between seven and nine years old, were so remote in time that they should not be disclosed. After reviewing the remainder of the documents, the court found some seven pages relevant and ordered those pages disclosed to the parties. The court concluded that the remaining documents should not be disclosed and placed them under seal.

B. *Legal Analysis*

Appellant now requests that we review the records to determine if “the sealed records would have assisted counsel in cross-examining [Jane] or developing either impeaching or exculpatory evidence.” Respondent states that it has no objection to appellate review of the sealed records.

“Parties who challenge on appeal trial court orders withholding information as privileged or otherwise nondiscoverable ‘must do the best they can with the information they have, and the appellate court will fill the gap by objectively reviewing the whole record.’ [Citation.]” (*People v. Price* (1991) 1 Cal.4th 324, 494, quoting *People v.*

Collins (1986) 42 Cal.3d 378, 395 fn. 22; accord, *People v. Martinez* (2009) 47 Cal.4th 399, 452-453.)

In the present case, we have carefully reviewed the sealed records to determine if any of the documents would have assisted defense counsel in cross-examining Jane or developing either impeaching or exculpatory evidence. We have determined that some of these documents were relevant to Jane's credibility and should have been disclosed to defense counsel. We nonetheless conclude that this error, standing alone, did not prejudice appellant. (See *People v. Martinez, supra*, 47 Cal.4th at pp. 453-454 [confidential records are "material" only if it is reasonably probable that, had documents been disclosed to defense, result of proceeding would have been different]; see also *People v. Price, supra*, 1 Cal.4th at p. 494; cf. *People v. Collins, supra*, 42 Cal.3d at pp. 394-395 & fn. 22.)

VI. Cumulative Error

Appellant's final contention is that, even if none of the errors in themselves require reversal, the cumulative effect of those errors resulted in prejudicial error. (See *People v. Hill* (1998) 17 Cal.4th 800, 844 (*Hill*).)

We have found that the trial court's errors related to counts one, two, and three are prejudicial and therefore require reversal of those three convictions. (See pts. I. & II., *ante*.) We further found that the court should have disclosed certain psychological documents that were relevant to Jane's credibility, but concluded that the error, standing alone, was not prejudicial to appellant. (See pt. V., *ante*.) We now conclude that the cumulative effect of these three errors deprived appellant of a fair trial such that the entire judgment, including the conviction on count four, must be reversed. (See *Hill, supra*, 17 Cal.4th at p. 847.)

It is inarguable that this was a very close case that turned on the credibility of appellant and Jane Doe. Each of the errors that occurred likely had the effect of

bolstering Jane’s credibility while undermining appellant’s.²⁰ Moreover, those errors did not occur in a vacuum; they necessarily affected the jury’s overall determination of who was telling the truth about what took place between appellant and Jane. We therefore cannot ignore the residual effect these errors inevitably had on the jury’s determination of appellant’s guilt with respect to count four. (See *Hill, supra*, 17 Cal.4th at p. 847 [concluding that numerous errors, including relentless prosecutorial misconduct, “[c]onsidered together, . . . created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors”]; cf. *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 32.)

In light of the cumulative effect of the various errors committed during trial, we conclude it is reasonably probable that the jury would have reached a result more favorable to appellant on all counts absent those errors. (See *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795 see also *Hill, supra*, 17 Cal.4th at p. 847.) Accordingly, the entire judgment must be reversed.²¹

DISPOSITION

The judgment is reversed.

²⁰ We also observe that the presence of a support person at the witness stand during Jane’s testimony, while not error (see pt. III., *ante*), likely had at least a slight effect on the jury’s perception of Jane’s credibility. (See *People v. Adams* (1993) 19 Cal.App.4th 412, 438 [first observing that demeanor evidence is relevant on issue of credibility and then stating, “The presence of a second person at the stand affects the presentation of demeanor evidence by changing the dynamics of the testimonial experience for the witness”].)

²¹ After briefing was complete in this appeal, appellant’s counsel filed a petition for writ of habeas corpus in case No. A142949, alleging ineffective assistance of trial counsel based on counsel’s failure to present evidence at trial relevant to appellant and Jane’s credibility. This evidence included expert medical evidence regarding the impossibility of appellant moving in his truck as Jane testified he did, evidence from his long-time dentist regarding his gag reflex, evidence showing he invited all of his students and their parents to the Christian music concert to which he also invited Jane, and expert evidence showing he did not fit the profile of a sexual offender. Because our disposition of this appeal renders the petition moot, in a separate order, we deny the petition.

Kline, P.J.

We concur:

Richman, J.

Stewart, J.