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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH EDWARD WHITE,

Defendant and Appellant.

C065136

(Super. Ct. No. 09F05741)

The trial court sentenced defendant Joseph Edward White to a prison term of 62 years to life for committing a lewd and lascivious act upon a child (Pen. Code, § 288, subd. (a)), possessing child pornography (Pen. Code, § 311.11, subd. (a)), and various other enhancements. In this appeal, defendant claims the trial court erred when it denied his motion to suppress evidence and his motion to quash a search warrant. We conclude the warrantless searches and seizures and the subsequent search pursuant to a warrant did not violate defendant's Fourth Amendment rights, and we affirm the judgment.

## FACTS

Eight-year-old Haley lived at an apartment complex in Sacramento. Sometime in April 2009, a resident of the apartment complex, Nicole Buzzetta, known to Haley as Nicki, came by Haley's apartment and asked Haley if she wanted some kittens. Haley went to Nicki's apartment with her sister to look at the kittens. The kittens were too young at that time to be taken from their mother.

On May 12, 2009, Haley told her mother she was going to the apartment complex's parking lot to show a friend her glasses. She also was going to see the kittens at Nicki's apartment.

A short time later, Haley returned home very scared. She told her mother that Nicki's boyfriend, defendant, had grabbed her by the hand and asked her what she was doing in the parking lot. He led Haley to a green truck or sport utility vehicle in the lot. While he sat inside the truck and she stood outside it, he stuck his hand down her shorts and touched her vagina.

On June 16, 2009, detectives visited Buzzetta's apartment three times. On the second visit, they located defendant inside the apartment's master bedroom. On the third visit later that day, detectives retrieved a laptop computer that was owned by Buzzetta from the apartment's master bedroom. The detectives did not have a warrant on any of these three occasions.

On July 7, 2009, detectives executed a search warrant at the apartment. In the apartment's master bedroom, they retrieved computer equipment and CDs which stored or contained numerous images of child pornography. They also found several written documents associated with defendant in the same bedroom. Because this appeal is based on these searches and seizures, we set forth the relevant facts in detail below.

The trial court sentenced defendant to a state prison term of 50 years to life on the lewd and lascivious act conviction and a corresponding finding that defendant was a habitual sexual offender within the meaning of Penal Code section 667.71. The court

also sentenced defendant to a consecutive determinate term of 12 years based on the upper term of three years for the child pornography count, three years for the habitual offender allegation, five years for a prior conviction within the meaning of Penal Code section 667, subdivision (a), and one year for a prior prison term within the meaning of Penal Code section 667.5, subdivision (b).

#### DISCUSSION

Pursuant to Penal Code section 1538.5, defendant moved to suppress all evidence obtained during the warrantless searches of the apartment's master bedroom on June 16, 2009. He also moved to quash the search warrant executed on July 7, 2009, claiming its supporting affidavit contained intentionally or recklessly false assertions of fact.

The trial court denied the motions. Of relevance here, the court found the detectives' entries into the apartment and its master bedroom on June 16, 2009, were with consent voluntarily provided by Buzzetta's cotenant, Tommie Butler, who is also defendant's mother. The court found that although Buzzetta's laptop computer was seized upon the detectives' request for it, defendant had no reasonable expectation of privacy in the laptop. Also, the court determined the affidavit supporting the search warrant did not contain false or reckless assertions of fact.

Defendant disagrees with the trial court's rulings. He contends: (1) the cotenant, Butler, had no authority, either legal or apparent, to consent to the search of the master bedroom; (2) Butler did not consent voluntarily; (3) defendant had a reasonable expectation of privacy in the laptop computer that was seized without a warrant; (4) the affidavit for the search warrant contained false assertions of fact made with knowing or reckless disregard for the truth; and (5) the evidence should have been suppressed because he was arrested inside his residence without a warrant. We address and reject each argument.

## I

### *Consent to Search*

Defendant claims the trial court erred when it determined Buzzetta's cotenant and defendant's mother, Tommie Butler, could consent to the search of his bedroom. We conclude the search did not violate the Fourth Amendment as it was reasonably conducted pursuant to Butler's apparent authority to consent and defendant's actual authority to consent.

#### *A. Additional background information*

Sacramento County Sheriff's Detective Darin Pometta learned from Haley that the molestation happened next to a green Chevy Tahoe she identified in the apartment complex's parking lot, and the person who had touched her was associated with a woman identified as Nicki who resided in apartment number 104. Pometta contacted a manager of the apartment complex and learned the listed tenants for apartment 104 were Nicole Buzzetta and Tommie Butler. Defendant was identified in a letter in the tenant file as a caregiver.

About 9:00 a.m. on June 16, 2009, Detective Pometta and his partner, Detective Anthony Saika, knocked on the door of apartment 104. The detectives were wearing plain clothes with their firearms on their belts and had their badges in view. Tommie Butler invited the detectives inside. They introduced themselves to Buzzetta and Butler, who agreed to answer some questions for them. Pometta met with Buzzetta outside in the parking lot while Saika met with Butler inside the apartment.

Detective Pometta asked Buzzetta if she had any boyfriends or male acquaintances that were associated with the apartment. She said she did not. Meanwhile, Butler, in her conversation with Detective Saika, told the officer her son, defendant, was engaged to Buzzetta. He was the only male associated with the apartment that would come and visit. Butler said defendant was then out of town looking for work and she had no way of contacting him. Saika also learned the green Chevy Tahoe that had been identified by

Haley was registered to Buzzetta's father but it was, for practical purposes, Buzzetta's car.

Detective Saika went outside to the parking lot and informed Detective Pometta what he had learned. Pometta then asked Buzzetta about her relationship with defendant. Buzzetta said she had a relationship with him but downplayed its significance. Saika asked her if she was engaged to defendant. She said she was not.

Following these conversations, the detectives returned to their station. After comparing notes, they decided to focus their investigation on defendant. A records check found no information associating defendant with apartment 104. However, the check did reveal defendant had outstanding warrants and was a registered sex offender from Santa Cruz County. To follow up on that information, the detectives returned to the apartment complex that day to ask Buzzetta and Butler additional questions about defendant.

Butler answered their knock on the door around 11:00 a.m. Detective Pometta told her they had additional questions and asked if they could enter the apartment to speak with her. Butler opened the door and gestured with her hand in an inviting manner, and the detectives entered the apartment.

Detective Pometta asked Butler if there was anyone else inside the apartment. Butler said her daughter and her two grandsons were sleeping in a bedroom in the back. Pometta asked if he could look in the different bedrooms and verify. Butler said he could. She directed him down the hallway to a room on the right, and he entered the room. He saw a female sleeping on the floor with an infant next to her and another toddler sleeping in a crib.

Detective Pometta left that room, and asked Butler if anyone else was inside the apartment. She said there was not. Pometta then went into the adjacent room. The door to that room was slightly ajar, and it appeared to be leading to the master bedroom area. As he opened the door and entered the room, he immediately noticed a man standing motionless off to his left. The man was standing inside the threshold of an adjacent door.

This startled Pometta, but he recognized the man as defendant. With his weapon drawn, he ordered defendant to the ground.

Prior to that moment, Detective Pometta had no information whatsoever that defendant was a resident of apartment 104 or that he was then inside the apartment. He and Detective Saika did not enter the apartment with the intent of arresting defendant.

Detective Pometta handcuffed defendant and led him into the living room where Detective Saika was speaking with Butler. In response to a request for identification, defendant stated his wallet was on top of the bed in the master bedroom. Pometta reentered the master bedroom and retrieved a wallet from the bed. While doing so, he noticed a black laptop computer on the floor at the foot of the bed. The computer was plugged into the wall socket.

Butler informed Detective Saika that defendant had been living in the apartment with her since she had moved in approximately a year and a half ago. Saika asked Butler if he could take pictures of the rear bedroom where defendant had been found. She agreed.

Detective Pometta transported defendant to the station. Defendant asked Pometta to provide his wallet and its contents to his mother, Butler. Pometta contacted Butler, and she, Buzzetta, and Butler's daughter came to the station primarily to retrieve the wallet.

Detective Pometta interviewed Buzzetta after she arrived at the station. Buzzetta informed him she and defendant were "in a relationship," and he had been living at the apartment for over a year. She also told him the green Tahoe registered in her father's name was a gift from her father. Defendant and Butler regularly drove the vehicle.

Buzzetta also told Detective Pometta that she and Haley had spoken with each other regarding some kittens she wanted to give to Haley. Haley had been to the apartment on a couple of different occasions to see the kittens. In fact, Buzzetta had a photograph of Haley and defendant together. She thought the photograph was stored in her digital camera, which was back at the apartment.

Detective Pometta instructed Detective Saika to go to the apartment and obtain from Buzzetta her digital camera or its memory card for the photograph of Haley and defendant. He also told Buzzetta that Saika would meet her at her apartment with regards to the photo. Buzzetta had no objections.

Detective Pometta also instructed Detective Saika to attempt to obtain the black laptop computer he had seen in the master bedroom. He thought other photographs taken with Buzzetta's camera might be stored on the computer. He directed Saika to obtain the computer from Buzzetta voluntarily, but if that was not possible, to seize the computer to prevent the destruction of evidence. Buzzetta, when she spoke with Pometta at the station, had mentioned deleting pictures from her cell phone, and he was concerned she might delete pictures on the computer.

Detective Saika went back to the apartment at about 4:00 p.m. that day. He was allowed into the apartment, and he followed Buzzetta into the rear bedroom where she retrieved a digital camera. She turned the camera on, showed it to Saika, and cycled through photographs. She found the photo of Haley and defendant and showed it to Saika. Saika asked for the camera's memory card, and Buzzetta gave it to him.

Detective Saika next informed Buzzetta he wanted the laptop computer at the direction of Detective Pometta. Saika testified: "I said [to Buzzetta] I wanted to take the lap top." She asked him why, and he explained his reasons. Buzzetta picked up the computer, sat down on the bed, and began pushing keys. She said she wanted to get rid of some background, but Saika told her not to do that.

Detective Saika asked Buzzetta if there was a password on the computer. Buzzetta said she had a password and defendant also had a password. Buzzetta said the computer was hers. She initially said she did not know defendant's password, but she later contradicted herself by saying she commonly checked his settings in regards to the pictures she had on the computer.

Detective Saika asked Buzzetta if she had anything on the computer that she was not supposed to have. Buzzetta said she had pictures of young girls. Saika asked what she meant, and Buzzetta explained they were young girls in various poses or fashions. She told Saika to see for himself. She opened a computer file, revealing several thumbnail pictures on the screen. Saika told her to click on one of the pictures. She did.

The photograph was of a young girl between eight and 11 years old. The photograph depicted the girl from the waist up. Except for a hat and gloves, the child was not wearing any clothes. She was bare-chested and flat-chested.

Detective Saika told Buzzetta to leave things as they were. Buzzetta turned off the computer and unplugged it from the wall. Saika asked her if she had a carrying case. She gave him a cover for the computer along with the computer itself. She also told Saika her computer password. She then followed him to his car, where he gave her a property receipt.

On July 3, 2009, Detective Pometta obtained a search warrant and viewed some of the items stored on the laptop computer. He testified the items included child pornography.<sup>1</sup>

The detectives also returned to the apartment on July 7, 2009, to execute the search warrant. In the master bedroom, they found a computer tower and several CDs and DVDs. They found, inserted inside a pornographic magazine, a two-page color printout consisting of approximately 15 images of child pornography. It was later discovered that the computer had 33 images of child pornography stored in a file. Also, two of the CDs retrieved from the apartment contained 94 and 98 images of child pornography respectively.

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<sup>1</sup> The term “child pornography” refers to any matter, data or image that “depicts a person under the age of 18 years personally engaging in or simulating sexual conduct” as defined by statute. (Pen. Code, §§ 311.11, subd. (a); 311.4, subd. (d).)

B. *Analysis*

Defendant claims the trial court erred in not suppressing the evidence obtained from the warrantless searches by concluding Butler had the authority to consent to the detectives entering the apartment and defendant's bedroom. We conclude the detectives reasonably relied on Butler's apparent authority, even if she had no authority in fact, to admit them into defendant's bedroom.

“To the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable *per se* (*Payton v. New York* (1980) 445 U.S. 573, 586 [63 L.Ed.2d 639]; *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 454-455 [29 L.Ed.2d 564]), one ‘jealously and carefully drawn’ exception (*Jones v. United States* (1958) 357 U.S. 493, 499 [2 L.Ed.2d 1514]), recognizes the validity of searches with the voluntary consent of an individual possessing authority ([*Illinois v. Rodriguez* (1990) 497 U.S. 177, 181 [111 L.Ed.2d 148] (*Rodriguez*)). That person might be the householder against whom evidence is sought (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 222 [36 L.Ed.2d 854]), or a fellow occupant who shares common authority over property, when the suspect is absent ([*United States v. Matlock* (1974) 415 U.S. 164, 170 [39 L.Ed.2d 242] (*Matlock*)), and the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant (*Rodriguez, supra*, 497 U.S. at p. 186).” (*Georgia v. Randolph* (2006) 547 U.S. 103, 109 [164 L.Ed.2d 208, 218-219].)

“Whether the basis for [the express or apparent authority to consent to a search] exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably. The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in

pursuit of a violent felon who is about to escape. [Citation.]” (*Rodriguez, supra*, 497 U.S. at p. 186.)

Whether or not Butler had authority to consent to the search of the master bedroom, the detectives’ belief that she had that authority was reasonable. Nothing in the surrounding circumstances would have led a reasonable person to doubt Butler’s authority. She and Buzzetta were listed on the lease as the only tenants. She was the person who invited the detectives into the apartment on the first two visits and consented to Detective Pometta searching the bedrooms on the second visit. Based on what she and Buzzetta had told them, the detectives had no reason to believe anyone else lived at the apartment. When the detectives made their second visit, there was no indication Buzzetta had exclusive control of the master bedroom. The door to that room was slightly open, and from what the detectives knew at that time, the room could have been used by either Butler or Buzzetta or both, since the other bedroom was at that time occupied by a woman and two children, all sleeping and whom Butler identified as her daughter and grandchildren. Under these circumstances, the detectives’ belief in Butler’s authority to consent to their searches was reasonable and did not violate defendant’s rights under the Fourth Amendment.

More significantly, the evidence admitted based on the detectives’ second visit to the apartment was discovered upon *defendant’s* consent. After bringing a handcuffed defendant out to the living room, Detective Pometta asked him for identification. Defendant told him it was in his wallet on top of the bed in the master bedroom, implicitly granting Pometta consent to reenter the bedroom and retrieve defendant’s wallet. Pometta testified it was not until he went back into the master bedroom to retrieve defendant’s wallet that he saw the laptop computer. And it was that laptop, first seen by Pometta under consent from defendant, which led to the discovery of the additional evidence found in the room.

Based on these facts, we conclude the detectives reasonably relied on Butler's apparent authority and defendant's actual authority to enter defendant's bedroom without a search warrant.

## II

### *Voluntariness of Consent*

Defendant argues that even if we find Butler had authority to consent, she did not give her consent voluntarily. We disagree. Substantial evidence supports the trial court's determination that Butler's consent was voluntary.

"The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and 'voluntariness is a question of fact to be determined from all the circumstances.' [Citation.]" (*Ohio v. Robinette* (1996) 519 U.S. 33, 40 [136 L.Ed.2d 347, 355] (*Robinette*).)

"Our role in reviewing the resolution of this issue is limited. The question of the voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process, 'The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings -- whether express or implied -- must be upheld if supported by substantial evidence.' [Citations.]" (*People v. James* (1977) 19 Cal.3d 99, 107.)

Substantial evidence supports the trial court's finding that Butler gave her consent voluntarily. Defendant cites no facts surrounding the time of Butler's consent that would suggest she was coerced. Butler invited the detectives into the apartment at their request. The detectives did not display any showing of force or coercion. Detective Pometta asked if he could look in the bedrooms and verify that Butler's daughter and grandchildren were the only other people in the apartment, and Butler said he could. There is nothing coercive in their interactions with Butler.

There was no subterfuge by the detectives. They had just decided to “focus” their investigation on defendant earlier in the day after their first visit to the apartment. They had no reason to believe defendant was actually present or lived there until well into the second visit. They did not even know the master bedroom was defendant’s.

Defendant claims the detectives’ attitude indicated they believed they did not need consent in order to search and seize. He draws this point from Detective Pometta’s later instruction to Detective Saika to retrieve Buzzetta’s laptop even if she denies her consent. This point, however, does not establish the detectives earlier coerced Butler to give her consent for them to search the bedrooms. There is simply no basis in the record to suggest the detectives would have entered defendant’s bedroom without Butler’s consent.

Defendant points to Detective Saika’s testimony that he did not have a clear recollection of Detective Pometta’s discussion with Butler and did not hear her vocalize consent. However, that testimony does not override or contradict Pometta’s testimony that Butler did in fact grant Pometta consent to enter the rooms. The trial court determined Pometta’s testimony was credible, and we do not review that finding.

Defendant also posits that perhaps Butler consented because Detective Pometta had his weapon drawn. There is no evidence that Pometta drew his weapon in Butler’s presence. When Pometta encountered defendant in the master bedroom, his weapon was drawn as he ordered defendant to the ground. Pometta could not recall if his weapon had been drawn prior to entering the room. Detective Saika testified Pometta did not have his weapon drawn when he walked down the hallway to the first bedroom. He later clarified that when he last saw Pometta in the hallway, he could not see whether Pometta had his gun drawn. Regardless, even on these facts it cannot be credibly argued that Pometta drew his weapon, much less exhibited it in some sort of threatening manner towards Butler before Butler gave her consent.

Defendant also faults the detectives for not specifically informing Butler she had a right to withhold her consent. But peace officers are not required to inform a person of

any right to withhold consent before obtaining it. (*United States v. Drayton* (2002) 536 U.S. 194, 206-207 [153 L.Ed.2d 242, 255].)

The detectives requested permission to search, Butler consented to the search, and substantial evidence supports the trial court's determination that the totality of circumstances indicates her consent was voluntary.

### III

#### *Seizure of the Laptop Computer*

The trial court determined Detective Saika seized Buzzetta's laptop computer once he indicated to Buzzetta he intended to take it. However, the court also determined defendant had no reasonable expectation of privacy in the laptop. Defendant claims the seizure of Buzzetta's laptop violated his Fourth Amendment rights because he had a reasonable expectation of privacy in the laptop. We disagree.

“[T]he application of the Fourth Amendment depends on whether the person invoking its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government action. [Citations.]” (*Smith v. Maryland* (1979) 442 U.S. 735, 740 [61 L.Ed.2d 220, 226].)

“The inquiry is substantive in nature, and consists of a subjective and an objective component. ‘[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i. e.*, one that has “a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” [Citation.] ‘In other words, the defendant must show that he or she had a subjective expectation of privacy that was objectively reasonable.’ [Citation.]” (*People v. Ayala* (2000) 23 Cal.4th 225, 255.)

There is no set formula for determining whether a defendant's expectation satisfies this test. Some of the factors to consider in the determination include: whether the

defendant has a property or possessory interest in the thing seized or the place searched, whether he has the right to exclude others from that place, whether he has exhibited a subjective expectation that it would remain free from governmental invasion, whether he took normal precautions to maintain his privacy, and whether he was legitimately on the premises. (*People v. Roybal* (1998) 19 Cal.4th 481, 507.)

Applying these authorities to the facts before us, we conclude the trial court correctly determined defendant did not have a reasonable expectation of privacy in Buzzetta's laptop computer. The laptop belonged to Buzzetta, not defendant. Although he had a profile and a password on the computer, he apparently had shared those with Buzzetta, as she checked his settings regularly regarding her photographs. Thus, he did not exclude Buzzetta from his profile, nor did he control his settings on the laptop.

Defendant analogizes his situation to that of an overnight houseguest, who the courts have held has a legitimate expectation of privacy in his host's home. (*Minnesota v. Olson* (1990) 495 U.S. 91, 98 [109 L.Ed.2d 85, 94].) But this analogy does not address defendant's expectation of privacy in Buzzetta's laptop computer. An overnight guest who shares a laptop computer with his host will not have a reasonable expectation of privacy in the shared laptop, particularly when he does not own or control the laptop. The Fourth Amendment's protection depends on the reasonable expectations of privacy held by people, not simply on the location of the item the people seek to keep private. (*Katz v. United States* (1967) 389 U.S. 347, 350-351 [19 L.Ed.2d 576, 581-582].)

The trial court correctly determined defendant did not have a reasonable expectation of privacy in Buzzetta's laptop computer.

#### IV

#### *Motion to Quash*

Defendant moved to quash the search warrant obtained by the detectives on July 3 and executed on July 7, 2009, claiming Detective Pometta deliberately or with reckless disregard for the truth made material misstatements of fact in his supporting affidavit

regarding Buzzetta's surrender of the laptop computer and the images Buzzetta showed Detective Saika. The trial court determined defendant did not make the required showing of deliberate or reckless falsity and denied the motion to quash. Defendant claims the trial court erred. We disagree.

A. *Additional background information*

In his affidavit in support of the search warrant, Detective Pometta stated the following: he directed Detective Saika to attempt to obtain the photo of defendant and Haley that Buzzetta said was stored on her digital camera and the laptop computer; Buzzetta voluntarily showed Saika the digital camera containing the photo of defendant and Haley; Saika spoke to Buzzetta about the laptop, and she claimed sole ownership but acknowledged defendant sometimes used the computer; without being prompted, Buzzetta opened the computer, turned it on, and showed Saika a folder containing numerous thumbnail images; she accessed one of the images and showed it to Saika; Saika recognized the nude photo to be consistent with child pornography; and as a result of these actions he collected the memory card from the digital camera and the laptop computer.

Defendant argues Pometta's affidavit contains the following factual misstatements: (1) Buzzetta voluntarily turned over her laptop computer to Detective Saika; (2) Buzzetta voluntarily showed him an image of a nude prepubescent female; and (3) the image Buzzetta showed to Saika was consistent with child pornography.<sup>2</sup>

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<sup>2</sup> In his affidavit, Detective Pometta declared: "Det. Saika later advised me he had consensually contacted N. Buzzetta at apartment # 104 and she had voluntarily shown him a digital camera containing a photo of both [defendant] and Haley []. Det. Saika further advised me that he also spoke to N. Buzzetta about the laptop computer. She claimed sole ownership of the computer, but acknowledged that [defendant] did sometimes use the computer. N. Buzzetta, without being prompted, then opened the computer, turned it on and showed Det. Saika a folder containing numerous thumbnail images. She then accessed one of the images and showed it to Det. Saika. According to

Defendant argues these statements were false because Buzzetta did not voluntarily give Saika her laptop or show him the image in her file until after Saika asked her for the computer, an act the trial court later determined constituted seizure of the computer. Defendant also claims the statement that the image Buzzetta showed Saika was child pornography was false because the image did not satisfy the statutory definition of child pornography.

Defendant further argues that once reference to the allegedly false statements regarding the seized laptop and its fruits are excised from the affidavit, there is insufficient probable cause to justify issuance of the search warrant. He thus claims all evidence obtained during the search must be suppressed. He also claims Detective Pometta's statements in his affidavit regarding characteristics of suspected child molesters and pornographers he has learned from experience and training do not provide probable cause to uphold the warrant.

B. *Analysis*

“[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and

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Det. Saika, the image clearly depicted a partially nude prepubescent female who appeared to be posing for a photo. Det. Saika stated he immediately recognized the nude photo to be consistent with child pornography. As a result, Det. Saika collected the memory card containing the photo of [defendant] and Haley [] from the digital camera as well as the laptop computer as evidence.”

the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.” (*Franks v. Delaware* (1978) 438 U.S. 154, 155-156 [57 L.Ed.2d 667, 672].) The allegations of falsehood must be accompanied by an offer of proof. (*Id.* at p. 171.)

The trial court determined defendant did not make the required preliminary showing, and we agree. Defendant did not prove by a preponderance of the evidence that Detective Pometta’s statements were intentionally false or made with reckless disregard of the truth. Regarding the first allegedly false statement, contrary to defendant’s claim, Pometta did not state in his affidavit that Buzzetta voluntarily turned over her laptop computer to Detective Saika. Rather, he stated Saika spoke with Buzzetta about the laptop and she, after showing Saika the file photo, gave it to him.

As to the second allegedly false statement, Detective Pometta did state Buzzetta voluntarily showed Detective Saika the file photo, and the facts indicate that is exactly what happened. Without being asked, Buzzetta opened the computer, turned it on, and began showing photos to Saika.

Defendant claims these two incidents were not voluntary, and thus Detective Pometta misrepresented them, because the trial court later determined the laptop had already been seized by Detective Saika by the time the two incidents occurred. However, at the time Pometta made his statements in his affidavit, there had been no such determination. Thus, there is no evidence that when made the statements were false or that Pometta included the statements in his affidavit in reckless disregard of the truth.

As to the third allegedly false statement regarding the nature of the photo Buzzetta showed Detective Saika, Pometta did not state the photograph met the statutory definition of child pornography set forth in Penal Code sections 311.11 and 311.4. Rather, he repeated what Saika had told him, that Saika recognized the photo as being consistent with child pornography. Nothing in Pometta’s statement was false or misrepresentative.

Because we conclude defendant failed to establish intentionally false or reckless statements by Detective Pometta, we do not reach his remaining arguments concerning the lack of probable cause when considered without the statements in Pometta's affidavit that defendant challenges.

V

*Evidence as Product of Arrest Without a Warrant*

Defendant contends his motion to suppress should have been granted because the detectives' second entry into Buzzetta's apartment when he was arrested violated *Payton v. New York* (1980) 445 U.S. 573 [63 L.Ed.2d 639] and *People v. Ramey* (1976) 16 Cal.3d 263, because the detectives allegedly did not have consent to be in the apartment and no exigent circumstances existed to justify the warrantless arrest inside his residence.

Here, there was actual consent. As explained above, Butler gave the detectives consent to enter the apartment and its bedrooms, and she told the detectives there was no one else in the apartment except for her daughter and grandchildren. As a result, defendant's arrest was pure happenstance and valid even though done without a warrant. The evidence seized following the valid arrest was thus validly acquired.

DISPOSITION

The judgment is affirmed.

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NICHOLSON, Acting P. J.

We concur:

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BUTZ, J.

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MURRAY, J.