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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

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THE PEOPLE,

Plaintiff and Appellant,

v.

TROY BARTON WALLERS,

Defendant and Appellant.

C065153

(Super. Ct. No.  
08F1747)

Defendant Troy Barton Wallers was convicted of four counts of lewd and lascivious conduct with a child under the age of 14 years, and two counts of annoying or molesting a child. He was placed on formal probation with the condition that he serve 365 days in jail.

On appeal defendant contends (1) there is insufficient evidence to support one of the convictions for annoying or molesting a child because the evidence does not establish that defendant harbored a sexual intent or motivation when he

encouraged the victim to take a pregnancy test; (2) the trial court erred in admitting the victim's prior consistent statements to her aunt; (3) the trial court erred in excluding statements made by the victim's father, upon learning of the victim's allegations, that the victim might have been lying to get attention; (4) we must conduct an in camera review of testimony and materials reviewed by the trial court to determine if the trial court abused its discretion; (5) the trial court erred in failing to instruct the jury with CALCRIM No. 302; (6) two of the probation conditions are unconstitutional; and (7) the trial court imposed a \$200 fine without authorization.

The People also appeal, contending the trial court erred in granting probation without considering the factors set forth in Penal Code section 1203.066, subdivision (d)(1).

In addition, our review of the record identified a discrepancy not raised by the parties. On May 18, 2010, the trial court orally pronounced that defendant was to serve 365 days in county jail, but the minutes indicated that defendant was to serve 360 days in jail.

We conclude (1) sufficient evidence supports the convictions for annoying or molesting a child because it is possible to infer from the evidence that defendant harbored a sexual intent or motivation when he encouraged the victim to take a pregnancy test; (2) the trial court did not err in admitting the victim's prior consistent statements; (3) the trial court did not err in excluding a statement made by the victim's father that the victim might have been lying, because

defendant did not establish that the statement was anything other than speculation; (4) our in camera review establishes that the trial court did not abuse its discretion; (5) although the trial court erred in failing to instruct the jury with CALCRIM No. 302, the error was harmless; (6) we agree with defendant's constitutional challenges to two of the probation conditions and we will modify the conditions; (7) we will vacate the \$200 fine and remand the matter to the trial court to allow it to exercise its discretion regarding whether to impose a fine based on applicable authority; (8) we will dismiss the People's appeal because it is taken from a nonappealable order; and (9) we will direct the trial court to correct the discrepancy in the record regarding jail time.

In all other respects, we will affirm the judgment.

#### BACKGROUND

The victim was 12 years old at the time of trial. During a five-year period until a few months before her 11th birthday, the victim often slept at her aunt's house while her parents were at work.

The victim's aunt was married to defendant and they had a three-year-old daughter together. Defendant also had three sons from a previous marriage.

Defendant's sons wrestled in school and liked to roughhouse at home. One of the boys would "pants" the others, meaning he would pull down their pants as a practical joke. One time, when defendant was alone with the victim, he pulled down her pants

and underwear and threw them in the laundry room. The victim immediately jumped up and retrieved her clothes.

On an evening in December 2007, when the victim's aunt was away visiting the victim's grandparents, defendant asked the victim to sleep in the same bed with him and kept asking until she agreed. She slept with defendant and his daughter. When the victim woke the next morning, her clothes were on, she was not in pain, and she did not remember anything happening that night. Her aunt had not returned home yet.

The victim took a shower with defendant's daughter. A short time later defendant joined them in the shower. He was naked and had an erection when he entered the bathroom. Defendant began washing the victim's hair and pressed his erection into her back. He had previously showered with her at least 10 times when her aunt was gone, and on two of those occasions his daughter was there. The victim told defendant she did not want to shower with him, but he continued doing so. The victim did not tell her father about what happened because she was afraid defendant would hurt her.

On another day, defendant and the victim were watching the animated series "The Family Guy." The victim was not permitted to watch that show at home because it was inappropriate. Two of the characters had their clothes off and were on top of each other having sex. Defendant said it was what they had done when they slept in the same bed. The victim did not know what he was talking about. Defendant told her to put her finger in her

mouth because that is what it felt like. She complied with his directive and it made her uncomfortable.

On February 2, 2008, the victim was alone with defendant and his daughter at defendant's house. Defendant handed the victim a pregnancy test and said it was a vitamin test. He instructed her to take it because her eyes appeared glossy. The victim knew it was a pregnancy test because she had seen one under her aunt's counter. She told defendant she was not going to take the test because she knew she was not pregnant. He replied that she should take it because he had done things to her in bed. The victim knew she could not be pregnant because she had not started having periods.

The victim was angry and tried to use her cell phone to call her dad. Defendant grabbed her arm and took her phone. He also hid the house phone. The victim advised defendant she was going to tell, but he said she was crazy and no one would believe her.

When the victim woke up the next morning, defendant was still asleep. Her phone had been returned and she texted her father that she needed to talk to him and her stepmother. According to the victim's father, the text said, "I need to speak to you alone and [stepmother]. It's an emergency. Please pick me up today."

Later that same day, while the victim was at Costco with her aunt, she told her aunt what defendant had been doing. The victim could not deal with it any more. When they returned

home, her aunt packed some things, they left, and the victim never returned.

The aunt testified that the victim was acting strange the day they went to Costco. That morning the victim had been adamant that she needed to contact her dad. The victim asked where her cell phone had come from because it was not there when she went to bed the night before. The aunt did not know what the victim was talking about or why she was making such a big deal about it. After they arrived at Costco, defendant left to run an errand. As soon as defendant was out of sight, the victim told the aunt she needed to talk to her.

The victim was acting very jittery and apprehensive, and said that when the aunt went out of town "weird things happened." For example, defendant slept in the same bed with his daughter and the victim. The victim said defendant took showers with them when they were running late "and then things happened." On one occasion when defendant slept in the same bed with the victim, the next morning he asked if she remembered anything happening. The victim did not remember anything happening, but defendant acted really weird. Defendant told the victim he was concerned because he thought she was his wife in the middle of the night, and wanted to know if the victim remembered anything about it.

The victim said defendant never kissed her, but had been acting strange toward her. Defendant showered with the victim when nobody else was around and she felt uncomfortable about it. On one occasion in the shower the victim felt something pressing

up against her, but did not know what it was. Her aunt said it was a small shower and the thought of three people in there was a "bit much." The victim also told her aunt that the night before the trip to Costco, defendant tried to get her to take a pregnancy test. Defendant said the test would check her iron and tell her if she was okay.

When they arrived home, the aunt told the girls to stay in the car. The aunt went into the house, gathered a few items, and then they left. The aunt did not return to the house for several days and did not discuss the matter with defendant.

After meeting with an investigator, the aunt agreed to telephone defendant. He was rude and said he would not talk to her because he thought she was recording the call. It was the first time she had spoken to him since coming home from Costco. At the investigator's request, she agreed to meet with defendant and wear a recording device so the investigator could listen to the conversation. The aunt offered to meet defendant at a Starbucks across from her office, but he said he wanted to meet in the open. She agreed to go to a park, but defendant kept changing the meeting location, saying he did not want any people around. He said he thought she was recording him and trying to get him to admit something. Defendant was "skittish" and would not answer any questions. He was paranoid and pointed out people that he thought were the police.

The aunt confronted defendant about the showers. Defendant said he had taken tons of showers with the victim over the years and had bathed her since she was small. He could not figure out

why the aunt thought it was a big deal. The aunt testified this was the first time defendant told her he had taken showers with the victim. She asked him about the pregnancy test and he said he did not know what she was talking about. Defendant never stated that the victim had been coming on to him.

Prior to trial, defendant told the aunt that if anything happened to him he would "slaughter" her and her entire family because he did not do anything wrong. He also told her he was not going to jail and he would rather "take everybody with him."

The victim's grandfather (the aunt's father) testified that on February 5, 2008, defendant surprised him outside his place of employment at a veteran's home. Defendant was unkempt, combative and waving his arms in the air. Defendant asked the grandfather what he "knew about this." The grandfather knew that the victim had alleged defendant molested her, but told defendant he knew very little.

Defendant told the grandfather they were saying defendant had sex with the victim or did something wrong. Defendant denied having any inappropriate contact with the victim, but when the grandfather said he heard defendant had taken showers with the victim, defendant's attitude changed. In a bragging manner, defendant said, "Well, I did. I took 50 showers with her naked. Fifty." Defendant called the victim a slut and said she had been coming on to him in a sexually flirtatious manner for a long time. The grandfather never saw the victim behave in that manner. Defendant also made a comment about buying a

pregnancy test and giving it to the victim, which the grandfather thought was so bizarre it had to be true.

Defendant asked the grandfather where they were hiding the aunt, and threatened to kill the aunt and the grandfather's wife. The grandfather told defendant the conversation was over and asked him to leave.

Redding Police Officer Kristen Fredrick, an investigator in the child abuse and sexual assault division, explained that child molesters will groom children in an effort to desensitize them to sexuality prior to an age when they would be curious about those things themselves. Officer Fredrick spoke with the victim about the allegations in the case, and the victim told her there was an instance when defendant was washing her hair in the shower and she felt his "thing." The victim later clarified that she was referring to defendant's penis, which was hard and touched her on the lower back.

Defendant's three sons testified at trial. They all wrestled in school and did so around the house, too. The victim would join in and seemed to enjoy it. Every once in awhile, they would "pants" each other as a joke. One of the brothers "pantsexed" the victim once and it seemed like she was having fun and was not offended. Everyone "pretty much knew" that defendant sometimes showered with his daughter and the victim. The victim did not seem uncomfortable about it or afraid of defendant.

Defendant testified in his own defense. He denied having any sexual intent toward the victim, whom he considered to be

like his own child. He had known the victim for nearly 11 years and had played an active role in helping to raise her.

Defendant admitted showering with the victim, whom he had bathed since she was small. He remembered the aunt being in Napa in December 2007, and explained that he was responsible for getting the children ready in the morning. The victim had difficulty washing herself thoroughly and needed the assistance of an adult. Defendant was only in the shower with her for 15 seconds. He got soap all over himself while washing the victim's hair, stripped off his underwear, rinsed off and got back out. His penis could have accidentally brushed against the victim, but he did not have an erection.

Defendant admitted asking the victim to take a pregnancy test. He testified she had been acting increasingly inappropriate with him, "mooning" him and purposefully walking in on him when he was showering, using the bathroom or changing clothes. He presented her with the pregnancy test in order to "scare her" into changing her behavior. He knew her mother became pregnant by someone other than her father and he did not want her to end up that way. The victim reacted negatively to his scare tactics, began crying and said, "We'll see." She tried to use her cell phone but defendant grabbed it away from her and instructed her to go to bed.

The next day, defendant found out about the victim's allegations against him and learned he was going to be arrested. Defendant tried to contact the aunt and during their subsequent meeting in the park, he denied the allegations against him.

Defendant admitted visiting the grandfather but stated he did not threaten the grandfather or the grandfather's wife.

A jury convicted defendant of four counts of lewd and lascivious conduct with a child under the age of 14 years, and two counts of annoying or molesting a child. (Pen. Code, §§ 288, subd. (a), 647.6, subd. (a).)<sup>1</sup> The trial court sentenced defendant to 12 years in prison, suspended execution of sentence for a period of 10 years, and placed him on formal probation with the condition that he serve 365 days in jail.

#### DISCUSSION

##### I

Defendant contends there is insufficient evidence to support one of his convictions for annoying or molesting a child. He points out that one of the convictions was based on his request that the victim take a pregnancy test. Defendant does not dispute that encouraging the victim to take a pregnancy test would irritate a normal person; rather, he maintains the evidence is insufficient to establish that he did so with a sexual motivation or intent. We disagree.

In a challenge to the sufficiency of the evidence, we review the record to determine whether the evidence is such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Bean* (1988) 46 Cal.3d 919, 932.) Although a jury must acquit a defendant if the

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

circumstantial evidence is susceptible of two interpretations, once the jury is convinced of defendant's guilt beyond a reasonable doubt, reversal of the judgment is not warranted merely because the circumstances might also be reconciled with a contrary finding. (*Id.* at pp. 932-933.)

Section 647.6, subdivision (a) states a misdemeanor offense for every person who "annoys or molests any child under 18 years of age." Defendant's conduct must be such that a normal person would unhesitatingly be irritated by it and it must be motivated by an unnatural or abnormal sexual interest in the victim. (*People v. Lopez* (1998) 19 Cal.4th 282, 289.) The words "annoy" and "molest" in section 647.6, subdivision (a) are synonymous; they generally "refer to conduct designed to disturb, irritate, offend, injure, or at least tend to injure, another person. [Citations.]" (*People v. Lopez, supra*, 19 Cal.4th at p. 289.)

While section 647.6 is often applied to incidents of explicit sexual conduct, it may also apply to conduct that is more ambiguous and not overtly sexual. (*People v. Kongs* (1994) 30 Cal.App.4th 1741, 1749-1750.) For example, it applied when the defendants offered to give the child victims a ride in their car, but refused to let the child victims out of the car after driving a short distance (*In re Sheridan* (1964) 230 Cal.App.2d 365, 370-371); where the defendant repeatedly drove alongside a 12-year-old girl riding her bicycle, stared at her and made gestures toward her with his hand and lips (*People v. Thompson* (1988) 206 Cal.App.3d 459, 461-462); and where the defendant took photographs of young girls while "surreptitiously aiming

his camera up a child's dress rather than photographing her face or entire clothed body" (*People v. Kongs, supra*, 30 Cal.App.4th at p. 1751).

A sexual intent or motivation may be inferred from the circumstances, including defendant's extrajudicial statements, other acts of lewd conduct, the relationship of the parties, coercion or deceit to obtain the victim's cooperation, offering a reward for cooperation, and attempts to avoid detection. (*People v. Martinez* (1995) 11 Cal.4th 434, 445; *In re Jerry M.* (1997) 59 Cal.App.4th 289, 299.)

Here, the evidence could support different inferences. One possible inference is that defendant asked the victim to take a pregnancy test because he was afraid a pregnancy would expose his criminal conduct. But another possible inference is that defendant asked the victim to take the pregnancy test in an effort to continue his criminal conduct. Such an inference supports the jury's finding that defendant harbored a sexual intent or motivation when he asked the victim to take the pregnancy test.

Defendant's other conduct with the victim supports the inference that defendant had a sexual interest in her. He told her they had sex, and made her insert her finger in her mouth while telling her that is what sex was like. When defendant's wife was absent, he slept with the victim, removed her pants and underwear while wrestling with her, and showered with her. During one showering incident defendant pressed his erection against the victim's back. These circumstances support the

jury's conclusion that defendant was motivated by an abnormal sexual interest in the victim when he encouraged her to take the pregnancy test.

## II

Defendant next contends the trial court erred in admitting the aunt's testimony (concerning what the victim told her about defendant's misconduct) under the prior consistent statement exception to the hearsay rule.

A prior statement consistent with a witness's trial testimony is admissible only if either (1) a prior inconsistent statement was admitted and the consistent statement predated the inconsistent statement, or (2) an express or implied charge is made that the testimony is recently fabricated or influenced by bias or other improper motive, and the consistent statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen. (Evid. Code, §§ 791, 1236.)

During his cross-examination of the victim, defense counsel attempted to establish that the victim had fabricated the charges by (1) establishing discrepancies between what she told the investigator about the shower incident and her trial testimony, and (2) questioning why she did not immediately tell her father about defendant's alleged sexual misconduct. Thereafter, the trial court granted the prosecutor's motion to permit the aunt to testify regarding the victim's prior consistent statements to her, and overruled defendant's subsequent objections to particular portions of the aunt's testimony.

Although cross-examination may imply a charge that the testimony is recently fabricated or biased (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1209), defendant maintains that the victim's prior consistent statements to the aunt were admissible only to the extent they concerned any discrepancy in the victim's testimony, which pertained to the amount of time defendant's penis brushed up against her back. Defendant adds that the consistent statements were nevertheless inadmissible because the prosecution failed to show such statements were made *before* the subsequent bias, motive for fabrication or other improper motive arose. (Evid. Code, § 791, subd. (b); *People v. Ainsworth* (1988) 45 Cal.3d 984, 1014.) Defendant claims the prosecution failed to demonstrate how defense counsel's cross-examination of the victim implied that the victim acquired a motive or bias *after* the prior statements were made because, in defendant's view, the victim already had a bias or motive to lie at the time she revealed defendant's alleged misconduct to the aunt.

Relying on *People v. Gentry* (1969) 270 Cal.App.2d 462 (*Gentry*), the People maintain that the trial court did not abuse its discretion in admitting the testimony.

In *Gentry*, the court articulated an exception to the Evidence Code section 791 requirement that the prior consistent statement must have been made before an improper motive is alleged to have arisen. (*Gentry, supra*, 270 Cal.App.2d at p. 473.) "Different considerations come into play when a charge of recent fabrication is made *by negative evidence* that the

witness did not speak of the matter before when it would have been natural to speak," and the witness's silence is alleged to be inconsistent with trial testimony. (*Ibid.*; original italics.) In this scenario, the evidence of the consistent statement becomes proper because "the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story.'" (*Ibid.*; see also *People v. Manson* (1976) 61 Cal.App.3d 102, 143.)

Here, defendant tried to establish that the victim was fabricating the story by the fact she did not tell her father about the incidents immediately after they occurred. Under the rationale articulated in *Gentry*, however, the aunt's statements were admissible to show that the victim told her aunt everything immediately after the pregnancy test incident.

But even if there had been error in admitting some of the prior consistent statements, the error was harmless. Defendant's testimony and other properly admitted evidence demonstrated that he admitted wrestling with the victim; sleeping with her in the same bed and showering with her while naked and his wife was away; and trying to get the victim to take a pregnancy test. The critical issue was his sexual motivation or lewd intent, which could be inferred from his conduct. The prior consistent statements did not affect this determination. It is not reasonably probable the jury would have reached a different determination if the content of the

victim's statements to the aunt had been excluded. (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.)

### III

Defendant also contends the trial court erred in excluding evidence of the victim's father's reaction upon learning of her accusations against defendant.

Before trial, the People moved to exclude evidence (contained in a police report) of statements made by the victim's father upon learning of the victim's allegations against defendant. According to defense counsel, father told the police that he initially believed the victim could be making it up because the father and his wife were going through a divorce and perhaps the victim was doing this to get attention. The trial court said that would be inadmissible speculation regarding the daughter's motivation and also hearsay. Defense counsel replied, "I need to think about that, but you are right."

Thereafter the trial court ruled, "I am going to grant the Prosecution's motion to exclude any testimony regarding the victim's father's state of mind unless counsel can demonstrate to the Court that it is, in fact, admissible evidence outside the presence of the jury." Defense counsel never made any such showing.

On appeal, defendant argues that the statements in the police report may have been hearsay, but the trial court's ruling precluded him from questioning the father directly regarding whether his daughter may have been lying.

Evidence Code section 702, subdivision (a) provides:  
"Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." Evidence Code section 702 requires that a witness at trial have "a present recollection of an impression derived from the exercise of the witness's own senses." [Citations.] (*People v. Lewis* (2001) 26 Cal.4th 334, 356; *People v. Tatum* (2003) 108 Cal.App.4th 288, 297-298.)

The victim's father was not present during the criminal activity and did not have personal knowledge of defendant's conduct with the victim. The father was not in a position to know whether the events occurred or not and thus could not properly proffer a motive for the victim to lie based on his knowledge of her behavior. (Compare, *People v. Chatman* (2006) 38 Cal.4th 344, 382, 382 [there is no prohibition on questions regarding other witnesses' credibility, where "a percipient witness to the events at issue has personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately"].)

Furthermore, defendant did not follow up on the trial court's suggestion that the evidence would be admissible if he demonstrated why the father's comment about the victim's potential motive to lie was not simply conjecture. For example, defense counsel did not make an offer of proof that the victim's father had personal knowledge of specific instances in which the

victim lied in order to get attention during her parents' divorce. Under the circumstances, defendant failed to establish that the father's reaction to learning the news was anything more than a reflection of his own state of mind, and only speculation regarding the victim's credibility.

Defendant contends defense counsel's omission demonstrates ineffective assistance of counsel. But we cannot say that defense counsel did not have a tactical reason for failing to pursue the matter. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) For example, he may have learned that the victim's father now believed his daughter was telling the truth and simply made the statement in question while he was in shock and hoping for a benign explanation. If so, then attempting to introduce the evidence would lead to the father vouching for the victim's credibility, which would not be helpful to the defense.

In any event, for the reasons expressed previously in part II of this opinion, defendant was not prejudiced by the omission of the father's statements upon learning of the victim's accusations.

#### IV

In addition, defendant asks that we conduct an in camera review of materials that the trial court reviewed in camera, pertaining to the victim's conversation with a counselor. According to an investigation report, the victim had been meeting with a counselor to help her deal with her parents' divorce. During the course of her therapy sessions, she revealed instances of sexual misconduct by defendant. Defendant

filed a motion seeking discovery of the victim's psychological records asserting that they contained exculpatory information, potential impeachment and likely contained the opinions of the counselor.

The People filed a motion seeking to preclude disclosure of such information under the victim/sexual assault counselor privilege codified in Evidence Code section 1035.4. The prosecutor informed the trial court that the victim's counselor, Dr. Robert McKinnon, would assert the privilege if called to testify.

In *Davis v. Alaska* (1974) 415 U.S. 308 [39 L.Ed.2d 347], the United States Supreme Court held a defendant cannot be precluded at trial from cross-examining for bias a crucial witness for the prosecution, even though the questioning calls for information made confidential by state law. (*Id.* at p. 320, [39 L.Ed.2d at p. 356].) But *People v. Hammon* (1997) 15 Cal.4th 1117 (*Hammon*) held that a defendant has no pretrial right to discovery of a victim's psychotherapy records in order to uncover information to use to challenge the victim's credibility. (*Hammon, supra*, 15 Cal.4th at pp. 1119, 1128.) Thus, under *Hammon*, psychiatric material is generally undiscoverable prior to trial (*People v. Gurule* (2002) 28 Cal.4th 557, 592), but *Hammon* "involved only the question of pretrial disclosure of information" and "did not purport 'to address the application at trial of the [confrontation clause] principles articulated in *Davis* [*v. Alaska* (1974)] 415 U.S. 308 [94 S.Ct. 1105, 39 L.Ed.2d 347].' [Citation.]" (*Alvarado v.*

*Superior Court* (2000) 23 Cal.4th 1121, 1137, fn. 7; original italics.)

In the present case, the trial court considered the relevant law, observed the matter was "now at trial" rather than the pretrial stage, and undertook an in camera review of the victim's counseling records. Following its review, the trial court disclosed one item from the counseling records that was no longer confidential because Dr. McKinnon had disclosed it to the victim's father in a letter.

Thereafter, the People objected to defendant calling Dr. McKinnon as a witness because his testimony involved a confidential communication from the victim. Defendant sought to discern if there was conflicting evidence regarding whether she reported any inappropriate touching to Dr. McKinnon. The trial court held an Evidence Code section 402 hearing outside the presence of the jury to determine what the victim said about her interactions with defendant, and whether she said anything more than what was contained in the portion of the notes the trial court had released to defendant already. The trial court questioned Dr. McKinnon, concluded what the victim told her counselor was consistent with what she told others, and ordered Dr. McKinnon's testimony at the Evidence Code section 402 hearing sealed.

Defendant asks that we review Dr. McKinnon's notes and testimony to ensure that the trial court appropriately balanced defendant's due process rights against the victim's privacy rights.

The People now contend "the trial court reviewed the materials and questioned Dr. McKinnon. There is no justification to repeat that process at the appellate level." The People argue defendant "has not shown good cause to justify again reviewing the victim's confidential and constitutionally protected records."

We disagree. The good cause is defendant's statutory right to post-judgment appellate review of trial proceedings (§ 1237), to ensure that he received his due process right to a fair trial, including the right to cross-examine witnesses and impeach their credibility. (*Davis v. Alaska, supra*, 415 U.S. at p. 320 [39 L.Ed.2d at p. 356]; cf. *People v. Mooc* (2001) 26 Cal.4th 1216, 1228 [in a *Pitchess* motion to access confidential law enforcement personnel records to the extent they contain material that is exculpatory or has impeachment value, the defendant is entitled to meaningful appellate review of the trial court's decision not to disclose the records].) Absent our review of the trial court's decision, there is no way to ensure that the trial court did not abuse its discretion in balancing the victim's right to privacy against defendant's constitutional right of confrontation and cross-examination.

Accordingly we have reviewed the sealed in camera testimony of Dr. McKinnon. Having done so, we conclude the trial court did not abuse its discretion. However, we cannot review Dr. McKinnon's sealed therapy notes because defendant failed to designate them as part of the record on appeal. It is the appellant's burden to provide an adequate record to review his

contention. Absent such a record, the matter is forfeited.  
(*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.)

V

Defendant further contends that given the conflicting testimony regarding whether defendant committed any of the acts of sexual misconduct, the trial court erred in failing to instruct the jury sua sponte with CALCRIM No. 302, which provides: "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

CALCRIM No. 302 must be given as an instruction in every criminal case where there is conflicting testimony. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885 [discussing CALJIC No. 2.22, the predecessor to CALCRIM 302]; *People v. Anderson* (2007) 152 Cal.App.4th 919, 939.) Failure to give the instruction is prejudicial, however, only where there is a reasonable likelihood that the error caused juror misunderstanding. (*People v. Snead* (1993) 20 Cal.App.4th 1088, 1097 (*Snead*), overruled on other grounds in *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 181.) In applying this standard, we consider the entire record and the totality of the instructions

given by the trial court. (*Snead, supra*, 20 Cal.App.4th at p. 1097.)

In *Snead, supra*, 20 Cal.App.4th at pages 1097-1098, the defendant raised a similar argument. While the court in *Snead* agreed it was error not to instruct the jury with CALJIC No. 2.22, it found the error harmless because the trial court had instructed the jury with other standard instructions that provided guidance for the jury in its consideration and evaluation of the evidence.

Here, the trial court instructed the jury with the CALCRIM equivalents of the CALJIC instructions given in *Snead* (CALJIC Nos. 2.00, 2.20, 2.21.1, 2.21.2, 2.27 & 2.80). (*Snead, supra*, 20 Cal.App.4th at p. 1097.) The trial court instructed the jury with CALCRIM Nos. 220 ("Reasonable Doubt"), 222 ("Evidence"), 223 ("Direct and Circumstantial Evidence: Defined"), 224 ("Circumstantial Evidence: Sufficiency of the Evidence"), 226 ("Witnesses"), and 301 ("Single Witness's Testimony"). CALCRIM No. 226 stated in relevant part: "Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently."

Defendant contends these instructions did not cure the error because they did not advise the jury not to simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses.

The record reflects that the number of witnesses testifying for and against defendant was fairly even with respect to the testimony he submits was conflicting. This undermines his assertion that he was prejudiced by the absence of CALCRIM No. 302's directive that the jurors refrain from making credibility determinations by counting the number of witnesses on each side. Moreover, the prosecutor did not argue in his closing argument that more witnesses supported conviction than the number who opposed it. Because it is not reasonably probable that the jury would have reached a different result had CALCRIM No. 302 been given, the trial court's error in failing to give the instruction is harmless. (*Snead, supra*, 20 Cal.App.4th at p. 1097; *People v. Watson* (1956) 46 Cal.2d 818, 831.)

## VI

Defendant asserts constitutional challenges to two of his probation conditions.

### A

One of the conditions of defendant's probation is that he "not . . . be in places where minors congregate, or school and other locations especially designated for use by minors unless approved by the Probation Officer." Relying on *In re Sheena K.* (2007) 40 Cal.4th 875 (*Sheena K.*), defendant contends the condition is unconstitutionally vague and overbroad because it does not include a knowledge requirement; i.e., that he know the place is one where minors congregate.

*Sheena K., supra*, 40 Cal.4th 875 held that a probationary condition prohibiting the probationer from associating with

anyone who is a member of a specified class of persons, without a requirement that the probationer know the person is a member of the class, is unconstitutionally vague because it did not notify the probationer in advance with whom she was precluded from associating. (*Id.* at pp. 889-892.)

While the Supreme Court in *Sheena K.* did not specifically decide whether the condition challenged here was unconstitutionally vague, the principles announced therein compel the conclusion that the condition before us does not pass constitutional muster under the vagueness doctrine. (*People v. Turner* (2007) 155 Cal.App.4th 1432, 1435-1436 [probation condition precluding associating with someone under the age of 18 was unconstitutional absent a knowledge requirement].) Although there are many places where it is obvious that minors congregate (e.g., a playground), there are others that might not be readily known as such to the casual observer. It is foreseeable that young people might "hang out" at a place that is not "especially designated for use by minors" and that defendant might be unaware of this fact. Nonetheless, if he unwittingly went to this location, he would be in violation of his probation condition.

After the parties submitted their briefs, this court filed *People v. Patel* (June 21, 2011) 196 Cal.App.4th 956 (*Patel*), as modified on denial of rehearing on July 19, 2011. *Patel* held that this court will no longer entertain this recurring issue on appeal, and construed every probation condition proscribing

presence, possession, association or other similar action to include the requisite knowledge. (*Id.* at pp. 960-961.)

Accordingly, we will modify the probation condition to state that defendant cannot be in places where he knows minors congregate, or school and other locations he knows are especially designated for use by minors without the approval of his probation officer. (*Sheena K., supra*, 40 Cal.4th at p. 892 [an acceptable remedy when such a condition is challenged on appeal is for the appellate court to insert the qualification that defendant have knowledge].)

B

Defendant also challenges a probation condition that he "shall not be on any school campus or within a 200 yard radius of any school campus unless enrolled or with prior administrative permission from school authorities." He contends "this condition is overbroad because it is not limited to schools designated for minors. As worded, the condition prohibits [defendant] from being within 200 yards of an adult university, which would bear no relation to the child sex offenses of which he was convicted." We agree.

In granting probation, the trial court has broad discretion to impose conditions that foster rehabilitation and protect public safety. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) However, a condition of probation which forbids noncriminal conduct must be reasonably related to the crime of which the defendant was convicted or to future criminality. (*Id.* at p. 1121.)

The challenged probation condition is overbroad because it prohibits defendant from being on any school campus, which potentially includes a wide spectrum of educational establishments such as colleges, universities and graduate schools. Defendant's presence on such campuses is unrelated to his crime or to future criminality because young children do not attend such schools, defendant's crimes all involved sexual misconduct with a 10-year-old child, and none of the misconduct occurred on college campuses. Under the circumstances, there is no rational reason to preclude him from being within 200 yards of a college campus. Accordingly, we will modify the condition to limit the prohibition to schools designated for minors.

#### VII

The trial court ordered defendant to pay a \$200 fine pursuant to section 1296b. The fine was increased to \$720 when penalty assessments were added. Defendant contends the fine is not authorized and must be vacated because there is no section 1296b.

The People agree there is no section 1296b, but contend the fine is authorized under section 672, which states: "Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding one thousand dollars (\$1,000) in cases of misdemeanors or ten thousand dollars (\$10,000) in cases of felonies, in addition to the imprisonment prescribed." The People contend the matter

should be remanded to permit the trial court to indicate the fine was imposed under section 672. The People are correct.

The Penal Code authorizes the trial court to impose payment of two types of fines as a condition of probation. First, section 1202.4, subdivision (m) mandates that payment of a restitution fine be made a condition of probation. (*People v. Hart* (1998) 65 Cal.App.4th 902, 905.) Second, where the defendant is convicted of a crime for which there is no statutorily imposed fine, the trial court has the discretion to impose a fine as a condition of probation. (§§ 672, 1203.1, subd. (a)(1); *People v. Christensen* (1969) 2 Cal.App.3d 546, 549.)

Under the circumstances, we will vacate the \$200 fine and remand the matter to the trial court to allow it to exercise its discretion regarding whether to impose a fine based on applicable authority.

#### VIII

The People also appeal, asserting that the trial court erred in granting probation because it did not consider the conditions set forth in section 1203.066, subdivision (d)(1) (hereafter section 1203.066(d)(1)).

Section 1203.066, subdivision (a) lists nine factors in which a child molester is ineligible for probation, none of which apply to defendant. Section 1203.066(d)(1) provides that if a person is convicted of a violation of section 288 or 288.5 and the factors listed in section 1203.066, subdivision (a) are

not pleaded or proven, then "probation may be granted only if" certain enumerated conditions are met.<sup>2</sup>

Here, none of the factors in section 1203.066, subdivision (a) were pleaded or proven at trial, so defendant was not expressly ineligible for probation. However, he was eligible for probation only if the conditions in section 1203.066(d)(1) were met. The trial court did not address the conditions in section 1203.066(d)(1) and the People did not object to the trial court's omission at the sentencing hearing. A few weeks later, the People asked the trial court to reconsider the

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<sup>2</sup> At the time defendant committed the offenses, section 1203.066(d)(1) stated: "(1) If a person is convicted of a violation of Section 288 or 288.5, and the factors listed in subdivision (a) are not pled or proven, probation may be granted only if the following terms and conditions are met: [¶] (A) If the defendant is a member of the victim's household, the court finds that probation is in the best interest of the child victim. [¶] (B) The court finds that rehabilitation of the defendant is feasible and that the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child molestation immediately after the grant of probation or the suspension of execution or imposition of sentence. [¶] (C) If the defendant is a member of the victim's household, probation shall not be granted unless the defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by his or her return. While removed from the household, the court shall prohibit contact by the defendant with the victim, with the exception that the court may permit supervised contact, upon the request of the director of the court-ordered supervised treatment program, and with the agreement of the victim and the victim's parent or legal guardian, other than the defendant. [¶] (D) The court finds that there is no threat of physical harm to the victim if probation is granted." (Stats. 2006, ch. 538, § 506, p. 4379.)

sentence, arguing that it was illegal because the trial court did not consider the conditions in section 1203.066(d)(1) before granting probation.

The trial court ruled that section 1203.066(d)(1) did not apply unless defendant's conduct fell within the section 1203.066, subdivision (a)(1) factors, but the subdivision (a)(1) conduct was not pleaded or proven. Only then did the trial court have to make the findings under subdivision (d)(1) before granting probation. Because defendant's conduct did not fall within any of the factors in subdivision (a)(1), section 1203.066(d)(1) did not apply.

The People contend the trial court's interpretation of section 1203.066(d)(1) is erroneous, and that a grant of probation without a finding that the enumerated conditions are met is unauthorized. According to the People, section 1203.066(d)(1) expressly states that if a defendant is convicted of violating section 288 or 288.5 under circumstances where the subdivision (a)(1) factors are not pleaded or proven, then probation may be granted only if the trial court finds that the conditions in section 1203.066(d)(1) are met. There is no requirement that the defendant's conduct fall within any of the factors listed in section 1203.066, subdivision (a)(1) before section 1203.066(d)(1) applies. Thus, the People argue the matter must be remanded for the trial court to make the requisite findings.

The People maintain that their appeal is permissible under section 1238, which states: "(a) An appeal may be taken by the

people from any of the following: [¶] . . . [¶] (10) The imposition of an unlawful sentence, whether or not the court suspends the execution of the sentence, except that portion of a sentence imposing a prison term which is based upon a court's choice that a term of imprisonment (A) be the upper, middle, or lower term, unless the term selected is not set forth in an applicable statute, or (B) be consecutive or concurrent to another term of imprisonment, unless an applicable statute requires that the term be consecutive. As used in this paragraph, 'unlawful sentence' means the imposition of a sentence not authorized by law or the imposition of a sentence based upon an unlawful order of the court which strikes or otherwise modifies the effect of an enhancement or prior conviction. . . ."

Defendant counters by citing section 1238, subdivision (d), which states: "Nothing contained in this section shall be construed to authorize an appeal from an order granting probation. Instead, the people may seek appellate review of any grant of probation, whether or not the court imposes sentence, by means of a petition for a writ of mandate or prohibition which is filed within 60 days after probation is granted. The review of any grant of probation shall include review of any order underlying the grant of probation."

Although we agree with the People that the trial court misinterpreted section 1203.066(d)(1), defendant is correct that the People cannot raise this claim in an appeal from the judgment. According to section 1238, subdivision (d) and

decisions of the California Supreme Court, the People cannot appeal an order granting probation; they must seek review via a petition for a writ of mandate or prohibition filed within 60 days after probation is granted. (*People v. Alice* (2007) 41 Cal.4th 668, 682; *People v. Douglas* (1999) 20 Cal.4th 85, 93.) “The patent purpose of [section 1238, subdivision (d)] is to provide a means for review of assertedly illegitimate probation orders while avoiding the unfairness that could result to a defendant who, while the People’s appeal from his or her probation grant is prepared, briefed, heard and decided, might serve all or a substantial part of the probationary period, only to be resentenced to a full state prison term if the People’s appeal is ultimately successful. The statute limits review to writ petitions because such procedures are assumed to operate more quickly than an appeal. [Citations.]” (*People v. Douglas, supra*, 20 Cal.4th at pp. 92-93, fn. omitted.)

“To serve this purpose, Penal Code section 1238, subdivision (d) prohibits not only appeals from orders granting probation, but also ‘prohibits appeals that, in substance, attack a probation order, even if the order explicitly appealed from may be characterized as falling within one of the authorizing provisions of subdivision (a). Thus, if the People seek, in substance, reversal of the probation order, the appeal is barred by subdivision (d) however they may attempt to label the order appealed from. [Citation.]’” (*People v. Alice, supra*, 41 Cal.4th at p. 682, quoting *People v. Douglas, supra*, 20 Cal.4th 85, 93.)

In the present case, the People are attacking the probation order as unauthorized absent certain findings by the trial court. They contend the matter must be remanded for the trial court to make the requisite findings. Of course, if the findings cannot be made, then the trial court cannot grant probation. This is, in essence, an attack on the grant of probation. The People appealed from a nonappealable order rather than seeking writ review as statutorily mandated. Under the circumstances, their appeal is dismissed. (See *People v. Bailey* (1996) 45 Cal.App.4th 926, 930 ["By enacting section 1238, subdivision (d), using language as clear and unambiguous as is ever encountered in statutes, the Legislature divested the People of the right to appeal an order granting probation and limited appellate jurisdiction over such orders to the more expedited writ review"].)

#### IX

Our review of the record identified a discrepancy not raised by the parties. On May 18, 2010, the trial court orally pronounced that defendant was to serve 365 days in county jail, but the minutes indicated that defendant was to serve 360 days in jail. We generally presume that conflicts between a reporter's transcript and a clerk's transcript are clerical in nature; we resolve conflicts in favor of the reporter's transcript unless the particular circumstances dictate otherwise. (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 249.) Here, there is no indication the reporter's transcript is

unreliable. We will direct the trial court to correct the record on remand.

DISPOSITION

The People's appeal is dismissed. Defendant's first challenged probation condition is modified to read: "Defendant is not to be in places where he knows minors congregate, or school and other locations he knows are especially designated for use by minors unless approved by the Probation Officer." Defendant's second challenged probation condition is modified to read: "Defendant is not to be on or within 200 yards of the campus of any school that he knows is one primarily designated for minors under the age of 18 years old unless given prior administrative permission from school authorities." The \$200 fine is vacated and the matter remanded to the trial court to allow it to exercise its discretion regarding whether to impose a fine based on applicable authority. The trial court shall correct the record to accurately reflect the number of days that defendant was ordered to serve in jail. As modified, the judgment is affirmed.

MAURO, J.

We concur:

HULL, Acting P. J.

ROBIE, J.