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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT RAYS BORYS,

Defendant and Appellant.

C066530

(Super. Ct. No. P08CRF0263)

A jury found defendant, Robert Rays Borys, guilty of molesting the daughter of his girlfriend continuously between the ages of nine and 15. He was convicted of the following: one count of continuous abuse of a child (Pen. Code, § 288.5);¹ one count of forcible lewd acts on a child under 14 years old (§ 288, subd. (b)); 11 counts of lewd conduct with a child under 14 (§ 288, subd. (a)); four counts of sexual penetration of a child under 14 by a person more than 10 years older (§ 289, subd. (j)); three counts of

¹ Undesignated statutory references are to the Penal Code in effect at the time of defendant's crimes.

oral copulation of a child under 14 by a person more than 10 years older (§ 288a, subd. (c)(1)); two counts of lewd conduct on a child under 14 by a person more than 10 years older (§ 288, subd. (c)(1)); three counts of unlawful sexual intercourse with a minor under 16 by a person older than 21 (§ 261.5, subd. (d)); and one count of sodomy of a child under 16 (§ 286, subd. (b)(2)). The trial court sentenced defendant to a 65-year state prison term.

On appeal, defendant contends the trial court violated his rights to a fair trial and present a defense by excluding the evidence of the victim's sexual history. He also claims that the trial court violated his rights to jury trial and a fair trial by failing to conduct an adequate investigation into possible juror bias.

We affirm.

FACTUAL BACKGROUND

Doe's Testimony

Jane Doe was born in January 1993. She was 17 at the time of the trial. Defendant had known Doe's mother P.H. for many years and began dating her when Doe was eight. P.H. and Doe moved into a duplex on Canal Street in Placerville when Doe was nine. The duplex was small, with only one bedroom and one bathroom. Doe and P.H. slept in the bedroom's two beds.

According to Doe, defendant visited them almost every day when they lived on Canal Street. On occasion, he would spend the night and shared a bed with P.H. Defendant had family dinners with Doe and P.H. and would talk about school with Doe. Doe saw defendant as "kind of like how I would like picture a dad being."

The first molestation took place when Doe was nine-years-old. Defendant committed the act one day around 4:00 p.m. while Doe was at home after school and her mother was at work. Doe was watching television with defendant when he asked her to sit on his lap. She complied, and defendant started touching her on the crotch area outside her clothes. He then moved his hands under her clothes, touching her vagina and

putting his finger in her vagina. She started to get up, but defendant said, “No. No. It’s okay. Just sit down.” After a minute or two, defendant pulled his hands out of her pants, smiled at her like he was very happy, and told her to get up. Defendant later told Doe what he did was okay because he loved her like a father loves his daughter.

A few days later, defendant touched Doe’s vagina and her chest, both over and under her clothing. Thereafter, defendant touched Doe’s chest and vagina once or twice a week while they lived on Canal Street. This would occur when her mother was out of the house running errands or when defendant was saying good night to Doe.

Defendant told Doe not to tell her mother. Doe was afraid to tell her mother because one time when she got up from defendant’s lap, he grabbed her arm and it was not gentle. Also, she had seen defendant yell at her mother; he seemed to anger easily and Doe was afraid of being yelled at like defendant yelled at her mother.

In the middle of sixth grade, Doe and her mother moved to a condominium at Cimarron Court in Cameron Park. Doe had her own bedroom in the new residence. Defendant visited the residence every day and would spend the night with P.H. once or twice a week.

After Doe moved to Cameron Park, defendant started putting his mouth on her breasts and touching them. One night, having gone to her room to tell Doe goodnight, defendant pulled down his pants and told Doe to touch his penis. She refused, and defendant grabbed her hand and put the crying Doe’s hand on his penis, moved her hand around it and told Doe, “It’s okay. It’s not hurting you.” Thereafter, defendant told Doe “thank you” and left. P.H. was downstairs watching television at the time.

Such incidents took place any night defendant was at the home or any time he was there and P.H. was not home. During spring break for Doe’s sixth and seventh grades, defendant took time off work to watch Doe. During the two weeks she was on break, defendant molested her twice a day.

When Doe tried to resist, defendant would get forceful, holding her shoulders and telling her it was okay. Defendant would ask Doe if she wanted to ruin her mother's happiness. He "made it out to be if [Doe] said anything, [her mother's] whole world would just fall apart."

In April 2007, Doe, her mother, and defendant moved to a house on Hillcrest Street in Placerville. Doe had a bedroom in the front of the new house while defendant and her mother shared a bedroom in the back of the house.

Defendant had sexual intercourse with Doe in her bedroom one day in the summer of 2007. Doe was 14-years-old at the time. Doe cried during the assault. During the assault, defendant told Doe "that's good" and "I like that." But mostly, he just talked to Doe about her day "like nothing was going on at all." The intercourse lasted about five minutes. After this, the touching was replaced by acts of sexual intercourse, which varied in frequency from once or twice a week to almost every day up until defendant's arrest in 2008.

Defendant gave nicknames to their genitalia, calling his penis "Joey" and Doe's vagina "Priscilla." He would say things like, "It's time for Joey."

Defendant bargained for sex with Doe, offering to buy her something after having sex with her or saying that she owed him when he bought something for her. Defendant kept pieces of paper on which maintained a record of sex he said Doe "owed" him for things he bought her, such as clothes. Defendant called them "bargains or deals," and he would say things to Doe like, "Now you owe Joey like one or two."

Doe testified that defendant also approved her clothing, preferring her to wear tight skirts and low-cut tops. Starting in the eighth grade, defendant bought her underwear at Victoria's Secret with his credit card.

Defendant orally copulated Doe on several occasions. The first incident lasted about 10 minutes. It happened about three or four times while they lived on Hillcrest Street. He also sodomized Doe one morning while she was in bed. That assault lasted

“three or four minutes” and “hurt a lot,” causing Doe to cry. She was in tenth grade at the time.

In June 2008, defendant discovered Doe was messaging a boy on MySpace. Defendant accused Doe of having sex with the boy. The argument escalated until Doe pushed defendant away and he hit her. When Doe screamed that defendant had hit her, P.H. came into the room, told Doe to get her things, and then took Doe to a friend’s home.

Defendant, Doe, and her mother got together the next evening to talk about what happened. After defendant accused Doe of being promiscuous, Doe asked to talk to her mother alone, and the two went into the bedroom. Doe told her about the molestations. According to Doe, her mother then asked defendant, “Is this true? Have you really been doing this? Is she right? Have you been touching her?” Defendant responded, “Well, I’m not going to bullshit you. It happened.”

Testimony of Doe’s Mother

P.H. testified that she met defendant when she was 17. They dated for a few years before breaking up. They reunited nine to ten years later, after P.H.’s husband died. They resumed dating when Doe was about eight years old and P.H. and Doe were living near Clear Lake. Defendant was married at the time.

P.H. and Doe moved to the Canal Street residence in Placerville in 2000. Defendant visited frequently and sometimes spent the night with P.H. P.H. loved defendant and thought he was a good father to Doe. Doe and P.H. moved to the Cimarron Court residence in the winter of 2002. Defendant visited P.H. regularly even though he was still married and living with his wife.

In April 2005, P.H. picked out a house with defendant. Shortly thereafter, defendant moved in with P.H. and Doe. Defendant participated in all family matters, including disciplining Doe. Defendant was “adamant” that Doe not date until she was 16. P.H. agreed, but Doe thought they were wrong, because others at her school were dating.

Defendant became “really frantic” about the boys Doe saw. According to P.H., defendant thought Doe was having sex with the boys she dated “all the time.” Defendant monitored Doe’s behavior, particularly around boys. He put a tape recorder in Doe’s bedroom and installed a monitoring program on the family computer. On one occasion, using his car, defendant followed Doe and a male friend. When he returned, defendant said he saw Doe and the male close to one another. He was upset about that.

On June 5, 2008, P.H. heard Doe arguing with defendant. She heard Doe say, “You hit me,” and saw defendant backing Doe into a corner while they were very close to one another. P.H. intervened and took Doe to her girlfriend’s house, where Doe spent the night. When P.H. returned from dropping off Doe, she suggested family counseling to defendant. Defendant was adamantly against counseling. He said it would not help the family.

Doe returned the next day. That evening, P.H. again suggested they get family counseling. Defendant looked at Doe and said, “if we have counseling, there’s going to be a lot of things coming up out in the open.” Doe then told P.H. that she needed to talk to her alone. P.H. eventually agreed and accompanied Doe to her bedroom, where Doe told P.H. that defendant had molested her.

P.H. ran out of the bedroom and said to defendant, “You son of a bitch. You’ve been lying to me all this time.” According to P.H., defendant replied, “I’m not going to bullshit you. It happened.” Defendant was shaken. He told P.H. he did not want to go to jail. Defendant kept saying “Look at all the things I did for you. I put the roof on the house. I did all this stuff for you.” As P.H. and Doe were leaving, defendant told P.H. he did not want her to call the police. P.H. and Doe went to P.H.’s mother’s house, where P.H. called the police.

A letter from defendant was on the table when Doe and P.H. returned from the hospital and police station. The letter said: “[P.H.], I know you are shocked about the revelation with [Doe] and don’t want to talk to me, but I really do love you both. Maybe

too much. You may not want to believe that, and that's okay. I don't think I really have that much time left to live." Continuing, defendant wrote that all he possessed went to P.H. and Doe but "That doesn't make up for what I did." Defendant also stated, "I really have felt sad this few years that you decided to have a child by another man and not me. Maybe that's what as driving me."

The Sex for Favors Records

Officers searched the Hillcrest residence and found notes in defendant's armoire referring to "Joey" and "Priscilla." The notes contained entries such as "new verbal commitment to touch [Doe's first initial] 4x per mo. Start Nov," and "Joey and Priscilla 4 times. Did not demand from [Doe's first initial]. Used one. Save three for future." Another read, "Negotiated 3 contacts for abnormal clothes purchases. 1 Joey contact left." The writings extended back as far as 2005.

After his arrest, a police investigator asked defendant if he knew who Joey and Priscilla were. Defendant said Joey might be someone from his taekwondo class and he did not know who Priscilla was.

In a monitored conversation defendant had with his son at the jail, defendant said Joey and Priscilla were fictional characters. But he also told his son not to tell the police about them.

The Defense

The defense was based on an extensive cross-examination of Doe in which defense counsel sought to undermine her credibility and portray her accusations as a product of an escalating conflict with defendant over his efforts to restrain her personal life.

Doe testified on cross-examination that a month before the trial she made a 911 call claiming that her boyfriend assaulted her. She admitted lying about the assault when the police responded to the call. Doe had been upset with her boyfriend because he stayed out with his friends. She told the officers that she lied about the assault "just to

get mean,” that “it was really stupid of her,” and that she felt “like an idiot now that everybody is here.” She also admitted to calling the prosecutor in defendant’s case in an effort to get her boyfriend out of jail.

Doe lied to a detective when she said that she had not disclosed the molestations to anyone else; she had told an unnamed person online. Also, Doe admitted she was not truthful when she wrote a letter stating that her mother saw defendant rubbing himself against her and had told Doe not to do it again.

When she was 13, Doe created various Internet profiles listing her age as 18, 21, and 27. She contacted a man named Jeff online and claimed to be a model. Her mother was very upset when she found out that Doe wanted to meet this man, who she had emailed and instant messaged.

Doe also admitted to sending naked photographs of herself to two boys, Seth and Cody. In May 2008, when she was 15, Doe asked to spend the night at Cody’s house in Elk Grove, but her mother said no. That same month, Doe told a nurse she was never sexually active.

According to P.H., Doe was an excellent student from the third to ninth grades, but changed in high school. One of her concerns was Doe’s interest in boys. P.H. also had concerns about Jeff, the man Doe contacted on-line, as early as 2006. In April 2006, Jeff had offered to buy Doe a bus ticket so that she could meet him. Defendant reported the matter to the FBI. Also, Doe told P.H. in 2006 that a visit to Seth’s house would be supervised by a parent, but it was not.

Doe and P.H. had recurring fights about Doe wearing suggestive clothing. According to P.H., Doe insisted on wearing high-end clothing, and no one told her what to wear.

DISCUSSION

I. Evidence of the Victim's Sexual Conduct

Defendant contends the trial court violated his Sixth Amendment and due process rights to present evidence and a fair trial by excluding evidence of Doe's prior sexual conduct. We disagree.

A. Background

The prosecutor moved in limine to exclude evidence of Doe's prior and subsequent sexual conduct, citing Evidence Code sections 782² and 1103, subdivision (c)(1).³ Defense counsel, who had not filed an Evidence Code section 782 motion,

² Evidence Code section 782 provided in pertinent part: "(a) . . . if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780, the following procedure shall be followed: (1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness. [¶] (2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing pursuant to paragraph (3). After that determination, the affidavit shall be resealed by the court. [¶] (3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant. [¶] (4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court."

³ Evidence Code section 1103, subdivision (c)(1) provided: "Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261, 262, or 264.1 of the Penal Code, or under Section 286, 288a, or 289 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those sections, . . . opinion evidence, reputation evidence, and evidence of specific instances of the complaining

replied: “I think this is going to get flushed out after [Doe] testifies. Because at that point, I’m going to know where she’s coming from. And I may or may not have something I think is relevant” The trial court ruled, “Well, basically what I’m saying is, [the prosecutor’s motion] is granted subject to your making a determination after the witness’s--any of the witness’s testimony that any of this information is relevant, and then we’ll discuss it.”

Prior to the resumption of voir dire the following day, the prosecutor raised another in limine matter. He moved to preclude evidence of the age of the victim’s then current boyfriend, who was 24-years-old. The prosecutor argued that two years had passed since the victim’s disclosure, the victim was nearly 18 and the person she was seeing at that point was not in her life when there was concern about her dating at the time of her disclosure, and thus his age was not relevant. Defendant asserted the boyfriend’s age related to the tension at home caused by the victim’s behavior and her motive for accusing defendant of molestation. Counsel asserted, that the victim “has a history of seeking out older men. That’s the sort of boundary that the parents keep trying to keep under control.” Again, the prosecutor asserted Evidence Code sections 782 and 1103, subdivision (c)(1). The trial court ruled that the probative value of evidence of the boyfriend’s age was outweighed by its prejudicial effect and precluded the evidence. Thereafter, defense counsel asserted he had information that indicated the victim had been “actively chasing older men.” The trial court maintained its ruling, but indicated a willingness to revisit the issue depending on how Doe testified.

Defense counsel began his opening statement later that day. In it, counsel outlined the defense theory of the case--that Doe fabricated the charges of molestation because she wanted to conduct her personal life free from restrictions. Counsel began to outline what

witness’ sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.”

he expected the evidence would show--Doe's contact with Jeff, the family's attempt to monitor her computer activities, and Doe's conflicts over Doe's desire to have a boyfriend. Counsel then brought up a statement on Doe's MySpace page, which contained the words, "I like it, the way your dick tastes" and "I'm your 'ho'" and "You're my pimp." The trial court called a sidebar and admonished counsel that he was commenting on matters which were within the scope of the court's in limine ruling.

Counsel resumed his opening argument, mentioning Doe's fight with defendant, her mother's intervention, and Doe leaving for her friend's house. Counsel then addressed the family meeting the next day, at which the MySpace page was discussed and defendant accused Doe of engaging in sexual behavior, including oral copulation. The prosecutor objected, and at the ensuing sidebar, the trial court admonished counsel that "this is exactly the type of information I have ruled is not to be discussed." The trial court sent the jury home. Thereafter, the prosecutor told the court he intended to draft a special instruction to address defense counsel's discussion of Doe's alleged sexual conduct. The trial court indicated it would hold an Evidence Code section 402 hearing regarding evidence of Doe's sexual conduct the following morning.

The following morning, the trial court noted that defense counsel had not filed an affidavit or made the appropriate motion after the prosecution filed its motion to preclude evidence of Doe's sexual conduct under Evidence Code sections 782 and 1103, subdivision (c)(1). The court further noted that based on the defense failure to file a motion to admit evidence of Doe's sexual conduct, "I indicated that I would wait until after the . . . alleged victim, complaining witness, testified because you said you would know after that occurred whether or not you would have any evidence or any statements that you wanted to use to attack her credibility that were related to these areas that the Court had excluded in light of the [prosecution's] in limine motion." The trial court further noted that defense counsel had violated the court's in limine ruling twice during opening statements. The trial court reiterated to defense counsel that he could not

address prospective evidence in his opening statement that had not been approved for admission by the court, and ruled that counsel was “not allowed to talk about anything regarding the sexual allegations relating to [Doe] without first having a 402 hearing outside the presence of the jury and doing a 352 analysis.”

To address the impact of defense counsel’s conduct, the prosecutor requested that the court read to the jury a special instruction he had drafted, and the court agreed to do so over defense counsel’s objection. Defense counsel asked if he could file an Evidence Code section 782 declaration and the court indicated he could.

When the jury returned, the trial court told the jury, “some issues came up yesterday that I want to address right now and I want to read you an instruction. [¶] The instruction is this: That in this case, no evidence may be presented regarding the complaining witness’s sexual conduct with individuals other than the Defendant. This includes opinion evidence, reputation evidence, and evidence of specific instances. This type of evidence is not relevant to these proceedings and should not be considered by you in any way.” The court then reiterated its earlier instruction that nothing the attorneys say is evidence.

Thereafter, defense counsel filed an Evidence Code section 782 motion seeking an Evidence Code section 402 hearing. In the motion, defendant asserted, “The motive explanation for the defense case will work only if the defense gets to set up the motive in a way that explains the defendant’s actions in grounding, curtailing, monitoring [Jane Doe’s] behavior as actions that any responsible parent would do in light of what he or she is dealing with.” Paragraphs 4 through 13 of the motion set forth the evidence defendant sought to admit. The court allowed some evidence and precluded other proffered evidence.

1. Evidence Allowed by the Trial Court

Paragraph 8 stated, “The defendant discovers that Jane Doe has sent full naked pictures of herself to her boyfriend. Defendant requests permission to provide fully

redacted photos hiding all improper nudity.” The trial court precluded the photographs but ruled that trial counsel could present oral evidence of them.

The trial court also allowed the evidence sought in paragraphs 12 and 13, Doe’s statement to a medical professional, one week after defendant’s arrest, that she just had sex for the first time, and her statement on May 21, 2008, that she was not sexually active.

As to paragraph 10, which addressed the fight between defendant and Doe, the trial court withheld ruling on this until defendant’s cross-examination of Doe.

2. Evidence Precluded by the Trial Court

The trial court excluded the following evidence set forth in paragraphs 4 through 7 and 9:

Paragraph 4

“The complaining witness had an internet relationship with a 20 plus year old man. This relationship was going on until Mother discovered it. Once discovered, a family discussion occurred which required that [Doe] discontinue contact with the man. There is proof of instant messaging between the parties regarding the breakup.”

Paragraph 5

“The content involved during the internet relationship involved the man asking her to make a video of herself. The defendant, in turn, contacts the FBI in order to report the adult male. The defense has the FBI report.”

Paragraph 6

“The complaining witness, then 13 after confronted [*sic*] by the defendant and her mother that she engaged in oral copulation of her then boyfriend Seth confirms that something sexual occurred. This incident resulted in a ‘No SETH’ rule imposed by the defendant and [Doe’s] mother.”

Paragraph 7

“[Doe’s] mother and the defendant confronted [Doe] about her MySpace postings ‘I’m your hoe, your my pimp.’ In an interview with the police [P.H.] confirms that a family meeting occurred discussing this topic.”

Paragraph 9

“All these incidents led to a blow out fight where the defendant confronts [Doe] and accuses her of having sex with boys to which she responds ‘I wish,[’] while claiming to the police she was being sarcastic.”

3. The Trial Court’s Ruling

The court ruled that the items in paragraphs 4 through 8 were inadmissible, because although they had some relevance on credibility, “that impact is outweighed by the prejudicial effect and by the legislative intent of [Evidence Code section] 782.” The trial court ruled the item in paragraph 9 inadmissible because it did not attack Doe’s credibility.

B. Analysis

Under California’s rape shield law, evidence of the complaining witness’s sexual conduct with persons other than defendant may be admissible “when offered to attack the credibility of the complaining witness, provided that its probative value outweighs the danger of undue prejudice and the defendant otherwise complies with the procedures set forth in Evidence Code section 782. First, the defendant must file a written motion and an offer of proof detailing the relevancy of the evidence. (Id., § 782, subds. (a) (1), (2).) If the court finds the offer sufficient, it shall order a hearing out of the presence of the jury to allow questioning of the complaining witness regarding the offer of proof. (Id., § 782, subd. (a)(3).) If the court finds the evidence relevant under section 780 and admissible under section 352, the court may make an order stating what evidence may be introduced by the defendant and what questions are permitted. (Id., § 782, subd. (a)(4).)” (*People v. Fontana* (2010) 49 Cal.4th 351, 354 (*Fontana*).

Evidence Code section 782 is designed to protect victims of molestation and sexual assault “from ‘embarrassing personal disclosures’ unless the defense is able to show in advance that the victim’s sexual conduct is relevant to the victim’s credibility. [Citation.]’ ” (*People v. Bautista* (2008) 163 Cal.App.4th 762, 782.) “By narrowly exercising the discretion conferred upon the trial court in this screening process, California courts have not allowed the credibility exception in the rape shield statutes to result in an undermining of the legislative intent to limited public exposure of the victim’s prior sexual history. [Citations.]” (*People v. Chandler* (1992) 56 Cal.App.4th 703, 708.) Our high court has emphasized that “ ‘[g]reat care must be taken to insure that this exception to the general rule barring evidence of a complaining witness’ prior sexual conduct . . . does not impermissibly encroach upon the rule itself and become a “back door” for admitting otherwise inadmissible evidence’ [citation].’ ” (*Fontana, supra*, 49 Cal.4th at p. 363.)

Defendant contends the excluded evidence showed a building tension between Doe and the adults in the household “revolving around [her] sexual maturation.” According to defendant, the evidence related to Doe’s sexual conduct which the defense sought to admit was “relevant to the central issue in this case: [Doe’s] credibility in accusing appellant of molesting her.” He concludes the trial court’s decision violated his constitutional rights to present evidence and to a fair trial and that the error is not harmless beyond a reasonable doubt.

We first observe that some of the evidence that the trial court initially precluded regarding Doe’s Internet relationship with a man named Jeff actually came in during the trial. The jury heard that Doe had communicated with Jeff by email and instant message, she posed as a model, Jeff offered to buy her a bus ticket, and defendant reported the communications to the FBI. The defense was also allowed to get Doe to admit placing on her MySpace page the phrase, “She likes the way ya dick tastes.”

To the extent the proffered evidence the jury did not hear was relevant to Doe's credibility, it was largely cumulative of other evidence. Moreover, the evidence presented a danger of prejudice and confusing the issues by focusing the jury's attention on the more lurid details of Doe's life rather than on her credibility. It was not an abuse of discretion to keep the case on the relevant issues--Doe's accusations and her credibility--and avoid the nonprobative, prejudicial, and potentially confusing issue of Doe's sexuality.

Defendant's claim that excluding the evidence violated his constitutional rights is also unpersuasive. The court correctly applied the rules of evidence and the application of the ordinary rules of evidence does not generally infringe impermissibly on a defendant's constitutional rights. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) This case does not present an exception to this rule.

Even assuming the trial court erred in precluding any of the evidence defendant contends should have been admitted, defendant has suffered no prejudice. Defendant was afforded the opportunity to present his defense. As recounted above, the direct and cross-examination of Doe and her mother presented ample evidence of Doe's conflict with defendant and her mother over desire to have relationships with members of the opposite sex. The defense established that Doe had a sexualized message on her MySpace page. She admitted fighting with her mother over wearing suggestive clothing, and to picking out thong underwear with her friend. Doe admitted that she posed as an older woman online, had an online relationship with a man which led to defendant reporting the matter to the FBI, and sent naked pictures of herself to some boys she knew. Doe and her mother also testified to the conflict over Doe's desire to date before defendant and her mother would allow it. This included Doe lying about whether a night spent at a boy's house was chaperoned, and Doe's efforts to spend the night at the house of a boy in Elk Grove. Contrary to defendant's assertion that the trial court "precluded the primary theory of the defense," we conclude that not to be the case.

Moreover, defendant admitted sexual conduct with Doe when he said, “I’m not going to bullshit you. It happened.” His statement before Doe’s disclosure that “if we have counseling, there’s going to be a lot of things coming up out in the open” was also incriminating. His letter in which he stated, “I know you are shocked about the revelation with [Doe]” without any denial that the revelation was true and his acknowledgment, “That doesn’t make up for what I did” were also incriminating. And the Joey and Priscilla writings--his record keeping of sex acts he felt he was owed--was extremely damning evidence. We have no trouble concluding beyond a reasonable doubt that the additional attacks on Doe’s credibility would not have changed the result.

In asserting that the asserted error was not harmless, defendant further contends that the benefit derived from the evidence that was admitted was “undone by the special jury instruction requested by the prosecution and given to the jury,” which according to defendant told the jury to completely disregard any of Doe’s sexual conduct with others. Defendant ignores that the instruction was given as a remedy for counsel’s discussion of Doe’s sexual conduct in his opening statement in violation of the court’s in limine ruling, before he sought permission to introduce the evidence as required by Evidence Code section 782. Although defendant does not mention it, we observe that the trial court did not expressly withdraw or modify the instruction at the end of the trial. And we note that the prosecutor began his closing argument, “I want to start, before I even get into my argument, with what is not allowed in this case, what is not acceptable, and what is not permissible. [¶] The judge gave you this instruction at the outset of this case. It read as follows: ‘In this case no evidence may be presented regarding the complaining witness’s sexual conduct with individuals other than the Defendant. This includes opinion evidence, this includes reputation evidence, and this includes evidence of specific instances. This type of evidence is not relevant to these proceedings and should not be considered by you in any way.’ ” He then urged the jury not to “buy-in to the Defense attempts to slander” Doe because such slander is not allowed by the law. “You don’t get

to say, ‘ “Oh, she’s just a big slut, so you shouldn’t believe her.” ’ That’s why these laws are in place.”

Assuming the court erred in not withdrawing or modifying its earlier instruction and assuming the prosecutor’s argument was error and defendant did not forfeit any claim related to that argument by failing to object to the argument in the trial court, we conclude that any such errors are harmless. The evidence that defendant continually molested Doe, including his admissions and incriminating writings, was overwhelming.

II. Inquiry into Possible Juror Misconduct

Defendant asserts the trial court prejudicially erred by failing to conduct an adequate inquiry into potential juror misconduct.

Background

During voir dire by the prosecutor, the following took place:

“[PROSECUTOR]: . . . Anything we need to talk to you about at this point? [¶]
. . . [¶]

“[JUROR NO. 8]: My wife had to testify in an indecent exposure case, and she had to go to jury for that. Not jury, she was a witness.

“[PROSECUTOR]: She was a witness in a jury trial?

“[JUROR NO. 8]: Correct. [¶] . . . [¶]

“[PROSECUTOR]: Anything about that that’s going to make this hard for you?

“[JUROR NO. 8]: I don’t believe so.

“[PROSECUTOR]: You feel pretty confident about your ability to do this?

“[JUROR NO. 8]: Yes.”

Defense counsel voir dired Juror No. 8 about the rule that one witness could be enough for a conviction. He asked, “do you understand that there might be other information in the case that might contradict that witness?” Juror No. 8 responded, “Yes, I understand.” After a series of hypotheticals involving the prospect of evidence in

addition to that of the single witness, defense counsel asked, “you might want to know about some of those other facts,” to which Juror No. 8 responded, “Right.”

Later, defense counsel asked another juror “Do you feel like a teenager might lie about sexual abuse.” After that juror responded, defense counsel questioned Juror No. 8 about the same subject:

“[DEFENSE COUNSEL]: [Juror No. 8], what are your feelings on that?

“[JUROR NO. 8]: I guess it’s possible that they could lie about it.

“[DEFENSE COUNSEL]: What if they are angry? [¶] . . . [¶]

“[JUROR NO. 8]: Then it’s certainly possible.”

Later, after asking other jurors about the “one witness rule,” defense counsel returned to Juror No. 8:

“[DEFENSE COUNSEL]: [Juror No. 8], you’re going to hear testimony from witnesses if you’re selected. And would you be able to take into account all the evidence you get in the case before deciding whether or not someone is being accurate or someone is not being accurate?

“[JUROR NO. 8]: Yes, I would feel I have to.”

Later counsel for defendant requested and was permitted to reopen his voir dire to ask Juror No. 8 about the case involving his wife.

“[DEFENSE COUNSEL]: You said that your wife was a witness in some case?

“[JUROR NO. 8]: Yeah.

— “[DEFENSE COUNSEL]: Okay. Did you have any part in that case at all?

“[JUROR NO. 8]: No.

“[DEFENSE COUNSEL]: Okay. Can you tell me about when that case was.

“[JUROR NO. 8]: What year?

“[DEFENSE COUNSEL]: Yeah. I mean, is it recent, long time ago?

“[JUROR NO. 8]: No, it was like probably 1979, 1980.

“[DEFENSE COUNSEL]: Anything that sticks with you in your mind that might somehow not allow you to be a juror in this case?”

“[JUROR NO. 8]: About that or about anything in general?”

“[DEFENSE COUNSEL]: No, about that.

“[JUROR NO. 8]: No.

“[DEFENSE COUNSEL]: How about anything in general, since you brought it up?”

“[JUROR NO. 8]: Just that I think over the course of it, it’s going to be a lot of anxiety, a lot of stress. Yeah, I think I can get through it, but it’s going to be--I don’t think it was brought up very--by either side telling the people do we really understand how much anxiety, how much stress it’s going to put on us.

“[DEFENSE COUNSEL]: Tell me more about that.

“[JUROR NO. 8]: I just think it would be pretty stressful. I don’t handle it well, but I think I can get through it. That’s me, I guess. [¶] . . . [¶]

“[DEFENSE COUNSEL]: Well, thank you for sharing that with us [Juror No. 8]. [¶] That might qualify you to be a great juror, to understand that this is the real thing.”

At a break after defense counsel concluded his opening statement, Juror No. 8 asked to speak to the court and counsel. Juror No. 8 told the trial court: “The only thing I was thinking about was the trial that my wife was on years ago and I was--I mean, I was in the audience and I heard the testimony of the defense. It just kind of sticks in my mind. I still don’t think it will have any impact, it’s just the way the story went that I felt it was just a made-up story.”

“THE COURT: Okay. But you understand that was a separate trial, a whole different case and these are different facts, different attorneys, different individuals?”

“[JUROR NO. 8]: Yeah.

“THE COURT: And the question is are you going to be able to concentrate on this case, the evidence that is presented in this case and abide by the instructions on the

law that I give in this case and apply those instructions, *being fair and impartial to both sides?* (Italics added.)

“[JUROR NO. 8]: Yes, I believe so.”

After the prosecutor indicated he had no questions, the court permitted defense counsel to voir dire.

“[DEFENSE COUNSEL]: What kind of case was that?”

“[JUROR NO. 8]: It was an indecent exposure. A man exposed himself to my wife.

“[DEFENSE COUNSEL]: *Okay. I have no further questions.*” (Italics added.)

On the next day of trial, defense counsel asked to reopen examination of Juror No. 8 to make sure that he could be fair and impartial since the juror’s answers indicated that his wife was the victim in the prior case. The trial court denied the request. The court stated that he understood the juror to have indicated the prior experience would not affect his ability to be fair.

Ignoring all of the relevant voir dire of Juror No. 8, including the trial court’s question to the juror about his ability to be fair when the juror later voluntarily came forward, defendant contends that the juror may have been biased, because he had said his wife was a witness in an indecent exposure case during voir dire, but later explained she was a victim in the case. Defendant argues the trial court did not fulfill its duty to investigate the possibility of juror bias. He concludes the court’s error violated his jury trial and fair trial rights.

“The decision whether to investigate the possibility of juror bias, incompetence, or misconduct rests within the sound discretion of the trial court. [Citation.] A hearing is *required* only where ‘ “the court possesses information which, if proven to be true, would constitute ‘good cause’ to doubt a juror’s ability to perform his duties and would justify his removal from the case.” ’ [Citation.]” (*People v. Burgener* (2003) 29 Cal.4th 833, 878, italics in original.) A trial court has broad discretion to decide whether and how to

investigate possible juror bias or misconduct. (*People v. Engelman* (2002) 28 Cal.4th 436, 442.)

Here, the trial court inquired into Juror No. 8's possible bias. The juror had brought the matter to the court's attention and said he understood that the instant case was separate from the prior case involving his wife. While defendant ignores the trial court's question and the juror's response about his ability to be fair, we do not. And we note that the trial court was in a position to observe the juror's demeanor when he said he thought he could be fair and impartial.

The revelation that in the prior case, the juror's wife had been the victim of indecent exposure, not just a witness--a revelation which came to light during questioning by defense counsel without follow-up by counsel--did not provide, as a matter of law, good cause sufficient to require additional inquiry by the court. It was not an abuse of discretion to deny defendant's request to reopen questioning of Juror No. 8.

DISPOSITION

The judgment is affirmed.

MURRAY, J.

We concur:

ROBIE, Acting P. J.

BUTZ, J.