

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN ROBERT GANOE,

Defendant and Appellant.

C076278

(Super. Ct. No. SF124150A)

ORDER MODIFYING OPINION  
AND DENYING PETITION  
FOR REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed October 13, 2016, in the above cause be modified as follows:

On page 6, replace the fifth sentence of the last paragraph with the following:  
Defendant offered her some Powerade to drink.

On page 14, replace the first paragraph with the following:

We also reject defendant’s assertion that exclusion of the evidence of pornography on the family cell phone violated his federal constitutional right to present a defense. (U.S. Const. Amends. VI & XIV.) The assertion lacks merit. “ ‘As a general matter, the

ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense.’ ” (*People v. Blacksher* (2011) 522 Cal.4th 769, 821, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834.) Defendant cites case law for the proposition a defendant is entitled to introduce relevant evidence. (See, e.g., *People v. Northrop* (1982) 132 Cal.App.3d 1027, 1042 [defendant has right to introduce all relevant evidence], disapproved of by *People v. Smith* (1984) 35 Cal.3d 798.) This case law is inapposite because it involved evidence that was excluded even though it was relevant. Here, however, the evidence regarding pornography on the cell phone was irrelevant because there was no evidence K. had viewed the pornographic images. Consequently, the derivative due process claim lacks merit. (See *People v. Valencia* (2008) 43 Cal.4th 268, 280, fn. 3 [holding that rejection of “a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional ‘gloss’ as well”].)

This modification does not change the judgment.

The petition for rehearing is denied.

\_\_\_\_\_  
/s/  
NICHOLSON, Acting P. J.

\_\_\_\_\_  
/s/  
MURRAY, J.

\_\_\_\_\_  
/s/  
HOCH, J.

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THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN ROBERT GANOE,

Defendant and Appellant.

C076278

(Super. Ct. No. SF124150A)

A jury convicted defendant John Robert Ganoë of three counts of lewd and lascivious acts upon a child under the age of 14 years (Counts 1, 2, and 3; Pen. Code, § 288, subd. (a)),<sup>1</sup> one count of forcible sodomy (Count 4; § 286, subd. (c)), and three counts of forcible rape (Counts 5, 7, and 9; § 261, subd. (a)(2)). The jury also found true the following enhancement allegations: kidnapping the victim (§§ 667.61, subd. (e)(1), 1203.066, subd. (a)(6)) as to all counts of conviction; use of a knife (§§ 667.61, subd. (e)(3)), 1203.066, subd. (a)(4)) as to count 2; tying or binding the

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

victim (§ 667.61, subd. (e)(5) as to count 2; use of force, violence, duress, menace, or threat of bodily harm (§ 1203.066, subd. (a)(1)) as to counts 2, 4, 5, 7, and 9; and infliction of bodily harm on a victim under 14 years of age as to counts 2, 4, 5, 7, and 9. All counts of conviction arose out of defendant's sexual assault on the victim, K., in Lodi, California, on May 15, 2013. The trial court sentenced defendant to serve 75 years to life in prison plus life without possibility of parole. The trial court also imposed various fines and fees. The abstract of judgment reflects imposition of a \$300 parole revocation fine. (§ 1202.45.)

On appeal, defendant contends (1) the trial court abused its discretion in excluding evidence of pornographic images on the cell phone shared by K.'s family, (2) the trial court exceeded the scope of its jurisdiction by recalling the jury to make further findings on four enhancement allegations after discovering the jury was missing several verdict forms, and (3) the abstract of judgment must be corrected to strike the parole revocation fine that was never orally pronounced by the trial court.

We conclude the trial court did not err in excluding evidence regarding images on the cell phone used by the victim's family because several people had access to the phone and it was speculative as to whether the victim ever saw the pornographic images. We reject the argument the trial court erred in recalling the jury. The jury was never discharged. Instead, the trial court realized the mistake while the jury was still in the jury box and immediately had jurors resume their deliberations. Finally, we accept the Attorney General's concession the parole revocation fine was never imposed by the trial court. Accordingly, we strike the parole revocation fine and affirm the judgment in all other respects.

## BACKGROUND

### *Evidence of Uncharged Prior Acts of Sexual Misconduct Committed by Defendant in New York and Florida*

The prosecution introduced evidence of defendant's prior uncharged acts of sexual misconduct against other girls in the 1980s and 1990s in the states of New York and Florida. Because defendant does not challenge the admissibility of this evidence, we summarize it as follows:

E. was five or six years old when she visited her grandmother's house in New York in the late 1980s.<sup>2</sup> Defendant is E.'s uncle, and he was also visiting at the house. Defendant involved E. in a card game that required her to hold his penis. E. had never seen a penis and was scared.

When E. was 12 or 13 years old, she and a friend went to babysit defendant's infant daughter. While babysitting, E. fell asleep on the couch. She awoke to find him standing over her and unbuttoning her shirt. Defendant walked away to turn on the television. To E., it sounded like defendant had put on something pornographic. She then heard him masturbating on the couch.

In the late 1990s, defendant babysat E.'s cousin, D., at his apartment in Florida. D. was eight or nine years old at the time. Defendant played a pornographic movie for D. and himself. The pornographic movie depicted defendant and his girlfriend, L.H. After a while, defendant went to a bedroom and began crawling around in his underwear. He then asked D. to touch his penis and she did so for a second. Defendant then instructed her to "play with it." D. refused and left the room.

In 2000, D. and her best friend, L., were babysitting at defendant's house in Clearwater, Florida. L. was around 13 years old at the time. L. and D. were spending the

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<sup>2</sup> To preserve the privacy of the sexual assault victims, we refer to their family members by their initials.

night in an upstairs bedroom. When L. went downstairs to use the bathroom, she walked by defendant who was sitting on the couch. When L. emerged from the bathroom, defendant “was standing right there.” She testified, “he just asked me if I wanted to fool around.” L. responded, “What?” And defendant repeated himself. L. understood he was referring to sexual activity. The experience “creeped [her] out” and that night she slept with a pen in case she needed it for protection.

### ***Defendant’s Prior Convictions for Possession of Child Pornography***

In 2003, Chester Johnson was employed as a Deputy Sheriff with the Pinellas County Florida Sheriff’s Office. In that capacity, Deputy Johnson accompanied a child protective team that was investigating an allegation of sexual abuse of defendant’s nine-year-old daughter, R. As part of the investigation, a computer was taken from defendant’s home with the consent of L.H., with whom defendant was living. A forensic analysis of the computer yielded four child pornography images labeled: “old guy fucks two thirteen year olds,” “tie nine year old nice pussy,” “[V.], a 12 year old, good ass fuck,” and “a young boy and girl fucking.” Each of the labels accurately reflected the content of the images. Defendant pleaded guilty to four felony counts of possession of child pornography under Florida law.

The forensic analysis of the computer also yielded a Yahoo instant message chat between “Toto Kaoz” and “Lady Vi Ram.” In pertinent part, the conversation involved a discussion of defendant’s sexual molestation of R. Lady Vi Ram asked, “You still do her in the ass?” To which defendant replied, “Yup. She’s getting better at sucking my cock too.” Defendant added, “She still bites it once in a while. Lol.” Defendant also exulted about ejaculating in R.’s mouth “a couple of times.”

The investigation into child sexual abuse was hampered because R. suffered Lennox-Gastaut syndrome. She was nonverbal and confined to a wheelchair. When Deputy Johnson tried to get a statement from R., she was able only to utter exhalations and flap her arms. Lady Vi Ram was the alias of G.D. G.D. gave the police her own

version of the instant message chat that she changed in an effort to make herself look better. Thus, there were conflicting versions of the instant message chat. At trial, the parties stipulated defendant “was not convicted of a sexual assault upon his daughter, [R.], in Pinellas County, Florida based on the instant messages with [G.D.] in 2003 or any other information.” The parties also stipulated G.D. had stated in a 2006 deposition she had lured defendant into the conversation and she “turned in [defendant] in exchange for a lighter sentence” for her convictions of marijuana sales and possession.

### ***Evidence of Defendant’s Sexual Assault in This Case***

In May 2013, K. was 13 years old and lived in a small studio apartment in Lodi with her family: her mother, her father, and her brother, C. C.’s friend, J., would sometimes stay with them. K.’s family had moved into the apartment after having lived at the Star Hotel in 2010 or 2011. During the year they lived at the Star Hotel, they got to know defendant because he was their neighbor. During that year, however, K. had never been alone with defendant.

On May 15, 2013, defendant sent a text message to ask K.’s mother whether K. was available to babysit to raise money for a camping trip. Defendant stated, “This super hot girl I want to take out needs a babysitter for her kid and she’s willing to pay good. We don’t know anybody else.” Defendant offered \$100 for K. to babysit. At the time, K.’s mother, father, and brother were all unemployed. K.’s mother agreed on the condition K. be able get enough sleep to go to school the next morning. Defendant indicated to K.’s mother his date was named T.H.

T.H. testified at trial that she knew defendant and exchanged text messages with him on May 15, 2013. T.H. did not have any children but did have a boyfriend. Defendant wanted T.H. to pose in the nude for him. Defendant sent her a message that read: “If you’re down for a sugar daddy, I am too. No shame in that at all on either of our parts. I read that a crazy high percentage of college girls” have “done that.” Defendant stated he “would expect absolute discretion.” T.H. responded she did not want

to do anything sexual with defendant. Defendant texted, "I would pay you really good" and offered her \$100 for a half hour of posing for him without nudity. T.H. desperately needed the money and agreed so long as it did not involve photo or video recording. T.H. agreed to meet him the next day, on May 16.

Around 9:00 p.m. on May 15, defendant rode his bike to the apartment to pick up K. K. and defendant then rode bikes back to the Viking Motel. K. brought along her iPod and a change of clothes for school the next day. At the motel, defendant said T.H. was supposed to show up but was delayed because she was fighting with her grandmother. They went into defendant's room and K. used his cell phone to send a text to her mother. K. sat on the bed playing with defendant's cell phone while he went to the bathroom.

Defendant returned from the bathroom, got onto the bed, wrapped his bare legs around her body, and grabbed her breasts. K. was scared. Defendant then held a three-inch knife against her throat. Defendant instructed her to drop the phone and she complied. Defendant then wrapped duct tape around her head, covering her mouth. K. moved the tape and began to scream. Defendant grabbed her throat and choked her until she fainted.

K. estimated she had passed out for a minute when she awoke to find herself lying on her right side with her head near the pillows. Defendant was naked and lying beside her. K. ran to the bathroom and stood by the sink for two hours. She "was just too scared, too traumatized to try to close the door." Meanwhile, defendant got up, dressed himself, and chatted on his phone. Defendant offered her some "white powder" and something to drink. While she was standing at the sink, defendant touched her buttocks. She was still clothed. K. was crying and saying she wanted to go home. She testified she was told, "I couldn't go home until he comes." Defendant told her she had to touch his penis and "make it go up and down." They went to the bedroom where she touched his penis for five minutes before she ran back into the bathroom.

Defendant told K. to go back to the bed when she returned from the bathroom. Defendant turned on pornography on the television and made her watch it for a short time. He grabbed her and took off her shoes, pants, and underwear. K. was crying and kicking at him. Defendant held her arms, slapped her in the face “really hard,” and then hit her “pretty hard” in the face near her nose.

Defendant placed K. onto her stomach, put KY Jelly onto his penis, and inserted his penis into her anus. He kept his penis inside her anus “for a couple of minutes.” Defendant flipped her onto her back and inserted his penis into her vagina. Defendant turned her over and inserted his penis into her anus. He flipped her over and inserted his penis into her vagina for about five minutes. Defendant turned her over and inserted his penis into her anus a third time. He flipped her over and inserted his penis into her vagina for a third time. Defendant ejaculated onto her stomach. It was about 6:30 a.m.

K. got up and began to dress. However, defendant told her to take a shower. She went to the bathroom, turned on the water and wet her hair but did not get into the shower. Defendant did not believe she had showered, so she turned on the water and faked another shower. Defendant still did not believe she had showered. He took a rag and wiped her buttocks and back. Defendant made her change into the shirt she had brought along. He washed the shirt she had been wearing in the sink and then hung it up to dry.

Defendant and K. exited the room together, and he went to the front office to return the room key. K. threw a bag handed to her by defendant into the trash dumpster. They rode their bikes back to K.’s apartment where defendant offered her \$100 a week for “not telling the cops.” Defendant handed her \$90 or \$100 and left. It was about 6:45 a.m.

K. went into her apartment and asked her mother if she could stay home from school that day. Her mother agreed when K. said she was really exhausted. K. slept for approximately two hours. When she woke up, she went to get something to eat with her

mother and father. K. paid for their food. Her mother found it odd K. wanted someone to go with her because K. usually went places by herself. Later that day, K. and J. (her brother's friend) went to a thrift store where she bought a purse and a wallet. She then bought a root beer float, gave her mother money for her birthday, and purchased beer and cigarettes for her parents. K. was trying to spend all of the money because having defendant's money made her sad.

At 8:00 or 9:00 p.m., K. felt nauseous and scared. She decided to tell her mother about the sexual assault. K. began to cry and told her mother what had happened. Her mother called the police, then called defendant to confront him with K.'s accusations. Defendant wanted to talk to K., but her mother refused. Defendant then "offered [K.'s mother] a hundred dollars a week hush money." She told him her daughter was more important and did not want the money.

### ***Investigation***

At 9:30 p.m., Lodi Police Department Officer Kevin Brown responded to K.'s apartment and spoke with her. K. "appeared to be very nervous" and "looked like she had been crying." She said she "had pain in her stomach, her lower back area and her buttocks area." Officer Brown observed bruising under her left eye and possible bruising around her collarbone. To Officer Brown, a mark under her chin "looked like there might have been something sharp that was pressed up against that."

K. was transported to San Joaquin General Hospital for a sexual assault forensic examination conducted by nurse Linda Rathe. K. reported she had not yet begun menstruating and had preexisting scratches on her face, chin, and leg. She reported she was experiencing pain in her throat, abdomen, and back. Rathe collected swab samples from K. and the underwear she said she wore during the attack. Rathe did not observe any visible bruising.

Around 3:00 a.m. the next day, Lodi Police Department Detective Carlos Fuentes went to the Viking Motel to investigate. Detective Fuentes was unable to locate anyone

to give any useful information and found nothing in the trash dumpster. The motel manager explained the trash had recently been picked up. The manager gave the detective the registration card defendant had filled out when he rented the motel room. At trial, the manager testified the motel provides free access to pornography.

Defendant was arrested on May 20, 2013. A search of defendant's cell phone found text messages sent to K.'s mother about the babysitting job for K. Inside defendant's backpack was a receipt from Wal-Mart that included clothes and a bottle of KY Jelly.

K.'s swabs and underwear were tested for biological fluids. The labial swabs tested negative for acid phosphate and the protein P30 that are present in semen. The underwear tested negative for acid phosphate but positive for P30. No sperm was observed.

Criminalist Jennai Lawson performed the initial DNA analysis on K.'s underwear, swabs, and debris and hair collected from the forensic combing of K.'s pubic area. Lawson found trace DNA on one of the hairs that provided information on only 5 of the 15 DNA markers used in the analysis. All 5 markers were consistent with defendant's DNA, but the partial profile did not suffice to positively identify him as the contributor. The partial profile is "estimated to occur at random among unrelated individuals in approximately one and 360 African-Americans, one in 210 Caucasians, and one in 540 Hispanics."

DNA analyst Heather Tonchick performed further DNA testing that focused on the Y chromosome unique to males. From the extracted DNA, Tonchick determined the present male DNA haplotype. Defendant's DNA haplotype was consistent with the extracted DNA haplotype. This haplotype, using a 95 percent confidence interval, is expected "to occur no more than approximately one and . . . 1,815 African Americans, one and 2,075 Caucasians and one and 610 Hispanics. The analysis excluded K.'s father and brother as contributors. Family friend, J., could not be excluded as a contributor in

the sample from K.'s underwear. However, J. was excluded as the source of the DNA found on the debris and labia swabs.

### *Defense Evidence*

Defendant testified on his own behalf as follows: He denied engaging in sexual conduct or any inappropriate conduct with K., E., D., or L. Defendant asserted D. is a liar and hates him. E.'s testimony was based on "some kind of false memory." His instant messages with G.D. about sexually molesting R. were "what she was into. That's what she wanted to hear." At the time, the conversation seemed funny.

In May 2013, defendant was "broke" and homeless. He stayed with friends at various locations. Defendant explained he spent two nights at the apartment belonging to K.'s family. K. "has clothes all over that apartment, everywhere." The apartment had two mattresses in the main room. K.'s mother and father and K. would sleep on one, and C. and defendant would sleep on the other. The main room was "completely trashed" because K.'s family got drunk every night. Defendant characterized K. as "a good friend of mine" for whom he had bought a bicycle for her birthday.

Late in the afternoon on May 15, 2013, defendant saw K. riding a bicycle by herself. He stopped to talk to her and she mentioned she was trying to raise money for an upcoming camping trip. K. added that "things were not going good at home; she hated being there." She asked where defendant was staying, and defendant said he had a room at the Viking Motel. K. asked defendant to tell her mother she was babysitting for defendant so K. could "hang out at the motel." Although defendant was the one who texted K.'s mother, it was K. who came "up with that whole entire story." K. went home and defendant went to hang out with friends.

Defendant "was having second thoughts about pulling this farce on her mom." Nonetheless, he rode his bicycle to K.'s apartment, picked her up, and they rode to the Viking Motel. Defendant went into the bathroom, closed the door, and spent a long time washing and drying some of his clothes. Meanwhile, K. sat on the bed and played with

his cell phone. Defendant heard the phone ring and K. soon announced her mother was going to bed. K. got up and left the motel room around 9:00 p.m. She left her backpack but took her bicycle.

Defendant did not see K. again until 6:00 a.m. the next day when she knocked on the door and woke him up. She was “real agitated and angry” and asked if they could again arrange for defendant to tell her mother she needed to babysit for him. Defendant declined and said, “We’re not . . . going to do this every[]day.” K. offered to pay for the room, but defendant said no. Defendant checked out of the motel and rode with K. back to her apartment. She was still very angry and agitated.

Defendant testified he was never naked in front of K., did not ask her to touch his penis, did not sodomize her, and did not rape her. The first time defendant learned he had been accused of doing something wrong was when K.’s mother called him to accuse him of raping K.

## DISCUSSION

### I

#### ***Exclusion of Evidence Regarding Pornography on the Shared Cell Phone***

Defendant contends the trial court committed prejudicial error and violated his federal constitutional right to present a defense by excluding evidence of pornography on the cell phone shared by K.’s family. We reject the contention.

#### **A.**

#### ***Exclusion of the Evidence***

During trial, K.’s mother acknowledged the family cell phone had pornography on it. She also acknowledged she, K., K.’s father and brother all used the same cell phone. The next day and outside the presence of the jury, defendant’s trial attorney moved to introduce evidence regarding the pornographic images. The prosecutor and defense counsel vaguely described the pornographic images but noted they did not include child pornography or photos of any of the witnesses. Some of the images included naked adult

males. The prosecutor objected and pointed out: “We don’t know how [the images] got there. There’s been no evidence of how [the images] got there, who put [them] there. In fact, I think the only evidence we had at trial about [the images] was kind of to the contrary.” The trial court observed no one had asked K. about the pornography on the cell phone. In response, defense counsel pointed out K. testified she had access to the phone and was aware of some of the photos on it. The prosecutor recalled the cell phone “had a lot of photos on it. Almost all of them were innocuous, you know, either family photos or just . . . nothing of any note.”

At the request of the defense, the trial court conducted an in camera hearing outside the presence of the jury and the prosecutor. During the in camera hearing, defense counsel stated that “there are some pornographic images on there that are pretty graphic. There are quite a few of them.” Defense counsel stated she planned to argue K.’s ideas about the sexual assault came from a source other than defendant. Defense counsel asserted the pornographic images were relevant to show “other sources of where the information could have been obtained” by K. However, the defense did not seek to introduce the images themselves into evidence.

After the in camera hearing, the trial court denied the motion to introduce the evidence, explaining: “At this point I am finding that the offer of proof is not sufficient to go into this type of evidence. That there’s not a nexus between the evidence and the reason it’s being . . . offered for the -- for the use of that evidence. [¶] I’m not saying that’s my final decision. I think if there’s more of an offer of proof or if there’s evidence that would somehow link this particular evidence to the alleged victim in the case, then there’s a possibility the evidence may come in. But at this point, I’m not hearing that.”

## **B.**

### ***Evidence Giving Rise to Speculative Inferences***

As the California Supreme Court has explained, “Except as otherwise provided by statute, no evidence is admissible except relevant evidence. (Evid. Code, § 350.)

Relevant evidence is evidence ‘having any tendency in reason to prove or disprove any disputed fact. . . .’ (*Id.*, § 210.) The trial court is vested with wide discretion in determining the relevance of evidence. (*People v. Green* (1980) 27 Cal.3d 1, 19.) The court, however, has no discretion to admit irrelevant evidence. (*People v. Turner* (1984) 37 Cal.3d 302, 321.) ‘Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact in light of Evidence Code section 210, which requires that evidence offered to prove or disprove a disputed fact must have a tendency in reason for such purpose.’ (*People v. De La Plane* (1979) 88 Cal.App.3d 223, 244, disapproved on other grounds in *People v. Green* [(1980)] 27 Cal.3d [1,] 39, fn. 25.)” (*People v. Babbitt* (1988) 45 Cal.3d 660, 681-682.) Consequently, the “exclusion of evidence that produces only speculative inferences is not an abuse of discretion.” (*Id.* at p. 684.) “We review for abuse of discretion a trial court’s rulings on relevance and the exclusion of evidence under Evidence Code section 352.” (*People v. Avila* (2006) 38 Cal.4th 491, 578.)

Here, the trial court did not abuse its discretion in excluding evidence regarding pornography on the cell phone shared by four members of K.’s family. Defense counsel’s offer of proof was based on speculation K. might have seen the pornographic images and these images gave her the ideas for fabricating a story about defendant sexually assaulting her. As the trial court noted, there was no evidence K. viewed the pornographic images on the cell phone. To the contrary, K. testified she had access to the cell phone but did not look at pictures on the phone except for one of her puppy. The cell phone had a large number of photos of the family and non-pornographic subject matter.

The speculation K. saw any pornography on the cell phone was not sufficient to render the evidence admissible. In short, the trial court did not err in excluding the evidence because the offer of proof relied on only speculative inferences about what K. might have seen.

We also reject defendant's assertion that exclusion of the evidence of pornography on the family cell phone violated his federal constitutional right to present a defense. (U.S. Const. Amends. VI & XIV.) Defense counsel did not object on this federal constitutional basis in the trial court. Consequently, the objection has not been preserved for appeal. (*People v. Blacksher* (2011) 52 Cal.4th 769.) Moreover, the assertion lacks merit. “ ‘As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.’ ” (*Id.* at p. 821, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834.) Defendant cites case law for the proposition a defendant is entitled to introduce *relevant* evidence. (See, e.g., *People v. Northrop* (1982) 132 Cal.App.3d 1027, 1042 [defendant has right to introduce all relevant evidence], disapproved of by *People v. Smith* (1984) 35 Cal.3d 798.) This case law is inapposite because it involved evidence that was excluded even though it was relevant. Here, however, the evidence regarding pornography on the cell phone was irrelevant because there was no evidence K. had viewed the pornographic images.

We also reject defendant's reliance on case law setting forth the rule a criminal defendant is generally entitled to cross-examine witnesses. (E.g., *Chambers v. Mississippi* (1973) 410 U.S. 284 [35 L.Ed.2d 297].) Here, defendant's trial attorney was able to cross-examine all of the witnesses at trial. The defense cross-examined K. about her access to the family cell phone and whether she looked at photos on the phone. And defense counsel elicited from K.'s mother an acknowledgment there were pornographic images on the phone. Even so, defendant did not have a right to introduce irrelevant evidence to invite the jury to draw speculative inferences. (*People v. Harris* (1989) 47 Cal.3d 1047, 1090-1091 [holding under the Confrontation Clause the trial court has discretion to disallow impeachment of a witness based on evidence that is repetitive or only marginally relevant].)

The trial court did not abuse its discretion in excluding evidence relating to pornography on the cell phone shared by members of K.'s family.

## II

### *Resumption of Jury Deliberations on the Four Enhancement Allegations for which Verdict Forms Were Not Originally Supplied*

Defendant contends the trial court exceeded its jurisdiction by reconvening the jury to make further findings after it had been discharged. We are not persuaded.

#### A.

##### *The Jury's Resumption of Deliberations*

While jurors were deliberating, the trial court, prosecutor, and defense counsel reviewed and agreed upon verdict forms. The jury reached a verdict on all of the verdict forms it received. The verdict forms were handed to the deputy clerk, who read them aloud in court. At the request of the defense, the jury was polled. After jurors confirmed their verdicts, the following colloquy ensued:

“THE COURT: [¶] . . . [¶] So at this point, we will ask [the deputy clerk] to record the verdicts. [¶] And does counsel waive reading of the verdict[s] as recorded?

“[The prosecutor]: Judge, before we get to that point, may we approach?

“THE COURT: Yes.

“(Conference at the Bench; not reported.)

“THE COURT: These are all the verdicts; correct? There were not any other verdicts that were not filled out or anything that was left back in the jury room?

“[¶] . . . [¶]

“JUROR JN.05: There was a couple that we noticed that had more forms than others on a couple of the -- but we just flipped them over because they weren't pertinent.

“THE COURT: Sure.

“(Conference at the Bench; not reported.)

“THE COURT: Okay. I'm trying to figure something out here. There's -- there's a finding on four of the counts that was not provided to you that should have been

provided to you. [¶] And it's something that we are going to need to make -- have you make a determination on. Okay?

“JUROR JN.05: Okay.”

The trial court gave the jurors the option to wait for a few minutes or to come back that afternoon. The jury opted to wait, and the bailiff escorted the jurors back to the jury room at 11:55 a.m. Outside the presence of the jury, the prosecutor indicated things got mixed up and a few forms had not been given to the jury. Defense counsel had seen the forms and expressed no objection. Within 15 minutes, the jurors returned to the courtroom with the completed remainder of the jury verdict forms. On these additional forms, the jury found defendant inflicted great bodily harm on the victim for counts 2 and 4 but did not find true the same allegations of great bodily harm as to counts 1 and 3. The jury was polled, the verdicts recorded, and the jury was discharged.

## **B.**

### ***Further Deliberations by a Jury***

Nearly 125 years ago, the California Supreme Court addressed the trial court's power to reconvene a jury in *People v. Lee Yune Chong* (1892) 94 Cal. 379 (*Lee Yune Chong*). In that case, the jury found the defendant guilty of murder and fixed the penalty of life in prison. (*Id.* at p. 383.) “This verdict was declared, and duly recorded, and the jurors were discharged for the term, and left the court-room.” (*Ibid.*) Jurors then engaged in conversation with court staff, the prosecution, and observers who spoke approvingly of the verdict. (*Ibid.*) The trial judge turned to another matter before retiring to his chambers. The trial judge returned from his chambers and ordered the jury to be called back into the jury box to find the degree of the crime. (*Id.* at p. 383.) Although only 5 or 10 minutes had elapsed, “it is clear that during that time they were beyond the control of the court, had thrown off their characters as jurors, and had mingled with their fellow-citizens, free from any official obligation.” (*Id.* at p. 384.) The jury returned a verdict of first degree murder and the defendant moved to set the verdict aside. (*Ibid.*)

The Supreme Court reversed and remanded the matter for retrial. (*Id.* at pp. 386-387.) In doing so, the Supreme Court explained:

“It is quite clear that all the proceedings by which the court reassembled the persons who had constituted the jury, and instructed them to find another verdict, and the so-called ‘second verdict’ itself, were nullities. ‘With the assent of the jury to the verdict as recorded, their functions with respect to the case cease and the trial is closed;’ and, ‘after the verdict is received and the jury discharged, . . . the control of the jury, and of the court, over such verdict is at an end. The court cannot alter it, nor can the jury be called to alter or amend it.’ ” (*Lee Yune Chong, supra*, 94 Cal. at pp. 384-385.)

“Subsequent cases appear to agree that any attempts to correct mistakes or improprieties in the verdict must be made before ‘the control of the jury and of the court over such verdict is at an end.’ (Cf. *Chong, supra*, at p. 385.) (*People v. Grider* (1966) 246 Cal.App.2d 149; *People v. Romero* (1982) 31 Cal.3d 685.)” (*People v. Thornton* (1984) 155 Cal.App.3d 845, 853 (*Thornton*).)

Section 1164 codifies this result by providing: “(a) When the verdict given is receivable by the court, the clerk shall record it in full upon the minutes, and if requested by any party shall read it to the jury, and inquire of them whether it is their verdict. If any juror disagrees, the fact shall be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall, subject to subdivision (b), be discharged from the case. [¶] (b) No jury shall be discharged until the court has verified on the record that the jury has either reached a verdict or has formally declared its inability to reach a verdict on all issues before it, including, but not limited to, the degree of the crime or crimes charged, and the truth of any alleged prior conviction whether in the same proceeding or in a bifurcated proceeding.”

The *Thornton* court surveyed cases involving claims of erroneous reconvening of a discharged jury and noted that “two cases . . . have upheld the reconvening of juries after discharge, but in both of them the reconvening occurred *before the jurors left the*

*jury box, i.e., before the trial courts had lost control over them. (People v. Powell (195[0]) 99 Cal.App.2d 178; People v. Ham (1970) 7 Cal.App.3d 768, overruled on other grounds in People v. Compton (1971) 6 Cal.3d 55.) In these cases, the jurors were discharged upon stating they could not reach a verdict, but immediately ‘reconvened’ without having left their seats upon discovery that a verdict had indeed been reached on one count (Powell) or that some counts had not yet been considered (Ham). The Court of Appeal in each case laid particular emphasis on the fact that in between being discharged and reconvened the jury had remained in the box. (People v. Powell, supra, 99 Cal.App.2d at pp. 181–182; People v. Ham, supra, 7 Cal.App.3d at p. 776.)” (Thornton, supra, 155 Cal.App.3d at p. 854, italics added.)*

### C.

#### ***Completion of Initially Omitted Jury Verdict Forms***

The trial court did not exceed its jurisdiction in submitting the initially omitted verdict forms to the jury. Although the first batch of forms was recorded by the deputy clerk, the verdict was incomplete. The trial court quickly discovered and corrected the error by having the jury resume deliberations. The trial court did not lose control of the jury before deliberations resumed. Unlike *Lee Yune Chong, supra*, 94 Cal. 379, jurors in this case had not spoken to the prosecution, court staff, or other observers. As in *People v. Powell* (1950) 99 Cal.App.2d 178, pages 181 to 182 and *People v. Ham* (1970) 7 Cal.App.3d 768, 776, the jurors in this case had not yet left the jury box. Thus, for the same reason as in *Powell* and *Ham*, the trial court did not err in having the jury reach a complete verdict.

We reject defendant’s argument the trial court lost jurisdiction the moment the deputy clerk recorded the incomplete verdict. Defendant misplaces his reliance on *People v. Lankford* (1976) 55 Cal.App.3d 203 (*Lankford*), overruled on other grounds in *People v. Collins* (1976) 17 Cal.3d 687, 694, fn. 4, and *People v. Mestas* (1967) 253 Cal.App.2d 780. The *Lankford* court held the jury’s verbal endorsement of the verdict

sufficed to ensure a valid verdict even though the jury foreman misdated one of the forms. (*Lankford*, at p. 210.) And in *Mestas*, the Court of Appeal affirmed the trial court’s discretion to allow the jury to correct its erroneous return of both guilty and not guilty verdict forms. (*Mestas*, at pp. 785-786.) The *Mestas* court held that “[p]atently, the conflict then did exist, and the court properly exercised its discretion . . . so a true verdict might be returned.” (*Id.* at p. 735.)

Rather than holding a trial court lacks power to reconvene a jury after a verdict is announced, both *Lankford*, *supra*, 55 Cal.App.3d 203 and *Mestas*, *supra*, 253 Cal.App.2d 789 confirm the trial court’s discretion to correct verdict form errors before the jury is discharged. As the California Supreme Court stated in *Lee Yune Chong*, *supra*, 94 Cal. 379, “A court would, no doubt, have the power to direct a jury to correct an informal verdict, although the mistake had not been discovered until after the verdict had been entered upon the minutes, ‘while the jury are before it and under its control.’ ” (*Id.* at p. 385.) Because the jury in this case remained under the trial court’s control and was not influenced by conversations with non-jurors, the trial court retained power to correct the incomplete verdict.

### III

#### ***Parole Revocation Fine***

Defendant contends, and the Attorney General agrees, the \$300 parole revocation fine listed on the abstract of judgment was never orally pronounced by the trial court. Although there was no objection to the imposition of the parole revocation fine, it is cognizable as a statutorily unauthorized fine. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) Because defendant was sentenced to serve life in prison without possibility of parole, no parole revocation fine could be imposed. (*People v. McWhorter* (2009) 47 Cal.4th 318, 380.) Consequently, we strike the \$300 parole revocation fine (§ 1202.45) as erroneously included in the abstract of judgment.

DISPOSITION

The \$300 parole revocation fine (Pen. Code, § 1202.45) included on the abstract of judgment is stricken. The trial court is directed to prepare a corrected abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is affirmed.

\_\_\_\_\_/s/  
HOCH, J.

We concur:

\_\_\_\_\_/s/  
NICHOLSON, Acting P. J.

\_\_\_\_\_/s/  
MURRAY, J.