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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	
Plaintiff and Respondent,	E052680
v.	(Super.Ct.No. RIF150515)
DAVID EUGENE FERRIS,	OPINION
Defendant and Appellant.	

APPEAL from the Superior Court of Riverside County. Richard Todd Fields, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia, Lynne G. McGinnis and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant David Eugene Ferris guilty of one count of attempting to contact a minor with the intent to commit a sexual offense (Pen. Code, § 288.3, subd. (a)),[1] and three counts of attempting to send harmful material to a minor with the intent of arousing himself or the minor and with the intent of seducing the minor (§§ 664, 288.2, subd. (a)). The trial court granted defendant five years of formal probation with the condition that he serve 180 days in jail. Defendant raises three contentions on appeal. First, defendant asserts the evidence supporting his four convictions does not meet the substantial evidence standard because the victim was an adult law enforcement officer posing as a minor. Second, defendant contends the trial court erred by not properly exercising its discretion regarding excluding video recordings of defendant masturbating. Third, defendant asserts he was denied effective assistance of counsel because it was not reasonable to stipulate that he intended to seduce the victim. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. PROSECUTION'S CASE

Heidi Chebahtah (Chebahtah) was a senior district attorney investigator, which means she is a sworn peace officer. Chebahtah was assigned to the Sexual Assault Felony Enforcement taskforce. Within the taskforce, Chebahtah was a member of the Internet crimes team. Members of the Internet crimes team were adult law enforcement

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

officers who went on the Internet pretending to be minors. While on the Internet, the officers tried to identify sexual predators targeting minors.

When members of the Internet crime team go on the Internet to search for predators, they create Yahoo! profiles, which indicate the person's age range and sex. Yahoo! requires users to be at least 18 years old, but no age verification is required. In other words, a user could not list her profile age as younger than 18. Part of the profile is the user's screen name.[2] In November 2008, Chebahtah had an account with the screen name Prncsalli13, which is read as "Princess Alli 13." Chebahtah tried to make the screen name read like one that a 13 or 14 year old would use. The full fake name associated with the Yahoo! account was Allison Chamberlin, with the nickname Alli.

When online as Prncsalli13, Chebahtah tried to present herself as a 14-year-old girl in southern California. In order to accomplish this, Chebahtah wrote about books, movies, and topics that would be interesting to a teenager. Chebahtah chatted online via instant messaging programs, such as Yahoo! messenger.[3]

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[2] A screen name identifies a person online.

[3] Instant messaging involves two people at two different computers writing to one another in real time. When User-A types to User-B, then a window pops-up on User-B's computer monitor, so he can see what User-A wrote to him. User-B can then write back to User-A, and the written chat continues in the pop-up window on the separate computers.

Chebahtah found people to chat with by entering chat rooms; instant messaging chats can be initiated after finding a person in a chat room.[4] When online as Prncsalli13, Chebahtah did not initiate chats with people.

On November 10, 2008, Chebahtah was working in the City of Riverside, and she was in a San Diego regional chat room, because Riverside does not have its own regional chat room. At a little after 5:00 p.m., defendant initiated a private chat or instant message chat with Chebahtah, who was posing as Prncsalli13. Defendant used the screen name "Wicked Dave." Chebahtah chatted with defendant over a six- to seven-month time period, from November 2008 to June 2009. During that time, Chebahtah never told defendant her exact fake age, because defendant never asked, and Chebahtah felt there was not a natural way to bring it up during the chats.

During the first chat conversation, defendant asked Chebahtah if she had a "cam."[5] Chebahtah explained that she did not, because her mother would not allow her to have one. Defendant asked if Chebahtah had a boyfriend, and she responded, "Not anymore." Defendant asked if Chebahtah had ever experienced sex. Chebahtah said

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[4] A chat room is a webpage people can visit to write to one another in real time. Chat rooms have different topics; some relate to a particular geographic region, some relate to religion, sports, music, sex, or fantasies. In a regional chat room there is usually not much writing that occurs, it is more like a "waiting room or lobby," where computer users wait for another person to contact them privately, via instant messenger.

[5] A "cam" refers to a webcam, which is a computer camera. A webcam is small, and photographs or video records a person, so that the images can be sent over the Internet to other computer users. For example, defendant would be able to use a webcam to send images of himself to Chebahtah. The webcam images would appear in a separate window on Chebahtah's computer, so that she could chat while seeing defendant's images.

that she had sex with her ex-boyfriend, who was 20 years old. Defendant asked Chebahtah if she liked sex, and she responded, "[Y]eah." Defendant asked Chebahtah if she masturbated. Chebahtah replied, "Um, sometimes." Defendant wrote that he was masturbating. The chat progressed as follows:

"[Defendant]: You don't mind me thinking of you; right?

"[Chebahtah]: I really didn't think about it. But not really.

"[Defendant]: If you were here, would you help me?

"[Chebahtah]: What would you want me to do?

"[Defendant]: Would you stroke it with me?

"[Chebahtah]: If you wanted me to, yeah, I would.

"[Defendant]: Would you sit on it?

"[Chebahtah]: If you asked, I would. Or if you told me to, I would.

"[Defendant]: I wish you would right now.

"[Chebahtah]: Really?

"[Defendant]: Yes. I'm very hard.

"[Chebahtah]: Oh. That's good, isn't it?

"[Defendant]: Yes.

"[Chebahtah]: I thought so.

"[Defendant]: I wish you had more pics.

"[Chebahtah]: Sorry. My camera got stolen at school, and mom won't let me get a new one.

"[Defendant]: I'm going to come soon.

"[Chebahtah]: Really? Then what?

"[Defendant]: Then shower. [Laughing out loud].

"[Chebahtah]: That's funny.

"[Defendant]: Would you suck it?

"[Chebahtah]: Yeah. I done that before.

"[Defendant]: Did you swallow when he came?

"[Chebahtah]: Yeah. What else you do with it?

"[Defendant]: Spit it out.

"[Chebahtah]: Oh, I never thought of that before. He told me what to do; so I did.

"[Defendant]: Your ex?

"[Chebahtah]: Yeah.

"[Defendant]: What are you wearing right now?

"[Chebahtah]: Jeans and a hoody.

"[Defendant]: Bra?

"[Chebahtah]: Yeah.

"[Defendant]: I'm going to go shower and think of how nice you are."

During their chats, Chebahtah sent defendant photographs. The photographs were obtained from a younger law enforcement officer, and reflected the law enforcement officer when she was a young teenager. Defendant also sent photographs of himself to Chebahtah.

During a chat on November 25, defendant suggested that he should "hit on" Chebahtah's mother, in order to "be close" to Chebahtah. Defendant wrote that he would make Chebahtah's mother "be very nice" to her, as long as Chebahtah did not tell her mother that defendant found Chebahtah to be "sexy and hot." Defendant chatted about how he would want to flirt with Chebahtah, kiss her, and touch her. Defendant wrote that he was "bad" for wanting to touch Chebahtah because she was "so young" and he was "so much more mature." Defendant then asked Chebahtah questions about what she did with her ex-boyfriend, such as, "[D]id he ever shoot his cum on your body or in your mouth? [F]rom his cock?" Defendant wrote that he wished he could have sex with Chebahtah. However, defendant wrote, "[I] would never do it until you were old enough that you wouldn't get in trouble for it." Chebahtah questioned why she would get in trouble, since she would not tell her mother about it. Defendant explained, "[W]e would both get in trouble and [I]'d be the one in real legal trouble but you would have it over your head that an older man took advantage of you. [A]nd that's tough to deal with, [I] promise."

Defendant asked if Chebahtah's best friend had ever had sex. Chebahtah wrote that she had. Defendant asked how old the friend was, and Chebahtah responded, "14." Defendant wrote, "wow." Chebahtah explained all the girls at her school "alre[a]dy do it." Defendant responded, "[I] need to hang out at your school."

On December 5, 2008, defendant asked Chebahtah, "[I]s it okay that [I]'m hard and stroking?" Defendant wrote that he wished Chebahtah was with him because he "want[ed] to feel [his] cock all over [her]." Defendant asked Chebahtah, "[H]ave you

ever watched anyone on cam jack off?" Defendant informed Chebahtah that he would be setting up his webcam. Defendant wrote that the image would be "just [his] cock." During the December 5 chat, defendant sent Chebahtah a webcam video of a white male, from the waist down, naked, sitting in a chair, masturbating. The man's face was not visible.

After the webcam images started, defendant instructed Chebahtah to remove her panties, and "feel [her] pussy." Defendant told Chebahtah to "rub it pretending [his] cock is there," and "rub it until you feel really good." Defendant then instructed Chebahtah to unhook her bra. Defendant wrote, "[F]eel your nipple while you finger yourself . . . [¶] . . . [¶] . . . now imagine my cock inside you and me licking your nipple."

On February 4, 2008, defendant asked Chebahtah, "[D]o you want to watch me a little?" Defendant sent Chebahtah webcam images of a naked man, from the waist down, masturbating. Defendant wrote, "[I] wish [I] could cum in between your legs [A]lli." Defendant asked Chebahtah if she was "rubbing" herself. After defendant ejaculated, he moved the webcam so that his face was visible. Chebahtah recognized the man from the webcam as defendant.

On February 19, 2009, Chebahtah wrote to defendant that she wished he could take her to her eighth grade dance. Defendant responded, "[I]'m a little old [I]'d get noticed." Chebahtah replied that she would tell people defendant was her uncle. Defendant suggested that he could visit Chebahtah. Defendant asked Chebahtah, "[H]ow many dads do you think are turned on by their daughters like you turn me on?"

Chebahtah wrote that she had a 15-year-old friend who "hooked up wit[h] her stepdad." Defendant asked, "[Y]ou wouldn't tell anyone about me right?" Chebahtah responded that she would not tell anyone. Defendant asked Chebahtah if she ever went out in the evenings, because he wanted to find a way to see her "without getting [Chebahtah] in trouble, or [himself]." Defendant suggested meeting in a park sometime. In March 2009, defendant wrote that he wanted to visit Chebahtah in order to give her a webcam he purchased for her. Defendant made tentative plans to meet Chebahtah at a Target, while she was on spring break, and requested that she wear a skirt and high heels. The meeting did not take place.

In April, defendant chatted with Chebahtah and asked her how school was going. Chebahtah said that she did not have homework because the school was involved in testing that week. Defendant asked Chebahtah, "[W]ould you want to take the tip of my cock and rub your pussy with it [A]lli if I was kneeling in front of you? [¶] . . . [¶] [W]ould you rub it until you came or you made me shoot all over you? [¶] . . . [¶] [W]ould you want to slide me inside you? [¶] . . . [¶] [I]f you were here right now would you try and sit on me?"

Defendant informed Chebahtah that he was about to orgasm. Defendant instructed her, "[S]pread your legs honey spread like [I]'m right there ok?" Defendant informed Chebahtah that he was orgasming. Defendant then asked Chebahtah what her favorite subject was in school. Chebahtah wrote that she liked English, and defendant

asked if she had read the *Twilight*[6] books. Chebahtah replied that she planned to borrow the books from a friend.

On May 7, 2009, defendant asked Chebahtah if she had any plans for summer vacation. Chebahtah wrote that she would spend time with a friend, and that she wished her mother worked more. On May 11, 2009, defendant told Chebahtah that he became aroused thinking of her wearing a skirt. Defendant asked if it bothered Chebahtah that he became aroused thinking of her. Chebahtah asked defendant why he would think it bothered her. Defendant responded, "[C]ause I act like a horny old guy sometimes." Defendant informed Chebahtah that he was masturbating, and asked if she would like to watch him.

During the May 11 chat, defendant sent Chebahtah webcam images of a naked man, from the waist down, sitting in a chair, and masturbating. The chat progressed as follows:

"[Defendant]: What kind of panties do you have on?

"[Chebahtah]: [B]oy shorts. . . . [¶] . . . [¶] . . . ha . . . u d[on't] got none on [laughing out loud]

"[Defendant]: [N]ope [¶] . . . [¶] what would you want to do with it? [T]ouch it? [L]ick it? . . . [¶] . . . [¶] [F]eel it between your legs? [¶] . . . [¶] [A]re your legs spread a little baby? [¶] . . . [¶] [H]ave you felt to see if you['re] wet? [¶] . . . [¶] I'm gonna cum baby [¶] . . . [¶] . . . mmmmmmmm wow[.]"

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[6] Vampire romance series of books (and movies) that is hugely popular with young adult and preteen girls.

As the chat conversation continued, defendant wrote, "[I] got new glasses today. [T]hey're for older gents like me." Defendant asked Chebahtah what she did with her mom the day before, and Chebahtah responded that they did not do anything together. During another chat conversation in May 2009, Chebahtah wrote that she had just walked home from school, and was planning to go to the mall with a friend to shop for eighth grade graduation dresses. During a chat on June 1, 2009, Chebahtah asked defendant if he could chat with her in the morning, rather than the evening, because her mother was going to start coming home earlier in the evening. When Chebahtah ended the conversation, she wrote that she was doing so because "mom[']s gonna b[e] home like any sec[ond]."

During Chebahtah's investigation, she discovered defendant's full name, that he was in his forties, and that he lived in the San Diego area. In June 2009, Chebahtah obtained a search warrant for defendant's home. Chebahtah found one webcam in defendant's home. A meeting between defendant and "Alli" never took place.

B. DEFENSE CASE

Defendant testified at trial. Defendant stated that he was 43 years old and resided in San Diego; defendant was 41 years old during the chats. Defendant admitted using the screen name "Wicked Dave." Defendant testified that he is a discreet sex addict, which means that he has a constant need for sexual gratification. The term discreet refers to the fact that defendant can satisfy his needs by "acting alone." Defendant stated that he had previously sought counseling for his addiction, but was "not sure why [he] turned out this way."

Defendant admitted that he went into chat rooms to "fulfill [his] sexual fantasies." Defendant assumed that everybody in the Yahoo! chat rooms was at least 18 years old. Defendant believed the screen name Prncsalli13 was associated with someone with whom he had previously chatted, which is why he initially contacted Chebahtah. The other "princess person" was "an older lady . . . she had kids, and she liked to role-play."[7] Defendant had previously seen the other "princess person" on a webcam, and she was "real close to [his] ideal woman." Defendant believed he was chatting with the other "princess person" the entire time he was chatting with Chebahtah; he only discovered it was not that person when he was arrested.

Defendant explained that he asked for photographs of Chebahtah because he was "looking for [his] ideal woman to talk to online and pictures help to see if [he] can find her." Defendant stated that he was not excited by the photographs sent by Chebahtah. One of the photographs that Chebahtah sent to defendant reflected the younger officer (when she was a young teenager) opening Christmas presents. When defendant saw the photograph he assumed that it was an old photograph because defendant has four children and there were no electronics among the gifts. Defendant remarked that there was a Monopoly box shown in the photograph, and that "box has not been produced in the last 12 years." Defendant felt he was chatting with someone who was pretending to be the girl in the photograph.

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[7] Role playing is when a person pretends to be something she is not.

When Chebahtah wrote about being in the eighth grade, defendant felt that Chebahtah was fantasizing, and that "her fantasies were going too far." Defendant stated that he was not interested in fantasizing about underage girls, but he thought he was helping with Chebahtah's fantasy. Defendant explained that he wrote about being in "legal trouble" if he met "Alli," because the meeting might cause his wife to divorce him. When Chebahtah wrote about the eighth grade dance, defendant believed she was preparing for her daughter's eighth grade dance. Defendant had a child in the eighth grade around the time he was chatting with Chebahtah, and he was bothered by the idea of a person chatting with an eighth grader about sex. Defendant stated that he never believed he was chatting with a minor.

Defendant explained that he was sexually aroused when chatting with Chebahtah because he was watching pornography during the chat conversations. Defendant was also chatting with other people about sex simultaneously to chatting with Chebahtah. Defendant explained that he wrote about meeting with "Alli" because "when you're fantasizing and you want the other person involved, it's easier to fantasize that they actually want to meet you. Then it's like more of a connection." Defendant stated that he never had any real intention of meeting "Alli." Defendant explained that he mentioned meeting Chebahtah to give her a webcam, because he believed he was chatting with the other "princess person," who he had previously seen on a webcam, and he was "hoping she would go 'Oh, I got one,' and [he] would get to actually see what she looked like,'" in order to verify that it was the same person.

C. VIDEO RECORDINGS

Prior to trial, defendant filed a motion to exclude the three masturbation webcam recordings that he sent to Prncsalli13. Defendant argued that the recordings were more prejudicial than probative, because "seeing defendant masturbate into a [webcam] would so enrage the jury . . . against the defendant, he could not receive a fair trial." (Evid. Code, § 352.) Defendant argued that Chebahtah "would be able to adequately describe to the jury what she observed without the necessity of the jury actually having to see [defendant] in the act of masturbation."

On July 26, 2010, the trial court held a hearing on defendant's motion. Defendant had two trial attorneys representing him at the hearing, Michael Scafiddi (Scafiddi) and Gary Smith (Smith). At the hearing, Smith stated a discussion took place in chambers regarding the three webcam recordings. Smith stated the prosecutor wanted to play, for the jury, the recording that showed defendant's face, because it was relevant to proving defendant sent harmful material to a minor. Smith said the defense would stipulate to the facts that on three occasions defendant "masturbate[d] on a webcam and that it was apparently viewed [b]y the investigator."

The prosecutor argued the defense stipulation was insufficient. The prosecutor said, "There are other elements that I have to prove that the jury needs to see the context of it, how long it lasts, and basically to see what is going on in the video for themselves to determine whether or not those elements have been proved." The prosecutor stated that "intent to seduce a minor" was an element that would still need to be proven, despite defendant's stipulation. The prosecutor argued the prejudicial effect of the

evidence was minimized because she only intended to show one of the tapes, and she selected the shortest of the tapes—14 minutes, as opposed to 17 and 20 minutes.

The trial court stated it believed the recordings could enrage the jury, and therefore it intended to exclude the recordings. The prosecutor clarified that the parties had already agreed to "have a stipulation." The court stated it understood, and "if there were no stipulation, it would come in. One tape would come in." The trial court explained the stipulation changed the analysis of whether the recording was prejudicial. The prosecutor then stated she was unwilling to stipulate. The prosecutor offered to present a redacted portion of the tape, which would show defendant's face and last approximately 10 to 15 seconds.

Defendant argued the stipulation satisfied the identification issue, so there was no need to show the recording. The trial court asked, "Does the Court have the power to force a stipulation?" Smith argued that the court did not, but the court had the authority to exclude evidence. The trial court stated it would exclude all of the recordings "except the 10 to 15 seconds which shows that in fact masturbation was occurring on at least one of the dates and the defendant's face."

The day after the hearing, on July 27, 2010, the defense filed a motion requesting that the trial court "revisit its previous ruling" regarding the recordings. Defendant asserted that he offered to stipulate he masturbated and transmitted the recordings via a webcam, and that the images were viewed by Chebahtah. Defendant contended the prosecutor could not reject the stipulation in bad faith—there must be a legitimate tactical reason for refusing the stipulation.

On July 27, the court held a hearing on the motion for reconsideration. The trial court asked the prosecutor to state her reasons for not accepting the stipulation. The prosecutor said the primary reason was the need to prove that the material was harmful, but also the need to prove an intent to seduce. The prosecutor argued, "It's highly relevant for a jury to see exactly what is being sent from the defendant to the person that was posing as a minor . . . ." The prosecutor argued that by reducing the recordings from approximately one hour to a few seconds, the prejudicial effect of the recordings was diminished. The prosecutor remarked that if defendant stipulated he had the intent to seduce when sending the material, then "that would be a different story."

The defense argued the recordings would not prove defendant's intent. The prosecutor argued intent could be deciphered from "exactly how far away from the camera he was" and "the way that he is smiling, the way that it's innocent." Smith said the defense would stipulate to the fact that defendant intended to arouse Chebahtah, because he did not "think it's any secret that [defendant] intended to arouse the person on the other side." Smith said the only fact the defense would not stipulate to, was that Chebahtah was a minor. The trial court stated "the video would be inappropriately presented to the jury" if such a stipulation were made.

Defense counsel offered the following stipulation: "[D]uring the three events of masturbation [defendant] did, in fact, masturbate on a webcam which was transmitted to someone and that he did so with intent to seduce and sexually arouse that person." The prosecutor argued the stipulation was problematic; if defendant stipulated to sending "harmful" material, then he would have stipulated the material was harmful, because it

was sent to a minor. The prosecutor explained that sending masturbation images to an adult would not be harmful—it was the fact a minor was possibly involved that made the images harmful. In other words, the prosecutor asserted defendant could not remove the "minor" element from the stipulation.

Smith argued that the prosecutor would still need to prove the material was harmful. Smith stated, "[I]n my book [it] would be complete malpractice on the part of the defense, to stipulate this is harmful material because it's not." The trial court asked Smith if the video was the best evidence for proving the "harmful" element. Smith responded the video was too prejudicial, and questioned if the prosecutor had a means of diminishing the prejudicial effect. The trial court said the prosecutor had a right to use the video, if the defense did not stipulate to the "harmful material" element. The trial court explained that it had limited the recording, due to the possible prejudicial effect of the video.

Smith requested a short recess. When the court reconvened, Smith said, "It is with some reluctance but out of concern that the video be shown and inflame the jury that defense offers the following proposed stipulation: That on the date specified earlier that [defendant] masturbated on a video webcam, which was transmitted to another person, in this case the undercover detective, and that it was harmful material, and that he transmitted that with the intent of seducing and sexually arousing the person on the other side." Smith stated the stipulation was being entered into "as a trial strategy." The prosecutor suggested the stipulation be put in writing.

The written stipulation provided: "1. The defendant sent harmful matter to . . . 'Alli,' by the Internet. [¶] 2. When the defendant acted, he intended to sexually arouse, appeal to, or gratify the lust, passions, or sexual desires of himself or Alli. [¶] 3. When the defendant acted, he intended to seduce Alli." The prosecutor agreed to the stipulation. The court held it would "allow the stipulation in lieu of the video." The court found the stipulation "cover[ed] the elements that would be covered by the tape itself and that to allow the tape would be error." The stipulation was read to the jury after the prosecution rested, but before the defense called its first witness.

DISCUSSION

A. VIDEO RECORDINGS

Defendant contends the trial court erred because it should have excluded the webcam recordings regardless of whether there was any stipulation, because the recordings were more prejudicial than probative. We disagree.

A trial court "in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "'A trial court's exercise of discretion in admitting or rejecting evidence pursuant to Evidence Code section 352 "will not be disturbed on appeal unless there is a manifest abuse of . . . discretion resulting in a miscarriage of justice." [Citation.]' [Citation]." (*People v. Thomas* (2011) 51 Cal.4th 449, 485.)

Defendant was charged with attempting to send harmful material to a minor. (§§ 664, 288.2, subd. (a).) Section 288.2, subdivision (a), provides: "Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes, [or] sends . . . any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of seducing a minor, is guilty of a public offense . . . ."

The trial court initially ruled that the prosecution could play 10 to 15 seconds of the video recording for the jury, specifically, the part showing "masturbation was occurring . . . and the defendant's face." Thus, we limit our analysis to whether the trial court abused its discretion by authorizing that 10- to 15-second exhibit.[8]

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[8] We note this court typically reviews the final evidentiary rulings of a trial court, as opposed to interim rulings. (See *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694 ["an appellate court reviews a court's final rulings on evidentiary objections"].) Ultimately, the trial court's final ruling excluded the recordings. Nevertheless, for the sake of addressing defendant's contention, we will review this interim ruling, because the issue is easily resolved. We anticipate defendant may disagree he is appealing the interim evidentiary ruling, as he is arguing he was essentially bullied into making stipulations so the video recordings would not be played for the jury, i.e., implicating the final ruling. However, this court reviews a trial court's final evidentiary rulings, not the trial court's reasoning and interim rulings. (*People v. Jackson* (2003) 110 Cal.App.4th 280, 289.) Thus, in terms of how this court views an argument, defendant is arguing the trial court erred by not excluding the videos, when the trial court *did* exclude the videos. Accordingly, for this court to address defendant's contention, we must infer he is asserting the interim ruling was incorrect—the trial court erred by permitting 10 to 15 seconds of the recordings to be admitted, when it should have excluded the videos outright.

The “harmful matter” charges against defendant related to the video recordings. (§ 288.2, subd. (a).) The video recordings were probative evidence because they showed the jury exactly what defendant sent to Prncsalli13. By viewing the 10- to 15-second recording, the jury could determine (1) whether the material was harmful; and (2) whether defendant was the person who sent the material. The video recording could also assist the jury with determining whether defendant intended to arouse himself and/or Prncsalli13. Overall, the video recording was extremely probative on the issues of identification and “harmful material.”

The videos are likely to be prejudicial because they are alleged to contain “harmful material.” In other words, it would be difficult to have a trial where a videotape is alleged to contain “harmful” matter and not have that content be at least somewhat upsetting to some jurors, i.e., allegedly harmful material is generally going to offend some people.

In the instant case, the trial court reached a well thought-out and reasonable result by reducing the nearly one hour of recordings to 10 to 15 seconds. By severely limiting the length of the recording played to the jury, the trial court limited the prejudicial effect, but still allowed the jury to see the evidence that had probative value. From the limited recording, the jury would be able to determine if defendant was “Wicked Dave” and whether the material was harmful; however, the video would not be played at great length, which would limit the emotional response the jurors might have to the material. In sum, the trial court acted reasonably in admitting 10 to 15 seconds of video recordings. As a result, we conclude the trial court did not abuse its discretion.

Defendant contends the trial court erred because the video recordings were not probative; defendant asserts testimony describing the recordings would have sufficed, and thus the recordings were cumulative. Defendant notes he never disputed that he was "Wicked Dave," and therefore identification was not at issue. We do not find defendant's argument to be persuasive because even if identification were not at issue, the "harmful" element was at issue—the jury needed to determine whether the recordings were "harmful." Chebahtah could have provided a graphic description of what she saw; however, Chebahtah would likely have needed to go into great detail so that the jury could decide whether the material was harmful. Chebahtah would have needed to explain how close defendant was to the camera, how grainy the image appeared, how long the video lasted, whether defendant backed away from the camera, exactly what movements defendant made, et cetera. This detailed and graphic testimony could be mostly eliminated by showing the 10- to 15-second video clip.

Moreover, we note that oral testimony about a writing is generally not admissible to prove the content of a writing. (Evid. Code, § 1523.) "A videotape is equivalent to a writing under the Evidence Code. [Citation.]" (*Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440, fn. 5.) Thus, we are not persuaded that the trial court's decision was beyond the bounds of reason, because (1) the trial court's decision quickly moved the jury through the potentially inflammatory material, and (2) used the best evidence, as opposed to oral testimony about the evidence.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends his trial counsel was ineffective for having stipulated that defendant intended to seduce "Alli."[9, 10] We disagree.

To secure a reversal of a conviction based on ineffective assistance of counsel, "a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

In regard to the reasonableness of counsel's performance, "'"[r]eviewing courts defer to counsel's reasonable tactical decisions."'" (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) "'"[T]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'"" and "'"courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight."'" (*Ibid.*)

The element of "intent to seduce a minor" in section 288.2 is defined as "entic[ing] the minor to engage in a sexual act involving physical contact between the perpetrator and the minor." (*People v. Jensen* (2003) 114 Cal.App.4th 224, 240-241.)

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[9] We infer defendant's contention relates to Smith, but not Scafiddi, since Smith was the defense attorney that presented the stipulation to the trial court.

[10] Defendant has petitioned this court for a writ of habeas corpus. (*In re Ferris*, petition filed Oct. 24, 2011, E054777). In the petition, defendant alleges his trial counsel was ineffective. We dispose of the writ petition via separate order.

In other words, enticing a minor to masturbate herself would not satisfy the "intent to seduce" element of section 288.2. (*Jensen*, at pp. 240-241.)

When making the stipulation about defendant's intent to seduce, Smith stated that he was doing so "with some reluctance but out of concern that the video be shown and inflame the jury." Smith explicitly stated on the record that the stipulation was done "as a trial strategy." Thus, Smith entered into the stipulation for the strategic purpose of preventing the jury from seeing the recording, because Smith feared that the recording would inflame the jury. As set forth *ante*, the recording was inflammatory to the extent that it contained "harmful" material—it would be difficult to have allegedly "harmful" material that some people did not find offensive—while the probative value may outweigh the prejudicial effect, there is still some inflammatory feelings that the jury could experience. We must defer to Smith's decision to use the stipulation in order to eliminate the potentially inflammatory evidence. In other words, there was a reasonable tactical basis for Smith's decision. Accordingly, we conclude that Smith did not render ineffective assistance of counsel.

Defendant contends that Smith was ineffective because there was no evidence that defendant intended to entice "Alli" into having actual physical sexual contact with him. Thus, defendant asserts that it was not reasonable for Smith to stipulate to the "intent to seduce" element. Contrary to defendant's position, there was evidence supporting the stipulation. During the chats, defendant wrote: "[I] wish you were here [¶] . . . [¶] cause [I] want to feel my cock all over you"; "[I] wish I could cum between your legs [A]lli"; "[W]ould you tell me what your zip code is?" "[W]ould you do

something for me when we meet? [¶] . . . [¶] [W]ould you reach down and rub my cock just on the outside of my pants? [¶] . . . [¶] [M]mm yeah just a tease kinda but damn it would turn me on[.] [¶] . . . [¶] [I]'m hoping when we meet [I] can talk you into wearing a skirt and some heels." "[J]ust wondering how to see you without getting you in trouble, or me [¶] . . . [¶] maybe just have you meet me at a park that's close or something[.] [¶] . . . [¶] [W]hen you [previously] had sex where did you go? [¶] . . . [¶] [I] wish I could make you cum [A]lli." "[I] am hoping that [I] can get some time to ride [my motorcycle] up and give you your [web]cam [I] have for you [¶] . . . [¶] [I]t will have to be next week sometime I think [¶] . . . [¶] but I'm excited to meet you[.] [¶] . . . [¶] [I] will see when I can come up[,] maybe Tuesday."

The foregoing evidence supports a finding that defendant intended to meet "Alli" and have actual physical sexual contact with her, because defendant wrote about meeting "Alli" and his desire to have intercourse with her. Thus, we are not persuaded that there is a lack of evidence supporting the stipulation.

Next, defendant argues that the stipulation was unreasonable because defendant explained that he never intended to meet "Alli"; rather, writing about plans to meet helped to create a better fantasy. While defendant testified that he never intended to actually meet "Alli," the jury was free to reject his testimony and find that defendant intended to meet "Alli" for sexual contact based upon the chat conversations. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 524.) Consequently, we are not persuaded by the argument that defendant's testimony somehow eliminated or canceled-out the evidence that he intended to meet "Alli" for physical sexual contact.

C. INVOLVEMENT OF A MINOR

Defendant contends that all of his convictions must be reversed due to insufficient evidence, because all his offenses require the involvement of an actual minor. (§§ 288.3, subd. (a), 664, 288.2, subd. (a).) We disagree.

Section 288.3, subdivision (a) provides: "Every person who . . . *attempts* to contact or communicate with a minor, who knows or reasonably should know that the person is a minor" with the intent to commit a specified sexual offense shall be punished. (Italics added.)

As to sections 664, and 288.2, subdivision (a), defendant was convicted of attempting to send harmful material to a minor with the intent of arousing defendant or the minor, and with the intent of seducing the minor while having knowledge that the person is a minor or while failing to exercise reasonable care in ascertaining the true age of the minor.

When "'"a person commits an act based on a mistake of fact, his guilt or innocence is determined as if the facts were as he perceived them."' [Citations.] There need be no '"present ability" to complete the crime, nor is it necessary that the crime be factually possible.' [Citations.]" (*People v. Reed* (1996) 53 Cal.App.4th 389, 396 (*Reed*) [Fourth Dist., Div. Two].) "Our courts have repeatedly ruled that persons who are charged with attempting to commit a crime cannot escape liability because the criminal act they attempted was not completed due to an impossibility which they did not foresee: 'factual impossibility is not a defense to a charge of attempt.' [Citation.]" (*Ibid.*)

In *Reed*, a detective responded to the defendant's sexual advertisement in a magazine. (*Reed, supra*, 53 Cal.App.4th at p. 393.) The detective, who was male, posed as a mother with children ages 12 and 9. (*Id.* at pp. 393-394.) The "mother" asked the defendant to educate her children about sex. (*Id.* at p. 394.) The defendant wrote about how he would have sexual contact with the children, such as "touching of genitals, play with sex toys, oral sex, and intercourse." (*Id.* at pp. 394-395.) Law enforcement set up a meeting at a motel between the defendant and the non-existent mother and children. The defendant was arrested at the motel. (*Id.* at p. 395.)

On appeal, the defendant in *Reed* asserted that he could not be convicted of attempted child molestation because the victims were imaginary and therefore the defendant could not fulfill all the elements of the offense. (*Reed, supra*, 53 Cal.App.4th at p. 396.) This court rejected the defendant's argument. This court applied the perception rule set forth *ante*, and reasoned, "[I]f the circumstances had been as defendant believed them to be, he would have found in the [motel] room he entered two girls under fourteen available for him to engage in lewd and lascivious conduct with them. Defendant's failure to foresee that there would be no children waiting does not excuse him from the attempt to molest." (*Id.* at p. 397.)

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation] '[T]he relevant question is

whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] '[I]t is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt.' [Citation.]" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1289-1290, fn. omitted.)

The record includes substantial evidence that defendant believed he was chatting with a minor who was in the eighth grade: Chebahtah's screen name was Prncsalli13, which is read as "Princess Alli 13." When defendant asked if Chebahtah had more pictures, she responded that her camera was stolen at school and her mother would not let her have another one. When defendant asked Chebahtah if anything fun happened at school, she wrote that she had a school assembly that day. Chebahtah wrote that during spring break she planned to walk to Target to buy a *Twilight* DVD with her "birthday [money]." When defendant mentioned going out to bars, Chebahtah wrote that she would go to bars if she could. While chatting, defendant explained that he was "bad" for wanting to touch "Alli" because she is "so young" and he is "so much more mature." Defendant wrote that he would not do anything sexual to "Alli" until she was "old enough that [she] wouldn't get in trouble for it." When Chebahtah asked why she would get in trouble, defendant explained, "[W]e would both get in trouble and [I]'d be the one in real legal trouble but you would have it over your head that an older man took advantage of you[,] and that's tough to deal with, [I] promise."

During a chat, Chebahtah informed defendant that her best friend was 14 years old, and that all the girls at her school were already having sex. Defendant responded,

"[Y]ou are so young. [Laughing out loud.] [I] wish [I] was that age again." When chatting, Chebahtah asked defendant if it was bad that she wanted to have sex; Chebahtah explained that she might be bad because her friend's mother was always saying that teenagers should not have sex because they are too young. Chebahtah wrote that she wished defendant could take her to her eighth grade dance, and she would tell people at the dance that he is her uncle.

The foregoing evidence supports a finding defendant believed he was chatting with a 13- or 14-year-old female, because Chebahtah made repeated references to being in eighth grade and being a teenager. In response, defendant wrote that Chebahtah was "so young," and he could face legal trouble for touching her. Given there is substantial evidence supporting a finding defendant perceived Chebahtah to be a 13- or 14-year-old female, we conclude that the lack of an actual minor's involvement in this case does not require the reversal of defendant's convictions for attempted acts.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.