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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

The PEOPLE,

Plaintiff and Respondent,

v.

SHAWN DAVID GODFREY,

Defendant and Appellant.

E053355

(Super.Ct.No. FMB1000290)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed in part; reversed in part with directions.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lynne G. McGinnis and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Shawn Godfrey, of committing a lewd act on a child (Pen. Code, § 288, subd. (c)(1))<sup>1</sup> and battery (§ 242). He was sentenced to prison for two years and appeals, claiming the trial court erred in denying his motion for a new trial and in ordering him to reimburse \$150 of the costs of appointed counsel. We reject his first contention and agree with the second. Therefore, we will strike the order of reimbursement and direct the trial court to remove references to it in the abstract of judgment and the minutes of the sentencing hearing. Otherwise, we affirm.

### **FACTS**

The 15-year-old victim, who babysat for defendant and his wife, testified that in mid-to-late-March, 2009, defendant texted her, telling her to sneak out of her parents' home and meet him because his wife was angry at him and had kicked him out of the family home. Defendant picked her up in his family car and drove one-half to one mile from his home and parked. After they talked for 20-30 minutes, defendant inserted his tongue in the victim's mouth while kissing her for two to three minutes. The victim pulled away from defendant. He asked her if she wanted her parents, who were friends of him and his wife, to find out that she had been sneaking out of her home at night. The victim was very scared. The defendant and the victim engaged in about 20 minutes of mutual French kissing. Defendant told her to remove her shirt, which she did because she felt intimidated and scared. She also removed her bra and defendant kissed her neck and breasts for 5-10 minutes. Defendant told the victim to remove her pants and she

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

complied, also removing her panties. Defendant got on the floor of the car in front of the victim and orally copulated her for 10-20 minutes as she reclined in the passenger seat. She was uncomfortable and he kept telling her to relax. Defendant resumed kissing the victim's mouth and neck. He removed his pants and rubbed his penis on her vagina for 15-25 minutes, while kissing her mouth and neck. Defendant then displayed an upset look on his face. He pulled away, got back into the driver's seat and said he couldn't do this. The victim dressed and defendant drove her back to the end of the road on which her home was located. He told her she could not tell anyone, as both of them would get in trouble. She walked home and showered. He later texted her, asking her if she had orgasmed during their encounter.

On a subsequent occasion, defendant texted the victim at 12:30 a.m. and asked her to meet him so they could discuss what had happened previously. Defendant picked the victim up in his Jeep and drove her to the mountains, where he French kissed her. The victim then got out of the Jeep and defendant followed her. He put his arms around her and his hands on her stomach and told her that that was the best part of her. They returned to the Jeep and eventually went to a park where they sat in the Jeep, talking. It was cold so they drove to an abandoned, door-less cabin near the victim's home. Defendant kissed the victim and the two went into the cabin. Defendant stood in front of the victim and told her that there was so much he wanted to do to her, but it was too cold. The victim, who was scared, said she just wanted to go home. Defendant walked her half way home, but when dogs began to bark, he returned to his Jeep while she continued on home.

The victim's mother grounded the victim for two weeks for having hickies on her neck, which the victim said had been caused by her boyfriend. When defendant asked the victim to babysit, she informed him that she had been grounded. Defendant was very worried, but the victim told him that her boyfriend had been responsible for the hickies. On April 9, defendant's wife called early in the morning and yelled at the victim, saying she knew what had happened and the victim's babysitting services were no longer needed. The victim's mother asked the victim why defendant had called the mother, saying he needed to talk to her about why the victim had been grounded. The victim told her mother she did not know, but defendant came to the home and told the mother that he had kissed the victim. Defendant told the mother that the victim had not wanted to kiss him. Defendant's wife came over to the victim's home and yelled for two-to-three hours. She told the victim that she knew more than kissing had occurred between the victim and defendant. The victim's mother called her husband, the victim's stepfather, who came home. Defendant told the victim's stepfather what had happened, the later became angry and told the mother to call the police, which she did. The victim told the deputy sheriff who came to the family home that defendant had French kissed her, but she did not say how many times. However, due to concern for the welfare of defendant's wife and children, the mother said she did not want charges pressed against defendant. The following month, the victim wrote an entry in her diary describing some of what had occurred between her and defendant (i.e., that she had removed her shirt and defendant had kissed her breasts), but not everything, as she believed there was a chance her mother would read it and she was embarrassed to have her mother know everything. However, a

friend of the victim's saw it and told the victim's mother, who read it. The victim was then interviewed by a second law enforcement officer, but she only admitted the things that she had put in the journal. She did this because she was embarrassed and because she was getting in trouble with defendant's daughter and stepchildren at school. At a party five months later, the victim became intoxicated and started telling everyone what really had happened between her and defendant. The victim's mother picked her up from the party and took her to a hospital because the victim was behaving irrationally and violently. At the hospital, the victim told staff in the Emergency Room that she had been raped. She told a third law enforcement officer that defendant had kissed her breasts and performed oral sex on her, omitting mention of defendant rubbing his penis on her vagina. However, during a subsequent interview with a military investigator (defendant was then in the Marine Corps.) she told him everything that had happened between her and defendant.

The People's theory at trial was that the charged lewd act on a child comprised either the kissing that occurred on either occasion, or the kissing of the victim's breasts or her neck or the rubbing of his penis on her vagina during the first occasion. The charged oral copulation of a person under 16 was alleged by the People to have occurred during the first occasion, however, the jury convicted defendant of the lesser included offense of battery.

## ISSUES AND DISCUSSION

### 1. *Denial of New Trial Motion*

After trial, defendant moved for a new trial on the bases that the victim had stated during her testimony that defendant refused to take a lie detector test and a juror and witness had committed misconduct. As to the first basis, the trial court had, before trial began, ordered that evidence concerning any discussion of defendant taking of a polygraph examination be excluded. The prosecutor said that she had advised all her witnesses not to talk about a polygraph examination. During direct examination of the then 17-year-old victim by the prosecutor, the latter testified that in July 2009, she had told the second law enforcement officer who questioned her about the journal entry she had written in May. As stated before, she said she told this officer that nothing had happened other than what she had described in the journal entry and she explained why. She said that she talked to this deputy two more times. The prosecutor then asked her if she ever got mad at this officer.<sup>2</sup> She said she had and he asked her why. She responded, “[Defendant] had refused to do a polygraph test---” The prosecutor interrupted her, saying, “No, no. Well, let me ask you this.” Defense counsel objected and moved to

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<sup>2</sup> At the time, it appeared that that was what the prosecutor was asking the victim. This made sense, in that the second law enforcement officer testified that when he was questioning the victim, he pointed out to her that she had given conflicting statements about her shirt or its removal during one of the incidents and the victim “got angry . . . [¶] . . . [¶] [because s]he felt that I didn’t believe her” “and [she] stormed off and went into the house[,] slamming the door.” Both parties to this appeal agree that the question concerned this officer and not defendant. However, during cross-examination by defense counsel, he accused the victim of being angry because nothing had happened to defendant after she had told her mother that he had kissed her. It was not clear, however, at whom the victim was supposed to have been angry.

strike. The trial court said, “Sustained. It’s stricken.” At a sidebar, defense counsel moved for a mistrial. The trial court denied it, saying, “[I]t was caught. It was objected to. It’s been stricken. The way it was brought out by [the victim], there really wasn’t a whole lot to it. [Defense c]ounsel brought the objection as it came out, and there was no more discussion about it. [¶] [It] . . . doesn’t . . . support . . . a motion for mistrial at this point . . . .” Defense counsel then asked that the jury be admonished to disregard the victim’s statement as it was something about which she could have no personal knowledge. With defense counsel’s consent, the court offered to instruct the jury as follows, while the victim was still on the stand, “[A] polygraph examination is not anything that this witness would have any personal information about. You are to disregard that testimony.” Without explanation in the record, this instruction was not given. However, before trial, the following instruction had been given, “During the trial, the attorneys may object to questions asked of a witness. I will rule on the objections according to the law. If I sustain an objection, the witness will not be permitted to answer and you must ignore the question. . . . If I order . . . testimony stricken from the record, you must disregard it and must not consider it for any purpose.”<sup>3</sup> At the end of

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<sup>3</sup> In his opening brief, defendant ignores the fact that this instruction was given. In his reply brief, he asserts that “if the jury specifically was never admonished to disregard [the victim’s] statement, . . . then the jury would have not been aware that they should not have considered her response to the prosecutor’s inquiry.” However, as already stated, the trial court sustained defense counsel’s objection to the witness’s statement and ordered it stricken. We cannot imagine how more specific defendant believes the trial court’s words should have been to trigger the jury’s application of this instruction mandating that it not consider the statement for any purpose.

trial, the jury was instructed, “During the trial, the attorneys may have objected to questions or move to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. . . . If I ordered testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose.”<sup>4</sup>

After the defense made its second motion for a mistrial, this time, based on juror and witness misconduct, it asked the court to consider the cumulative effect of this error along with the victim’s reference to defendant refusing to take a polygraph test. As to the latter, the trial court said, “I still don’t see a prejudicial effect from the young witness who did say the information or testified something about the polygraph test. But then considering the context with this most recent event [(i.e., the juror and witness misconduct)], the Court still feels it doesn’t rise to the level of the defendant being unable to receive a fair trial.”

In denying the post-verdict motion for a new trial on this basis, the trial court said, “[T]he victim testified she got mad at the defendant<sup>5</sup> because he refused to do a polygraph test. A motion to strike that testimony was immediately made by the defense counsel and granted by the Court. [¶] The Court then admonished the jury to disregard this testimony. Certainly this 15-year-old witness provided information to the jury that she shouldn’t have. However, this did not rise to the level of misconduct by either the

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<sup>4</sup> See footnote three, *ante*, page seven.

<sup>5</sup> See footnote two, *ante*, page six.

prosecutor or the witness that would have tainted the jury. The Court’s admonishment to disregard that testimony and the Court’s striking of that testimony was a sufficient remedy.”

We review the trial court’s denial of defendant’s post verdict motion for a new trial on this basis de novo. (See *People v. Ault* (2004) 33 Cal.4th 1250, 1262.) Defendant has the burden of showing that the trial court’s ruling was irrational or arbitrary or was not grounded in reasoned judgment or guided by appropriate legal principles and policies. (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659.)

Defendant calls our attention to three cases in which mentions of polygraphs were found to be non prejudicial where the trial court had admonished the jury to ignore them. (*People v. Cox* (2003) 30 Cal.4th 916, 953 (*Cox*) [disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22]; *People v. Price* (1991) 1 Cal.4th 324, 428 (*Price*); *People v. Carpenter* (1979) 99 Cal.App.3d 527, 532, 533 (*Carpenter*).) In *Cox*, the prosecutor solicited from the sole eyewitness to one of the crimes, who had been significantly impeached, if she had been given a polygraph examination by the district attorney’s office. (*Cox, supra*, 30 Cal.4th at pp. 932, 951.) He then asked the witness whether she had told the polygraph examiner what had happened. (*Id.* at p. 951.) Defense counsel interrupted with an objection. (*Ibid.*) The prosecutor told the trial court that the witness had been untruthful during the examination. (*Ibid.*) The trial court observed that this was the inference created by the prosecutor’s questions. (*Ibid.*) The court struck her answer and admonished the jurors, “[A] question was [asked] . . . whether or not the witness recalled talking to a polygraph operator. That

question is struck. . . . You are to treat it as though you never heard it.” (*Ibid.*) The prosecutor later solicited from the witness that she had had contact with a named person from the district attorney’s office and that she had been untruthful with him and with other law enforcement officers and had told the truth only after counseling sessions with a psychologist. (*Ibid.*) Assuming that the prosecutor had engaged in misconduct by asking the witness about taking a polygraph exam, the Supreme Court, nevertheless concluded that it was not prejudicial because the trial court had “immediately struck the prosecutor’s question and forcefully told the jurors to disregard it.” (*Id.* at p. 952.)<sup>6</sup> The only difference between this case and *Cox* was the absence of an immediate admonition. However, given the brief mention by the victim, the immediate objection by defense counsel and the immediate sustaining of it and the striking of the testimony by the trial court, as well as the instructions at the beginning and end of trial that were restatements of the one given in *Cox*, there is nothing in *Cox* mandating that the trial court’s ruling here was incorrect.

In *Price, supra*, 1 Cal.4th 324, a prosecution witness testified, non responsively, that when he was taken to a sheriff’s substation after agreeing to provide information about the defendant’s criminal activities, he took lie detector tests, among other activities. (*Id.* at p. 428.) Defense counsel did not object to the reference and did not move to strike

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<sup>6</sup> Similar to *Cox* is *Carpenter, supra*, 99 Cal.App.3d 527, also cited by defendant, wherein the appellate court pointed out that the brief reference to the polygraph exam, implying that the defendant had failed it, the immediate objection by defense counsel and the immediate admonishment by the trial court to disregard the comment cured any prejudice to the defendant. (*Id.* at pp. 532-533.)

it, however, he later moved for a mistrial on the basis that the reference gave the witness's testimony a false aura of credibility. (*Ibid.*) The trial court denied the motion and "strongly admonished the jurors to disregard [the witness's] mention of polygraphs because polygraph results are both scientifically unreliable and legally inadmissible in evidence." (*Ibid.*) The Supreme Court upheld the trial court's denial of the mistrial motion, saying, "The mention of polygraphs . . . was brief and nonresponsive. [The witness] did not state what questions he was asked or what the examiner concluded about his truthfulness. The admonition the court gave was thorough and forceful; it was sufficient to prevent any prejudice to defendant." (*Ibid.*) Unlike in *Price*, here, defendant had the added advantage of an immediate objection by his attorney which was sustained by the trial court, who struck the testimony.

Of course, it must be remembered that in *Cox*, the prosecutor's question suggested that the witness had failed the polygraph exam and, was, therefore, not credible, and in *Price*, the testimony suggested that the witness had passed the polygraph exam and was, therefore, credible. Here, no suggestion was made as to how defendant did on a polygraph exam. The information conveyed was that defendant refused to take the exam, which, of course, *could have* created an inference that he was guilty. However, that inference was not dependent on whether, in fact, polygraph exams are scientifically reliable, which was the issue in *Cox* and *Price*. Rather, it was dependent either on defendant's consciousness of guilt or on what defendant believed about the reliability of polygraph exams in general or as applied to him, specifically. Equally reasonable inferences to derive from the evidence, since the witness did not state at what point

defendant had refused to take the exam, was that he had been advised by counsel or some other person to refuse to take the exam or that he took the position that he was not going to help the police with their case against him by taking the chance of appearing to be anything other than absolutely truthful on a polygraph exam. Any of these inferences could be drawn by jurors—some suggested that defendant was conscious of his guilt, others did not, unlike the inferences in *Cox* and *Price*, which unequivocally related to the credibility of the witnesses. While recognizing that Evidence Code section 351.1 prohibits the introduction of evidence of the results of a polygraph examination, as well as any reference to “an offer to take, failure to take, or taking of a polygraph examination[,]” there is a difference between the prejudicial strength of the inferences in *Cox* and *Price* and that here.

In *People v. Basuta* (2001) 94 Cal.App.4th 370, 388, 398 (*Basuta*), also cited by defendant, a police detective testified that the only eyewitness to the charged assault on a child with force likely to cause great bodily harm, who testified for the prosecution and had been impeached, had agreed to take a polygraph test. (*Id.* at pp. 387, 389.) Defense counsel objected, but, apparently, his objection was not sustained. (*Id.* at p. 389.) The trial court denied the defendant’s motion for a mistrial concluding that the reference was meaningless since the results were not revealed and, therefore, was non-prejudicial. (*Ibid.*) The appellate court concluded the error in admitting the evidence, was, when considered with another error, prejudicial, saying, “[The witness’s] credibility was crucial to the prosecution’s case. While it was possible for the prosecution to have partially lost the battle of experts [over whether the defendant violently shook the victim] and still

convicted [the defendant] . . . , the prosecution’s case could not tolerate a loss of the conflict over [the witness’s] credibility. [The detective’s] comment had a high potential to affect the jury’s resolution of that issue. [¶] . . . The mention of [the witness] taking a polygraph test came at the worst possible time. The prosecution’s case had reached a crescendo when [the detective] introduced the videotaped recording of [the witness’s] vivid statement to the police [accusing the defendant of violently shaking the victim]. Asked what happened after the statement, [the detective] replied [that the witness] agreed to take a polygraph examination. First, a juror might conclude that [the witness’s] apparent readiness to take a polygraph examination reflected her confidence in its result. A juror could also reasonably conclude the state would not base a serious prosecution on the testimony of a lone witness whose credibility it had cause to doubt. A serious danger exists that one or more jurors concluded that [the witness] passed the polygraph examination and that she was, therefore, worthy of belief. [¶] . . . [¶] [T]he improper mention of the polygraph test, in combination with the error in excluding evidence that [the victim’s] mother [physically abused him which resulted in his death without the defendant violently shaking him], was prejudicial. Both errors substantially affected the crucial issue in the case—[the witness’s] credibility. We conclude it is reasonably probable that but for these errors a result more favorable to the defendant would have been reached . . . .” (*Id.* at pp. 390-391.)

There are significant differences between *Basuta* and the instant case. First, there was no additional error here that was inextricably interwoven with the error in admitting the evidence of defendant’s refusal to take a polygraph. Second, defense counsel

objected to the reference and it was stricken and the jury was twice instructed to disregard it, unlike in *Basuta*. Finally, defendant never testified.

Also distinguishable is *People v. Schiers* (1971) 19 Cal.App.3d 102, 108 (*Schiers*), which was also cited by defendant. There, a police officer testified that defendant had been given a polygraph test and told that he had failed it and was asked to explain the failure. The defendant replied that there was something wrong with the machine. (*Id.* at p. 108.) The officer went on to state that defendant had initially been reluctant to submit to an exam, fearing that the machine was defective, but a test was conducted to prove to defendant otherwise, and, convinced, defendant agreed to be tested. (*Ibid.*) The officer said that defendant was told that the completed test indicated that he had been lying about the crime and defendant replied that he could not understand this. (*Ibid.*) Defense counsel did not object to this testimony at the time it was offered, but did so later, and the trial court struck it and admonished the jury to disregard it. (*Ibid.*) The appellate court reversed the conviction, and finding that the objectionable references had been made deliberately, relied on comments made by a California Supreme Court Justice in dissenting from that court's denial of a hearing on the issue. (*Id.* at pp. 109, 112, 114.)<sup>7</sup>

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<sup>7</sup> *Schiers* distinguishes *People v. Babcock* (1963) 223 Cal.App.2d 737, which *Schiers* describes as follows, “[A] police officer testified that he asked defendant if he would be willing to take a [polygraph] test; an objection was interposed, sustained and the jury admonished ‘to absolutely disregard it.’ In holding that the error was not prejudicial, the court noted that even though defendant’s answer to the question was no[t] stated, there was an inference that defendant either refused or made an unsatisfactory showing; and stated . . . that notwithstanding this fact, [the error was not prejudicial].” (*Schiers, supra*, 19 Cal.App.3d at p. 111.) *Schiers*’s description of *Babcock* is closer to the facts of this case than any of the cases defendant cites in support of his argument.

We cannot agree with defendant that the trial court abused its discretion in denying the motion for a new trial on this basis.

The second basis for defendant's motion for a new trial was juror/witness misconduct. Very early in the testimony of the deputy sheriff who was dispatched to the victim's home after the police had been called, defense counsel reported to the court that a juror or the deputy<sup>8</sup> had told him that the deputy had had a three or four minute conversation with the juror. According to the juror, he told the deputy that his son was also a police officer and he really liked his job. Defense counsel represented to the court that six other jurors were nearby and "hear[d] what a nice guy" the deputy was. The prosecutor said that the deputy told her that he and the juror did not discuss the case. The trial court questioned the deputy, who reported that the juror approached him and said that his son worked for a local police department and had taken the same career path that the deputy had, and they discussed that and where the juror lived, but they did not discuss the case. The deputy said he tried to end the conversation but was unsuccessful. The trial court lectured the deputy about the inappropriateness of him speaking to a juror about any subject and said that it expected this never to happen again. The trial court denied defendant's motion for a new trial and told counsel that it would instruct the jury again about having contact with witnesses. The trial court also denied the motion in response to defense counsel's assertion that the conversation between the deputy and the

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<sup>8</sup> Defense counsel used the pronoun "him" without clarifying which one he had spoken to. However, he later asserted that the juror had told him what the juror had said to the deputy, and, still later, counsel talked about what "they" told him, implying that he had spoken both to the juror and to the deputy.

juror, combined with the victim's statement that defendant refused to take a polygraph examination, deprived defendant of a fair trial. Before the deputy resumed testifying, the trial court told the jurors, "It was brought to my attention that [the d]eputy . . . was speaking to one of the jurors, juror in seat number 6. I've already had a conversation with [the d]eputy . . . . He knows better. . . . Don't talk to witnesses. [¶] Are we clear about that, everyone?" The jurors responded that they were. The court continued, "I was able to determine it had nothing to do with this case. That's good." Juror No. 6 apologized to the trial court. The court then said, "And [the d]eputy . . . has apologized as well. But it shouldn't come to apologies. It shouldn't happen."<sup>9</sup>

In his written motion for a new trial, defendant asserted that the trial court should have questioned Juror No. 6 and the six other jurors who assertedly overheard the conversation between that juror and the deputy about the conversation. As to Juror No. 6, it is apparent that defense counsel had questioned him about the incident, finding out how

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<sup>9</sup> During argument to the jury, defense counsel said the following, "[T]here's minimalization here, but I don't believe it's proved what actually did happen [to the victim]. That's really what we're going to come down to. But some stuff happened during the trial. [¶] Juror Number 6, the deputy—the judge told folks not to talk to the lawyers, cautioned everybody about talking to the lawyers. The judge didn't actually talk about not talking to the witnesses. [¶] Now, [the d]eputy . . . should have known better. Okay? But I'm the one who saw it, and I'm the one who told the judge. Is there any ill will that you bear me over that?" At that point, the trial court cautioned Juror Number six not to respond to defense counsel and said, "If any counsel want to argue, they have the opportunity to argue, but they're not going to inquire of any witnesses or any jurors, so jurors[,] you're to disregard any questions posed to you." Defense counsel apologized and said it was his error. Defense counsel continued, to the jury, "What I would say is that if there were something that's changed, if anything has gone on, any event that's changed them, I would ask that you talk—ask to speak to the judge privately and communicate that." The trial court told defense counsel that this was improper argument.

long the conversation had lasted, that there were six other jurors in earshot of it and what was discussed.<sup>10</sup> The trial court told all the jurors, including Juror No. 6, that it was its understanding that the conversation did not involve the case. Juror No. 6 did not correct this. The trial court's remarks and the apology offered by Juror No. 6 made it clear to all the jurors that what Juror No. 6 and the deputy had done was wrong. Therefore, there was no need for the trial court to additionally question these seven jurors. As defendant, himself, states, error occurs in this regard only when the trial court fails to make whatever inquiry is necessary to determine if the juror should be discharged. (*People v. Farnam* (2002) 28 Cal.4th 107, 141.) The failure of a trial court to conduct a further inquiry is subject to the abuse of discretion standard. (*People v. Jenkins* (2000) 22 Cal.4th 900, 985, 986.) Defendant also notes that de minimus contact between a juror and a witness may not be prejudicial (*People v. Hardy* (1992) 2 Cal.4th 86, 175) and the presumption of prejudice does not arise if the contact is unrelated to the trial. (*People v. Woods* (1950) 35 Cal.2d 504, 512; *People v. Cobb* (1955) 45 Cal.2d 158, 161.) Even if the presumption of prejudice arose, it was rebutted by the insignificant nature of the misconduct and the lack of probability that actual prejudice occurred. (See *People v. Diaz* (1984) 152 Cal.App.3d 926, 935.)

All of what the deputy testified to that incriminated defendant was corroborated by the testimony of other witnesses or by defendant's own pretrial statements.

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<sup>10</sup> This is confirmed later by what defense counsel said during argument to the jury (see fn. 8, *ante*, p. 15 and fn. 9, *ante*, p. 16.).

The only point of contention between the deputy and the defense case was whether defendant had told the deputy at the victim's home in April, in an unrecorded interview, that he and the victim had kissed briefly during the first incident, which was defendant's position or whether he told him that he participated in open-mouthed kissing with the victim for 5 or 10 minutes on both occasions, as the deputy's supplemental report, written four months after his interview with defendant, stated. The deputy was impeached as to the latter, as it contradicted the report he had written contemporaneously with the interview and may have been the result of information supplied by the second law enforcement officer based on the latter's interview with the victim. The deputy offered no testimony whatsoever about the victim's allegation that defendant had performed oral sex on her, which comprised the charged oral copulation. All in all, the deputy's testimony was not nearly as significant as the victim's or the manner in which defendant conducted himself during recorded interviews with law enforcement, which were played for the jury. Defendant did damage to his own cause by giving the victim's parents and law enforcement contradictory statements about the kissing he admitted had occurred between himself and the victim. He further implicated himself by giving a military investigator, who wanted to check defendant's phone records, an incorrect number.

We note that defense counsel did not ask the trial court, at the time of the incident, to question Juror No. 6 or the other six jurors who might have overheard the conversation. It was not until defendant had been convicted and the new trial motion was

brought, that defense counsel first saw the need to question these seven jurors.<sup>11</sup> In denying the new trial motion, the trial court concluded that its inquiry had revealed that the conversation between the deputy and the juror was not of a prejudicial nature. In our view, there was no point to question the jurors about the incident as the court had before it all the facts it needed. The court had three options at that point, i.e., to ask all seven if they could remain fair despite what had occurred, and proceed from there; to declare a mistrial; or to do what it did and insure that all the jurors knew that what had taken place should not have. Asking the jurors whether they could remain fair is fraught with danger and we do not doubt that if the trial court had done this, and not subsequently declared a mistrial, defendant would now be complaining about that. The option of declaring a mistrial is not mandatory under the circumstances, or else every alleged incident of juror or witness misconduct that did not conclude with a mistrial would be grounds for automatic reversal. We believe that under the circumstances the trial court handled the problem in a reasonable manner, therefore, we cannot agree with defendant that the trial court abused its discretion in denying the new trial motion or concluded that the misconduct did not deprive defendant of a fair trial. (*People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5.)

Defendant additionally contends that the cumulative effect of these two errors denied him a fair trial. (*People v. Cardenas* (1982) 31 Cal.3d 897, 910.) We disagree. Defendant, himself, admitted to one act supportive of his conviction for committing lewd

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<sup>11</sup> At this point, an attorney other than trial counsel was representing defendant.

acts on a child, i.e., the kissing. Additionally, the fact that defendant willingly engaged in kissing with the victim made her version of the events seem believable. As in most such cases, this was very much a “he said/she said” situation. As already stated, defendant did his position no favor by being evasive in his answers to law enforcement and giving contradictory information and false information. In light of this, his refusal to take a polygraph exam, even if it suggested consciousness of guilt, is not significant. The same is true of the contact between the juror and the deputy.

## *2. Reimbursement of Appointed Counsel Costs*

At sentencing, the trial court ordered defendant to reimburse the costs of appointed counsel in the amount of \$150. Defense counsel did not object. Defendant here contends that the trial court’s failure to conduct a hearing to determine his ability to pay the reimbursement renders the order reversible. The People assert that defendant waived his right to a hearing and a determination that he had the ability to reimburse for this expense by failing to object below, and sufficient evidence supports an implied finding that he had that ability.

Section 987.8 provides that the trial court “may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the costs” of legal assistance. Included in defendant’s ability to pay were his then current financial position and his reasonably discernable future financial position for six months from the date of the hearing. (§ 987.8, subds. (g)(2)(A) & (B).) “Unless the [trial] court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to

have a reasonably discernible future financial ability to reimburse the costs of his . . . defense.” (*Ibid.*)

The probation report shows that although defendant had been a sergeant in the United States Marine Corps., he had lost his job when he had been convicted of these offenses. At the time the probation reports were authored, defendant had no income and had debts of \$145,000, comprised of a mortgage, car(s) payment and credit cards. He was married and the father of two minor children. The probation officer recommended that the trial court find that defendant did have the present ability to pay appointed counsel fees in the amount of \$150.00. Despite being represented by court appointed counsel at trial, defendant had retained new counsel following his conviction, who submitted various written motions, including a motion for new trial, and represent him at sentencing.

In *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537, the appellate court held, “In the absence of a guilty plea, the sufficiency of the evidence to support a finding is an objection that can be made for the first time on appeal. [Citations.] [¶] . . . [¶] While [section 987.8] ordinarily may not require an express finding of ability to pay [citation] it contains a presumption that those sentenced to prison are unable to pay. . . . We construe this part of the statute to require an express finding of unusual circumstances before ordering a state prisoner to reimburse his . . . attorney.”

Therefore, we disagree with the People that defendant forfeited his current argument by failing to object to the imposition of the reimbursement below. Further, contrary to the People’s view, the information in the record about defendant’s finances

neither constitutes sufficient evidence to show that he was able to pay \$150 based on his then current financial situation nor to overcome the presumption that, as a state prisoner, he did not have a reasonably discernable future financial ability to pay \$150 within six months after beginning his prison sentence. In the interests of judicial economy, we reverse the order of reimbursement.

**DISPOSITION**

The order that defendant reimburse \$150 of the cost of his appointed counsel is reversed and the trial court is directed to strike the references to it in the abstract of judgment and minutes of the sentencing hearing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ  
P. J.

We concur:

HOLLENHORST  
J.

KING  
J.