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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.

ADRIAN ANDRINO,

Defendant and Appellant.

E055371

(Super.Ct.No. SWF10002531)

OPINION

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge.
(Retired judge of the former Tulare Mun. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.) Affirmed in part, reversed in part, and remanded.

Joanna Rehm, 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, and Steve Oetting and Andrew
Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Adrian Andrino was convicted of unlawful oral copulation with a person under the age of 18 (Pen. Code,¹ § 288a, subd. (b)(1); count 1) and one count of committing a lewd act upon a child under the age of 14 without force (§ 288, subd. (a); count 2). Defendant was sentenced to state prison for a total term of six years eight months. He appeals, contending he was denied his constitutional right to cross-examine his accuser, and the trial court erred in admitting certain evidence and then denying his motion for new trial. He further challenges his sentence, faulting the trial court for finding him ineligible for probation and then relying on improper aggravating factors to impose the middle term on count 2.

I. FACTS

In April 2010, 12-year-old Jane Doe,² her mother, and her two sisters traveled to Southern California to vacation at the home of Doe's aunt. Defendant, Doe's 20-year-old cousin, lived at the house. A few days into their visit, while seated next to each other during their drive home from Universal Studios, defendant and Doe began sending text messages to each other. Defendant's messages became sexual. He asked Doe if she was a virgin. She texted that she was not. Defendant asked about her sexual experiences. He told her that he "had done incest before." Over the next few days, defendant's texts continued. In his messages, he said that "he wanted to do things to [Doe]," which made her feel "[a] little uncomfortable." Concerned about being rude, Doe would just laugh off

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

² At the time of trial, Doe was 14 years old.

the sexual comments. On one occasion during the week when Doe's mother and aunt went to a nail salon, defendant and Doe accompanied them. While flipping through magazines, defendant observed a photograph of a woman "bent over" while doing yoga. Referring to the photograph, defendant said, "[t]hat's what you're going to be doing." Doe just "laughed it off."

On April 9, 2010, the family had a party at Doe's aunt's house. During the party, defendant again texted Doe, "telling [her] what he wanted to do to [her] and whatnot." Doe texted defendant back, telling him they were cousins and were "not supposed to be doing this."

At some point during the party, Doe went into a bedroom and began using a computer. About five to 10 minutes later, defendant came into the room, closed the door, and began rubbing Doe's leg. Defendant began touching Doe's breasts, first over her clothing, then under her bra. Defendant then touched Doe under her underwear, rubbing the top part of her vagina, and penetrating her vagina with his finger. Defendant stood, pulled down his pants, grabbed the back of Doe's head, and pushed her head down, placing his penis into her mouth. Defendant's penis was in Doe's mouth for approximately five minutes. When someone, possibly Doe's mother, came into the room, defendant sat down on the bed and covered himself with a shirt. When the person left the room, defendant began touching Doe's breasts, but he did not put his penis in her mouth. When more people returned to the bedroom, Doe was able to leave the room. She went downstairs and sang karaoke.

Later that night after the party, defendant texted Doe, asking her if she would come downstairs late at night while her mother slept. Defendant also texted that he wanted to have sex with her. While Doe slept, her mother heard a buzzing sound from Doe's phone. Defendant had sent Doe a text stating, "I want more, I want more. I couldn't get enough." Doe's mother was "puzzled and distraught," and answered the text on her daughter's cell phone, "Go to sleep. I'm only 12." Defendant texted back some questions marks and symbols that Doe's mother did not understand.

Doe texted her friend about the incident with defendant and then told the same friend about it when she saw her back at school. Doe did not tell any adults about it. After the incident she felt confused. She indicated she did not want defendant to get in trouble and believed it was "just a mistake."

On September 8, 2010, Detective Wilfredo Collazo of the Riverside County Sheriff's Department interviewed defendant at his house.³ Defendant initially denied that anything had occurred between him and his cousin, stating, "I didn't do anything man, for real," and that Doe was making stories up. He speculated she was blaming him because of something that had happened between her and her boyfriend. He claimed he only got close to Doe in the computer room during the party when he was getting the mouse for the computer.

Detective Collazo told defendant he knew that Doe "sucked [his] dick" but wanted to make sure defendant did not force her to do so. Defendant then indicated the oral sex

³ An audiotape of the interview was played for the jury.

was consensual. He denied having sex with Doe but admitted the oral sex occurred in the room where Doe was staying. When asked if the oral sex had occurred “just one time,” defendant nodded and stated, “Uh huh.” Defendant reiterated that the incident was “[n]ot forced.”

In defense, several family members who attended the party testified that defendant and Doe were not in the bedroom alone during the party.

Defendant testified he came to the United States from the Philippines when he was 10 years old and English is his second language. In spring 2010, when Doe came to stay at his house, he was not sexually attracted to her. He denied fondling or rubbing Doe’s chest and touching her vagina. He also denied putting his penis in her mouth. According to defendant, in the Philippines, when he was four or five years old, he observed some cousins touching each other. He had never done anything sexual to his sister or any family member.

Prior to Detective Collazo’s visit to his house, defendant heard from his parents and other family members that Doe was making allegations about him. He denied doing anything. He stated they had sent approximately 20 text messages to each other during her visit and the messages were about Doe’s boyfriend. Doe had said she was not a virgin and she had been touched by her brother. She also said she had not told her mom about her boyfriend because she was scared.

According to defendant, he never suggested that he wanted to have sex with Doe. Rather, his text, “I want more” said “I want to know more,” because he wanted to know more about what was going on with Doe and her boyfriend. Doe asked him not to tell her

mother about her boyfriend, but when he became aware of Doe's allegations, he knew that Doe's mother had found out.

Defendant testified that when Detective Collazo came to speak with him, he was nervous and had just awakened. He had never interacted with police before, and in the Philippines, police officers treat people very badly. Defendant did not understand every question that Detective Collazo asked because he is "not very good" at English. During his interview, he laughed because Detective Collazo's allegations were "ridiculous." He denied Doe's testimony regarding a comment he purportedly made about the lady doing yoga. He claimed he was never alone in his room with Doe on the night of the party. Maintaining his innocence, he said that he had a girlfriend and would not cheat on her.

II. EXCLUSION OF EVIDENCE OF DOE'S PRIOR SEXUAL CONDUCT

Defendant contends the trial court erred in excluding evidence of Doe's prior sexual conduct, which he argues established her motive to lie about defendant molesting her. Similarly, he claims the court erroneously excluded this evidence, which was relevant to show an alternate source for Doe's knowledge of sexual acts.

A. Additional Background Facts

Prior to trial, the prosecution filed a motion in limine seeking to exclude any cross-examination of Doe regarding any alleged sexual conduct with persons other than defendant. Citing Evidence Code sections 782 and 1103, subdivision (c), the prosecution argued that Doe's sex life was "absolutely irrelevant." The prosecution asserted that, should defense counsel choose to pursue testimony on this subject, the procedures set

forth in Evidence Code sections 782 and 783 must be followed. On September 6, 2011, the trial court conditionally granted the prosecution's motion.

The next day, defense counsel indicated that Doe had another case pending in which she was involved in a "consensual boyfriend/girlfriend relationship" with an adult, which was ongoing in April 2010 when the instant crimes allegedly occurred. Counsel claimed the disclosure of defendant's conduct occurred during the investigation into this other relationship. According to defense counsel, Doe's mother indicated that Doe "gave up her virginity" to the other person on May 29, and they had consensual oral sex. Doe's friend confirmed Doe's consensual boyfriend/girlfriend relationship with the other adult. Defense counsel requested permission to ask Doe "about the circumstances of the disclosure and reporting the case to the police." The defense theory was that Doe "turned the blame on" defendant to avoid any trouble she faced for "engag[ing] in [a] relationship with this older man." Defense counsel opined this was not a situation that required him to follow specific procedures of Evidence Code section 782.

The prosecutor expressed concern that the defense wanted to bring up the fact that Doe had "made an allegation about something else and that now all she looks like is a girl who is making all these allegations against lots of people" According to the prosecutor, the theory advanced in the boyfriend's case was that Doe had been assaulted by defendant first and the boyfriend used the assault as a way to get closer to Doe. The prosecutor opined that the proffered evidence would require him to bring in evidence regarding Doe's boyfriend and would require "a trial within a trial." The prosecution maintained that Doe's relationship with the boyfriend did not become sexual until

May 29, as alleged in the criminal complaint against the boyfriend. This date was after defendant's assault and after the date when Doe confided to her friend about defendant's assault. Thus, it was argued "the idea that [Doe] made it up to get that person who was going to victimize her in a couple months off doesn't really make any sense." The court requested that it be provided with the interviews of defendant, Doe's mother, and Doe's girlfriend, and asked that defense counsel provide the court with a list of questions he would like to ask Doe.

On September 8, 2011, defense counsel filed a "Request for Court to Permit Questioning Regarding Circumstances of Victim's Disclosure." The request sought permission to question witnesses regarding the circumstances of Doe's disclosure of this incident to her mother and her mother's subsequent disclosure to law enforcement. The motion referenced mother's disclosure to the police that Doe was involved in a "consensual sexual relationship with her 21[-]year[-]old boyfriend," and that a criminal investigation had been initiated. During the investigation, Doe claimed to have engaged in sexual conduct with defendant. Defense counsel argued: "[T]he defense is not seeking to introduce evidence of Jane Doe's sexual relationship with another person to prove consent by Jane Doe. Therefore, the procedures of Evidence Code [section] 782 are inapplicable. Instead, the defense is seeking to question witnesses regarding the circumstances of Jane Doe's disclosure to her mother and her mother's disclosure to law enforcement. Jane Doe's secret romantic relationship with her boyfriend was under investigation in July 2010. [She] was afraid that her mother would be upset about her inappropriate relationship. Rather than face the wrath of her family for her misconduct,

[she] deflected her family’s rage toward Defendant by fabricating a story of sexual misconduct. As Defendant explains in his interview, Jane Doe used the allegations against Defendant to redirect her family’s attention toward Defendant. The circumstances under which the disclosures were made are relevant to the reliability and credibility of Jane Doe and [her mother].” Furthermore, defense counsel argued that the questions were “relevant to explain Defendant’s text message to Jane Doe, ‘I want more, or ‘I want to know more.’” The defense identified 10 questions to ask Doe.⁴

After listening to the tapes of the interviews and reviewing the relevant Evidence Code sections, the trial court commented that defendant’s questions appeared to be “a little bit of a fishing expedition at this point.” Defense counsel replied that Evidence Code section 782 was inapplicable because it addresses prior sexual conduct for purposes of proving consent, and the defense was not seeking to prove consent. Rather, defense counsel reiterated his desire to cross-examine on factors or issues which “may have led

⁴ “1. Was Jane Doe involved in a sexual relationship with another in April 2010? [¶] 2. Did Jane Doe discuss this relationship with Defendant in April 2010? [¶] 3. Did Jane Doe ask Defendant not to tell her mother about the relationship? [¶] 4. Was Jane Doe afraid to tell her mother that she was engaged in a romantic relationship with her boyfriend[?] [¶] 5. Why did Jane Doe wait to disclose the incident with Defendant until after her relationship with her boyfriend was revealed? [¶] 6. Does Jane Doe believe that Defendant told her mother or his mother about her relationship with her boyfriend? [¶] 7. Does Jane Doe blame Defendant for her relationship with her boyfriend being discovered by her mother and law enforcement? [¶] 8. Did Jane Doe fabricate the story of sexual conduct with Defendant as ‘pay back’ for his perceived disclosure of her relationship with her boyfriend? [¶] 9. Did Jane Doe fabricate the story about a sexual encounter with Defendant in order to deflect her family’s negative attention away from her and toward Defendant? [¶] 10. Did Jane Doe believe that if she accused Defendant of misconduct, she would avoid negative treatment and/or punishment for her willing participation in a sexual relationship with her boyfriend?”

the complaining witness to fabricate a story against the defendant.” Counsel offered to “sanitize” the relationship and not go into any details. The prosecutor explained that Doe had already admitted she had a relationship with another adult male, so the defense theory did not make sense, and her sexual relationship with the other adult male did not begin until the end of May, after the charged crimes occurred.

After reviewing a transcript of Doe’s interview, the court noted: “[T]here [are] a couple of places [Doe] does talk in there about making the revelation to her friend. She also talks about her having not had sex prior to that, at least not being a virgin. I think she said she had messed around with a couple of boys.” The court denied the defense request to ask the questions identified. However, the court informed defense counsel that a written motion with an affidavit (pursuant to Evidence Code section 782) could be filed if counsel “c[a]me up with more information that somehow would make that relevant.” The court clarified that it would be appropriate to ask Doe if she had a boyfriend at the time of the incident, whether she told defendant she had a boyfriend, and whether she told defendant she was sexually active with any boyfriend she had.

On September 12, 2011, defense counsel filed the Evidence Code section 782 motion and affidavit per the trial court’s direction. Defense counsel sought to introduce evidence that Doe had accused defendant of sexual conduct similar to sexual conduct that she had engaged in with her boyfriend; Doe was afraid of negative treatment and/or punishment from her parents as a result of the disclosure of her sexual relationship with her boyfriend; and Doe’s relationship with her boyfriend was under investigation when she made the current allegations against defendant. Counsel argued the evidence was

relevant to Doe's credibility, the time and circumstances of her disclosure, the meaning of defendant's "I want more" text, and to show that Doe learned of sexual behavior from her boyfriend, not defendant. Reiterating its previous ruling as to the acceptable questions, the trial court concluded its ruling remained appropriate and would not be modified.

At trial, during cross-examination, Doe testified that at the time of the incident with defendant, she did not have a boyfriend, nor was she in any relationship with somebody back home. She stated that she did not tell defendant otherwise; however, she did tell him that she had previously had sex, but she did not provide details.

During a police interview, defendant said that Doe and her mother were "trippin" after he texted a message saying he "want[ed] to know more." He claimed that Doe had told him "all the stories" about her boyfriend, which was why he said he wanted to know more about what was going on. He speculated that Doe was "using [him] or something." He said she had told him that she and her boyfriend "already did it" a few months before and defendant asked if she was going to tell her mom. Defendant opined that Doe was trying to blame him "since she did it with her other boyfriend again." At trial, he testified to the same statements made during his interview. He added that Doe told him that she had been touched by her brother but "they are already taking care of [that.]" When he spoke to the police, defendant was aware of Doe's allegations involving him. He believed she had accused him "of all this stuff" because she had been caught "doing it" with her boyfriend. Because the incident involving Doe's boyfriend came out at the same time as the incident involving him, defendant believed they were related to each other.

B. Analysis

The constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) Thus, a criminal defendant has a due process right to present all relevant evidence of significant probative value in his defense. (*Washington v. Texas* (1967) 388 U.S. 14, 19.) However, as a general rule, application of the ordinary rules of evidence does not impermissibly infringe on a defendant's right to present a defense. (*People v. Cunningham* (2001) 25 Cal.4th 926, 998-999.)

“Evidence of the sexual conduct of a complaining witness is admissible in a prosecution for a sex-related offense only under very strict conditions.” (*People v. Fontana* (2010) 49 Cal.4th 351, 362.) This evidence may be admissible “when offered to attack the credibility of the complaining witness,” and when presented in accordance with the procedures under Evidence Code section 782. (*People v. Fontana, supra*, at p. 362.) “Evidence Code section 782 provides for a strict procedure that includes a hearing outside of the presence of the jury prior to the admission of evidence of the complaining witness's sexual conduct. [Citations.] Evidence Code section 782 is designed to protect victims of molestation from ‘embarrassing personal disclosures’ unless the defense is able to show in advance that the victim's sexual conduct is relevant to the victim's credibility. [Citation.] If, after review, ‘the court finds the evidence relevant and not inadmissible pursuant to Evidence Code section 352, it may make an order stating what evidence may be introduced and the nature of the questions permitted.’ [Citation.]” (*People v. Bautista* (2008) 163 Cal.App.4th 762, 782.)

“By narrowly exercising the discretion conferred upon the trial court in this screening process, California courts have not allowed the credibility exception in the rape shield statutes to result in an undermining of the legislative intent to limit public exposure of the victim’s prior sexual history. [Citations.]” (*People v. Chandler* (1997) 56 Cal.App.4th 703, 708.) “Great care must be taken to insure that this exception to the general rule barring evidence of a complaining witness’ prior sexual conduct, i.e., Evidence Code section 1103, subdivision (b)(1), does not impermissibly encroach upon the rule itself and become a ‘back door’ for admitting otherwise inadmissible evidence.” (*People v. Rioz* (1984) 161 Cal.App.3d 905, 918-919.)

We review the trial court’s ruling in denying the admission of evidence of sexual conduct for an abuse of discretion. (*People v. Chandler, supra*, 56 Cal.App.4th at p. 711.)

To begin with, defendant contends the trial court erred in refusing to hold an evidentiary hearing on his Evidence Code section 782 motion. We disagree. The trial court considered the interviews of Doe, her mother, her friend, and defendant in its review of the relevant Evidence Code sections. The court observed: “I think the real question here is whether we have enough to go further into that to do it properly, if it’s going to be done, which would then involve a[n] [Evidence Code section] 402, of course. And I think from looking at the questions that have been propounded here, it clearly includes going into prior sexual conduct of a victim. I mean, the first question is: Was Jane Doe involved in a sexual relationship with another in April 2010? Therefore, I think we need to meet the Evidence Code requirements of the filing of an affidavit and have a

402, if we get past that with the affidavit that you submit. [¶] Frankly, it looks to me a little bit like you don't know the answers to these questions. It's a little bit of a fishing expedition at this point." We agree. While defendant claims Doe was sexually active at the time of the incident involving him, the record before this court shows that she was not. Instead, she did not become sexual active until end of May. However, Doe told her girlfriend about the incident involving defendant shortly after it happened in April.

Notwithstanding the above, the court allowed defendant to question Doe as to whether she had a boyfriend at the time of the incident involving defendant, whether she spoke to defendant about her boyfriend, and whether she told defendant she was sexually active with her boyfriend. Defendant was not precluded from asking the questions that could elicit evidence to support his defense. Rather, he was merely limited in his questioning in order to prohibit public exposure of Doe's sexual history. Defendant was not deprived of a meaningful opportunity to present a complete defense. While it is true that Doe's credibility was at issue, to have subjected her to further cross-examination on her sexual history would not prove to be helpful. When questioned on the subject, Doe stated she did not tell defendant she was in a relationship; however, she did tell him that she had previously had sex. The jury was not precluded from hearing the defense theory. Rather, the jury heard that defendant believed Doe was using him because she blamed him for her mother finding out about her adult boyfriend.

Defendant's claim that evidence of Doe's prior sexual history was relevant to show "an alternate source for Doe's knowledge of sexual acts" (capitalization omitted) is a red herring. There was no issue as to Doe's ability to describe the sexual acts in

question. In any event, even if she was sexually active prior to the incident involving defendant, such fact does not affect the defense theory of her motivation for fabricating her claims against defendant. Whether Doe gained knowledge of oral copulation before or after the incident involving defendant is irrelevant to her motivation for lying.

Even if we were to assume error, we conclude it is not reasonably probable the error affected the verdict. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendant admitted to police that the charged conduct occurred. While he claims his admission was equivocal, the jury disagreed, and so do we. The evidence showed he spent a significant amount of time with Doe, accompanying her to the nail salon, sitting beside her in the car, and texting her. His text of wanting more sent in the middle of the night was seen by Doe's mother.

III. MOTION TO EXCLUDE ANY REFERENCE TO INCEST

Defendant contends the trial court erred in admitting evidence that defendant told Doe he had “done incest” before.

A. Additional Background Facts

Prior to trial, defense counsel asked the court to exclude portions of defendant's interview in which Detective Collazo made “implications or some insinuations that [defendant] has engaged in incest in the past.” This request was prompted by Doe's statement to police that before the alleged incident, defendant had texted her that he “did incest” before. The prosecutor argued that the officer's conversation with defendant about “incest” and Doe's allegation that defendant had texted her that he had “done it” before were relevant because it was a way of “normalizing what would be otherwise very

abnormal behavior.” Further, the prosecutor argued that “defendant’s statement earlier, which would be a very unusual thing for a person to say . . . is really a partial confirmation that what she earlier said about it was true.” The trial court referenced Doe’s statements in her interview with the social worker regarding defendant’s text and concluded it would be appropriate to give a limiting instruction that stated the evidence “is offered just for the fact whether or not those words were spoken, not that they’re true. You are not to imply from that that they are necessarily true. The question is were they spoken or were they not?”

At trial, Doe testified about defendant texting her messages that were sexual. One message stated that he “had done incest before.” She stated that at the time she did not know what incest was. However, over the next few days, the sexual texts continued with defendant telling her he wanted to do things to her that made her feel “[a] little uncomfortable.” On cross-examination, she remembered defendant saying he had seen or become aware of his cousins doing incest and that he was also involved. Previously, during his interview with Detective Collazo, defendant acknowledged his cousin “did incest” in the Philippines while he was present, but he “didn’t do anything.”

B. Analysis

“When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence’s probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers ‘substantially outweigh’ probative value, the objection must be overruled. [Citation.]” (*People v. Cudjo* (1993) 6 Cal.4th 585, 609; see also *People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

“‘[P]rejudicial’ is not synonymous with ‘damaging,’ but refers instead to evidence that “uniquely tends to evoke an emotional bias against defendant” without regard to its relevance on material issues. [Citations.]” (*People v. Kipp, supra*, at p. 1121.) “On appeal, the ruling is reviewed for abuse of discretion. [Citation.]” (*People v. Cudjo, supra*, at p. 609.)

Defendant contends the evidence about incest was not probative because Doe told the social worker that when defendant mentioned incest, she was scared because she knew defendant had a little sister. However, defendant points out that Doe did not know what incest meant at the time of the reference; she thought it was a reference to burning candles. Thus, defendant argues that the text about incest, according to Doe’s own statements, did not induce her to submit to oral sex. The People reply that “[w]hether [defendant’s] incest reference did, in fact, convince Doe that orally copulating [him] would be appropriate is insignificant. What is relevant is that [defendant] made the statement in his own effort to convince Doe that his behavior was not improper.” We agree with the People.

Alternatively, defendant faults the trial court for failing to exclude the evidence under Evidence Code sections 1521 and 1523. Evidence Code section 1521 provides: “The content of a writing may be proved by otherwise admissible secondary evidence.” (Evid. Code, § 1521, subd. (a).) However, it is subject to Evidence Code section 1523, and defendant attacks the prosecution’s compliance with this section because the prosecution did not meet its burden of establishing that the original writing has been lost without fraudulent intent or that it was not reasonably procurable through the court’s

process or other available means (Evid. Code, § 1523, subs. (b) & (c)(1).) Even if these exceptions exist, admission of the oral evidence is subject to exclusion “if the court determines either of the following: (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion. [¶] (2) Admission of the secondary evidence would be unfair.” (Evid. Code, § 1521, subd. (a).)

Here, Doe testified that she deleted the texts sent by defendant. Detective Collazo testified that he tried to obtain the text messages from the phone providers, but his understanding was they were no longer available, given the passage of time. Although defendant disputed the exact language used in the texts, he did not dispute texting Doe about incest. Rather, he explained that he had seen his cousin have incest but he was not a participant. Thus, the trial court complied with Evidence Code sections 1521 and 1523.

Nonetheless, defendant argues the “incest” evidence created a substantial danger of being unduly prejudicial, confusing or misleading. However, we note the reference was brief and defendant was able to explain it. Moreover, the trial court provided the jury with a limiting instruction on the use of this evidence to prevent any potential prejudice. We presume the jury followed this instruction. (*People v. Gray* (2005) 37 Cal.4th 168, 217.) Accordingly, we conclude the trial court did not abuse its discretion in admitting the evidence.

IV. MOTION FOR NEW TRIAL

Defendant contends the trial court erred in denying his motion for new trial based on newly discovered evidence.

A. Further Background Facts

After the verdicts were rendered, defendant's newly retained counsel filed a motion for new trial with supporting exhibits. Defendant argued he was entitled to a new trial based upon newly discovered evidence. According to defendant, the new evidence was that the case against Doe's boyfriend, C.B., was pending at the time the allegations against defendant arose. Defendant claimed that, had this evidence been presented at trial, the likelihood of a different result was probable since the evidence established a motive to lie and fabricate the incident with defendant by Doe.

In support of his motion, defendant offered the declarations of Doe's aunt and uncle (the H.'s) and another uncle. These declarations claim that Doe's mother knew about C.B., that he was a Black male who was 21 or 22 years old, and that Doe was having sex with him. Defendant also provided the court records from Alameda County regarding the criminal charges against C.B., who had pled no contest to one count of unlawful sexual intercourse with a minor (§ 261.5, subd. (c)) and received five years' formal probation.

In opposition to the motion for new trial, the prosecution argued the evidence was not newly discovered, as the defense was in possession of a pretrial "sworn statement" by the H.'s, which discussed conversations they had with Doe's mother, such that defendant was aware of the witnesses who could testify as to Doe's relationship with C.B. and motive to cover it up. The prosecutor also argued the defense was aware of the criminal case involving C.B. but had failed to request additional time to further investigate. In addition to the defense's declarations containing hearsay, the prosecutor asserted it was

unlikely a different verdict would be reached, given defendant's admission in his interview with Detective Collazo.

At the hearing on his motion, defendant continued to assert that the evidence was new, because he had been unable to obtain the name of Doe's boyfriend, i.e., C.B., until after receipt of the probation report. Defendant's case was reported after prosecution against C.B. had commenced. Regarding hearsay, defendant argued the declarations contained admissions by Doe's mother. The court was provided with the pretrial statements of the H.'s, which were sealed by the court.

The prosecution maintained the defense was aware of C.B.'s name during trial. The prosecutor had provided the defense with information about the matter, including the location and nature of the charges, and argued "this [was] not new information." The prosecutor pointed out the hearsay in the declarations and that the chances that defendant would obtain a different result were unlikely given defendant's admission.

Denying the motion for new trial, the trial court found that the information failed to fall within the scope of newly discovered evidence and would not "likely result in a different result."

B. Analysis

Under section 1181, a trial court can grant a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (§ 1181, subd. (8).) "In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: "1. That the evidence, and not merely its materiality, be newly discovered;

2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.” [Citations.]” (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) “Because a ruling on a motion for new trial rests so completely within the trial court’s discretion, we will not disturb it on appeal absent ““a manifest and unmistakable abuse of discretion.”” [Citation.]” (*People v. Earp* (1999) 20 Cal.4th 826, 890.) None exists here. While defendant may not have known the specific details surrounding C.B.’s charges, he did know that Doe’s adult boyfriend was under investigation regarding his relationship with Doe. A diligent investigation would have provided more information. Thus, the evidence offered in support of defendant’s new trial motion did not qualify as “newly discovered evidence” for the purpose of a motion for new trial. (*In re Hall* (1981) 30 Cal.3d 408, 420.) As such, we cannot say the trial court abused its discretion in denying defendant’s motion.

V. DEFENDANT’S ELIGIBILITY FOR PROBATION

Defendant contends, and the People concede, the trial court erred in finding defendant statutorily ineligible for probation.

A. Further Background Facts

Initially, defendant was charged with unlawful oral copulation with a person under the age of 18 (§ 288a, subd. (b)(1); count 1) and forcibly committing a lewd act upon a child under the age of 14 (§ 288, subd. (b)(1); count 2). However, during trial, count 2

was amended to charge him with committing a lewd act upon a child under the age of 14 without force (§ 288, subd. (a)). The jury found defendant guilty of both counts.

Following his conviction, the probation department noted that pursuant to section 1203.066, subdivision (a)(8), defendant was prohibited from a grant of probation because he had been “convicted of Penal Code Section 288(a) which involved substantial sexual conduct; lewd act on a minor without force.” At sentencing, the trial court stated: “In looking at the probation report, I do concur that the defendant is statutorily ineligible for probation. That is not an option to the Court at this point.” Defendant was sentenced to state prison.

B. Analysis

The trial court is required to determine whether a defendant is eligible for probation. (Cal. Rules of Court, rule 4.413(a).) All defendants are eligible for probation as long as they do not fall within one of the categories restricting the availability of probation. The most severe restrictions deprive the sentencing court of jurisdiction to grant probation to the defendant; in other words, probation is unconditionally prohibited in certain felony cases. (See, e.g., §§ 1203.06-1203.09.) Less severe restrictions merely limit the sentencing court’s authority to grant probation except in unusual cases in which the interests of justice would best be served by such a grant. (See, e.g., § 1203, subd. (e).)

Relying on section 1203.066, subdivision (a)(8), the trial court determined defendant was ineligible for probation because of his section 288, subdivision (a), conviction. Section 1203.066 generally prohibits probation whenever lewd acts are

committed under specified circumstances, such as multiple victims, substantial sexual conduct, or the use of obscene matter. (§ 1203.066, subs. (a)(7), (8) & (9).) Section 1203.066, subdivision (a)(8), in relevant part, provides that “probation shall not be granted to . . . the following persons: [¶] (8) A person who, in violating Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age.” (§ 1203.066, subd. (a)(8).) Subdivision (b) of section 1203.066 defines “substantial sexual conduct” as “penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender.” The existence of “substantial sexual conduct” must be “alleged in the accusatory pleading and is either admitted by the defendant in open court, or found to be true by the trier of fact.” (§ 1203.066, subd. (c)(1).)

Here, because defendant rubbed Doe’s breasts and vagina before he inserted his penis into her mouth, the jury convicted him of committing a lewd act upon a child under the age of 14 without force, in violation of section 288, subdivision (a). A defendant who violates section 288 becomes ineligible for probation when he has “substantial sexual conduct” with the victim, which is “alleged in the accusatory pleading and is either admitted by the defendant in open court, or found to be true by the trier of fact.” (§ 1203.066, subs. (a)(8) & (c)(1).) No such allegation was made against defendant, nor was a “substantial sexual conduct” finding made by the jury. While defendant had Doe orally copulate him, conduct that falls within the meaning of “substantial sexual conduct,” such conduct gave rise to count 1, a violation of section 288a, subdivision

(b)(1), and not count 2, a violation of section 288, subdivision (a). Section 1203.066, subdivision (d)(1), provides that when a person is convicted of violating section 288, and “substantial sexual conduct” is not pled or proven, probation may be granted only if certain terms and conditions are met, i.e., defendant is a member of the victim’s household, rehabilitation is feasible, and no threat of physical harm. (§ 1203.066, subs. (d)(1)(A), (B) & (E).)

For the above reasons, the trial court erred in concluding that defendant was statutorily ineligible for probation based upon his conviction of section 288, subdivision (a) in count 2. The matter must be remanded for the trial court to determine whether defendant meets the conditions identified by section 1203.066, subdivision (d)(1), such that probation should be granted. (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1248 [“[w]here a trial court imposes sentence without an accurate understanding of its sentencing discretion, remand for resentencing is appropriate”].)

VI. SENTENCING

Defendant faults the trial court for imposing the middle term of six years on count 2, followed by a consecutive eight-month term on count 1. He contends the trial court erred in its reliance on two aggravating factors, namely, that the offense “almost” qualified for a more serious crime and that Doe was “a little bit” more vulnerable than a typical molestation victim because defendant was her cousin. Anticipating the People will respond that he has forfeited this issue because his counsel failed to object at the trial court level, defendant claims ineffective assistance of counsel. A reviewing court may, in its discretion, decide to review a claim that has been or may be forfeited for failure to

raise the issue below. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7.) We exercise such discretion in this case and will address the merits of the claim.

A. Further Background Facts

The probation report noted three factors in aggravation: (1) the victim was “moderately vulnerable”; (2) the manner in which the crime was carried out “indicates planning, sophistication, or professionalism”; and (3) the defendant “engaged in violent conduct that indicates a serious danger to society.” The only mitigating factor was that defendant had no prior record, no significant record of criminal conduct. The report also noted that Dr. Maurizio F. Assandri, a psychiatrist, opined, “defendant is not a risk to the victim, and he is a low potential risk to other children.” Defendant’s “Static-99R score” was (+2), which placed him in the “Low Moderate Risk Category.”

At sentencing, the trial court stated, “In reviewing this matter . . . I think it’s very clear that the defendant is a person who has not been in trouble before and has led . . . what appears to be a fine, upstanding life to the point of this incident. The disturbing things I see with this incident are several The age difference, of course. This is right on the borderline. If it wasn’t—and I haven’t actually checked the actual birth dates—what it would have been is a 269, I believe, where he could be looking at 15 years to life even though it’s his first . . . situation. [¶] There is the fact of the relationship where he was an older cousin, making the victim a little bit more vulnerable. Perhaps not as vulnerable as you might be in a parent-child situation, but it’s more vulnerable certainly than a stranger situation would have been.” The court sentenced defendant to

the midterm of six years on count 2, plus a consecutive one-third the midterm, or eight months, on count 1.

B. Analysis

“When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court.” (§ 1170, subd. (b).) “Section 1170, subdivision (c), provides that the court “shall state the reasons for its sentence choice on the record at the time of sentencing.” The decision to impose consecutive rather than concurrent sentences is a “sentence choice” within the meaning of this section. [Citations.] An express statement of reasons is required to support such a choice.’ [Citation.]” (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1297.) We review a trial court’s sentencing decision for an abuse of discretion. (*People v. Castellano* (1983) 140 Cal.App.3d 608, 615.) “An abuse is found only where its choice is ‘arbitrary or capricious or “exceeds the bounds of reason, all of the circumstances being considered.’” [Citations.]’ [Citations.]” (*People v. Trausch* (1995) 36 Cal.App.4th 1239, 1247.)

In making its sentencing decision, the trial court referenced two factors in aggravation: vulnerability of the victim and the age difference between the victim and defendant. We agree with defendant that the trial court’s reliance on a “what if” scenario, i.e., had defendant been convicted of aggravated sexual assault he would have received a 15-year to life sentence, was inappropriate. Nonetheless, as the People point out, “California courts have long held that a single factor in aggravation is sufficient to justify a sentencing choice” (*People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.) Here,

such single factor was the victim’s vulnerability. However, defendant points out that California Rules of Court, rule 4.421(a)(3), requires a finding that the “victim was *particularly* vulnerable.” (Italics added.) He argues that because the trial court found only that Doe was “a little bit more vulnerable,” it failed to make the necessary finding that she was “particularly vulnerable.” Victim “[v]ulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant’s criminal act.” (*People v. Smith* (1979) 94 Cal.App.3d 433, 436 [describing that term in the context of Calif. Rules of Court, rule 4.421(a)(3)].) A “little bit more vulnerable” is not “particularly vulnerable.” Moreover, the probation report noted that Dr. Assandri opined that “defendant is not a risk to the victim, and he is a low potential risk to other children.” Defendant’s Static-99R score was (+2), which placed him in the “Low Moderate Risk Category.” And more importantly, Doe’s father preferred that defendant be granted probation, her mother asked only for an apology, and Doe testified that she did not want defendant to get in trouble; she considered the sexual encounter to be “a mistake.”

Given the above, we cannot conclude the trial court acted within its discretion in reaching its sentencing choice. Because the matter must be remanded for the trial court to determine defendant’s eligibility for probation, we will also direct the court to reconsider its sentencing choice if it should decide to deny probation.

VII. DISPOSITION

Defendant’s sentence is reversed and the matter is remanded. The trial court is directed to hold a resentencing hearing within 30 days after the finality of this opinion.

The court is directed to exercise its discretion, consistent with the views expressed herein, to determine whether defendant should be granted probation. If the court determines not to grant probation, then it shall clarify and/or re-evaluate its sentencing choice. The court shall issue an amended abstract of judgment reflecting the sentence as modified and to provide a copy of the amended abstract to the parties and to the Department of Corrections and Rehabilitation within 30 days after resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MILLER

J.