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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JON DAVID WOODY,

Defendant and Appellant.

H037191

(Monterey County

Super. Ct. No. SS082448)

Defendant Jon David Woody appeals from a judgment of conviction entered after a jury found him guilty of three counts of sexual penetration of a child 10 or under (Pen. Code, § 288.7, subd. (b)¹ - counts 1, 2, 5) and 17 counts of lewd acts upon a child under 14 (§ 288, subd. (a) - counts 3, 4, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25). The jury found true the allegation that the lewd acts were committed on multiple victims (§§ 1203.066, subd. (a)(7), 667.61, subd. (e)(5)) as to counts 3, 4, 7, 12, 13, 17, 18, 19, 22, 23, 24, 25. After denying defendant's motion for new trial, the trial court sentenced defendant to an indeterminate term of 210 years to life and a consecutive determinate term of 16 years in state prison. On appeal, defendant raises contentions relating to the

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

admissibility of evidence, jury instructions, and prosecutorial misconduct.² We affirm the judgment.

I. Statement of Facts

A. Jane Doe 1 - Counts 1, 2, 3, 4, 5, 7, 12, 13, 14, 15, 16

Jane Doe 1, who was born in December 1999, was 10 years old and in the fifth grade when she testified at trial. Defendant and his wife Nancy were her neighbors, and she, her twin brother and her younger sister began visiting them when she was in kindergarten. When Jane Doe 1 was in first grade, defendant and Nancy babysat her and her siblings after school. Jane Doe 1 stopped going to defendant's house when she was in third grade.

Jane Doe 1 remembered that defendant had many boxes of Penthouse magazine in his basement. He showed Jane Doe 1 photographs of naked women and asked if she could "do this pose." She did not respond to his request.

Defendant took Jane Doe 1 into his RV, which was parked next to his home. Defendant told her that he would give her candy if she would clean the RV while she was naked. She removed her clothes, and defendant watched her while she vacuumed. He then gave her candy. This happened a couple of times.

Defendant also told Jane Doe 1 to take off her clothes. He then laid her on the bed or the couch in the RV, put his fingers into her vagina, and moved them around. When he was finished, he gave her candy. Sometimes he "just fe[lt] and stroke[d]" her vagina. Defendant also rubbed her buttocks while she was lying on the bed in the RV. At other times defendant took his clothes off, but left his underwear on. He then touched her vagina. Defendant once inserted the eraser end of a pencil in her vagina. On another

² Defendant also contends that the trial court erred in denying his motion for new trial. Since this motion was based solely on the same issues that he raises on appeal, this appellate contention is superfluous.

occasion, defendant threatened her and made her touch his penis over his underwear. She remembered kissing his penis while he was wearing his underwear.

Defendant had a laptop computer in the RV and he showed her the photos of naked women on the Web site sex.com. He also showed her movies of people having sex. She once accompanied him to the store when he purchased a Penthouse magazine.

All the touching occurred in the RV and defendant told Jane Doe 1 that he would kill or hit her if she did not do what he wanted. He hit her on one occasion in the RV, but she did not remember why. Defendant also used a Polaroid camera to take photographs of her naked. The windows of the RV were tinted so that no one could see inside.

Michelle, Jane Doe 1's mother, testified that when Jane Doe 1 was eight in September 2008, she asked her what a penthouse was. Michelle replied that it was the best room in the hotel. Jane Doe 1 then asked, "[W]hat about the magazine?" When she said that she had seen one, Michelle asked what she had seen, and Jane Doe 1 replied that "there's naked people, and they're doing that sex thing." She also told her that defendant showed it to her. Michelle told her that she would talk to defendant and his wife about having the magazine available for children to view. Jane Doe 1 then told her that defendant had also touched her inappropriately. After Jane Doe 1 provided more details, Michelle contacted the police.

The police executed a search warrant of defendant's residence and RV on September 23, 2008. They conducted a forensic search of defendant's desktop computer in his home office and found that sex.com, penthouse.com, and bunnyranch.com were Web sites that had been visited. They also seized a laptop computer on which they found 29 deleted movie files, including 14 that referred to child pornography. The police did not find any Penthouse magazines in the basement, but there were four Penthouse magazines in the master bedroom and one in the RV. They did not find a Polaroid camera or photographs of Jane Doe 1.

B. Jane Doe 2 - Counts 17, 18, 19, 20, 21

Jane Doe 2, who was born in June 1992, was 18 years old at the time of trial. She became involved in the Big Brothers Big Sisters program when she was five years old. Her mentors were defendant and Nancy. She spent more time with defendant than Nancy, and played games on his computer in his home office. He told her that the computer would not work unless she was sitting on his lap and he was touching her chest and genital area. As she played on the computer while sitting on his lap, he reached under her clothing, grabbed her nipples, and rubbed her vagina. The touching occurred every time she went to his house. On one occasion, defendant kissed her on the neck when they were in the car.

When Jane Doe 2 told defendant that she did not want to take a nap at his house, he pulled her pants down to her knees, inspected her vagina, and told her he was checking to see if she was tired. Defendant once took her into the basement, put her on the tool bench, and pulled down her pants. He also asked her to wear leather underwear on another occasion. She stopped participating in the Big Brothers Big Sisters program because she felt uncomfortable with defendant.

Natalie, Jane Doe 2's mother, testified that her daughter participated in the program for less than six months. Jane Doe 2 initially visited defendant and his wife once a week, but the frequency of the visits "dropped down quite a bit." While she was being mentored by defendant and his wife, she no longer wanted to wear dresses and became less receptive to other people. She also complained of pain in her genital area. When she was seven or eight years old, Jane Doe 2 told her mother that defendant had inappropriately touched her. Natalie asked her whether she wanted to take him to court or never to see him again. Jane Doe 2 decided never to see him again. Natalie did not contact the police. However, in 2008, Jane Doe 2 was in the hospital and she reported the molestation to the police.

C. Jane Doe 3 - Uncharged Offenses

Jane Doe 3, who was born in August 1987, was 23 years old when she testified at trial regarding uncharged offenses committed by defendant. Her mother had read about the allegations against defendant in the newspaper and asked her if she should come forward and talk about what had happened to her. Jane Doe 3 was defendant's neighbor and her older brother was a friend of defendant's son. When she was about four years old, she went to defendant's house a couple of times a week to play games on his computer. Defendant told her that the computer would not work unless his hand was down her pants. She sat on his lap and played on the computer while he rubbed her vagina and inserted his finger. Defendant sometimes asked, "Does that feel good?" She usually played on the computer for half an hour to an hour. Nancy knew what defendant was doing because she stood next to him a few times and "there was no way she could miss what was going on." The touching occurred every time she visited defendant's house over a two year period.

Defendant asked Jane Doe 3 not to wear pants with buttons. Defendant also showed her magazines with naked people having sex, and said, "Doesn't that look like fun? Wouldn't that feel good?"

Jane Doe 3's brother broke his collar bone late one night and one of her parents asked defendant to come watch Jane Doe 3 while they took her brother to the hospital. Jane Doe 3 woke up in the middle of the night to find defendant standing over her. Defendant then put his hand down her pants and touched her vagina.

The last time that Jane Doe 3 went to defendant's house, he instructed her to go into another room. After she did, he laid her on the bed, took off her pants and underwear, touched her vagina, and inserted his fingers inside her. He then said, "I'll be right back. I have something for you." After he left, she dressed quickly and ran home.

When Jane Doe 3 was in kindergarten, her teacher gave a lesson on "bad touching." She then told her mother what had happened. Her mother Tamara testified

that they decided that they would handle the situation as a family and not notify the police. She explained that one of her students had been in a similar situation and the student's mother had told her how traumatic the investigation had been for her daughter. Tamara also had pressure from her husband not to call the police.

Jane Doe 3 began seeing a therapist when she was 15 years old and told her therapist about the molestation. These events affected Jane Doe 3's life. She is scared of men, does not like going places alone, and is paranoid about having children.

D. Jane Doe 4 - Counts 22, 23

Jane Doe 4, who was born in October 1993, was 17 years old and housed in juvenile hall when she testified at trial. She is the younger sister of Jane Doe 5. Jane Doe 4 became involved in the Big Brothers Big Sisters program when she was almost seven years old. She and Jane Doe 5 were matched with defendant and Nancy. Jane Doe 4 visited defendant's home many times and frequently spent the night.

Jane Doe 4 played games on defendant's computer in his home office. While she sat on defendant's lap, he put his hands down her pants and inserted his finger in her vagina. He told her that she would not be able to play the game unless he touched her. The touching occurred every time she played with the computer, which was about 60 or 70 times. On one occasion, Jane Doe 4 and defendant went into the basement to get a scooter, and defendant put her on a wooden table, pulled down her pants and underwear, and put his fingers in her vagina.

After defendant had touched her a number of times, Jane Doe 4 told him that she was going to tell her mother. Defendant said that it was a secret and she couldn't tell her mother because it was between the two of them. He also told her that he would buy her toys and candy if she did not tell anyone. At one point, Jane Doe 4, who was then eight years old, told her mother. When her mother became very angry, she then lied and said that she was just playing.

Defendant bought Jane Doe 4 a lot of toys and candy. He also bought her a scooter and a bicycle. She thought that defendant's conduct was her fault. She explained that she was letting him touch her because she wanted to play games on the computer. When the acts occurred, Nancy was in the kitchen with Jane Doe 5.

In May 2010, Jane Doe 4 was taken to juvenile hall. She had been getting into trouble since she was 13. She had a phone conversation with her mother in which her mother asked why she was always getting in trouble. Jane Doe 4 started crying and said, "You don't know what I've been through," and "[defendant] used to touch me down there." She never discussed the molestation with Jane Doe 5.

E. Jane Doe 5 - Counts 24, 25

Jane Doe 5, who was born in October 1992, was 18 years old when she testified at trial. She participated in the Big Brothers Big Sisters program when she was seven or eight years old. She was matched with defendant Nancy and went with Jane Doe 4 to their house. Defendant supervised her when she used the computer. She sat on defendant's lap while he put his hands down her pants and rubbed her vagina. The touching occurred every time that she used the computer. Jane Doe 4 would be watching television or playing a board game with Nancy while Jane Doe 5 was playing on the computer.

Jane Doe 5 never spoke to Jane Doe 4 about the molestation. She learned that Jane Doe 4 had also been molested by defendant only recently.

F. Defense Case

Defendant testified on his own behalf at trial. He was 65 years old and retired at the time of trial. He had been married to Nancy for 39 years and they had a 36-year-old son Jimmy. Defendant lives in a home in Prunedale and has an RV. He uses his

basement as a storage space and there is no work bench in it. He allowed his neighbors to use his computer.

Defendant and Nancy were involved in the Big Brothers Big Sisters program from 1972 or 1973 until approximately 1996. After participating in the screening process, they were matched with Jane Doe 4, Jane Doe 5, their sister Felicia, and other children.

There were also many neighborhood children who would come over to their house. The children went through their refrigerator, watched television, played with their dog, and used their computer. Jane Doe 1 was one of these children and she came over with her twin brother and her sister. They watched television and played with a radio-controlled toy. He paid them to get his mail because Nancy had arthritis in her knees. Defendant helped Jane Doe 1 and her brother with their math homework and he bought them paper and pencils. He was never alone with Jane Doe 1 for more than five minutes because her siblings were around. Defendant gave Jane Doe 1 candy for cleaning his RV, stating that “she worked as a maid very cheaply” and liked cleaning the RV. He denied: touching her vagina while they were in the RV, putting his fingers inside her vagina, putting a pencil inside of her, rubbing her buttocks, offering her candy for a sexual favor, showing her pornography on the computer, showing her pornographic magazines, having her touch his penis with her hands, having her kiss his penis, having her see him in his underwear, and taking any photographs of her. He admitted that he bought a Penthouse magazine when he went to the store with Jane Doe 1 and his wife.

Jane Doe 2 was matched to defendant and Nancy by the Big Brothers Big Sisters program when she was five. The placement lasted six or seven weeks because her father thought they were taking his time away from his visits with his daughter. Defendant saw Jane Doe 2 seven times. She spent little time at his house, but he allowed her to play on the computer for an hour. He did not own a laptop computer at that time. When he showed her how to set up games on the computer, she stood between his legs and she never sat on his lap. Defendant had an extremely bad back and knees and could not lift

more than 20 pounds. He also could not sustain more than 20 pound on his left leg. Defendant denied touching Jane Doe 3's vagina while she was on the computer. He also denied pulling down her pants in the bedroom or the basement.

Jane Doe 3 lived next door to defendant and was the younger sister of his son's friend when his son was 14 years old. He only saw her when she accompanied her brother to his house. She played on the computer once or twice. He showed her how to use it the same way that he had shown Jane Doe 2. When Jane Doe 3's brother was injured one night, he and Nancy watched her. He denied touching Jane Doe 3's vagina that night or while she was playing on the computer.

Defendant testified that he and Nancy were matched with Jane Doe 4, Jane Doe 5, and their sister Felicia. Felicia decided that she did not want to participate in the program after two weeks while Jane Doe 4 and Jane Doe 5 stayed in the program for six months. The Big Brothers Big Sisters program terminated the match because their mother was using the program as a babysitter. After a month, the girls asked defendant and Nancy if they could come over. Defendant and Nancy then continued a relationship with them outside the program. The girls would also spend the night at defendant's house when their mother was having a difficult time.

Defendant denied touching Jane Doe 4 and Jane Doe 5's vaginas. He also denied taking Jane Doe 4 to the basement and pulling down her pants. After hearing the accusations in court, he felt "pissed" because "none of that ever happened." He would never hurt a child. Defendant also denied visiting the Web sites sex.com, and bunnyranch.com, but admitted that he visited penthouse.com. He denied that he ever downloaded pornographic files onto his computer.

II. Discussion

A. Admissibility of Evidence

Defendant contends that the trial court erred in admitting the testimony of Jane Doe 3 under Evidence Code sections 1108 and 352.

Prior to trial, defense counsel objected to the admission of testimony by Jane Doe 3 pursuant to Evidence Code section 352 on the ground that the prior incidents occurred over 10 years ago and were related to uncharged offenses. The prosecutor argued that the uncharged offenses were similar to some of the charged offenses because defendant molested Jane Doe 3 while she was playing on his computer. He also noted that Jane Doe 3's testimony would not be time-consuming and that courts have admitted evidence of uncharged offenses which were more remote. When the trial court referred to the burden on Jane Doe 3 to testify, the prosecutor stated that "her attitude at this point is this is something she needs to do to bring closure in her life as to the events." The trial court ruled that her testimony was admissible under Evidence Code section 1108.

After defendant was convicted, he filed a motion for a new trial in which he argued that Jane Doe 3 was more articulate and mature and that she was allowed to testify about the effects of the uncharged offenses on her marriage and life, which was extremely inflammatory and unduly prejudicial. The trial court denied the motion.

In general, evidence that a defendant has committed a prior offense other than the charged offense is generally inadmissible to prove his or her disposition to commit the charged offense. (Evid. Code, § 1101.) However, one of the exceptions to this general rule involves sex offense cases. (Evid. Code, § 1108.) Under Evidence Code section 1108,³ the defendant's other acts of sex offenses are admissible to prove propensity to

³ Evidence Code section 1108 states that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not made inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. a.)

commit the charged offense if the evidence is not inadmissible under Evidence Code section 352. (*People v. Loy* (2011) 52 Cal.4th 46, 60 (*Loy*)). “[T]he Legislature decided evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitations of Evidence Code 1101.’ [Citation.] Or, as another court put it, ‘[t]he charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108.’ [Citation.]” (*Loy*, at p. 63.)

Evidence Code section 352 provides that “[t]he 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 issues, or of misleading the jury.” In reviewing the admissibility of evidence under Evidence Code section 352, trial courts consider the “nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense [Citations.]” (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

On appeal, “[t]his court reviews the admissibility of evidence of prior sex offenses under an abuse of discretion standard. [Citation.] A trial court abuses its discretion when its ruling ‘falls outside the bounds of reason.’” (*People v. Wesson* (2006) 138 Cal.App.4th 959, 969.)

Here, defendant was either a neighbor of or a mentor to girls between the ages of four and eight in both the uncharged offenses and the charged offenses. The uncharged offenses and the charged offenses involving Jane Does 2, 4, and 5 also involved similar conduct, that is, repeated fondling and digital penetration of the victims’ vaginas while

they played on the computer. Moreover, defendant told Jane Doe 3 and some of the other victims that they would only be able to use the computer if he was touching them. Thus, the trial court could have reasonably found that evidence of the uncharged offenses was highly probative of defendant's propensity for committing the charged offenses.

The trial court's next step was to evaluate the potential for prejudice posed by evidence of the uncharged offenses. Defendant argues that the uncharged offenses were remote, and thus prejudicial. Though the prior conduct occurred approximately 16 years prior to trial, this factor does not significantly lessen the probative value of the other crimes evidence. Between the time that defendant last molested Jane Doe 3 and he began molesting Jane Doe 2 was approximately five years. A couple of years later, he then began molesting Jane Does 4 and 5, and then eventually Jane Doe 1. Thus, this factor does not weigh in defendant's favor.

Defendant argues that Jane Doe 3's testimony was more inflammatory than the charged offenses. Here, the evidence of the uncharged sex offenses was no more inflammatory than the charged offenses. Defendant, however, refers to Jane Doe 3's response when the prosecutor asked her whether the molestation "affected [her] life currently." Over a defense objection, she testified: "Um, I'm scared of men. I have an amazing husband, but our -- what a husband and wife should be doing is almost impossible for me to do. I can't stand feeling him touch me. I don't like going places alone because I'm scared I'll be hurt again. I'm paranoid about having children because I don't want anything like this to happen to them." Defendant also claims that Jane Doe 3's testimony was "impassioned and political," because she "sought 'closure' and wished to help others."

"The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." [Citation.] (*People v. Bolin* (1998) 18 Cal.4th 297,

320.) Here, as the trial court noted, Jane Doe 3's testimony was relevant on the issue of her credibility, that is, it provided an explanation for why she came forward to testify in the case. We do not find this evidence unduly prejudicial.

Defendant also contends that since the uncharged acts did not result in criminal convictions, there was a risk that the jury might have been tempted to punish him for the uncharged acts and the jury's attention was diverted to determining whether he committed those acts. There will always be less "certainty" than there would be if there had been a conviction, and consequently an additional burden on the defendant to defend against the uncharged acts as well as a potential danger that the jury would want to convict defendant to punish him for the past offense. However, here, the jury instructions on reasonable doubt, the necessity of proof of the elements of the offenses, and the limited purpose for which the evidence of the uncharged acts was admitted counterbalanced this risk. Moreover, the jury was not likely to be confused or misled as this evidence concerned events that occurred at a different time than the charged offenses. In any event, these are just two of the relevant factors that a trial court must weigh in balancing probative value against undue prejudice.

In sum, the prejudicial factors, that is, the degree of certainty that defendant committed the uncharged acts and the likelihood of distracting the jurors from their main inquiry, did not substantially outweigh the probative value of this evidence. Thus, the trial court did not abuse its discretion in admitting this evidence.

Defendant also raises a procedural issue, that is, that the record fails to show that the trial court properly weighed the prejudicial factors against the probative value.

"When a section 352 objection is raised, 'the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value.' [Citations.]" (*People v. Leonard* (1983) 34 Cal.3d 183, 187.) However, "'the trial judge need not expressly weigh prejudice against probative value—or even expressly state that he has done so.'" [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 135.) The California Supreme

Court has found that when the arguments of counsel or comments by the trial court refer to the issues of prejudice and probative value, it could be inferred that the court was aware of Evidence Code section 352 and thus of its duty to weigh probative value against prejudice. (See, e.g., *People v. Garceau* (1993) 6 Cal.4th 140, 179, overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) Here, the prosecutor's motion to introduce evidence pursuant to Evidence section 1108, as well as his trial brief, referred to Evidence Code section 352 and the relevant factors to be considered by the trial court. The prosecutor and defense counsel also referred to the issues of relevancy and prejudice at the hearing on the in limine motion. Thus, we conclude that the trial court was aware of its duty under Evidence Code section 352.

B. Jury Instructions

Defendant next challenges the jury instructions on propensity evidence (CALCRIM No. 1191) and the multiple victim enhancement allegation (CALCRIM No. 3181).

When a criminal defendant challenges the propriety of a jury instruction, we inquire “‘whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.” (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, quoting *Boyde v. California* (1990) 494 U.S. 370, 380 (*Boyde*)). We evaluate the challenged instruction in the context of all the instructions given by the trial court. (*Boyde*, at p. 378.) We will find *error* only if it is reasonably likely that the jury misunderstood the law. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526.)

1. CALCRIM No. 1191

Defendant argues that the trial court instructed the jury pursuant to a version of CALCRIM No. 1191 that was prejudicially defective.

The standard CALCRIM No. 1191 instruction on evidence of uncharged sex offenses states: “The People presented evidence that the defendant committed the

crime[s] of *<insert description of offense[s]>* that (was/were) not charged in this case. (This/These) crime[s] (is/are) defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense[s]. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offense[s], you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] *<insert charged sex offense[s]>*, as charged here. If you conclude that the defendant committed the uncharged offense[s], that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of *<insert charged sex offense[s]>*. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt. [¶] [Do not consider this evidence for any other purpose [except for the limited purpose of *<insert other permitted purpose, e.g., determining the defendant's credibility>*].]”

In the present case, the trial court instructed the jury as follows: “The People presented evidence that the defendant committed the crimes against Jane Doe 3, . . . that was not charged in this case. These crimes are defined for you in these instructions. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses. [¶] Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard the evidence entirely. [¶] If you decide that the defendant committed

the uncharged offenses, you may, but are not required to, conclude from the evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit the sex offenses as charged here. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor along with all the other evidence. It is not self-sufficient by itself to prove the defendant is guilty of the charged sex offenses. The People must still prove each charge and allegation beyond a reasonable doubt. Do not consider this evidence for any other purpose.”

Defendant points out that the first line of the instruction fails to identify the offenses committed against Jane Doe 3, and that the next line incorrectly states that “these crimes are defined for you in these instructions.” Defendant also asserts that the offenses committed against Jane Does 1, 2, 4, and 5 are not specified in the instruction, and thus the jury “would be likely to interpret this instruction to mean that whatever Jane Doe 3 testified to [testimony regarding problems with her husband, fear of having children, desire to support other victims] could be used to prove whatever the accusations were pertaining to Jane Does 1, 2, 4 and 5.”

Here, Jane Doe 3 testified that defendant repeatedly rubbed her vagina and inserted his finger into her vagina. Though the trial court did not identify the uncharged offenses committed against Jane Doe 3, it did subsequently define the offenses of sexual penetration of a child under 10 and lewd acts on a child under 14. The jury was also informed of the charges relating to Jane Does 1, 2, 4, and 5 through other instructions and the verdict forms. In the context of all the instructions given, it is not reasonably likely that the jury would have interpreted the challenged instruction as allowing it to consider her testimony about problems with her husband and fear of having children as uncharged offenses from which it could then conclude that defendant was disposed to commit the charged offenses.

Defendant next argues that the final paragraph of the instruction “compounds the negative effects of the previous ones,” because it fails to specify the purpose for which the evidence of uncharged offenses may be used by the jury. However, the trial court had already instructed the jury as to the limited purpose of the propensity evidence. The jury was instructed that “[i]f you decide that the defendant committed the uncharged offense, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses” There was no need to repeat the instruction on the purpose of the propensity evidence.

Defendant’s reliance on *People v. Orellano* (2000) 79 Cal.App.4th 179 is misplaced. In *Orellano*, since the “trial was conducted in 1998, *the jury was not provided with the subsequently adopted cautionary language of the 1999 revision to CALJIC No. 2.50.01, which states: ‘However, if you find by a preponderance of the evidence that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. The weight and significance of the evidence, if any, are for you to decide.’ [Citations.]’* (*Id.* at p. 183.) The Court of Appeal found the instruction prejudicially erroneous and reversed the judgment. (*Id.* at p. 181.) Here, the instruction included the language omitted in *Orellano*.

2. Instruction on Multiple Victim Allegations

Defendant also argues that the instruction on the multiple victim enhancement allegations was impermissibly unclear.

The trial court instructed the jury: “If you find the defendant guilty of two or more of the sex offenses charged, you must then decide whether the people have proved the additional allegation that those crimes were committed against more than one victim. The People have the burden of proving this allegation beyond a reasonable doubt. If the

People have not met this burden, you must find this allegation has not been proved.”⁴

When the jury returned its verdicts, it found true the allegation that the lewd acts were committed on multiple victims as to counts 3, 4, 7, 12, 13, 17, 18, 19, 22, 23, 24, and 25. However, the jury found not true the allegation that the lewd acts were committed on multiple victims as to counts 14, 15, 16, 20, and 21.

Defendant contends that the trial court erred by failing to inform the jury which charges the multiple victim allegation applied to and when the multiple victim enhancement would apply.

Here, the jury was informed that defendant was charged with multiple counts of two offenses, that is, sexual penetration (§ 288.7, subd. (b)) and lewd acts upon a child under 14 (§ 288, subd. (a)). Sexual penetration was charged only as to one victim, Jane Doe 1. Lewd acts upon a child under 14 was charged as to all the victims, Jane Does 1, 2, 4, and 5. Thus, the jury would have reasonably understood the challenged instruction to mean that the multiple victim allegation only referred to the lewd touching charges. This point was emphasized when the trial court instructed the jury that the verdict forms referring to the section 288, subdivision (a) charge contained the multiple victim allegation. The jury was instructed that “[t]he only difference is in the charges that refer to the lewd act upon a child -- let me find one of them here -- there’s a further finding included in the verdict form which is: ‘We the jury find that the defendant did/did not commit the crime of lewd acts upon a child under 14 against more than one victim.’” Moreover, the verdict forms specified that the multiple victim allegation applied to the lewd conduct counts. For example, the verdict form for count 3 provided: “We, the Jury,

⁴ CALCRIM No. 3181 states: “If you find the defendant guilty of two or more sex offenses, as charged in Counts <insert counts charging sex offense[s] from Pen. Code, § 667.61(c)>, you must then decide whether the People have proved the additional allegation that those crimes were committed against more than one victim. [¶] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.”

sworn to try the above-entitled case, find the defendant, JON DAVID WOODY, (GUILTY/NOT GUILTY) of the crime of LEWD ACTS UPON A CHILD UNDER 14, against [Jane Doe 1], in Violation of California Penal Code Section 288(a), to wit: DIGITAL PENETRATION - FIRST TIME. [¶] We, the Jury, further find, that the defendant (DID/DID NOT) commit the crime of LEWD ACTS ON A CHILD UNDER 14, against more than one victim.”

Defendant argues, however, that the verdict forms were inconsistent because one instruction “vaguely just referred to the crime as ‘basement’” and “there were several that referred to the specific offense, but the last four just referred to the code section.” There is no merit to this argument. All the verdict forms that included the multiple victim allegation specified both the crime of lewd acts upon a child under 14 and the applicable code section. Where there was evidence of more than one lewd act as to a particular victim, the verdict form identified which act the count referred to. For example, the verdict form for count 19 referred to the lewd act charge that occurred in the basement as to Jane Doe 2, while the verdict form for count 22 referred to the first time defendant committed a lewd act upon Jane Doe 4. Furthermore, defendant is incorrect that the last four verdict forms referred only to the code section. These verdict forms referred to either the first or last time that defendant committed a lewd act upon either Jane Doe 4 or Jane Doe 5. Thus, defendant has failed to establish that it was reasonably likely that the jury would have misunderstood the law based on the trial court’s instructions or the verdict forms.⁵

⁵ Since we have concluded that the trial court did not err in its instructions to the jury on the multiple victim allegation, we need not consider defendant’s contention that the inconsistent verdicts “occurred due to the lack of clarity in instructing the jury.” However, we note that “[a]s a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.] For example, ‘if an acquittal of one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to both.’ [Citation.]” (*People v. Avila* (2006) 38 Cal.4th 491, 600.)

C. The Trial Court's Comment Regarding the Verdict Forms

Defendant next contends that the trial court improperly suggested to the jury that it convict him of the charged offenses rather than the lesser included offenses because it would not be required to fill out as many verdict forms. We disagree.

The trial court instructed the jury as follows: “If all of you find the defendant is not guilty of the greater crime, you may find him guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and a lesser crime for the same conduct. [¶] Simple battery is a lesser crime to each of the crimes charged. Simple assault is a lesser crime to battery. [¶] It is up to you to decide the order in which you consider each crime and the relevant evidence, but I cannot accept a verdict of guilty of a lesser crime unless you have found the defendant not guilty of the corresponding greater crime. [¶] For each count you will receive verdict forms of guilty and not guilty for the greater crime, which is the crime charged, and also verdict forms of guilty and not guilty for each of the lesser crimes.”

After the trial court instructed the jury how to complete the verdict forms depending on whether it found defendant guilty of the charged offenses or the lesser included offenses, the court commented: “Now, ladies and gentlemen, to approach this from another angle, you are going to receive a total of, I believe, 63 verdict forms. So there's 21 counts, but there are two lesser included offenses that are potentially there for each of those counts. So that's a total of 63 verdict forms. [¶] If you find the defendant guilty of a charged crime, then you do not fill out any other verdict forms. In other words, the lesser included verdict forms for that particular count. [¶] So if you -- looking at the whole picture, if you found the defendant guilty of all the charged crimes, you would only fill out 21 verdict forms. But if you find the defendant not guilty of everything, you would fill out 63 verdict forms. It sounds kind of unfair, but that's -- I'm just trying to explain to you how the system works. And none of this is by of way is

giving you any suggestion as to what you should do or how you should approach it. It's entirely up to you."

The trial court's comments to the jury did not suggest to the jury that it would be easier to convict defendant of the charged offenses rather than the lesser included offenses. The trial court accurately explained the number of verdict forms and the manner in which they should be completed depending on whether they found him guilty of the charged offenses, not guilty of the charged offenses but guilty of the lesser included offenses, or not guilty of any of the offenses. Moreover, the trial court expressly stated that it was not suggesting what the jury should do or how it should approach its voting. Given that the trial court properly instructed the jury on reasonable doubt, to consider all the evidence, and that it could only convict defendant of the lesser included offenses if it found him not guilty of the charged offenses, it is not reasonably likely that the jury understood the trial court's comments to mean that it should convict defendant of the charged offenses because it involved filling out fewer forms.

D. Prosecutorial Misconduct or Judicial Error

Defendant contends that the prosecutor engaged in misconduct during closing argument by displaying a photograph of defendant. He also contends that the trial court erred by overruling defense counsel's objection to the photograph.

Prior to giving his closing argument, the prosecutor stated that he planned on showing a photograph of defendant during argument. The photograph depicted defendant behind a microphone wearing a beige jacket and a red and white striped shirt, which is what the defendant was currently wearing in the courtroom. The photograph had the word "guilty" written on it. Defense counsel objected on the grounds that the photograph had not been entered into evidence and it was inflammatory. The trial court overruled the objection and stated: "The photograph does reflect exactly what the defendant looks like here in the courtroom. Not particularly well-focused, but you can make it out. And I

plan to start off by reminding the jury that what the attorneys say is not evidence.” The trial court then instructed the jury: “The attorneys are now going to have a chance to address you. What they say is not evidence. They’re going to tell you what they think the evidence means, but ultimately, that’s going to be up to you folks to decide what the evidence means. So please take what they have to say in that light. I’m not saying you shouldn’t pay attention to it and evaluate it that for what it’s wort[h], but it is not evidence.” The trial court later instructed the jury: “You must use only the evidence that was presented in this courtroom. Evidence is the sworn testimony of witnesses [and] the exhibits admitted into evidence”

“On appeal, we presume that a judgment or order of the trial court is correct, “[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.” [Citation.]” (*People v. Giordano* (2007) 42 Cal.4th 644, 666.) Thus, a defendant has the burden to present an adequate record on appeal. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102; *People v. Malabag* (1997) 51 Cal.App.4th 1419, 1427.)

Here, the photograph used by the prosecutor during closing argument has not been included in the record on appeal. Thus, our review of this issue is necessarily limited to the description of the photograph that was provided by the prosecutor and the trial court.

“The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]” (*People v. Smithey* (1999) 20 Cal.4th 936, 960.)

In *People v. Waldie* (2009) 173 Cal.App.4th 358 (*Waldie*), the prosecutor's laptop displayed the word "'GUILTY,'" which may have been observed by the jury when it entered and existed the courtroom during closing arguments. (*Id.* at p. 367.) In his motion for new trial, the defendant argued that the prosecutor engaged in misconduct because the message might have had an improper subliminal effect on the jury. *Waldi* reasoned that "[t]he unfortunate, but inadvertent and casual, display of a single word fairly characterizing the prosecutor's position does not qualify as intemperate, egregious, unfair, deceptive, or reprehensible conduct," and held that the trial court did not abuse its discretion in denying the motion. (*Ibid.*)

Here, unlike in *Waldie*, the prosecutor's display of defendant's photograph with "guilty" written on it during closing argument was not inadvertent. Nevertheless, though many might find such conduct unprofessional, this court cannot conclude that the prosecutor engaged in misconduct under either federal or state law. The use of the photograph did not constitute an egregious pattern of conduct that deprived defendant of due process. The photograph was neither deceptive nor reprehensible since it presented defendant as he appeared at trial and wearing the same clothing. The prosecutor argued that the evidence established that defendant was guilty and, as in *Waldie*, the word "guilty" on the photograph did no more than reinforce this position. Moreover, the trial court properly admonished the jury that the attorneys' arguments did not constitute evidence, that it must only consider evidence in reaching its verdict, and that evidence consisted of the witnesses' testimony and exhibits admitted into evidence. We must presume that the jury understood and followed those instructions. (*People v. Panah* (2005) 35 Cal.4th 395, 492.) Thus, it must be presumed that the jury understood that the photograph of defendant was not evidence and could not be considered in determining his guilt or innocence.

Even assuming that the use of the photograph constituted prosecutorial misconduct or error by the trial court, the error was not prejudicial because it is not reasonably likely

the result would have been different if the photograph had not been displayed. (*People v. Davis* (2009) 46 Cal.4th 539, 612.) The testimony of Jane Does 1, 2, 4, and 5, which was corroborated by Jane Doe 3's testimony, was consistent and credible. It established that defendant lured the four girls, who were between the ages of five and eight, to his home by befriending them as a neighbor or as a mentor in the Big Brothers Big Sisters program. He then offered them candy or the opportunity to play computer games in order to be able to molest them. There was no evidence that undermined their version of events. Since the evidence of guilt was overwhelming, the prosecutor's conduct was not prejudicial.⁶

III. Disposition

The judgment is affirmed.

⁶ Defendant claims that the cumulative effect of the trial court's errors deprived him of a fundamentally fair trial. However, even assuming error in the display of the photograph, we have found no other errors. (*People v. Cooper* (1991) 53 Cal.3d 771, 839.)

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Márquez, J.