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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DEMEAKA L. ELLIS, Defendant and Appellant.	A133343 (Alameda County Super. Ct. No. H50155)

Demeaka Ellis was convicted of sexual activity with a 13-year-old girl, of making the girl available to another adult for lewd and lascivious acts, and of encouraging and attempting to force the girl to work for him as a prostitute. He argues that photographs taken during the victim's sexual assault examination were admitted in evidence in violation of his Sixth Amendment confrontation clause rights; that his right to present a defense was violated by exclusion of a journal written by the victim; and that he received multiple punishments for a single course of conduct in violation of Penal Code section 654.[1]

We conclude that the disputed photographs are not testimonial hearsay and were properly admitted. In the unpublished portion of this opinion, we also find that the court did not abuse its discretion in exclusion of evidence, and reject Ellis's challenge to his sentence.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.B and II.C.

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

I. BACKGROUND

The victim, Jane Doe, was a 13-year-old middle school student in March 2010, when the underlying events took place. Her mother, G.B., worked full time, and Doe regularly called her mother when she got home from school. Doe usually told her mother she was going to the library, which was across the street from their apartment, and usually was coming home from the library when G.B. arrived home at about 4:45 p.m. On March 10, 2010, Doe did not call G.B. after school and was not home when G.B. got home from work. G.B. looked for Doe at the library and was told they had not seen her. After searching the neighborhood without success, G.B. called the police.

On March 12, 2010, at about 9:30 p.m., G.B. received a phone call from Doe, who was crying and asked to be picked up. A woman then got on the phone and told G.B. to come get Doe " 'because he's choking her.' " The woman asked G.B. to meet her at a 7-Eleven convenience store. At the 7-Eleven, the woman told G.B. that "they" (apparently, Doe and another person) were driving. G.B. reported the situation to the police and returned home. G.B. received another call from Doe. G.B. then saw Doe running toward their home. Doe was quiet and crying and was wearing clothes that did not belong to her. G.B. called the police again and an officer came to their home.

Fremont Police Officer Michael Gilfoy interviewed Doe shortly after she returned home. Doe told him that she had been kidnapped by 10 men, who grabbed her and threw her in a car. Three of the men got into the car with her and the others ran off. Doe said she was choked, that the three men smoked marijuana, and that they took her to a house at the end of Chapel Street, which was a description of Ellis's home. The driver took off all of her clothes, touched her everywhere, made her touch his penis, put his penis in her mouth, and put his penis in her vagina. She protested but he punched her in the arm. He then gave her $20. The driver's name was "Shoog" (also spelled "Suge" in the record; hereafter Suge). Gilfoy examined Doe's neck and arms and saw no choke marks or bruises and he told her that the story did not make sense. Doe then revised her story and said that when she left the library the men offered her a ride home, grabbed her and threw her in the car. Gilfoy questioned this story as well and Doe gave him a third version. At

some point, Doe's sister told Gilfoy that Doe lies a lot and Doe's brother told him she had previously run away. Later that night, when Doe went with Gilfoy to a hospital, she told him a different version of what had happened to her. According to Gilfoy, Doe said she had been with a man she knew as Suge, whom she later identified as Ellis. Doe acknowledged she had had sex with him and said she did not want him to get in trouble. Doe was later interviewed at the Child Abuse Listening and Interview Center (CALICO) and provided an account of the events. Still later, she was taken out of class at school to identify Ellis from a photographic array, and she provided a new account in writing.

At trial, Doe provided the following account of what she experienced from March 10, 2010, to March 12, 2010. On March 10, she went to the library after school. While she was using a computer in the library, she noticed that a man she did not know was standing close to her. She identified this man as Ellis. Ellis started talking to Doe in a friendly manner and Doe was friendly back. Doe willingly left the library with him, and they drove to the house of a man she came to know as Slim. Slim, Slim's wife, and another man were in the home, and Doe watched television while the three men smoked marijuana.

Doe then willingly went with Ellis to an apartment she believed was his home. A man and woman in their 40's were in the apartment watching television downstairs. Ellis led Doe upstairs to his bedroom and closed the door behind them. He played rap music on his laptop computer and sat facing Doe, who was sitting on the bed. Doe touched Ellis's genitals through his clothing and he touched her breasts with her consent. They each took off all of their own clothes and they lay down next to each other. Ellis then knelt between Doe's legs. At first, Doe testified that Ellis did not touch her from that position and that he eventually lay down next to her, where they remained for the rest of the night without touching each other. After she was confronted with her preliminary hearing testimony that Ellis had touched her vagina from the kneeling position, she changed her testimony. She testified that Ellis touched her vagina and moved his fingers in and out of her vagina while he knelt between her legs. She did not remember what happened next, but at some point he was lying next to her. She got on her knees and

willingly performed fellatio on Ellis without prompting. They then lay next to each other without touching and fell asleep. Doe was again impeached with her preliminary hearing testimony that Ellis had inserted his penis in her vagina while he was kneeling between her legs. She acknowledged the prior testimony was true. In still later testimony, Doe said that after she removed her clothes Ellis rubbed lotion over her whole body.

Doe spent the next day (Mar. 11, 2010) with Ellis in the apartment. She did not try to call her mother because she was happy to be with Ellis. At about 10:00 p.m., she left the apartment with Ellis, thinking they were going to buy food. Instead, Ellis drove her to a Motel 6 and led her into a motel room. After Doe watched television for a while, an older white man arrived, talked to Ellis outside the room for a few minutes, and then entered the room. He sat next to Doe and squeezed her breasts with his hands. She tried to ignore him and after a few minutes went to the bathroom. She returned and watched television. The white man remained in the room for a couple of hours but did not touch her again. Doe initially testified that she saw the man wad up money and put it in his pocket when he was leaving. She was impeached with her preliminary hearing testimony that she saw him take a few bills out of his pocket before he left the room and that Ellis entered the room right after he left. She then testified at trial that she saw the older man take twenty dollar bills out of his pocket when he left the room and also saw him put the bills back in his pocket, and that Ellis entered the room hours after the older man left. At about midnight, Slim came into the motel room, asked if she was okay, and left. Ellis was just outside the door at the time. Doe did not try to contact her mother that night because she was still happy to be with Ellis. She spent the night with Ellis in the motel room, but they slept on separate beds and no sexual activity occurred between them.

On the following day (Mar. 12, 2010) in the nighttime, Ellis and Doe left the motel and drove to an apartment building. While they were sitting together in Ellis's car outside the building, Ellis said to her in an angry tone, " 'I want you to make me some money.' " She understood his comment to mean that he wanted her to "be a ho," that is, "[s]leep around with people" for money. This was the first time Ellis had brought up this subject, which made her feel uncomfortable. When she said, "No," Ellis reached over

and choked her, cutting off her breath for more than a minute. Doe struggled, got Ellis's hands off her throat, and left the car.

Doe testified that she then walked up to an older woman who was standing by a stairway near a downstairs apartment and asked if she could use her phone. The woman agreed. Doe called her mother and asked to be picked up, but could not describe where she was. When Doe walked out of the woman's apartment, Ellis was standing by the door, looking angry and staring at her. Ellis then drove her home. Doe later testified that after she entered the older woman's apartment, Ellis banged on the door, Doe started crying, and the older woman tossed Doe her phone so she could call her mother. Ellis then pulled Doe out of the house, saying, " '[B]itch, she my ho.' " The older woman called Doe's mother, and Ellis drove Doe home. Doe was impeached with her preliminary hearing testimony that, after she got away from Ellis in the car, she hid behind the door to the apartment building and did not enter any of the apartments. Ellis found her, asked if she wanted to go home, and took her home.

Doe testified that in each of her statements, including her preliminary hearing testimony and her trial testimony, she was only partially truthful.

Gilfoy testified that during his initial interview with Doe on the day she returned home, Doe agreed to lead him to the apartment where the driver or Suge had taken her. She led Gilfoy to an apartment on Grimmer Boulevard, and she later led the detective assigned to the case, Officer Michael Gebhardt, to the same location. When Doe arrived at the apartment with Gebhardt, she immediately started sobbing and was unable to talk for five to six minutes. Gebhardt later determined that Betty Moore La Blanc (Moore) lived in the apartment and that Ellis often stayed there. Based on information he received from Moore, Gebhardt created a photographic lineup that included Ellis's image. Both Moore and Doe identified Ellis in the array as Suge. Moore also identified Doe by photograph.

Doe was medically examined at Children's Hospital in Oakland. Dr. James Crawford-Jakubiak, medical director of the Center for Child Protection (Center) at Children's Hospital, testified that photographs taken of Doe late on March 12 or early on

March 13, 2010, during a sexual assault and rape trauma (SART) examination showed an abrasion on her hymen. He opined that the abrasion could only have been caused by penetration of the vagina and that the abrasion was one to four days old.

Daniel Espindola, assistant general manager of the Motel 6 at 5601 Mowry Avenue in Newark, testified that Ellis rented room 242 at the motel from March 11 to March 12, 2010, paying cash. Per motel policy, the lodger must produce picture identification, which is reviewed by the front desk clerk before the transaction is completed.

Moore testified that Ellis, whom she knew as Suge, was like an adopted son to her. Ellis kept his things in her apartment and was often in the apartment. She thought Ellis was about 19 years old.[2] In about March 2010, Ellis brought Doe over to the apartment and Moore let them go upstairs. About a half hour later, she checked to make sure their door was not closed and saw them sitting at the foot of the bed, hugging and holding hands. About a half hour later, they left the apartment. A couple of weeks later, Ellis brought Doe back and they again went upstairs. About a half hour later, she went upstairs and they were listening to music on the laptop.

Tony Cotton, who used the nickname Slim, testified that Ellis came to his house with Doe in March 2010. She appeared to be about 15 years old. Cotton's girlfriend and another male were also present and everyone probably was smoking marijuana. After about 20 minutes, Ellis and the girl left. A few days later, Cotton saw the girl in a motel room with Ellis and a white man about 30 years old. He had seen the white man at Ellis's house on a prior occasion. Cotton had gone to the motel to get some marijuana from Ellis and when he knocked on the door, Ellis opened it. Cotton wanted to use the bathroom, but he saw that the girl was in there. The white man was also in the bathroom. Cotton noticed in the room marijuana, a marijuana pipe, and a towel that looked like it had blood and dirt on it. After he got his marijuana from Ellis, he left. At the time Cotton testified,

[2] The parties stipulated that Ellis was 29 years old in March 2010.

he was on probation for a misdemeanor theft, he had at least six prior felony convictions for theft and burglary, and he had spent time in prison.

Michelle Taylor testified that she lived in a downstairs apartment at an apartment complex frequented by Ellis, whom she knew as Suge. On March 11 or 12, 2010, she saw Ellis and a young girl sitting in a car outside the apartment building. On March 12, the girl, looking scared, shocked and teary-eyed, came up to her and asked to use the bathroom in her apartment. Taylor noticed that Ellis was outside. After the girl used the bathroom, Taylor asked her what was wrong. The girl said she wanted to call her mother and Taylor handed her a phone. The girl asked her mother to come get her, then handed the phone to Taylor and the mother asked Taylor to describe Doe's location. Taylor told the mother that Doe had been choked and she arranged to meet the mother at a nearby 7-Eleven. In the meantime, Ellis walked up to Taylor's front door and said, " 'Come out, bitch' " in a loud, very rough, angry voice. The girl left the apartment, either walking out or being pulled out by Ellis.

The jury convicted Ellis of committing lewd acts upon a child under the age of 14 (§ 288, subd. (a); counts one, three); oral copulation of a child under the age of 14 and more than 10 years younger than himself (§ 288a, subd. (c)(1); count two); sexual penetration by foreign object of a child under 14 (§ 289, subd. (j); count four); pandering by encouragement (§ 266i, subd. (a)(2); count six); procuring a child under age 16 to engage in a lewd act (§ 266j; count seven); and first degree residential burglary (§ 459, count eight). The jury found true an allegation that the burglary was committed when a person, not an accomplice, was present in the residence. The court sentenced appellant to a total term of 17 years and four months in state prison.

II. DISCUSSION

Ellis challenges his convictions on two grounds. First, he contends that the trial court erred in admitting the SART photographs of Doe, upon which Dr. Crawford-Jakubiak relied in rendering his opinion. Ellis argues the photographs were not properly authenticated and that he had no opportunity to cross-examine the photographer in violation of his confrontation clause rights. Second, Ellis argues the court erred in

excluding a journal written by Doe, which he sought to use to impeach her credibility. Ellis also argues his sentence on the pandering charge should have been stayed under section 654.

A. *SART Photographs*

1. *Authentication*

Ellis argues the photographs were not properly authenticated.[3] We disagree.

Photographs are considered "writings." (Evid. Code, § 250; see *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440 [videotape].) To be admissible in evidence, they must be authenticated. (Evid. Code, § 1401, subd. (a).) That is, there must be evidence that they are accurate depictions of what they purport to show. (Evid. Code, § 1400; see *People v. Mayfield* (1997) 14 Cal.4th 668, 747 [videotape].) The proponent of the evidence has the burden of producing evidence to establish authenticity. (Evid. Code, § 403, subd. (a)(3); *People v. Marshall* (1996) 13 Cal.4th 799, 832.) This burden "is *not* to establish validity or negate falsity in a categorical fashion, but rather to make a showing on which the trier of fact reasonably could [find by a preponderance of the evidence] the proffered writing is authentic." (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1437; *People v. Marshall*, at pp. 832–833.) We review the trial court's determination of this issue for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 197.)

Photographs are typically authenticated "by the testimony of a person who was present at the time the picture[s] [were] taken, or who is otherwise qualified to state that the representation[s] [are] accurate" (*People v. Bowley* (1963) 59 Cal.2d 855, 862 (*Bowley*)), such as an expert on photograph alteration (*id.* at p. 860). However, and

[3] We question whether Ellis has preserved this argument. During discussion of counsel's confrontation objection, defense counsel insisted that if Dr. Crawford-Jakubiak were allowed to offer an opinion based on the photographs "they have to come into evidence." Defense counsel herself then offered them into evidence. Colloquy by the court with counsel at the close of testimony indicates that the photographs (Exhibit 17A) were admitted without objection. However, since this issue has not been raised or briefed by the parties, we do not decide it and we address the merits of the claim.

contrary to Ellis's argument on appeal, photographs may also be authenticated by other means. Any evidence that sufficiently establishes the photographs accurately depict what they purport to show is adequate, including "[c]ircumstantial evidence, content and location." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383 [writings authenticated as writings by defendant by content (defendant's alias and details corroborated by other evidence), location (in defendant's residence), and absence of evidence they were written by anybody else]; accord, *People v. Valdez, supra,* 201 Cal.App.4th at p. 1435 [photograph posted on social media internet page authenticated by content (image matched defendant's appearance), circumstantial evidence (same social media page included messages addressed to names and designations that could be matched with defendant and listed interests that matched defendant's interests), and absence of evidence that photograph was not genuine].)

In order to render his medical opinion at trial, Dr. Crawford-Jakubiak accessed about 30 photographs that were taken during Doe's sexual assault examination. The prosecution offered the photographs as business records.[4] In addition to offering his expert medical evaluation, Dr. Crawford-Jakubiak testified as custodian of records for the Center. He testified that as medical director of the Center, he was personally and solely responsible for the Center's system of image storage, and that he was "intimately familiar" with how the images are entered into the computer system. He testified that examiners at the Center take pictures of any "physical findings" they make during a sexual assault examination. Photographs of a patient's internal genital anatomy are taken with a colposcopic instrument, which provides magnification and additional light to create images that are then captured with a digital camera.[5] The examiners use a separate memory card for each patient and they include on the memory card pictures of the

[4] Only three of the 30 photographs were actually received in evidence. The printed images from photographs stored on digital media are presumed to be accurate representations of the images they purport to represent. (Evid. Code, § 1553, subd. (a).)

[5] The photographs are taken by a Nikon digital camera connected to the colposcope, with the colposcope serving as the camera lens. It takes no measurements, and requires no calibration.

patient, the patient's unique medical record number and the date in addition to pictures of their physical findings. The examiners then put the memory card in a sealed envelope, write the patient's medical record number on the outside of the envelope, and place the envelope in a locked cabinet. Every morning, the Center's secretary removes envelopes from the locked cabinet, takes them to the Center's computer, and downloads images from each memory card in the envelopes to the computer hard drive. Each computer file containing the images of one memory card is named using the patient's medical record number and the date the photographs were taken. The number is checked against the images to make sure the medical record number in the images matches the medical record number in the computer file name. It is part of Dr. Crawford-Jakubiak's responsibilities to review the entire record of each examination, including the photographs, in order to render an independent opinion of the examination results, and he did so here. Dr. Crawford-Jakubiak retrieved the images taken during Doe's examination from the computer, matching them with her unique medical record number, and he copied the photographs onto a storage disk that he brought with him to court.

The testimony of Dr. Crawford-Jakubiak was more than sufficient to allow a trier of fact to find by a preponderance of evidence that the SART photographs accurately depicted what they purported to show, i.e., images of Doe's genitalia on March 12–13, 2010. Therefore, the trial court did not abuse its discretion in admitting the photographs in evidence.

2. *The Confrontation Clause*

Ellis contends that admission of the SART photographs violated his confrontation clause rights. He argues, "The manner, time, identity of the photo subject and other circumstances surrounding the creation of these photographs are all subject to [the Sixth Amendment right to confrontation and] cross-examination," and contends the circumstances here are analogous to confrontation clause cases involving admission of forensic laboratory reports without testimony by the person actually conducting the tests.

The confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const.,

6th Amend.) In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court "adopted a fundamentally new interpretation of the confrontation right, holding that '[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.' [Citation.]" (*Williams v. Illinois* (2012) 567 U.S. ___ [132 S.Ct. 2221, 2232] (plur. opn. of Alito, J.) (*Williams*); see also *People v. Dungo* (2012) 55 Cal.4th 608, 616 (*Dungo*).) *Crawford* did not, however, adopt a particular definition of "testimonial." (*Crawford,* at p. 52; see also *Dungo,* at p. 616.)

Efforts by both the United States Supreme Court and our own Supreme Court to more precisely define the contours of the confrontation clause, and to determine what is testimonial hearsay have proven challenging and problematic, with no clear majority view in many of the recent United States Supreme Court decisions, and multiple concurring and dissenting opinions by our own Supreme Court justices. In *Williams*, for example, a forensic specialist at the Illinois State Police laboratory, testified that she matched a DNA profile produced by an outside laboratory, Cellmark, from vaginal swabs of a sexual assault victim to a profile the state laboratory produced using a sample of the petitioner's blood. (*Williams, supra,* 132 S.Ct. at p. 2227 (plur. opn. of Alito, J.).) At trial, the outside laboratory report was not introduced into evidence, and no analyst from that laboratory testified. (*Id.* at p. 2230.) A majority of the justices found that the expert's testimony did not violate the defendant's confrontation clause rights. (*Id*. at p. 2244.) But, as our Supreme Court observed in *Dungo*, the *Williams* four-one-four opinion reflected "widely divergent views, none of which was able to garner majority support." (*Dungo, supra,* 55 Cal.4th at p. 618.) Indeed, our own Supreme Court's analyses in three recent confrontation clause cases decided on the same day—*Dungo*, *People v. Lopez* (2012) 55 Cal.4th 569 (*Lopez*), *People v. Rutterschmidt* (2012) 55 Cal.4th 650 (*Rutterschmidt*)—generated nine separate opinions, evidencing what Justice Liu characterized as the "the muddled state" of current doctrine in this area. (*Lopez,* at p. 590 (dis. opn. of Liu, J.).)

The consistent principle that is articulated in both the federal and state high court cases is that the confrontation clause is not implicated unless there is evidence presented of a hearsay statement, i.e. a statement from a "witness absent from trial," which is "testimonial."[6] (*Williams, supra,* 132 S.Ct. at p. 2232 (plur. opn. of Alito, J.); *Dungo, supra,* 55 Cal.4th at p. 616; *Lopez, supra,* 55 Cal.4th at pp. 580–581.) The photographs at issue here fail to meet the threshold hearsay requirement.

3. *Photographs are Not Hearsay*

Hearsay is an out-of-court "*statement* that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a), italics added.) A "statement" is oral or written verbal expression or nonverbal conduct of a *person* that is intended to be a substitute for oral or written verbal expression. (Evid. Code, § 225.) The SART digital photographs are not "verbal expressions," nor are they made by a "person."[7] "Only people can generate hearsay. Machines, animals, chemical reactions cannot. (See Simons, Cal. Evidence Manual (2012 ed.) § 2.2, pp. 74–75.)" (*Dungo*, at pp. 646–647 (dis. opn. of Corrigan, J.).)

In *Lopez, supra,* 55 Cal.4th 569, our Supreme Court confirmed that raw machine generated data is not a hearsay statement. The defendant in *Lopez* was charged with vehicular manslaughter while intoxicated (§ 191.5, subd. (b)). To prove intoxication, the prosecution at trial introduced into evidence a laboratory analyst's report on the percentage of alcohol in a blood sample taken from defendant following the fatal accident. The analyst who conducted the testing did not testify, but a colleague did. (*Lopez,* at p. 573.) The testifying criminalist said that he had reviewed a laboratory report

[6] A five-justice majority of the high court and at least six of the seven justices on the California Supreme Court appear to agree that, for purposes of the confrontation clause, out-of-court statements admitted as basis evidence during expert testimony are admitted for their truth if treated as factual by the expert and, thus, implicate confrontation rights if the statements are testimonial. (See *Williams, supra*, 132 S.Ct 2221; *Lopez, supra*, 55 Cal.4th 569.)

[7] " 'Person' includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity." (Evid. Code, § 175.)

by the criminalist who had analyzed defendant's blood sample. A copy of the six-page laboratory report was admitted into evidence over defense objection. The second page of the report was a printout of the gas chromatography machine's calibrations on the day of the test. Pages 4 and 5 of the report showed two computer-generated numerical results (.0906 and .0908) of two laboratory analyses of the defendant's blood sample. (*Id.* at pp. 582–583.) Pages 3 and 6 were reports of "quality control runs." The court held that pages 2 through 6 of the report, consisting entirely of data generated by a gas chromatography machine, were not "statements" of the analyst. (*Id.* at p. 583.)[8] The court acknowledged that the United States Supreme Court has not yet considered whether the prosecution's use at trial of a machine printout violates a defendant's right to confront and cross-examine the machine's operator where the printout contains no statement from the operator attesting to the validity of the data shown. However, the *Lopez* court upheld the use of such printouts citing with approval federal appellate court opinions. (*Lopez,* at p. 583, citing *U.S. v. Moon* (7th Cir. 2008) 512 F.3d 359, 362 ["the instruments' readouts are not 'statements,' so it does not matter whether they are 'testimonial' "]; *U.S. v. Washington* (4th Cir. 2007) 498 F.3d 225, 231 ["the raw data generated by the machines

[8] *Lopez* separately addressed the admissibility of the information contained on the first page of the report, consisting of a "chain of custody log sheet" and a chart showing the results of nine blood samples, including defendant's, with the identifying number assigned by the laboratory to each sample. The chart contained information filled in by hand by a laboratory assistant ("Booking # ," "Lab Number," "Sample Sealed," "Subject's Name," and "Arresting Officer") for each blood sample. Information as to the date the blood was analyzed and the test result, with the corresponding identifying lab number assigned by the laboratory assistant, was entered by the analyst. (*Lopez, supra,* 55 Cal.4th at pp. 582–584.) The court found the notations entered by the laboratory assistant, particularly those linking defendant's name to the assigned blood sample lab number, a "more difficult question." (*Lopez, supra,* 55 Cal.4th at p. 583.) They were clearly statements by a person. However, accepting that such information was being offered for the truth of the matter asserted, the court found that the report containing the statements lacked the formality required to be considered testimonial. (*Id.* at pp. 583–585.) Ellis did not challenge in the trial court Dr. Crawford-Jakubiak's use of the examiner-assigned identifiers to connect the photographs to Doe, and makes no such challenge here.

do not constitute 'statements,' and the machines are not 'declarants' "].) The court held that "Because, unlike a person, a machine cannot be cross-examined, here the prosecution's introduction into evidence of the machine-generated printouts . . . did not implicate the Sixth Amendment's right to confrontation." (*Lopez,* at p. 583.)

We believe the same is true of the digital camera images presented here. "Photographs . . . are demonstrative evidence, depicting what the camera sees. [Citations.]" (*People v. Cooper* (2007) 148 Cal.App.4th 731, 746 (*Cooper*).) The California Supreme Court long ago rejected the view that photographs are essentially expressions of a witness's testimony. In *Bowley*, the court first set forth conflicting views about the nature of photographic evidence: "According to Professor Wigmore, a photograph is no more than the nonverbal expression of the witness upon whose foundation testimony its authenticity rests. [Citations.] It is merely that witness' testimony in illustrated form; a 'pictorial communication of a qualified witness who uses this method of communication instead of or in addition to some other method.' [Citation.] . . . [¶] Other authorities disagree. They urge that once a *proper foundation* has been established as to the accuracy and authenticity of a photograph, 'it speaks with a certain probative force in itself.' [Citation.]" (*Bowley, supra,* 59 Cal.2d at pp. 859–860.) The court then adopted the latter view, explaining: "There is no reason why a photograph or film, like an X-ray, may not, in a proper case, be probative in itself. To hold otherwise would illogically limit the use of a device whose memory is without question more accurate and reliable than that of a human witness. It would exclude from evidence the chance picture of a crowd which on close examination shows the commission of a crime that was not seen by the photographer at the time. It would exclude from evidence pictures taken with a telescopic lens. It would exclude from evidence pictures taken by a camera set to go off when a building's door is opened at night. [Citations.] We hold, therefore, that a photograph may, in a proper case, be admitted into evidence not merely

as illustrated testimony of a human witness but as probative evidence in itself of what it shows." (*Id.* at p. 861.)[9]

Ellis nevertheless argues the photographs should not have been admitted in evidence unless and until he had the opportunity to confront and cross-examine the photographer to "explor[e] the possibility that she lacked proper training, had actually taken photos of the complaining witness, as well as . . . [whether] the photographic image [was] subject to distortion based on a number of factors such as focus, lighting and the skill of the person shooting the photographs." This, however, is essentially a challenge to the authentication of the photographs, and a claim, which we have already rejected, that photographs must be authenticated through the testimony of the person who took the photographs. Ellis cites no authority that he has a confrontation clause right to demand that the photographs be authenticated in a particular manner, and as we have discussed *ante*, no "statements" by the photographer were admitted in evidence in this case. In fact, Dr. Crawford-Jakubiak's testimony clearly shows that the raw data contained in the photographs themselves would have been meaningless to any nonmedical observer without the expert interpretation which he provided. Consequently, Ellis was never denied the right to confront a "witness" who testified against him.

The properly authenticated photographs were themselves probative demonstrative evidence of a physical trauma suffered by Doe. As "demonstrative evidence," the photographs were not out-of-court hearsay "statements" by a "person" that would

[9] We are aware that the Supreme Court has granted review in two cases addressing the admissibility of computer-generated red light camera photographs, video and data. (See *People v. Goldsmith* (2012) 203 Cal.App.4th 1515, review granted May 9, 2012, S201443; *People v. Borzakian* (2012) 203 Cal.App.4th 525, review granted, May 9, 2012, S201474.) In *Goldsmith*, the Second District Court of Appeal held that red light camera enforcement photographs, video, and data imprinted on them were not hearsay. In *Borzakian*, a different division of the Second District reversed a conviction for a traffic infraction based on an automated camera enforcement system, but did so based on a lack of proper authentication and foundation. Among the issues to be briefed and argued before the Supreme Court is whether such automated traffic enforcement evidence is hearsay and, if so, whether any exceptions apply.

implicate a Sixth Amendment confrontation right. (*Cooper*, *supra*, 148 Cal.App.4th at p. 746.)

B. *Victim's Journal*

Ellis argues the trial court erred by excluding a journal written by Doe, which Ellis wished to use to impeach Doe's credibility. We conclude the journal was properly excludable under Evidence Code section 352 and that the exclusion of the evidence was in any event harmless beyond a reasonable doubt.

1. *Background*

Although Ellis did not have the proffered exhibit transmitted to this court for our review (see Cal. Rules of Court, rules 8.224(a)(1), 8.320(e)), the journal is sufficiently described in the record to permit our resolution of this issue without having the exhibit before us. Defense counsel described the journal, titled "Ghetto Life," to the court as follows: "[S]he states it's a work of nonfiction, and . . . she indicates she has both a four-year-old son and a daughter who's named Mocha. It's just for purposes of showing she had a wild imagination and she cannot distinguish between the truth and non-truth." The trial court stated that it had read the journal and described it in this manner: "[O]n page 1, it does say it's supposed to be true and it does say that people under certain a [*sic*] age shouldn't read it. But at the same time, it does seem to be a work of imagination rather than necessarily an . . . entirely personal account of a person's life. [¶] It appears to cover one or two days where . . . she does say she has a child in there four years of age, and she does say . . . something about a daughter. At the same time, she says she has a driver's license and a car. She clearly doesn't have a driver's license and a car. She was 13 years at the time. [¶] . . . There's no mention of Suge in there. There's no mention of Demeaka Ellis. There's no mention of Slim . . . . [¶] It appears that . . . her character has a number of boyfriends. She seems to switch from one boyfriend to the next fairly rapidly, but it sounds like a person who is quite lonely, doesn't have a father in her life and is looking for love."

Ellis told the trial court he intended to cite the journal as evidence that Doe had a vivid imagination and could not distinguish between truth and fiction.[10] The trial court ruled that the journal was not relevant to Doe's ability to distinguish between truth and fiction: "I don't know that the document in and of itself is evidence that she doesn't know the difference between truth and non-truth. I mean, we can write things that we say are nonfiction and that doesn't necessarily mean they are nonfiction. [Calling fiction 'nonfiction'] doesn't mean that we don't know the difference between truth and non-truth." The court further noted, "a person who's writing a story, even if they describe it as what's going on in their life, . . . doesn't necessarily mean that's necessarily what's going on in their life. . . . [This] has no bearing as far as I can tell on this particular case. [¶] . . . [¶] If I go write up a story about what a great baseball player I am . . . [e]ven if I say it's my journal . . . . It has no bearing on whether or not I'm a truthful person."

2. *Analysis*

"The trial court has broad latitude in determining the relevance of evidence. [Citations.] We review such determinations for abuse of discretion." (*People v. Scott* (2011) 52 Cal.4th 452, 490.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. (Evid. Code, § 352; *People v. Scott*, at p. 490.)

Ellis suggests that the journal, which is labeled "nonfiction" but contains, as the trial court found, indisputably fictional elements, has *some* tendency in reason to disprove

[10] On appeal, Ellis further claims that the journal demonstrated that Doe could easily fabricate stories about romantic or sexual encounters that included mature sexual content. This argument is forfeited because Ellis did not raise it in the trial court. (*People v. Dykes* (2009) 46 Cal.4th 731, 756 [failure to raise objection to evidentiary ruling on same ground in the trial court results in forfeiture of the argument on appeal].)

Doe's credibility. But even if the journal could be said to have some marginal relevance to Doe's credibility, the trial court's comments clearly reflected its view that "its probative value [was] substantially outweighed by the probability that its admission [would] . . . necessitate undue consumption of time . . . ." (Evid. Code, § 352.) We find no abuse of the trial court's broad discretion, particularly where the journal evidence would have been at best cumulative to the evidence presented of Doe's untruthfulness, both in statements to authorities and under oath, about the very incidents at issue in the trial. Even if we were to find the evidence improperly excluded, we would find any error to be nonprejudicial. Ellis contends exclusion of the journal interfered with his ability to confront the witnesses against him in violation of his Sixth Amendment rights. (See *Davis v. Alaska* (1974) 415 U.S. 308, 315–316 [Sixth Amendment confrontation clause secures defendants' right to cross-examine adverse witnesses for some impeachment purposes].) Such errors are reviewed to determine whether they were harmless beyond a reasonable doubt. (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) We have no difficulty concluding that any error here was harmless under this standard.

Defense counsel extensively impeached Doe on her truthfulness regarding the very facts at issue at trial, her contacts with Ellis from March 10–12, 2010. On cross-examination, she agreed with defense counsel's statement that, when police kept demanding more and more details during their interviews with her, she just made details up. She testified that she had lied "a lot" to both the police and the CALICO interviewer, and also during the preliminary hearing. She testified that she had lied more than 20 times during the trial itself. She acknowledged that in one of her statements, she made up facts just for the fun of it. Even on direct examination, she was impeached with her preliminary examination testimony, and she acknowledged numerous specific lies in her prior statements to authorities. On this record, introduction of the only tangentially related journal evidence could not have affected the outcome of the trial.

Ellis argues he was prejudiced when the trial court allowed his attorney to say in opening statement that Doe had a "vivid imagination" but then excluded the journal, which was Ellis's evidence in support of the statement. As a result, he argues, the

prosecutor was able to discredit the defense by arguing in closing that Ellis had not demonstrated that Doe had a vivid imagination as he had promised. The record does not support Ellis's argument. Defense counsel's statement in opening was, "The evidence is going to show that we have a young girl who has a very vivid imagination. She's a young girl . . . who's very attractive, who's perhaps more mature than one would think at 13. She's someone . . . [who] is dealing with the difficulties of growing up and adolescence. [¶] . . . [¶] . . . [She] tells at least three different stories, depending on how much and what . . . she's being asked." After describing three different versions of the events provided by Doe, defense counsel said, "[R]idiculous-sounding lies are what you're going to hear. . . . You're going to have to filter out which of those ridiculous-sounding lies is true, if any." The defense did not promise a specific piece of evidence that would prove Doe had a vivid imagination; defense counsel argued Doe's own accounts of what happened in March 2010 would so demonstrate and the defense pursued that line of argument throughout the trial. In closing, the prosecutor said, "Defense counsel said originally this was going to be a case of a girl with a very vivid imagination who's mature beyond her years, who's just dealing with growing up. But all of you saw that that wasn't true. All of you saw that this is a young girl with potentially a mature physical appearance but with no emotional maturity. [¶] . . . [¶] . . . But when you all saw her [on the witness stand] . . . it bec[ame] painfully, painfully obvious how unsophisticated she is, how she has no ability to communicate. It's because of those qualities that she [was] the perfect target for this defendant . . . ." The prosecutor then discussed Doe's conflicting accounts of what happened to her and argued the consistencies among those accounts helped prove the charges against Ellis. The prosecutor did not undermine the defense by arguing or implying that the defense failed to present evidence promised in opening argument; rather, she argued the defense cross-examination of Doe did not persuasively establish that Doe's incriminating statements were untrustworthy. In short, Ellis was not prejudiced by the trial court's ruling as he suggests. In any event, Ellis knew at the time he presented his opening statement that the

journal might not be admitted in evidence. Accordingly, there was no unfairness in the timing of the court's later ruling that the journal was inadmissible.

C. *Sentence for Pandering Charge*

Ellis argues the trial court erred by imposing punishment for both the pandering and the procuring convictions in violation of section 654. We disagree.

1. *Background*

In count six of the information, Ellis was charged with pandering in violation of section 266i, subdivision (a)(2) "in that between March 10, 2010 and March 12, 2010, . . . said defendant did unlawfully, and by threats, violence, promises, a device, and scheme, cause, induce, persuade, and encourage [Doe], a person under 16 years of age, to become a prostitute." The court instructed the jury that "the People must prove that: [¶] One, the defendant used violence, device, or scheme to cause, persuade or induce Jane Doe to be a prostitute; [¶] And two, the defendant had the specific intent to persuade or influence Jane Doe to be a prostitute; [¶] And three, Jane Doe was under the age of 16 at the time the defendant acted. [¶] A prostitute is a person who engages in sexual intercourse or any lewd act with another person in exchange for money. [¶] A lewd act means physical contact of the genitals, buttocks, or female breasts of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification."

In count seven of the information, Ellis was charged with procuring a child to engage in a lewd act in violation of section 266j "in that between March 10, 2010 and March 12, 2010 . . . said defendant did unlawfully, and intentionally give, transport, provide, make available, and offer to so do [*sic*] [Doe], a child under the age of 16 years, to another person for the purpose of a lewd and lascivious act." The court instructed the jury that "the People must prove that: [¶] One, the defendant intentionally transported or made available a child to someone else so that person could engage in a lewd or lascivious act with the child; [¶] . . . [T]wo, when the defendant acted, the child was under the age of 16; [¶] And three, the defendant had the specific intent to make the child available to another to engage in a lewd or lascivious act. [¶] A lewd or lascivious act is

any touching of a child with the intent to sexually arouse either the perpetrator or the child. The touching need not be done in a lewd or sexual manner. [¶] Contact with the child's bare skin or private parts is not required. Any part of the child's body or the clothes the child is wearing may be touched."

In closing argument, the prosecutor discussed counts six and seven together. After reviewing the elements of each crime, she reviewed both what had occurred in Motel 6 and what had occurred in the car outside Taylor's apartment, and argued, "That course of conduct between March 10th, 2010 and March 12th of 2010 shows that the defendant [is] guilty of both pandering and procuring Jane Doe."

At sentencing, defense counsel raised a section 654 objection but specifically discussed only the sex offenses that were directly committed by Ellis. The prosecutor responded, inter alia, "Counts Six and Seven . . . are complete and distinct, separate acts, particularly from Counts One Through Four, because they occurred at a different time in a different location. They also require varying levels of intent. [¶] The pandering itself, as was argued and was found by the jury, was sort of an ongoing conduct, but the distinct crime of bringing her to a hotel is above and separate from attempting to encourage her to become a prostitute." The trial court did not expressly rule on the section 654 issue, but it imposed punishment for both the pandering and procuring convictions.

2. *Analysis*

As a preliminary matter, the parties both acknowledge that the sentence pronounced from the bench was internally inconsistent. The court said, "I think Mr. Ellis'[s] . . . ultimate goal was to have somebody be working for him, and the things he did beforehand were things that led in that direction. [¶] It seems that all the conduct that occurred at the apartment of Betty Moore was conduct that was designed to kind of break down [Doe's] resistance and put her of a mind to be prepared to do that, working for him as a prostitute. So the Court is going to choose Count No. 7 as the principal term. The range of sentence on that is three, six or eight years. . . . [T]hat's the procuring count. [¶] . . . Count Six, the procuring, the midterm is four years. The Court would impose the one-third of one year and four months." The court's introductory remarks suggest that it

chose *pandering* as the principal term, because pandering occurs when a defendant "[b]y promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute." (§ 266i, subd. (a)(2).) However, the court expressly stated it was choosing *procuring* as the principal term and it expressly referred to count seven, which was the procuring charge. On the other hand, the court also referred to count six as the procuring count. Ellis argues in his reply brief that the principal term must have been for the procurement conviction because only that count carried an upper term of eight years. In fact, while the basic triad for a section 266i pandering charge is three, four and six years, a three-six-eight triad applies when the victim is a minor. (§ 266i, subd. (b)(2).) Because the upper term was the same for the two counts, the determination of which count was designated as the principal term does not affect Ellis's total sentence. Nor does it affect our section 654 analysis. We therefore find it unnecessary to resolve the apparent inconsistency in the record.

Ellis argues that the pandering and procuring convictions "entail the same acts and single objective by appellant, thus requiring that the [pandering punishment] be stayed pursuant to section 654." He writes, "[T]he prosecutor's theory concerning procurement centered around [his] appeal to Doe on a personal level, which was for the purpose of working as a prostitute for him, as evidenced by taking her from his room at [Moore's] apartment and checking into a motel, where an older male came in and touched Doe on her breasts. There was no exchange of money established and there was no actual sex reported between Doe or the unidentified male." We disagree.

First, Ellis mischaracterizes the prosecutor's theory at trial. The prosecutor clearly argued to the jury that Ellis's conduct at the Motel 6 (causing Doe to be the victim of lewd acts by another) *plus* his conduct in the car the next day (asking Doe to make money for him and choking her) proved the charge of pandering. She argued generally that the same evidence also proved procuring. At sentencing, the prosecutor expressly argued that two distinct crimes had occurred: "The pandering itself, as was argued and was found by the jury, was sort of an ongoing conduct, but the distinct crime of bringing her to a hotel is above and separate from attempting to encourage her to become a prostitute."

While she did not make the distinction so clear in her argument to the jury, in our view the distinction was easily discernable by the jurors.

Second, we are unpersuaded by Ellis's application of section 654 to the facts of this case. Section 654, subdivision (a), provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The Supreme Court recently reiterated and clarified its interpretation of this provision in *People v. Mesa* (2012) 54 Cal.4th 191 (*Mesa*). Section 654 " 'bars imposing [multiple] sentences for a single act or omission, even though the act or omission may violate more than one provision of the Penal Code. [Citation.]' " (*Mesa,* at p. 195.) In circumstances involving multiple acts, multiple punishment may be imposed if the defendant pursued multiple criminal objectives in pursuing the course of conduct. (*Id.* at p. 199.) "Each case must be determined on its own circumstances. [Citations.] The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.]" (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

Ellis's section 654 argument is not well developed. He writes that the pandering and procuring convictions "entail the same acts and single objective" by him. To the extent Ellis is arguing that multiple punishment is barred because both the pandering and procuring convictions are based on the same set of acts, we disagree. Ellis incorrectly argues that the only "true distinction" between the crimes of procuring and pandering is that section 266j (procuring) applies only to minors under 16 years of age, whereas section 266i (pandering) is not so restricted. He is wrong on two grounds. First, Ellis's conviction and eight-year punishment for violating section 266i was premised in part on Doe's being a minor under the age of 16. (§ 266i, subds. (a)(2), (b)(2).) Second, there are significant other distinctions between the crimes. Section 266j requires proof that the defendant "gives, transports, provides, or makes available, or . . . offers to give, transport,

provide, or make available" the child to another person for the purpose of any lewd or lascivious act, or that the defendant "causes, induces, or persuades" the child to engage in such an act with another person. (§ 266j.) That is, the defendant must take concrete steps toward bringing the child into contact with another person for the purpose of engaging in a lewd or lascivious act. In contrast, section 266i may be violated when a defendant simply "encourages" someone "[b]y promises, threats, violence, or by any device or scheme" to engage in certain conduct. On the other hand, to establish a violation of sections 266i the encouraged conduct must be "prostitution" and not simply engagement in a lewd or lascivious act, as in a section 266j violation. Prostitution is defined as "any lewd act between persons for money or other consideration." (*People v. Freeman* (1988) 46 Cal.3d 419, 424 ["prostitution" in former § 266i has the same meaning as "prostitution" as defined in § 647, subd. (b)]; § 647, subd. (b); compare former § 266i as amended by Stats. 1983, ch. 79, § 2, pp. 171–172 ["[a]ny person who: (a) procures another person for the purpose of prostitution; or (b) by promises, threats violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute . . . is guilty of pandering . . . ."] with § 266i, subd. (a) ["any person who does any of the following is guilty of pandering . . . . [¶] (1) Procures another person for the purpose of prostitution. [¶] (2) By promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute"].)

Ellis's acts of driving Doe to the motel room and giving the white male access to her in the motel room, inferably for the purpose of allowing him to engage in a lewd and lascivious act, established the offense of procurement of a child for a lewd and lascivious act in violation of section 266j. He "transport[ed]" Doe and "ma[de her] available" to the white man for the purpose of a lewd or lascivious act, and he "induce[d]" Doe to engage in such act by placing her in the room with this man. Ellis's conduct in the car the following day, when he asked Doe to make money for him (inferably by engaging in lewd acts for money) and choked Doe when she refused, established the offense of pandering in violation of section 266i. He used "violence" (choking Doe) and a

"scheme" (his course of conduct since March 10 to build a relationship with her and test her willingness to engage in lewd acts with him and others) to "induce[]" her to work as a "prostitute[e]," i.e., engage in lewd acts for money. This conduct would not have been sufficient to establish the offense of procuring, however, because Ellis did not at this time make Doe available to another person for the purpose of a lewd act or cause or induce her to engage in such an act. In sum, the two convictions were not based on the same set of facts.

We reject Ellis's implied argument that multiple punishment for the two crimes is barred because Ellis pursued only a single objective in the course of conduct that supported the pandering and procuring convictions. Section 654's purpose "is to insure that a defendant's punishment will be commensurate with his culpability. [Citation.] 'Because of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an "act or omission," there can be no universal construction which directs the proper application of section 654 in every instance.' [Citations.]" (*People v. Perez* (1979) 23 Cal.3d 545, 550–551 (*Perez*).) *Perez* involved a series of sexual offenses that were committed during an attack lasting 45 minutes to an hour. (*Id.* at pp. 549–550.) The court rejected the argument that the offenses were committed pursuant to the single objective of obtaining sexual gratification. "To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability. [Citation.] . . . [¶] A defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act." (*Id.* at pp. 552–553.) Here, Ellis's conduct of both setting up a situation where Doe was subjected to a lewd and lascivious act by another person and also of using force to induce her to work for him as a prostitute is substantially more culpable than the commission of only one of those offenses. The trial court reasonably concluded that Ellis pursued multiple objectives (the objectives of

making Doe available for another person's sexual gratification and of attempting to employ Doe as a prostitute) during this course of conduct.

Perez also discusses the multiple acts/single objective construct of section 654 in terms of whether some of the acts were merely incidental to or a means of accomplishing other acts committed during the course of conduct. "In *People v. Greer* (1947) 30 Cal.2d 589, we held that section 654 precluded punishment for both lewd and lascivious conduct and rape because the act giving rise to the lewd conduct, the removal of the victim's underclothing, was essentially part of the rape. In *People v. Slobodion* [(1948)] 31 Cal.2d 555, however, we held that section 654 did not preclude punishment for both lewd and lascivious conduct and oral copulation, even though both acts were closely connected in time and a part of the same criminal venture, because the act giving rise to the lewd and lascivious conduct was separate and distinct and was not incidental to or the means by which the oral copulation was accomplished. . . . [¶] . . . [In this case, n]one of the sex offenses was committed as a means of committing any other, none facilitated commission of any other, and none was incidental to the commission of any other. We therefore conclude that section 654 does not preclude punishment for each of the sex offenses committed by defendant." (*Perez, supra,* 23 Cal.3d at pp. 553–554, parallel citations omitted.) Here, Ellis's conduct of taking Doe to the motel so she could be the victim of lewd conduct by the white male was not merely incidental to or a means of accomplishing the pandering offense, even though it arguably was part of the pandering scheme. The pandering conduct could easily have occurred without the motel room events and a pandering scheme that involves subjecting the victim to lewd acts with another person is substantially more culpable than a pandering scheme that involves only verbal persuasion. Thus, multiple punishments were justified.

The trial court's ruling that section 654 did not preclude multiple punishment for the pandering and procuring offenses is supported by substantial evidence.

III. DISPOSITION

The judgment is affirmed.

_____
Bruiniers, J.

We concur:

_____
Jones, P. J.

_____
Simons, J.

Bruiniers, J. concurring.

I write separately from the majority opinion I have authored to express my view that even if the digital photographs at issue here could somehow be characterized as out-of-court "statements" of a "person," they still would not be considered "testimonial" under the confrontation clause, as articulated by our Supreme Court in *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*). "Although the high court has not agreed on a definition of 'testimonial,' testimonial out-of-court statements have two critical components. First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution." (*Dungo*, *supra*, 55 Cal.4th at p. 619.) "The question of what out-of-court statements are and are not testimonial has divided the justices of the United States Supreme Court, whose decisions have not yet yielded a clear definition or test. But the justices have consistently considered two factors in deciding whether a given statement sufficiently resembles the English court abuses that gave rise to the confrontation clause, primarily the use at trial of witness statements obtained through ex parte examination: (1) the degree of formality or solemnity with which the statement was made and (2) the degree to which it was produced for use at trial. The more a statement resembles the ' "solemn declaration or affirmation" ' that is testimony, commonly understood, and the more it was expected, when made, ' "to be used prosecutorially" . . . "at a later trial," ' the more centrally it is located within the 'core class of "testimonial" statements.' [Citation.]" (*Id*. at p. 622 (conc. opn. of Werdegar, J.); see also *Williams v. Illinois* (2012) 567 U.S. ___ [132 S.Ct. 2221, 2242] (plur. opn. of Alito, J.) (*Williams*) ["abuses that the Court has identified as prompting the adoption of the Confrontation Clause shared the following two characteristics: (a) they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions"].)

I would hold that the photographs at issue here lack the requisite degree of formality or solemnity, and that they do not meet the "primary purpose" test.

I. *Formality or Solemnity*

To be testimonial the out-of-court statement must have been made with some degree of formality or solemnity (*Davis v. Washington* (2006) 547 U.S. 813, 830–831 & fn. 5, ["formality is indeed essential to testimonial utterance"]), although the degree of formality required remains a subject of dispute in the United States Supreme Court. (*People v. Lopez* (2012) 55 Cal.4th 569, 581–582 (*Lopez*).) In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the Supreme Court defined "testimony" for confrontation clause purposes as " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " (*Crawford,* at p. 51.) The United States Supreme Court has addressed the application of this standard to forensic evidence in two recent cases. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*) and *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705] (*Bullcoming*).

In *Melendez-Diaz*, the trial court admitted in evidence affidavits that certified the results of laboratory tests on substances that had been seized by police, verifying they were controlled substances. (*Melendez-Diaz, supra*, 557 U.S. at pp. 307–308.) The Supreme Court held that the affidavits fell "within the 'core class of testimonial statements' " subject to the confrontation clause. (*Id.* at p. 310.) "The fact in question [was] that the substance found in the possession of [the defendants] was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. . . . [¶] . . . [M]oreover, . . . the affidavits [were] ' "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," ' [citation] . . . . [¶] . . . Absent a showing that the analysts were unavailable to testify *and* that [the defendant] had a prior opportunity to cross-examine them, [the defendant] was entitled to ' "be confronted with" ' the analysts at trial. [Citation.]" (*Id*. at pp. 310–311.) The court stressed that the laboratory certificates at issue were "quite plainly affidavits: 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.' [Citation.]" (*Id*. at 310.)

In *Bullcoming*, the trial court admitted a laboratory report of the alcohol level in a defendant's blood sample through the testimony of an analyst who worked in the laboratory where the tests were performed, but who had not personally performed or observed the specific tests at issue. (*Bullcoming, supra,* 131 S.Ct. at p. 2709.) The Supreme Court held the evidence was admitted in violation of the defendant's confrontation rights. (*Id.* at pp. 2713–2717.) Distinguishing "representations, relating to past events and human actions" from "raw, machine-produced data" (*id.* at p. 2714), the high court emphasized that the laboratory certificate containing those representations was " 'formalized' in a signed document . . . referring to . . . rules" that made the document admissible in court." (*Id.* at p. 2717; see *Lopez, supra,* 55 Cal.4th at p. 581.)

At issue in *Dungo* were certain statements in an autopsy report, where the testifying pathologist had not conducted the autopsy. (*Dungo, supra*, 55 Cal.4th at pp. 618–619.) The court found no confrontation clause violation in part because the particular statements at issue, which described objective facts, were not the sort of formal testimony that implicated the confrontation clause. (*Id.* at pp. 619–621.) Specifically, the court held that "statements describing the pathologist's anatomical and physiological observations about the condition of the body" were not formal testimony subject to the confrontation clause. (*Id.* at p. 619.) "These statements, which merely record objective facts, are less formal than statements setting forth a pathologist's expert conclusions. They are comparable to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment. Such observations are not testimonial in nature. (*Melendez-Diaz, supra,* 557 U.S. at p. 312, fn. 2 ['medical reports created for treatment purposes . . . would not be testimonial under our decision today'].)" (*Dungo,* at pp. 619–620; see also *id.* at p. 621 ["facts that Dr. Lawrence related to the jury were not so formal and solemn as to be considered testimonial for purposes of the Sixth Amendment's confrontation right"].) Similarly, the Supreme Court in *Lopez* found identifying information, notations and results contained on a laboratory report on analysis of blood samples, entered by a laboratory assistant and by the examining analyst, to be admissible over a confrontation

clause objection because the report lacked the formality required to be considered testimonial. (*Lopez, supra,* 55 Cal.4th at pp. 582–585.)

At least one other California appellate court has recently applied *Dungo* and *Lopez* in concluding that notes, DNA profiles, and laboratory reports prepared by nontestifying witnesses, and relied upon by testifying criminalists, were merely "unsworn, uncertified records of objective fact," lacking sufficient formality to be considered testimonial. (*People v. Holmes* (2012) 212 Cal.App.4th 431, 436, 438 (*Holmes*).)[1]

The *Dungo* majority opinion did not separately address the admissibility of the autopsy photographs, but made no suggestion that reliance by the witness on the photographs would be subject to a different "testimonial" analysis. (See *Dungo, supra,* 55 Cal.4th at p. 619 ["Dr. Lawrence's . . . description [to the jury of the condition of the victim's body at the time of autopsy] was based on [his] review of Dr. Bolduc's autopsy report and its accompanying photographs," and the record did not indicate whether that description was based solely on the photographs, solely on the report, or a combination of the two].)

In my view, the "unsworn, uncertified" photographs taken during the SART medical examination depict only objective physical conditions, and are not "formal testimony" for Sixth Amendment purposes. (*Dungo, supra,* 55 Cal.4th, at p. 619.)

II. *Primary Purpose*

In addition to lacking the formality and solemnity associated with testimonial statements, the *Dungo* court noted that criminal investigation, while one purpose of the autopsy, was not the primary purpose for recording the facts in question. (*Dungo, supra,* 55 Cal.4th at pp. 620–621.) To make an extrajudicial statement testimonial, the statement must also have a primary purpose pertaining to the investigation and

[1] The court found the "primary purpose" of the reports to pertain to criminal prosecution because the procedures were undertaken at the behest of police to identify a suspect in a homicide case, and some of the analysis was performed after the defendant was targeted as a suspect. (*Holmes, supra,* 212 Cal.App.4th at p. 438.) Since the reports lacked formality, the court found the primary purpose to be immaterial under *Lopez* and *Dungo*. (*Holmes,* at p. 438.)

prosecution of a crime. (*Lopez, supra*, 55 Cal.4th at p. 582 ["all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution"]; see *Williams, supra*, 132 S.Ct. at pp. 2243–2244 (plur. opn. of Alito, J.) [even if expert witness testimony relying on Cellmark DNA report had been admitted for the truth of the matter asserted, the report was not testimonial because it was not prepared "for the primary purpose of accusing a targeted individual"]; *id.* at p. 2273 (dis. opn. of Kagan, J.) [pertinent inquiry is whether the report was prepared "for the primary purpose of establishing 'past events potentially relevant to later criminal prosecution'—in other words, for the purpose of providing evidence"].)

"[T]he objective forensic autopsy, with its findings including toxicological tests, special tests, microscopic examination, etc. . . . does not resemble the ex parte examinations of historical example or the structured police interrogations of *Crawford* and *Davis* [*v. Washington, supra,* 547 U.S. 813]. Though there is a structure to the autopsy examination process, it is largely that of a medical examination, not an interrogation." (*Dungo, supra*, 55 Cal.4th at p. 624 (conc. opn. of Werdegar, J.).)[2]

Similarly the evidence before the trial court here confirmed that the primary purpose of the examination conducted on Doe was medical, and not forensic.[3]

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[2] See also *Dungo, supra*, 55 Cal.4th at p. 630 (conc. opn. of Chin, J.): "The out-of-court statements in the autopsy report that Dr. Lawrence relied on to form his opinion are not testimonial under [the primary purpose] test. They did not have the primary purpose of accusing defendant or any other targeted individual of engaging in criminal conduct. The primary purpose of the portions of the report that Dr. Lawrence relied on was to describe the condition of the body. . . . In describing the condition of the body, there was no prospect of fabrication or incentive to produce anything other than a scientifically reliable report."

[3] The Second District Court of Appeal, in a decision rendered prior to *Dungo* and in a slightly different factual context, reached a contrary conclusion in *People v. Vargas* (2009) 178 Cal.App.4th 647 (*Vargas*). The court there found that the statements of a sexual assault victim to a forensic nurse examiner were testimonial and inadmissible, concluding that the nurse "acted as an agent of law enforcement" in examining and questioning the victim. (*Id*. at p. 660.) Aside from the fact that the testimony presented as to the *primary purpose* of the examination differed significantly in this case from that

Dr. Crawford-Jakubiak testified that Doe "had a thorough medical examination. [¶] . . . [¶] We do a medical evaluation in the context of somebody who's disclosing sexual assault." When specifically asked the purpose of his review of the examination results, he said, "The SART exam is a medical evaluation is how I would refer to it, not a SART exam, provides a number of different purposes. [¶] The most important is to make sure in the context of how somebody presents, that they get the medical care that they need. If they were exposed to biological material that could potentially get you sick, could potentially get somebody pregnant, that care is provided to establish whether or not that's an issue. Medications can be provided to prevent those things. If injuries are identified that need care, that's part of the evaluation. [¶] Simultaneous with that . . . there's a component where foreign material, if present, can be collected . . . ." Doe was provided medical care, including medications.

As with the autopsy report in *Dungo*, the physical examination conducted of Doe served several purposes, only one of which was criminal investigation. "The record does not show or suggest that [the SART examiner] was . . . guided in [her] conduct and documentation of the [examination] by anything other than professional medical practices and standards." (*Dungo*, *supra*, 55 Cal.4th at p. 627 (conc. opn. of Werdegar, J.).) Further, the court in *Dungo* specifically analogized the physical autopsy finding to "observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment," stating that "(s)uch observations are not testimonial in nature. (*Melendez–Diaz*, *supra*, 557 U.S. at p. 312, fn. 2 ['medical reports created for treatment purposes . . . would not be testimonial under our decision today'].)" (*Dungo*, at pp. 619–620, fn. omitted.)

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in *Vargas* (cf. *id.* at pp. 660–662), the photographs here, as we have discussed, are statements of neither Doe nor the SART nurse. *Vargas* is thus distinguishable.

I find nothing "testimonial" in the use of the medical examination photographs under any standard articulated by the United States Supreme Court or by the California Supreme Court, and thus nothing which would implicate Ellis's 6th Amendment confrontation rights.

I concur.

Bruiniers, J.

A133343

Superior Court of Alameda County, No. CH50155, Michael J. Gaffey, Judge.

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