Court of Appeal, Fourth Appellate District, Division One - No. D073015

S278664

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

RONALD JAMES LITTLEFIELD, Defendant and Appellant.

The petition for review is denied.

GUERRERO

Chief Justice

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DIST

DIVISION ONE

THE PEOPLE,
Plaintiff and Respondent,
v.
RONALD JAMES LITTLEFIELD,
Defendant and Appellant.
D073015
Riverside County Super. Ct. No. RIF1313733

THE COURT:

Appellant's motion to recall remittitur and reinstate appeal is DENIED.

McConnell

Presiding Justice

cc: All Parties

Filed 2/26/18 P. v. Littlefield CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RONALD JAMES LITTLEFIELD, Defendant and Appellant.	D073015 (Super. Ct. No. RIF1313733)

APPEAL from a judgment of the Superior Court of Riverside, Mac R. Fisher, Judge. Judgment affirmed.

Quinn Law and Stephane Quinn for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Meagan Beale and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

In a recorded interview with a sheriff's investigator, defendant Ronald Littlefield admitted he had repeatedly had sex with and inappropriately touched one of his adopted daughters (Jane Doe 1), and that he had once touched—though not in a sexual manner—the butt of his other adopted daughter (Jane Doe 2).[1] He was charged with 10 counts of sex offenses as to Jane Doe 1,[2] and five counts as to Jane Doe 2.[3] The jury found defendant guilty on all counts, and found true a multiple-victim allegation under California's "One Strike" law (§ 667.61).[4] The trial court sentenced defendant to a determinate term of four years four months, and an indeterminate term of 195 years to life.

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1 The trial court ordered that "[t]he identity of the victims in all transcripts be listed as Jane Doe 1 and Jane Doe 2." The reporter's transcripts on appeal conform to this order. We, too, will refer to the victims as Jane Doe 1 and Jane Doe 2.

2 As to Jane Doe 1, defendant was charged with one count of assault with the intent to commit rape (Pen. Code, § 220, subd. (a); count 1) (all further unspecified statutory references are to the Penal Code); three counts of rape (one count per year for when Jane Doe 1 was 16, 15, and 14) (§ 261, subd. (a)(2); counts 2-4); and six counts of committing a lewd act on a child under age 14 (one count per year for when Jane Doe 1 was 13, 12, 11, 10, 9, and 8) (§ 288, subd. (a); counts 5-10).

3 As to Jane Doe 2, defendant was charged with four counts of committing a lewd act on a child under age 14 (one count per year for when Jane Doe 2 was 13, 12, 11, and 10) (§ 288, subd. (a); counts 11-14), and one count of committing a lewd act on a child who is 14 or 15 and is more than 10 years younger than the defendant (§ 288, subd. (c)(1); count 15).

4 Under the One Strike law, a defendant who commits certain qualifying sex offenses against multiple victims is subject to a sentence of 15 years to life, per count. (§ 667.61, subds. (b), (c), (e)(4).)

On appeal, defendant contends (1) his trial counsel rendered ineffective representation during voir dire proceedings;[5] (2) the trial court deprived him of his right to a fair trial by not providing a new jury panel and by accepting an invalid and unknowing waiver of defendant's right to an unbiased jury; (3) the trial court abused its discretion by denying his posttrial petition to disclose jurors' identifying information (hereafter, the Petition to Disclose) so he could develop a new trial motion based on juror bias; (4) the court erred by denying his new trial motion based on instructional error and ineffective assistance of counsel; and (5) insufficient evidence supports his convictions on the counts pertaining to Jane Doe 2.

For reasons we will explain, we reject these contentions, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Prosecution Case

In about 2005, defendant and his wife (Mother) adopted four children out of foster care: daughters Jane Doe 1 and Jane Doe 2 (then about seven and six years old, respectively), and sons J.L. and G.L. (then about four and three years old, respectively).

About eight years later, on November 22, 2013, J.L. told Mother he had seen defendant touching Jane Doe 1 inappropriately. Jane Doe 1 confirmed this, and added she had seen defendant touch Jane Doe 2 inappropriately, too. After Jane Doe 2 confirmed this information, Mother called child protective services.

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5 Defendant asserts substantially similar claims in a petition for writ of habeas corpus. In a separate order, we deny the petition based on conclusions we reach in this opinion.

Investigator Ted Gonzales with the Riverside County Sheriff's Department interviewed defendant the morning after Mother's report.[6] Defendant initially admitted he had touched Jane Doe 1 inappropriately "once or twice" by grabbing her butt or by inadvertently touching her breast during horseplay. As the interview proceeded, he admitted to touching Jane Doe 1 inappropriately since she was 10, to having sex with her "about a half dozen times" in the previous four years (since she turned 13), and to orally copulating her each time they had sex. Defendant admitted he took pictures during his sexual encounters with Jane Doe 1, but he deleted them a few months before his arrest.

When Investigator Gonzales asked defendant if he had also inappropriately touched Jane Doe 2, defendant responded, "Not so much"—he would "try to initiate somethin' with [her]," but she was less "receptive" than Jane Doe 1, so he "left her alone." However, he acknowledged he sometimes "grabbed her butt and . . . she'd turn around real quick and slap [his] hand."

At the end of his interview, defendant wrote a letter to his family apologizing "for the grief" he "imposed" on them. Defendant's letter and recorded interview were presented to the jury.

Jane Doe 1 testified at trial, when she was 17. She said that within a few months of arriving in defendant's home, when she was eight, he began touching her breasts and grabbing her butt. Defendant began touching Jane Doe 1's vagina over her clothing when

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6 Defendant was advised of, and waived, his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. There are no issues in this appeal regarding his *Miranda* waiver.

she was nine, under her clothing when she was 12, and began inserting his finger in her vagina when she was 13. Defendant told Jane Doe 1 "he was training [her] so he would have sex with [her]." She said defendant had sex with her about four times, once each year when she was 13, 14, 15, and 16. Jane Doe 1 said defendant also masturbated in front of her, sometimes while touching her. She also saw defendant masturbate in front of Jane Doe 2, and touch her inappropriately. Defendant rewarded Jane Doe 1 by letting her use an iPod. He warned that if she ever reported him to the police, he would go to jail and Mother and the siblings would be alone and without money.

Jane Doe 2 also testified at trial; she was 16. She said that when she was 10, defendant began touching her inappropriately by grabbing her butt. When she was 11, 12, and 13, defendant both grabbed and slapped her butt. She considered both forms of contact "inappropriate[]." Jane Doe 2 estimated that defendant touched her breasts 20 to 30 times, and touched her butt 30 to 40 times. Defendant also grabbed Jane Doe 2's breasts and grabbed and slapped her butt "[a] few times" when she was 14, but "he didn't do it as much."

In addition to touching Jane Doe 2, defendant sometimes kneeled in front of her and masturbated, often with Jane Doe 1 present. When defendant did this, Jane Doe 2 would try to move away, but he would follow her. On another occasion, defendant asked to put his penis in Jane Doe 2's mouth, but she refused. Jane Doe 2 also recalled an occasion when she saw defendant with a camera while she was showering, but she was not sure if he actually took any pictures. She also described an incident where defendant

picked her up, threw her over his shoulder, and walked toward his bedroom. She grabbed the door frame and said, "no, let me go," and defendant complied.

The Defense Case

Defendant called no witnesses. Through cross-examination and argument, however, he attempted to show that Jane Doe 1 consented to having sex with him, such that he was not guilty of forcible rape.[7] He did not dispute the lewd touching counts as to Jane Doe 1. As to Jane Doe 2, defense counsel acknowledged "there was a touching, there was a grabbing," but argued it was for the jury "to determine whether or not that was for sexual pleasure or whether or not it was just one of those buddy pats." Defendant denied any other touching of Jane Doe 2.

Jury Verdict and Sentencing

At the end of the second full day of testimony, the parties rested and the jury began deliberating. The next morning, the jury requested that the court "provide . . . the transcripts of (Jane Doe 1)'s and (Jane Doe 2)'s testimonies.—All." In response, the court directed the court reporter to read the jury the witnesses' full testimony. Later that afternoon, the jury submitted a second question, this time asking about a particular date range in one of the verdict forms. The court responded by directing the jury to pattern instructions the court had provided earlier. The jury continued deliberating for the rest of the day. The next morning, the jury announced it had reached a verdict. The jury found

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7 Defense counsel argued defendant should instead have been (but was not) charged with statutory rape. There are no issues in this appeal regarding statutory rape.

defendant guilty on all 10 counts as to Jane Doe 1, all five counts as to Jane Doe 2, and found true the multiple-victim allegation.

The trial court sentenced defendant to a determinate term of four years four months (consecutive terms of three years on count 15, and 16 months on count 1), and an indeterminate term of 195 years to life (13 consecutive terms of 15 years to life on counts 2 through 14).

DISCUSSION

I. *Challenges Arising From Voir Dire Proceedings*

Defendant's retained trial counsel knew defendant would face a dramatically longer sentence under the One Strike law if the jury concluded he had committed the charged offenses as to both of his daughters.[8] Therefore, defense counsel sought to ensure during voir dire that defendant's admissions as to Jane Doe 1 would not "bleed into" and bias jurors against him on the *contested* counts regarding Jane Doe 2.

To implement his strategy, defendant's trial counsel candidly revealed during voir dire that defendant "has confessed that he actually had sex with *one of* his daughters." (Italics added.) Some prospective jurors became confused and angry, wondering why a trial was necessary if defendant had already confessed. Defense counsel then tried to clarify that defendant had admitted to only *some* of the charges levied against him. Still

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8 For example, whereas a violation of section 288, subdivision (a) ordinarily carries a determinate sentence of three, six, or eight years per count (§ 288, subd. (a)), the sentence under the One Strike law for the same violation is 15 years to life per count (§ 667.61, subd. (b)). Defense counsel understood defendant faced a potential indeterminate sentence of 195 years to life under the One Strike law.

sensing confusion, the trial court further clarified the limited scope of defendant's admission vis-à-vis the number of charges and victims, and instructed jurors of their duty as factfinders to evaluate each count separately based on the evidence, not bias. During subsequent voir dire questioning, some prospective jurors said that, knowing of defendant's admissions, they could not be fair; others insisted they could.

Outside the presence of the jury panel, the trial court expressed concern about whether defendant could receive a fair trial, and asked counsel whether a new panel was necessary. Defense counsel said a new panel was not needed because his tactic had worked—it flushed out those jurors who previously stated they could be fair but now admitted they could not. Defendant conferred with his counsel, and stated his agreement (which he characterizes on appeal as a "waiver") on the record.

Defendant now contends he received ineffective representation by virtue of his counsel's (1) manner of voir dire questioning, (2) failure to request a new jury panel, and (3) allowing of an invalid and unknowing waiver of his right to an unbiased jury. Similarly, he contends the trial court deprived him of his right to a fair trial by failing to provide a new jury panel after impliedly finding the original panel was biased, and by accepting defendant's invalid and unknowing waiver of his right to an unbiased jury.

As we will explain, we conclude defendant was adequately represented because his trial counsel had a clear tactical basis for his conduct during voir dire—to decrease the likelihood of a true finding on the multiple-victim allegation (and corresponding sentence under the One Strike law) by ensuring jurors could fairly evaluate the evidence

as to Jane Doe 2 despite defendant's admissions as to Jane Doe 1. We also conclude the trial court adequately protected defendant's right to a fair trial by dispelling any initial confusion or anger among prospective jurors caused by counsel's initial voir dire questioning. In reaching this conclusion, we necessarily reject defendant's contention that the trial court impliedly found the prospective jurors were biased. Thus, we do not reach defendant's contentions regarding the validity of his purported waiver of his right to an unbiased jury.

A. *Background*

At the outset of jury selection, the trial court informed the panel of the nature of the charges against defendant, stressing that they were merely allegations at that point. In light of the nature of the charges, the court emphasized to jurors the need to decide the case based on the evidence, and not on any bias, passion, or prejudice. The court reiterated that neither the court nor the parties wanted jurors who could not be fair. The court then questioned prospective jurors from a standard questionnaire that included the question, "Can you be a fair judge of the facts?"

After the court finished its questioning of the prospective jurors, defendant's trial counsel (Victor Marshall) questioned them. Marshall noted the "extremely egregious sort of crime[s]" defendant was charged with, said the alleged conduct "kind of makes [him] angry," then asked if anyone else felt the same way. Two prospective jurors said it made them angry, and another (eventually selected as Juror No. 12) said it made him or her angry and sad.

When Marshall learned that several of the prospective jurors' occupations mandated that they report incidents of child abuse, he asked them if the children's stories made them sad or could be false. Some prospective jurors responded that they believed children could be manipulative, and Juror No. 12 explained that as a teacher it was "important to [get] all the details and facts and [go] through the entire process to verify whether or not [the allegations] were indeed true."

Marshall then had the following exchange with a prospective juror, who was later selected as Juror No. 5:

> "[MR. MARSHALL:] Now, I want to be very, very candid with each and every one of you. These kinds of crimes tend to make us sad, just as (Juror Number 12) was saying. Angry as well. Probably even angry at the perpetrator, couldn't it, (Juror Number 5)?
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> "JUROR NUMBER 5: It could.
>
> "MR. MARSHALL: Would you find yourself being angry with the person that perpetrated a crime like this?
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> "JUROR NUMBER 5: Well, based on the information, if I don't have the information, why should I believe—I'm saying—
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> "MR. MARSHALL: Let me be very candid with each and every one. My client did it. My client has confessed that he actually had sex with one of his daughters, okay. So I would like to go through those questions again with you. [¶] Knowing that he did it, I would like to know about your emotions. I mean, would you feel angry at him, knowing that he actually did something?"

After one prospective juror commented that she was angry at defendant for having sex with his daughter instead of protecting her, Marshall asked:

> "Yeah, okay. Does that affect—remember one of the final questions was whether or not you could be fair on the facts. Knowing that,

> knowing that . . . there's some emotional investment now that you know that he's actually done it, and there's some anger that's been expressed. Would that affect your ability in the facts of the case, to fairly assess facts of the case, knowing that you're angry with him?"

Several prospective jurors said they would not be able to fairly assess the facts due to defendant's admission, including one prospective juror (a peace officer) who said, "just knowing that he admitted to that would make me want to cause harm to him. . . . But with me being a peace officer, I can't cross that line." None of these prospective jurors were selected.

Another prospective juror then asked Marshall, "Well, if he's said that he's guilty, then by saying that he did it, why are we here? I don't understand." Marshall responded, noting that defendant's admission applied to only certain of the charges against him:

> "There are a number of counts. And in those counts, each of you will be asked to decide on each and every last count and each of the elements. [¶] And my concern is that we will be too angry as jurors to decide on other counts that we're saying actually did not happen. Do you understand? So in other words, he may have admitted on some counts, but will your anger, will it bleed into other counts and you say, 'Well, if he did those, he must have done other things as well'? [¶] And . . . if you feel as though you still cannot be fair, that's absolutely fine. That's what we need to know."

With that explanation, the prospective juror who had asked why they were there said she would be able to listen to the evidence and be fair. Other prospective jurors agreed.

Marshall reiterated that "[t]here's a difference in terms of some of the things he's being charged with, and the things that he's admitted to." One prospective juror

expressed confusion that if defendant had "already admitted to the worst thing"—having sex with his daughter—then "anything, if there's a molestation, would be a lesser charge."

Sensing "a lack of clarity," the court interrupted Marshall's questioning:

> "What Mr. Marshall is indicating is that his client has admitted to certain acts . . . . [¶] But he's charged for more than he has admitted to. The determination for you is to decide whether or not the other matters to which he has not admitted have been proven beyond a reasonable doubt. [¶] The fact that he has admitted to certain acts, does that at all impact your ability to be fair and impartial as you consider the other acts as charged? Your job is a factfinding job. Your [*sic*] is to set aside bias, prejudice, and so forth in making your individual and collective decisions in that regard."

At the conclusion of Marshall's questioning, the court excused the panel until the following morning. The court then addressed Marshall's voir dire questioning. The court said Marshall's discussion of the facts of the case (instead of using hypothetical questions) confused the jury and created a "conundrum" whereby Marshall may attempt to use anger created by his discussion of the facts of the case as the basis to dismiss potential jurors for cause:

> "[U]nusually, Mr. Marshall did something that I've not seen happen. At least I'm really trying to draw upon my memory in the 150 trials that I've conducted as a criminal bench officer, somebody has in fact done what you did, Mr. Marshall, which is discuss the facts of the case in such a fashion so as to indicate to this jury—and I think potentially confusing them, that's why I jumped in—that he has admitted to these crimes. He has admitted. Leaving in the minds of these jurors no other issues of concern without indicating that there are remaining issues, that is, specifically that he's been overcharged for the crimes. [¶] And it creates some difficulty for yours truly, because I envision, by your reserving here, that you're going to come up with a number of challenges for cause based upon what I perceive to have been rather incomplete recital of where the case is presently situated. . . ." [¶] . . . [¶]

"I will tell you that my first impulse is that most people would normally and predictably be angry with your client. Because you had just indicated he's admitted to these crimes. And as such, I expect that to some extent you may argue, 'Well, now they're angry, Judge, we should excuse them.' [¶] Well, they're only angry because you told them he did it.

"So that's the conundrum. We have now talked about the evidence in the case, and you're going to use that as a foundation or basis upon which to make the argument to the judge that you should excuse them for cause.

"So that's why I attempted, maybe inartfully, to jump in there and say, 'This is a matter of concern as relates to the issues of this case for you jurors to determine whether or not there has been an overcharging; that he's charged for more than he has admitted to.' [¶] 'And the issue that you are presented with is that, can you be fair knowing that he committed some of these crimes? Fair in regard to the remaining issues of this case?' [¶] It's akin to a civil case where there's an admission of liability, all right. . . . [¶] . . . [¶]

"So my point is that I don't want this jury confused here. And I think they could be just confused right now as to why they're here. I think you heard that by one if not more than one of the jurors, 'What are we here for if he's admitted to the crimes?' "

Marshall responded that the court had accurately summarized his approach—"[t]o come out in the open . . . and be as clear as possible" to determine whether jurors would allow their "emotional standpoint" regarding defendant's admission as to some counts to "affect other counts." Marshall said he had "actually done this before." Regarding the court's concern that he had discussed the facts of the case, Marshall explained he "didn't go into any facts in terms of how it happened, when it happened"; he only addressed that defendant had "admitted to acts that are covered in the charging document." He

reiterated his view that "it's . . . important" to know whether potential jurors' anger as to admitted counts will prevent them from being "fair when it comes to the others."

After this discussion, court adjourned for the day.

First thing the next morning, outside the presence of the jury, the trial court read aloud Marshall's statement to the jury the day before regarding defendant's admission, then said:

> "That was the question yesterday posed by Mr. Marshall to the prospective panel of 20. A lot of negative responses were obtained thereafter. Negative in the Court's opinion by virtue of the comments made by individual jurors that indeed they were angry. [¶] Do we need another panel? Do we need a new panel?"

Marshall responded that although his method "could have been done in a different way, . . . the issue is still the same."

The court again stated its preference that counsel avoid discussing the facts of the case during voir dire. Speaking to Marshall about his questioning, the court said, "what was lost in your question is that your client has confessed to having sex with one of his daughters, but there are two daughters at issue . . . . And he denies that he committed . . . the acts as it relates to a second daughter." As a result of Marshall's "inartful" questioning, the court observed some jurors appeared angry and confused:

> "[w]hat's happened now is that there, by my observation—and I'll make this observation here—it isn't just the comments of many people here on this jury, it's everybody in the gallery. As your back is turned to them, maybe you didn't observe it, but I did. A good many of these people in our venire are very upset that they're even back for day two of a jury selection process, and they have not yet heard any evidence, because they believe your client is guilty, based on your comments. [¶] . . . [¶]

> "I know your intent was this. That you know the evidence, and you know your client has admitted or confessed to at least Jane Doe 1, to some aspect of it. . . . And the issue presented is, what are they going to do with Jane Doe 2, knowing that he may have confessed to Jane Doe 1?
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> "I understand the intention behind it, but it was phrased in such a fashion here that this jury, not just the 20 in the box right now, but the gallery may have been infected with a real negative feeling towards Mr. Littlefield, to the extent that he cannot receive a fair trial. That is of concern to me, and I hope you understand that."

Marshall explained his view that a new panel was not necessary because he had accomplished what he had set out to do—elicit jurors' unvarnished reactions to defendant's admissions regarding Jane Doe 1 to determine whether the jurors believed they could truly be fair as to the disputed counts pertaining to Jane Doe 2:

> "We are here with a number of jurors who have received some information that obviously if they would have been, if they would have stayed on this jury panel, received said information from the start of my opening statement, which is going to happen, then they would end up feeling the same way, but have not uncovered it at this point. [¶] . . . . At this juncture, we have a number of jurors who are hiding behind, or are not revealing of themselves in terms of their feelings about things. [¶] It would be unfair and wrong for me to allow them on the panel when they are going to have such extremely adverse feelings about my client once I mention the fact that my client has admitted to these things.
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> "The only thing that I have, Your Honor, in this case, is the truth. . . .
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> "And in this case, for me to wait—and I'll tell you, these jurors have been so nondescript, that all seven of the people who have talked about their detest[ation] of Mr. Littlefield, that would not have happened unless I proposed some sort of example, or made some sort of facts that would make them reveal of their own emotions, and the truth behind everything. I cannot take the chance, knowing that

this is an extremely volatile case, Your Honor, there's only one way to go, and that's with the truth.

"But I was able to uncover the seven that made those comments. There are still quite a few more who say that they could still be fair. And because of that, I would have no problem with the remaining, I believe it's the remaining 13, which is still enough to comprise our jury with. . . . [¶] . . . And as long as we can get people who are still able to listen, Your Honor, I think that would be the most fair thing."

The court explained its overarching concern: "I'm not just doing this to protect this Court, nor am I having this discussion in order to protect the record. The purpose is this. I want to make sure that Mr. Littlefield gets a fair trial, all right." The court then asked the prosecutor for his view.

The prosecutor recommended, "in [an] abundance of caution, to start with a new panel," unless defendant was willing "to waive his rights on appeal as to this issue." The court wondered aloud whether a waiver of appellate rights would even be procedurally proper. The court took a brief recess so Marshall could, "out of fairness," speak to defendant about the issue. Marshall did so.

After the recess, the prosecutor confirmed he was "perfectly okay with starting with another venire panel." Marshall, however, explained that defendant was "okay with proceeding with the present panel." Marshall put defendant's consent on the record:

"MR. MARSHALL: Mr. Littlefield, you do understand the issue we're going through at this time; correct?

"THE DEFENDANT: That's correct.

"MR. MARSHALL: That I have revealed a certain fact about your statement in this case, and the jurors have now heard it. And the

jurors have expressed anger in that regard. Do you agree to proceed with this panel and continue to seek a panel from this jury pool?

"THE DEFENDANT: Yes.

"MR. MARSHALL: And I join, Your Honor.

"THE COURT: Thank you. . . ."

The prosecutor then questioned the prospective jurors. When Marshall objected during the prosecutor's use of a hypothetical scenario involving multiple crimes, only one of which had been admitted to, the court instructed the prospective jurors of their obligation to consider each count separately, regardless of defendant's admission as to some. The respective jurors indicated they understood the counts "all stand alone."

On final questioning by Marshall, prospective jurors agreed they still "could be fair," even "taking into consideration everything that was said" the day before. Counsel then agreed on the required number of jurors and alternates from the original panel. The jurors swore an oath to render a verdict "according only to the evidence presented . . . and to the instructions of the court."

In light of what transpired during voir dire, and to "make sure that Mr. Littlefield gets a fair trial," the court advised counsel before opening statements that, although it was not the court's ordinary practice to do so, the court would pre-instruct the jury that it must consider each count separately.[9] The court also admonished counsel to ensure during

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9 The court ultimately pre-instructed the jury with a modified version of CALCRIM No. 3515, stating: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." The court's

opening statements that they "qualify" the phrase " 'admit it' " so that the jury would understand "[o]bviously it's not admitting to all 15 of the counts."

During his opening statement, Marshall distinguished the counts against defendant on a victim-by-victim basis. He explained counts 1 through 10 relate to conduct with Jane Doe 1, and that defendant was only disputing the assault and rape counts because defendant maintained the sex was consensual. As to Jane Doe 2, Marshall conceded (as had defendant during his interview with Investigator Gonzales) that defendant touched her butt on one occasion, but denied the contact was sexual in nature; Marshall disputed outright the remaining counts as to Jane Doe 2.

The topic of Marshall's voir dire questioning came up again after trial, when the court tentatively denied defendant's Petition to Disclose. The court found that although Marshall's "*procedure*" of discussing the facts of the case (as opposed to using hypothetical questions) "may have been questionable," the "*tactic*" was not, itself, "that unusual." (Italics added.) The court also found it had adequately and timely intervened during voir dire, and had properly instructed the jury regarding its obligation to consider each count separately and to set aside any bias, prejudice, or anger.

B. *Defendant Received Effective Representation During Voir Dire Proceedings*

Defendant contends he received ineffective representation by virtue of Marshall's questioning during voir dire and declining of a new jury panel. We are not persuaded.

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predeliberation instructions included the same instruction, as well as one instructing the jury to "not let bias, sympathy, prejudice, or public opinion influence [its] decision."

"The constitutional standard for determining whether counsel has failed to provide adequate legal representation is by now well known: First, a defendant must show his or her counsel's performance was 'deficient' because counsel's 'representation fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.' [Citations.] Second, he or she must then show prejudice flowing from counsel's act or omission. [Citations.] We will find prejudice when a defendant demonstrates a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.] 'Finally, it must also be shown that the [act or] omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make.' " (*People v. Gurule* (2002) 28 Cal.4th 557, 610-611; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-692.)

Marshall's voir dire questioning was expressly tactical and reasonable under the circumstances. Defendant admitted he had inappropriately touched, orally copulated, and had intercourse with Jane Doe 1. He also admitted he had touched Jane Doe 2's butt once, but denied it was sexual or that he had touched her inappropriately on any other occasions. To avoid a true finding on the multiple-victim allegation—and the corresponding 195-year-to-life indeterminate sentence under the One Strike law—it was imperative that Marshall select jurors who could fairly evaluate the *evidence* as to Jane Doe 2 without being biased by defendant's outright admissions as to Jane Doe 1.

Marshall explained that the abstract and hypothetical questions initially asked during voir dire were yielding only "nondescript" responses from jurors who were "hiding behind, or [were] not revealing of themselves in terms of their feelings about things." In Marshall's experience—he said he had "actually done this before"—it was necessary to confront the jurors with *this* defendant's admissions in *this* case. It was only when Marshall did so that some prospective jurors finally admitted "their detest[ation]" of defendant. Marshall was convinced "that would not have happened" absent his voir dire tactic. Under the circumstances, this was a reasonable strategy.

Defendant concedes Marshall may have had a tactical purpose for his voir dire questioning, but maintains Marshall went about it the wrong way by revealing the fact of defendant's confession instead of using hypothetical questions. However, as Marshall pointed out to the trial court, it was only when he revealed case-specific facts that jurors became candid. Moreover, as Marshall explained, he did not provide any details and, in any event, did not tell the prospective jurors anything they were not going to hear "from the start of [his] opening statement." To the extent Marshall's use of case-specific facts created any initial confusion, he and the trial court ensured the jury was not left with the mistaken impression that defendant had admitted guilt as to all counts. Thus, even if Marshall ineffectively executed his tactical plan, defendant has not met his burden of showing a reasonable probability the result at trial would have been different absent the alleged ineffective representation.

Marshall's decision not to request a new jury panel was similarly tactical. He explained a new panel was not needed because he concluded his questioning of *this* panel had been effective: it enabled him to "uncover" seven prospective jurors who finally admitted they could not be fair, and 13 jurors—"enough to comprise our jury with"—who said they could be. Marshall reasonably believed he had achieved the very purpose of voir dire.

C. *The Trial Court Did Not Deprive Defendant of His Right to a Fair Trial*

1. *Relevant Legal Principles*

"A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; [citations].)" (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) "Voir dire is critical to assure that the Sixth Amendment right to a fair and impartial jury will be honored. 'Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.' " (*People v. Chapman* (1993) 15 Cal.App.4th 136, 141, quoting *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.)

"[T]he trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required." (*People v. Medina* (1990) 51 Cal.3d 870, 889.) "[D]ischarging the entire venire is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice . . . ." (*Ibid.*) In reviewing the trial court's

decision whether to dismiss an entire venire, we consider "the totality of the circumstances surrounding jury selection." (*People v. Martinez* (1991) 228 Cal.App.3d 1456, 1465.) The trial court's conclusion on the question of group "juror bias and prejudice is entitled to great deference and is reversed on appeal only upon a clear showing of abuse of discretion." (*Id.* at p. 1466.) "The trial court's exercise of its discretion in the manner in which voir dire is conducted . . . shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice . . . ." (Former Code Civ. Proc., § 223.)[10]

2. *Analysis*

Considering the totality of the circumstances, we find neither an abuse of discretion nor a miscarriage of justice.[11]

Defendant's challenge fails at the outset because it is predicated on the unsubstantiated claim that the trial court "made an implied finding that [defendant]'s rights to a fair and impartial jury had been compromised by defense counsel's voir dire." To the contrary, the trial court itself rejected this claim when it tentatively denied defendant's Petition to Disclose, finding its own intervention during voir dire timely and

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10 Code of Civil Procedure section 223 has been amended since the voir dire proceedings were conducted in this case. There is no contention the amendments apply to this appeal.

11 The Attorney General contends that by affirmatively electing to proceed with the original jury panel despite the trial court's offer to provide a new one, defendant has forfeited this issue on appeal. Because defendant's challenge addresses his fundamental right to a fair trial, we will consider the merits of his challenge.

adequate, and further finding the jury was adequately instructed regarding its obligations of fairness.

The record supports the trial court's findings. First, due to the nature of the charges against defendant, the court instructed the prospective jurors before voir dire questioning began that jurors must set aside bias and passion and decide the case based on the evidence. Second, when jurors first expressed confusion or anger during Marshall's questioning, Marshall informed them that defendant had admitted only *some* of the charges, and that the others were disputed. Third, sensing a "lack of clarity" in Marshall's explanation, the court interrupted, clarified that defendant was admitting to only some of the charges against him, and again instructed the jury of its duty "to set aside bias, prejudice, and so forth" in deciding defendant's guilt. Fourth, Marshall's tactic of being candid with the prospective jurors flushed out jurors who admitted bias. Noting that the initial voir dire questioning elicited only "nondescript" responses, Marshall observed it was only after he was candid with jurors about defendant's admissions as to Jane Doe 1 that jurors were truly candid with him. As a result, seven prospective jurors admitted they *could not* set aside their bias, while 13 prospective jurors confirmed they *could*. Fifth, the court interrupted the prosecutor's voir dire questioning to again instruct the jury of its duty to consider the evidence against defendant on each count separately. Sixth, at the conclusion of Marshall's voir dire questioning, prospective jurors confirmed they could be fair. Seventh, the jurors swore in their oath to decide the case based only on the evidence presented at trial and on the court's instructions. Finally, the court

departed from its ordinary practice and pre-instructed the jury regarding its duty to consider each count separately. On this record, the court did not abuse its discretion in concluding it was unnecessary to dismiss the entire jury panel to ensure defendant received a fair trial.

We are further satisfied the court's decision to proceed with the original panel did not result in a miscarriage of justice. (Former Code Civ. Proc., § 223.) In addition to all the *pretrial* instructions just noted, the court's *predeliberation* instructions reminded the jury of its duty to "not let bias, sympathy, prejudice, or public opinion influence [its] decision." "We presume the jury followed the instructions it was given." (*People v. Chism* (2014) 58 Cal.4th 1266, 1299.) Indeed, the record indicates this jury did so: after hearing about two days' evidence, the jury deliberated for more than one full day, asked questions, and requested and then listened to all of Jane Doe 1's and Jane Doe 2's testimony. These are not the actions of a biased jury.

II. *Petition to Disclose*

Defendant contends the trial court abused its discretion by denying his Petition to Disclose. The contention is without merit.

A. *Background*

After the jury returned its verdicts and before sentencing, the trial court appointed the public defender's office to represent defendant on a potential motion for new trial based on Marshall's alleged ineffective representation. Before filing a new trial motion, deputy public defender Joshua Knight first filed the Petition to Disclose, in which he

argued Marshall's voir dire questioning "appears to have led to the perceived misunderstandings that Mr. Littlefield had admitted to everything," and that "inquiry must be conducted to see if the [jurors] considered his comments and/or preformed opinions regarding . . . guilt . . . ." The petition was supported by a perfunctory declaration from Knight and a partial transcript of the voir dire proceedings.

On the date originally set to hear the new trial motion (which had not yet been filed), the court advised counsel why it tentatively intended to deny the petition:

> "I am of the belief, as I indicated in chambers, that the jury was adequately instructed, that the Court adequately and in a proper time intervened during the course of voir dire. And I further referred to . . . unanimity instructions, [CALCRIM Nos.] 3515, 3181, 200, 3550, and the other instructions which place upon the jurors the obligation to decide the case as fact finders, setting aside any bias, prejudice, including anger they may have in regard to the matters.
>
> "I further indicated . . . that though Mr. Marshall's procedure may have been questionable in regard to jury selection, the tactic, I do not find that unusual. . . . Mr. Marshall could have . . . been a little bit more articulate. I totally agree with that.
>
> "However, I also believe that I intervened and instructed the jury as to what their role was. And I am positive as we sit here, they were properly instructed in that regard. And unless and until I'm given some information other than speculation, or some case law directly on point to allow for a fishing expedition as to the private thoughts and, for that matter, identification of jurors, I'm not inclined to release that information.
>
> "However, I invite you to clarify your position and to convince me I'm wrong in regard to how I look at this right now. So I have not denied your motion to obtain personal juror identification, but I'm giving you my tentative right now. And you can expand upon your thought process, and [the prosecutor] can respond to that."

It appears the matter was then continued for two months to coincide with the hearing on defendant's new trial motion. At the continued hearing, attorney Knight stated his understanding that the Petition to Disclose was denied at the last hearing "unless we were to renew . . . . We are not renewing it." The court responded, "I don't need to rule again."

B. *Relevant Legal Principles*

"Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors . . . , consisting of names, addresses, and telephone numbers, shall be sealed until further order of the court . . . ." (Code Civ. Proc., § 237, subd. (a)(2).) "[A] defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose." (*Id.*, § 206, subd. (g).) "The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information." (*Id.*, § 237, subd. (b).)

"Good cause, in the context of a petition for disclosure to support a motion for a new trial based on juror misconduct, requires 'a sufficient showing to support a reasonable belief that jury misconduct occurred . . . .' [Citations.] Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported." (*People v. Cook* (2015) 236 Cal.App.4th 341, 345-346 (*Cook*).) "Absent a

showing of good cause for the release of the information, the public interest in the integrity of the jury system and the jurors' right to privacy outweighs the defendant's interest in disclosure." (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1430.)

To make the required prima facie showing of good cause, a petitioning defendant need not introduce admissible evidence establishing juror misconduct actually occurred; rather, it is sufficient to show that talking to jurors is reasonably likely to produce admissible evidence of such misconduct. (*People v. Johnson* (2013) 222 Cal.App.4th 486, 493.)

Evidence Code section 1150 limits the admissibility of evidence regarding jury deliberations. It states, in part: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (*Id.*, § 1150, subd. (a).) Evidence Code section 1150 " 'distinguishes "between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved . . . ." ' " (*People v. Danks* (2004) 32 Cal.4th 269, 302.)

We review the denial of a petition for disclosure of juror information for an abuse of discretion. (*Cook, supra*, 236 Cal.App.4th at p. 346.)

C. *Analysis*

We find no abuse of discretion in the trial court's conclusion that defendant did not meet his burden of making a prima facie showing of good cause to obtain the jurors' identifying information. First, to the extent the motion was based on objectively ascertainable overt acts that occurred during voir dire proceedings, the trial court presided over those proceedings and was in the best position to evaluate Marshall's conduct. Defendant has not identified any potential overt acts that would reveal juror bias. To the contrary, the record describes many overt acts by jurors that indicate they were not biased (e.g., stating they could be fair, swearing an oath to decide the case based on the evidence, deliberating for more than one full day, requesting a readback of the entirety of both victims' trial testimony).

Second, to the extent the petition is aimed at discovering jurors' subjective deliberations, this evidence would be inadmissible under Evidence Code section 1150. Defendant has cited no authority holding otherwise.

Defendant contends the trial court failed to balance his showing of need against the jurors' interest in their privacy. We disagree. The trial court expressly stated it was not inclined to allow a "fishing expedition" into jurors' "private thoughts." The court's reference to a fishing expedition indicates the court assessed the strength of defendant's showing, and the reference to jurors' private thoughts indicates the court weighed that showing against jurors' privacy interests. This was sufficient under the circumstances.

III. *New Trial Motion*

Defendant ultimately filed a motion for new trial on the alternative bases of (1) instructional error for failing to instruct on the lesser included offense of *attempted* lewd acts on Jane Doe 2 on counts 11 through 15; and (2) ineffective assistance of counsel based on Marshall's alleged concession as to count 11 (lewd act on Jane Doe 2) during his closing argument.

A. *Instructional Error*

Defendant was charged with five counts of committing lewd acts on Jane Doe 2—one act per year for each year from the time she was 10 to 14. She testified he touched her breasts 20 to 30 times, and touched her butt 30 to 40 times. Citing two examples of times that Jane Doe 2 successfully resisted his advances—the time he started carrying Jane Doe 2 to his bedroom until she resisted, and "[a]nother time" she declined his request to put his penis in her mouth—defendant maintains the court should have sua sponte instructed the jury regarding the lesser included offense of attempted lewd act. We conclude that even if the court erred by not instructing the jury regarding attempt, any such error was not prejudicial.

1. *Relevant Legal Principles*

A trial court must instruct the jury, sua sponte, on lesser included offenses if substantial evidence supports such instructions. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) " ' "Substantial evidence" in this context is " 'evidence from which a jury composed of reasonable [persons] could . . . conclude[]' " that the lesser offense, but not

the greater, was committed. [Citations.]' " (*Ibid.*) For a sua sponte instruction on attempt to be required, however, there must be "evidence that a reasonable jury could find persuasive" on the point. (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) That is, the evidence supporting the giving of the lesser included offense must be " ' " 'substantial enough to merit consideration.' " ' " (*People v. Huggins* (2006) 38 Cal.4th 175, 215.) We review de novo a claim that the trial court erred in failing to instruct on a lesser included offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

"Instructional error is subject to harmless error review." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214.) In a noncapital case, "error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v. Watson* (1956) 46 Cal.2d 818]." (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) Under *Watson*, " 'a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.' " (*People v. Beltran* (2013) 56 Cal.4th 935, 955.) This review " 'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration.' " (*Id.* at p. 956.) "Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to [the] defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

2. *Analysis*

Assuming without deciding that the trial court should have instructed the jury on attempted lewd acts, we conclude defendant was not prejudiced by the court's failure to do so. The fact that defendant cites only *two* incidents that would support an instruction on attempt, yet the jury convicted him on *five* counts of completed lewd acts, indicates the jury convicted defendant based on Jane Doe 2's testimony regarding the 20 to 30 breast touches and 30 to 40 butt touches, and not on the two attempted incidents defendant cites on appeal. Jane Doe 2's testimony about the breast and butt touches was nonspecific and did not differentiate between incidents such that the jury would likely have found her testimony credible as to some counts but not as to others. Based on this finding, it is exceedingly unlikely the jury, if properly instructed, would have convicted defendant of only three completed lewd acts and two attempts. Because there is little doubt the jury convicted defendant based on the numerous completed acts, any error in failing to instruct on attempt caused defendant no prejudice.

Defendant's contention that he was prejudiced by a much longer sentence due to the resulting multiple-victim finding erroneously focuses on the result of the jury's verdicts, and not on whether the alleged instructional error likely impacted those verdicts. As explained, we conclude under the *Watson* standard that an instruction on attempt would not likely have impacted the verdicts.

B. *Ineffective Assistance of Counsel*

Defendant contends the court also erred by denying his new trial motion to the extent it was based on Marshall's alleged concession of guilt as to count 11. This contention lacks merit.

1. *Background*

During his closing argument, Marshall told the jury that defendant "admits to counts 5, 6, 7, 8, and 9" (lewd act counts as to Jane Doe 1). Skipping over count 10 (the final lewd act count as to Jane Doe 1), Marshall immediately added, "He also admits to count 11" (the first lewd act count as to Jane Doe 2).

Marshall then addressed the admissions defendant made to Investigator Gonzales:

> "He gave everything to the detective. Because he even said more as far as sexual contact that occurred than (Jane Doe 1) remembered. He told it all. And he told it all one [*sic*] particular instance where he touched (Jane Doe 2).
>
> "And the People are right when they stated [during the prosecutor's closing argument] that there was a touching, there was a grabbing. That's up to you to determine whether or not that was for sexual pleasure or whether or not it was just one of those buddy pats. But he admits to that touching, but the others, he doesn't. But remember, (Jane Doe 2) would run—get up, leave the room, ignore him, those kinds of things."

The trial court denied defendant's new trial motion, finding Marshall had acted reasonably under the circumstances:

> "[A]s to trial tactics, Mr. Marshall was trying to make lemonade out of lemons. . . . His trial tactics were a tad unusual, but he was left with a difficult, difficult task in light of the outrageous conduct of [defendant] as relates to these two children. [¶] And so on those grounds, that is, that it was ineffective assistance of counsel, I deny

> the motion. And beyond that, the defendant must demonstrate that it is reasonable and probable a more favorable result would have been obtained in the absence of counsel's failings. And I cannot make that—reach that conclusion. [¶] I think the result obtained in this case was the correct result . . . and it would have been no matter what. And this statement could have been corrected by Mr. Marshall if, in fact, it's considered to be a misstatement. It was a very difficult case for anybody to defend in light of the totality of this evidence."

2. *Relevant Legal Principles*

We set forth the general principles applicable to ineffective assistance of counsel in part I.B., *ante*.

"Where, as here, the trial court has denied a motion for a new trial based on an ineffective assistance claim, we apply the standard of review applicable to mixed questions of law and fact, upholding the trial court's factual findings to the extent they are supported by substantial evidence, but reviewing de novo the ultimate question of whether the facts demonstrate a violation of the right to effective counsel." (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 590-591.)

"The trial judge is the one best situated to determine the competency of defendant's trial counsel. Where, as here, defendant is represented by different counsel at the motion for a new trial and the issue is called to the trial court's attention, the trial judge's decision is especially entitled to great weight and we defer to his fact finding power. Absent a showing of clear and unmistakable abuse, we will not disturb his decision." (*People v. Wallin* (1981) 124 Cal.App.3d 479, 483.)

3. *Analysis*

Defendant overstates the record when he asserts Marshall conceded guilt on one count of lewd acts on Jane Doe 2. First, it appears Marshall simply misspoke when he proceeded from conceding counts 5 through 9 to conceding count 11. Based on our thorough review of the record, it appears Marshall instead intended to concede count 10. This is consistent with the balance of Marshall's trial strategy of acknowledging guilt on the lewd act counts as to Jane Doe 1, but denying guilt on all counts as to Jane Doe 2. We believe the jury understood this, and was not swayed by Marshall's apparent slip of the tongue. (See, e.g., *People v. Malone* (1988) 47 Cal.3d 1, 19 ["Such a slip of the tongue does not, in our view, establish ineffective assistance of counsel."].)

Second, it appears Marshall intended to concede some *conduct*—but not *guilt*—as to one count of lewd acts on Jane Doe 2. Faced with defendant's recorded admission that he had touched Jane Doe 2's butt once, Marshall conceded a touching occurred but denied it was sexual. Under the circumstances, Marshall's factual concession was an acceptable tactical choice. (*People v. Gamache* (2010) 48 Cal.4th 347, 392 ["[S]ensible concessions are an acceptable and often necessary tactic."]; *People v. Mayfield* (1993) 5 Cal.4th 142, 177 ["candor may be the most effective tool available to counsel."].)

IV. *Substantial Evidence of Lewd Acts on Jane Doe 2*

Defendant contends Jane Doe 2's testimony about his lewd acts was too "nonspecific and amorphous" to constitute sufficient evidence to support his convictions on counts 11 through 15. We disagree.

Under the prosecution theory in this case, a violation of section 288, subdivision (a), as charged in counts 11 through 14, requires proof that: (1) the defendant willfully touched any part of a child's body; (2) the defendant committed the act with the intent of arousing or gratifying his or the child's sexual desires; and (3) the child was under the age of 14 years at the time of the act. (§ 288, subd. (a); see CALCRIM No. 1110.) Section 288, subdivision (c) (1), as alleged in count 15, requires similar proof to section 288, subdivision (a), with the added requirements that the victim is a child of 14 or 15 years, and that the defendant is at least 10 years older than the child. (§ 288, subd. (c); see CALCRIM No. 1112.)

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. ' "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" ' [Citations.] [¶] ' "Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our

evaluation of a witness's credibility for that of the fact finder. [Citations.]" ' " (*People v. Smith* (2005) 37 Cal.4th 733, 738-739.)

In *People v. Jones* (1990) 51 Cal.3d 294 (*Jones*), the California Supreme Court adopted an evidentiary standard for cases involving "the so-called 'resident child molester' [citation], who either lives with his victim or has continuous access to him or her." (*Id.* at p. 299.) The standard balances the public's interest in assuring the defendant "is not immunized from substantial criminal liability merely because he has repeatedly molested his victim over an extended period of time," while at the same time protecting the defendant's "due process right to fair notice of the charges against him and reasonable opportunity to defend against those charges." (*Id.* at p. 305.) The standard also addresses the "difficult, even paradoxical, proof problems" inherent when child victims of a resident molester have "no practical way of recollecting, reconstructing, distinguishing or identifying by 'specific incidents or dates' all or even any such incidents." (*Id.* at p. 305.)

With these considerations in mind, the *Jones* court articulated the following standard for determining the sufficiency of a child victim's "generic" testimony:

> "The victim . . . must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period. Additional

> details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*Jones*, *supra*, 51 Cal.3d at p. 316.)

Jane Doe 2's testimony satisfied this standard. First, as to the "*the kind of act or acts committed*" (*Jones*, *supra*, 51 Cal.3d at p. 316), Jane Doe 2 testified defendant engaged in lewd conduct by touching her breasts and butt. This sufficiently "differentiate[d] between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy)." (*Ibid.*) Abundant circumstantial evidence (e.g., defendant's admissions as to Jane Doe 1 and his admission that he masturbated in front of both girls) supports the reasonable inference that defendant touched Jane Doe 2 with the requisite "intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires" of the perpetrator or victim. (§ 288, subd. (a); see *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1380 [evidence of the defendant's pattern of conduct with the victim, "as well as with other young girls," was sufficient to support an inference of the requisite intent].)

Second, Jane Doe 2 testified as to the "*number of acts*" (*Jones*, *supra*, 51 Cal.3d at p. 316) defendant committed against her: 20 to 30 touches of her breasts, and 30 to 40 touches of her butt. This number of acts is sufficient to support the five counts of lewd acts charged against defendant with respect to Jane Doe 2. Under *Jones*, any concern that

Jane Doe 2 testified about more acts than defendant was charged with was alleviated by instructing the jury regarding unanimity.[12] (*Jones*, *supra*, 51 Cal.3d at p. 321.)

Finally, Jane Doe 2 testified about "*the general time period* in which [the] acts occurred." (*Jones*, *supra*, 51 Cal.3d at p. 316.) Specifically, she testified defendant touched her inappropriately when she was 10, 11, 12, 13, and 14. This corresponds to the one-year periods alleged in counts 11 through 15. Defendant's complaint that Jane Doe 2 "did not link the alleged abuse to any specific date, holiday, birthday or other significant event" is of no moment. (*Ibid.* ["Additional details regarding the time, place or circumstance of the various assaults . . . are not essential to sustain a conviction."].)

Defendant claims Jane Doe 2's "nonspecific" testimony unduly prevented him from establishing an alibi defense or from attacking her credibility. *Jones* disposes of these claims. (*Jones*, *supra*, 51 Cal.3d at p. 319 [rejecting claim that nonspecific testimony precludes alibi defense]; *id.* at p. 320 ["In some cases, the very nonspecificity of the child's testimony . . . may offer defense counsel fertile field for challenging the child's credibility."].)

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12 The court instructed the jury with CALCRIM No. 3501 ("Unanimity: When Generic Testimony of Offense Presented"), which states (as given): "The defendant is charged with rape, lewd acts on a minor under 14, lewd acts on a minor 14 or 15 years of age in Counts 2-15 sometime during the period of 2005 to November 23, 2013. [¶] The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense; [¶] OR [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged."

In sum, substantial evidence supports the jury's verdicts on counts 11 through 15 as to Jane Doe 2.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.

Additional material from this filing is available in the Clerk's Office.

D073015

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