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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. MARK WAYNE GRAY, Defendant and Appellant.	C062668 (Super. Ct. No. 08F8637)

APPEAL from a judgment of the Superior Court of Shasta County, Monica Marlow, Judge. Affirmed as modified.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman, R. Todd Marshall and Larenda Delaini, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Mark Wayne Gray met his wife S. when she was only 17 years old. The couple had three children, but the marriage

* Pursuant to California Rules of Court, rules 8.1110 and 8.1105(b), this opinion is published with the exception of parts I., III., IV. and VI. of the Discussion.

fell apart and she moved out of their house. Rather than get on with his life, defendant turned hers into a living hell. He embarked on a course of conduct calculated to terrify her, drive her crazy, or both. As a result of misdeeds committed both before and after the separation, defendant was convicted by a jury of the felonies of spousal rape of unconscious or sleeping victim (Pen. Code, § 262, subd. (a)(3)), genital penetration with a foreign object (*id.*, § 289, subd. (d)) through use of a controlled substance (*id.*, § 12022.75), four counts of first degree residential burglary (*id.*, § 459), attempted first degree residential burglary (*id.*, §§ 664, 459), sexual battery (*id.*, § 243.4, subd. (e)(1)), stalking (*id.*, § 646.9, subd. (a)) and attempted stalking (*id.*, §§ 664/646.9, subd. (b)), as well as a host of misdemeanors. He was sentenced to an aggregate term of 20 years and two months in state prison.

Defendant appeals, arguing that the trial court erred in denying his pretrial motion to suppress evidence. He also challenges several other convictions on procedural grounds. In the published parts of this opinion, we reject two of his arguments: (1) that the trial court committed reversible error in ordering disclosure to the prosecutor of documents defendant brought with him to the witness stand, over his objection that they were protected by the attorney-client privilege; and (2) that the enhancement for administering a controlled substance for the purpose of committing sexual penetration (Pen. Code,

§ 12022.75) must be vacated because the prosecution introduced no evidence that "Ambien" was a controlled substance.

As for the rest of defendant's claims, we find no reversible trial error, but shall strike two of the misdemeanor convictions, modify the sentence in minor respects, and otherwise affirm the judgment.

FACTUAL BACKGROUND

Prosecution's Case

S. and defendant met when she was 17 years old and he was 30. They dated, moved in together, got married in 1999, and had three children.

During their marriage defendant began to videotape them having sex, which made S. uncomfortable. A couple of times S. discovered that he had been secretly videotaping her. However, when she confronted him with it, he became angry.

In the fall of 2006, S. began to feel the marriage was not working out. In early 2007, she enrolled in some college classes, which made defendant unhappy.

One night in August 2007, an incident occurred where, after S. rebuffed defendant's sexual advances, he pinned her down on the bed so she could not breathe and assaulted her sexually. She fled the house, stayed at a friend's place and eventually moved into her own residence.[1]

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[1] At the time of trial, S. and defendant were still legally married.

Once S. moved into her own house in September 2007, she told defendant he was not allowed inside. From then on, unusual and suspicious events began to occur.

The tires in S.'s minivan kept going flat, despite the efforts of the car shop to reinflate them. In November, roofing nails were found in the center of her tires, and in December, two new tires that she had received for her birthday were found slashed.

Various small items that S. kept in her minivan turned up missing, such as work shirts, CD's (compact discs), a phone charger and various items of personal clothing. Lights inside the van that she was sure she had turned off were turned back on.

Unusual occurrences also began happening around S.'s house. The electrical circuit breaker box was turned off mysteriously. Several articles of clothing were found with slits in them. Decorative pumpkins put outside the house repeatedly disappeared. On Thanksgiving Day 2007, the main water valve to the house was turned off. Single shoes of S.'s were missing and numerous items of personal clothing had disappeared. All of the thefts were reported to the police.

After the pumpkins kept disappearing, S. bought a security camera and installed it outside her home. The camera caught a videotape of defendant near her home at a time when she and the children were away. In December 2007, a PC-based video surveillance system S. had purchased was stolen out of her garage.

A private investigator hired by S. recorded two surveillance videos showing defendant entering her locked minivan and removing items from it, including panties, a purse and several CD's. One night in April 2008, S. heard a loud noise upstairs and discovered that a window had been broken. In June 2008, S. suspected that someone had placed spyware on her cell phone. Police subsequently recovered from defendant's house video footage indicating that he had scrolled through S.'s contacts on her cell phone with a gloved hand.

These events left S. shaken and afraid. On September 12, 2008, she obtained a restraining order against defendant.

On September 18, 2008, police obtained an arrest warrant for defendant and a search warrant for his house and car. When the officer read charges of theft or burglary, defendant responded that any items he took were under the belief they were his property.

In the trunk of defendant's car, police found S.'s CD's that had been reported stolen. Under the floor mat, they found a duplicate key to S.'s minivan.

Inside defendant's house, police found a set of keys to S.'s house before she had the locks changed. They also found numerous items S. had reported stolen from her home, including the single shoes that were taken from S.'s closet and her cell phone charger. During the same search, police discovered a VHS tape showing defendant having sex with S. while she was sleeping or unconscious. Numerous other videotapes taken by a hidden

camera were discovered, some containing footage showing S. in various states of undress, and another showing defendant digitally penetrating her vagina while she was asleep.[2] Officers also found surreptitiously filmed videotapes depicting defendant's next door neighbors engaging in sexual activity.

Defendant's criminal misconduct did not end with his arrest. Defendant used his mother as an intermediary to tell S. that he would agree to whatever child custody arrangement she wanted if she would drop the charges against him. A secretly taped jailhouse conversation indicated defendant and his mother collaborated in trying to avoid a subpoena so that she would not have to testify at trial.

Defendant's former cellmate, Courtney Jones Botta, testified that defendant offered him money to commit acts of petty theft and vandalism against S.'s property. Defendant wanted these acts done while he was in custody, so as to make it appear he was not the perpetrator of the charged crimes.

Defense

Defendant took the stand in his own defense. He testified that he and his wife had a "great sex life." He admitted he used a camera to videotape S. in states of undress and recorded footage of them having sex, but insisted that "90 percent of the time" S. knew about it and did not object.

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[2] A bottle of sleeping pills with the trade name "Ambien" was also recovered. Some of the pills had been crushed into a powder and placed in a paper bindle.

Defendant stated that he started secretly videotaping S. in June 2007 after their relationship became rocky, because she started acting "suspicious" and "paranoid," like she was hiding something from him. He also believed she was spending time with other men and taking some of his things.

Defendant explained the digital penetration video by stating that he had been massaging his wife to see if he could motivate her to have sex, and was shocked to realize that she had fallen asleep. He videotaped the episode to prove to her what a sound sleeper she was. He denied giving her narcotics or sleep medication. He claimed that he took the Ambien himself to help him fall asleep.

Explaining the video that formed the basis of the spousal rape by intoxication charge, defendant claimed that he filmed S. asleep, paused the video to obtain her consent to have sex with him, and then restarted the filming. He insisted his wife was awake during the entire act of intercourse.

Defendant denied ever breaking into S.'s house, stealing items of personal property, or committing acts of vandalism directed at her. He admitted taking things out of her van, but claimed he was exercising his community property rights. He also admitted videotaping his neighbors having sex on several occasions. He claimed that they were having sex in their backyard, and was concerned that his children would see them. The purpose of the taping was to gather evidence for the police.

Jury Verdict and Sentence

The table below summarizes the jury verdict on defendant's felony convictions and the court's sentence on each one.

CT.	FELONY†	TERM	YRS.	MOS.
1	Sexual penetration—foreign object (§ 289(d))	6 years (midterm) plus 5-year enhancement (use of controlled substance (§ 12022.75(b))	11	0
2	Burglary (§ 459)	1/3 midterm—consecutive	1	4
3	Burglary (§ 459)	1/3 midterm—consecutive	1	4
4	Spousal rape (§ 262(a)(3))	1/3 midterm—consecutive	2	0
5	Stalking (§ 646.9(a))	1/3 midterm—consecutive	0	8
6	Burglary (§ 459)	1/3 midterm—consecutive	1	4
7	Attempted burglary (§§ 664/459)	1/3 midterm—consecutive	0	8
8	Burglary (§ 459)	1/3 midterm—consecutive	1	4
29	Attempted stalking (§§ 664/646.9(b))	1/3 midterm—consecutive	0	6
	TOTAL PRISON TERM		**20**	**2**
† NOTE: STATUTORY REFERENCES IN THIS CHART ARE TO THE PENAL CODE.				

The jury also convicted defendant of numerous misdemeanors,[3] each of which garnered a six-month jail term, to be served concurrently with his state prison sentence.

[3] The misdemeanor convictions were: two counts of sexual battery (Pen. Code, § 243.4, subd. (e)(1)—counts 10 & 24), dissuading a witness/victim from prosecuting a crime (*id.*, § 136.1, subd. (b)(2)—count 20), contempt of court/disobeying a court order (*id.*, § 166, subd. (a)(4)—count 22), three counts of petty theft (*id.*, §§ 484, subd. (a), 488—counts 24, 25, 26), eight counts of invading privacy by means of video (*id.*, § 647, subd. (j)(3)—counts 11-18), and peeking (*id.*, § 647, subd. (i)—

DISCUSSION

I. The Motion to Suppress Evidence*

Prior to trial, defendant moved to suppress some of the items seized during the initial search of his home on the ground that the scope of the search exceeded the description in the search warrant. Defendant also asserted that, since the improper search led to a second search warrant for additional items, all the property obtained in executing the second warrant should be suppressed as the fruit of the poisonous tree.

The trial judge denied the motion to suppress. Defendant claims the judge's ruling was erroneous and that the evidence was improperly admitted, requiring the reversal of several of his convictions. We disagree.

A. Factual Background

In conjunction with defendant's arrest, police obtained a search warrant for his vehicle and home (Search Warrant #1). Redding Police Officer Scott Hyatt, who filed the affidavit for this warrant, stated that S. suspected defendant of committing vandalism and stealing numerous items of personal property from her minivan and home. She had surveillance equipment stolen from her garage and suspected defendant was responsible. The affidavit stated that S. had captured defendant on videotape

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count 19). A misdemeanor conviction for inducing false testimony (*id.*, § 166, subd. (a)(1)—count 21) was dismissed on the court's own motion for lack of a factual basis.

* See footnote, *ante*, page 1.

removing several articles of property from her van, and that defendant admitted as much when confronted by officers. The warrant authorized the police to seize "Women's clothing (see attached list), Mary Kay Belara perfume, Women's wedding ring white gold with princess cut diamonds, musical CD's, and a *Wilife pc based security video system* taken from victims [*sic*] residence and vehicle." (Italics added.)

On September 18, 2008, in mid-afternoon, Investigators Matt Stoker, Scott Hyatt and another officer participated in the execution of the warrant at defendant's home. They were looking for the stolen property listed in the warrant. The officers noticed that an active surveillance system had been installed around the home, with cameras running. One camera was inside the home, pointing toward a child's bedroom. There was a computer tower for a desktop personal computer in defendant's living room. In the master bedroom, Stoker noticed a TV-VCR combination. Next to the television were several CD's labeled "S video" and "S pictures." Stoker pushed the "play" button to see if there was a videotape inside the machine.

As soon as Investigator Stoker pushed the "play" button, the television began playing what appeared to be a homemade videotape of a man and woman having sex on a bed. The camera appeared to be hidden and a child was shown passing back and forth in front of the camera. Stoker notified Officer Hyatt of his discovery and the two officers watched the video for about a minute before Hyatt stopped the tape, seized it and sought a new

search warrant. A prescription bottle of Ambien was also found and seized during this search.

On the evening of September 18, Officer Hyatt obtained a second search warrant (Search Warrant #2) based on new information and evidence discovered in the execution of Search Warrant #1. The affidavit recited S.'s reported belief that she had been secretly videotaped inside her home. She also told the officers she had woken up one morning to discover her vagina had been shaved. The warrant also reported the discovery of the homemade sex tape and a bottle of Ambien, "a prescribed sleep aid that can have strong effects on a body." Based on this evidence, Hyatt believed that S. might have had her private parts shaved without her knowledge and been the victim of sexual intercourse while unconscious. Search Warrant #2 thus authorized the search for the following additional items of property: "All computer, video, electronic storage devices and recording media to include CD's, VHS tapes, Audio tapes. Ambien and other medications."

Upon issuance of the second warrant, the officers returned to the home and recovered numerous articles of evidence, including numerous CD's, VHS tapes, photographs, and items stolen from S.

B. Motion and Ruling

Defendant moved to suppress all the items seized in both search warrants based upon the fact that Investigator Stoker had engaged in an illegal search in executing the first search

warrant by pressing the "play" button on the TV-VCR combo in the bedroom. The defense argued that the playing of the videotape was an exploratory search not reasonably encompassed within the scope of Search Warrant #1, which only authorized seizure of personal items, musical CD's, and a *PC-based* surveillance system. Since the affidavit for Search Warrant #2 was based on evidence resulting from the initial search, defendant argued that all of the evidence of that search must be suppressed as well, as the fruit of the poisonous tree.

The trial court denied the motion, ruling that Investigator Stoker had a right to play the TV-VCR in carrying out the search, since he was looking for a video surveillance system and images from that system could very well have been transferred to other media formats, such as VHS tapes.

C. Analysis

It is a constitutional requirement that a warrant "particularly" describe the place to be searched. (U.S. Const., 4th Amend.; Cal. Const., art. I, § 13; cf. Pen. Code, §§ 1525, 1529.) "The description in a search warrant must be sufficiently definite that the officer conducting the search 'can with reasonable effort ascertain and identify the place intended.' [Citation.] Nothing should be left to the discretion of the officer." (*People v. Dumas* (1973) 9 Cal.3d 871, 880.) Officers are not entitled to search beyond the place described in the warrant. (*Id.* at pp. 880-881.)

"We [also will] review the warrant's description of the property to be searched in a commonsense and realistic fashion," recalling that they "'are normally drafted by nonlawyers in the midst and haste of a criminal investigation.'" (*People v. Smith* (1994) 21 Cal.App.4th 942, 948-949.) "'Technical requirements of elaborate specificity . . . have no proper place in this area.'" (*Id.* at p. 949.) "Because the questioned search in this case occurred during execution of a search warrant, defendant had the burden of proving the search was beyond the warrant's scope." (*People v. Reyes* (1990) 223 Cal.App.3d 1218, 1224.)

"Searching officers may seize items specifically named in a valid warrant, as well as other items in plain view, provided the officers are lawfully located in the place from which they view the items and the incriminating character of the items as contraband or evidence of a crime is immediately apparent." (*People v. Kraft* (2000) 23 Cal.4th 978, 1041, citing *Horton v. California* (1990) 496 U.S. 128, 136 [110 L.Ed.2d 112, 122].) "'When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, they may seize them whether they are initially in plain sight or come into plain sight subsequently, as the result of the officers' efforts.'" (*People v. Diaz* (1992) 3 Cal.4th 495, 563.)

The incriminating nature of an object is immediately apparent when the police have probable cause to believe it is contraband or evidence of a crime. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 374-375 [124 L.Ed.2d 334, 346]; *People v. Gallegos* (2002) 96 Cal.App.4th 612, 623.)

Defendant does not dispute that the incriminating nature of the sex video was apparent upon its viewing. The crux of his argument is that Investigator Stoker had no right to view the tape by pressing the "play" button on the TV-VCR, since (1) the tape was inside a closed container, and its contents therefore were not in plain view; (2) the player was located in the master bedroom, far from the location of the computer tower; and (3) there was no evidence that a VHS tape player could be considered a storage medium or component of a "*PC-based* security video system." (Italics added.)

The claim lacks merit. Search warrants must be read in a practical and commonsense manner. (*United States v. Ventresca* (1965) 380 U.S. 102, 108-109 [13 L.Ed.2d 684, 689].) Officer Hyatt's affidavit stated that defendant's estranged wife captured video images of him stealing items of personal property out of her vehicle and suspected him of having stolen video surveillance equipment out of her garage. The officers observed security cameras around the perimeter of defendant's property and one inside the house. A computer tower was observed in the living room. The fact that the computer was not located near the master bedroom is of no moment. In this age of

technological wizardry, computer and video equipment can easily be interconnected through hidden wiring or even with no wiring at all. When the officers came upon the TV-VCR player in the master bedroom, they saw two CD's nearby labeled "S. video" and "S. images."

Given this cluster of evidence, it was reasonable for Investigator Stoker to suspect that video images of S. from the surveillance system had been either captured or transferred onto a VHS tape, for defendant's private viewing. We also note with approval that, as soon as the illicit nature of the sex video became apparent, the officers stopped their search and obtained a new warrant based on additional facts.

Contrary to defendant's argument, the absence of scientific evidence regarding the capability of surveillance camera video footage to be transferred to VHS format did not render the search illegal. Police officers are not required to be computer or technology experts, nor are they compelled to stop and consult one in the middle of executing a search warrant. As long as it was reasonable for Investigator Stoker, given his training and experience, to believe that the TV-VCR unit was a "plausible repository of the contraband which is the object of the search," he had a right to search it. (*People v. McCabe* (1983) 144 Cal.App.3d 827, 830; see also *People v. Berry* (1990) 224 Cal.App.3d 162, 167.) We conclude that it was, and thus reject the claim that the suppression motion should have been granted. [END OF NONPUB. PT. I.]

II. Disclosure of Defendant's Notes

Defendant argues that it was reversible error for the trial court to order him to surrender 18 pages of notes that he brought with him to the witness stand. He asserts that such compelled disclosure was a violation of the attorney-client privilege, and that the prosecutor's use of the notes severely damaged his defense. We do not agree.

A. Factual Background

In the middle of defendant's testimony, the prosecutor asked for a bench conference. Out of the presence of the jury, the trial judge, the Honorable Monica Marlow, stated on the record that defendant had taken certain notes with him to the witness stand and that the prosecutor had asked to review them. Defense counsel's initial reaction was, "That would be fine. I don't know what he's taken with him." Defendant, however, asked, "What if I have a problem with that?" A recess was then taken to allow defendant to consult with his attorney.

At the conclusion of the conference, defense counsel Amy Babbits explained that the notes were communications defendant made with his prior attorney and with her. Judge Marlow asked why defendant had the notes with him on the witness stand, to which Attorney Babbits had no ready reply. The judge then ordered the notes placed in a sealed envelope until an Evidence Code section 402[4] hearing could be held regarding their

[4] Undesignated statutory references are to the Evidence Code.

disclosure. Defendant objected to this turn of events, stating "I would like my notes. I've worked on the notes for eight months." Judge Marlow asked Attorney Babbits whether she explained to her client that if he took the notes to the witness stand the prosecutor would have a right to review them. She responded, "I've told him that. Yes."

Judge Marlow explained to defendant that if he chose to have the notes with him on the witness stand, they would be "discoverable to the prosecution." Defendant replied, "That damages my case." The judge stated that the decision was his, but if he chose to take the notes with him, "you may end up with a court ruling you don't agree with . . . ." Defendant responded that he would testify without the notes.

Subsequently, a section 402 hearing was held on the discoverability of the notes.[5] The prosecution's investigator testified that he saw defendant consulting the notes "at least four times" during his testimony. Defendant admitted that he took the notes to the stand, but claimed that he referred to them only a couple of times, to check on dates.

Attorney Babbits took the position that the documents were privileged attorney-client communications and were therefore protected from disclosure. The prosecutor argued that by taking

[5] The notes hereinafter referred to consist of a six-page document and a 12-page document. Each begins with the salutation "Dear Josh," a reference to defendant's former attorney, Josh Lowery.

the documents with him to the witness stand to refresh his memory, defendant had waived any privilege and subjected them to discovery under section 771.

When his trial testimony resumed, the prosecutor elicited defendant's admission that he had taken the notes with him to the witness stand the previous day. At a resumption of the section 402 hearing, defendant testified that the notes were "letters and summaries to [his] attorney" since November of 2008. He admitted that he reviewed them to refresh his recollection just prior to testifying. Under questioning by Attorney Babbits, defendant stated that the notes were reviewed during conversations between him and his present and former attorneys, that some were prepared at his attorney's request, and that some were written by his attorney.

Judge Marlow then took a recess to view the documents in camera. Afterward, she announced that she was satisfied they contained no attorney work product and thus were not protected by that privilege. Judge Marlow also determined that the documents were "simply a summary of [defendant's] recollection of events," the primary purpose of which was to refresh his memory. The court concluded that, even though the notes might have been protected initially as attorney-client communication, defendant had waived the privilege by bringing them to the witness stand to refresh his memory during his trial testimony. Accordingly, the court ordered disclosure of the notes to the prosecutor.

In a later exchange, Attorney Babbits clarified that she did not object to a one-page summary that defendant concededly looked at while testifying, but did object, on grounds of attorney-client privilege, to disclosure of the six- and 12-page documents he had brought with him to the witness stand. Judge Marlow ruled, however, that under section 771, the prosecutor had a right to review any writing defendant actually used to refresh his memory.

During cross-examination, the prosecutor used the notes to elicit defendant's admission that he lied to his attorney when he wrote that he never saw the video of someone scrolling with S.'s cell phone. With respect to the spousal rape charge, the prosecutor got defendant to admit that the notes failed to mention his current claim that he paused the video to obtain S.'s consent before having intercourse with her.

B. Analysis

Defendant contends that the trial court violated the attorney-client privilege by allowing the prosecutor to see the notes he used while testifying. He asserts that the documents were absolutely privileged as confidential communications and that, notwithstanding section 771, the mere fact that he took them to the witness stand did not constitute a waiver of the privilege.

Section 954 states in relevant part: "Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to

disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . . ." (§ 954, 1st par.) Section 912 states in pertinent part: "[T]he right of any person to claim a privilege provided by Section 954 . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. *Consent to disclosure is manifested by* any statement or *other conduct of the holder of the privilege indicating consent to the disclosure*, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." (§ 912, subd. (a), italics added.)

Section 771 states, with inapplicable exceptions, that "if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, *such writing must be produced at the hearing at the request of an adverse party* and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken." (§ 771, subd. (a), italics added.)

We shall assume for purposes of argument that the two documents in question were confidential communications between defendant and his attorneys and thus presumptively privileged. The decisive question is whether Judge Marlow correctly ruled that defendant's use of these notes to refresh his memory constituted a waiver of that privilege.

Cases addressing the interplay between section 771 and the attorney-client privilege are few. In *Kerns Construction Co. v. Superior Court* (1968) 266 Cal.App.2d 405, the defendant's employee used certain investigation and accident reports to refresh his testimony at a deposition. When the plaintiff's attorney demanded disclosure of the reports, defense counsel objected on grounds of attorney-client privilege. (*Id.* at pp. 408-409.) The Court of Appeal, Fourth Appellate District, Division Two, held that the reports were properly subject to disclosure. "Having no independent memory from which he [the witness] could answer the questions; having had the papers and documents produced by [defendant] Gas Co.'s attorney for the benefit and use of the witness; [and,] having used them to give the testimony he did give, it would be unconscionable to prevent the adverse party from seeing and obtaining copies of them. We conclude there was a waiver of any privilege which may have existed." (*Id.* at p. 410.)

However, in *Sullivan v. Superior Court* (1972) 29 Cal.App.3d 64, (*Sullivan*), a conference between the plaintiff and her attorney regarding the facts of an automobile accident was tape recorded and then transcribed. The plaintiff reviewed the transcript to refresh her memory before giving deposition testimony. After ascertaining that the plaintiff had used it to refresh her memory, defense counsel demanded disclosure of the transcript under section 771. (*Sullivan*, at p. 67.)

The Court of Appeal, First Appellate District, Division Four, held that the privilege was not waived under these circumstances. Although it recognized an apparent conflict between section 771, which requires the production of all writings used to refresh testimony, and section 954, which protects confidential communications between attorney and client (*Sullivan*, *supra*, 29 Cal.App.3d at p. 72), the court, as a matter of statutory interpretation, held that the word "writing" in section 771 was never intended to include a verbatim transcript of a confidential interview between attorney and client with respect to the core issues in the case (*Sullivan*, at p. 73). In light of the "age and sanctity" of the privilege, the *Sullivan* court found it doubtful that the Legislature intended the word "writing" in section 771 to cover such a unique document as a transcript of a confidential attorney-client conversation. (*Sullivan*, at pp. 73-74.)

Much more recently, in *People v. Smith* (2007) 40 Cal.4th 483, the California Supreme Court had no trouble deciding that the mandate of section 771 prevailed over a claim of psychotherapist-patient privilege. There, defense-retained psychologist, Dr. Oliver Glover, administered numerous psychological tests to the defendant and used the results to refresh Dr. Glover's recollection before testifying. The prosecution moved to discover Dr. Glover's notes, raw data and test materials under sections 771 and 721, subdivision (a), criterion (3) (providing that an expert witness may be fully

cross-examined as to "the matter upon which his or her opinion is based and the reasons for his or her opinion"). (*People v. Smith*, *supra*, 40 Cal.4th at pp. 507-508.)

Smith held that the foregoing statutes required production of the materials. Noting that Dr. Glover relied on the documents to refresh his memory and to formulate his opinion, the Supreme Court ruled that the trial court "did not abuse its discretion" in ruling that the prosecution was entitled to disclosure of the doctor's tests and notes. (*People v. Smith*, *supra*, 40 Cal.4th at pp. 508-509.)

Applying the foregoing principles and interpreting the relevant statutes, we uphold the trial court's determination that the attorney-client privilege was waived under the circumstances here.

It is the function of the trial court to resolve any factual dispute upon which a claim of privilege depends (*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1619) and the court's resolution of such factual conflicts will not be disturbed if supported by substantial evidence (*Sierra Vista Hospital v. Superior Court for San Luis Obispo County* (1967) 248 Cal.App.2d 359, 364-365). Moreover, discovery orders are reviewed for abuse of discretion. (*People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1071.)

Unlike the situation in *Sullivan*, the prosecutor was not seeking to discover the contents of a pretrial attorney-client

communication. She merely sought notes that were being employed by a witness during the course of his testimony.

Section 954 declares that the attorney-client privilege may be *waived* by any conduct on the part of the privilege holder manifesting consent to the disclosure. Evidence adduced at the section 402 hearing revealed that defendant's "Dear Josh" letters actually consisted primarily of notes he prepared in computer class during his incarceration. They contained a count-by-count response to the criminal charges. Defendant brought the documents with him to the witness stand, referred to them on several occasions while testifying, and admittedly used them to refresh his memory.

A person "who exposes any significant part of a communication in making his own case waives the privilege with respect to the communication's contents bearing on discovery, as well." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 20-21, fn. 5; see also § 912, subd. (a); *People v. Barnett* (1998) 17 Cal.4th 1044, 1124.) By bringing the notes to the witness stand and using them to refresh his memory, defendant made their contents fair game for examination and inquiry. Such conduct is inconsistent with an intent to preserve them as confidential attorney-client communications.

"The doctrine of waiver of the attorney-client privilege is rooted in notions of fundamental fairness. Its principal purpose is to protect against the unfairness that would result from a privilege holder selectively disclosing privileged

communications to an adversary, revealing those that support the cause while claiming the shelter of the privilege to avoid disclosing those that are less favorable." (*Tennenbaum v. Deloitte & Touche* (9th Cir. 1996) 77 F.3d 337, 340-341, citing 8 Wigmore, Evidence (McNaughton ed. 1961) § 2327, p. 636.)

It would be unjust to allow a party to use written materials on the witness stand to enable him to present his case to the jury and then hide behind a claim of attorney-client privilege when his adversary seeks to review the same materials.[6] The trial court reasonably found that, by using the documents as a memory-refreshing device and visual aid in presenting his testimony, defendant waived any claim of attorney-client privilege. Accordingly, the court properly required their disclosure to the prosecution pursuant to the mandate of section 771. We find no abuse of discretion in the disclosure order.[7]

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[6] Section 771 provides an alternative—striking defendant's testimony—but that apparently was not requested by the parties.

[7] Defendant also claims the trial court's in camera review was itself error, citing *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725. In *Costco*, the Supreme Court noted that section 915, subdivision (a) prohibits information claimed to be protected by the attorney-client privilege from disclosure to a presiding officer. (*Costco*, at p. 736.) Although the statute allows in camera review to enable a trial court to rule on a claim of *work product* privilege, it has no counterpart with respect to the attorney-client privilege. Thus, the trial court erred by conducting an in camera review of the subject attorney-client letter. (*Id.* at pp. 736-737.)

Unlike the situation in *Costco*, Judge Marlow conducted an in camera review for the stated purpose of ascertaining whether any attorney *work product* privilege applied, which is expressly permitted by section 915, subdivision (b). Defense counsel

III. The Sexual Battery Convictions and the Statute of Limitations*

Defendant contends that both of his misdemeanor convictions for sexual battery must be stricken because they are barred on their face by the applicable one-year statute of limitations. The Attorney General concedes the point. We accept the concession.

The first sexual battery count (count 10) was alleged in the consolidated information to have occurred between June 1 and August 30, 2007. The second sexual battery count (count 24) was alleged to have occurred on August 24, 2007. They refer to incidents where defendant shaved his wife's pubic area while she was asleep (count 10) and grabbed her left breast during an altercation on the last night she spent at the family home (count 24).

Misdemeanor battery carries a one-year statute of limitations. (Pen. Code, § 802, subd. (a); *People v. Mejia* (2007) 155 Cal.App.4th 86, 97, fn. 3.) The record shows that S. was aware of the August 24 battery as soon as it happened, and discovered the battery that was the basis of count 10 upon showering the following day. Thus, no tolling provisions applied.

For statute of limitations purposes, a prosecution commences, at the earliest, when a defendant's arrest warrant is

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lodged no objection to the court's procedure. Accordingly, any claim of error has been forfeited.

* See footnote, *ante*, page 1.

issued. (Pen. Code, § 804, subd. (d).) Defendant was arrested on September 18, 2008, more than one year after the alleged batteries occurred. Thus, the record conclusively establishes that both sexual battery convictions were time-barred, and should have been dismissed. (*People v. Price* (2007) 155 Cal.App.4th 987, 998.)

Defendant is not precluded from raising the statute of limitations defense by his failure to raise it in the trial court. The California Supreme Court has held that "the statute of limitations cannot be forfeited by the mere failure to assert it." (*People v. Williams* (1999) 21 Cal.4th 335, 341.) We will therefore order these convictions (counts 10 and 24) stricken.

IV. Separate Convictions for Stalking and Attempted Stalking*

In count 5, defendant was convicted of stalking (Pen. Code, § 646.9, subd. (a)) between October 7, 2007, and September 3, 2008, based on evidence that he continuously harassed S. by stealing items from her van and home and vandalizing property at her home. In count 29, defendant was convicted of attempted stalking (*id.*, §§ 646.9, subd. (b), 664) between November 4, 2008, and December 9, 2008, based upon a jailhouse conversation with his cellmate Jones Botta, in which defendant solicited the latter to commit additional acts of vandalism and petty theft against S.

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* See footnote, *ante*, page 1.

Relying on *People v. Muhammad* (2007) 157 Cal.App.4th 484 (*Muhammad*), defendant contends the attempted stalking conviction must be vacated because the jailhouse solicitation was merely "a continuation of the earlier conduct [defendant] engaged in before being arrested." The claim has no merit.

In *Muhammad*, the defendant Muhammad was convicted of four crimes—stalking, stalking in violation of a court order, stalking with a prior conviction for making terrorist threats, and stalking with a prior conviction for stalking (Pen. Code, § 646.9, subds. (a), (b), (c)(1) & (2))—based on a continuous course of conduct over the course of a year. (*Muhammad*, *supra*, 157 Cal.App.4th at p. 489 & fn. 3.) The appellate court held that subdivisions (b) and (c)(1) and (2) of section 646.9 did not define separate crimes, but were penalty enhancements that provide for additional punishment if a crime is committed under specified circumstances. (*Muhammad*, at pp. 491-494.) Since all of the criminal convictions were based on a single course of misconduct, Muhammad could only be convicted of one stalking offense, not four. (*Id.* at p. 494.)

Defendant's situation is not comparable to Muhammad's. As the Attorney General points out, defendant engaged in two discrete courses of criminal conduct separated by a distinct time lapse. The stalking charge was predicated on a series of acts over the course of a year designed to harass and terrorize S. The attempted stalking conviction was based on evidence that, two months *after* he was arrested and incarcerated,

defendant attempted to hire his cellmate to engage in a similar course of harassment against his wife. The two counts were thus based on two separate and independent acts of criminal misconduct. Under no stretch of the imagination can it be said that the jailhouse solicitation was simply a "continuation" of the stalking that took place prior to defendant's arrest. Defendant was properly convicted of both felonies. [END OF NONPUB. PTS. III.-IV.]

V. The Penal Code Section 12022.75 Enhancement

Defendant was charged and convicted of sexual penetration with a foreign object (Pen. Code, § 289, subd. (d)), with a special finding that he administered a controlled substance in the course of committing this felony (*id.*, § 12022.75, subds. (a), (b)(2)(D)). The enhancement drew a five-year prison term and was proved by evidence that defendant used Ambien to render S. unconscious, enabling him to film and perform the act of digital penetration.

Defendant contends that the enhancement must be stricken because the prosecution introduced no evidence that Ambien was a controlled substance. We do not agree.

Defendant's argument frames a false issue. The question is not whether the prosecution failed to prove an element of the offense (that Ambien was a controlled substance) because the jury instruction given by the trial court *completely removed* that issue from the jury's consideration.

The court instructed the jury as follows: "If you find defendant guilty of the crime charged in count one [digital penetration,] you must then decide whether the People have proved the additional allegation that defendant administered a controlled substance to [S.] during the commission of that crime. [¶] . . . To prove this allegation, the People must prove two things; number one, in the commission of sex penetration with a foreign object when [the] victim [was] unconscious, [defendant] *administered Ambien to* [*S.*] [¶] And, number two, [defendant] did so for the purpose of committing the crime of sex penetration with a foreign object when the victim was unconscious."[8] (Italics added.)

Thus, the instruction conclusively presumed that Ambien was a controlled substance, rather than asking the jury to determine it as a factual issue. Because the instruction completely removed the issue from the jury's consideration, it makes no sense to ask whether that element of the crime was supported by substantial evidence. "'When proof of an element has been completely removed from the jury's determination, there can be no inquiry into what evidence the jury considered to establish that element because the jury was precluded from considering whether the element existed at all.'" (*People v. Flood* (1998) 18 Cal.4th 470, 533 (*Flood*), quoting *United States v.*

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[8] Prior to this instruction, the court twice referred to the special allegation relating to count one as "administering Ambien," not "administering a controlled substance."

Gaudin (9th Cir. 1994) 28 F.3d 943, 951.) Instead, the issue on appeal devolves into one of instructional error.

An instruction that forecloses jury inquiry into an element of the offense and relieves the prosecution from the burden of proving it violates the Fourteenth Amendment. (*Carella v. California* (1989) 491 U.S. 263, 266 [105 L.Ed.2d 218, 222].) Such an instruction does not require automatic reversal, however. An instruction which misdescribes, omits *or presumes* an element of an offense is subject to harmless error review under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711], i.e., whether the error was harmless beyond a reasonable doubt (*Flood*, *supra*, 18 Cal.4th at p. 499). Stated another way, we must ask whether we can say beyond a reasonable doubt that the error did not contribute to the jury's verdict. (*Flood*, *supra*, 18 Cal.4th at p. 504, citing *Yates v. Evatt* (1991) 500 U.S. 391, 402-403 [114 L.Ed.2d 432, 448], overruled on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4 [116 L.Ed.2d 385, 399].)

"One situation in which instructional error removing an element of the crime from the jury's consideration has been deemed harmless is where the defendant concedes or admits that element." (*Flood*, *supra*, 18 Cal.4th at p. 504.)

Here, the jury instruction presuming Ambien was a controlled substance was given without objection and was never the topic of discussion in chambers. At trial, defendant did not dispute that Ambien was a controlled drug. His defense was

that he procured a prescription for Ambien for himself, because he had trouble sleeping. In their summations, both attorneys argued their case as if it were a given fact that Ambien was a controlled substance. The prosecutor argued, "There's an enhancement here. And that's for the *administration of Ambien* to commit the crime." (Italics added.) Defense counsel retorted, "She has no proof that at the time of that video [S.] was *given Ambien*." (Italics added.) The record thus establishes that the trial was conducted by the court and all parties as if Ambien's status as a controlled substance was a *presumed fact*.

There is a sound basis for judicially noticing the truth of the fact presumed in the instruction. Judicial notice is commonly taken of well-known medical and scientific facts. (See 1 Witkin, Cal. Evidence (4th ed. 2000) Judicial Notice, § 33, pp. 128-129 (Witkin) [and cases collected therein].) Although "Ambien" is not listed as a controlled substance in the Health and Safety Code section 11057, subdivision (d) provides that controlled substances include "any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of those salts, isomers, and salts of isomers is possible within the specific chemical designation: [¶] . . . [¶] (32) Zolpidem."

The Physicians' Desk Reference (PDR) states that "Ambien" is the chemical compound "*zolpidem* tartrate." (Ambien,

Physicians' Desk Reference, Prescription Drugs (63d ed. 2009) p. 2692, italics added.)

Judicial notice is a substitute for formal proof of facts. (1 Witkin, *supra*, Judicial Notice, § 1, p. 102.) Section 452 provides that judicial notice may be taken of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (§ 452, subd. (h).) The PDR has been recognized in other jurisdictions as an authoritative source for indisputably accurate information. (See *Commonwealth v. Greco* (Mass. 2010) 76 Mass.App.Ct. 296, 301 [921 N.E.2d 1001, 1006]; *Kollmorgen v. State Bd. of Med. Examrs.* (Minn.Ct.App. 1987) 416 N.W.2d 485, 488; *U.S. v. Dillavou* (S.D.Ohio 2009) 2009 WL 230118; *Wagner v. Roche Labs.* (Ohio 1996) 77 Ohio St.3d 116, 120, fn. 1 [671 N.E.2d 252, 256] ["The PDR is considered an authoritative source for information."].)

An appellate court may take judicial notice of any fact judicially noticeable in the trial court. (Evid. Code, § 459, subd. (a).)[9] Therefore, we take judicial notice, by reference to the PDR, that Ambien contains zolpidem, which is specifically listed as a controlled substance in Health and Safety Code section 11057, subdivision (d)(32).

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[9] In a letter requesting supplemental briefing, we informed the parties that we were considering the propriety of taking judicial notice of the PDR entry for Ambien, and afforded them an opportunity to brief the issue.

"The United States Supreme Court has admonished that, '[h]armless-error analysis addresses . . . what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, *but in practice clearly had no effect on the outcome*.'" (*People v. Harris* (1994) 9 Cal.4th 407, 431, quoting *Rose v. Clark* (1986) 478 U.S. 570, 582, fn. 11, [92 L.Ed.2d 460, 473].)

Our review of the trial record, coupled with undisputed facts of which we take judicial notice, convinces us beyond a reasonable doubt the instructional error here played no part in the jury's true finding on the enhancement of administering a controlled substance. Indeed, to overturn a verdict due to the absence of proof of an undisputedly true and judicially noticeable fact would be an abdication of our constitutional duty to reverse only where the error complained of resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.)

VI. Penal Code Section 654*

Defendant's final contention is that the trial court erred in imposing punishment for two sets of misdemeanor crimes because there was no substantial evidence that the crimes had separate, independent objectives. The Attorney General concedes both points. We take up the claims separately.

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* See footnote, *ante*, page 1.

A. Counts 15 and 19

In count 15, defendant was convicted of invasion of privacy by means of a video camera, in violation of Penal Code section 647, subdivision (j)(3). In count 19, he was convicted of "peeking," in violation of section 647, subdivision (i).

Penal Code section 654, subdivision (a) provides, in relevant part, that "[a]n 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." Section 654 precludes multiple punishments for a single act or indivisible course of conduct. (E.g., *People v. Coleman* (1989) 48 Cal.3d 112, 162.) "'The proscription against double punishment in section 654 is applicable where there is a course of conduct which . . . comprises an indivisible transaction punishable under more than one statute . . . .'" (*Coleman*, at p. 162; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Penal Code section 647, subdivision (j), which forms the basis for count 15, makes it a misdemeanor for any "person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in . . . the interior of any . . . area in which that other person has a reasonable

expectation of privacy, with the intent to invade the privacy of that other person." (Pen. Code, § 647, subd. (j)(3)(A).)

Count 19 (also referred to as "peeking") was based on Penal Code section 647, subdivision (i), which prohibits "loitering, prowling, or wandering upon the private property of another [who] peeks in the door or window of any inhabited building or structure, without visible or lawful business with the owner or occupant."

Defendant was charged with violating both statutes on the same day, February 9, 2008. In her closing argument, the prosecutor asserted that, by trespassing onto the property of his neighbors, defendant violated both statutes. Indeed, she contended that the only way defendant could have videotaped his neighbors in compromising positions was for him to go into their backyard and hold the camera up to the window. The conclusion is inescapable that defendant was convicted of violating two statutes through a single, indivisible act of misconduct.

B. Counts 20 and 22

In count 20, defendant was convicted of dissuading a witness on September 19, 2008; in count 22, he was convicted of violating a restraining order on the same day.

The evidence showed and the prosecutor argued that both statutes were violated when, the day after his arrest, defendant contacted his mother and requested that she persuade S. to drop the case against him. In fact, the prosecutor told the jury that count 22 was based upon the "same conduct" as count 20.

Manifestly, defendant was convicted of two crimes based on the commission of a single criminal act. He may be punished for only one of these misdemeanors.

The proper remedy for the Penal Code section 654 violations is to stay the punishment on the duplicative convictions. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1125-1127.) We shall so order. [END OF NONPUB. PT. VI.]

DISPOSITION

The misdemeanor convictions for sexual battery (counts 10 & 24) are stricken. The sentence is modified by staying the punishment for counts 19 (peeking) and count 22 (violating a restraining order), such stays to become permanent upon completion of the jail terms for counts 15 and 22, respectively.

The trial court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed. **(*CERTIFIED FOR PARTIAL PUBLICATION*.)**

BUTZ, J.

We concur:

ROBIE, Acting P. J.

MAURO, J.