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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOSE ALBERTO MIRALRIO, Defendant and Appellant.	C056930 (Super. Ct. No. 06F06740)

APPEAL from a judgment of the Superior Court of Sacramento County, Maryanne G. Gilliard, J. Affirmed as modified.

Law Office of Mark L. Christiansen and Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Michael P. Farrell, Assistant Attorneys General, Julie A. Hokans and Judy Kaida, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts III, IV and V of the DISCUSSION.

Defendant Jose Alberto Miralrio appeals following his conviction on six counts of sex offenses with minors (Pen. Code,[1] §§ 261, 269, 288) with enhanced sentencing due to multiple victims (§ 667.61, subd. (e)(5)[2]) and one count of battery (§ 242). Defendant contends the trial court (1) improperly allowed the prosecution to amend the information during trial, (2) misadvised him of the sentencing consequences of going to trial, (3) improperly handled a request for new trial and new counsel, and (4) improperly imposed a fine (§ 243.4). Defendant also contends there is an inadequate appellate record regarding jury instructions, and the jurors' set of written instructions improperly included headings. In the published portion of the opinion, we shall reject defendant's first two contentions. In the unpublished portion, we strike the section 243.4 fine but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

An original information charged defendant with nine counts of sex offenses against three victims and contained at the end of the pleading an allegation of section 667.61, subdivision

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[1] Undesignated statutory references are to the Penal Code.

[2] Section 667.61 provides in part that, "any person who is convicted of an offense specified in subdivision (c) [including the offenses charged against defendant] under one of the circumstances specified in subdivision (e) [including offense against more than one victim] shall be punished by imprisonment in the state prison for 15 years to life." (§ 667.61, subd. (b).)

(e)(5), enhancement for multiple victims, applicable "as to Counts One through Nine."

A first amended information, filed just before trial, deleted one count, leaving eight counts, and moved the section 667.61 allegation to the first page of the pleading under Count One, with no indication it applied to all counts.

After all evidence was adduced at trial and before closing arguments, the trial court allowed the prosecution to file a second amended information to correct the "clerical error" and reinstate the multiple victims allegation as to *all* counts.[3]

The second amended information charged defendant as follows:

Count One -- Committing a lewd and lascivious act with the requisite intent on June 17 and 18, 2006, putting his hand on the buttocks of victim I., a child under the age of 14 years, in violation of section 288, subdivision (a).

Count Two -- Rape of victim B., a child under age 14 and more than 10 years younger than defendant, between November 7, 1997, and November 6, 1998 (§§ 261, subd. (a)(2) [rape by means of force, violence, duress, menace, or fear of bodily injury], 269, subdivision (a)(1) [aggravated sexual assault of child]).

Count Three -- Lewd and lascivious act (defendant put his fingers in B.'s vagina) by use of force, violence, duress,

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[3] We refer to this pleading by its label of *second* amended information, even though defendant observes the court previously allowed an amendment by interlineation regarding a date in the first amended information.

menace, and threat of great bodily harm, between November 7, 1997, and November 6, 1998 (§ 288, subd. (b)(1)).

Count Four -- Rape of B. between August 7, 1998, and November 6, 2000 (§§ 261, subd. (a)(2), 269, subd. (a)(1)).

Count Five -- Lewd and lascivious act (finger in victim's vagina) on B., by use of force, etc., between November 7, 1998, and November 6, 2001 (§ 288, subd. (b)(1)).

Count Six -- Lewd and lascivious act (defendant's hand to victim's breast) on victim A., a child under the age of 14, between June 14, 2002, and June 13, 2003 (§ 288, subd. (a)).

Count Seven -- Lewd and lascivious act (defendant's finger to victim's vagina) on A. (§ 288, subd. (a)).

Count Eight -- Lewd and lascivious act (finger to vagina) on A., between June 14, 2002, and June 13, 2003 (§ 288, subd. (a)).

Evidence adduced at trial included the following:

Defendant was born in 1976. All three victims are his half-sisters who lived with defendant's father at the time.

Evidence Re I. (Count One)

I. testified (regarding an uncharged incident) that one summer night in 2005, when she was 12, she awoke during an overnight stay at defendant's house to find her pajama pants pulled down and defendant in the room. Defendant tried to hide. I. never stayed there again because she did not "trust the house."

One night around Father's Day in 2006, I., then age 13, was awakened when someone entered her room. I. opened her cell

phone for light and recognized defendant. He told her to be quiet and grabbed her buttocks (Count One). She first testified she did not remember whether he rubbed her buttocks, then testified he did rub in circles. I. tried to leave. Defendant grabbed her shoulders from behind. She broke away and ran to A.'s room. After phoning B. at a friend's house, they told their father, who telephoned the police.

Evidence Re B. (Counts Two, Three, Four, and Five)

B. testified that, when she was around 11 years old, she awakened in her bedroom to find defendant (then age 21 or 22) touching her breasts with his hands. She told him to stop and tried to push him away. He told her to be quiet. He touched her vagina through her clothing, reached inside her underwear, and inserted his fingers into her vagina (Count Three). He took off her clothing. He inserted his penis in her vagina a couple of times (Count Two). He told her not to say anything and left.

When B. was 12, she was staying overnight at defendant's house, when defendant entered the room B. was sharing with defendant's daughter. He grabbed B.'s leg and tried to flip her onto her back. She pushed him off, but he grabbed her leg again, flipped her over, and pulled off her clothes. He told her to be quiet. He spit into his hand and rubbed the spit on his penis. She tried to hold her legs closed, but he forced them apart and inserted his penis in her vagina more than once (Count Four). He left when his daughter started to wake up. B. was too scared to tell anyone at the time (though she confided

in a friend years later, months before the matter was reported to law enforcement, after B. learned defendant touched A.).[4]

Another day, when B. was home alone, defendant entered the house and, over the victim's resistance, threw her on the bed, touched her vagina through her clothes, moved his hand underneath her clothes and inserted his fingers in her vagina (Count Five).

B. testified she told her sister-in-law N. that she (B.) did not want to press charges because defendant is her brother, and she does not want her nieces to have to live without their father. B. denied saying she was pressing charges "to prove a point" to her father.

Evidence Re A. (Counts Six, Seven, and Eight)

A. testified that, one summer night when she was 11 years old, she was sleeping in the bedroom of defendant's daughter. Defendant came into the room and inserted his fingers in her vagina (Count Seven). At trial, A. said defendant did not do anything else. A. said she did not remember telling a sheriff's investigator that defendant first put his hands on her breasts and stomach (Count Six), or that defendant left the room and then came back and inserted his finger in her vagina a second time (Count Eight). If she did say that to an investigator, it was untrue.

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[4] Defendant mentions the statute of limitations in a footnote in his statement of facts. We need not address undeveloped points inadequately briefed. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

A sheriff's investigator testified A. told him defendant put his hands on her breasts and stomach, put his fingers in her vagina, left the room, came back, and put his fingers in her vagina a second time.

Taped Interview of Defendant

A sheriff's investigator testified he conducted a videotaped interview with defendant on August 29, 2006, during which defendant admitted contact with private parts of the three victims, including sexual intercourse with B. (which he viewed as consensual). A DVD with excerpts of the videotaped interview, as well as a written transcript, were admitted into evidence.

The Defense

Defendant did not testify but presented as witnesses his father (who is also the father of the victims), brother and sister-in-law, all of whom questioned the victims' veracity. G., who is the father of defendant and the victims, testified he brought the girls (who live with him rather than their mother) to the sheriff's office to give statements at the direction of a detective. The girls were nervous. The father did not speak with them about the case "because it makes them feel bad." The father testified he did not believe two of his daughters -- B. and A. He thinks they exaggerated a lot of things out of anger. He testified that B. (who by then had turned 18 and no longer lived with her father) was "angriest," and he did not know why. He admitted he went to the district attorney's office and asked for the charges to be dropped. The father asked that the

investigators “really be strong” with his daughters “to get the truth out.” The father testified he loves all his children. The father tried to interject that B. was raped by other persons at age 16 and got pregnant, but the trial court sustained objections and instructed the jury to disregard the comment about pregnancy.

J. testified he is full-brother to the victims and half-brother to defendant. J. testified A. and I. told him defendant never touched them. J. and his father went to the district attorney’s office to try to get the charges dropped.

N. testified she is “married in association by J[.]” She is really close with the victims and has seen defendant (her brother-in-law) only three or four times. The previous September, B. was crying and, when pressed, said defendant had “done things to her” when she was seven or eight years old. B. said her father did not believe her, and she was at odds with him about it. N. inferred B. wanted to press charges to prove to her father that she could live her own life. N. said A. stated B. was telling her she had to speak about it. N. got the impression B. was putting pressure on A. According to N., A. said defendant’s acts involved “just touching,” but she was being told things supposedly happened to her that she did not believe happened. A. did not want her brother to go to jail for “stupid things” and just wanted the whole thing to go away. N. said I. said defendant was drunk one night and fell onto the bed and touched her stomach but left when she got up and used her cell phone light to see who it was. N. said she, J., and the

father went to try to get the charges dropped at the request of the victims. N. testified she told the detective B.'s "stories kept changing . . . ." N. testified B. spent a lot of time at defendant's house when B. turned 16 and started to drive and smoke marijuana. The trial court interjected, "Okay. You know what? You know that's inappropriate, don't you?" Nichole said no. The court said, "Well, that was non-responsive. I strike that from the record." N. testified she told the detective that B. had been pressuring A. and I. into pressing charges, and "that's from what the girls have told me." However, N. earlier testified "[I.] never actually told me that she was being pressured . . . ." N. insisted she is not taking sides.

The jury found defendant not guilty on Count Eight (second alleged incident of finger to vagina re A.), guilty of a lesser offense of battery (§ 242) on Count Five (finger in vagina with force, re B.), and guilty on all other counts.

The trial court sentenced defendant to prison for a total term of 90 years to life (six consecutive indeterminate terms of 15 years to life on Counts One, Two, Three, Four, Six, and Seven, pursuant to section 667.61). On the Count Five battery, the court sentenced defendant to a concurrent misdemeanor jail term of six months.

DISCUSSION

I. Amendment

Defendant claims the trial court denied him due process and abused its discretion by allowing the prosecution to file a second amended information during trial to attach to each count

the multiple victim allegation (§ 667.61, subd. (e)(5), also known as "the one-strike law"), whereas the first amended information charged the multiple victim allegation as to Count One only. We find no grounds for reversal.

A. Background

We set forth the background in detail because it gives rise not only to defendant's contention about leave to amend, but also his contention (which we discuss *post*) that he was misadvised about his potential sentence when he rejected the prosecution's plea offer.

At the end of the original information appeared the allegation that "as to Counts One through Nine, that [defendant] committed the above described offense(s) against two or more victims, within the meaning of Penal Code Section 667.61(e)(5)." The parties appear to agree this subjected defendant to consecutive terms of 15-years-to-life on each count.

The first amended information (which deleted one count) moved part of the quoted sentence to the beginning of the pleading, following Count One, with no mention of application to all counts. On its face, this pleading subjected defendant to only one term of 15-years-to-life under section 667.61 (though defendant notes on appeal the two rape charges subjected him to two terms of 15-years-to-life under section 269, subdivision (b)).

The record shows the following exchange when the case was called for trial:

"THE COURT: All right. My understanding is, Ms. Steber [prosecutor], you're willing to advance the offer of 30 years to life today and up until jury selection would commence on Tuesday?

"[Prosecutor]: That's correct, Your Honor.

"THE COURT: And what is [defendant's] full exposure in this case?

"[Prosecutor]: I believe he's looking at a total of 60 to life, plus another 3/6/[or]8, so another 8; 60 to life plus 8.[5]

"THE COURT: All right. And you're willing to keep that offer open until we commence with jury selection on Tuesday [July 24, 2007]?

"[Prosecutor]: That's correct, Your Honor."

At the close of proceedings on July 23, before jury selection, the following exchange occurred:

"THE COURT: . . . Mr. Roth [defense counsel], I just want to confirm about you obviously you [*sic*] conveyed the offer to your client of 30 years to life.

"[Defense counsel]: I did, Your Honor, and he's not inclined to accept that.

"THE COURT: You're not going to accept that, Mr. Miralrio [defendant]?

"THE DEFENDANT: No."

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5 This was wrong, even going by the face of the pleading in effect at the time, the first amended information. Defendant says that pleading would have yielded a possible sentence of 85 years.

After the presentation of all evidence but before closing arguments, the defense objected to the proposed verdict form because it asked the jury to find the multiple victim allegation as to each count. The prosecutor asked the court for leave to file a *second* amended information to correct a "clerical error" which resulted in omission from the *first* amended information of an allegation in the *original* information that *all* counts were subject to enhanced sentence for multiple victims under section 667.61. The first amended information alleged section 667.61 as to Count One only.

Defendant opposed the motion to amend.

Discussion of the matter between court and counsel included reference to a plea offer, as follows:

"[Prosecutor]: The People have proceeded throughout this trial with the understanding -- and we've had multiple discussions about how this was a multiple life case, multiple terms of life. And that was understood from the very beginning of this case. [¶] The People have alleged the multiple victim enhancement for three victims, and that's been the understanding through the case.

"THE COURT: It's my recollection that when this case was assigned to this department, that the People made an offer to [defendant] on the record, and that offer contemplated the multiple victim enhancement because you indicated at the time, [prosecutor], that the Defendant was facing a maximum of how many years to life?

"[Prosecutor]: I don't remember what I said, but we were talking about multiple life terms. Multiple, not one. And that was the understanding. And we've proceeded that way throughout this trial. Not one life term, multiple life terms. And that was the offer from the beginning was multiple life terms.

"THE COURT: In fact, [defendant] declined the offer that was presented before jury selection commenced of 30 years to life.

"[Prosecutor]: I do remember the Court asking the People if the People would offer one life count, and the People did not offer one life count. We offered multiple -- our offer was two life counts, and that was a pretrial offer. And the understanding was there was multiple at the time nine life counts, now eight life counts.

"[THE COURT:] If the intent [of] the People at the time [was] that it was sufficient he face one life term [an interpretation of the first amended information urged by defense counsel], I think that is dispelled by what the offer was pretrial or, well, pre-jury selection in this case."

Defense counsel argued defendant could have been subjected to multiple life terms even if the prosecution alleged only one section 667.61 enhancement. Defense counsel said that, "to the best of my recollection," there were three possible life sentences. This apparently referred to the fact that the rape counts subjected him to two 15-year-to-life terms under section 269.

After an overnight recess, the trial court allowed the amendment, stating, "it appears there was a clerical error attached to Count One, but that in any event defense has always been on notice with respect to that allegation. And the Court further reflected upon the discussions that were held prior to the selection of the jury. [¶] The Court's of the belief that we all understood that that enhancement attached to each count as a multiple victim enhancement, not[]withstanding what I think was a very good argument put forward by [defense counsel] [¶] . . . . [¶] [I]n addition, I do not believe that [defense counsel], you would have defended your client any differently even if the Court were to agree that that allegation only attached to Count One. I think the defense would have been the same. [¶] I think, from the perspective of this case, that has always been the count that was the least egregious as far as if the jury believed the statements and testimony of the named victims in this case, that count was always the less egregious . . . . [¶] For all of those reasons, I'm going to permit the district attorney to amend her information, which will now be a second amended information, to reflect what I believe ultimately was a clerical error, but in any event does not substantially prejudice [defendant] in any regard."

After trial, at sentencing the prosecutor urged the court to adopt the probation officer's recommendation of a sentence of 90 years to life. Defense counsel acknowledged he had received a copy of the probation report and had adequate opportunity to review it with defendant. The defense never expressed surprise

at the 90-year figure, nor did they claim the earlier misadvisement caused defendant to reject the plea offer.

B. Analysis

Section 1009 provides a trial court may allow amendment of an information "at any stage of the proceedings," and the trial shall continue unless the defendant's substantial rights would be prejudiced, in which event the court may grant a postponement. We review the trial court's decision for abuse of discretion. (*People v. Bolden* (1996) 44 Cal.App.4th 707, 716.)

The trial court allowed the second amendment based on the court's conclusions (1) there was clerical error in the first amendment, which omitted the original information's allegation that the multiple victim enhancement applied to each count; and (2) defendant would not be prejudiced because all parties always understood that the prosecution was seeking the section 667.61 enhancement on all counts and the defense would have been the same.

Defendant argues he was prejudiced as demonstrated by defense counsel's argument that he focused on Count One because of its attached enhancement allegation. Defendant says there is not the slightest suggestion the judge did not believe defense counsel. However, this argument ignores the trial court's findings that "we all understood that that enhancement attached to each count," and "I do not believe that [defense counsel] would have defended your client any differently . . . ."

Defendant argues there is no basis for the trial court's belief. However, there is a basis, in that the trial court had its own recollections.

As noted by defendant, there is a basis upon which the trial court might have reached a different decision. Thus, when the prosecution's plea offer of 30 years to life was put on the record before jury selection, the court asked what was defendant's "full exposure in this case," to which the prosecutor answered, "I believe he's looking at a total of 60 to life . . . plus 8." This was a mistake, as both sides agree on appeal, but nevertheless was closer to the facial allegations of the first amended information (with only one section 667.61 allegation) than to the original information. Additionally, defense counsel, in opposing the posttrial amendment, argued (somewhat inartfully) in the trial court that the pretrial offer of 30 years to life did not necessarily translate to two counts *enhanced by section 667.61* because the first amended information charged defendant with one section 667.61 allegation plus two other "life counts," by which defense counsel presumably meant (as more clearly expressed in his appellate brief) the two counts of aggravated sexual assault (rape) of a child, for which section 269, subdivision (b), would impose a sentence of 15 years to life.

That there might be a basis for the trial court to reach a different conclusion does not render the court's decision an abuse of discretion. The trial court expressly considered and rejected defendant's argument that the first amended information

was not clerical error but rather a deliberate decision by the prosecutor that this case was only worth one section 667.61 enhancement.

Defendant claims the trial court's reasoning conflicts with *People v. Mancebo* (2002) 27 Cal.4th 735, which he cites for the proposition that a section 667.61 enhancement must be specifically alleged (as stated in section 667.61, subdivision (j) ["penalties provided in this section shall apply only if the existence of any circumstance specified in subdivision (d) or (e) is alleged in the accusatory pleading pursuant to this section, and is either admitted by the defendant in open court or found to be true by the trier of fact"]), and adequate awareness of the charges is necessary for defense counsel to advise his client effectively during plea bargaining. (*Mancebo, supra*, 27 Cal.4th at pp. 744-745 [where firearm use was pleaded as a basis for section 667.61 enhancement, but multiple-victims circumstance was not, trial court erred in substituting multiple-victims circumstance as basis for section 667.61 enhancement and using firearm as basis for enhancement under a different statute].) Defendant also cites our statement in *People v. Smart* (2006) 145 Cal.App.4th 1216, that it is not too much to ask that a prosecutor clearly specify in the accusatory pleading a defendant's potential punishment under a statutory enhancement. (*Id*. at p. 1225.)

However, the enhancements were *never* alleged in *Mancebo* or *Smart*, neither of which involved an amendment which merely corrected a clerical error in a prior amendment to restore

allegations of the original pleading. (*Mancebo, supra*, 27 Cal.4th at p. 740 [multiple victim enhancement was never alleged].)

We conclude defendant fails to show grounds for reversal regarding amendment of the information.

II. Misadvisement Re Consequences of Going to Trial

Defendant contends reversal is required because, before he rejected the prosecutor's pretrial plea offer of 30 years to life, the trial court and the prosecutor misadvised him that his potential maximum sentence if he went to trial was 60 years to life (plus an eight year enhancement), when in fact it was 120 years to life.[6] We shall conclude the misadvisement does not require reversal because defendant has not shown it is reasonably probable he would have accepted the plea offer had he been advised correctly.

The People do not dispute that the trial court and prosecutor misadvised defendant regarding his potential maximum sentence if he went to trial.

Relying on *People v. Goodwillie* (2007) 147 Cal.App.4th 695 (*Goodwillie*), defendant contends the misadvisement constituted federal due process error compelling reversal because the People fail to show absence of prejudice beyond a reasonable doubt

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[6] The People say the potential maximum sentence was 135 years to life, apparently referring to the original information containing nine counts. However, the first amended information, filed a few days before defendant stated on the record his rejection of the plea offer, contained only eight counts.

under *Chapman v. California* (1967) 386 U.S. 18 at page 24 [17 L.Ed.2d 705].[7] The People respond the initial burden is on defendant to show he relied on the misinformation in rejecting the plea offer.

We reject defendant's reliance on *Goodwillie*.

Goodwillie found a Fourteenth Amendment due process violation where a pro per defendant expressed on the record a willingness to plead guilty if he would receive full credit for good behavior. The defendant rejected the prosecution's plea offer because the trial court and the prosecution misadvised him that he could not receive full credit. (*Goodwillie, supra,* at pp. 731-732.) After the defendant was convicted by a jury, the trial court realized defendant was in fact eligible for full credit. (*Id*. at p. 732.) The appellate court vacated the judgment and remanded with directions to allow the district attorney to submit the previous offer to the court or set the case for retrial (with or without a resumption of plea negotiations). (*Id*. at p. 738.)

Goodwillie said, "In cases involving plea bargains that the defendant has *accepted* [italics added], reversal is generally required only if the court fails to inform the defendant of information that makes the plea bargain less attractive than it appeared to be without the omitted information. [Citations.]

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[7] Defendant specifies he makes no claim of ineffective assistance of counsel in this appeal because it would require a petition for writ of habeas corpus.

Extending that concept to the reverse situation where, as here, a defendant rejects the plea bargain and is subsequently convicted, reversal may be required if the omitted information makes the bargain more favorable to the defendant than it appeared to be without the information." (*Goodwillie, supra,* 147 Cal.App.4th at p. 734, italics omitted.)

Goodwillie, supra, 147 Cal.App.4th at page 734, observed *In re Alvernaz* (1992) 2 Cal.4th 924 held a criminal defendant is deprived of effective assistance of counsel if he or she rejects a plea bargain *because of* misadvice from defense counsel. *Goodwillie* observed the misinformation at issue was by the court and prosecutor, not by defense counsel (since the defendant represented himself), but "[b]y misinforming [the defendant] as to the consequences of the proffered plea bargain, the court and the prosecutor caused him to reject an offer that was more favorable to him than the result after trial, and one that he had indicated a willingness to accept." (*Id*. at p. 735.) *Goodwillie* distinguished the case before it, which involved affirmative misinformation by the court, from cases where the court simply failed to inform a defendant of a collateral consequence of a plea. (*Id*. at p. 735, fn. 27.)

Goodwillie said, "[T]he court and the prosecutor, as officers of the court, have a duty not to misstate the law, whether intentionally or not. [Fn. omitted.]" (*Goodwillie, supra,* at pp. 734-735.) "The trial court and the prosecutor's misunderstanding brought the plea bargaining process to a halt, and thus prevented Goodwillie from obtaining a plea offer more

favorable to him than the sentence he received after trial. This violates notions of fundamental fairness assured by the due process clause of the Fourteenth Amendment. [Citation.]" (*Ibid*.)

Goodwillie continued, "Because we have concluded that the trial court's error violated Goodwillie's right to due process, the standard for assessing the prejudice to Goodwillie is that stated in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]. (See, e.g., *People v. Scheller* (2006) 136 Cal.App.4th 1143, 1152 [error implicating due process requires 'federal "beyond a reasonable doubt" standard' of *Chapman*].) *Chapman* provides that federal constitutional error requires reversal unless the People can prove that the error was harmless beyond a reasonable doubt. [Citation.] The People have not made such a showing. In fact, the evidence establishes that Goodwillie was prejudiced[,]" because of the evidence he would have accepted the plea offer. (*Goodwillie, supra*, 147 Cal.App.4th at p. 736.)

As defendant interprets *Goodwillie*, all defendant has to do is show he was misadvised, which automatically constitutes a due process violation requiring reversal unless the People prove the error harmless beyond a reasonable doubt. However, the defendant's evidence in *Goodwillie* showed not only that the defendant was misadvised, but also that the misadvisement caused him to reject the plea offer.

We shall assume for the sake of argument *Goodwillie* is correct in finding a due process violation from a misadvisement as to penal consequences.

We respectfully disagree with *Goodwillie, supra,* 147 Cal.App.4th 695, however, to the extent it holds the burden is *on the People* to prove the error harmless beyond a reasonable doubt. (*Id*. at p. 736.) The burden of showing that defendant would have accepted the plea bargain, had he been correctly advised of penal consequences, is properly placed on defendant, for the following reasons:

First, "[a]nyone who seeks on appeal to predicate a reversal of conviction on error must show that it was prejudicial. (Cal. Const., art. VI, § 13.)" (*People v. Archerd* (1970) 3 Cal.3d 615, 643 [defendant bore burden of showing prejudice from pre-indictment delay in prosecution, so as to require reversal on due process grounds].) Defendant fails to show this is the type of case where prejudice is presumed. Generally, "[a] person seeking to overturn a conviction on due process grounds bears a heavy burden to show the procedures used at trial were not simply violations of some rule, but are fundamentally unfair. [Citation.]" (*People v. Esayian* (2003) 112 Cal.App.4th 1031, 1042 [issue was forfeited and no evidence demonstrated that admission of blood test results, taken in violation of statute, violated due process], citing *Montana v. Egelhoff* (1996) 518 U.S. 37, 43-44 [135 L.Ed.2d 361] [statute prohibiting voluntary intoxication from being taken into consideration in determining existence of criminal mental state

did not violate due process].) It has been consistently held that where a defendant seeks to withdraw a guilty plea due to misadvisement by the court regarding consequences of the plea, the "defendant (even on direct appeal) is entitled to relief based upon a trial court's misadvisement only if the defendant establishes that he or she was prejudiced by the misadvisement, i.e., that the defendant would not have entered the plea of guilty had the trial court given a proper advisement." (*In re Moser* (1993) 6 Cal.4th 342, 347, 352-353 [remanded to allow defendant to present evidence that he was prejudiced by trial court's misadvisement regarding parole term, where prosecution failed to challenge absence of evidence before trial court allowed defendant to withdraw guilty plea]; accord, *People v. McClellan* (1993) 6 Cal.4th 367, 374-378 [trial court's failure to advise about sex offender registration was harmless error because defendant did not object at sentencing and failed to meet his burden to show prejudice].) *People v. Zaidi* (2007) 147 Cal.App.4th 1470, allowed a defendant to withdraw a guilty plea due to misadvisement by the court regarding the lifetime nature of sex offender registration, because the defendant showed prejudice in his prompt effort to withdraw his plea, accompanied by his specific declaration that he would not have entered a plea had he known of the lifetime registration requirement. (*Id*. at p. 1490.) We see no reason to apply a different rule where misadvisement allegedly causes a defendant to reject a plea bargain in the first place.

Second, it makes sense to require the defendant to show prejudice, because the defendant is the only one who knows whether he would have accepted the plea bargain absent the misadvisement. *Goodwillie* thus assigns the People an impossible burden insofar as it requires the People to show absence of prejudice.

Third, when a defendant claims misadvisement *by defense counsel* and seeks reversal due to ineffective assistance of counsel, the defendant has the burden to show he or she would have made a different decision had defense counsel advised properly. (*In re Alvernaz, supra*, 2 Cal.4th 924, 936-937 [to establish a claim of ineffective assistance of counsel in the context of a defendant's rejection of a proffered plea bargain, the defendant must show not only deficient performance by counsel, but also prejudice, i.e., a reasonable probability that defendant would have accepted the plea offer but for counsel's deficient performance, and that the trial court would have approved the plea bargain]; see also cases seeking to withdraw guilty pleas, e.g., *Hill v. Lockhart* (1985) 474 U.S. 52, 58-59 [88 L.Ed.2d 203, 209-210] [defendant who pleaded guilty was required to show that, but for counsel's deficient performance, he would have rejected the plea offer and insisted on going to trial]; *In re Resendiz* (2001) 25 Cal.4th 230, 239, 253-254 [defendant failed to show he would have rejected plea bargain had trial counsel not misadvised him].) It would be anomalous to place the burden on the defendant in ineffective-counsel cases but on the People in other cases of misadvisement.

Finally, in this case, unlike *Goodwillie*, nothing in the record on appeal suggests defendant would have accepted the 30-year proffered deal if he had been correctly advised of penal consequences. (*Resendiz, supra*, 25 Cal.4th at p. 253 [in determining whether defendant would have accepted or rejected plea offer, pertinent factors include disparity between proposed plea bargain and probable consequences of going to trial (as viewed at the time of the offer), and whether the defendant indicated he or she was amenable to negotiating plea bargain].)

At sentencing, the defense made no objection and showed no surprise at the 90-year sentence, nor did the defense claim the earlier misadvisement caused defendant to reject the plea offer.

Defendant asks us to draw from the record an inference that he would have accepted the plea bargain. He argues 68 years is "a world away" from 120 years, and the former would leave him a reasonable hope of release at age 82 (with nine years credit), whereas the latter would be in effect a life sentence without any real possibility of parole. We question defendant's math, because he was 31 years old at the time, and therefore would be age 99 at the end of 68 years, and age 90 if we deduct nine years' credit. In any event, even if we accept defendant's calculation, it could just as well be that a person of defendant's age (31) would not consider the possibility of parole at age 82 as a ray of hope. Such a person might consider 68 years as a life sentence, such that 120 years would have made no difference.

Defendant refers to the jury's verdict acquitting him of one count and finding him guilty of a lesser offense on another count, which lowered the sentence. However, the issue here was the potential maximum sentence at the time defendant rejected the pretrial plea offer (*Resendiz, supra*, 25 Cal.4th at p. 253), not the actual sentence he ended up with after trial. We recognize a defendant's plea decision may be based in part on the defendant's belief that his culpability is less than the prosecution thinks. Nevertheless, the ultimate verdict does not serve as evidence that defendant would have accepted the plea offer but for the misadvisement.

Defendant says the record suggests he might have been amenable to a plea bargain with a prison sentence, because he knew he was guilty of something, as reflected in his admissions to the sheriff's investigator and defense counsel's admission of two counts of molestation in closing argument to the jury (though defense counsel argued they were committed without force). However, these circumstances are insufficient to show defendant would have accepted the plea offer had he been properly advised about the potential sentence.

Thus, even assuming the trial court would have accepted the plea bargain, we conclude defendant fails to show the misadvisement prejudiced him so as to entitle him to reversal of the judgment. (*In re Alvernaz, supra,* 2 Cal.4th at p. 945.)

III. Jury Instructions

A. Claim of Absence from the Record

Defendant contends that the absence of jury instructions from the record, and the absence of any proper waiver by defense counsel, require reversal. The contention is not meritorious.

First, the jury instructions are not absent from the record. They appear on pages 251 through 291 of the Clerk's Transcript, with a cover sheet signed by the trial judge stating "JURY INSTRUCTIONS GIVEN." A deputy court clerk certified the clerk's transcript as true and correct. (California Rules of Court, Rule 8.336(c)(5)[8] [clerk must certify as correct the original and all copies of the clerk's transcript]; see Gov. Code, § 1194 [unless otherwise specified, a deputy possesses the powers and may perform the duties attached by law to the office of his or her principal].)

Defendant claims the set of written instructions in the clerk's transcript is not good enough. He claims "we are uncertain about precisely what the jurors viewed . . . ." He claims we need the actual pieces of paper that went into the jury room. None of his cited authority supports this proposition. Nor does defendant give us any reason to think the set that went into the jury room differed from the court's set. (Evid. Code, § 664 [presumption that official duty is regularly performed].) That the jurors during deliberations asked a

[8] Undesignated rule references are to the California Rules of Court.

question to which the trial court responded by citing specific numbered instructions does not, as defendant claims, demonstrate the jurors failed to cull through their set of written instructions, nor does it show any defect in the record. Defendant cites *People v. Murillo* (1996) 47 Cal.App.4th 1104, where a trial court failed to read to the jurors one of the instructions, though it was (and was intended to be) included in the written set given to the jurors. The appellate court said that, because it was not possible to determine if the jurors actually read their written copy, the court would assume they did not, and would approach the appeal as though the instruction was not given at all. (*Id*. at pp. 1107-1108 [error was harmless because omitted instruction set out commonsense principle for evaluating witness credibility].) Here, defendant fails to show the trial court omitted any instruction during its reading of instructions to the jurors (and we reject, *post*, his contention that the stipulated absence of a transcript of the reading of the instructions renders the appellate record inadequate).

We reject defendant's suggestion that the set in the clerk's transcript cannot be the exact set that went into the jury room because the set in the clerk's transcript included "Final Instruction on Discharge of Jury."

Defendant observes we granted his request to augment the record with various items (rule 8.340), including his request for "[a] copy of the written instructions set actually given to the jurors or a declaration that the set in the Clerk's Transcript is a set actually given to and viewed by the jurors."

The trial court responded, "After a thorough search of the court file, the following documents could not be located. [¶] A copy of the written instructions set actually given to jurors (*other than the one already provided in CT, pages 251 to 291*) . . . ." (Italics added.)

Our granting of a request to augment the record with specific items does not mean the items are necessarily absent from the record, nor does it mean the items are essential to the appeal. We often entertain augmentation requests before cases are assigned to chambers, in reliance on the moving party's assertion that the item is absent from the record. That the trial court, in response to the augmentation order, did not supply the declaration defendant wanted attesting the copy in the jury room was identical to the copy in the clerk's transcript, does not help defendant. That assurance was already provided in the judge's signature on the cover sheet of "JURY INSTRUCTIONS GIVEN," the deputy clerk's certification of the record as true and correct, and the presumption that official duty is regularly performed.

Defendant suggests written instructions may suffice only if the record shows the jury read them, and here the jury only received one copy, not six copies as was the case in *People v. Osband* (1996) 13 Cal.4th 622 at pages 687 through 688. However, *Osband*, a death penalty case, did not say or even suggest that other courts in other cases must give more than one copy to the jurors, or that an appellate record must affirmatively show the jurors read the instruction. *People v. Murillo, supra,* 47

Cal.App.4th 1104, which is also cited by defendant did say that, because it was not possible to determine if the jurors actually read their written copy of a specific instruction, the appellate court would assume they did not. There, however, the record affirmatively showed the trial court inadvertently failed to read that one instruction and declined to call the jurors back because the court did not want to call undue attention to that one instruction, which was then simply included in the written set given to the jury. Here, the record does not show any error in the reading of the instructions.

We conclude defendant fails to show an inadequate record of the written jury instructions.

Defendant also contends reversal is compelled by the absence of a transcription of the trial court's oral reading of the instructions to the jury. Again, the contention is frivolous. The reporter's transcript shows:

"(Upon stipulation by counsel, the court reporter was not required to transcribe the jury instructions.)

"(Jury Instructions read by the Judge to the Jury)

"THE COURT: Counsel, are you satisfied with the Court's reading of the jury instructions?

"[Prosecutor]: Yes, your Honor.

"[Defense counsel]: Yes, your Honor."

People v. Garrison (1989) 47 Cal.3d 746, "reject[ed] [a] defendant's contention that the failure to report the reading of the instructions denied him due process. The parties stipulated that the court reporter might be excused from reporting the

reading of the jury instructions. In light of counsel's stipulation and defendant's failure to suggest that there was any deviation in the reading from the typed copies contained in the record, [there was] no violation of due process." (*Id*. at pp. 780-781.)

Defendant asked this court for augmentation of the record with a reporter's transcript of any oral stipulation that the court reporter need not transcribe the court's reading of the instructions (which as indicated already appeared in the reporter's transcript) and a "copy of any written stipulation that there need be not [*sic*] record of the oral instructions." The trial court responded that no written stipulation was located.

Defendant claims the law requires that the court reporter transcribe the oral instructions, and counsel cannot competently waive that requirement except in writing and with a personal waiver from the client. None of defendant's cited authorities comes anywhere close to supporting his position.

Thus, he cites rule 8.320, a rule governing appeals, not trials, which states:

"(a) Contents

"If the defendant appeals from a judgment of conviction, or if the People appeal from an order granting a new trial, the record must contain a clerk's transcript and a reporter's transcript, which together constitute the normal record.

"[¶] . . . [¶]

"(c) Reporter's transcript

"The reporter's transcript must contain:

"[¶] . . . [¶]

"(4) All instructions given orally;

"[¶] . . . [¶]

"(f) If counsel for the defendant and the People stipulate in writing before the record is certified that any part of the record is not required for proper determination of the appeal, that part must not be prepared or sent to the reviewing court." (Rule 8.320(c), (f).)

We reject defendant's contention that this rule mandates a *written* stipulation during trial to relieve the court reporter from having to transcribe the reading of the instructions.

This rule has nothing to do with what happens during trial in the trial court; it speaks only about a stipulation *after* an appeal has been filed.

Defendant cites no apposite authority. He cites cases holding a trial court's misreading of instructions may be harmless when the written instructions are correct. (*People v. Osband, supra*, 13 Cal.4th at pp. 686-688; *People v. Crittenden* (1994) 9 Cal.4th 83, 138.) He says we cannot know whether there was error because we cannot review the reading of the instructions. What defendant does *not* show is that the stipulated absence of transcription of the reading is reversible error.

Defendant cites *People v. Hersey* (1879) 53 Cal. 574, as supposedly holding that written instructions are required. However, *Hersey* interpreted a statute requiring that

instructions be in writing or recorded by a phonographic reporter (see now, § 1127, which provides that all instructions shall be in writing, unless a phonographic reporter takes them down, in which case they may be given orally). In *Hersey*, the trial court responded to jury questions by giving them oral instructions, in the absence of a phonographic reporter, "without the consent of the defendant," and then stated his "recollection" when the court reporter returned. (*Hersey, supra,* at pp. 574-575.) Here, the record does contain the written instructions, and thus there is no violation of section 1127. Moreover, defendant here did consent, through his counsel, to forego a transcription of the reading of the instructions.

Criminal defense counsel can waive all but a few fundamental rights for a defendant. (*People v. Bradford* (2007) 154 Cal.App.4th 1390, 1418-1421.) The narrow exception includes such matters as whether to plead guilty or waive trial by jury, the right to counsel, or the privilege against self-incrimination. (*Id*. at p. 1410 [even assuming defense counsel had authority to bind client, trial judge exceeded scope of any purported waiver by having private, unreported discussions with jurors during deliberations].)

Defendant cites no authority rendering defense counsel's stipulation ineffective in the circumstances of this case. Defendant's cited cases involved other circumstances or are otherwise inapposite. (E.g., *People v. Stanworth* (1969) 71 Cal.2d 820, 834 [a defendant who is sentenced to death cannot

elect to forego an appeal]; *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1659 [defendant's waiver of appeal rights as part of plea bargain must be knowing and voluntary].)

We have reviewed defendant's other citations, but none of them help him here. (E.g., *Halbert v. Michigan* (2005) 545 U.S. 605, 610 [162 L.Ed.2d 552] [held indigent defendant was entitled to appointed counsel on appeal; noted authority that when state conditions appeal on provision of trial transcript, state must furnish free transcript to indigent defendants]; *Chessman v. Teets* (1957) 354 U.S. 156, 162 [1 L.Ed.2d 1253] [ex parte settlement of record violated procedural due process, where court reporter died and transcript was completed by a relative of the prosecutor, and record was settled in proceedings without defendant or his counsel]; § 1259 [appellate court may review any instruction given, even though defendant did not object in trial court, if defendant's substantial rights were affected thereby]; *People v. Wickersham* (1982) 32 Cal.3d 307, 331-332 [trial court's affirmative duty to instruct on general principles of law is not nullified by defense counsel waiver unless counsel expresses a deliberate tactical purpose]; *In re Steven B*. (1979) 25 Cal.3d 1, 9 [juvenile was entitled to new hearing due to inadvertent destruction of court reporter's notes after appeal was filed]; *People v. Vann* (1974) 12 Cal.3d 220, 225-227 [reversible error in trial court's failure to instruct that defendants were presumed innocent and that prosecution had burden of proving guilt beyond a reasonable doubt, and points were not adequately covered in other instructions]; *People v.*

Cervantes (2007) 150 Cal.App.4th 1117, 1121 [where court reporter was unable to provide transcript of one witness's testimony due to technical malfunction, settled statement was inadequate because it was prepared by prosecutor and approved by trial judge, who had no independent recollection, in absence of defense counsel]; *People v. Flores* (2007) 147 Cal.App.4th 199 [instruction on reasonable doubt during voir dire did not cure error in court's failure to instruct on reasonable doubt orally or in writing after trial]; *In re Christina P.* (1985) 175 Cal.App.3d 115, 129-130 [failure of appointed trial counsel to request and secure presence of court reporter in civil case terminating parental rights constituted ineffective assistance of counsel]; *People v. Apalatequi* (1978) 82 Cal.App.3d 970, 974 [applied § 1181, subd. (9), authorizing appellate court to order new trial when the right to a phonographic report has not been waived and a transcript is impossible due to loss or destruction of the notes or death of the reporter]; *In re Andrew M.* (1977) 74 Cal.App.3d 295, 300 [court reporter failed to record closing arguments as required by Welfare and Institutions Code; no indication parties consented to forego transcript]; *People v. Gloria* (1975) 47 Cal.App.3d 1, 5-7 [court reporter failed to take down instructions as orally delivered; no indication parties consented].) Similarly unavailing is defendant's citation to cases for "general rules" on ineffective assistance of counsel.

We conclude defendant fails to show an inadequate record concerning jury instructions.

B. Headings of Jury Instructions

Defendant contends the headings of the written instructions were improper for the jurors to consider, because they were misleading or constituted improper pinpoint instructions favoring the prosecution. We shall entertain this contention despite defendant's failure to object in the trial court.

Defendant complains CALCRIM 207 bore the "misleading" heading, "**Proof Need Not Show Actual Date**." Defendant admits, however, that the instruction itself correctly noted the charges were alleged to have occurred "on or about and between" specified dates, and correctly instructed, "The People are not required to prove that the crime took place exactly on that day but only that it happened reasonably close to that day." Defendant says the text of the instruction "corrected" the "misleading" heading. We disagree. The heading and the text say the same thing, and the heading was not misleading.

To the extent defendant suggests the heading constituted an improper pinpoint instruction, we disagree. A pinpoint instruction is one that relates particular facts to the legal issue in the case or pinpoints the crux of the defendant's case. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119-1120.) In a proper pinpoint instruction, what is pinpointed is not specific evidence as such, but the theory of the defendant's case. (*People v. Wright* (1988) 45 Cal.3d 1126, 1137.) An improper pinpoint instruction is one which improperly implies certain conclusions from specified evidence. (*Ibid*.) We accept for purposes of this appeal defendant's contention that these rules

apply to instructions favoring the prosecution. Nevertheless, a heading which does nothing more than summarize the text of an instruction does not constitute a pinpoint instruction, and defendant cites no authority that it does.

Defendant next complains of the heading of CALCRIM 1190 -- "**Other Evidence Not Required to Support Testimony in Sex Offense Case**." The text of the instruction said, "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone." Defendant argues this was redundant of the non-argumentatively-headed CALCRIM 301 (Single Witness's Testimony), except CALCRIM 1190 failed to reiterate CALCRIM 301's qualification that "[b]efore you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." Defendant acknowledges it was proper for the trial court to give both instructions under *People v. Gammage* (1992) 2 Cal.4th 693 at page 702. Defendant suggests there is no longer a need to tell jurors that a victim's testimony alone may suffice for a sexual assault conviction. Defendant's view does not provide grounds for reversal. That CALCRIM 1190 does not repeat the caution to review all evidence carefully is inconsequential, since the jury was instructed to consider all the instructions together. We reject defendant's unwarranted speculation that the jurors might have simply skimmed the headings instead of reading the instructions.

Defendant also complains of the heading of CALCRIM 3181: "**Sex Offenses: Sentencing Factors[]Multiple Victims**", because jurors are not supposed to consider punishment. The text

stated, “If you find the defendant guilty of two or more sex offenses, as charged in Counts 1 through 8, you must then decide whether the People have proved the additional allegation that those crimes were committed against more than one victim. [¶] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.”

We assume for the sake of argument that the words “Sentencing Factors” should have been deleted because a jury should not consider penalty or punishment in arriving at its decision of guilt or innocence. (*People v. Moore* (1968) 257 Cal.App.2d 740, 750.) Nevertheless, reversal is not warranted, because we see no reasonable likelihood that the jury applied the instruction in a way that violates defendant’s constitutional rights. (*People v. Raley* (1992) 2 Cal.4th 870, 901.) Even without the words “Sentencing Factors,” the jury knew there was a separate allegation of multiple victims. Any reasonable juror would realize the separate allegation might impact sentencing, just as any reasonable juror would assume a defendant found guilty of any criminal offense is subject to some form of punishment. Here, the heading did not specify the potential penalty and gave the jury nothing to consider regarding penalty/punishment other than the obvious consequence that sentencing follows guilt.

Defendant argues that, in light of the level of emotion involved in cases involving sex crimes against children, the heading invited the jury to find defendant guilty as to two or

more victims in order to insure heavy sanctions on one victim truly found beyond a reasonable doubt. We disagree.

We conclude defendant fails to show any defect in the appellate record or in the instructions warranting reversal of the judgment.

IV. Motion for New Trial

Defendant argues reversal is compelled by the trial court's "FAILURE TO INQUIRE, FAILURE TO SET A MOTION FOR NEW TRIAL, AND FAILURE TO APPOINT INDEPENDENT COUNSEL . . . ." The contentions lack merit.

A. Background

At the sentencing hearing, before the court pronounced sentence, defense counsel said defendant's father (G.), who is also the father of the victims, wanted to address the court through a Spanish interpreter. The record shows:

"[Father]: I am 54 years old. I have never been involved in any kind of problem or any situation. Ever since this case has started I have noted that things are not correct and that the appropriate steps have not been taken.

"The prior attorney, the prior attorney, she knew that when [defendant] was being questioned, the people that were questioning him, um, the investigators, she knew that he had been given drugs.

"The prior attorney knew. 'She' knew. This attorney [presumably referring to defense counsel, Mr. Roth] also knew, and the [female] district attorney also knew, and they didn't say anything about it. I took my daughters to go and speak to

her, and then I took them so that she could question them again so that she could do the investigation all of them [*sic*]. And then every time she would say, oh, no, not right now. Oh, no, not right now. Oh, no, not right now. Three times that happened.

"And I have spoken to my daughters and asked them if they have mentioned because the -- this daughter, [B.], I have known her for 20 years, and I know she is lying. She is lying about this. My two younger daughters know this that she was lying, that she was exaggerating. That [B.] was exaggerating and lying. My two younger ones know this.

"When this attorney questioned me, she would also twist things around so that the things wouldn't come out that about that [*sic*] [defendant] had been given drugs or that my girls wanted to change their versions of this facts [*sic*].

"The attorney sent an investigator to have further investigation with my daughters to ask them questions. That was two days before we were supposed to start here. Then after that he only interviewed I. at school. [A. and B.] didn't say anything further.

"This woman -- this woman pushed [A., B., and I.] to say that what they had said previously. They have no proof that [B.] had been abused by him. They have no proof that A. had been abused by him. They have no proof with the police. I think this case that is going on is not just. It is not just.

"And the last thing I will say you are the professionals. I ask you please to be aware and to be conscious and aware of

all of your mistakes and search them out now. Not wait 'til tomorrow when it is too late.

"And finally, [A.] and [defendant] have been involved in drugs -- oh, no. [B. and defendant] have been involved in drugs for a long time, and money was owed. She owed money. So I think this might have been some kind of vengeance, something like that. I found out about this about [*sic*] [B.] from other people. I have the names.

"I found out unfortunately too late when this case had already been going on, but I can give the names of the people that told me about this. One of them is N[., sister-in-law to defendant and B.]. She knows about the way [B.] was living, the lifestyle that she was drinking [*sic*]. It wasn't that she was prostituting herself, but she would go out with the boyfriends and that stuff. So she knows about that lifestyle.

"And the last thing I would like to say to all the personnel here, there is a God that does know everything that happened. I ask you please to investigate everything that should be investigated before you give a verdict that I know is incorrect and shouldn't be done with all the -- to do the investigation with all the people that know my family.

"Thank you. And I hope everything goes well for you.

"THE COURT: Mr. Roth [defense counsel].

"[Defense counsel]: Well, based on the -- his information his recent information, it may actually amount to, um, information which may lead to motion for a new trial. As such,

at least on behalf of [defendant], I make a motion for a new trial and ask different counsel be appointed.

"THE COURT: Based on what, Mr. Roth?

"[Defense counsel]: Why different counsel?

"THE COURT: Yeah. Based on what?

"[Defense counsel]: Based on the ineffective assistance, and I'm just dealing with the facts I heard . . . from the witness.

"THE COURT: I am too, and I will tell you on the record for the Appellate Court and all to hear there was nothing ineffective about your representation of [defendant]. Nothing.

"[Defense counsel]: Then I'm prepared to proceed [with sentencing]."

After hearing from counsel regarding sentencing, the trial court said:

"THE COURT: The Defendant is not eligible for probation in this case. And I must say that hearing [G., the father of defendant and the victims], I do want to make the following comments.

"First, I find Mr. Roth [defense counsel] to have done his job above and beyond and more than adequately. He represented [defendant] very well in these proceedings. He was aggressive. He was knowledgeable about the case and the case law. There's nothing that [defense counsel] did in his representation of [defendant] that would warrant anything other than a thank you from the family.

"As to the District Attorney's Office in this case, I heard nothing, absolutely nothing in this case that would lead me to believe that they have been anything other than looking out for the best interest of the victims, which [their father] has failed to do evidently for such an extended period of time that the girls had to seek outside family, immediate family, in order to get some kind of help with respect to what was going on in their lives.

"They clearly were not comfortable speaking with their father. And in light of [his] comments to this Court, I can certainly understand why. He has absolutely no ability to understand the dynamics of this family. He has no ability to understand that the Defendant in this case is a predatory pedophile who preyed upon young girls, raped them.

"In the case of [B.], who is obvious to this Court during the course of her testimony [*sic*], has been scarred for life. The Defendant may be going away for life, but [B.] is going to serve a life of pain knowing that her father does not believe her. And that's why we have independent citizens in this community that sit in judgment.

"They don't know the family. They don't know the dynamics. And they certainly don't understand why this occurred. With that being said, they believed each and every victim that testified in this case -- [defendant's] three half sisters.

"They believed that he raped them, that he molested them, and he took advantage of them. And it's clear that he had all the love and support of [the father] throughout the course of

these proceedings. It's a shame that the girls didn't have that same support."

B. Analysis

Defendant says the gist of his father's complaint was that there was inadequate investigation to reveal, until too late, that B. had been involved in drugs and owed defendant money, and that defendant was under the influence of drugs when he spoke to the police. Defendant argues the trial court erred in failing to conduct a hearing on the new trial motion and a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118). Defendant complains the trial judge improperly gave her own evaluation of defense counsel's competence, because she only knew what she saw in the courtroom, whereas the issue involved matters occurring outside the courtroom, i.e., an alleged failure to investigate adequately. We shall conclude there is no basis for reversal.

"'When, after trial, a defendant asks the trial court to appoint new counsel to prepare and present a motion for new trial on the ground of ineffective assistance of counsel, the court must conduct a hearing to explore the reasons underlying the request. [Citations.] If the claim of inadequacy relates to courtroom events that the trial court observed, the court will generally be able to resolve the new trial motion without appointing new counsel for the defendant. [Citation.] If, on the other hand, the defendant's claim of inadequacy relates to matters that occurred outside the courtroom, and the defendant makes a "colorable claim" of inadequacy of counsel, then the trial court may, in its discretion, appoint new counsel to

assist the defendant in moving for a new trial.' [Citations.]" (*People v. Smith* (1993) 6 Cal.4th 684, 692-693.) Substitute counsel should be appointed "only when[] necessary under the *Marsden* standard, that is whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel . . . [i.e.,] if the record shows that the first appointed attorney is not providing adequate representation [or the defendant and attorney have become embroiled in irreconcilable conflict]." (*Id*. at p. 696.)

"The assumption has been that courts would decide such claims in the context of a motion for new trial when the court's own observation of the trial would supply a basis for the court to act expeditiously on the motion." (*People v. Cornwell* (2005) 37 Cal.4th 50, 98-102 [trial court acted within its discretion in concluding the claim should be litigated in a habeas corpus proceeding].)

Here, *defendant* had no complaint about his lawyer. It was defendant's *dad* who complained. Although the request for new counsel came from defendant's attorney, who was defendant's voice in the courtroom, the attorney made clear when questioned by the trial court that his sole reason for seeking new counsel was the statement of defendant's *father* (not any dissatisfaction expressed by defendant). Thus, the trial court did "explore the reasons underlying the request." Defendant cites no authority requiring a trial court to inquire of defendant or conduct a

Marsden inquiry when an adult defendant's *father* complains about defense counsel.

As for motions for new trial generally, defendant cites *People v. Braxton* (2004) 34 Cal.4th 798, which reversed and remanded for a trial court to conduct a hearing on a verbal motion for new trial made at the sentencing hearing. *Braxton* said, "[S]ection 1202 [fn. omitted] contains this sentence: 'If the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion before pronouncing judgment or the making of an order granting probation, then the defendant shall be entitled to a new trial.' . . . (1) When a trial court has refused or neglected to hear a defendant's new trial motion, a separate motion citing section 1202 is not required (and thus the futility exception does not come into play), but a defendant may forfeit a claim to the section 1202 remedy by acquiescing in the trial court's failure to hear the new trial motion. (2) A reviewing court may order a new trial under section 1202 only if the trial court's failure to hear the defendant's new trial motion has resulted in a miscarriage of justice (Cal. Const., art. VI, § 13). (3) A reviewing court may, in appropriate circumstances, prevent a miscarriage of justice by remanding the matter to the trial court for a belated hearing and ruling on the defendant's new trial motion." (*Braxton, supra*, 34 Cal.4th at p. 805.)

Even assuming defendant did not forfeit section 1202, there is no ground for reversal, because there was no real motion for new trial. Defense counsel said, "based on [the father's

statement], it may actually amount to, um, information which *may lead to* [a] motion for a new trial. As such, at least on behalf of [defendant], I make a motion for a new trial and ask different counsel be appointed." (Italics added.) Thus, the record shows there was nothing for the trial court to hear at that time.

Nor was there any reason to continue the matter. The father's claims of new evidence did not show any potential for new evidence. Thus, the record shows B.'s drug activity had already been discussed and excluded by the court. Thus, N. tried to inject testimony about B. smoking marijuana. The trial court interjected, "Okay. You know what? You know that's inappropriate, don't you?" N. said no. The court said, "Well, that was non-responsive. I strike that from the record." This indicates the trial court excluded evidence of B.'s drug use (presumably during one of the discussions held off the record).

As to the father's assertion that defendant was drugged when the detective interviewed him in August 2006 (a year before trial), this would obviously not be new information to defendant, who would be the person in the best position to make such an accusation. Yet defendant never made any such accusation. Moreover, the interview was videotaped (with excerpts played for the court and jury) and therefore would have provided prior evidence if defendant's speech or demeanor suggested any impairment, which apparently was not the case.

The suggestion that B. was making false accusations because she owed defendant money was mere speculation by defendant's

father, who was clearly biased in favor of his son despite also being the father of the victims. In any event, the jury already heard plenty of testimony from defendant's father, brother, and sister-in-law, that B. had personal reasons for lying. Adding one more reason (a tenuous one at best) would not have made any difference, particularly since defendant in the videotaped interview admitted sexual contact.

Thus, the father's statement did not suggest any new evidence that might warrant a new trial or even a continuance.

Defendant says the trial judge's criticism of the father was unsupported. While we disagree with defendant, it does not matter because he does not show any grounds for reversal.

We conclude there was no error in the trial court's handling of the matters of new trial and request for new counsel.

V. Section 243.4 Fine

Defendant contends the trial court improperly imposed a $600 fine under section 243.4 (sexual battery), over an (ambiguous) objection, even though defendant was convicted of the lesser offense of misdemeanor battery (§ 242). The People concede the error but ask that we remand for the trial court to determine whether to impose a fine under section 242, which authorizes a fine up to $2,000. In the interest of conserving judicial resources, we decline the People's request.

DISPOSITION

The trial court shall prepare an amended abstract of judgment striking the $600 fine imposed under Penal Code section

243.4 and shall transmit a certified copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

SIMS, Acting P.J.

We concur:

DAVIS, J.

RAYE, J.