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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RUSSELL MECANO, Defendant and Appellant.	B233401 (Los Angeles County Super. Ct. No. BA331929)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed.

Law Offices of William J. Kopeny and William J. Kopeny for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer, Joseph P. Lee and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts II, III, IV and V of the Discussion.

INTRODUCTION

A jury found defendant and appellant Russell Mecano, a police officer, guilty of solicitation of prostitution, sexual battery by restraint, sexual penetration by force or duress, and sexual penetration under threat by a public official. In the published portion of this opinion, we consider and reject Mecano's contention that because he never explicitly requested sex for money, there was insufficient evidence to support his conviction of solicitation of prostitution. We find that Mecano's words, coupled with his overt acts, constituted sufficient evidence of the crime. In the unpublished portion of this opinion, we reject his remaining challenges to his conviction. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *Prosecution case.*

1. Taylor P.

On October 20, 2007, Taylor P. was 18 or 19 years old and homeless, living on the streets of Santa Monica with her boyfriend, Eric A. That night, Taylor slapped a woman who approached Eric. Los Angeles Police Department (L.A.P.D.) Officers Mecano and James Matthews arrived. Mecano told Taylor she was in a lot of trouble, but he could help her out. Unsure what to think about what Mecano said, Taylor thought he was flirting with her and wanted to have sex.

Along with their bikes, Taylor and Eric were taken to the West Los Angeles (West L.A.) police station. While Taylor was alone in a holding cell, Mecano told her she would be charged with battery, but he could get her out of a bad situation and get her "O.R'd" (released on her own recognizance). He told Taylor, however, she would owe him.

Officer Matthews and Mecano transported Taylor to Pacific Division Station for booking. After Taylor was booked, she was alone with Mecano in the patrol car, although Officer Matthews, who was doing paperwork, would come and go. Mecano asked Taylor, in a "flirting kind of way," where she lived and how he could find her. She told him she lived behind the wall on one side of Meth Mountain in Santa Monica.

Mecano said that Taylor's boyfriend wasn't good enough for her, and she should be treated better. Mecano would take her out, "wine and dine" her, and treat her right. Not wanting to ruin her chances of being released, Taylor went along with him.

Although Eric remained detained based on warrants, Taylor was released on her own recognizance. Back at the West L.A. station, Mecano ordered a cab for Taylor at about 1:30 a.m. and he gave her $200 in crisp $20's, saying he would be "fucking pissed" if she "burn[ed]" him for the money. He told her to go to a nearby Holiday Inn, to give his name to someone at the front desk, to get a room, and to take a shower and to wait for him. He would come after his shift to see her. Although Mecano didn't say why he was coming to the motel, Taylor thought it was to have sex with her.

When the taxi arrived, Taylor told the driver to take her to the beach. The cab driver, Narbey Savadian, testified that Taylor was upset. She told him that the "policeman" gave her money and she was supposed to go to the Holiday Inn. She was afraid of the policeman, who she thought was following them. Savadian assured her they weren't being followed. After having Savadian take her to Pacific Coast Highway, Taylor hid from a person with a flashlight, thinking it was Mecano looking for her.

Mecano called the taxicab company four times in the early morning to ask for Taylor's final destination. He was told that the driver would call him. When the driver did not call him, Mecano called the taxicab company again and said he needed an "exact address where she's gonna end up staying." The next day, someone identifying himself as a policeman called Savadian and asked if he had dropped off the girl where he was supposed to. Savadian told the caller he'd taken Taylor to Pacific Coast Highway.

Taylor told two officers what happened to her. Homeless Liaison Police Officer Jacob Holloway testified that Taylor told him an Asian sergeant[1] released her and gave her $200 to go to a hotel, where she should take a shower. This "sergeant" warned Taylor not to burn him. Officer Holloway told Taylor to report the incident.

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[1] Mecano is Filipino.

Sergeant Joy Smith testified that, on March 16, 2008, Taylor told her that Mecano said he could get her "O.R'd," but she would "owe" him.[2] He gave her $200 in $20 bills and ordered a cab for her, telling her to go to the Holiday Inn up the street. He would meet her there when his shift was over at 6:00 a.m. Mecano told her she was good looking and he wanted to be with her. After being dropped off at the beach, she saw Mecano with a flashlight. Taylor knew it was him because he was "Asian looking," and she knew his voice.

2. Alexandria H.

On the evening of May 28, 2008, Alexandria H. (Alex), then 18, was at Pacific Palisades Park with Jacob Colman (Colman), Ben W., Audrey L., and Anna F. Audrey, Anna, and Ben were minors. Some members of the group were smoking marijuana. When Officer Mathews and Mecano arrived, Colman was arrested.

Needing a female officer to search the minor girls, Mecano called for additional officers. Officers Alan Parra and Georgina Villalobos arrived, and Villalobos searched Audrey and Anna. Villalobos handed a purse to Mecano, who walked away with it. According to Officer Parra, Mecano threw marijuana he found in the purse into a trash can. Officers Parra and Villalobos left, taking the two minor girls with them. At some point, Ben left with his mother.

Mecano asked Alex what was going on, and she told him she had a marijuana pipe and marijuana. Mecano found the pipe in her purse, but he left it there. She gave him her driver's license, which had a restriction. Mecano told Alex she was responsible for the minors' actions and that her car could be impounded.

Mecano repeatedly asked what Alex would do if he let her go. When Alex answered she was just telling the truth, Mecano blatantly asked if she would hook up with him if he let her go. Terrified, Alex said yes, maybe. He asked if she had money to meet him at a hotel when he got off his shift at 6:00 a.m., and he mentioned several places they

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[2] The sergeant recorded her conversation with Taylor.

could meet, including the Holiday Inn. Although Alex indicated she would go along with Mecano, she never intended to meet him.

Saying he wanted to know if she was "for real," Mecano walked Alex towards a building, adding that he could "tell the good ones from the bad ones."[3] With Alex's back against a wall, Mecano kissed her. He put his hands up her shirt and touched her breast. He unzipped her pants and put two fingers into her vagina. To stop him, Alex put her hands on his chest, saying they could do this later. Mecano told Alex he would keep her driver's license until she met him at the hotel. She wrote her cell phone number on a white card for him, and he gave her his phone number, which she wrote on her hand. Without having been given any citation, Alex left.

Crying, she called Ben and told him that she'd let Mecano do things to her, and she felt dirty. Alex called 411 and told a Pasadena police officer that she just had an "incident" with a police officer, "Rusty," in which he let her "off," and "bribed me with sex." She told the Pasadena officer, "[h]e wants to meet me at a hotel room at 6:00 in the morning." Alex also called her mother and told her what happened. While talking to her mother, someone tried to call her, but she didn't answer it because she thought it was Mecano. She answered it once and it was Mecano, who had left her a voicemail message.[4] She told him she was on her way home. When Alex got home, her mother was on the phone with the police department. Alex told the watch commander that an officer named Rusty or Russ assaulted her. Several hours later, detectives arrived at her house and she told them what happened.

That same night, swabs were taken from Alex for DNA testing. Swabs were also taken from Mecano's hands. A DNA profile was obtained from his right hand, and Alex could not be excluded as a minor contributor to the mixture. The probability of randomly selecting a Caucasian who fit that profile was 1 in 8,842. Swabs from Mecano's police

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[3] Colman, who was handcuffed in the back of the police car, saw Mecano walk with Alex to a trash can until they passed out of view. They were gone for about 10 minutes.

[4] Phone records showed that Mecano called Alex a total of four times between 12:30 and 1:00 a.m.

car contained a mixture of at least three, most likely four, people. Alex and Mecano could not be excluded as potential contributors to the mixture. In the Caucasian population, the probability of randomly selecting an individual and being able to include them in the mixture was 1 in 1,328.

B. *Defense case.*

Anna testified that she was at the park that night to hang out and smoke. Although she did not go to the park to sell marijuana and did not recall anyone discussing buying or selling marijuana that night, she and Audrey had, in the past, pooled money to buy drugs. She saw Mecano walk away with Audrey.

Ben initially testified that everybody at the park smoked except him and Alex, and he tested negative for drugs. Then Ben admitted that he smoked marijuana at the park and faked his drug test. After he left the park that night, Alex called him. Crying, she told him an Asian officer kissed her and wanted to meet her at 6:00 a.m.

Mecano testified. With respect to the May 28, 2008 incident, Alex told Mecano she didn't want to go back to "rehab." Mecano did tell Officer Parra that Audrey had some "shit" in her purse and, feeling that Audrey was in enough trouble due to curfew, he advised her to throw it away. Mecano admitted walking about 60 feet with Alex, but only because she wanted to tell him something. They exchanged phone numbers because Alex wanted to tell him over the phone. After Alex left the park, Mecano called her to follow up.

As to the October 20, 2007 incident with Taylor, when Mecano first came into contact with her, he merely told her why she was being arrested. He transported her to the West L.A. station, where he advised the watch commander that Taylor was eligible for release on her own recognizance. He went to Taylor's holding cell to clear up what would be in the report. After Taylor was booked at Pacific Station, Mecano's partner went into the station to retrieve some papers, leaving Mecano alone with Taylor. Mecano did not tell Taylor he wanted to date her, wine and dine her or have contact with her after her release. Instead, Taylor told him she was homeless, she lived at Meth Mountain, and she was a "cutter."

When they returned to the West L.A. station and Taylor was getting ready to go, she became upset because one of her bikes was damaged. To avoid an altercation with her, Mecano called a taxi and withdrew from the station's ATM machine $200, $40 of which he gave to Taylor for the taxi fare. Taylor asked where she should go, and he told her she could go to the Holiday Inn. He did not tell her to take a shower at the motel and to wait for him. He did not go to Meth Mountain to find Taylor. He called the taxicab company and driver because he wanted to get more information from Taylor about Meth Mountain.

II. Procedural background.

On March 14, 2011, a jury found Mecano guilty of: count 1, misdemeanor solicitation of prostitution of Taylor (Pen. Code, § 647, subd. (b));[5] count 2, sexual battery by restraint on Alex (§ 243.4, subd. (a)); count 3, sexual penetration by force or duress on Alex (§ 289, subd. (a)(1)); and count 4, sexual penetration under threat by public official on Alex (§ 289, subd. (g)).

On May 26, 2011, the trial court, after denying Mecano's new trial motion, sentenced him on count 3 as the base term to eight years and to a consecutive six months term on count 1. The court imposed a concurrent sentence of four years on count 2 and imposed but stayed under section 654 a sentence of eight years on count 4.

DISCUSSION

I. There was sufficient evidence to support Mecano's conviction of solicitation of prostitution.

Based on the absence of an explicit request of sex for money, Mecano challenges his conviction of soliciting Taylor for prostitution. We hold that Mecano's words, placed in context and coupled with his overt actions, constituted sufficient evidence of the crime.

In assessing the sufficiency of the evidence to support a conviction, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt.

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[5] All further undesignated statutory references are to the Penal Code.

[Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

Every person who solicits or who agrees to engage in or who engages in any act of prostitution is guilty of disorderly conduct, a misdemeanor. (§ 647, subd. (b).) "A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act." (*Ibid.*) "[*A*]*ll persons*, customers as well as prostitutes, who solicit an act of prostitution are guilty of disorderly conduct." (*Leffel v. Municipal Court* (1976) 54 Cal.App.3d 569, 575.) To establish that a defendant committed the crime of solicitation, the People must prove that (1) the defendant

requested or solicited a person to engage in an act of prostitution and (2) the defendant intended to engage in an act of prostitution. (CALCRIM No. 1154.)[6]

To be guilty of the crime of solicitation under section 647, subdivision (b), however, the defendant need not make an express verbal offer of sex. (*People v. Superior Court (Hartway)* (1977) 19 Cal.3d 338, 347.) "Although most solicitations are verbal, we are not prepared to accept [the] suggestion that the concept be limited, for the purposes of this statute, to 'verbal offers.' If we so held, well-advised prostitutes would immediately enroll in sign language courses." (*Id.* at pp. 346-347.) Nor is a criminal solicitation limited to those specifying price and services. (*Id.* at p. 347; see also *In re Elizabeth G.* (1975) 53 Cal.App.3d 725, 727, 729-730.)

In *Elizabeth G.*, for example, the minor-appellant argued that there was insufficient evidence of solicitation because she and the undercover officer never discussed prices, and no money exchanged hands. (*In re Elizabeth*, *supra*, 53 Cal.App.3d at p. 729.) Rather, officers made an appointment over the phone to see the minor and another girl. (*Id.* at p. 727.) At the minor's instruction, the officers picked up the girls and drove them to a motel. When an officer asked how much it would cost, the minor said they wouldn't talk about it until they were in the room. Based on the "circumstances of [these] events," that no money changed hands was irrelevant to the solicitation charge, and the court therefore rejected the challenge to the conviction. (*Id.* at p. 730.)

Similarly, Mecano did not expressly state he wanted sex from Taylor. He did not, for example, use the word "sex" or other sexually explicit language. But neither the standard of review nor section 647, subdivision (b), required such blatant behavior. Mecano said many things implying he wanted to have sex with Taylor: he told her he

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6 The jury was instructed with CALCRIM No. 1154, which also states that a "person engages in an act of prostitution if he or she has sexual intercourse or does a lewd act with someone else in exchange for money or other compensation. A lewd act means touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification. Under the law, when a prostitute and a customer engage in sexual intercourse or lewd acts, both of them are engaged in an act of prostitution."

could help her out; he could get her released on her own recognizance, but she would owe him; he asked where she lived and how to find her if he wanted to see her; he wanted to wine and dine her; and he suggested that her boyfriend wasn't good enough for her and she should be treated better. Mecano gave her $200 in cash and told her to take the cab to a Holiday Inn, where she should have a shower and wait for him to get off work. He warned her not to burn him for the money. When she did burn him, he tried to track her down by calling the cab company and cab driver to find out where she had been dropped off.

Other evidence corroborated Taylor's story. Within weeks and months of Taylor's arrest, she told a story consistent with the above to two officers. She told Officer Holloway that an Asian sergeant released her and gave her $200 to go to a hotel and take a shower. The "sergeant" warned Taylor not to burn him. Taylor similarly told Sergeant Smith that Mecano said he could get her "O.R'd," but she would "owe" him. He gave her $200 in $20 bills, ordered a cab for her, and told her to go to the Holiday Inn where he would meet her after work. The cab driver who picked Taylor up in front of the police station also verified that she was visibly upset and that she proclaimed her fear of the "policeman." He confirmed that Taylor had cash to pay for the taxi. The taxi cab company's records showed that Mecano called the company repeatedly to ask where Taylor had been dropped off. Mecano also went to the great length of getting and calling the cab driver's personal number.

From this evidence, the jury could reasonably conclude that Mecano specifically intended to solicit sex from Taylor. After repeatedly flattering her, he used his position to get her released on her own recognizance. He took the unusual steps of calling a cab for her and giving her $200, an amount greatly in excess of the cab fare. He told her to meet him at a Holiday Inn, where she should shower. Had Mecano expected nothing in exchange for the money, he would not have told her he would be "fucking pissed" if she "burn[ed]" him for it. The money thus made explicit any ambiguity behind Mecano's flattery: she was to meet him at the motel and have sex with him in exchange for the $200.

Although this certainly constituted sufficient evidence Mecano solicited Taylor for an act of prostitution, Mecano appears to argue that there had to be an "overt act" in furtherance of an agreement to engage in such an act. This argument misconstrues section 647, subdivision (b). The section originally proscribed soliciting an act of prostitution or engaging in an act of prostitution. (*In re Cheri T.* (1999) 70 Cal.App.4th 1400, 1405.) It did not mention an agreement to engage in an act of prostitution. (*Ibid.*; *Kim v. Superior Court* (2006) 136 Cal.App.4th 937, 941.) The language concerning such an agreement was added in 1986 "to close a loophole which permitted 'street-wise' prostitutes from avoiding prosecution. . . . Experienced prostitutes were able to exploit this to their advantage by playing 'word games' with undercover vice officers, who were unable to make an arrest for solicitation if they raised the topics of either sex or money with a suspected prostitute." (*In re Cheri T*, at p. 1405, fn. omitted; see also *Kim*, at p. 941 [section 647, subdivision (b), was expanded to permit conviction for an agreement to engage in an act of prostitution].)

Although section 647, subdivision (b), therefore can be violated where there was evidence of an agreement to engage in an act of prostitution, it can also be violated where, as here, there was evidence the defendant merely *solicited* an act of prostitution. Thus, the section provides that a person commits disorderly conduct "[w]ho solicits *or* who agrees to engage in or who engages in any act of prostitution." (§ 647, subd. (b), italics added.) Here, count 1 was based on Mecano soliciting Taylor for sex as opposed to an agreement to engage in an act of prostitution. The indictment, for example, stated, "Mecano[] did unlawfully attempt to solicit another, Taylor P., to engage in an act of prostitution." The jury also was only instructed on solicitation under CALCRIM No. 1154. The jury was not instructed on an agreement to engage in an act of prostitution under, for example, CALCRIM No. 1155.

Assuming, however, that an agreement to engage in act of prostitution was at issue, we would find that there was sufficient evidence of such an agreement. As we have detailed, Mecano told Taylor he could get her released, but she would owe him. He wanted to wine and dine her and treat her right. He told her to take a shower at the

Holiday Inn, where he would meet her after work. She took the money he gave her but went to Pacific Coast Highway instead of the motel. If this "agreement" was ambiguous, then Mecano's overt acts underscored its meaning and his intent. (*In re Cheri T., supra,* 70 Cal.App.4th at p. 1407 ["[T]o ease concerns that ambiguous conduct or statements might lead to false arrests" for violations of the section, the Legislature added the overt act requirement, namely, no agreement to engage in an act of prostitution shall violate the section unless some clarifying or corroborating act in furtherance of it was committed].)

In *Cheri T.*, for example, the defendant's act of grabbing an undercover officer's crotch "eliminated any ambiguities as to what she agreed to do." (*In re Cheri T., supra,* 70 Cal.App.4th at p. 1408.) The overt act, however, need not be either so obvious or a physical one. Words alone can constitute " 'acts in furtherance' " of an agreement to engage in prostitution. (*Kim v. Superior Court, supra,* 136 Cal.App.4th at pp. 944-945.) Still, not "all statements will suffice; to constitute an act that satisfies the statutory requirement, the statements must be unambiguous and unequivocal in conveying that the agreed act of prostitution will occur and move the parties toward completion of the act." (*Id.* at p. 945 [telling an undercover officer to undress was a clear and unequivocal statement in furtherance of the agreement to engage in an act of prostitution].)

To the extent Mecano argues that there was no evidence he committed an "overt act" that clarified or corroborated an agreement to engage in an act of prostitution, surely ordering a taxi for Taylor, giving her $200 in cash, and telling her to shower at a motel until he got off work and met her there constituted such acts. The trial court, in denying Mecano's new trial motion, aptly summarized this evidence: "As to count 1, . . . it is argued that Taylor was so unreliable in her recounting of events that the evidence is wholly insufficient to support a conviction for solicitation of prostitution . . . . [¶] . . . That at best, her testimony was speculative that the defendant wanted [to have] sex with her. . . . [¶] The court acknowledges that Taylor was not clear on details and could not lay a proper foundation for past recollection recorded. I observed Taylor to have . . . a very sketchy and hazy recollection of the events, and indeed that was the case. But I will say this: I thought the basic thread of her testimony rang true. It just made no sense

for Officer Mecano to give her $200 of his own money, to call a taxi company, to obtain the home telephone number of the taxi driver to find out where the driver had dropped Taylor off. It also made no sense for Taylor to make this up. It's indisputable that the defendant withdrew $200 from the station ATM, and it is indisputable that Taylor was released, but her boyfriend was held in custody. I found her story held together."

We agree and reject Mecano's challenge to his conviction of solicitation of prostitution.

II. Past recollection recorded.

Believing that a foundation could be established, the trial court admitted extensive prior recorded statements of Taylor. When a proper foundation for those prior statements could not be established, the court instructed the jury to disregard them, choosing the remedy of giving a limiting instruction instead of granting Mecano's request for a mistrial. Mecano now contends that the court's failure to grant his motion for mistrial or to strike Taylor's testimony was an abuse of discretion and violated his due process rights and, in any event, the limiting instruction was inadequate. We disagree.

A. *Additional facts.*

On direct examination, Taylor, who had a history of mental illness and institutionalization, was vague and unable at times to recall events and details. She could not, for example, remember what Mecano said to her while she was in the holding cell; what she and Mecano talked about while just the two of them were in the patrol car at Pacific Station, including that since he did a favor for him she owed him; and whether he complimented her "pretty eyes" while she was in the patrol car and called her a "cute girl" or a "good looking girl" around the time she was taken into custody. Her memory was therefore refreshed with her prior recorded statements.[7]

Defense counsel argued that Taylor's prior statements were not refreshing her memory, and there was an inadequate foundation to allow in her past recollection recorded. Although "troubled" by Taylor's hazy recollection and the way in which her

[7] These were primarily statements she made on July 9, 2008.

recollection was being refreshed, the trial court found that the prosecutor was "very close" to laying a foundation for past recollection recorded. The court allowed the prosecutor to proceed but limited the amount of time in which prior statements could be used.

On cross-examination, however, Taylor admitted she didn't recall making her prior recorded statements, and she couldn't even say her memory at the time she made those statements was accurate. She could not say whether her prior statements were accurate because she had no recollection of them.

Because there was not a proper foundation to admit past recollection recorded under Evidence Code section 1237,[8] defense counsel asked for either a mistrial, or to strike all of Taylor's testimony, or to strike the past recollection recorded and admonish the jury not to consider it. Calling Taylor's testimony a "jumbled mess," the trial court nonetheless refused to strike all of it, choosing instead to strike those portions of her testimony that were read as past recollection recorded and to instruct the jury not to consider them.

"I'm going to give you what is called a limiting instruction, and I'm going to strike some of the testimony you heard. And when a judge does this, you must understand that you cannot consider testimony that is stricken for any purpose. [¶] The law permits a jury to consider the prior statements of a witness when the witness has insufficient present recollection to enable her to testify fully and accurately, and the statement was made when the events described were fresh in the witness's memory and the witness testifies the statement was true at the time it was made. [¶] In this case Taylor P. initially said she was truthful when she made prior statements and that the events involving her

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[8] Past recollection recorded is admissible if the statement is in a writing which "(1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; [¶] (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an accurate record of the statement." (Evid. Code, § 1237, subd. (a).)

interaction with defendant Mecano were fresh in her mind when she made the statements. Then we heard on cross-examination . . . that she admitted that she cannot say whether she was being truthful when she made the prior statements. [¶] As a result of those responses, I am now striking all references to prior statements that were read into the record by the prosecutor that were allegedly made by Taylor P. on prior occasions, unless Taylor P. in her testimony here at trial acknowledged having made the statements and that they were accurate when made. In other words, if she's asked did he say something about whatever it was and she says, yes, I remember he said that, you can consider it. [¶] But we had some portions of prior testimony this morning read into the record and she was not asked further about them, you can't consider those. Okay. So I'll try to make this clear for you. You may consider facts asserted in prior statements by Taylor P. which the prosecutor asked her about so long as she adopted them in her testimony. If she didn't adopt them in her testimony here at trial, you may not consider them."

B. *The motion for mistrial and the limiting instruction.*

Mecano argues that either his mistrial motion should have been granted or Taylor's testimony stricken in its entirety, because the limiting instruction was inadequate to cure the error.

A mistrial, however, should be granted only when a party's chances of receiving a fair trial have been irreparably damaged. (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) If the trial court is apprised of prejudice it judges incurable by admonition or instruction, then a mistrial should be granted. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) " 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' [Citation.]" (*Ibid.*) In reviewing rulings on motions for mistrial, we apply the deferential abuse of discretion standard. (*Ibid.*)

Under that standard of review, we cannot say that the trial court abused its discretion by denying the motion for mistrial. Taylor was able to recall, without having her recollection refreshed, what generally happened to her the night she was arrested. She recalled the circumstances leading up to her arrest; that Mecano seemed attracted to

her when he told her he was the person who could help her out; that while she was in a holding cell, Mecano told her she would be charged with battery but released on her own recognizance; that Mecano was flirting with her; that she was alone in the patrol car with Mecano for a brief period of time at Pacific Station; that he gave her $200 in $20 bills; that he got her a taxi and told her to go to Holiday Inn, take a shower, and wait for him to come when his shift was over; that if she burned him for the money he would be pissed; and her general perception that Mecano wanted to have sex with her even though he did not say so specifically. Taylor thus was able to recall generally what happened to her, but not the specifics of it, for example, specific words and the exact sequence of events.

To the extent Mecano's due process argument hinges on an alleged inability to cross-examine Taylor, " '[t]he Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.' [Citation.]" (*United States v. Owens* (1988) 484 U.S. 554, 558-559; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 622 ["[T]he right of confrontation . . . does not protect against testimony that is ' "marred by forgetfulness, confusion, or evasion" ' [citations]"]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1292, fn. 32.) Mecano was permitted to cross-examine Taylor about her prior institutionalization in a psychiatric facility and use of methamphetamine.

Nor do we agree that the trial court abused its discretion by opting to give a limiting instruction instead of striking Taylor's testimony in its entirety. A trial court's evidentiary rulings are generally reviewed under the abuse of discretion standard. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) The limiting instruction was adequate to inform the jury what it could consider. The court informed the jury that although Taylor initially said she was truthful when she made her prior statements, she later admitted she didn't know if she was truthful. The court therefore struck "all references to

prior statements that were read into the record by the prosecutor that were allegedly made by Taylor P. on prior occasions, unless Taylor P. in her testimony here at trial acknowledged having made the statements and that they were accurate when made." The court clarified that if Taylor "adopted" those prior statements in her trial testimony, then the jury could consider them. This instruction clearly told the jury it could only consider any prior statement that Taylor adopted. All other prior statements read into the record were stricken. We presume that the jury followed the limiting instruction. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

Because we conclude that the trial court did not abuse its discretion by allowing the jury to consider Taylor's testimony, we also reject Mecano's assertion that Taylor's testimony "infected" the counts related to Alex. It was not improper for the jury to consider, based on Taylor's testimony, absent those parts that were stricken, whether there were similarities between what happened to Taylor and to Alex, thereby lending credibility to either or both of the victims' stories.

III. DNA evidence.

Under the line of cases beginning with *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), Mecano contends that his Sixth Amendment right to confrontation was violated by the admission of DNA evidence, because the technicians who performed the DNA tests did not testify, although the supervisor who analyzed the results did. We hold that any error in admitting the DNA evidence did not prejudice Mecano.

A. *Additional facts.*

Defense counsel objected, under the Sixth Amendment, to DNA evidence, because the technicians who analyzed samples from Mecano and Alex would not testify. Instead, Jody Hynds, the senior forensic scientist at Orchid Cellmark who supervised the technicians, would testify. The prosecutor represented that when Cellmark received the DNA samples, one person removed them from the envelopes and placed them in a machine to determine whether there was sufficient material for a DNA analysis. A second person reviewed that analysis. As an offer of proof, Hynds told the trial court that after the data was run through the machine, she made comparisons and issued

conclusions, including statistical analysis: "So the report is mine, the conclusions are mine." She said that "automation robotics" ran most of the duties, including the liquid handling and checking the bar codes on the tubes to ensure the correct tube was placed in the machine. "So really the only manual involvement specifically in this case is placing [the] sample into a tube once it was received and then a technician places the sample on to the equipment, but the equipment checks that it's the correct sample based on bar code readings and does the liquid handling." The trial court found that "the mere administerial act of opening the mail, taking the samples, putting them in the machine, . . . does qualify as business records, the recordation of those acts[.]"

Thereafter, Mandel Medina, an L.A.P.D. criminalist, testified that he took potential DNA samples from Mecano's car. Sandra Wilkinson, a sexual assault nurse examiner, testified that she swabbed Mecano's hands and took a reference blood sample from him. Kathy Adams, also a sexual assault nurse examiner, similarly testified that she took swabs and a reference blood sample from Alex. The parties stipulated that the items were sealed and taken to the crime lab. Guy Holloman, an L.A.P.D. criminalist, received the items, performed a cellular extraction on Alex's and Mecano's samples, and viewed them under a microscope.

When Cellmark received the evidence from the L.A.P.D., individuals placed the samples into a tube for a four-step, automated process: (1) extraction (removing DNA from cells and purifying it); (2) quantitation; (3) polymerase chain reaction (chemical procedure that amplifies DNA); and (4) genetic analyzer, which repeats the profiles. Hynds supervised the six analysts who work on L.A.P.D. cases. Once the automation was completed and there were DNA profiles, she made the comparisons and issued the conclusions.

B. *Mecano was not prejudiced by any error in admitting the DNA evidence.*

The United States Supreme Court's most recent formulation of Confrontation Clause jurisprudence began with *Crawford, supra,* 541 U.S. 36. *Crawford* considered the admissibility of a tape-recorded statement made by the defendant's wife to the police. Due to the wife's unavailablity to testify at trial because of marital privilege, the

defendant argued that admitting her out-of-court statement would violate his Sixth Amendment right to confront witnesses offering testimony against him. (*Id.* at p. 40.) The court held that "[t]estimonial statements of witnesses absent from trial [may be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Id.* at p. 59, fn. omitted.) *Crawford* thus distinguished testimonial statements (e.g., extrajudicial statements in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, and statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial) from nontestimonial ones, which are not subject to the Confrontation Clause. (*Id.* at p. 68.)

After *Crawford*, the United States Supreme Court considered its impact on the admissibility of forensic evidence. In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, the court considered a laboratory's "certificates of analysts" attesting that the substance found in the defendant's car was cocaine. The court held that the certificates were "testimonial," the functional equivalent of live, in-court testimony doing precisely what a witness does on direct examination. (*Id.* at pp. 310-311.) "Absent a showing that the analysts were unavailable to testify at trial *and* that [the defendant] had a prior opportunity to cross-examine them, [the defendant] was entitled to ' "be confronted with" ' the analysts at trial. [Citation.]" (*Id.* at p. 311, fn. omitted, quoting *Crawford, supra*, 541 U.S. at p. 54.)

Then, in *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705], the court considered a laboratory analyst's report, which included the analyst's "certificate of analyst," stating that a blood sample from the defendant had an illegally high level of alcohol. (*Id*. at p. 2710.) The analyst did not testify, although a colleague familiar with the laboratory's testing procedures did testify. That colleague had not, however, participated in or observed the testing. *Bullcoming* held that the admission at trial of the laboratory report violated the defendant's right to confront and cross-examine the analyst who prepared it.

Most recently, the court decided *Williams v. Illinois* (2012) 567 U.S. ___ [132 S.Ct. 2221] (*Williams*). *Williams* concerned a forensic DNA expert's testimony that a DNA profile from a rape victim produced by an outside laboratory, Cellmark, matched a profile produced by the state police laboratory using a sample of the petitioner's blood. (*Id*. at p. 2227.) A plurality of the court[9] found that Cellmark's report, which was not admitted into evidence, was " ' basis evidence' " to explain the expert's opinion. (*Id.* at pp. 2239-2240.) It was not offered for its truth and therefore did not violate the Confrontation Clause. (*Ibid.*) The plurality concluded further that even had the report been offered for its truth, its admission would not have violated the Confrontation Clause, because the report was not a formalized statement made primarily to accuse a targeted individual. Rather, the report was produced before any suspect was identified, hence the profile Cellmark provided was not "inherently inculpatory." (*Id*. at pp. 2228, 2242-2244.)[10]

In a concurring opinion, Justice Thomas agreed with the plurality's conclusion that there was no violation of the defendant's confrontation right but for a different reason: the laboratory report on which the expert relied "lack[ed] the solemnity of an affidavit or deposition" and was therefore not "testimonial." (*Williams, supra,* 132 S.Ct. at p. 2260 (conc. opn. of Thomas, J.).) Justice Kagan disagreed with the plurality and Justice Thomas, and, in a dissenting opinion,[11] found that the expert's testimony violated the defendant's confrontation right.

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[9] Justice Alito authored the plurality opinion, which the Chief Justice and Justices Kennedy and Breyer joined, although Justice Breyer explained why he joined Justice Alito's opinion "in full" in a separate concurrence. (*Williams, supra,* 132 S.Ct. at p. 2252 (conc. opn. of Breyer, J.).)

[10] The plurality said, "[T]he primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial. . . . [I]ts primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time." (*Williams, supra,* 132 S.Ct. at p. 2243.)

[11] Justices Scalia, Ginsburg, and Sotomayor joined the dissent.

Although the Attorney General argues that *Williams* is dispositive of this case, we do not think the issue so clear. Hynds was like the expert in *Williams* in that she did not create the DNA profiles; she merely looked at the reports and did an analysis based on them. Hynds was also more involved in the process than was the expert in *Williams.* As a Cellmark supervisor, she oversaw the analysts who participated in the four-step automated process. She had firsthand knowledge of the automated process involved in creating the DNA profiles and of the controls Cellmark used to ensure accuracy. Therefore, admitting Hynds's testimony arguably presented less of a confrontation problem than did the expert's in *Williams*.

But there are also differences between this case and *Williams* that raise confrontation concerns. Unlike in *Williams*, where no suspect had been identified, the primary purpose of the underlying reports here was to exclude or include from the investigation a specific suspect, Mecano. Also, the *Williams* plurality found significant that the underlying trial was a *bench* trial and not a jury trial, because a trial judge has the "acumen" to understand that the expert based her opinion on a premise she merely *assumed* to be true as opposed to being true. (*Williams, supra,* 132 S.Ct. at pp. 2236-2237.) The factfinder's identity made a "big difference in evaluating the likelihood that the factfinder mistakenly based its decision on inadmissible evidence." (*Id*. at p. 2237, fn. 4.) Therefore "[a]bsent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could not have gone to the jury." (*Id.* at p. 2236.) Here, of course, the matter was tried to a jury. It is therefore not clear that Hynds's testimony would have been admissible in a jury trial under *Williams* or even that *Williams* "produced" "authoritative guidance beyond the result reached on the particular facts of that case." (*People v. Lopez* (2012) 55 Cal.4th 569, 590 (dis. opn. of Liu, J.).)

Our California Supreme Court, however, has distilled from these Confrontation Clause line of cases that a statement is "testimonial" when, first, the out-of-court statement was made with some degree of formality or solemnity; and, second, its primary purpose pertains in some fashion to a criminal prosecution. (*People v. Lopez, supra,* 55 Cal.4th at pp. 581-582.) Under the first standard, formality or solemnity, the *Lopez*

majority found that a laboratory report, part of which was "machine-generated," concerning the defendant's blood alcohol level was not testimonial. (*Id.* at pp. 582-585.) The key notation linking the defendant's name to a blood sample, which the prosecution's expert witness then testified contained 0.09 percent alcohol, was nothing more than an informal record of data for internal purposes; hence, the report itself on which the expert relied was not testimonial and no confrontation problem was present.

We need not decide the impact of these decisions on Hynds's testimony, because any error in admitting the DNA evidence did not prejudice Mecano. "Violation of the Sixth Amendment's confrontation right requires reversal of the judgment against a criminal defendant unless the prosecution can show 'beyond a reasonable doubt' that the error was harmless[,]" under *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661.) First, the DNA evidence was, in the trial court's words, "unimpressive" and of "little value." That evidence was simply this: Alex could not be excluded as a minor contributor to a DNA mixture from Mecano's hand, and the probability of randomly selecting a Caucasian who fit that profile was 1 in 8,842. Alex also could not be excluded as a potential contributor to a mixture from Mecano's car, and, in the Caucasian population, the probability of randomly selecting an individual and being able to include them in the mixture was 1 in 1,328. These probabilities were "low" in comparison to the probabilities often involved in DNA cases. Moreover, even if the jury believed that Alex's DNA was on Mecano's hand or in his car, there were potentially innocent explanations for its presence.

Second, the case was largely a credibility contest between Mecano and Alex. Mecano testified that he let Alex go, but he got her telephone number and gave her his personal number because he wanted to use her as an informant. Soon after Alex left the park, Mecano called her multiple times.

But after all the time Mecano spent at the park and taking Colman into custody, it is unclear why Mecano needed to call Alex to see if she had any more information. As the trial court said in denying Mecano's new trial motion, "The only reasonable explanation . . . is that he did what he did because he wanted to do what she has accused

him of doing. [¶] I felt [that] the defendant's testimony appeared to be crafted to fit around the evidence in [this] case. I found his testimony to be remarkably facile and unpersuasive."

IV. *Brady*[12] violations.

Mecano's final contention is his federal due process rights were violated by the prosecutor's failure to disclose *Brady* material. We find that Mecano's due process rights were not violated by any failure to comply with *Brady*.

A. *Additional facts.*

Colman and Audrey were with Alex at Pacific Palisades Park on the night of May 28, 2008. Colman testified that the prosecutor told him they weren't pursuing charges against him arising out of the incident. This agreement had not been disclosed to the defense. Audrey testified she was selling marijuana that night. In exchange for her testimony, Audrey entered into an immunity agreement, which also had not been disclosed to the defense. Defense counsel thereafter said he had not been told there was a drug deal or an immunity agreement, which "changes the complexion of the case . . . because it gives different people different motives."

To determine whether there had been a discovery violation, Audrey testified out of the jury's presence. She said that a couple of weeks before trial, she went back to the park with detectives, where she admitted she and her friends were at the park to sell drugs to Alex.

The trial court found that there were two discovery violations: (1) assurances were made to Colman that he wouldn't be prosecuted; and (2) Audrey's statement that she was selling drugs to Alex and that she had an immunity agreement were not disclosed. The trial court said it would allow the defense to recall Alex. Describing the violations as "serious," although "not sufficiently serious either singularly or in conjunction with the other issues that I've raised to warrant such a dramatic action as a mistrial," the trial court denied Mecano's mistrial motion and instead instructed the jury:

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[12] *Brady v. Maryland* (1963) 373 U.S. 83.

"Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the People failed to disclose the following information: [¶] (1) When interviewed by the prosecutor before trial (a) Jake [Colman] asked for assurances he would not be prosecuted for any of the events he engaged in on the evening of May 28th, 2008, and (b) Jake [Colman] told the prosecutor that he and his friends were smoking marijuana in his car on the evening of May 28th, 2008. [¶] (2) When interviewed by the prosecutor before trial, Audrey [L.] stated she went to Pacific Palisades Park on May 28th, 2008, to participate in a sale of marijuana to Alex H. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure."

B. *Any* Brady *violation was harmless.*

The due process clause requires a prosecutor to disclose to the defense all material evidence known to the prosecution team that is material to guilt or punishment, even in the absence of a request. (*Kyles v. Whitley* (1995) 514 U.S. 419, 432-441; *Brady v. Maryland, supra,* 373 U.S. at p. 87; *People v. Clark* (2011) 52 Cal.4th 856, 981-982.) "There are three components of a *Brady* violation: (1) the evidence must be favorable to the accused, meaning it is exculpatory, or impeaching; (2) the evidence must have been willfully or inadvertently suppressed by the State; and (3) prejudice must have ensued because the evidence was material to the issue of guilt and innocence of the accused by establishing a reasonable probability of a different result." (*People v. Bowles* (2011) 198 Cal.App.4th 318, 325; see also *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 175-176; *People v. Salazar* (2005) 35 Cal.4th 1031, 1043.) Evidence is favorable to the defense if it helps the defense or hurts the prosecution. (*Clark,* at p. 982; *People v. Verdugo* (2010) 50 Cal.4th 263, 279.) "Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *Verdugo,* at p. 279.)

Evidence is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley* (1985) 473 U.S. 667, 682; accord *People v. Salazar, supra*, 35 Cal.4th at p. 1042.) The defendant bears the burden of showing materiality. (*In re Sassounian* (1995) 9 Cal.4th 535, 545.) We independently review whether a *Brady* violation has occurred, but give great weight to any trial court findings of fact that are supported by substantial evidence. (*People v. Letner and Tobin*, *supra*, 50 Cal.4th at p. 176.)

We will assume that the evidence should have been disclosed. The Attorney General does not deny there was a "garden-variety discovery violation." The issue is not, however, the commonality of the violation. It is whether the evidence that Alex and the others were at the park to conduct a drug deal was "material" such that there was a reasonable probability that had the evidence been disclosed the outcome would have been different. We conclude it was not "material."

The defense asserted that the evidence was material to Alex's credibility and to her motive to lie, namely, she accused Mecano of sexual battery to cover up that she and her friends were at the park to buy and to sell drugs. As the trial court pointed out, this was a tenuous defense. Alex testified that Mecano let her go without issuing her a ticket or citation. It is therefore unclear what she would need to cover up, when she had already been released without being charged with any crime. And, in any event, the trial court said it would allow the defense to recall Alex, an offer the defense declined.

Moreover, even in the absence of evidence that the kids were at the park dealing drugs, there was ample other evidence of that fact. (See *People v. Letner and Tobin, supra*, 50 Cal.4th at p. 178 [that there was other evidence negatively impacting the prosecution witness's credibility was a factor in considering materiality].) It was clear that at least some of the kids were smoking marijuana at the park. Alex admitted that she had smoked marijuana earlier in the day. Colman had drug paraphernalia (a scale and baggies) in his car. Alex also had marijuana and a pipe in her purse. Anna testified that

although she couldn't recall anyone talking about selling or buying drugs at the park, she and Audrey had, in the past, pooled their money to buy drugs to sell. Ben, after initially denying that he smoked marijuana at the park, admitted he lied, and, in fact, the group met in the park to sell marijuana. He admitted giving money to Colman to buy marijuana to sell to others in the past.

The defense, therefore, was able to establish that Alex and the others were dealing drugs at the park and to make a connection, if any, to Alex's motive to lie. Given that this evidence was before the jury, we cannot say that the outcome would have been different had the additional evidence about the drug dealing been timely disclosed.

V. Cumulative error.

Mecano contends that the cumulative effect of the purported errors undermined the fundamental fairness of the trial and require reversal. As we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial,' " we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236; see also *People v. Butler* (2009) 46 Cal.4th 847, 885.)

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.