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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. DOUGLAS RICHARD BRITT, Defendant and Appellant.	C039621 (Super. Ct. No. 00F01822)

APPEAL from a judgment of the Superior Court of the County of Sacramento, Gail D. Ohanesian, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Stan Cross, Supervising Deputy Attorney General, and Justain P. Riley, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant Douglas Richard Britt of one count of burglary (Pen. Code, § 459), one count of indecent exposure (*id.*, § 314, subd. 1), and one count of annoying or

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, and III through IX.

molesting a child (*id.*, § 647.6, subd. (a)). Special allegations that Britt had sustained a prior misdemeanor indecent exposure conviction and a 1987 felony conviction for lewd and lascivious conduct with a child (*id.*, § 288, subd. (a)) were found true in separate proceedings.

Britt appeals from a judgment sending him to state prison for 17 years. He claims insufficiency of the evidence to support his conviction, improper admission of uncharged instances of sexual misconduct, and instructional error. He also seeks reversal of his convictions under the "special versus general" doctrine and attacks his sentence on constitutional grounds. We reject these arguments and affirm.

BACKGROUND

On January 17, 2000, 14-year-old Heather H. and her 10-year-old sister Sarah H. were living with their mother at the Canyon Terrace Apartments in Folsom. The sisters shared the same bedroom. The previous night they had closed and locked their bedroom window and drawn the blinds. The screen, however, had been removed a few days earlier.

Heather awoke to the sound of her alarm clock going off some time between 6:00 and 6:30 a.m. Looking up, she saw a man standing at the open window, raising the blinds. The man started to unzip his pants. His hand moved to the area of his genitalia, and his arm began moving up and down. The man was "[j]acking off basically," while he looked through the window at Heather and her sleeping sister. She could not get a good look

at his face because of the shadows and trees, so she went into the front room and dialed 911.

Folsom Police Officer Patrick Mefferd received a report of a prowler at the apartment at 6:28 a.m. Arriving at Heather's apartment, he took a statement from Heather and examined the bedroom area. The window, which opened sideways, was clean except for two latent fingerprints in the lower right corner, where someone would normally place a hand to slide the window open. The fingerprints were later determined to be Britt's.

Although Heather was unable to identify Britt in a photo lineup, her sister Sarah H. identified his photograph. She had seen him twice before around the Canyon Terrace Apartment complex. On the first occasion, she was emptying the garbage in an outside dumpster; when she turned around Britt said to her "nice butt." The second time, while she was riding her bike, he stopped and stared at her, making her feel uncomfortable.

Two witnesses testified as to Britt's propensity for committing sexual misconduct. Lynn B. testified that in 1978, she was driving in her car in Orange County and stopped for a red light. Britt, who was driving a delivery-type truck with a side door, pulled alongside and honked to gain her attention. When she looked over, he opened the door, and appeared completely nude, masturbating in front of her with a full erection. Britt was caught immediately and pleaded guilty to misdemeanor indecent exposure.

Sara M., who was 22 years old at the time of trial, testified that Britt moved in next door to her when she was

10 or 11. Britt used to drink and offer her alcohol, saying it would "make [her] horny." He was always making sexual comments to her. Several times he went to her window at night, waking her and speaking to her. Once, when Sara was 12, Britt told her to come to the corner of her back yard where it met his back yard, because he wanted to show her something. When she arrived there, she saw him standing in front of the sliding glass door at the back of his house, completely naked.

Britt's defense was alibi. Both he and a coworker, Keith Armour, testified that at 6:00 a.m. on the day of the incident, which was Martin Luther King Day, the two met at Armour's apartment in Orangevale and went fishing at Granite Bay after stopping at a Raley's supermarket to obtain a fishing license. Britt produced a Raley's receipt, which was time-stamped January 17, 2000, at 7:12 a.m.

Britt categorically denied exposing himself to either Lynn B. or Sara M. While he could not think of any reason why Lynn B. would fabricate her testimony,[1] he asserted that Sara M. wanted to get back at him for his having learned that she stole her mother's wedding ring 10 years earlier.

As to the fingerprints, Britt claimed that after he injured his arm in November 1999, he sometimes used the jacuzzi at the

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[1] Britt admitted he was convicted of indecent exposure in the Lynn B. case while represented by counsel, but claimed that he understood the plea "nolo contendere" to mean "not guilty." The sentencing judge did not place him on probation or impose any other punishment, but instead told him to report to spring training camp with the Pittsburgh Pirates.

apartment complex. On one of these occasions, he realized he did not bring along a towel; coincidentally, he saw a towel lying on a window screen leaning against a wall. Britt said he lifted the towel off the screen and used it, leaving it at the jacuzzi. He did not need to and did not touch a window.[2]

APPEAL

I

Substantial Evidence

Britt first asserts that there was insufficient evidence of his identity as the masturbating man in the window who Heather H. saw on January 17. Britt claims that, apart from the undated fingerprints which were found on the outside of the window, there was a paucity of evidence linking him the crime. Citing Heather's inability to identify him and the plausible alibi testimony given by him and a coworker, Britt concludes the evidence adduced by the prosecution produced nothing more than conjecture or suspicion of his guilt.

A reviewing court faced with a claim of insufficiency of the evidence "determines 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

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[2] Prior to trial and out of the presence of the jury, Britt admitted that in 1987, he had been convicted of violating Penal Code section 288, subdivision (a) (lewd and lascivious conduct with a child under the age of 14). Exercising its discretion, the trial court prevented the jury from learning of this conviction, even after Britt denied, on cross-examination, ever having been "sexually excited" by children.

beyond a reasonable doubt.' (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 . . . .) We examine the record to determine 'whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] Further, 'the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] This standard applies whether direct or circumstantial evidence is involved." (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

The California Supreme Court has repeatedly emphasized that fingerprint evidence is the strongest evidence of identity, "'"and *is ordinarily sufficient alone to identify the defendant*."'" (*People v. Andrews* (1989) 49 Cal.3d 200, 211, italics in original, quoting *People v. Johnson* (1988) 47 Cal.3d 576, 601, and *People v. Gardner* (1969) 71 Cal.2d 843, 849.) Britt's fingerprints were found on a portion of the window in a place where an intruder would logically touch it, and he offered no explanation that made any sense for how they could have been left there.[3]

Evidence of guilt involved more, however, than mere fingerprints. Heather described the intruder as masturbating

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[3] Although, as Britt correctly points out, there was no indication of the age of the fingerprints, the manager of the apartment complex testified that eight different tenants had occupied the sisters' apartment since 1993, and that every time a tenant vacated, the windows had been washed.

with his left arm -- Britt is left-handed. By Britt's own admission, he was intimately familiar with the apartment complex, having worked on its construction as a carpenter and used the jacuzzi on several occasions. The testimony of Lynn B., Sara M., and Sarah H. demonstrated that Britt had an unusual preoccupation with exposing himself and behaving in sexually inappropriate ways toward children. The jury could infer that Britt had been keeping a watchful eye on the sisters' apartment with lewd intentions, as he was spotted there staring at Sarah H. on two prior occasions, once directing a crude remark toward her. The sight of the screen having been removed from the sisters' bedroom window might have proved too much temptation for Britt to resist.

Contrary to Britt's argument, the jury was not required to credit his alibi testimony that he was out fishing with coworker Armour on the morning of the burglary, even though it was corroborated by Armour. The weighing of credibility was the exclusive province of the jury. (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1259.) Britt accused both Sara M. and Lynn B. of fabricating their testimony, while his own was fraught with bizarre explanations. The jurors had the opportunity to weigh the demeanor and judge the believability of all witnesses; it was their role, not ours, to decide who was lying. Finally, as the Attorney General points out, even though both men testified that Britt arrived at Armour's residence at 6:00 a.m., there were a number of unexplained discrepancies between the two versions of events that morning. In short, the jury was

entitled to conclude that Britt's "fish story" was -- exactly that.

Substantial evidence supports the jury's finding that Britt was the intruder whom Heather saw on the morning of January 17. (See *People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1586-1588.)

II

Admission of Section 1108 Evidence

Over Britt's objection, the trial court admitted the testimony of Lynn B. and Sara M. concerning prior incidents of sexual misconduct by Britt under Evidence Code sections 1108 and 1101, subdivision (b) to prove "propensity" and "intent."[4]

Britt contends the trial court abused its discretion in admitting the testimony of the two women, but his theory is an unusual one. Eschewing the traditional section 352 analysis, Britt urges that the evidence should have been excluded because the jury could too easily have used other crimes evidence to prove identity. According to this theory, section 1108 allows uncharged misconduct evidence only to prove "propensity," not identity. Using uncharged misconduct to prove identity is improper because section 1108 did not change the existing requirement of section 1101, subdivision (b) that, to be admissible as evidence of *identity*, the prior uncharged misconduct "'must be so unusual and distinctive as to be like a signature.'" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

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[4] All further unspecified statutory references are to the Evidence Code.

Because the "signature" test was not met as to the other crimes evidence in this case, Britt asserts the prejudicial effect of the testimony clearly outweighed its probative value.

Britt's argument fails because it is based on an incorrect characterization of the effect of section 1108 on the admission of uncharged sexual misconduct in a sex offense case.

Prior to the enactment of section 1108, section 1101 governed the use of evidence of prior uncharged sexual misconduct in a criminal trial. Subdivision (a) declared the general rule that character evidence (including evidence of prior bad acts) was inadmissible to prove a person's conduct on a specified occasion. Subdivision (b), however, carved out an exception to this rule: uncharged misconduct could be admitted to prove some fact *other than a mere disposition to commit such an act* such as motive, intent, identity, or plan. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) As Britt correctly points out, under case law interpreting section 1101, subdivision (b), an extremely high degree of similarity between charged and uncharged crimes was required to establish the uncharged crime's admissibility to prove identity. "For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (*Ewoldt*, *supra*, 7

Cal.4th at p. 403; see also *People v. Balcom* (1994) 7 Cal.4th 414, 424-425.)

All of that radically changed with respect to sex crime prosecutions with the advent of section 1108. Determining that, in a sex offense prosecution, the need for evidence of prior uncharged sexual misconduct is particularly critical given the "serious and secretive nature of sex crimes and the often resulting credibility contest at trial" (*People v. Fitch* (1997) 55 Cal.App.4th 172, 181-182), the Legislature enacted section 1108, which provides that evidence of a prior sexual offense "is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." By removing the restriction on character evidence in section 1101, section 1108 now "permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses *for any relevant purpose*" (*People v. James* (2000) 81 Cal.App.4th 1343, 1353, fn. 7, italics added), subject only to the prejudicial effect versus probative value weighing process required by section 352.

Evidence is relevant if it has any "tendency in reason to prove or disprove any disputed fact." (§ 210.) Where contested, the *identity* of the defendant as the perpetrator is obviously a disputed issue of fact. The introduction of other crimes evidence to prove identity thus constitutes a "relevant purpose."

The flawed premise in Britt's argument is that section 1101, subdivision (b)'s test for admissibility of prior uncharged offenses in a sex offense case survived the enactment

of section 1108. It did not. "In enacting Evidence Code section 1108, the Legislature decided evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible *without regard to the limitations of Evidence Code section 1101*." (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 405, italics added.) When section 1108 swept away the general prohibition on character evidence set forth in section 1101, it rendered moot the exceptions to that prohibition created by section 1101, subdivision (b). Thus, in a sex crime prosecution, the "signature test" is no longer the yardstick for admission of uncharged sexual misconduct to prove identity.

We disagree with Britt's unsupported assertion that the Legislature intended section 1108 to allow admission of uncharged sex offenses only where the defendant's identity as the perpetrator has already been established, not to help establish the fact of identity.

As stated by the California Supreme Court, quoting the author of the legislation, section 1108 "'"permits courts to admit such evidence on a common sense basis -- *without a precondition of finding a 'non-character' purpose* for which it is relevant -- and permits rational assessment by juries of evidence so admitted. This includes consideration of the other sexual offenses as evidence of the defendant's disposition to commit such crimes, *and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense*."'" (*Falsetta*, *supra*, 21 Cal.4th at

p. 912, quoting from Letter by Assemblyman Rogan regarding Assem. Bill No. 882 (1995-1996 Reg. Sess.), reprinted at 29B pt. 3 West's Ann. Evid. Code (1999 pocket supp.) foll. § 1108, at pp. 40-41, italics added.)

Sex crime trials inevitably turn on whether the defendant has been falsely accused. The central issue in these cases commonly involves not just whether the conduct took place as the victim described it, but whether the defendant was the one who perpetrated it. Section 1108 assists the jury's task by allowing the accused's sexual misconduct history to be considered for whatever light it might shed on these issues, including a defendant's claim of mistaken identity.

Since the trial court correctly admitted the testimony concerning the uncharged offenses under section 1108, we need not reach the question of its admissibility under section 1101. And since Britt does not otherwise assert the trial court abused its discretion in weighing the prejudice of the evidence against its probative value, the claim must fail.

III

CALJIC No. 2.50.01

Britt next urges that the court erred by giving CALJIC No. 2.50.01[5] because it permitted the jury to use prior sexual misconduct to prove his identity.

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[5] As given here, CALJIC No. 2.50.01 told the jury, in part: "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. [¶] . . . [¶] If you find that the defendant committed a prior sexual offense, you may but

Britt's claim is essentially a repetition of his previous contention dressed in the new clothing of instructional error. We therefore reject it under the same analysis set forth in the previous section.

Britt additionally appears to argue that the instruction improperly suggests to the jury that they could find the other crimes evidence sufficient *by itself* to prove his identity as the perpetrator. We find nothing in the instruction which authorizes such an inference. To the contrary, the court here gave the post-1999 version of CALJIC No. 2.50.01, which tells the jury that evidence of defendant's other sexual offenses *is not sufficient by itself* to prove his commission of the charged offense, that the weight and significance of the evidence, if any, is for the jury to decide, and that unless otherwise instructed, the jury may not consider this evidence for any other purpose. (See fn. 5, *ante*.) Our Supreme Court has specifically held that this charge "adequately sets forth the controlling principles under section 1108." (*Falsetta*, *supra*, 21 Cal.4th at pp. 923-924.) Britt's claim of instructional error must be rejected.

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are not required to infer that the defendant had a disposition to commit sexual offenses. [¶] If you find that the defendant had this disposition, you may but are not required to infer that he was likely to commit and did commit the crime or crimes of which he is accused."

IV

Sarah H.'s Pretrial Identification of Britt

Prior to trial, Britt unsuccessfully sought to suppress, as the product of an unfairly suggestive pretrial identification, the testimony of Sarah H. identifying Britt as the man who she previously saw at the Canyon Terrace Apartment complex, and who directed a lewd comment at her. Britt challenges the admission of this testimony as constitutional error.

The foundational facts surrounding the pretrial identification as recited by defense counsel[6] were, that a police officer showed Sarah a six-person photographic lineup and pointed to Britt's photo, asking her if she had ever seen that individual before. Sarah responded that he looked familiar, and that he was the man she had seen around the complex a couple of weeks before, who once told her she had a "nice butt." Britt claims the identification procedure violated due process because it "suggested in advance of the identification the identity of the person suspected."

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[6] The motion was ruled upon without the benefit of an evidentiary hearing under section 402. In a footnote, Britt suggests the absence of such a hearing deprived him of his "due process and statutory rights." However, he points to no place in the record where counsel requested such a hearing. The claim is waived, both because it is not contained in a separately headed legal argument (*People v. Sipe* (1995) 36 Cal.App.4th 468, 481), and because trial counsel never perfected the record by making an objection to the form of hearing. (*People v. Hill* (1992) 3 Cal.4th 959, 994-995.)

"A pretrial identification procedure violates a defendant's due process rights if it is so impermissibly suggestive that it creates a very substantial likelihood of irreparable misidentification. The defendant bears the burden of proving unfairness as a 'demonstrable reality,' not just speculation. [Citations.] [¶] On review we must consider the totality of the circumstances to determine whether the identification procedure was unconstitutionally suggestive. We must resolve all evidentiary conflicts in favor of the trial court's findings and uphold them if supported by substantial evidence. [Citation.]" (*People v. Contreras* (1993) 17 Cal.App.4th 813, 819 (*Contreras*).)

We have no difficulty upholding the trial court's ruling. Numerous cases have held that a single person photographic identification is not inherently unfair. (See cases cited in *Contreras*, *supra*, 17 Cal.App.4th at p. 822.) There is no evidence the officer ever told Sarah H. that Britt was suspected of a crime or was the intruder seen by her sister on January 17. The officer merely pointed to his photograph and asked her if she had ever seen him before. Sarah's response was spontaneous and not in any way suggested by the officer. Her answer was fully consistent with her in-court identification of Britt at trial. Finally, the jury was made aware of the circumstances of the pretrial identification, and heard defense counsel vigorously contend in closing argument that the young girl's identification was unduly influenced by the officer.

Britt has not shown that the admission of Sarah's identification resulted in unfairness "'as a demonstrable reality.'" (*Contreras, supra,* 17 Cal.App.4th at p. 824.) The trial court's finding that the identification procedure was not constitutionally impermissible may not be disturbed.

V

Instructional Error

Penal Code section 314 provides in part: "Every person who willfully and lewdly . . . [¶] 1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . [¶] . . . is guilty of a misdemeanor. [¶] . . . [¶] Upon the *second and each subsequent conviction* under subdivision 1 of this section, or *upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288*, every person so convicted is guilty of *a felony,* and is punishable by imprisonment in state prison." (Italics added.)

By stipulation, the jury was informed that Britt had been convicted of misdemeanor indecent exposure in 1979. The jury was also instructed on the elements of the charged crime of indecent exposure. On the burglary charge, the jury was instructed that, "Every person who enters any building or residence *with the specific intent to commit a crime of indecent exposure* is guilty of the crime of burglary, in violation of Penal Code Section 459." (Italics added.) Britt claims the verdict based on this instruction cannot stand because, as a matter of law, entry into a residence with intent to commit

indecent exposure cannot constitute burglary. This claim must be rejected under the doctrine of invited error.

Under the recidivist paragraph of Penal Code section 314, subdivision 2, the offense of misdemeanor indecent exposure is elevated to felony status if (1) the defendant has previously been convicted of misdemeanor indecent exposure, or (2) the defendant has previously been convicted of violating Penal Code section 288. Britt qualified under both provisions: he had been convicted of misdemeanor exposure in 1979 and he suffered a section 288 conviction in 1987. Understandably then, defense counsel in chambers stipulated that the People did not need to prove that Britt had suffered a prior section 314 conviction to make the illegal entry a felony, and agreed to instructing the jurors that "every person who enters any building or residence with the specific intent to commit the crime of indecent exposure is guilty of the crime of burglary."

A defendant is precluded from challenging the correctness of an instruction which he requested or joined in requesting. (*People v.* Jackson (1996) 13 Cal.4th 1164, 1223; *People v. Hardy* (1992) 2 Cal.4th 86, 152.) Although the foregoing rule of invited error is subject to the qualification that the choice be made deliberately and not out of ignorance, all that is necessary to satisfy this requirement is that it be inferable from the record that defense counsel "made a conscious, deliberate tactical choice between having the instruction and not having it." (*People v. Cooper* (1991) 53 Cal.3d 771, 831; accord, *People v. Cain* (1995) 10 Cal.4th 1, 38, fn. 14.)

Such an inference is readily drawn in this case. Under *People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1767 (*Rehmeyer*), the intent to commit felony indecent exposure may qualify as the underlying felony supporting a burglary charge. It was thus advantageous for counsel to stipulate away the need for the prosecution to prove the prior felony and to consent to an instruction substituting the phrase "indecent exposure" for "a felony" in the definition of burglary, to avoid any mention of Britt's previous sex offense convictions in the jury instructions.[7] Because his lawyer's concurrence in the questioned instruction was justifiable as the product of deliberate choice, the claim was waived.

VI

Validity of the Burglary Conviction

Britt next claims that the burglary conviction cannot stand because it was supplanted by a more specific statute -- felony indecent exposure inside an inhabited dwelling.

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[7] The People concede the burglary instruction was deficient by assuming that the target felony for the burglary charge was the *intent to commit indecent exposure inside a dwelling.* (Pen. Code, § 314, subd. 2.) Taking the view that the instruction should have included the phrase "without consent," the People go on to argue the omission was harmless beyond a reasonable doubt. The concession is inapt. The in-chambers colloquy among court and counsel reveals that the entire instruction on entry without consent was deleted *by agreement*, owing to the People's theory (concurred in by the defense) that it was Britt's *admitted prior convictions* which made his intent to commit indecent exposure the underlying felony on the burglary charge.

Pursuant to Penal Code section 459, a person who enters a residence or other qualifying structure with the intent to commit "any felony" is guilty of burglary. Since Britt qualified under the recidivist provisions making the crime of indecent exposure a felony, the jury was instructed that if it found beyond a reasonable doubt that he "enter[ed] any building or residence with specific intent to commit a crime of indecent exposure," he would be guilty of burglary.

It is Britt's view that the prosecution was powerless to try him for burglary because the Legislature has created a more specific crime covering the same conduct in Penal Code section 314, subdivision 2. That section provides in relevant part: "Every person who [commits indecent exposure] *after having entered, without consent, an inhabited dwelling house*, . . . is punishable by imprisonment in the state prison, or in the county jail not exceeding one year." (Italics added.) We will refer to this crime as "residential indecent exposure."

According to the "special over general" doctrine, "when a specific or special statute covers much of the same ground as a more general statute so that a violation of the specific statute will necessarily result in a violation of the more general statute, prosecution under the general statute is precluded." (*Rehmeyer*, *supra*, 19 Cal.App.4th at p. 1768, citing *People v. Jenkins* (1980) 28 Cal.3d 494, 505 (*Jenkins*), and *In re Williamson* (1954) 43 Cal.2d 651, 654.) "The rule does not apply, however, unless 'each element of the "general" statute corresponds to an element on the face of the "specific" [*sic*]

statute' or 'it appears from the entire context that a violation of the "special" statute will necessarily or commonly result in a violation of the "general" statute.'" (*People v. Coronado* (1995) 12 Cal.4th 145, 154, citing *Jenkins*, *supra*, at p. 502.)

Does each element of burglary, where the underlying intended felony is felony indecent exposure, coincide with each element of residential indecent exposure? Clearly not. As explained in *Rehmeyer*, an indispensable element of burglary is entry with a specific felonious intent. Residential indecent exposure, however, only requires a previous unauthorized entry; the defendant need not harbor a felonious intent upon entry. "Accordingly, every [residential] felony indecent exposure is not necessarily a burglary." (*Rehmeyer, supra,* 19 Cal.App.4th at p. 1768.)

For similar reasons, a conviction on the special statute would not "necessarily or commonly" result in a conviction on the more general one. An intruder who exposes himself inside a residence may be guilty of a burglary, but conviction of the latter offense requires a higher threshold of proof regarding his intent upon entry.

Furthermore, the special over general doctrine is merely a tool by which the court may ascertain and effectuate legislative intent. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1243.) Here, the two statutes were intended to serve different legislative purposes. Burglary is a felony, while residential indecent exposure is a "wobbler," punishable either as a felony or a misdemeanor, in the court's discretion. (Pen. Code, § 17,

subd. (b); *People v. Douglas* (2000) 79 Cal.App.4th 810, 812-813.) As explained in *Rehmeyer*, *supra*, 19 Cal.App.4th at page 1768, the Legislature created the new crime in 1982 in recognition that indecent exposures occurring inside the victim's residence warrant more serious treatment than those which take place elsewhere. Elevating residential indecent exposure to wobbler status also gives prosecutors an alternate charging provision in residential exposure cases where proof of burglary (i.e., entry with felonious intent) may be thin or nonexistent.[8] Nothing about the enactment, however, supports the proposition that the law was intended to *preclude* burglary convictions in cases where such proof is available. (*Rehmeyer, supra*.) Such a notion would require the inference that the 1982 amendment was intended to treat exhibitionist home invaders *more leniently* than they were previously, by sheltering them from burglary convictions. This hypothesis would be at war with the chief purpose of the 1982 amendment, which was to strengthen punishment for indecent exposure which is perpetrated inside a dwelling.

We conclude the People were not precluded from prosecuting Britt for burglary.

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[8] According to the California District Attorneys Association, which promulgated the legislation, the new crime of residential indecent exposure was "not couched in terms of burglary (entering with intent) because it would be difficult to prove that the person entered with the intent to expose himself as opposed to the idea coming to [*sic*] the person after he entered." (Assem. Com. on Crim. Justice, com. on Assem. Bill No. 3458 (1982 Reg. Sess.) Apr. 8, 1982, p. 2.)

VII

Validity of the Indecent Exposure Conviction

Again citing the special over general doctrine, Britt claims his felony indecent exposure conviction cannot stand because it was supplanted by the 1982 creation of the new wobbler crime of residential indecent exposure. Again he is wrong.

As explained in the previous section, the 1982 amendment authorizes felony or misdemeanor treatment for intruders who expose themselves once inside a victim's residence. Britt's felony indecent exposure conviction, however, is based on a wholly different objective -- the recidivist provision, *mandating* felony punishment for Penal Code section 314 violators who have already been convicted of the same crime (or have been convicted of violating Penal Code section 288).

Because each offense carries a different punishment based upon separate and distinct purposes, the special over general doctrine is inapposite. This claim must be rejected.

VIII

Penal Code Section 647.6 "Special Over General" Challenge

Replicating the previous "special over general" argument, Britt challenges his conviction under that provision of Penal Code section 647.6 making it a felony to annoy or molest a child after having been previously convicted of a specified sex offense (subd. (c)(1)), claiming that the provision was supplanted in 1982 by an addition to the same statute making it a wobbler to molest a child after having entered an inhabited

dwelling without consent (subd. (b)). The analysis is the same in both cases; we therefore need not repeat it to dispose of this claim.

IX

Sentencing Claims

Britt received a 17-year prison term. The court imposed the upper term of six years on the burglary, doubled to 12 years as a second strike for his prior Penal Code section 288 conviction. It also imposed a consecutive five-year term for the "serious felony" enhancement (Pen. Code, § 667, subd. (c)(6)). A 12-year term on the felony child annoyance (Pen. Code, § 647.6) and a six-year term for felony indecent exposure conviction were each stayed pursuant to Penal Code section 654.

Britt argues that his 12-year prison sentence for annoying or molesting a child, even though stayed, violated equal protection and/or constituted cruel and unusual punishment. Neither argument persuades.

Equal Protection

Britt's equal protection argument goes nowhere because it is based on an asserted disparity in punishment between recidivists convicted for felony indecent exposure and those convicted of felony annoying or molesting a child. Although Britt describes these two groups as "virtually identical," they clearly are not. Members of the first group receive an automatic felony sentence for exposing themselves in an offensive manner after having already committed a sex-related offense. The second group consists of recidivists who disturb,

irritate or offend *children* while "motivated by an unnatural or abnormal sexual interest." (*People v. Lopez* (1998) 19 Cal.4th 282, 290.)

"A meritorious claim under the equal protection clause requires a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner. [Citation.] The state may make distinctions between different groups of persons so long as the classifications created bear a rational relationship to a legitimate public purpose. [Citation.]" (*People v. Acuna* (2000) 77 Cal.App.4th 1056, 1060-1061, italics in original.) Because recidivist child molesters and recidivist indecent exposure offenders are not similarly situated, the Legislature may constitutionally subject them to different treatment.

Nor, contrary to Britt's suggestion, does it make any difference that the single act of masturbating in front of a child may result in conviction under either Penal Code section 314 or Penal Code section 288. Equal protection does not guarantee strict equality in the exercise of prosecutorial discretion. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 15.) The fact that different prosecutors may elect to prosecute the same criminal act under different statutes is, standing alone, insufficient to sustain an equal protection claim. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 567-569.)

Cruel and Unusual Punishment

This argument is fashioned from language in the United States Supreme Court decision in *Coker v. Georgia* (1977) 433

U.S. 584, 592 [53 L.Ed.2d 982, 989] that a sentence offends the Eighth Amendment's prohibition on cruel and unusual punishment if it is "grossly out of proportion to the severity of the crime" or "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."

Britt contends this test is satisfied when a recidivist such as himself is subject to a prison sentence of six years under Penal Code section 647.6 for masturbating in front of a child, when he might just as well have been sentenced to 16 months, two years, or three years for annoying or molesting a child under the recidivist provision of Penal Code section 314.

"Punishment is cruel and unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity." (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358, citing *In re Lynch* (1972) 8 Cal.3d 410, 424.) Penal Code sections 647.6 and 314 serve different goals. Section 314 punishes indecent exposure as a felony when committed by a recidivist sex offender; on the other hand the purpose of section 647.6 is to protect *children* from improper advances and annoyances of a sexual nature. (See *Lopez*, *supra*, 19 Cal.4th at p. 296 (conc. opn. of Baxter J.), citing *In re Gladys R.* (1970) 1 Cal.3d 855, 868.) Harsher treatment for repeat sex offenders who harass children than those who do not serves a legitimate penological goal. In this case, Britt had been convicted of indecent exposure in 1979 *and* lewd conduct with a child in 1987. A six-

year sentence for misconduct of the same genre when it occurs a third time in front of a child neither shocks the conscience nor inflicts unnecessary pain and suffering on the offender. No constitutional violation appears.

DISPOSITION

The judgment is affirmed. (CERTIFIED FOR PARTIAL PUBLICATION.)

CALLAHAN, J.

We concur:

BLEASE, Acting P.J.

HULL, J.