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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANK CHARLES SANBORN, Defendant and Appellant.	E035729 (Super.Ct.No. FVI011236) OPINION

APPEAL from the Superior Court of San Bernardino County. Rufus L. Yent, Judge. Affirmed.

Paul R. Ward, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Arlene Sevidal and Deana L. Bohenek, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II A., B. and C.

Defendant Frank Sanborn appeals from his conviction of multiple felony counts of lewd acts with a child under the age of 14 and misdemeanor counts of cruelty to a child by endangering health. Defendant contends that (1) the trial court should have excluded evidence about the Child Sexual Abuse Accommodation Syndrome (CSAAS); (2) instructing the jury with CALJIC No. 10.64 violated his right to due process because the instruction is biased in favor of the prosecution; (3) his convictions for counts 2 through 8 should be reversed because the state violated his due process right to reciprocal discovery; and (4) the convictions should be reversed because the court discarded valid verdicts after a juror was dismissed and thereby denied him his right to due process and a jury trial and subjected him to double jeopardy. We reject defendant's contentions, and we affirm.

I

FACTS AND PROCEDURAL BACKGROUND

Defendant was 34 years old in 1999. He lived with his sister and two nephews, then ages 11 and 13. Defendant took his nephews and other boys on camping trips, during which defendant sometimes furnished the boys with alcohol and left them unsupervised.

Counts 2 through 8 alleged sexual acts against Jason D.[1] in 1998 and 1999 when Jason was 11 and 12 years old. Counts 10 through 13 alleged sexual acts against David

[1] The jury failed to reach a verdict as to counts 1 and 9. Those counts were dismissed, and the evidentiary basis for those counts has not been included in the statement of facts. In addition, because no issue has been raised on appeal concerning the

[footnote continued on next page]

C. in 1999 when David was about 11 years old. Counts 14 through 17 alleged cruelty to three other boys in 1999 by endangering their health.

Count 2. Defendant took his two nephews and their friend Jason on a camping trip. That night, while they were all sleeping in a tent, Jason felt defendant touch his penis over and under his clothing.

Counts 3 and 4. On another camping trip, Jason woke up to find defendant fondling his penis. Defendant pulled down Jason's shorts and sodomized him.

Count 5. On another camping trip after Jason turned 12, defendant rubbed Jason's penis after they lay down to sleep.

Count 6. Defendant took Jason for a ride up into the foothills in defendant's new truck. Defendant stopped the truck and told Jason to pull his penis out and masturbate, and Jason did so. Defendant then orally copulated Jason.

Count 7. On a camping trip, defendant attempted to sodomize Jason.

Count 8. On Jason's 12th birthday, defendant took him and another boy to an amusement park. On the way back, they stayed overnight at a motel, where defendant tried to sodomize Jason.

Count 10. Defendant took David on a camping trip and touched him during the night while they were sleeping in defendant's truck.

[footnote continued from previous page]
sufficiency of the evidence to support the convictions, the underlying facts are set forth in summary fashion.

Count 11. On July 4, 1999, defendant took David camping. Defendant touched David's penis while they were sleeping in defendant's truck.

Counts 12 and 13. In the summer of 1999, defendant took David on a camping trip. Defendant rubbed David's penis and put his mouth on David's penis.

Counts 14 through 17. Defendant provided alcohol for other minor boys to drink and became intoxicated in front of them.

Other evidence is set forth in the discussion of the issues to which it pertains.

The jury found defendant guilty of 11 counts of lewd acts with a child under the age of 14 (Pen. Code, § 288, subd. (a)) and 4 counts of cruelty to a child by endangering health (§ 273a, subd. (b)). The jury found true the multiple-victim allegations (§ 667.61, subd. (b)(5)) as to counts 2 through 8 and 10 through 13. The jury also found true the allegation of substantial sexual conduct for count 3 (§ 1203.066, subd. (a)(8)), but did not reach a determination for that allegation as to count 13. The trial court sentenced defendant to a determinate term of 24 years and to 2 consecutive indefinite terms of 15 years to life.

II

DISCUSSION

A. CSAAS Testimony

Defendant raises a multipronged challenge to the admission of CSAAS testimony at his trial. He contends that the use of such evidence was prejudicial error because (1) the prosecution failed to establish that the jury or the general public still subscribe to the myths and misconceptions CSAAS was designed to correct, and such testimony was

therefore irrelevant, and (2) the trial court erred in ruling on the admissibility of such evidence before the child victims had testified.

1. Procedural Background

Defendant moved in limine to prohibit the use of CSAAS testimony at trial. The prosecution filed an opposition to the motion stating, "In the case at hand, the alleged victims . . . became close friends with the defendant. The victims came from backgrounds without strong male role models and were very happy to have the defendant in their lives, as he paid attention to them and took them places. These boys 'allowed' the defendant to allegedly molest them repeatedly over a period of time without telling anyone about it or 'fighting off' the defendant. If these kinds of issues are left unexplained to a jury, the preconceptions of society about sexual abuse will only reinforce child victimization, societal complacency and prosecutorial ineffectiveness." The opposition further stated, "It is anticipated that the defense will attack the credibility of the victims and suggest to the jury that they are lying because of their behavior. An expert witness can assist in explaining to a jury that these 'behaviors' can be consistent with sexual abuse."

The court held a hearing at which the expert witness, Vicki Lee Davio, testified about the background and purpose of the CSAAS theory. Defense counsel argued, following her testimony, that she had failed to identify a specific myth the CSAAS testimony was intended to address: "This witness can't tell us that there was a survey done and 60 percent of the population think that if a minor is abused they would immediately tell somebody of the abuse or they might delay telling somebody of the

abuse. And then we can certainly say, well, from that position, we know that expert testimony is needed to tell these people that that's not true. [¶] This witness in no way explains why this is not understood by people in general. In fact, this witness has explained that despite 18 years of experience, she doesn't know anything that would tell her that of the 12 people sitting up there there's a chance that 60 percent of them might not know or might have some mis-idea of what the situation would be that might show or be consistent with abuse." The court denied the motion to exclude CSAAS testimony. The court explained that it would be a common reaction for a victim of a crime to report the crime to others, "[s]o the opposite, late reporting is something that's different than most person[s'] usual experience in life. [¶] So certainly an expert may be able to shed some light on that reaction to this kind of a[n] incident." The court further stated that an expert witness could shed light for the jury on the tendency to minimize embarrassing or shameful situations and "the idea of guilt and shame and the idea of wanting to try to keep the family together" that might lead to delayed reporting. The court concluded that because "there are a lot of factors there that are beyond the experience of most lay persons," expert testimony would be useful to help the jury evaluate the evidence.

2. *The CSAAS Testimony*

After Jason and David testified and underwent cross-examination on, among other things, delayed disclosure of the molestations, Vicki Lee Davio, a psychotherapist who treats sexual offenders and the victims of child sexual abuse, testified as an expert witness. She testified that she was familiar with the CSAAS through seminars, her readings, and her own observations at work. She explained that children who have been

sexually abused often fail to report the abuse right away. They may feel helpless, powerless, or entrapped, and they learn to accommodate and hope the abuse will not happen again.

She testified that other times, children may tell only part of what happened, and if they are made to feel uncomfortable or if their disclosures cause problems, they sometimes recant. Children fear that their disclosure would be embarrassing or might ruin the family or marriage.

She testified that boys typically fail to come forward, especially about a same-sex offender. They may fear they are gay, or they may feel betrayed by their own body parts because those parts liked the behavior. Parents sometimes are mad at their children for not disclosing the abuse, or the parents may fear the children are homosexual.

Davio further testified that sexually abused children are sometimes withdrawn, and they may regress in their behavior at home or school. Other abused children become outgoing or sexually promiscuous, and they sometimes abuse other children.

Davio testified that abused children usually do not fight back. They may not realize what is happening if the abuse is brought on gradually. They sometimes return to the same abusive situation because they love the abuser or enjoy the other activities they do with the abuser. They sometimes tell themselves that the abuse will stop or that they can make it stop the next time. Children sometimes put up with sexual abuse because of rewards. Sometimes, if cigarettes, drugs, or alcohol are involved, the children fear that if they reveal the sexual abuse, they will get in trouble for their use of those items.

Davio testified that sexual offenders often groom children by engaging them gradually in more and more behaviors by gaining the trust of the child and doing nice things for the child. Perpetrators are frequently adults the children trust, such as family members or friends, and some perpetrators have good rapport-building skills with children. Children without a strong family system are more susceptible to being groomed by abusers, and abusers often target such children.

Finally, Davio testified that the prosecutor did not provide her with any information about the children in this case.

3. Standard of Review

"[T]he decision of a trial court to admit expert testimony 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.' [Citation.]" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299 [affirming the trial court's ruling allowing a police officer to testify that parents often fail to report known sexual molestations of their children].) In addition, a trial court's determination that a preliminary fact has been established will be upheld on appeal if the determination is supported by substantial evidence. (*People v. Brown* (2003) 31 Cal.4th 518, 541.)

4. Analysis

Defendant argues that CSAAS testimony was improperly admitted at his trial because it was not offered to dispel any myth presented by the evidence.

a. Requirements for admissibility of CSAAS testimony

To support the admissibility of CSAAS evidence, it is sufficient that the victim's credibility is placed in issue due to paradoxical behavior, including a delay in reporting

the molestations. (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745.) In *Patino*, the court stated, "CSAAS testimony has been held admissible for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation. . . . [¶] Identifying a 'myth' or 'misconception' has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with a finding of molestation. It is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation." (*Id.* at pp. 1744-1745.) Another court has stated, "[T]he [CSAAS] evidence must be targeted to a specific 'myth' or 'misconception' suggested by the evidence." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 393-394.)

In *People v. McAlpin, supra,* 53 Cal.3d 1289, 1300, the court explained, "expert testimony on the common reactions of child molestation victims is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident – e.g., a delay in reporting – is inconsistent with his or her testimony claiming molestation."

Here, the credibility of both Jason and David was at issue. Jason delayed reporting the molestations for months after it happened, and he finally revealed the molestations to an interviewer at juvenile hall after his own arrest for molesting another child. Similarly, David did not report the abuse when it happened, and he initially revealed only partial information. The CSAAS testimony was relevant to explain to jurors that children sometimes may delay reporting sexual abuse and that they sometimes

tell persons other than their parents. The CSAAS testimony was also relevant to explain why Jason and David continued going on camping trips with defendant and spending time with him alone.

Defendant argues, however, that Davio was "unable to identify with any degree of certainty what myths or misconceptions this particular jury held or even might hold," and her testimony was therefore irrelevant. However, as noted above, in *People v. McAlpin*, *supra*, 53 Cal.3d 1289, the Supreme Court affirmed the admission of a police officer's expert opinion testimony that parents frequently fail to report known sexual molestations of their children. In reaching its decision, the court relied, in part, on prior appellate opinions addressing the admission of CSAAS testimony. (*Id.* at pp. 1300-1301.) The court stated, "An even more direct analogy may be drawn to expert testimony on common stress reactions of children who have been sexually molested ('child sexual abuse accommodation syndrome'), which also may include the child's failure to report, or delay in reporting, the abuse. In a series of decisions the Courts of Appeal have extended to this context both the rule and the exception of *People v. Bledsoe* [(1984)] 36 Cal.3d 236: i.e., expert testimony on the common reactions of child molestation victims is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident – e.g., a delay in reporting – is inconsistent with his or her testimony claiming molestation. [Citations.]" 'Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching

behavior. [¶] The great majority of courts approve such expert rebuttal testimony.' [Citation.]" (*McAlpin*, at pp. 1300-1301, fn. omitted.) Thus, our Supreme Court has acknowledged that failure to report and delayed reporting are "commonly held misconceptions." Contrary to defendant's assertion, nothing in California's CSAAS cases suggests that the prosecution is required to prove, in every child molestation case, that the particular jury subscribes to such misconceptions. Rather, all that is required is that the evidence supports that the child's behavior comports with "commonly held misconceptions," which California courts have identified to include failure to report and delayed reporting. Here, the child victims did delay in reporting, and they showed other seemingly paradoxical behavior, such as continuing to go on outings with defendant even after he began molesting them. The trial court explicitly found that Davio's expert testimony would be helpful to the jury in understanding matters beyond common experience. (Evid. Code, § 801, subd. (a).) We conclude there was no error in the admission of the CSAAS testimony.

b. Timing of court's ruling on admissibility

Defendant contends that the trial court erred in ruling that the CSAAS evidence would be admissible before any evidence was introduced that either Jason or David displayed any of the behaviors described by CSAAS. Thus, defendant argues, the court should have reserved ruling on the admissibility of the evidence until after the boys had testified and the foundational facts for the admissibility of the testimony were shown on the record.

Defendant brought the motion seeking a ruling on the admissibility of the evidence before trial, and defendant did not argue in the trial court that a ruling on his own motion was premature. At the hearing on the motion, the prosecutor made the equivalent of an offer of proof that the evidence would raise issues of, among other things, delayed reporting. The boys' testimony did in fact raise issues relating to delayed reporting, and defense counsel challenged their credibility through cross-examination. The jury thus heard the victims' testimony before the CSAAS evidence was introduced.

Under these circumstances, because the actual testimony supported the prosecutor's arguments at the motion in limine relating to the purposes for admitting such evidence, there was no error based merely on the timing of the court's ruling.

B. CALJIC No. 10.64

At the defendant's request, the trial court instructed the jury with a modified version of CALJIC No. 10.64 which included the following language: "You should consider the evidence concerning the theoretical syndrome and its effect only for the limited purpose of showing, if it does, that the alleged victim's reactions, as demonstrated by the evidence, are not inconsistent with him having been molested." Defendant now contends this instruction favors the prosecution, and the last part of the instruction should have been modified to state that the victim's reactions "are not inconsistent with either him having been molested *or with him not having been molested*." (Italics added.)

1. Waiver of Error

The People argue that defendant has waived any error with regard to CALJIC No. 10.46 by failing to object to the instruction in the trial court on the basis now urged on

appeal. However, because instructional errors are cognizable on appeal even without an objection at trial if the errors affected the defendant's substantial rights (Pen. Code, § 1259; *People v. Hannon* (1977) 19 Cal.3d 588, 600), we will therefore exercise our discretion to consider the issue on the merits.

2. Analysis

Defendant objects to CALJIC No. 10.64, contending the instruction is unbalanced and unduly favors the prosecution. Defendant cites *Wardius v. Oregon* (1973) 412 U.S. 470 [93 S.Ct. 2208, 37 L.Ed.2d 82] (*Wardius*) for the proposition that "state trial rules which provide nonreciprocal benefits to the State" and that interfere with a fair trial violate the defendant's due process rights under the 14th Amendment." (*Id.* at p. 474, fn. 6.) Defendant also cites *People v. Moore* (1954) 43 Cal.2d 517, 526, for the principle that "[t]here should be absolute impartiality as between the People and the defendant in the matter of instructions, . . ." While we agree with these general statements of the law, we do not find that CALJIC No. 10.64 violates them. Rather, the instruction properly requires the jury "to presume that the defendant is innocent" and emphasizes that the "People have the burden of proving guilt beyond a reasonable doubt."

The jury was instructed to consider the instructions "as a whole" (CALJIC No. 1.01). CALJIC Nos. 3.30 and 3.31 instructed the jury that a guilty verdict requires a union or joint operation of act or conduct and the requisite intent. CALJIC Nos. 10.41 and 10.42.6 specified the elements of the charged offenses and told the jury that a conviction required proof of each of those elements. We review a challenged instruction "'in the context of the instructions as a whole and the trial record' to determine '"whether

there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citations.]" (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013.)

CALJIC No. 10.64 instructs the jury to consider CSAAS evidence solely for the purpose of reconciling certain reactions, such as delayed disclosure or recantation, with true allegations of molestation. The instruction warns that such evidence is not proof that the alleged victim's claims are true. The instruction twice refers to the completely different approach taken in CSAAS research, namely, that it begins with the assumption that the molestation has occurred. The instruction reaffirms that the defendant is presumed innocent and that the prosecution bears the burden of proving his guilt beyond a reasonable doubt. Even in the last paragraph, the phrase "if it does" leaves for the jury's determination the decision of whether the prosecution presented evidence to support an inference that the victim's reactions are not inconsistent with having been molested. CALJIC No. 10.64 provides a careful and correct way of instructing the jury in considering CSAAS testimony in its deliberation of the case.

We conclude that CALJIC No. 10.64 does not suffer from the constitutional infirmities alleged by defendant. There was no error in giving the instruction.

3. Ineffective Assistance of Counsel

Defendant also contends that if this court finds that any error in the giving of CALJIC No. 10.46 was waived, his trial counsel provided ineffective assistance by failing to object to the instruction. Because we have considered the issue on the merits and have found no error in the instruction, we need not further address this argument.

C. Right to Reciprocal Discovery

Defendant argues that he was denied his right to reciprocal discovery with respect to the counts involving Jason.

1. Background

When Jason was being booked into juvenile hall after he was detained for sexually assaulting a girl while he was in foster care, the booking officer asked him if he had ever been sexually assaulted. Jason then revealed that he had been molested. He was later declared a ward of the court and sent to a group home. He was interviewed by Detective Nuss in the presence of Rose Kogeman, his appointed attorney in his juvenile proceedings.

Before trial, defense counsel filed a motion to "cease interfering with Defendant's right to interview a witness . . . ." Defense counsel argued that the defense team had made repeated efforts to contact Jason for an interview, but that Kogeman, the attorney representing Jason on his juvenile court charges, refused to allow defense counsel to interview him. At the hearing on the motion, defense counsel argued that if Jason did not wish to be interviewed, he himself should tell that to defense counsel.

In opposition, the prosecutor argued that Kogeman had provided a letter stating that she had spoken to Jason and Jason did not wish to be interviewed.

The court denied the motion, finding no basis for it in the law. The court stated that if the child had a parent, and the parent refused to allow the child to be interviewed, that would be the end of it. Here, Jason's attorney had told defense counsel that she had spoken to Jason, and he did not want to be interviewed. In addition, social workers,

acting in the place of Jason's parents, had said they did not want Jason interviewed. The court also denied the motion for access to Jason's records. The court stated that such a motion had to be made through the juvenile court, which had already denied such a motion.

2. Analysis

"[D]iscovery in criminal cases shall be reciprocal in nature." (Cal. Const., art. I, § 30; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 373.) The Due Process Clause of the Fourteenth Amendment requires that the state and the defendant have equal access to witnesses before trial: "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street," (*Wardius*, *supra*, 412 U.S. at p. 475), and "the government has no right to interfere with defense access to witnesses." (*Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, 1333, internal quotation marks omitted.)

However, witnesses are not required to speak to either the prosecution or the defense. (*Reid v. Superior Court*, *supra*, 55 Cal.App.4th at p. 1333.) When the witness is a minor, his or her parent decides whether to allow the minor to speak to either the prosecution or the defense. When the minor has been declared a ward of the court, the juvenile court has the authority to allow a minor to speak with either the prosecution or the defense. The record is clear that Jason knew of defense counsel's desire to interview him, but that, through his appointed attorney, he declined to participate in such an interview. We therefore reject defendant's contention that his statutory discovery rights or his constitutional rights were violated.

Defendant also argues that the prosecutor committed error and acted in bad faith when she interviewed Jason before trial because by doing so, she skirted the due process requirement of equal access to discovery. A week or two before Jason testified, the prosecutor interviewed Jason. She gave him copies of the police report and a transcript of his December 1999 interview with Detective Nuss.[2] However, defense counsel did not object in the trial court that the prosecutor had spoken with Jason. We conclude that any objection based on the fact that the prosecutor interviewed Jason has been waived.

D. Discarding Verdicts After a Juror Was Dismissed

Defendant contends that the trial court erred in discarding valid verdicts after a juror was dismissed and thereby denied him his right to due process and a jury trial and subjected him to double jeopardy.

1. Background

The jury began deliberations on December 4, 2003. On December 9, Juror No. 5 became ill and was replaced by an alternate. The jury deliberated seven full days, and then the trial was continued for three weeks to January 12, 2004. On January 20, Juror No. 7 was excused because of a death in the family and was replaced by an alternate.

After the alternate juror had been substituted in, the jury returned to the jury room. The foreperson then informed the bailiff that the jury had already reached verdicts on

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[2] Defendant speculates that if the prosecutor interviewed Jason while he was at his group home, she acted in bad faith and violated the law because Jason's address was confidential. The record is silent on the location of the interview, and we therefore need not further address this contention, which is also unsupported by any citation to relevant authority.

some of the counts and asked what to do with the completed verdict forms. Defense counsel stated, "They have to start all over." The prosecutor agreed that the verdict forms already completed should be destroyed. The court collected those forms and provided the jury with a new set of blank forms. Defense counsel agreed with this procedure.

2. Waiver

The People argue that defendant has waived the right to raise this issue on appeal by failing to object below. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) Neither party requested that the jury be asked whether they had reached verdicts on any counts before the juror was excused. Because the alleged error involves fundamental constitutional rights, we will exercise our discretion to consider the matter on the merits.

3. Analysis

Defendant contends that in discarding the verdicts, the trial court denied him his rights to due process and to a jury trial and subjected him to double jeopardy. The federal and California Constitutions guarantee defendants accused of felonies the right to the unanimous verdict of 12 jurors. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; Cal. Const., art. I, § 16.)

The parties did not cite any published California case addressing the precise issue raised in this case, and our own research did not reveal any such case. However, a handful of cases that have addressed the converse issue have concluded that partial verdicts reached before a juror is dismissed and the jury is reconstituted are valid. In *People v. Aikens* (1988) 207 Cal.App.3d 209, the jury had reached a verdict on one of

two counts before a juror was dismissed and replaced by an alternate. The trial court accepted that verdict, and the defendant claimed on appeal that the trial court should have instead declared a mistrial. The appellate court found no error. (*Id.* at p. 214.) In *People v. Thomas* (1990) 218 Cal.App.3d 1477, two jurors asked to be excused after the jury had reached verdicts on some of the counts. The trial court, over objection from defense counsel, elected to have the jury return its partial verdicts before discharging the jurors from the panel. (*Id.* at p. 1483.) On appeal, the defendant argued that this was error, and that the trial court should have ordered the reconstituted jury to begin deliberations anew. The court rejected that argument, explaining: "Inasmuch as the verdicts returned and recorded prior to the discharge of [the two jurors] were the product of a unanimous panel of 12 competent and qualified jurors, we have difficulty discerning the nature of defendant's complaint as to those verdicts. [¶] Certainly, the work of the jury in rendering those verdicts, the nature of which were unknown to anyone except the jurors, should not be lightly set at nought simply because two of the jurors who participated were subsequently discharged and we find nothing untoward in the fact that the trial court knew in advance of receiving the verdicts that one of the jurors was to be excused from further deliberation on the remaining charges. (*Id.* at p. 1485.)

The Supreme Court approved *Aiken* and *Thomas* in *People v. Cain* (1995) 10 Cal.4th 1 at page 67, stating: "In both cases the appellate court *approved* the trial court's excusal of a juror and substitution of an alternate after the jury had reached verdicts on some but not all of the charges. [Citations.] Neither decision holds the reconstituted jury

must reconsider the verdicts already returned or deliberate on factual conclusions irrelevant to the counts yet to be decided." (Original italics.)

Aiken, *Thomas*, and *Cain* make clear that it would not have been error for the court to accept the partial verdicts before discharging the juror and seating an alternate juror. Those cases do not, however, establish a rule that the court *must* accept partial verdicts under such circumstances. Rather, a defendant is entitled to a unanimous verdict reached through the joint deliberations of all 12 jurors. (*People v. Collins* (1976) 17 Cal.3d 687, 693.) That is exactly what defendant got. The trial court instructed the jurors to begin deliberations anew after the juror was excused. On appeal, we presume that the jury understood and followed that instruction. (See, e.g., *People v. Delgado* (1993) 5 Cal.4th 312, 331.) We conclude that defendant was not deprived of his constitutional rights.

Defendant argues, however, that the record shows that the jury did not begin deliberations anew. Defendant notes that the jury deliberated eight full days between December 9, 2003, and January 20, 2004, while Juror No. 7 was still a member of the jury. During that time, the jurors requested readbacks of the testimony of both Jason and David.

The trial court replaced Juror No. 7 with an alternate on January 20, 2004, and the reconstituted jury began deliberations. The dates on the verdict forms show that the jury reached verdicts on ten counts and one allegation of substantial sexual conduct in three and one-half hours on January 20 and on five counts and one allegation in approximately four hours on January 21. Defendant argues that the speed with which the reconstituted jury reached its verdicts, combined with the fact that seven weeks had passed since the

jurors had heard testimony or argument, demonstrate that the jurors did not begin deliberations over again.

Defendant notes that in *Griesel v. Dart Industries, Inc.* (1979) 23 Cal.3d 578 (overruled on another ground in *Privette v. Superior Court* (1993) 5 Cal.4th 689, 696), the Supreme Court reversed a verdict when the jury deliberated for seven days before a juror was replaced, and the reconstituted jury then reached a verdict in less than four hours. (*Id.* at p. 585.) However, the court did not base the reversal on a comparison of the time the jury took in deliberations before and after the substitution, but on the fact that the trial court had erred in failing to instruct the jury to disregard all past deliberations and begin deliberating anew. The court considered the length of time of deliberations in determining whether the instructional error was prejudicial. (*Id.* at pp. 584-585.) Here, in contrast, the trial court properly instructed the reconstituted jury on the requirement of reaching consensus based on common deliberations. Nothing in the record indicates that the jury disregarded the court's instruction.

III

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.