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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VASSAR WILLIAMS SMITH, Defendant and Appellant.	H020031 (Santa Clara County Super. Ct. No. 209576)

The facts underlying the convictions in the instant case involve defendant Vassar Smith's repeated lewd fondling and spanking of his son (Victim). A jury found defendant guilty of 11 counts of lewd or lascivious conduct on a child under the age of 14 (Pen. Code, § 288, subd. (a) [counts 1 & 3-12]),[1] five counts of lewd or lascivious conduct on a child under the age of 14 by use of force, fear, violence, or duress (§ 288, subd. (b) [counts 13-17]), one count of continual sexual abuse of a child under the age of 14 (§ 288.5, subd. (a) [count 2]), and one misdemeanor count of possession of child pornography (§ 311.11, subd. (a) [count 18]). Defendant was sentenced to 68 years in state prison. On appeal he contends his convictions on counts 1 through 17 must be reversed because those charges were barred by the statute of limitations. Defendant claims the trial court erred by instructing pursuant to CALJIC No. 2.50.01 because it allows for conviction based solely upon uncharged offenses admitted under Evidence Code section 1108; alternatively, he argues the combined application of the instruction and Evidence Code section 1108 violated the federal prohibition upon ex post facto legislation. Defendant also contends the trial court abused its discretion by admitting evidence regarding

[1] All further statutory references are to the Penal Code unless otherwise specified.

the uncharged prior sex offenses. He next claims the court erred by admitting evidence concerning his friend who was seen by the victim on America's Most Wanted. Defendant also claims the court's refusal to order adequate discovery regarding a jailhouse informant's pending criminal charges, and its failure to strike the informant's testimony, require reversal. He contends the trial court erred as to counts 13 through 17 by failing to instruct sua sponte that defendant had the right to reasonably discipline his child and earlier had erred by refusing to allow the defense to call Victim's psychiatrist as a witness. With regard to count 18, defendant claims the evidence that he possessed his "slide show" video during the time period charged is insufficient and that the court erred by failing to give a unanimity instruction as to that charge.

FACTUAL SUMMARY

Defendant and his wife (Wife) met in the early 1960's when they were 12. They next saw each other in 1981 at a wedding in Tennessee; at the time, Wife was divorced and struggling to provide for her nine- and 11-year-old sons, C. and J. Defendant struck up a friendship with Wife and then contacted her from Palo Alto. That Christmas, he proposed marriage, and Wife agreed. Before the wedding, defendant told Wife he had been counseled by a priest to tell her he had a "real fondness for boys." Wife thought the confession odd but interpreted it to mean he would be a good father to her sons. The couple married in 1982, and Wife and her boys moved into defendant's house in Palo Alto.

Wife and defendant did not have sexual relations before marriage. After the wedding, he said he wanted to start a family immediately, but his sexual behavior was "unusual" in that he wore his clothes and found aspects of sex "repugnant." Five months after the wedding, when defendant learned Wife was pregnant, he stopped having sex with her, became adamant the child had to be male, and insisted upon an ultrasound to establish its gender. In 1983, he moved to a separate bedroom.

Defendant took an immediate interest in Wife's boys. He bought them new clothes, consisting of tight-fitting white shorts, and he visited their room at bedtime. In 1983, when her sons reported defendant was inappropriately fondling their buttocks under their underwear during "back rubs," Wife told defendant to stop. Wife testified defendant had little interest in Victim early in his life, had a

markedly greater interest when Victim was around five or six, and had much less interest after Victim turned 13 or 14.

Defendant's son Victim, age 15 at the time of the trial, testified as follows regarding defendant's behavior with him as a prepubescent boy.

Approximately three times a week from the time Victim was six until 11 or 12, defendant engaged in night reading sessions with him in defendant's bedroom, with the door closed. Defendant lay on his back and read from books which centered around the lives of boys, while Victim lay on his stomach, wearing pajamas or a white T-shirt and underwear. As he read, defendant would give Victim a 10-minute "back rub," in which he repeatedly slipped his hand under Victim's underwear and fondled Victim's buttocks. Victim estimated that, over the course of these sessions, defendant gave him a back/buttock rub on at least 400 occasions.

At about age nine, Victim became uncomfortable with the buttock rubs and often declined defendant's offer of a "back rub." By age 10, Victim frequently objected to the reading sessions. Defendant was adamant about continuing them and responded to the refusals by grounding Victim or taking away his allowance.

While Victim was between five and nine, defendant would wrestle with him and tickle him. He would hold Victim down with one hand and, while Victim struggled to get away, he would pull down Victim's underwear and spank his bare buttocks. Victim estimated defendant spanked his bare buttocks while wrestling around 200 times, often in the context of the reading sessions.

Defendant also often administered painful punishment spankings when Victim was between five and 11. These often took place without justification; behind closed doors, defendant would have Victim pull his pants down, and he would bend Victim over his knee. Victim eventually reported to his mother that defendant would spank him one cheek at a time, with each slap harder than the previous.

Defendant insisted Victim wear white cotton briefs, even when Victim decided he preferred boxer shorts. Defendant would scream at Victim and threaten to burn any boxer shorts in Victim's room. By age 12, Victim's relationship with his father changed; they fought more, and defendant no

longer played with him. When Victim was 13 or 14, defendant once angrily grabbed Victim by the neck and choked him.

Defendant had a private office in a locked shed in the back yard; his second office was a converted bedroom where he kept his computer. When Victim was 13 or 14, he often saw defendant on the computer. When anyone walked by, defendant would turn off or block the screen. When Victim did see it, he noticed defendant using a program to draw pictures of young boys. Victim also noticed that next to defendant's bed were albums containing photographs of family members interspersed with ones of young boys wearing white cotton underwear.

In 1998, Victim reevaluated his earlier relationship with his father following two incidents. The first involved defendant's friend Jon Tampico (Tampico), who often came over when Victim was alone and helped him with school work. In July 1998, Victim watched an episode of America's Most Wanted, which featured Tampico and noted that he was wanted for involvement in child pornography. Victim was upset by the fact defendant condoned him spending time alone with Tampico. The second incident occurred a week later when Wife asked for a blank disk from defendant's office. Victim retrieved an unmarked disk, put it into his mother's computer, and discovered it had files labeled with boys' names. When Victim opened one, he saw the back of a little boy with his head turned over his shoulder; the boy's underwear were down, exposing his buttocks. Victim broke the disk and threw it in the garbage. He retrieved another blank disk from defendant's office; it was filled with files similarly labeled. Victim discarded it without opening the files and reported his discovery to his mother, who became very upset. A week later, defendant moved out of the house. Thereafter, Victim saw defendant return and remove garbage bags of material from the shed.

After the disk discovery, Victim told his mother about the "rubs" in which defendant had fondled his bare buttocks. His mother then mentioned a 1985 incident when Victim's half-brother found pornography depicting young boys in the shed, and she expressed concern that defendant may have done something to J. and C. When Victim asked if defendant was a pedophile, Wife said she thought he was a child pornographer.

Victim first reported defendant's molestations to the police on October 22, 1998.

Several males testified regarding defendant's prior uncharged acts of lewd conduct and molestation. A summary of that evidence follows.

Defendant began babysitting his professor's son Matt in 1971 when Matt was 10.[2] Defendant befriended Matt, and he then began taking pictures of him in underwear, a jock strap, or naked, mainly focusing on Matt's buttocks. These photography sessions lasted until Matt was 16. During those years, Matt was small for his age, and defendant would give him "back rubs" which ended with fondling Matt's bare buttocks. He also gave Matt frequent spankings, finding trivial excuses to do so. Matt testified defendant became "sexually aroused" by the bare buttocks spankings. Twice defendant photographed taking Matt's temperature with a rectal thermometer. In 1976, defendant gave Matt an enema while photographing the event. Defendant once tried to have anal sex with Matt, but Matt was afraid and defendant relented. Some photographs recovered from defendant's collection depict Matt partially or completely naked, including ones in a "slide show" video made by defendant. Defendant had Matt wear white cotton underwear in several photographs.

In 1973, defendant babysat eight-year-old Tommy while renting part of the house in which Tommy's family lived. Telling Tommy that he loved him unconditionally, defendant mentioned photographing boys in underwear or naked; he said the photographs were artistic and told Tommy not to tell anyone about them. After winning Tommy's trust, defendant took pornographic photographs of Tommy which focused on his nude buttocks. These photographic sessions continued even after defendant moved when Tommy was 11. Defendant once painfully spanked Tommy's bare buttocks. Tommy declined defendant's request to photograph him with a rectal thermometer in his anus; Tommy also declined defendant's request to give him an enema. Defendant joked about boys' buttocks, talked about spankings, enemas, and rectal thermometers, and asked whether Tommy's parents gave spankings with pants off. Defendant often gave Tommy what defendant labeled "back rubs;" these involved rubbing Tommy's back and fondling his exposed buttocks. Tommy testified the rubs were

[2] Given the nature of the testimony involved, we refer to defendant's victims by first name. Two victims were named John; we refer to them as John 1 and John 2.

used by defendant to get "off" sexually because he had "a little boy fetish thing." Tommy identified photographs of himself from defendant's album and identified a boy photographed by defendant in underwear as Kris. Tommy said defendant once became upset because Hooper Phillips published in a pedophilic magazine photographs defendant had shared with him of Kris.

The prosecution played two video tapes made by defendant, the "slide show" video mentioned above and an "excerpts" video. The first shows a screen on which a slide show is projected by defendant while an audio tape plays in the background. The photograph slides, taken by defendant, are of nude children. The audio tape includes defendant's discussions with Tommy and others. Tommy recognized himself and a boy named Sean in the slides. Tommy is naked or with his bottoms down with his buttocks facing the camera. The tape has a recording of defendant asking Tommy to describe a child being spanked and whether his underpants were down, and sounds can be heard which appear to those of Tommy being spanked. Defendant describes with pleasure how Tommy let defendant rub his bare buttocks and how Tommy enjoyed this because he knew he was loved by defendant. Defendant describes many slides as depicting Tommy after a spanking, says he enjoyed rubbing Tommy's buttocks when Tommy was little, and describes his pleasure in putting his hand around Tommy's white cotton underwear. Audible in the tape are sounds of defendant masturbating as he watched the slide show and listened to the tape and defendant saying that, when little boys are waiting to be spanked, they get a sense of power and worth from knowing how sexy and desirable they are to the spanker. He says little boys enjoy having their underwear pulled down with their buttocks exposed to a man who loves them and like to have their buttocks spanked and fondled. In the second video, which is a movie depicting defendant's interactions with Tommy and others, defendant assumes the role of a character named Igor, and Igor talks to Tommy about photographing boys in the nude and walking around without clothes or in white underwear. In that video, defendant often recorded spanking scenes in slow motion.

In 1972 or 1973, when John 1, who is deaf, was about 12 years old, his mother enrolled him with Big Brothers Association. Defendant was assigned to be John 1's big brother. This relationship lasted six to 12 months, during which John 1 often visited defendant's house; once John 1 wore nothing

but his underwear there. Defendant often had other men over while John 1 was there, and John 1 had the impression that those men "liked boys." Defendant took photographs of John 1 in his underwear, and defendant's friend Leroy also photographed John 1. Defendant once pinned John 1 to the floor, pulled his underpants down, and spanked his bottom. At some point, defendant suggested John 1 go to a baseball game with Leroy and spend the night at Leroy's house. When John 1 went to Leroy's house, Leroy made John 1 strip naked, fondled John 1, took photographs of John 1, and masturbated in front of John 1. John 1 reported the incident to his mother, and Leroy faced a trial over the incident.

In 1976, defendant was assigned to be James's big brother when James was eight. This relationship lasted three months, during which defendant saw James twice a week. Defendant once offered to give James a massage. After having James remove his shirt and lie on the bed, defendant pulled down James's pants and rubbed James's bare buttocks with both hands for about five minutes. Defendant occasionally had James sleep with him after making James remove his clothes except his T-shirt and white briefs; defendant then slept very close to him. Once, when defendant had friends over, he had James and another boy wrestle for the group. When James told his mother he did not want defendant to be his big brother, she ended James's involvement in the program.

In 1976 or 1977, when Sean was eight or nine, defendant was assigned to be his big brother. Their relationship lasted until Sean was 12. Sean often spent the night at defendant's home. Defendant would have Sean sleep with him; in bed, defendant would hug Sean, who wore a T-shirt and underwear. Defendant posed Sean and took pictures of his buttocks. Defendant would pull down Sean's pants and spank him; other times, he gave Sean a massage and rubbed his buttocks. Sean appears in his underwear in the excerpts video. Defendant is seen with an erection during a session in which he places Sean on his lap and, while Sean is straddling him, he spanks Sean's bottom and tells Sean he loves him. Defendant also is seen restraining Sean, kissing his face, and fondling his buttocks. In the slide show video, defendant can be heard masturbating while talking about the joy of massaging a young boy's legs and viewing slides of Sean. Sean recalled that defendant once bought him a snug white bathing suit which looked like underwear and insisted Sean wear it in public.

Victim's step-brothers and his mother testified as follows.

Defendant would enter the room C. and J. shared and give them "back rubs," during which defendant would slip his hand under the boys' underwear and fondle their buttocks. The fondling sessions lasted between five and 15 minutes and took place two or three times a week.

Defendant preferred white cotton briefs, and C. usually wore them. Defendant told C. he hated the person who invented boxer shorts and once asked C. to help remove some from Victim's dresser. Defendant gave C. frequent, brutal spankings in the shed. He made C. pull down his underwear, lay across his lap, and alternated spanking his buttock cheeks, pausing between slaps in a seemingly "ritualistic" manner. In public, defendant, who had poor vision, would strain to "gawk" at little boys. C. identified a photograph of himself as a child in which he is dressed in his underwear but could not recall the picture being taken.

J. eventually reported the fondling to his mother; a few years later, he reported it to the police. Defendant would spank J. and his brothers over trivial matters. Until J. was 13, defendant would make J. lower his underpants, lie J. across his lap, and spank alternate buttock cheeks. J. testified defendant posed him and C. in underwear and photographed them from behind. Following defendant's 1985 hospitalization for injuries received when he was hit by a truck, J. went to the shed to retrieve an address book. There he found trunks of photographic albums which contained pictures of boys in T-shirts and underwear or partially and completely nude. J. reported his discovery to his mother. J. testified that, when defendant came home, he moved the trunks to a storage area, and that, after Victim discovered the disks, their mother ordered defendant to get rid of his child pornography. In August 1998, defendant called J. and asked for help in doing so. Defendant said he had shredded the material and needed a ride; J. reluctantly helped defendant take several "Hefty bags" filled with shredded child pornography to the dump.

Wife testified that, after J.'s discovery of the pornography, she entered the shed and observed photographs of young boys in underwear with the focus on their buttocks. Upset, she called Jon Tampico, who said he had warned defendant to tell Wife about his collection and proclivities before marriage. Once defendant returned from the hospital, Wife told him to get rid of his pornography. Defendant agreed, and Wife heard him on the telephone making arrangements to do so. Knowing

defendant took a briefcase to the home of her friend, Susan B., defendant's wife assumed he had gotten rid of all of his pornography collection in 1986.

In July 1998, Wife retrieved the broken disks with images of nude boys and took them to a friend's home. Soon thereafter, she asked defendant to move out. Two weeks later, Victim told Wife that defendant had fondled his buttocks during the reading sessions and had said he showed Victim he loved him in that way. He also reported that defendant spanked one cheek at a time and that he pulled Victim's pants down during wrestling sessions. Wife confirmed that, when Victim objected to the reading sessions, defendant yelled and threatened to withhold Victim's allowance.

Wife and defendant talked with their priest following the disk discovery. Asked why he had not gotten rid of the pornographic material as promised in 1985, defendant said he had stored it with Tampico but brought it home when Tampico was arrested. In August 1988, when defendant said he had destroyed the material, the priest had defendant give Wife a key to his shed. Wife saw defendant take two garbage bags from the shed. When Wife entered the shed three days later, she discovered he had not destroyed all the material. Wife found pornographic drawings, books, albums, and stories, and she viewed a few video tapes which depicted child pornography. She packed some of this material in Rubbermaid tote boxes and took them to the home of her friend Susan B.

On October 9, 1998, Victim's school counselor called Wife to say Victim had reported abuse by defendant. Wife assumed the counselor was referring to sexual abuse and agreed to discuss defendant's fondling of Victim's buttocks. In fact, the counselor was referring to Victim having reported the incident when defendant choked him; learning of the sexual abuse, the counselor said she would report both the physical and sexual abuse to the police.

Two weeks later, defendant told Wife he was moving back. Over her protests, he pushed his way inside the house but left when informed Victim had reported him to the police. Soon thereafter, Wife called the police, who interviewed Wife and Victim Wife told the police to pick up the materials from Susan B. and the broken disks from another friend. She turned over letters from Tampico and others which had arrived after defendant had moved. In court, Wife identified pornographic photographs from defendant's albums as well as ones of Matt and Tommy which had been taken from

the shed. She testified defendant had photographed Victim in his underwear when he was nine or 10, and she gave one of these photographs to the police.

Susan B. testified that, in August 1998, defendant's wife brought over two cartons which contained books, videotapes, and notebooks concerning young boys. Susan B. gave these items to police five weeks later. She added that, in 1985 or 1986, defendant gave her a locked briefcase to store, saying it contained artwork which might be misinterpreted.

Detective Brown recovered a plastic tub and a cardboard box from Susan B. They contained 28 video tapes and numerous letters, drawings, photographs, and books. Brown recovered 100 video tapes, several drawings, photo albums, and letters from the shed and photographs, pictures, writings, and computer equipment from the house where defendant stayed after moving out. Brown watched the 128 tapes, including commercial productions and the "slide show" and "excerpts" videos; each focused on young boys and predominantly showed them wearing white underwear and T-shirts or with their bare buttocks exposed. The films also depicted naked children, children taking showers, sex between children, and scenes of boys being spanked on their bare buttocks. Defendant's possessions included Polaroid shots of boys with their buttocks exposed, drawings of boys being spanked, and books with sexual themes involving boys. Brown found a June 1995 letter sent to defendant in which its pedophile author acknowledges sharing a similar interest in boys wearing white underwear; the writer thanks defendant for sending art work and writes about a description defendant sent about enjoying watching his son and his son's friends skinny dipping. Some stories written by defendant discuss spankings as a sexual experience; one is about a father spanking his son and rubbing his son's buttocks because he loves him. Defendant also wrote a treatise on pedophilia in which he identifies what he considers to be a positive pedophile, whom he labeled "boy-lover," as one who establishes a loving, rather than exploitative, sexual relationship with a young boy.

Homer Resendez testified that, while he was an inmate in Santa Clara jail awaiting trial on a murder case, he once shared a holding cell with defendant. In response to defendant's questions, Resendez said he was a former gang member and that he was getting out of jail soon. Defendant asked if Resendez would like to make money by ensuring defendant's wife and child did not come to court as

they would give "damaging" testimony; offering $5,000, defendant said he did not care if Resendez killed Wife but he did not want Victim injured. Defendant said he was in the printing business and that Resendez would be paid by his business associates. Defendant discussed details of his case, his personal life, his relationship with his wife, and he made up a poem criticizing government officials for interfering with his lifestyle, which defendant wrote down and signed. Resendez said he received no promises or special treatment for testifying, that he did so because he "hate[s] sex cases."

Detective Watson retrieved documents from defendant's disks and hard drive and a list of the web sites visited by defendant before his arrest. On a disk, Watson found vignettes defendant wrote which had sexual themes involving little boys. A few were fictional, but most identify specific individuals, such as Sean, and recount actual events during which defendant admired young boys who were wearing underwear or were spanked. In one story, defendant talked with pleasure about a time when his son Victim's swimsuit kept falling down and Victim decided to take it off and walk around in his white cotton underwear. Defendant fondly recalled how Victim then wrestled with defendant, rode on his back, and lay in his arms wearing only white underwear. Watson recovered from the files stories and images of boys being spanked, including boys getting erections from spankings. Watson determined defendant had visited several boy-spanking-oriented web sites within weeks of his arrest. On the hard drive, there were photographs of boys in white underwear, including one of C., which defendant last modified on the evening of October 26, 1998.

When Watson interviewed Resendez, Resendez knew information about defendant's case unknown to the public; in addition, Resendez said defendant had taken bags of pornographic material to the dump with the help of his son J., a fact then unknown to police. Resendez was aware defendant had a partner in the publishing business in Tennessee, and Watson confirmed that defendant's brother Beecher lived in Tennessee and was defendant's partner in a publishing business there.

Defendant testified in his own defense as follows.

Defendant married because he was ready to do so and because Wife was a sweet person. He told Wife he wanted a baby boy because he wanted someone to carry on his family name. He had a

loving relationship with Victim until he began to pull away at age 12. Defendant has a vision deficit and is legally blind in one eye.

From 1990 to 1996, defendant and Victim had reading sessions, although Victim occasionally resisted them. Defendant's door was kept closed to keep out pets. Defendant denied fondling Victim's buttocks during the back rubs he gave before or after the reading. He would rub from Victim's shoulders down to the coccyx bone at the top of the buttocks, and he admitted that his fingers "might get to [Victim's rear end]" but he denied having had any sexual purpose in giving the rubs.

Defendant acknowledged play wrestling with Victim but denied pulling down Victim's pants and spanking him for a sexual purpose. He said Victim's pants sometimes fell as he wore no belt, and defendant admitted occasions when he pulled down Victim's pants as a joke but denied it was sexual. Defendant acknowledged giving serious spankings to Victim but said they were for discipline rather than sexual purposes; he sometimes withheld allowance to teach Victim a lesson when he showed disrespect, such as by saying he did not want a reading session with defendant.

Defendant wrote the stories found on his computer in the mid-1970's and later scanned them into his computer. He admitted possessing several photographs and books found in his home but said he had not solicited the child pornography mailed to him in the late 1990's. Defendant admitted owning the album containing children's photographs from 1979 to 1983.

Defendant made the "slide show " and "excerpts " videos in 1981. He said scenes were repeated because his VCR lacked capacity for creating stills and that he recorded spanking scenes repeatedly in slow motion in order to conduct studies on the nature of motion.[3] Defendant feels children have "sexual feelings to do sexual things," but he does not believe it appropriate to have sex with them. He acknowledged his preference for cotton briefs but denied having a sexual attraction for them.

Defendant took posed photographs and videos of the boys who testified against him but claimed he only took them to "preserve" their images as they were at that time. He conceded it was

[3] Defendant compared his slow-motion recordings to those of Muybridge, who used slow motion photography to create series of still shots of running animals to show their motion.

"debatable" whether the pictures were of a sexual nature but said he had not had sexual feelings at the time. He denied having a sexual relationship with any of the males who testified, except for Matt, for whom he had an "aesthetic" attraction which turned into a "sexual" one. Defendant said he has not taken pornographic pictures since the early 1980's when therapy changed his life. He kept the photographs and videos thereafter because he thought they were "artistic," but, when C. discovered his collection in 1985, defendant arranged to put his collection into storage, but, by 1997, he had retrieved all of those materials. In 1998, he decided to destroy them and began taking them to the dump with his stepson; defendant said he would have destroyed them all but his wife prevented that by taking two boxes of materials to Susan B.'s home.

In 1988, defendant wrote a "Make Amends" list which included the names of the males who testified at trial. He denied writing the list because he had molested the boys, saying his therapist had recommended healing by confession and he listed those against whom he had transgressed for any reason, such as by using inappropriate language.

Defendant conceded he told Resendez the details of his case which Resendez recited in court. He denied saying he wanted his wife dead or that he wished she were dead and denied offering Resendez money to keep his wife from testifying, saying he would not have offered money because his assets were frozen in the divorce.[4] Defendant denied having a publishing partner in Tennessee or saying as much to Resendez but did admit his brother, who lives in Tennessee and has a publishing company, collaborated in editing defendant's books.

Defendant said he never took pictures of Victim in a sexual or semi-sexual pose. At the conclusion of direct-examination, defendant denied ever having spanked Victim or rubbed Victim's his back or buttocks "for the purpose of sexual arousal, either [his] or [Victim's]."

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[4] The prosecutor later produced a writing which defendant admittedly wrote. Asked to translate it, defendant claimed it was just untranslatable nonsense words. If read backwards in English, the writing seven times said "A fatal curse upon you fat bitch [name omitted]." The full name in the writing was that of defendant's wife.

On cross-examination, defendant denied he was a pedophile and claimed he had "not thought about a boy as a sex object" since 1981; and had not thought of spankings as "sexy" while in his teens and 20's, he had found little boys "appealing" but said he did not think of them "as sex objects consciously." He did acknowledge later filming himself masturbating to images of nude young boys in the "slide show" video. The last time he had an undeniable sexual interest in a boy was in 1976, when he cared for Matt; asked if he had sexual interest in young boys thereafter, defendant said they are "erotic" and "aesthetic" but "the word sexual in most people's minds comes down to wanting to have sex with someone."[5]

Defendant's first sexual intercourse, which occurred when he was 16, was with a 10-year-old boy named John 2. During that four-year relationship, defendant sodomized John 2, gave him enemas, and inserted objects in his anus. Acknowledging these acts were sexual, defendant claimed not to understand them now as an adult. Defendant wrote stories sexualizing the infliction of pain and humiliation through spankings but claimed he wrote them to someone else's specifications and did not condone those acts. He conceded he had considered inflicting painful or humiliating spankings a "turn on" and had fantasized about them but denied ever acting upon those fantasies, which he claimed had stopped in the 1970's.

At least until the early 1980's, defendant had found young boys' buttocks, tight white cotton underwear, and spanking young boys to be sexy. He conceded fantasizing about administering spankings as punishment and leaving welts on young boys' buttocks as he masturbated in the slide show video, as well as talking about young boys being spanked and punished by the person the boy loves. Asked about his taped comments while holding Matt and fondling his buttocks, defendant admitted he found fondling buttocks a way of showing love for little boys and that he found such fondling sexually appealing. Denying his taped fondling of Matt's buttocks was a "sexual moment," he admitted he was masturbating while watching that part of the video.

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[5] Pressed about his desires toward young boys, defendant noted that, since his 1985 accident, he has been "incapable of a sexual function." However, he admitted he still can masturbate to ejaculation, experience feeling in his penis, and derive sexual pleasure from masturbation.

Defendant had a sexual relationship with Matt until 1977. He acknowledged having touched and patted Tommy's bare buttocks and having playfully spanked Tommy but denied these acts were sexual in nature. Defendant admitted he had videotaped Tommy modeling his buttocks and exposed his erect penis. Defendant acknowledged the video showed himself with an erection but denied any sexual interest, suggesting he had needed "to go to the bathroom." Defendant denied ever pulling down James's underwear, fondling his buttocks, or spanking him.

Defendant fantasized for years about living in a society where little boys wear T-shirts and underwear in public because he found such underwear "aesthetic." He admitted masturbating on the video while talking about images of boys in tight white underwear and recording "Underoos" commercials so he could masturbate to them.

Defendant acknowledged posing Sean in underwear for defendant's sexual gratification and having fondled and spanked Sean's bare buttocks over protest. Defendant admitted having an erection while filming the spanking but claimed not to know if he was sexually aroused. He took Sean's temperature rectally because he feared Sean would bite down on the thermometer. Defendant sent his photographs for development to his friend Hooper after management of a local lab became suspicious of the photographs. Defendant wrote numerous letters to Hooper about the boys he photographed; in one, he described Sean as "at the golden age."

Defendant acknowledged he gave his stepsons back rubs and massages, touching the "upper area of the buttocks," and that he pulled down their pants and spanked their bare buttocks. When the prosecutor noted the massages were similar to those described by Matt, Sean, Tommy, and James, defendant suggested they were changing over time, focusing more on the back and less on the buttocks. He said he did not touch Victim's "full" buttocks in a rubbing fashion, but he did admit giving Victim both "playful" and serious spankings with his pants down or with bare buttocks. During the rubs he gave to his three sons, defendant occasionally moved the underwear waistband and touched the buttocks, but he testified the contact was incidental to giving a full massage down to the coccyx bone and was not intentional.

During the month preceding his arrest, defendant visited two spanking web sites, but he suggested he may have been inadvertently taken to them from another site. He was unsure if he typed the search words "young boys, tight white briefs" found in his computer cache but acknowledged having authored spanking stories found on internet sites he had visited.[6] According to defendant, he searching the internet in October 1998 for materials he found erotic and materials related to his stories because he was in therapy and felt viewing such material would help him understand his interests. Defendant scanned pictures of Kris and Tommy into his computer in October 1998, manipulating them to show the boys in underwear instead of shorts. In September 1998, he took photographs of Kris from 1993 and used computer software to change shorts to tight white underwear; defendant said he did this because he thought it would be "goofy," not because he still had a sexual interest in boys in white underwear. In October 1998, he visited two more internet sites with spanking stories.

Defendant had told police he had never possessed pictures of nude children. He testified the statement was not a lie because the pictures he had of the boys were not completely nude, although pictures in his slide show video show Matt entirely nude. Although defendant also told police he does not look at kids' buttocks now, a picture from his computer cache from web sites visited in the three months before his arrest show a nude boy's buttocks.

After defendant examined Polaroid shots of boys with bare buttocks and penises exposed and said he did not know who they were of or where he got them, the prosecution introduced letters sent to defendant in which the writer thanked defendant for sending him the pictures and enclosed photographs and stories about children for defendant. In a letter dated October 26, 1996, the writer told defendant to send his slides in groups of ten; defendant testified the mentioned slides were of paintings by a man who depicted little boys naked in activities such as boxing.

Defendant received a letter dated June 7, 1995, in which a friend thanked him for explicit art and a story about adults having children undress and giving them enemas. In another letter, that friend

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[6] While defendant said his stories were from the 1970's, he wrote one story about Victim at age 11, which would have been in 1994, in which Victim walked around in his underwear, and went skinny dipping, and played and wrestled with defendant.

thanked defendant for stories on spanking and underpants. Defendant claimed his friend was fantasizing or fabricating in these letters. In a June 4, 1995 letter, that friend thanked defendant for a story about defendant's son Victim and a friend skinny dipping. Defendant testified Victim and his friends had not stripped naked but were wearing underwear when they swam, and that he sent the story to a pedophile, not because he viewed it as sexual, but because it depicted innocent spontaneity.

Defendant told his therapist he discarded albums of photographs of boys in underwear and with their buttocks exposed in July and August 1998 and only kept innocuous photographs. He received pornographic photographs and stories mailed in the late 1990's but claimed most were unsolicited, he was not interested in them, and he simply forgot to discard them. When defendant denied possessing any North American Man-Boy Love Alliance ("NAMBLA") publications, the prosecutor noted that, when defendant was arrested, he possessed a NAMBLA article about a priest spanking a boy for sexual pleasure.

On redirect, defendant claimed the last time he had physical contact with a boy or took pornographic photographs was in 1982. He said his recent pornographic writings were about unconventional behavior and commentaries on the "strange but true." He claimed his love of children and white underwear was a love of "aesthetic" beauty and cleanness and innocence but denied it was sexual. With regard to the massages, he said he only rubbed to the tip of the tailbone but that, if the child's underwear covered it, he would run his fingers under the underwear to finish the motion, rubbing the bare skin at the upper portion of the buttocks. He performed the massages as a form of affection and was not sexually aroused by the acts. He said his spankings of Victim, both light and hard, were not sexual, although he acknowledged that spankings could be sexual.

On recross-examantion, defendant admitted he had been a pedophile when he wrote "Coming Of Age, A Personal Testament," but he denied he was a pedophile now. He has love and reverence for boys but does not act on it. While trying to distinguish between his views that boys in underwear are aesthetically beautiful, clean, pure, and innocent from sexual views of boys, defendant acknowledged having used that same language while masturbating to the pornographic slide show video. He reiterated

that, while he had rubbed the upper portion of the buttocks of his three sons, he did not do so for sexual purposes.

Dr. Randall Weingarten, defendant's psychiatrist, testified for the defense as follows.

On direct examination, Dr. Weingarten said he had diagnosed defendant as having exhibited pedophilic behavior in adolescence and early adulthood but that, as defendant went through life changes during the late 1970's, he channeled his sexual and erotic pedophilic interests into an "aesthetic aspect" of appreciating young boys. Dr. Weingarten concluded defendant was able to differentiate any pedophilic thoughts from his parental behavior with his son. These conclusions were based on Dr. Weingarten's evaluation of defendant's self-reporting of his pedophilic interests. In particular, Dr. Weingarten mentioned that defendant reported a sexual relationship with a "young man" when defendant was a teenager but had said it did not involve sex, that he had admired the "freshness and vitality" of the youth rather than his sexuality. Dr. Weingarten said defendant reported having undergone a religious-type transformation by his early 30's and had come to understand the "sinister" aspects of an interest in young boys. These reports convinced Dr. Weingarten that defendant had matured enough to enter a marital relationship with Wife and put his pedophilia behind him, i.e, that defendant presently views young boys as a source of vitality and beauty in an aesthetic sense rather than in a sexual way.

On cross-examination, Dr. Weingarten acknowledged defendant felt no guilt about his past relationships with boys and thinks about young boys when he masturbates. Through prosecutorial questioning, Dr. Weingarten was confronted for the first time with information presented to the jury about defendant's extensive sexual interest in, and his molestation of, young boys. As a result, Dr. Weingarten reconsidered his opinions and, ultimately, modified or withdrew them.

For example, after learning defendant had maintained a child pornography collection almost until he was arrested, had made the "slide show" video in 1981, and had lied when he told Dr. Weingarten he never touched any boys in Big Brothers and only took one potentially inappropriate photograph, Dr. Weingarten testified that, if defendant "misrepresented all those things . . . , it would have made me

reconsider his behavior with Victim and to have very seriously considered the awful notion of incestuous behavior with his own son."

Faced with information regarding defendant's interest in spanking and causing pain and humiliation, his repeated harsh and playful spankings of Victim, and defendant's statements about his sexual fascination with administering spankings, Dr. Weingarten began to "question the motivations that were involved in [defendant's] spanking behaviors" and acknowledged, " I don't really know [if defendant could differentiate between pedophilia and parenting] or not." Learning of the interaction with Sean during which defendant had an erection, Dr. Weingarten conceded defendant's activity with Sean was sexual rather than affectionate or loving, as defendant had claimed and that defendant was unable to maintain a bright line between his pedophilic thoughts and his actions with boys he cared for and mentored.

Dr. Weingarten conceded defendant's behavior in marrying a woman who had two young sons shortly after he was cut off from his source for new boys would correspond to the DSM-IV and the FBI profile for pedophile behavior but said he found it too "horrifying" a possibility to accept as a motivation.[7]

Hearing the letter written in which a pedophile thanked defendant for sending a story about defendant watching Victim and his friends skinny dipping, a story which made the friend's "fantasies run amuck," Dr. Weingarten acknowledged this was an instance where defendant "crossed the boundary" between a pedophilic view and a parental view of Victim

After hearing the story defendant wrote about his pleasure in watching Victim pull down his pants and swim in white underwear and his pleasure in having Victim sit in his arms and wrestle with defendant while wearing underwear, Dr. Weingarten agreed defendant "was not capable on all occasions of drawing a bright-line distinction between his pedophilic tendencies and sexual motivation and his role as a parent of his own child," that "there are possibly moments" when defendant had

[7] The DSM-IV is the Diagnostic and Statistical Manual of Mental Disorders, (4th ed. 1994), cataloging psychiatric conditions and profiles.

"sexual motivations" with Victim and "saw him in a sexual way, and . . . through the eyes of the defendant's pedophilia."

DISCUSSION

Statute of Limitations

A complaint was filed against defendant on October 26, 1998, charging him with a single violation of continuous sexual abuse of a child under age 14 between April 1, 1989 and April 30, 1996 (§ 288.5, subd. (a)), and an arrest warrant issued on that date, which fixed the date of commencement of the prosecution as well as the ending date of the statute of limitations. (§ 804.) After a preliminary hearing, defendant was bound over to superior court for trial. On November 23, 1998, an information was filed which charged defendant with the 18 counts listed at the beginning of this opinion. It charged that count 1 occurred between April 22, 1989 and April 21,1990, count 2 between April 22, 1990 and April 21, 1991, and counts 3 through 17 between April 22, 1991 and April 21, 1996. Noting that the charged crimes generally are governed by section 800, which establishes a six-year statute of limitations, defendant argues the statute of limitations would have lapsed for any crime which occurred before October 26, 1992. In turn, he argues his convictions on counts 1 through 17 must be reversed because "the prosecution did not plead facts adequate to establish that prosecution on those counts was not barred by the statute of limitations; because the jury was not instructed to find, nor did it find, that any of these alleged offenses occurred within the appropriate limitations period; and because the prosecutor expressly requested the jury to convict [defendant] of offenses alleged to have occurred outside the limitations period." (Emphasis and capitalization omitted.)

I. *Counts 1 and 2*

Count 1 charged defendant with violating section 288, subdivision (a) by committing a lewd or lascivious act upon his son Victim between April 21, 1989 and April 20, 1990. Count 2 charged him with violating section 288.5 by committing continuous sexual abuse upon Victim between April 21, 1990, and April 20, 1991. Both counts plainly fall outside the six-year limitations period specified in section 800.

Prior to trial, the defense moved to dismiss counts 1 and 2 on the ground that they violated the limitations period of section 800 and that the exceptions to section 800 found in section 803 did not apply. The trial court found that counts 1 and 2 fell within the exception to the six-year statute of limitations set forth in section 803, subdivision (f) (hereinafter "subdivision (f)"), which provides, in pertinent part: "(1) Notwithstanding any other limitation of time described in this section, a criminal complaint may be filed within one year of the date of a report to a responsible adult or agency by a child under 18 years of age that the child is a victim of a crime described in Section . . . 288 . . . [or] 288.5 . . . [¶] (2) . . . This subdivision applies only if both of the following occur: [¶] (A) The limitation period specified in Section 800 or 801 has expired. [¶] (B) The defendant has committed at least one violation of Section . . . 288 . . . [or] 288.5 . . . against the same victim within the limitation period specified for that crime in either Section 800 or 801."

Although the prosecution has the burden of proving the crimes occurred within the applicable statute of limitations, the statute of limitations is not an element of the offense. (*People v. Frazer* (1999) 21 Cal.4th 737, 757-760.) Therefore, the prosecutor need only demonstrate that the crime occurred within the applicable statute of limitations by a preponderance of the evidence. (*People v. Zamora* (1976) 18 Cal.3d 538, 565, fn. 27.)[8]

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[8] By supplemental letter received after oral argument, defendant brought to the attention of this court the California Supreme Court's recent case that decided "whether the circumstance of gun use was available to support two section 12022.5(a) enhancements when gun use had already been properly pled and proved as a basis for invoking One Strike sentencing." (*People v. Mancebo* (2002) 27 Cal.4th 735, 738.) Defendant contends "*Mancebo* controls [this court's] resolution of the [statute of limitations] harmless error issue in the present case" To the contrary, we conclude *Mancebo* is inapplicable to the resolution of the statute of limitations issues presented in this case. *Mancebo* addressed pleading and proof problems with section 667.1. The court noted that express language of that statute required that each qualifying factor be pleaded and proven and held that the trial court could not rely upon an unpleaded factor to impose the enhancement. *Mancebo*'s analysis turned entirely on the absence of notice to the defendant as to the unpleaded factor invoked by the court at sentencing. Here, by contrast, defendant has not presented a claim of absence of notice as to the applicable statute of limitations as a ground for reversal. Furthermore, we find it significant that the Supreme Court cautioned that its holding "is limited to a construction of the language of section 667.61, subdivisions (f) and (i) read together, as controlling here. We have no occasion in this case to interpret other statutory provisions not directly before us." (*Id*. at p. 745, fn. 5.)

Both counts 1 and 2 charge crimes listed in subdivision (f)(1). The record undisputably reveals that Victim reported the crime for the first time to police on October 22, 1998,[9] well within one year of the time the complaint was filed. As noted above, both counts meet the requirement of subdivision (f)(2)(A) in that they fall outside the six-year limitations period specified in section 800.

The only remaining criterion is subdivision (f)(2)(B), which requires that "[t]he defendant has committed at least one violation of Section . . . 288 . . . [or] 288.5, . . . against the same victim within the limitation period specified for that crime in either Section 800 or 801." This subdivision does not require that the defendant be *convicted* of at least one violation of section 288 against the same victim within the 6-year limitation period; rather it only requires that defendant has *committed* at least one violation of section 288 within the 6-year limitation period. Accordingly, we are convinced this requirement is satisfied if the available evidence demonstrates by a preponderance of the evidence that defendant did in fact commit a violation of section 288, against the same victim within the six-year period. (See *People v. Garcia* (1995) 33 Cal.App.4th 1119, 1127 ["It appears defendant is contending the use of the word 'committed' in subdivision (f)(2) of section 803 means the defendant was 'convicted' of at least one of the enumerated offenses against the same victim within the statute of limitations . . . . [T]he language is not susceptible to this meaning . . . ."].)

In concluding that we can evaluate whether the record demonstrates that defendant committed at least one violation of section 288 within the section 800 limitation period without determining which acts the jury relied upon to convict defendant of violating subdivisions (a) and (b) of section 288, we look to the holding and reasoning in *People v. Williams* (1999) 21 Cal.4th 335 (*Williams*) for guidance. We find its holding and reasoning helpful here, although we recognize that the *Williams* court explicitly stated that the case before it "presents no issue regarding the rules to apply when the defendant does assert the statute of limitations at trial." (*Id*. at p. 345, fn. 3.) The defendant in *Williams* argued for the first time on appeal that the prosecution was time-barred because the

[9] While Victim reported the choking incident to a school counselor in late September or early October 1998, he did not report the molestations at that time.

information alleged that he committed the offense more than three years before it was filed, and it contained no other facts or tolling allegations that would make the prosecution timely. Citing information outside the appellate record, the People claimed the prosecution was timely because an arrest warrant had issued on January 31, 1995, within the statutory time limit, and delayed discovery tolled the statute of limitations and urged that the prosecution at least should be allowed to amend the information on remand.

The *Williams* court concluded that "when the charging document indicates on its face that the action is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time. If the court cannot determine from the available record whether the action is barred, it should hold a hearing or, if it is an appellate court, it should remand for a hearing." (*Williams*, *supra*, 21 Cal.4th at p. 341.) The court went on to explain that, "if on remand, the trial court determines the action is not time-barred, the conviction will stand despite the prosecution's error in filing an information that appeared time-barred . . . ." (*Id*. at p. 346.)

By analogy to *Williams*, we are convinced that, when the trial court determines that certain counts are not time-barred, defendant's convictions as to those charged offenses will stand if the reviewing court can determine from the available record, including both the trial record and the preliminary hearing transcript, that the action is not time-barred despite the prosecution's error in filing an information in which those counts appeared to be time-barred.

Here, the trial evidence allowed for only two possible conclusions, namely, that all the section 288 molestations identified by Victim had occurred or none had occurred. At trial, Victim testified about three series of identical, undifferentiated acts which occurred regularly: buttock fondlings; playful spankings in which defendant forcibly held Victim down and spanked his bare buttocks; and violent spankings. The buttock rubs were the bases for the section 288, subdivision (a) charges (counts 3-12); the two types of spankings were the bases for the section 288, subdivision (b) charges (counts 13-17). Victim testified to hundreds of fondlings and spankings occurring over a seven-year period. At trial, defendant presented a same defense to each described act, namely, that he may have committed it but that he lacked the requisite sexual intent when he did so. Defendant did not seriously dispute that the

acts occurred over the period identified by Victim After reviewing the available record, we conclude that it contains overwhelming evidence that defendant *committed* all of the hundreds of acts described by Victim with the requisite intent, including the multitude of described acts which occurred regularly between October, 26, 1992 and April 20, 1996.

Our conclusion in this regard is supported, in part, by cases discussing the concept of jury unanimity. For example, our state Supreme Court reasoned that "if an information charged *two* counts of lewd conduct during a particular time period, the child victim testified that such conduct took place *three times* during that same period, and the jury believed that testimony in toto, its difficulty in differentiating between the various acts should not preclude a conviction of the two counts charged, so long as there is no possibility of jury disagreement regarding the defendant's commission of any of these acts. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 321-322; see also *People v. Moore* (1989) 211 Cal.App.3d 1400, 1414 [where child testified to a "consistent, repetitive pattern of acts," if jury believes defendant committed all acts it necessarily believes he committed each specific act].)[10] Our conclusion also is supported by the fact that the available record also contains overwhelmingly evidence that defendant was guilty of continuous sexual abuse of a child during 1989 and 1990 (§ 288.5). Accordingly, we find more than sufficient evidence in the record to support the trial court's implied subdivision (f)(2)(B) finding that defendant "has committed at least one violation of Section . . . 288 . . . against the same victim within the limitation period specified for that crime in either Section 800 . . . " and its explicit finding that counts 1 and 2 were not time-barred despite the inadequate charging language in the information.

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[10] The *Jones* court contrasted its situation with that of *People v. Diedrich* (1982) 31 Cal.3d 263, 280-283, in which the defendant raised distinct defenses to the acts identified by the prosecution. In finding the failure to give a unanimity instruction prejudicial, the *Diedrich* court noted, "This is not a case where the jury's verdict implies that it did not believe the only defense offered." (*Id*. at p. 283; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1199-1200, [in context of first degree robbery-murder conviction, where testimony established either two robberies or none occurred, no unanimity instruction required because general guilty verdict necessarily included a finding that both occurred].)

II. *Counts 3 Through 17*

We next consider defendant's claim that the accusatory information charging counts 3 through 17 is deficient on its face in failing to show the charged acts occurred within the six-year statute of limitations.

Citing *In re Demillo* (1975) 14 Cal.3d 598, *People v. Zamora*, *supra*, 18 Cal.3d 538, *People v. Swinney* (1975) 46 Cal.App.3d 332, and *People v. Crosby* (1962) 58 Cal.2d 713, defendant claims the convictions must be dismissed as a matter of law without review of the trial evidence. While these cases note that the pleadings were deficient if the crimes charged therein were plainly facially excluded from the permissible statutory period and from any exceptions to that period, those courts still looked to facts presented in the indictment, the preliminary hearing, or at trial to determine whether the crime fell outside the statute of limitations. (See *In re Demillo*, *supra*, 14 Cal.3d at p. 602; *People v. Zamora*, *supra*, 18 Cal.3d at pp. 548-561; *People v. Swinney*, *supra*, 46 Cal.App.3d at pp. 337-339; *People v. Crosby*, *supra*, 58 Cal.2d at pp. 722-731.) In any event, *Williams* concluded the proper method for evaluating a statute of limitations defense, raised for the first time on appeal based upon a facially deficient pleading, is to review the record or, if necessary, to remand the case to the trial court for factual findings on the statute of limitations question. (*Williams*, *supra*, 21 Cal.4th 335, 341.)

Here, the information charging defendant with committing the 15 violations of section 288, subdivisions (a) and (b) alleged that each of those criminal acts occurred between April 22, 1991 and April 21, 1996. This range includes lewd acts committed by defendant after October 26, 1992, acts which fall within the statutory period. The fact the time range also included dates falling beyond the limitations presents a question as to whether the charged crimes actually occurred within the statutory period set forth in section 800 and, if any of those acts fell outside the period set forth in section, whether they fall within the exception set forth in subdivision (f) of section 803.

Having undertaken a record review pursuant to the procedure described in *Williams*, we conclude the available record supports a conclusion that each of the 15 *charged* offenses is not time-

barred, either because it occurred within the statutory period set forth in section 800 or because it falls within the exception set forth in subdivision (f).

Defendant's jury was given a proper unanimity instruction, and the prosecutor repeatedly reminded the jurors of that, in order to return a verdict of guilty as to counts 3 through 17, as to each count, they must agree that defendant committed the same act or acts. The jury then found defendant guilty of each of the 15 charged offenses in question. We look at each of the 15 disputed charged offenses separately. If the jury found that the act underlying any given charged offense set forth in counts 3 through 17 occurred after October 26, 1992, the action as to that charged offense was not time-barred pursuant to the time limitations set forth in section 800. Alternatively, if the jury found that the act underlying any given charged offense occurred on or before October 26, 1992, the action as to that charged offense was not time-barred pursuant to the time limitations tolling provision set forth in subdivision (f) of section 803 for the same reasons set forth above in our discussion of counts 1 and 2; i.e., the time period under section 800 had expired, the reporting and charging occurred within a year of each other, and the fact the record contains overwhelming evidence that defendant *committed* all of the hundreds of acts described by Victim with the requisite intent, including the multitude of described acts which occurred regularly after October, 26, 1992.

We are aware that in *People v. Angel* (1999) 70 Cal.App.4th 1141, the court addressed a factual scenario somewhat similar to the one before us but reached a different conclusion. *Angel* presents a case in which two molestation counts were charged as occurring within "July 1989," whereas the statute of limitations ended July 20, 1989. (*Id*. at p. 1146.) The victim in *Angel* testified the defendant committed numerous acts within the month of July. The court concluded that, because it could not tell which acts the jury relied upon, the prosecution had failed to meet its burden in proving the statute of limitations. The *Angel* court also concluded that the tolling provision upon which the People relied, namely subdivision (b) of section 803, did not apply. (*Id*. at pp. 1147-1150.) The court therefore reversed the relevant counts as time-barred although the defendant had not demurred to them because "a defendant in a criminal case may assert the statute of limitations at any time. [Citations.]" (*Id*. at p. 1145, fn. 3.) To the extent the *Angel* decision

contradicts our analysis or conclusions, we respectfully disagree with it. In that regard, we note that the *Angel* court did not have the benefit of the analysis and holding of the pertinent Supreme Court case, given its decision predated *Williams* by several months.

Defendant next contends counts 1 through 17 must be reversed because the trial court erred by failing to instruct the jury on the applicable statute of limitations.

As a general rule, the trial court need only instruct on the statute of limitations when it is placed at issue by the defense as a factual matter in the trial. (See *People v. Brown* (1960) 186 Cal.App.2d Supp. 889, 892; cf. *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 393 (conc. & dis. opn. of Brown, J.) [noting that under current California procedure defendant may request instructions on statute of limitations if defendant deems it to be an issue].) To hold otherwise would render moot the discussion in *Williams* as to whether the defendant may raise a statute of limitations claim for the first time on appeal. If the trial court has a sua sponte duty to instruct on the statute of limitations, even if factually not placed at issue by the defendant at trial, there would never have been an issue as to forfeiture of the right to raise the statute of limitations for the first time on appeal; the claim always would be preserved under the rubric of instructional error for failure to give a required instruction sua sponte. As the court clarified in *Williams*, when an appellate court is reviewing a statute of limitations question after a conviction for the charged offenses, the proper question is whether the record demonstrates that the crime charged actually fell within the applicable statute of limitations.

Here, defendant did not raise any objection to counts 3 through 17, and although, he did raise a challenge to counts 1 and 2, he did so only facially and as a matter of law, without contesting the factual applicability of the exception provided in subdivision (f). Specifically, defendant filed a three-sentence motion in limine arguing that counts 1 and 2 fell outside the six-year limitation period and that the exception in section 803, subdivision (g) did not apply because of its terms and because of ex post facto limitations. The prosecution agreed subdivision (g) did not apply, but noted that subdivision (f) did. Defendant did not raise any factual challenge to the applicability of the exception in subdivision (f), and the trial court denied his motion. Given defendant did not raise any dispute as to the factual application of the statute of limitations, the court had no obligation to give an instruction to the jury to factually

resolve any statute of limitations question. The proper challenge for defendant to make now is not that the court failed to instruct but, rather, that he has the right to raise the issue for the first time on appeal, pursuant to *Williams*, which we have addressed above.

In any event, assuming arguendo the trial court did err by failing to instruct the jury to make factual findings with respect to the tolling requirements set forth is subdivision (f), such error was harmless under any standard of review.

We are convinced the proper standard for evaluating an alleged erroneous failure to instruct on the statute of limitations is the traditional state prejudice standard set out in *People v. Watson* (1956) 46 Cal.2d 818, given statutes of limitations are not elements of an offense and are not constitutionally mandated or subject to due process concerns. (*People v. Frazer*, *supra*, 21 Cal.4th at pp. 770-772 [noting "[c]riminal statutes of limitation appear no more rooted in the Constitution or the traditions underlying the American legal system than their civil counterparts" and rejecting a due process claim against retroactive application of a change in the statute of limitations].) We are aware that in *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1154, the court applied the federal *Chapman*[11] harmless error standard to the failure to instruct on the statute of limitations. However, in light of our state Supreme Court's recent holding that the statute of limitations is not an element of an offense, we believe *Stanfill* was incorrect in that regard.

Regardless of which standard is applied, the alleged error was harmless here where only the last prong of subdivision (f), namely, whether defendant "committed" at least one offense within the section 800 six-year limitations period, is in dispute. As discussed above, defendant did not dispute at trial that the identified acts occurred regularly over the course of the period charged in counts 3 through 17, including the period between October 26, 1992 and April 20, 1996, which fell within the section 800 statute of limitations. His only defense was that he lacked the requisite lewd intent when he committed those acts. Here, where the evidence of the required intent was overwhelming as was the evidence that

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[11] *Chapman v. California* (1967) 386 U.S. 18.

defendant committed all of the hundreds of acts occurring both outside and within the six-year limitations period, any error is harmless beyond a reasonable doubt.

CALJIC No. 2.50.01

Defendant contends the 1999 version of CALJIC No. 2.50.01 (hereinafter "the 1999 revision") impermissibly reduces the burden of proof to a preponderance of the evidence[12] despite its supplementary language which is emphasized below. Defendant claims the 1999 revision failed to explain that the jury "could not convict him on the basis of other offense evidence alone" or because its supplementary language conflicts with the unconstitutional portion of the original instruction. Claiming the supplementary language can be read "as a reminder that to convict on the basis of the defendant's commission of the other offenses alone, those offenses must be proven beyond a reasonable doubt, not merely by a preponderance of the evidence," he complains it "logically can be reconciled with the earlier version so as to leave that version's erroneous teaching wholly uncontradicted." Alternatively, he claims that "[e]ven if the supplementary language could be read to conflict with the constitutionally

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[12] Pursuant to the 1999 revision, the jury was instructed with respect to evidence admitted under Evidence Code section 1108 as follows: "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. [¶] 'Sexual offense' means a crime under the laws of the state or the United States that involve any of the following: [¶] A. Any conduct made criminal by Penal Code Sections 288(a), 288.5 and 288(b). The elements of these crimes are set forth elsewhere in these instructions. [¶] B. Deriving sexual pleasure or gratification from the infliction of physical pain on another person. [¶] If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type 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. [¶] *However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. The weight and significance of the evidence, if any, are for you to decide. [¶] Unless you are otherwise instructed, you must not consider this evidence for any other purpose*." (Italics added.)

offensive message of the original version of 2.50.01, that conflict still renders the 1999 version confusing and prejudicial."

The propriety of the 1999 revision has been upheld against the general, but not against the specific, challenges asserted by defendant. (E.g., *People v. Hill* (2001) 86 Cal.App.4th 273, 275-279; see *People v. Falsetta* (1999) 21 Cal.4th 903, 922-924 (*Falsetta*); cf. *People v. Brown* (2000) 77 Cal.App. 4th 1324 (*Brown*) [upholding a similar revision to CALJIC No. 2.50.02].) However, in *Falsetta*, our state Supreme Court did comment that "[i]n future cases, defendants may request an instruction based on revised CALJIC No. 2.50.01 (1999 rev.), *supra*, which contains language appropriate for cases involving the admission of disposition evidence." (*Falsetta, supra*, 21 Cal.4th at p. 922.) *Falsetta* noted that the 1999 revision incorporated the two important instructional points contained in the defendant's proposed jury instruction in that case, one of which was to reaffirm that the proper burden of proof for the current offense was proof of the elements beyond a reasonable doubt. (*Id*. at p. 923) In concluding, the court commented, "Without passing on each specific paragraph, . . . we think revised CALJIC No. 2.50.01 adequately sets forth the controlling principles under section 1108." (*Id*. at p. 924.) Based upon the analysis in *Falsetta*, the *Brown* court concluded the identical instruction for propensity evidence under Evidence Code section 1109, the revised version CALJIC No. 2.50.02 presented no constitutional infirmities. (*Brown, supra*, 77 Cal.App.4th at pp. 1334-1335.)

With regard to the specific challenges made by defendant to the 1999 revision, we consider the challenged language in light of the entire charge to the jury as well as argument by counsel and ask whether there is a "reasonable likelihood" the jury understood the instructions as defendant asserts. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4; *People v. Cain* (1995) 10 Cal.4th 1, 36.)

Here, the jury was instructed that "if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes." After giving the challenged instruction, the court instructed that the prosecution had the burden to prove the prior offenses by a preponderance of the evidence only as follows: "Within the meaning of the preceding instructions, the prosecution has the

burden of proving by a preponderance of the evidence that a defendant committed crimes or sexual offenses other than those for which he is on trial. [¶] You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that a defendant committed the other crimes or sexual offenses. [¶] 'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. [¶] You should consider all of the evidence bearing upon every issue regardless of who produced it." (See CALJIC Nos. 2.50.1 & 2.50.2.) The court's additional charge expressly directed the jury to apply the preponderance-of-the-evidence standard in determining whether defendant committed prior sexual offenses and further admonished it not to consider the evidence of other offenses for any purpose unless it found by a preponderance of the evidence that the defendant committed them. The court also instructed the jury that the prosecution must prove defendant's guilt beyond a reasonable doubt, that "each fact which is essential to complete a set of circumstances necessary to establish a defendant's guilt must be proved beyond a reasonable doubt," and that, as to each charged offense, there were enumerated elements and that "[i]n order to prove this crime, each of the following elements must be proved." Viewing the 1999 revision and the court's follow-up instruction along with the entire charge to the jury, we find no reasonable possibility that jurors could think, or reasonably might have thought, that they could find the defendant guilty based solely upon his prior uncharged misconduct.

Defendant relies upon *People v. Vichroy* (1999) 76 Cal.App.4th 92 (*Vichroy)*, a case which concluded that a modified version of CALJIC No. 2.50.01 did not satisfy due process requirements "[b]ecause we cannot assume the jury followed the constitutionally correct conflicting instruction." (*Id*. at p. 101.) We choose not to follow *Vichroy*. Significantly, *Vichroy* failed to consider the Supreme Court's discussion of the revised CALJIC No. 2.50.01 in *Falsetta*, and thus did not analyze the claimed error in the jury instructions "in light of the guidance provided by" *Falsetta*. (*Brown, supra*, 77 Cal.App.4th at p. 1336.) We take into account that the *Falsetta* court expressed its view that the challenged instruction guiding the jury's consideration of other bad acts evidence in defendant's case

"contains language appropriate for cases involving the admission of disposition evidence." (*Falsetta, supra*, 21 Cal.4th at p. 922.) While the *Falsetta* court tempered its endorsement of the 1999 revised version of CALJIC No. 2.50.01 by indicating the issue was not squarely presented in that case (*id*. at p. 924), "even dictum from our Supreme Court is considered 'highly persuasive.' [Citations.]" (*Brown, supra*, 77 Cal.App.4th at p. 1336.) We believe "it is improbable that the California Supreme Court would suggest an instruction 'adequately sets forth the controlling principles' for considering other crimes evidence, and then find that same instruction to be constitutionally defective." (*Id.* at p. 1336; accord, *People v. Regalado* (2000) 78 Cal.App.4th 1056, 1060, fn. 2; see also *People v O'Neal* (2000) 78 Cal.App.4th 1065 [*Vichroy's* interpretation of the instruction at issue strained]; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1097-1098 [rejecting *Vichroy*].)

The claim that the supplementary language in the 1999 revision could be interpreted as merely informing the jury that the prior crime evidence must be proved beyond a reasonable doubt before it can be used to find defendant guilty of the current offense, without requiring that the jury find the elements of the offense beyond a reasonable doubt, fails to consider the instructions as a whole (*People v. Burgener*, (1986) 41 Cal. 3d 505, 538) and ignores the fact the same instruction already informed the jury that the propensity evidence need only be proven by the prosecution by a preponderance of the evidence. We reject defendant's interpretation, which requires the jury to view the instruction as setting out two competing, contradictory standards regarding propensity evidence, because we assume "jurors are intelligent beings and capable of understanding and correlating all instructions which are given to them" (*People v. Billings* (1981) 124 Cal.App.3d 422, 428) and because the attorneys' arguments would have reinforced that the prosecution must prove each element of the offenses beyond a reasonable doubt. (See, e.g., *People v. Kelly*, (1992) 1 Cal.4th 495, 526-527.) The prosecutor argued that she was "going to discuss the elements of an offense, because . . . [y]ou need to decide was each element of each crime proved beyond a reasonable doubt." Likewise, defense counsel argued the prosecution must prove the elements of the offenses beyond a reasonable doubt, read the relevant portions of CALJIC No. 2.50.01, and then explained that "even if you conclude that [defendant] committed sexual offenses with these boys in the '70's and early '80's, under this instruction that would

not be sufficient in itself to prove that he is guilty of the charges brought against him as to which [Victim] is the victim." In sum, we conclude "the record reveals a consistent message from the instructions as a whole and from the closing arguments—that is, the jury must find [defendant] guilty beyond a reasonable doubt before it could convict him of any of the charged offenses." (*People v. Brown*, *supra*, 77 Cal.App.4th at p. 1335.)

In any event, assuming arguendo error did occur, we are convinced it was harmless beyond a reasonable doubt. (See, e.g., *People v. James* (2000) 81 Cal.App.4th 1343, 1360-1365.) The only issue in this case was whether defendant had a sexual intent when he fondled and spanked his son. Here, the evidence of sexual intent was overwhelming in light of defendant's sexual fixation with young boys' buttocks and his longstanding pattern of rubbing and spanking young boys' buttocks for sexual stimulation. The record reveals that, up until the night of his arrest for the present offenses, defendant was downloading explicit sexual fantasies about fathers spanking their sons. Defendant's claim of prejudice is not well taken.[13]

Ex Post Facto Legislation

Defendant next contends Evidence Code section 1108 (hereinafter "section 1108"), standing alone or coupled with the instruction given under CALJIC No. 2.50.01, violates the prohibition against ex post facto laws.

In *People v. Fitch* (1997) 55 Cal.App.4th 172, 185, the court held admission of propensity evidence in sex offense cases committed before 1996 under section 1108, which was enacted in 1996, did not violate the state or federal prohibition against ex post facto legislation. The court reasoned that

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[13] After briefing in this case, Division Four of the Second Appellate District filed *People v. Reliford* (2001) 93 Cal.App.4th 973. In that case, the court found the revised version of CALJIC No. 2.50.1 confusing: On the one hand, it tells the jury that a prior offense, found by a preponderance to be true, is not sufficient by itself to support a conviction; on the other hand, it tells the jury that it must decide the weight and significance to give evidence of a prior offense. The court further concluded that error in giving the instruction was subject to harmless-error review under *Chapman v. California* (1967) 386 U.S. 18. The court proceeded to find the error harmless beyound a reasonable doubt. Even if we were to agree with *Reliford's* analysis of the instruction, we would find any error in giving it harmless in light of the other jury instructions, arguments of counsel, and strength of the evidence.

the clause's meaning includes the following element: " ' "Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender*." [Citation.].' " (*Id*. at pp. 185-186.) However, the court concluded that " 'this language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes. [Citations.]' '[A] new rule of evidence which admits evidence not previously admissible or which extends competency to a witness may validly operate in the trial of a prior offense. [Citations.]' [¶] Since . . . section 1108 does not alter the definition of a crime, increase punishment, or eliminate a defense, it does not violate the ex post facto clause . . . ." (*Id*. at pp. 185-186, internal citations omitted.) Defendant acknowledges *Fitch* found the application of section 1108 in trials for crimes predating its enactment did not violate the ex post facto clause and concedes he "has no quarrel with the holding in Fitch." Rather, he contends his case presents a different question than *Fitch*.

Focusing upon CALJIC No. 2.50.01, he again suggests the instruction changes the nature of sex offenses by allowing a conviction based upon propensity evidence alone. This ex post facto argument is an alternate formulation of defendant's earlier due process argument challenging the validity of the instruction. For the reasons previously set forth, we remain convinced defendant's underlying premise regarding CALJIC No. 2.50.01 is flawed; in turn, we conclude that premise cannot support his ex post facto claim.

To support his ex post facto argument, defendant relies upon the case of *Carmell v. Texas* ((2000) 529 U.S. 513. Such reliance is misplaced. There, the Supreme Court reviewed a 1993 change in Texas law pertaining to rape cases. Under prior law, a defendant could not be convicted of rape based solely upon a victim's uncorroborated testimony unless the victim had reported the rape to another person within six months of the offense. The statute had an exception to this " 'outcry or corroboration' " requirement if the victim was under age 14. In 1993, Texas deleted this requirement for all victims, and the court in *Carmell* concluded this change could not be applied to crimes committed before the effective date of the statutory change. (*Id*. at p. 517.) It reaffirmed that procedural rule changes, such as changes in the rules of evidence, ordinarily do not implicate ex post

facto concerns, but it explained that changes which alters " 'the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender*' " do implicate ex post facto concerns. (*Id*. at p. 522.) The court found the Texas amendment had the effect of changing the quantum of proof necessary for the prosecution to prove rape because, prior thereto, the prosecution had to demonstrate outcry or corroboration, in addition to the listed elements of rape, to sustain a conviction, while elimination of that requirement eased the prosecution's burden for proving rape. (*Id*. at pp. 529-532.) The court noted, "The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant. Evidence admissibility rules do not go to the general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained. Prosecutors may satisfy all the requirements of any number of witness competency rules, but this says absolutely nothing about whether they have introduced a quantum of evidence sufficient to convict the offender. Sufficiency of the evidence rules (by definition) do just that—they inform us whether the evidence introduced is sufficient to convict as a matter of law (which is not to say the jury *must* convict, but only that, as a matter of law, the case maybe submitted to the jury and the jury may convict). In the words of [the Texas statute], '[a] conviction . . . is supportable' when its requirements are met." (*Id*. at pp. 546-547.)

Defendant argues section 1108, when coupled with CALJIC No. 2.50.01, similarly reduces the quantum of evidence needed to sustain a conviction for a sex offense, allowing a sex offense conviction based upon either propensity evidence or on proof of the elements of the offense, rather than on proof of the elements of the offense alone. We disagree.

"[S]ection 1108 was intended in sex offense cases to relax the evidentiary restraints section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*Falsetta, supra*, 21 Cal.4th at p. 911.) It was neither designed nor intended to provide an alternate basis for finding a defendant guilty without the need to prove all the elements of the offense. Defendant concedes section 1108, by itself, was a procedural change in an evidentiary rule which did not implicate ex post facto

concerns, and we are convinced CALJIC No. 2.50.01 is not a law which alters or augments the statute governing admissibility of propensity evidence or the role of that evidence in relation to determining guilt for the charged offense. The instruction, which is designed to inform the jury of the law and of how to evaluate and apply evidence admitted pursuant to section 1108, cannot form the basis for an ex post facto challenge.[14] Only the new statute itself, namely, section 1108, can constitute a change in the governing law which could give rise to ex post facto concerns. Given section 1108 by itself does not reduce the prosecution's burden or create an alternate means for convicting a sex offender, there can be no ex post facto claim under *Carmell*.

In summary, we conclude defendant's ex post facto argument is not well taken.

Admissibility of Prior Sexual Misconduct Pursuant to Evidence Code Section 352

Defendant contends the trial court abused its discretion by admitting his prior uncharged criminal sexual acts against boys and "the videos, photos, computer disks, and other documentary evidence" depicting child pornography. He claims the sexual material other than the "slide show" videotape should have been excluded under Evidence Code section 352 (hereinafter "section 352").

Section 1108 establishes that evidence of prior sex crimes has a tendency to prove a willingness to commit such crimes. As such, the evidence is relevant and admissible but subject to exclusion under section 352 " 'if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' " "The trial court's exercise of discretion in admitting evidence under . . . section 352 will not be disturbed unless the court acted in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v.*

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[14] If an instruction expanded the means by which a crime could be committed or allowed for conviction in a manner unauthorized by statute, it would be a misstatement of existing law but would not constitute a valid change in the law giving rise to ex post facto concerns. The proper recourse would be to challenge the instruction as misstating the law, the precise challenge defendant has made to CALJIC No. 2.50.01 in an earlier contention. In that regard, for the reasons discussed earlier, we reject defendant's challenge to the 1999 revision of CALJIC No. 2.50.01 as providing a new, alternate basis for convicting a defendant for a sex offense based upon propensity evidence alone.

Yovanov (1999) 69 Cal.App.4th 392, 406.) The prejudice which exclusion of evidence under section 352 is designed to avoid is not the prejudice "to a defense that naturally flows from relevant, highly probative evidence . . . . '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and *which has very little effect on the issues*." (*People v. Karis* (1988) 46 Cal.3d 612, 638, emphasis added.) In concluding whether to admit or exclude prior crimes evidence under section 352, the trial court need not specifically address each factor in its balancing; all that is required is that the record demonstrate that the trial court understood its responsibilities and fulfilled them under section 352. (*Brown, supra,* 77 Cal.App.4th at p. 1337.)

Here, the trial court understood its duty under section 352 and expressly exercised its discretion after considering the probative value of the proffered disputed exhibits and the proposed testimony by victims of defendant's prior molestations against its potential for prejudice. It then ruled "this . . . was a definite course of conduct over the years, so I think your argument on remoteness fails. [¶] As to the 1108 section . . . , you don't need any similarity at all, but I think there is a great deal of similarity here . . . . There are plenty of acts here that will fulfill that section. [¶] Under 1101 (B), the common scheme, plan, design, intent, you do need similarity, but there is similarity here. They're all young boys of a certain age; their buttocks are shown either with white shorts or without shorts. And the nature of the molests, the spankings and the rubbings, . . . so that section is also satisfied. And as to 352, I find all of these acts are more probative than prejudicial so this testimony will be allowed."

Relying upon *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*), a case which the California Supreme Court used as an example of a trial court abusing its discretion to admit evidence pursuant to section 1108 (*Falsetta, supra,* 21 Cal.4th at pp. 918-919), defendant points to factors which he contends weighed in favor of exclusion. In *Harris*, a nurse was accused of raping two psychologically vulnerable women at a mental health center in 1995. (*Harris, supra*, 60 Cal.App.4th at pp. 730-733.) To bolster the women's testimony, the prosecution introduced, under section 1108, evidence relating to a 1972 burglary conviction in which the defendant, an assistant apartment manager,

obtained keys to the victim's apartment, entered, and brutally beat her, cut her vagina with an instrument, and stabbed her chest with an icepick. (*Id*. at p. 733.) The trial court gave the jury a redacted version of the events which omitted some of the attack's brutality but gave the impression it was primarily sexual and involved a violent rape. The prosecution then suggested to the jury that this assault involved a breach of trust similar to the charged rapes. (*Id*. at pp. 734-736.) The reviewing court was troubled that the redaction was "misleading" (*id*. at p. 733) and felt the potential for prejudice greatly outweighed the minimal probative value because the brutal nature of the earlier offense was far more inflammatory than the current offense, the prior offense had occurred 23 years earlier with no significant intervening criminal behavior before the current allegations, and there was a probability of confusion because the defendant was not convicted of rape for the prior crime. (*Id*. at p. 738-739.) The court concluded the trial court abused its discretion under section 352 because every significant factor militated strongly against admitting this prior crime. (*Id*. at p. 741.)

Defendant's case does not suffer from the infirmities present in *Harris*. Defendant claimed any touching of Victim's buttocks during the reading sessions was accidental or nonsexual, that he lacked sexual intent when he spanked Victim during the play or punishment sessions, and that he did not intentionally pull Victim's pants down during the play spankings. The challenged testimony regarding the prior molestations was highly probative of defendant's criminal intent and in showing absence of accident. It revealed that defendant gave other young males similar "rubs" which involved intentionally pulling down their underwear and fondling their bare buttocks. The witnesses discussed defendant's sexual fascination with tight, white underwear, which defendant had his prior molest victims wear and which he tried to force Victim to wear. They also described defendant's sexual obsession with spanking, his sexual fascination with little boys' buttocks during his molestations, and his belief in an ideal society in which boys walked around naked or in tight white cotton briefs. The witnesses indicated defendant molested them while acting in a parental-like role, as a stepfather of C. and J., as a housemate babysitter for Tommy, as a babysitter for Matt, and as the official big brother and surrogate father for James, John 1, and Sean. This consistent testimony of several prior molest victims substantiated Victim's testimony that defendant repeatedly fondled Victim and spanked his buttocks

with sexual intent: " '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence . . . or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the . . . criminal, intent accompanying such an act . . . .' [Citation.]" (*People v. Ewo1dt* (l994) 7 Cal.4th 380, 402.)

The documentary evidence similarly was probative with regard to intent, absence of accident, and common plan or scheme. Defendant wrote about the nature of child molesters and his attraction to young boys. He wrote and possessed stories, photographs, videos, and drawings reflecting sexual interest and arousal derived from spankings and the pain inflicted during them. The evidence showed defendant visited internet sites containing sexual stories about spankings and punishing little boys, some of which had sexual themes regarding fathers spanking sons. This evidence, which revealed defendant's sexual interest in young boys' buttocks, his sexual obsession with spanking boys' bare buttocks, and his lewd fascination with boys in tight white cotton underwear, was highly probative of the nature of defendant's physical relationship with Victim and of his sexual intent during the charged acts.

We are unpersuaded by defendant's claim that the slide show video was sufficient to demonstrate his "sexual interest in boys" and that any further evidence was cumulative and offered merely to inflame the prejudices of the jury. The additional evidence showed that defendant had very specific sexual obsessions and engaged in consistently distinctive patterns of molestation with his earlier victims, thereby refuting the claims that his repeated fondling of Victim's bare buttocks were accidental brushings during back massages similar to those given by a typical parent and that the playful and punitive spankings were accidental or administered solely for disciplinary purposes. While the video showed isolated snapshots of defendant's prior molestations, the live testimony revealed the parental relationship defendant had with his victims and described defendant's statements made in relation to his specific acts, thereby demonstrating with specificity defendant's unique sexual interests with regard to fondling and spanking boys' buttocks.

The evidence pertaining to defendant's molestation of his stepsons and the evidence showing the pedophilic pictures and stories he possessed in 1998 also were highly relevant to rebut the claim that his pedophilic sexual interest in boys and fascination for spanking, rubbing buttocks, and tight white

underwear had ended by 1983. The physical evidence recovered from defendant's possession in 1998 also significantly assisted the jury in evaluating defendant's psychiatric defense. Defendant testified his love of boys was an "aesthetic" appreciation rather than a sexual interest and that his photographs of boys were art rather than pornography. He claimed taped slow motion spanking sequences were made to observe the kinetics of motion rather than because of any sexual interest in the spanking. Defendant's psychiatrist repeated this theme in his analysis, initially concluding that defendant went through a change by the early 1980's by letting go of his view of little boys as sex objects and taking on an "aesthetic appreciation" of them. However, confronted with the writings, drawings, and explicit child pornography in defendant's possession at the time of his arrest, as well as with the extent of defendant's relationships with his prior molestation victims, the psychiatrist acknowledged this evidence affected the validity of his diagnosis and caused him to reevaluate his conclusions. The challenged evidence, which proved substantially probative in undermining defendant's psychological defense and his claim of lack of criminal intent, was not merely cumulative of the slide show video.

Defendant's argument that "the admission of . . . the cross-examination of [himself] concerning his relationship with the now-deceased John [2], was error" fails for several reasons. The prosecution did not offer evidence about defendant's relationship with John 2 in its case-in-chief; that evidence was not a part of the in limine motion addressed by the court, and defendant did not raise any pretrial objections to it. Given defendant did not raise a section 352 objection to this line of questioning at the time the evidence was offered,[15] any claim of error with respect to the testimony regarding defendant's relationship with John 2 was waived. (See *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014-1015.) In any event, this evidence properly was elicited by the prosecutor to show how defendant's trial testimony differed from what he had revealed to his psychiatrist regarding the relationship defendant had with a young boy as a teenager. The prosecution was entitled to impeach defendant's psychiatric defense by casting doubt on the strength of Dr. Weingarten's diagnosis on the basis that defendant

[15] Defendant raised one objection based upon "relevance" and "speculation" to a specific question but otherwise did not object to this line of questioning.

repeatedly lied to his psychiatrist about the extent of his sexual activities with young boys, including his early relationship with John 2.[16]

While the witnesses testified about events dating back to 1970, their testimony demonstrated that defendant had molested young boys, including his stepsons, almost continuously for at least a 26-year period, except for a few years following his severe accident in 1985, and that he continuously acquired and possessed explicit child pornography during that period. Thus, the trial court properly concluded that defendant's "argument on remoteness fails." (See *People v. Mendoza* (2000) 78 Cal.App.4th 918, 925-926 [remoteness claim fails where defendant has consistent repeated pattern of offenses throughout relevant period prior to instant offense].) Contrary to the facts in *Harris*, the pervasiveness of defendant's lewd conduct throughout his adult life favored admission of the challenged evidence.

Although defendant was not convicted of the prior acts, we find little concern for potential jury confusion in this case. In *People v. Balcom* (1998) 7 Cal.4th 414, 427, the court identified two subparts to potential confusion for prior uncharged acts: (1) potential confusion arising from the temptation of the jury to convict for past crimes rather than the current crime and (2) potential confusion arising from its attention being diverted by having to evaluate whether the prior offenses actually occurred. Here, where the jury was properly instructed on the role of prior crimes evidence admitted under section 1108, the chance of confusion with regard to convicting the defendant for the prior crimes was minimized. (See *People v. Callahan*, (1999) 74 Cal.App.4th 356, 372.) Similarly, there is little chance the jury's attention was unnecessarily diverted by the need to determine whether defendant

[16] Defendant's claim that Victim did not appear in the pornographic photographs or stories is belied by the record. Defendant's collection of sexually-themed vignettes included a story written by defendant relating his excitement about seeing Victim wearing underwear in public, and a letter by a pedophile referred to a story written by defendant about Victim skinny dipping with a friend. Dr. Weingarten admitted these two exhibits were examples of defendant viewing his son as a sex object. Police also recovered a photograph of Victim posed wearing Superman Underoos similar to those in which defendant posed Sean.

committed the prior offenses given he effectively admitted the prior acts and asserted, instead, that he had changed his life in the years preceding the charged lewd acts on his son.

While testimony regarding the prior molestations involved a substantial portion of the trial, the evidence did not require an undue consumption of time under section 352 given the nature of defendant's defense, which focused on his lack of intent and on the psychological evaluation of his past history with young boys.

Here, where the evidence offered was highly probative to several different issues in the case, including whether defendant's interest in sexual physical contact with boys had waned and whether he could draw a "line" when it came to his natural son, and the factors on the prejudice side were not so overwhelmingly strong as to suggest the trial court's evaluation of the evidence was arbitrary, capricious, or patently absurd, the trial court "correctly deemed the prior [acts] evidence to be highly probative, and not 'uniquely intended to provoke an emotional bias against' appellant. The similarity of the earlier events to the offense charged in this case was quite remarkable. The pattern of abuse was unmistakable, and the trial court properly permitted it to be presented and argued to the jury." (*People v. Jennings*, (2000) 81 Cal.App.4th 1301, 1315-1316.) We are convinced the trial court understood its obligation to balance the risk of undue prejudice against the probative value of the evidence and did not commit a manifest abuse of discretion in ruling that the challenged testimony and exhibits were admissible.

Evidence of Defendant's Friendship with Man Featured on American's Most Wanted

Defendant next contends the trial court abused its discretion by admitting evidence relating to his friendship with Jon Tampico (Tampico) and to the fact Tampico was featured in an episode of America's Most Wanted.[17]

[17] The prosecution originally intended to call Tim Painter as an expert witness on NAMBLA, a pedophilic organization with which defendant was involved, and on the prominent role of Tampico in the organization. However, given the prosecution ultimately elected not to use Painter's testimony, we agree with the People that "any of defendant's argument directed at this proposed testimony is misplaced."

Victim testified one reason he reported the charged molestations was that he saw Tampico featured on America's Most Wanted in July 1998. Tampico frequently helped Victim with school projects when defendant was not there. The program indicated Tampico was wanted on charges relating to child pornography focusing on young boys. Defendant had defended Tampico's lifestyle choices, while the program presented a strong case condemning Tampico. Seeing the show present Tampico in a light radically different from his father's views caused Victim to question his father's moral views. A week after the show, Victim discovered defendant's disks with photographs of young boys with exposed bare buttocks. These events caused Victim to reevaluate defendant's behavior with him for over past several years, to suspect his father was a pedophile, and to realize he had been repeatedly molested by his father when he was a preadolescent.

In addition, defendant's wife briefly testified regarding defendant's interactions with Tampico and about a statement Tampico made to her after she discovered defendant's child pornography collection in 1985. Wife testified that Tampico had told her he had advised defendant to tell her about the pornography before the marriage.

One aspect of defendant's defense at trial was to assert that Victim was being manipulated by his mother and that the testimony regarding the buttock fondling was exaggerated due to her influence. For example, in closing argument, defense counsel suggested Wife manufactured the molestation case to help her divorce proceedings and that Victim enjoyed the back rubs but "[was] subjected to a number of influences" in 1998 which colored his perception, including Wife's views of defendant. The defense pointed to the fact that Victim did not report the buttock rubs as improper molestations until 1998. Thus, the challenged evidence was relevant and highly probative to demonstrate Victim's motivation for reevaluating the earlier interactions and to show the circumstances surrounding his decision to report that conduct.

We conclude the trial court did not abuse its discretion in determining the probative value of the challenged evidence was not outweighed by its potential for prejudice.

In any event, assuming arguendo the trial court erred by admitting some or all of the evidence related to Tampico, any error in admitting those references was harmless. The trial court instructed the

jury that testimony about Tampico appearing on America's Most Wanted for child pornography was not admitted for the truth but only to show how it affected Victim's mental state. It also instructed that the evidence Wife gave regarding Tampico was not offered for the truth but only to show the effect of his statements on her at the time and to explain her subsequent actions with respect to defendant's pedophilia. The challenged testimony was brief, it was substantially less inflammatory than other testimony regarding defendant's pedophilia, its impact was expressly limited by the instructions, and it was of little significance to the prosecution's overall case. Defendant claims the prosecutor argued Tampico was guilty of child pornography because America's Most Wanted "can't be wrong." Defendant mistakes Victim's explanation for one made by the prosecutor. Victim reported the molestations in large part because he believed the television report could not be wrong and therefore began doubting defendant, and the prosecutor simply reiterated Victim's thought process as explaining why he reconsidered the nature of the buttock rubs and reported them as molestations. Moreover, the jury was instructed that the testimony regarding Tampico was admitted for a limited purpose, and we presume the jurors generally understood and faithfully followed those instructions. (See *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) Finally, we note that overwhelming evidence was presented that defendant was a pedophile irrespective of testimony connecting him with Tampico. Accordingly, we are convinced there is no reasonable likelihood defendant would have received a more favorable outcome had the challenged evidence been excluded. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

Denial of Defense Motion to Strike Tesimony of Defendant's Cellmate

Defendant challenges the testimony of Homer Resendez (Resendez) regarding defendant's conversation with him in a holding cell. In essence, defendant argues the trial court abused its discretion by denying his request to strike Resendez's testimony following the invocation of his Fifth Amendment right to silence.

The day trial testimony began, the prosecutor learned that, while Resendez and defendant shared a cell, defendant made inculpatory statements, including soliciting Resendez to injure his wife. In indicating her desire to call Resendez as a witness, the prosecutor informed the court that Resendez was

in custody as a "witness" in a murder case pending in the county. This misstatement occurred because, when he came forward with information, Resendez provided that information to Detective Watson. It later was clarified that Resendez had been indicted, along with several others, and was facing trial on murder charges arising from a 1980 killing.

The prosecutor agreed to provide the defense Resendez's rap sheet and the notes and recording of his police interview. The defense received the promised items but then additionally requested discovery of all police reports regarding Resendez's underlying murder charge to elicit his bias and motive to testify. The prosecutor replied that neither her office nor the police had offered a deal in exchange for Resendez's testimony, and she introduced a letter in which Resendez said his motivation for coming forward was his belief the solicitation was serious. She objected to including the murder police reports in a discovery order, asserting the request was too broad and the information therein would not lead to admissible evidence in the present case because the reports are hearsay. The trial court indicated it would allow questions about the strength of Resendez's case and whether it was motivating him to offer testimony, but it denied the request for the police reports, saying it would not permit a collateral trial on the facts underlying that indictment.

Before Resendez took the witness stand, his attorney told the trial court that he had advised Resendez not to testify and had made it "clear" to Resendez that defendant's prosecutor, as well as the prosecutors in Resendez's case, had indicated there were no promises in exchange for his testimony. Resendez said he wished to testify against that advice, noting he was not pressured by anyone, including the prosecution, and that no inducements had been offered for his testimony.

Resendez then testified defendant had offered him $5,000 to ensure Wife and Victim would not testify. He told Resendez he could kill Wife but should just frighten Victim Defendant provided Resendez with details regarding his past, his marital relationship, and his case, including details neither released to the press nor known to police. Resendez said he reported this conversation out of love for children and concern for the wife and son. Resendez said he hates child molesters and was disturbed defendant was charged with child molestation and pornography. Resendez added that the prosecutor

explicitly had said he would receive no consideration in exchange for testimony, had asked no questions about his pending murder case, and had refused to discuss it.

On cross-examination, Resendez admitted he had been to prison eight times, he had been convicted of first degree burglary in 1992 and had been sentenced to 22 years in prison as a career criminal, and he had been convicted of theft in 1990, false imprisonment in 1987, first degree burglaries in 1986 and 1983, and second degree burglary in 1982. Resendez admitted he told Watson he was a "witness" to a murder and had given a co-defendant's name when asked whose case it was. Asked if he had told Watson the District Attorney's Office was angry with him, Resendez said they know he is not guilty and are charging him because he would not cooperate by saying what happened on the day of the murder. He then said he would not discuss the facts surrounding the 1980 murder and asserted his Fifth Amendment privilege as to the specifics of what had occurred. Asked about his grand jury testimony, Resendez said he had testified there in part but had refused to answer some questions out of concern for his family's safety. Asked if he volunteered to help San Jose police in the murder case or they sought him out, Resendez again exercised his privilege. Defense counsel then moved to strike Resendez's testimony, contending Resendez's exercise of the privilege impaired the defense right to cross-examination. The prosecution argued Resendez only had asserted the privilege when asked specific questions about his actions at the homicide scene, that he had been forthcoming on all matters related to defendant's case and had been fully cross-examined about his prior felonies and about whether he had been offered or promised a benefit in exchange for testimony.

When the court essentially adopted the prosecution's views, defense counsel said he wanted to further establish the factual basis for the strength of the murder charge to impeach Resendez's testimony that he was not worried about that case. The court concluded the defense had received sufficient impeachment information through cross-examination and that counsel's inability to get further details on the murder through Resendez did not sufficiently impair the right to cross-examination so as to warrant striking Resendez's testimony. Recognizing defense counsel was trying to attack Resendez's credibility, the trial court observed, "I think you've been able to do that, so your motion is denied."

Resendez then was asked more questions about his grand jury testimony. He answered several but asserted his Fifth Amendment privilege when asked if he had testified that he had been sought out by San Jose police to give testimony in that case. Resendez admitted he was a former gang member but refused to identify the gang. He said he did not identify himself as a defendant because he does not so view himself. Asked whether he told Watson that San Jose officers had offered a deal in exchange for his testimony in the murder case but he had refused, Resendez asserted his Fifth Amendment privilege. Resendez asserted this same privilege in response to additional questions about his whereabouts at the time of the murder.

In denying a renewed motion to strike Resendez's testimony, the court noted that defense counsel was able to create the impression he wished to show by having Resendez repeatedly invoke his Fifth Amendment privilege when asked about the details of the 1980 murder case despite his claimed unconcern with the charges. It also noted that the portions of the grand jury transcript and interview with Watson which were read to the jury revealed that Resendez previously had worked with police with respect to the murder charge.

On redirect, the prosecution used the same grand jury testimony to rehabilitate Resendez by showing from its transcript that the prosecutor had not promised anything to Resendez in exchange for his testimony before the grand jury.

On recross, Resendez again asserted his Fifth Amendment privilege to questions regarding whether he told Watson the prosecutor in his murder case was trying to get information for free and that, when Resendez told the prosecutor he no longer would help in the homicide investigation, that prosecutor had said that, if Resendez would not help, he would be hit with a murder charge. The trial court denied a renewed motion to strike based upon this final exchange and, following the jury's verdict, the defense unsuccessfully moved for a new trial on this same ground.

Defendant first claims the trial court abused its discretion by denying his admittedly "broad" discovery request for all police reports related to the 1980 homicide investigation, reiterating his trial claim that he was entitled to discovery of all of those records and reports so he could use that evidence to show how strong the case was against Resendez.

Given a ruling on a motion to compel discovery "is subject to review for abuse of discretion" (*People v. Ashmus* (1991) 54 Cal.3d 932, 979), a court's exercise of its discretion in ruling on a such a motion "cannot be overturned unless it is arbitrary, capricious, or patently absurd. [Citation.]" (*People v. Broome* (1988) 201 Cal.App.3d 1479, 1489.)

The People correctly concede that, while the information sought had no direct relevance to defendant's guilt or innocence, it "might have contained material that had the potential to relate to Mr. Resendez's credibility by showing a motive to try to curry favor with the prosecution in light of the strength of the charges against him." We likewise concur with the People that the request was too broad for the purpose identified by defendant in that the materials sought went beyond providing counsel with sufficient knowledge about the murder case to question Resendez effectively about his motive to lie, that such reports likely included substantial extraneous material, such as information applicable to the other defendants and investigations which did not involve Resendez. In denying the discovery request, the trial court aptly commented that it was "not going to try that homicide case here."

We are convinced the trial court's discretionary discovery ruling did not significantly hamper defense counsel's ability to question Resendez about the strength of the murder charges. Even without the requested reports, counsel had substantial information regarding the facts underlying the pending case, such as the transcripts from the grand jury hearing which resulted in Resendez's indictment of for murder. The transcripts included Resendez's own testimony, and counsel was allowed to use information in those transcripts to cross-examine him at trial.

In *Hill v. Superior Court* (1974) 10 Cal.3d 812, a case in which the defense requested all information contained in a " 'rap sheet' " for a prosecution witness, the appellate court held the trial court had abused its discretion in refusing to order the prosecution to turn over records of felony convictions contained in that " 'rap sheet' " but had not abused its discretion in refusing to order discovery of portions of that sheet containing records of arrests or detentions. (*Id*. at pp. 822-823.) Rejecting a claim that such arrests or detentions might reveal a modus operandi of the witness making false reports, the *Hill* court concluded that, "[i]n view of the minimal showing of the worth of the

information sought and the fact that requiring discovery on the basis of such a showing could deter eyewitnesses from reporting crimes, we are satisfied that [the trial court] did not abuse its discretion in denying discovery of those records, if they exist." (*Ibid*.)

As in *Hill*, defendant has made only a minimal showing that the reports he sought would provide significant information beyond the grand jury testimony, and his request would have required turning over records which had little or no bearing on Resendez's possible motive to lie. Given defense counsel had substantial information regarding the 1980 homicide with which to effectively cross-examine Resendez about his pending case, we conclude the trial court did not abuse its discretion in limiting the scope of discovery on the grounds that the information requested was too broad and would have resulted in a collateral trial.

Defendant's reliance upon *Giglio v. United States* (1972) 405 U.S. 150, *People v. Morris* (1988) 46 Cal.3d 1, and *People v. Westmorland* (1976) 58 Cal.App.3d 32, is misplaced. These cases involve failure to disclose deals negotiated between the prosecution and the witness in exchange for testimony while, here, the prosecutor, Resendez, and Resendez's attorney consistently represented that no deals had been offered or promises made in exchange for testimony.

For the first time on appeal, defendant suggests Resendez in fact received benefits in his murder case for his testimony in defendant's trial, a claim unsupported by any facts and directly contrary to the record on appeal. In so arguing, defendant asserts that Resendez testified only that he did not expect, in exchange for his testimony, to receive any benefits *in defendant's case* but never testified that he did not expect to receive benefits *in his own murder case*. This parsing of the record defies logic given Resendez was not charged with any crime or wrongdoing in connection with defendant's case; any testimony by Resendez that he was not going to benefit from his testimony in "this case" necessarily referred to his pending murder case.

Defendant's claim that Resendez refused to testify about whether anyone connected with his murder prosecution, as opposed to defendant's prosecution, was offering any benefit or promise for his testifying in defendant's case is belied by the record. Resendez testified he had understood "very clearly" after defendant's prosecutor met with him that neither she nor any member of her office would

give him "any consideration in [his] murder case," that if he wanted to testify on this case, "that was entirely up to [him] but those two are completely unrelated, and [he was not] going to get any special consideration in the murder case."[18]

Defendant now claims he has found proof that Resendez secretly "knew he was going to receive leniency for his cooperation," namely, evidence that Resendez allegedly received a lighter sentence than he should have for the murder case. Without support in the record, defendant notes that Resendez ultimately pleaded guilty to being an accessory to the murder[19] and was given credit for time served; defendant then claims this sentence was far less than what Resendez should have received, "despite the fact that as a 'third strike' offender, the proper sentence on even the accessory conviction was twenty-five years to life." The murder for which Resendez was indicted occurred in 1980, well before the advent of the Three Strikes Law; accordingly, he could not have been sentenced under the Three Strikes Law. The proscribed sentence for a conviction as an accessory after the fact to murder is the same today as it was in 1980, namely 16 months, 2 years, or 3 years in state prison. (§ 18.) Resendez testified that, at the time of defendant's trial, he had been in prison since 1992 on various charges; thus, his being sentenced to credit for time served was not necessarily extraordinary or suggestive of a secret deal with the prosecution. Defendant's suggestion that the prosecution failed to disclose a secret deal for leniency lacks support in the record. (Cf. *People v. Claxton* (1982) 129 Cal.App.3d 638, 663 [claim of coercion unsupported by record when no evidence that the witness was expressly or impliedly led by officials to believe his chances for parole depended upon content or effect of his testimony].)

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[18] Similarly, we note that, prior to Resendez's testimony, his attorney told the trial court that no one in connection with either the prosecution of defendant or of Resendez's murder charge had offered any promise or deals in exchange for the testimony. The court then specifically asked Resendez if he had been given any promises or assurances "[f]rom the district attorney's office or any place else," to which Resendez replied "No."

[19] We take defendant's reference to the term "accessory" as meaning an accessory after the fact as defined in section 32.

With regard to the denial of the requested discovery, we simply note that, assuming arguendo the trial court erred, we would find such error harmless. " 'Failure to disclose relevant impeachment evidence requires reversal " 'only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.' [Citation.] . . . [R]eversal is required '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.' " (*People v. Santos* (1994) 30 Cal.App.4th 169, 179.) Such is not the case, here, where the evidence against defendant was overwhelming and where his attorney effectively used the information from the grand jury testimony to impeach Resendez by showing a motive to curry favor based upon his pending charges.

Defendant next contends the trial court abused its discretion when it refused to strike Resendez's testimony.

"[W]here a party is deprived of the benefits of cross-examination of a witness by refusal of the witness to answer, the trial court may strike out the direct examination. [Citations.] . . . [¶] . . . [¶] Striking the testimony is the appropriate remedy in most cases; a mistrial will not be granted unless incurable prejudice is shown. [Citations.] [¶] However, the refusal to answer some questions may not be as seriously prejudicial as a total refusal to submit to cross-examination, and the judge has discretion to let the direct examination stand where the unanswered question was relatively unimportant." (3 Witkin, Cal. Evidence (3d ed. 1986) § 1877, 1831-1832 [emphasis omitted]; see also *Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 735-736.) For the reasons stated below, we find no abuse of discretion in the trial court's denial of defendant's motion to strike Resendez's direct examination and in its implicit finding that the limitation on defendant's cross-examination occasioned by Resendez's invocation of the Fifth Amendment did not constitute a material loss.

People v. Daggett (1990) 225 Cal.App.3d 751, 754-755, is illustrative. In *Daggett*, the victim in a child molestation case acknowledged he was charged with molesting two younger children but asserted his Fifth Amendment privilege when asked about admitting the molestation charges. The appellate court upheld the trial court's denial of the defense motion to strike the victim's testimony, explaining that "refusal to answer only one or two questions need not lead to the striking of the

testimony. [Citation.] [¶] Here Daryl testified on cross-examination that he had been charged with molesting two children, and that he did not tell a police detective during an interview in 1988 that Daggett had molested him, but only told the police after he had been charged . . . . [¶] Although Daggett might have obtained some benefit if Daryl had answered that he told others he molested the children, Daggett received the essence of what he needed for impeachment purposes from the answers Daryl gave to other questions . . . ." (*Id*. at p. 760.)

Similarly, here, Resendez admitted he had been indicted for murder and was currently awaiting his trial, and the jury was aware he had a motive to try to curry favor with the prosecution even in the absence of a deal being offered in his murder case. The jury also was aware of Resendez's extensive criminal history given his admission of numerous prior felonies. As for the limited areas where Resendez did invoke his right to remain silent, the refusal did not result in any material loss.

Resendez invoked the Fifth Amendment as to two categories of questions.

He first invoked his right to silence when asked about his contact with San Jose police after which he agreed to testify before the grand jury on the murder charges. Thereafter, defense counsel said it was his understanding that Resendez volunteered assistance to police and provided information as to other people whom he claimed had participated in those homicides. Counsel claimed Resendez "did such a poor job" before the grand jury "that the D.A. indicted him." He argued Resendez's refusal to answer whether he had reached out to police was "important because we would want to draw a parallel between his reaching out to [them] attempting to give information to them to get a deal" with defendant's case where "we've got him reaching out to law enforcement, and we would want to . . . show that when this person is deeply involved in a criminal act like the 1980 murder case, he reached out, tries to sell his testimony to law enforcement in an effort to benefit his own situation."

Counsel's comments reveal that Resendez's trial testimony was a relatively accurate reflection of his situation, namely, that he felt he was indicted based upon his equivocal grand jury testimony. More important is the fact that counsel essentially presented to the jury the information he felt was pertinent to this subject during cross-examination irrespective of Resendez's refusal to answer a few questions on the topic. For example, although Resendez refused to directly answer whether he had told

Watson about an occasion before the grand jury testimony when a San Jose police officer offered to help him if he assisted with the murder case, later, when asked whether he told Watson the district attorney's office was angry that he would not help in that investigation, Resendez explained that he had "said the D.A.'s office knows I'm not guilty of this crime, and they're mad because I'm not saying nothing about it." He said he doubted he had said "the district attorney got mad at [me] because [I] wouldn't help the prosecution," although he remembered thinking "the D.A.'s office knows I'm not guilty of that crime. If they know I didn't kill anybody and people have testified to that, I think they were mad they charged me because I wouldn't . . . cooperate." Asked if he felt the prosecutor was angry because he failed to cooperate, Resendez testified, "I wouldn't say the district attorney's office. I think somebody is . . . not happy with the fact that I don't want to . . . say what happened that day."

In response to a defense question, Resendez acknowledged he was called by the district attorney to testify before the grand jury, but he refused to answer whether he had volunteered his help in 1995 in the case by testifying or he had been sought out by the San Jose police. The trial court then ruled, over prosecutorial objection, that the prior grand jury testimony was admissible as a prior inconsistent statement and that defense counsel could impeach Resendez's refusals to answer with his prior testimony on that subject.[20] Reading from the transcript, counsel then asked if Resendez had testified before the grand jury that San Jose officers had sought him out. While Resendez refused to answer that question, he effectively answered it in responding to others. Asked if he was "in Folsom State Prison at the time you were contacted by the San Jose Police Department," Resendez, replied, "No. I was in Santa Clara County Jail." Asked whether he was "contacted" by San Jose police "about the murder case that happened in 1980," Resendez answered, "Correct, in the county jail."

When asked if officers had offered a deal in exchange for his grand jury testimony, Resendez refused to answer, but was impeached with his prior inconsistent statement when counsel asked "whether this is what you told Detective Watson last week. Your answer, quote, no, see, what

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[20] As prior inconsistent statements, that grand jury testimony was admitted for the truth of the matter asserted. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 55 fn. 4; Evid. Code, § 1235.)

happened is, um, when I went in in state prison, two detectives came to see me and, and they offered me a deal. They offered to help me out if I would help them out." Counsel continued to use Resendez' prior inconsistent statements to counter his refusal to answer by reading from grand jury testimony in which Resendez said he had told Watson the San Jose police "were never going to help you out; they wanted to try to get this -- referring to the information -- for free" and that "the D.A. got mad because I told him that I was no longer going to help him. So he goes, quote, well, if you don't help me, I'm going to hit you with a murder charge, closed quote." Defense counsel also read from the transcript of Resendez's interview, asking, "Did you tell Detective Watson last week: 'And this dude was trying to get something free. You know what I mean? Well, anyways [sic] the D.A. got mad because I told him I was no longer going to help him. So he goes, well, if you don't help me I'm going to hit you with a murder charge."

Given defense counsel put before the jury the essence of the pertinent information regarding Resendez's limited cooperation with San Jose police and the prosecution which preceded his grand jury testimony, the trial court properly concluded counsel had been able to bring before the jury the fact that Resendez initially cooperated with police prior to his grand jury testimony and the fact that he felt he had been charged with murder based upon his limited cooperation during his grand jury testimony.

The second area in which Resendez refused to answer questions concerned the underlying facts of the 1980 murder charge.

Although Resendez refused to answer a question about whether he was in the vicinity of the Pink Elephant on January 26, 1980, moments earlier, he explained that he was near the Pink Elephant but not near the incident leading to the murder. Although Resendez refused to answer whether he was in a gang called "BBS," or to identify the name of his gang, he did admit he had been in a gang.

Near the end of cross-examination, Resendez refused to answer questions about what he was doing on January 26, 1980, such as whether he was at a barbecue, he was with his brother and ex-wife, he heard gunshots, and he was near a gray Pontiac by the Pink Elephant. Given the court already had ruled that it would not allow defendant to try the 1980 murder charge, the specific details of the murder were neither relevant nor material to the issue at hand. While defendant argues he had a right to show

Resendez had a reason to curry favor with the prosecution given his pending murder prosecution, we are convinced his counsel adequately accomplished that goal by introducing the fact that Resendez had been indicted for the murder and would soon face trial for that murder.

When counsel said he wanted to get into the facts of the murder case to show Resendez was more worried about that case than he let on, the court found the evidence and questioning did not support that premise because counsel's questions "hit the area of did the police say that they would give you a break if you cooperated and told them who did it and so forth. So I don't know that the case is so strong against him." When counsel announced his intention to further question Resendez about his participation in the murder, the court said it did not know "if it's relevant," adding, "I don't think it destroys him at all, ... Why, if the case was so strong against him, would the police . . . say they would give [him] a break if [he] cooperated or told them?" Noting the jury already knew that Resendez was involved in the 1980 murder and the only impeachment question was whether he had any reason to come forward based on inducements by the prosecution, the court commented, "The whole idea is has he been offered, promised, or any reason why he would do this; right? Why would he come in and show this thing about your client and say all the things he did; right? The bottom line is you've asked him that and he said no . . . . [I]t's whether [the jurors] believe him or not is what it comes down to."

The cases defendant cites in arguing that the court's ruling infringed on his constitutional right to confront and cross examine witnesses are inapposite because they address a complete foreclosure of any defense cross-examination on a subject of potential bias of a prosecution witness. (See, e.g., *Davis v. Alaska* (1974) 415 U.S. 308, 316-318 [complete prohibition on inquiring about juvenile's prior criminal history as showing motive to lie].)[21] While the United States Supreme Court has rejected a

[21] Other cases cited by defendant involve failure to disclose a deal between a witness and the prosecution and the presentation of false testimony on the existence of any deal. (*Brown v. Wainwright* (11th Cir. 1986) 785 F.2d 1457; *United States v. Sanfilippo* (5th Cir. 1977) 564 F.2d 176, 178; *People v. Phillips* (1985) 41 Cal.3d 29, 48.) Here, by contrast, the record reveals there was no deal between the prosecutors and Resendez for his testimony.

complete foreclosure of any questioning into the area of potential bias of a witness, it has held that the trial court may limit the scope of such cross-examination by applying the traditional rules of evidence. (See, e.g., *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [Confrontation Clause allows trial judge to impose reasonable limits on defense inquiry into potential bias of prosecution witness "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant"].) The trial court here set reasonable limits when it ruled the specific underlying facts of the 1980 homicide were only marginally relevant and constituted collateral evidence of impeachment. (*People v. Daggett*, *supra*, 225 Cal.App.3d at p. 760.) Its denial of the motion to strike Resendez's testimony did not violate defendant's constitutional right to confrontation and cross-examination. Here, as in *People v. Redmond* (1981) 29 Cal.3d 904, 913, defendant " 'was not denied the opportunity to place the witness in proper perspective. His credibility was thoroughly questioned, and the weight of his testimony was put to a proper test. The jury was afforded full opportunity to appraise the witness and his testimony.' [Citation.]"

Finally, we note that, buried within his argument for prejudicial error, defendant makes a claim that the prosecutor committed misconduct during her closing argument by being an "advocate-witness." Specifically, he points to several statements during closing which he argues constituted testimony by the prosecution.

None of the statements identified as misconduct on appeal were objected to below. "Because the defense failed to make a timely objection and to request an admonition when such an objection and admonishment would have cured any potential harm, the claims of prosecutorial misconduct have been waived for purposes of appeal." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1136-1137; see also *People v. Cain* (1995) 10 Cal.4th 1, 48.) Defendant acknowledges that a failure to object constitutes a waiver, but he relies upon *People v. Hill*, *supra*, 17 Cal.4th 800, as identifying an exception to the objection requirement when an objection would be futile. *Hill* does not help defendant as he has not and cannot identify any apparent "futility" of such objections. (*Id*. at pp. 821.)

In any event, assuming arguendo the identified comments by the prosecutor were in any way inappropriate, they did not rise to the level of prejudicial misconduct. The brief statements in question were not egregious, nor were they likely to mislead the jury. Here, as in *People v. Wash* (1993) 6 Cal.4th 215, 266, we discern no possibility that challenged remarks in the prosecutor's detailed argument "had any affect on the verdict."

In summary, we conclude that none of the claims of error with regard to witness Homer Resendez warrant reversal.

Sua Sponte Duty to Instruct that Defendant had the Right to Discipline Victim

Claiming he merely was disciplining Victim when he spanked him, defendant contends the trial court had a sua sponte duty to instruct that defendant had a right to reasonably discipline his child.

To support this claim, defendant relies upon *People v. Whitehurst* (1992) 9 Cal.App.4th 1045 (*Whitehurst*), a case in which the defendant claimed at trial that he merely was disciplining his child when he struck her. In the context of the charge of child abuse, the *Whitehurst* court concluded defendant was entitled to an instruction on the defense of a parent's right to discipline a child by use or corporal punishment because "[a] parent has a right to reasonably discipline by punishing a child and may administer reasonable punishment without being liable for battery. [Citations.] This includes the right to inflict reasonable corporal punishment. [Citation.] [¶] However, a parent who willfully inflicts unjustifiable punishment is not immune from either civil liability or criminal prosecution." (*Id*. at p. 1050.) *Whitehurst* involved a claim of child abuse, which is a form of battery, i.e., infliction of a corporal injury. (See § 273d [corporal injury upon a child] and § 240 [battery].) The court explained that the difference between legitimate discipline of a child and battery or child abuse is one of degree, that whether corporal punishment falls within parameters of parent's right to discipline involves consideration of necessity for the punishment and whether amount of punishment was reasonable or excessive: "Reasonableness and necessity therefore are not two separate defenses but rather two aspects of the single issue of parental right to discipline by physical punishment. [Citation.]" (*Whitehurst, surpa*, 9 Cal.App.4th at p. 1050.)

Whitehurst in inapposite here, where defendant was charged with committing a lewd act upon his child (§ 288). This offense is qualitatively different because the prohibited touching involves a sexual purpose or intent. Parental discipline is not simply separated from committing a lewd act on a child by a matter of degree. Disciplining one's child, which involves administering modest and reasonable punishment to correct or punish breaches of rules or prescribed conduct, is privileged because of its educational purpose within the parental role in a child's upbringing. On the other hand, there is no educational or parental role involved when a parent touches a child with a sexual purpose or intent.

Thus, in the context of terminating parental rights, our state Supreme Court has noted that "child molestation is among those acts 'so inherently harmful that the intent to commit the act and the intent to harm are one and the same . . . . [Citation.]" (*In re Kieshia E.* (1993) 6 Cal.4th 68, 77.) It added that, when a parent molests his child, "the parent also abandons and contravenes the parental role." (*Ibid*.) Earlier, in *J. C. Penney Casualty Ins. Co. v. M. K.* (1991) 52 Cal.3d 1009, 1026, the court had discussed the fundamental difference between child molestation and other parental acts in the context of an insurance claim: "There is no such thing as negligent or even reckless sexual molestation. The very essence of child molestation is the gratification of sexual desire. The act is the harm. There cannot be one without the other. Thus, the intent to molest is, by itself, the same as the intent to harm." (*Id*. at p. 1021.) The court concluded Insurance Code statutes preclude coverage for child molestation because it "is *always* intentional, it is *always* wrongful, and it is *always* harmful." (*Id*. at p. 1025.)

In *People v. Martinez* (1995) 11 Cal.4th 434, 443, the court reaffirmed that "section 288 prohibits *all* forms of sexually motivated contact with an underage child. Indeed, the 'gist' of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act. [Citation.] '[T]he purpose of the perpetrator in touching the child is the controlling factor and each case is to be examined in the light of the intent with which the act was done . . . . If [the] intent of the act, *although it may have the outward appearance of innocence*, is to arouse . . . the lust, the passion or the sexual desire of the perpetrator [or the child,] it stands condemned by the statute . . . .' [Citation.] [¶] Thus, . . . the cases have made clear that a 'touching' of the victim is required, and that sexual gratification must be presently intended at the time such 'touching' occurs. [Citations.]

However, the form, manner, or nature of the offending act is not otherwise restricted. Conviction under the statute has never depended upon contact with the bare skin or 'private parts' of the defendant or the victim. [Citations.]" (*Id*. at p. 444, original italics.)

In light of the above, the right of a parent to discipline a child is no defense to a charge of section 288, which requires that the touching be committed with a sexual intent. Given any contact by a parent on his child undertaken with a sexual intent cannot constitute justifiable discipline, defendant was entitled to argue that he lacked any sexual intent when he touched Victim but was not entitled to a sua sponte instruction that parental discipline is a defense to committing a lewd act on a child.[22]

Given the defense of reasonable discipline is inapplicable to a charge of committing a lewd act on a minor in violation of section 288, subdivision (b)(1), we conclude this instructional claim of error is not well taken.

Refusal of Request to Call Victim's Psychiatrist as a Defense Witness

Defendant contends the trial court abused its discretion by refusing the request to call Victim's psychiatrist as a defense witness to testify about the effects of anti-depression medication on Victim's testimony, conduct, perception, and memory. At trial this claim is based upon defendant's assertion that, as Victim was testifying, his psychiatrist made an observation about Victim "physiologically" which led him to conclude Victim had not taken his medication. Defendant wanted to call the psychiatrist as a witness to challenge Victim's competency and to impeach Victim by testifying about the indicators the doctor observed that led him to conclude Victim was not on a proper dose of his medication. On appeal defendant argues the trial court violated his right to call all relevant witnesses and his right to cross-examination.

Defendant's argument is based upon a misreading of the trial transcript.

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[22] The trial court correctly instructed that, in order to find defendant guilty of violating section 288, subdivision (b), the jury had to find that he spanked VICTIM with a sexual intent, thereby ensuring that it understood that if defendant lacked the requisite sexual intent, i.e., if he spanked VICTIM for disciplinary purposes rather than for his lewd sexual pleasure, he was not guilty of violating section 288.

Shortly after Victim began testifying, the prosecution requested a recess. During a hearing outside the presence of the jury, defense counsel gave the following reason for the hearing: "We approached side bench a moment ago, and the prosecutor asked the Court for a recess because she apparently had been told by Dr. Stubblefield . . . I believe he's an M.D. psychiatrist for the witness A[.], that apparently A[.] had not, quote, taken his medication this morning, although the prosecutor didn't know what that medication was. [¶] And the doctor felt that he -- *I'm interpreting what I think the prosecutor understood*. And the doctor felt that he needed to take his medication now because he could see some kind of physiological -- he made some kind of observations of A[.] physiologically that indicated to the doctor that A[.] was off the medication, somehow showing that. That raised questions to me as to A[.]'s competence." (Emphasis added.)

Counsel distinguished between what the doctor said to the prosecutor, that Victim had not taken his medication, and the prosecutor's speculative assumption regarding how the doctor knew that fact. The prosecution's assumption, an assumption which she communicated to defense counsel, served as the basis for defense counsel's request to call the doctor as a percipient witness as to Victim's competency to testify, and it serves as the basis for the claim of error on appeal. However, the prosecutor's assumption was erroneous.

On cross-examination, Victim testified he was taking two anti-depression medications. In response to defense questioning, Victim noted that, on this day, he took his medication during the morning recess requested by the prosecution. Victim explained that that was the usual time he takes his daily dose, at around 10:00 or 10:30 a.m. On redirect, Victim explained that he had unknowingly run out of Depakote that morning and, upon that discovery, he called his psychiatrist, Dr. Stubblefield, and asked him to bring a dose for him to take that morning.

At a subsequent hearing, the trial court clarified that the doctor had not observed some physiological indicator during testimony as mistakenly assumed by the attorneys in the case. The following colloquy took place: "[Defense Counsel]: What I wanted to do is ask A[.] about the sequence of events that occurred this morning when the prosecutor requested a recess or, *apparently at least my interpretation was, without having talked to the doctor of course*, is somehow the

doctor thought that A[.] had not taken his medication and wanted him to take his medication and saw something in his behavior that indicated to the psychiatrist as his treating psychiatrist that he hadn't taken his medication, and I wanted to follow up with that with A[.] to put that in front of the jury. [¶] THE COURT: No, because A[.] said that he ran out of his meds and he asked the doctor to bring them to him. He said that on direct, so I didn't see any reason to go into Dr. Stubblefield because it's a privilege once again." Regarding another bench conference in which defense counsel wanted "to reintroduce the topic of Dr. Stubblefield based upon the district attorney's questioning to put the sequence of Dr. Stubblefield's activity before the jury," the court reiterated that "A[.] ran out of the prescription and the doctor brought his pills he is supposed to take." At the prosecutor's request, the court then put on the record that Dr. Stubblefield "came in about 20 minutes after [Victim] took the stand." The prosecutor added that Dr. Stubblefield "at that point tapped me on the shoulder and asked for a five-minute recess." The court and the prosecutor noted that the doctor had the pill with him at that time. (Emphasis added.)

Given its conclusion that Dr. Stubblefield had not become aware that Victim was off of his medication that morning due to an observation of behavior on the witness stand, the trial court correctly refused to allow the defense to call him as a percipient witness in order to examine the doctor about the effect of the medications upon Victim based on courtroom observations. The court did allow the defense to ask Victim about the medications he was taking and their effects on him, and defense counsel did ask those questions. The court also gave the defense the option of calling any psychiatrist, other than Victim's personal doctor, as an expert witness to testify about the effects of Depakote and Zoloft on one's ability to recall facts accurately and testify.

Dr. Stubblefield was not a percipient witness of some physiological or psychological effect on Victim during his testimony, and the defense was given the opportunity to call another doctor as an expert witness regarding the effects of the medication Victim was taking. Accordingly, we conclude defendant's due process claim regarding the denial of his request to call Dr. Stubblefield as a defense witness is meritless. For the exact same reasons, assuming arguendo the trial court erred by refusing to

allow Dr. Stubblefield to testify as a defense witness, any such error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 36.)

Sufficiency of Evidence and Necessity of a Unanimity Instruction for Count 18

Defendant contends insufficient evidence supported the charge in count 18 that he possessed his slide show video during the charged period. He suggests the jury could have found him guilty of possessing it in 1985, a year which falls outside of the statute of limitations for the misdemeanor crime of violating section 311.11, subdivision (a).

We "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a, reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Defendant does not dispute that Detective Brown discovered the slide show video at Susan B.'s home when she turned over defendant's materials. His claim is based upon his assertion that the tape could have been in her home since 1985. He supports this assertion with statements by his wife and by Susan. B. that, in 1985, defendant had Susan B. store a locked briefcase which he had said contained art. Defendant speculates that, if this briefcase contained the slide show video tape in 1985, then he did not possess it in 1998. Claiming the two possible delivery scenarios for that video are equally plausible, he concludes there is insufficient evidence that he possessed the video in 1998, as charged. The claim the video was delivered in 1985 is based upon speculation and ignores undisputed trial evidence which established virtually without question that the slide show video was in defendant's physical possession throughout 1997 and 1998 until it was taken to Susan B.'s home by defendant's wife in 1998.

Defendant's wife testified that, in August or September 1998, she took a large portion of defendant's pornographic collection, including many video tapes, to Susan B.'s home in a "Rubbermaid tote" and a plastic milk crate. Susan B. similarly testified that, in August 1998, Wife brought over two bins filled with video tapes and child pornographic material. About five weeks later, Susan B. turned

over to the police the materials which had been delivered by Wife. Officer Brown testified she collected from Susan B.'s home 28 video tapes which were "in a cardboard box in a clear plastic tub" and that the slide show video was one of those videos. Accordingly, the evidence established that the slide show video was among the materials taken to Susan B.'s house by defendant's wife in 1998.

Defendant essentially admitted this fact at trial. He testified he made the slide show video in 1981, he put much of his child pornography in storage in 1985, he reacquired most of them after Tampico was sent to prison in 1991, and, by 1997, "all of it had been given back." He added that, although he "got rid of the video of many videotapes" by taking them to the dump in 1988, "that one with the slide show on it was taken out of my hands by [Wife]. So I was not able to destroy it. Otherwise, I would have."

The above testimony provided more than sufficient evidence that the slide show video was in defendant's physical possession in 1997 and remained in his possession until it was taken to Susan B.'s home in 1998, and there is no evidence in the record to counter defendant's admission that the only reason he did not destroy that video in 1998 was because his wife had taken it to Susan B.'s home that year. Defendant's insufficiency of the evidence claim is not well taken.

We similarly are unpersuaded by defendant's claim that the trial court erred by failing to give the jury a unanimity instruction as to his possession of the video.

"When a defendant is charged with a single criminal act but the evidence reveals more than one such act, the prosecution must either select the particular act upon which it relies to prove the charge or the jury must be instructed that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act." (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1499.) Quoting *People v. Beardslee* (1991) 53 Cal.3d 68, 93, defendant points out that a "unanimity instruction is necessary 'when conviction on a single count could be based on *two or more discrete criminal events.* In such cases, it is appropriate the jurors all agree the defendant is responsible for the same discrete criminal event.' " He then argues that, "[u]nder this law, it would clearly be a constitutional violation to convict [defendant] on the possession charge if some jurors believed

[defendant] only possessed the slide show video in December of 1997, while others believed he possessed it only in July 1998."

While defendant correctly quotes the general rule for unanimity instructions, he ignores the exception to the general rule which provides no unanimity instruction is required for a crime which is a continuing offense: "The continuous course of conduct exception arises in two contexts. [Citations.] 'The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. [Citation.] The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]" (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299.) The second exception applies here because the possession of the pornographic videotape is a continuing offense. (See, e.g., *People v. Dell* (1991) 232 Cal.App.3d 248, 265-266 [an exception to unanimity instruction requirement recognized for continuous criminal conduct resulting in a single offense, such as possession of stolen property].) The evidence demonstrated that defendant possessed the slide show video continuously throughout late 1997 and 1998, and there was no evidence to suggest that his possession of that video from December 1997 to October 1998 was interrupted or otherwise broken down into any discrete temporal components. Because possession of matter depicting a minor engaging in sexual conduct in violation of section 311.11 is a continuing offense throughout the period the matter is possessed, no unanimity instruction was required. (*People v. Jenkins*, *supra*, 29 Cal.App.4th at p. 299.)

We are unpersuaded by defendant's claim that the jury may have convicted him based on his possession of the tape in 1985. At the beginning of the trial and, later, when instructing on the applicable law, the trial court informed the jury of the crimes with which defendant was charged by reading the information, which expressly charged defendant with possessing the slide show video "on and between December lst, 1997, and October 23rd, 1998." The jury properly was directed to determine whether defendant was guilty of the charged offense of possessing the video during the identified months, and not in 1985, and we presume the jury followed the instructions given by the court. (*People v. Callahan*, *supra*, 74 Cal.App.4th at p. 372.) Given the jury was instructed to convict

defendant for possession of the tape between 1997 and 1998, no unanimity instruction was needed to require the jury to elect between the possession in 1998 and in 1985.[23]

In any event, assuming arguendo the trial court should have given a unanimity instruction, the error would be harmless under any standard of review given that the evidence, including defendant's own admissions, conclusively established that defendant possessed the slide show video continuously between December 1997 and October 1998.

DISPOSITION

The judgment is affirmed.

O'FARRELL, J.*

WE CONCUR:

BAMATTRE-MANOUKIAN, ACTING P.J.

WUNDERLICH, J.

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[23] In his motion for summary reversal, defendant contended count 18 was barred by the statute of limitations. He based this claim on his previously made factual assertion that the evidence could be interpreted such that the jury could have found that he possessed the slide show video either in 1985 or in 1998 and his claim that the verdict could reflect that the jury convicted him for a crime occurring outside the applicable statute of limitations. However, for the reasons set out above, the evidence and the information conclusively establish that that the crime for which defendant was convicted in count 18, possession of sexual matter depicting a child committing or simulating sodomy in violation of section 311.11, subdivision (a), occurred within the applicable limitations period.

* Judge of the Monterey Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 5/30/02

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VASSAR WILLIAMS SMITH, Defendant and Appellant.	H020031 (Santa Clara County Super. Ct. No. 209576)

THE COURT:

Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion, which was filed on May 1, 2002, is certified for partial publication. The portions directed to be published follow: (1) the single introductory paragraph before "FACTUAL SUMMARY" (2) the heading "DISCUSSION" and the entire portion of the opinion entitled "Statute of Limitations" (3) the entire portion of the opinion entitled "Sua Sponte Duty to Instruct that Defendant had the Right to Discipline A.S." and (4) the entire portion of the opinion entitled "DISPOSITION."

_____
O'Farrell, J.*

_____
Bamattre-Manoukian, Acting P.J.

_____
Wunderlich, J.

*Judge of the Monterey Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The written opinion which was filed on May 1, 2002, has now been certified for partial publication pursuant to rule 976(b) and 976.1 of the California Rules of Court, and it is therefore ordered that the opinion be partially published in the official reports.

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Bamattre-Manoukian, Acting P.J.

Trial Court:	Santa Clara County Superior Court Superior Court No.: 209576
Trial Judge:	The Honorable Marilyn Pestarino-Zecher
Attorney for the Respondent: The People	Bill Lockyer Attorney General David P. Druliner Chief Assistant Attorney General Ronald A. Bass Senior Assistant Attorney General Stan M. Helfman Supervising Deputy Attorney General Jeffrey M. Laurence Deputy Attorney General
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