Filed 1/12/17 P. v. Dev CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. AJAY KUMAR DEV, Defendant and Appellant.	C062694 (Super. Ct. No. 062444)

A jury convicted defendant Ajay Kumar Dev on 14 counts of committing lewd or lascivious acts upon a child, 23 counts of penetration of a genital opening with a foreign

object, four counts of penetration of a genital opening with a foreign object upon a person under 16 years of age by a person over the age of 21 years, 23 counts of rape by force or threat, nine counts of penetration of a genital opening with a foreign object upon a person under 18 years of age, and three counts of dissuading a witness. The trial court sentenced defendant to an aggregate prison term of 378 years 4 months.

Before we set forth defendant's specific arguments in this appeal, we first address his more general claim that his trial was unfair. Based on our review of the entire record, we are confident defendant received a fair trial. The testimony of a single witness can support a conviction if that testimony is believed by the jury. Defendant claims the victim lied, but it was the responsibility of the jury to review all the evidence, including the witness testimony, and determine which evidence it found credible and dispositive.

Our review of the record establishes that defendant's convictions are supported by substantial evidence. In addition to the victim's testimony regarding the sexual offenses, there is evidence of a recorded phone conversation between the victim and defendant in which defendant made statements that he deserved to be put in prison, that he threatened to kill the victim and himself, that the victim's life would be ruined because she had sex with defendant after she turned 18 and thus had consented, that they met together at a motel, and that nothing would happen because the victim had no proof. There is also evidence regarding pornographic materials found on a laptop and computer tower in defendant's house, including movies depicting young girls involved in sex acts with titles such as "Kiddie Blow Job," "Real Homemade Incest -- Me With My Daughter," and "Young Teen Lolita." In addition, the victim testified that after she reported the sexual offenses to the police, defendant offered to pay her to stay outside the United States.

Defendant challenges certain evidence and claims other violations and errors, and thus we turn to his specific appellate contentions. He contends (1) the trial court failed in its sua sponte duty to instruct the jury with CALCRIM No. 359 (corpus delicti -- independent evidence of a charged crime) in connection with the use of statements he

made during the recorded pretext call; (2) the trial court erred in failing to appoint a certified Nepali interpreter to translate the statements defendant made during the pretext call, and it abused its discretion in permitting the victim to act as an "uncertified interpreter" of those statements; (3) the trial court erred in instructing the jury with CALCRIM No. 358 because, according to defendant, the instruction directed the jury that all recorded statements made by defendant could be viewed without caution ; (4) the trial court erred in excluding evidence of the victim's 2005 Nepal record of conviction; (5) the trial court erred in admitting evidence of adult pornography; (6) the prosecutor committed misconduct in arguing that a person using a file-sharing website cannot inadvertently or unknowingly obtain child pornography, and it was error to admit People's exhibits 44-A, 44-B and 44-C (pertaining to files which an expert believed contained child pornography); (7) the trial court erred in excluding evidence of an e-mail which purportedly showed that defendant was at work when someone accessed child pornography on his home computer; (8) the prosecutor committed misconduct by commenting on defendant's failure to testify; (9) the trial court violated defendant's constitutional rights by refusing to hold an evidentiary hearing to settle a proposed statement with regard to a missing jury note and whether the jury received certain trial exhibits during deliberations; and (10) defendant is entitled to a new trial based on the cumulative effect of the asserted errors in this case.

We conclude (1) the trial court erred in not instructing with CALCRIM No. 359, but the error was harmless because there is sufficient independent evidence of the crimes; (2) the trial court was not obligated to appoint a certified Nepali interpreter, and did not prejudicially err in allowing the victim to testify regarding statements made in the pretext call, because there was no witness or party who could not speak or understand English, and it was for the jury to decide witness credibility and resolve conflicts in the evidence; (3) we disagree with defendant's characterization of CALCRIM No. 358, and the last sentence of that instruction does not apply to the parties' dispute about the interpretation

of defendant's recorded pretext call statements; (4) defendant fails to show that the purported Nepal court records were admissible or subject to judicial notice, and the claims he raises for the first time on appeal are forfeited; (5) defendant's claims in connection with the admission of adult pornography are forfeited because he did not make a specific objection on the grounds asserted on appeal in the trial court; (6) defendant failed to preserve his prosecutorial misconduct claim for review because he did not object at trial to the challenged remarks, and it was not error to admit People's exhibits 44-A, 44-B and 44-C; (7) the trial court did not err in excluding the proffered e-mail because defendant failed to establish the foundational requirements for its admissibility; (8) read in context, there is no reasonable likelihood the jury would have construed the prosecutor's remarks as a reference to defendant's failure to testify; (9) no prejudicial error is demonstrated in the settled statement proceedings; and (10) reversal is not required because defendant's appellate claims are forfeited or lack merit.

We will affirm the judgment.

BACKGROUND

Defendant and his wife Peggy met the victim, S., while visiting family in Nepal in 1998.[1] Defendant and S.'s father were distant cousins. The Devs offered to adopt S. so that she could live in the United States, get a good job, and help her family in Nepal. S.'s family agreed to allow the Devs to adopt S.

S. arrived in California on January 23, 1999. She was 15 years old. She lived with the Devs in Davis. The Devs finalized their adoption of S. on December 6, 1999.

According to S., within the first couple of weeks after she started living with the Devs, defendant positioned himself behind her on the couch and rubbed his penis against

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[1] We refer to certain individuals by first name or initial(s) for clarity or to protect their privacy.

her behind, over her clothes. Defendant also touched her breast and crotch area over her clothes. Peggy was not at home at the time.

Defendant told S. to not tell anyone about what happened. He said if S. disclosed what he did, she would go back to Nepal, her reputation would be ruined, her career would end, and the Devs would get divorced.

S. testified that within a month after the incident on the couch, defendant raped her when Peggy was not home. S. tried to get away, but defendant held her hands and told her to be quiet. He put his finger and then his penis inside her vagina while holding her hands down and ignoring her plea to stop. Defendant gave S. the same warning he gave her when he first touched her inappropriately.

S. said defendant raped her two to three times a week until she was 19 years old. At first, defendant raped S. only when Peggy was not home. Later, he raped her even when Peggy was home. S. said defendant also raped her when he, Peggy, and S. stayed overnight at the homes of family members and friends. S. further testified that defendant raped her in a hotel room in Bangkok, Thailand, during a layover on a trip to Nepal in 2003. Defendant put his fingers inside S.'s vagina and touched her bare breasts with his hands at times.

Defendant always warned S. against telling anyone about what he was doing. Consequently, S. did not disclose the abuse to anyone until later.

S. testified that defendant also showed her pornography from the time she was 15 until she was 18 or 19. Defendant showed S. five to six pornographic movies on his Dell laptop and on a Dell desktop computer. All of the movies featured extremely young looking girls.

S. specifically recalled three of the pornographic movies that defendant showed her. One featured a father, a mother, and a daughter character, and depicted the daughter orally copulating the father. S. was under 18 years of age when she watched that movie

with defendant. Defendant wanted S. to do what the girl in the movie did. He forced S. to orally copulate him probably three times a month.

S. testified that defendant also took photographs of her without her clothes on when she was 19. Defendant showed S. the photographs on his laptop. S. said Peggy saw the photographs and asked S. whether something was going on between defendant and S. S. did not answer Peggy's question and Peggy did not say anything further to S.

S. recalled that she became pregnant three times during the time defendant forced her to have sex with him. Defendant took S. to get an abortion on January 2, 2003. S. was 18. She had been pregnant for about five weeks and did not know that she had already miscarried. S. testified that defendant was the only person she was having sex with at that time. Defendant took S. to a clinic to get an abortion a second time in May 2003. S. was about five weeks pregnant. She took a pill to terminate the pregnancy. S. testified that defendant took her to a clinic when she was pregnant a third time. But no documents were presented at trial in relation to a third pregnancy.[2]

S. moved out of the Dev home on December 1 or 3, 2003, when she was 19. She testified that she moved out primarily because of the sexual abuse by defendant. However, S. sent the Devs messages after she moved out of their home, declaring that she loved and missed them. She also visited the Devs after she moved out.

S. testified that defendant raped her again after she moved out of the Dev home. According to S., defendant asked S. to meet him so they could talk, but he took her to a Motel 6 and raped her. Motel 6 records showed defendant checked into the motel on

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[2] There was testimony that S. met S.J. in November 2002 and dated him for one or two months. S. dated A.T. sometime in 2003. S. testified that she went to Planned Parenthood on November 4, 2003, to get tested for sexually transmitted diseases because she was thinking of having sex with S.J. S. dated W.G. sometime after December 1, 2003. She became romantically involved with A.T. again in 2004.

December 10, 2003, and on January 12, 2004. S. said the Motel 6 incident was the last time defendant had sex with her.

S. also testified about another incident that occurred after she moved out of the Dev home. S. said she accompanied the Devs to the hospital on January 29, 2004, when Peggy had surgery. According to S., while she and defendant were in the hospital waiting room, defendant told S. he needed to have sex with her and he wanted her to move back home. According to S., defendant offered to pay S. for sex, S. refused, and defendant said he would kill S. and himself. Defendant also told her he would not let a boyfriend come into S.'s life. S. said she became very frightened.

Nevertheless, S. returned to the Dev house with the Devs after the surgery, and she planned to stay the night. S. said defendant tried to rape her that night. S. ran from the house to her apartment. She confided in A.T. and her roommate about the sexual abuse that night. Her roommate encouraged S. to go to the police and accompanied S. to the police station.

Officer Keirith Briesenick interviewed S. on February 2, 2004. S. reported that defendant had sex with her two or three times a week from the time she was 15 until she moved out of his house. S. told the officer she last had sexual contact with defendant on December 6, 2003, when she moved out of his house. She reported that when her adoptive mother had surgery defendant threatened to kill S. and himself if S. did not have sex with him.

Detective Mark Hermann interviewed S. on February 3, 2004. S. told the detective defendant began touching her inappropriately during the first month she lived with him, then he raped her about one month later. She said defendant had sex with her at least three times a week. She described acts of digital penetration and masturbation. She said defendant took nude photographs of her, and Peggy saw the photographs on his computer. S. told the detective defendant offered to pay her for sex and threatened to kill her and himself when Peggy had surgery, and he tried to rape S. later that night.

S. disclosed that defendant got her pregnant three times and she had one miscarriage and two abortions. S. subsequently reported that defendant showed her pornography on a Dell computer tower and a Dell laptop when she was a minor. She described a movie involving a mother, a father, and a young girl.

S. made a pretext call to defendant under Detective Hermann's direction the next day. The pretext call was partly in English and partly in Nepali. A recording of the pretext call was played at the trial.

S. told defendant, during the pretext call, that a school counselor asked her the identity of the man who had impregnated her, causing her to have three abortions, but S. did not tell the counselor anything. S. asked defendant if she should tell the school counselor about her and defendant. Defendant responded that S. should do what she wanted: go to the police, give the police defendant's name, and have defendant arrested and put in prison. Defendant said, "This is what I deserve, I know." Further, defendant did not immediately deny S.'s charge "you had sex with me, ever since I was 15." He said "[t]hese are not something you talk on the phone with people." But, thereafter, defendant repeatedly denied S.'s continued accusation that he had sex with her from the time she was 15. Defendant said S. was accusing him because she broke up with her boyfriend W.G. However, defendant did not deny that he offered to pay S. for sex and went to her bedroom that night. He admitted threatening to kill S. and himself, but said S. should not judge him based on what happened in the last three weeks.

Speaking in Nepali, defendant told S. that his life would be gone and S.'s life would be ruined from this. When S. asked how her life would be ruined, defendant responded "[b]ecause you have fucked me after 18 years of your age. [¶] . . . [¶] That means you have given me consent." Defendant later said "you had sex with me when you were 18." S. responded that defendant made her do it. Defendant answered, "How is that possible, didn't you know it even at the age of 18, did I give you drug or what? Didn't you know even after you were 19 years of age? [¶] . . . [¶] . . . After you had

moved out, recently you had gone to a motel with me for a little while. [¶] . . . [¶] Then after that, you were already 20 years old, isn't it? [¶] . . . [¶] It means that people will say that you are also involved in this and he is not alone, it is my mistake I understand, but you are also at fault too and people will understand it. [¶] . . . [¶] That is what I am saying. It is not only my life that will be doomed, your life will be doomed too." Defendant warned S. that both of their lives would be "spoiled." Defendant said S. should not talk about this because the police will investigate the matter and nothing will happen because there was no proof. He said, "[w]hether this matter is in fact or false, I will not admit this no matter what. You should not too." He also said, "Whether it is truth or not babu, you have no proof in this. It is not only your name but both of our names will face insult; you would not be able to save yourself in this; that is what I am telling you. [¶] . . . [¶] You would not be able to save yourself because you do not have proof."

Defendant did not deny S.'s accusation that he fathered the babies she aborted. He suggested S. was already 18 when she got pregnant.

Police seized a Dell laptop and a Dell computer tower from the Dev house. Detective Brent Buehring conducted a forensic examination of the computers. He found pornographic material on both computers.

Buehring used a computer program to determine when files on the computers were created, last accessed, last written, and last modified. He testified about that data at the trial. However, he did not know who used the computers when files were created or accessed. He also could not tell whether someone actually viewed a file from the created, last accessed, last written, and last modified dates. He said running a computer virus program could change the last accessed date even if no one was actually on the computer.

Buehring found viewable adult pornographic still images on the laptop. None of the pornographic images were of S. Buehring also recovered still image files that were in a folder called "paid site" and that were deleted from the laptop. The deleted files were

found in subfolders entitled "Ashley," "barely legal," and "blow jobs." Buehring could not view the deleted file images. But he testified that in his experience, "Ashley" could refer to pornographic images of underage girls. Some of the deleted files had file names suggesting child pornography.

Buehring also testified about Kazaa files recovered from the laptop. Kazaa was a file-sharing website. People's exhibit 44-A, 44-B, 44-C listed 122 files downloaded from Kazaa to the laptop. Buehring surmised the files on People's exhibits 44-A, 44-B, and 44-C contained child pornography based solely from the titles of the files, such as "Fouradolescent Girls(1).jpg." Buehring admitted there was no way of telling whether the titles of the files accurately described the content of the file.

There was a folder containing adult pornographic still images on the computer tower. Some of the images were in a folder called "Ajay." None of the pornographic still images were of S.

Buehring also found seven viewable pornographic movies on the computer tower which he believed depicted children. Those movies included "Kiddie Blow Job" and "Real Homemade Incest-Me With My Daughter," which S. later identified as two of the movies defendant showed her when she was a minor. One movie showed a very young girl giving oral sex. The other showed a man and a very young girl having sex. A prosecution expert testified the girls featured in "Kiddie Blow Job" and "Real Homemade Incest-Me With My Daughter" were under the age of 14.

There were two pornographic movies featuring a father, a mother, and a daughter character on the computer tower. One of those movies ("Young Teen Lolita") was a commercially produced movie which depicted a girl orally copulating a man. Detective Hermann testified that "Young Teen Lolita" was produced by Heat Wave Entertainment and was entitled "Eighteen and Confused." S. identified "Eighteen and Confused" as one of the movies defendant showed her. "Eighteen and Confused" was created on

January 13, 2000. It did not exist in 1999, when S. said defendant showed it to her for the first time.

S. asked the prosecutor to drop the charges against defendant in a letter dated May 5, 2004. She said her family in Nepal was pressured by the community that defendant financially supported in Nepal, and continuing with the case would have consequences for her family. S. testified that when she was in Nepal in June 2004 for her sister's wedding, defendant told her not to return to the United States. S. said defendant offered to pay her if she stayed in Nepal or went to Canada. S. declined defendant's offer.

S. planned to return to the United States in July 2004, but she was arrested in Nepal, detained in jail, and tried in Nepal for having an altered birth date on her passport. Defendant's cousin signed the complaint that led to S.'s arrest. The Nepal court determined that S.'s correct birth date was April 28, 1983, and that S. used a false birth date on her passport papers. S. had to pay a fine of about $100.

Detective Hermann contacted the U.S. Embassy in Kathmandu for help in getting S. back to the United States. S. said she followed Detective Hermann's advice and applied for a new passport so that she could return to the United States. She did not appeal the Nepal court decision. She returned to the United States.

A.T. testified at the trial. He met S. in 2003 at Sacramento City College. He and S. became friends, and they had a sexual relationship. He testified that S. told him defendant sexually abused her from the time she was 15 until she moved out of the Dev house.

Peggy also testified at the trial. She said she never observed anything untoward between defendant and S. According to Peggy, S. never said defendant did something improper or sexual in nature, except during the pretext call. Defendant also presented the testimony of family members and friends, some of whom stayed overnight at the Dev

house or hosted the Devs and S. at their homes, but who never observed S. behave in a way or say anything which indicated that defendant was sexually abusing her.

Peggy denied that she saw naked photographs of S. or spoke with S. about defendant taking nude photographs of S. With regard to pornography, Peggy testified that she and defendant had problems conceiving, and defendant purchased pornographic still images, which he placed on his laptop, to help him masturbate when the Devs underwent fertility treatments.

Peggy described the Devs's struggles with S. According to Peggy, S. repeatedly stayed out at night without letting the Devs know where she was. Peggy explained S. was dishonest about where she was going, and Peggy became increasingly frustrated with S.'s behavior.

Defendant's neighbors testified that when S. was in high school, they saw boys at the Dev house when the Devs were not home. The neighbors saw the front curtains were closed while the boys were inside the house with S. One neighbor said a tall Indian or Iranian man was at the Dev house with S. about three to four times, with the curtains closed.

Peggy testified that she and defendant arranged for S. to spend the summer with S.'s family in Nepal in 2003, with the hope that S. would reconnect with her Nepali culture and become more responsible. Defendant and S. left California for Nepal on May 30, 2003. Peggy did not accompany them. It was during that trip that S. alleged defendant raped her in a hotel room in Bangkok.

Peggy recounted how her problems with S. continued after S.'s 2003 Nepal trip. Peggy said S. exchanged text messages with A.T. until midnight or 1:00 a.m., the night before a midterm exam. S. told Peggy the text messages were related to studying for the exam. But Peggy did not believe S. In addition, according to Peggy, S. admitted cutting class once and going off campus with A.T., his brother, and another girl for lunch. S. had to withdraw from two classes at Sacramento City College in the fall semester of 2003.

Things came to a head between the Devs and S. on December 1, 2003. Peggy said S. called her from a blocked number and was evasive when Peggy asked for S.'s location. Peggy and S. argued and S. admitted she was using the cell phone of A.T.'s brother. The Devs told S. that evening that she could move out if she could not follow their rules. S. moved out of the Dev home that night.

According to Peggy, defendant had a breakdown after S. moved out. He left a note at home on December 10, 2003, stating he needed to get away. Peggy and S. called defendant on his cell phone multiple times and spoke with him. Defendant eventually told Peggy he was at Motel 6. Peggy went to the motel. Defendant was alone. He appeared distraught.

On December 31, 2003, defendant sent an e-mail to S.'s father, with a copy to S., letting S.'s father know about the problems the Devs had with S. S. responded by sending an e-mail to her father on January 1, 2004. S. told her father the Devs slapped her, she was afraid of them, and she did not want to live with them. S. did not mention sexual abuse. Peggy said the Devs were shocked by the claims S. made in her e-mail to her father.

S. visited Peggy at the Dev house on January 10, 2004. She denied to Peggy that she said the Devs were "abusive." Peggy told S. she did not want to see S. if S. did not apologize for what she said in her e-mail to her father and write her father to clarify things. Peggy later learned from defendant and S. that defendant met S. at the Motel 6 on January 12, 2004, to explain to S. why Peggy was so angry. S. subsequently visited Peggy at the Dev house and apologized to Peggy. Peggy testified that S. did not appear distraught, upset or bruised.

Peggy also described what happened when she had surgery on January 29, 2004. She recalled that S. and defendant appeared upset when she got out of surgery. Defendant and S. argued about S.'s boyfriend and about S. being more responsible. Peggy heard defendant and S. arguing about the same things later that evening. Peggy

got out of bed twice and yelled at defendant and S. to stop arguing. She saw defendant and S. sitting on the futon bed in S.'s bedroom. Defendant later told Peggy that S. left the house.

Defendant sent S.'s boyfriend W.G. an e-mail on January 31, 2004. He told W.G. that if he wanted a relationship with S. he should understand there were cultural expectations because S. was Nepalese. W.G. responded on February 1, 2004, that he and S. were no longer dating. S. testified that she was angry with defendant for contacting her boyfriend. S. told defendant to stay out of her life in an angry e-mail on February 1, 2004. She did not mention sexual abuse or rape in her e-mail. But she reported the sexual abuse to the police the next day.

Defendant presented Jeffrey Fischbach as an expert on the forensic examination of electronic media. Fischbach testified the pornographic material in a folder called "QcBar" on defendant's laptop was the result of malware and was not deliberate human activity.

Defendant and the People also presented expert opinion in connection with Child Sexual Abuse Accommodation Syndrome (CSAAS). The People's expert, Dr. Anthony Urquiza, explained it was common for a child sexual abuse victim to delay reporting the abuse for a significant period of time. Dr. Urquiza said child victims may tell different stories or give more information about what happened over time, which may appear unconvincing. According to Dr. Urquiza, when there are many instances of abuse, it may be difficult for the victim to distinguish the different instances and provide details about each incident. Dr. Urquiza said, in general, it is more common for a victim to change minor details as opposed to the major core details of their story. Dr. Urquiza also explained that some children cope with sexual abuse by disassociating from their feelings. Those children may not show signs of being abused to other family members. He said a sexually abused child can appear to have a loving relationship with the abuser while the abuse is occurring.

Defendant's expert, Dr. William O'Donohue, was critical of CSAAS. He said if abuse is prolonged and severe he would expect psychological symptoms such as post traumatic stress disorder, depression, substance abuse, and problems with sexual functioning and interpersonal relationships. S.'s roommate testified S. did not have trouble eating or sleeping, did not cry uncontrollably without reason, and did not complain of nightmares. Dr. O'Donohue opined that when rape routinely occurs in one setting and then on one occasion the victim is raped in a different setting, he would expect the victim to remember the rape in the different setting. (S. did not report the rape in Bangkok to Detective Hermann.)

Defendant argued that S. falsely accused defendant of sexual abuse because she was furious when defendant contacted her boyfriend and caused her boyfriend to break up with her, and S. continued the lie to regain entry into the United States and to gain citizenship.

The jury convicted defendant of committing lewd or lascivious acts upon a child, penetration of a genital opening with a foreign object, penetration of a genital opening with a foreign object upon a person under 16 years of age by a person over the age of 21 years, rape by force or threat, penetration of a genital opening with a foreign object upon a person under 18 years of age, and dissuading a witness. The jury acquitted defendant on three counts of sexual penetration against the victim's will, three counts of sexual penetration with a person who is under 16 years of age, three counts of rape, one count of lewd or lascivious acts upon a child, one count of exhibition of child pornography to a minor with lewd intent, one count of possession of child pornography with intent to exhibit to a minor, and one count of false imprisonment. The jury was deadlocked and the trial court declared a mistrial on one count of rape, one count of threat to commit a crime which will result in death or great bodily injury, and one count of assault with intent to rape. The trial court sentenced defendant to an aggregate prison term of 378 years 4 months.

DISCUSSION

I

Defendant contends the trial court failed in its sua sponte duty to instruct the jury with CALCRIM No. 359 in connection with the use of statements he made during a pretext call.

CALCRIM No. 359 explains the corpus delicti rule. Under that rule, the prosecution cannot rely exclusively on the defendant's extrajudicial statements, confessions, or admissions to prove the corpus delicti of the crime, i.e., the fact of injury, loss, or harm and the existence of a criminal agency as its cause. (*People v. Jennings* (1991) 53 Cal.3d 334, 364 (*Jennings*); *People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169 (*Alvarez*).) There must be proof, aside from the defendant's statements, that a crime actually occurred. (*Alvarez, supra*, 27 Cal.4th at p. 1178.) And whenever the defendant's extrajudicial statements form part of the prosecution's case, the trial court must sua sponte instruct the jury that conviction requires some additional proof the crime occurred. (*Id.* at pp. 1165, 1170, 1180.)

At the time of the trial, CALCRIM No. 359 provided, "The defendant may not be convicted of any crime based on (his/her) out-of-court statement[s] alone. You may only rely on the defendant's out-of-court statements to convict (him/her) if you first conclude that other evidence shows that the charged crime [or a lesser included offense] was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime [and the degree of the crime] may be proved by the defendant's statement[s] alone. [¶] You may not convict the defendant unless the People have proved (his/her) guilt beyond a reasonable doubt." (CALCRIM No. 359 (2008) p. 126.)

Defendant's extrajudicial statements were admitted at the trial. But the trial court did not instruct the jury with CALCRIM No. 359. This was error, as the Attorney General concedes.

"Error in omitting a corpus delicti instruction is considered harmless, and thus no basis for reversal, if there appears no reasonable probability the jury would have reached a result more favorable to the defendant had the instruction been given." (*Alvarez, supra,* 27 Cal.4th at p. 1181.) "[T]he modicum of necessary independent evidence of the corpus delicti, and thus the jury's duty to find such independent proof, is not great. The independent evidence may be circumstantial, and need only be 'a slight or prima facie showing' permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues. [Citations.]" (*Ibid.*; see *Jennings, supra,* 53 Cal.3d at pp. 368-369 [corpus delicti rule was satisfied even though evidence of rape was "thin"].) It is sufficient if the additional evidence permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. (*Alvarez, supra,* 27 Cal.4th at p. 1171.)

The record here contains sufficient evidence, independent of defendant's extrajudicial statements, for a prima facie showing of the corpus delicti of the crimes for which defendant was convicted. Additionally, the trial court instructed the jury to consider any extrajudicial statements by the defendant along with all the other evidence in reaching a verdict.

S. testified that defendant touched her breasts and crotch area and rubbed his penis against her buttocks when she was 15 years old. She described the first incident of rape and digital penetration when she was 15, and the subsequent, repeated acts of digital penetration, sexual touching, and rape committed against her until she was 19 years old. S. and Peggy's testimonies established defendant was over 21 years old and at least 10 years older than S. at the time of the charged offenses. The nature of the contact, the evidence of child pornography on defendant's laptop, and the presence of pornographic movies involving children on the computer tower seized from defendant's home provided circumstantial evidence that defendant acted with the intent to arouse, appeal to, or gratify his or S.'s lust, passions, or sexual desires or for purposes of sexual arousal,

gratification, or abuse. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1070-1071, 1102 (*McCurdy*); *People v. Memro* (1995) 11 Cal.4th 786, 814, 861-862, 864-865 (*Memro*), overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) S. testified the sexual acts by defendant were committed against her will and by means of force or duress. With regard to counts 90 through 92, S. testified about the pressure placed on her family, causing her to ask the prosecutor to drop the criminal charges against defendant in May 2004, and defendant's June 2004 telephone call to S. in Nepal, asking S. not to return to the United States.

Defendant's assessment of S.'s lack of credibility and the implausibility of her story do not justify reversal of the judgment. (*People v. Hughes* (1960) 183 Cal.App.2d 107, 113 [the jury determines the credibility of a witness and the weight to be given her testimony, even if it was inconsistent]; *People v. Day* (1945) 71 Cal.App.2d 1, 4 ["Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."].) In any event, the jury could not have convicted defendant of the sexual offenses based on his pretext call statements alone because defendant did not admit, during the pretext call, that he engaged in sexual conduct with S. when she was a minor or that he engaged in sexual conduct with S. against her will; yet the jury convicted defendant of committing lewd or lascivious acts upon a child (Pen. Code, § 288, subd. (c)(1)), sexual penetration against the victim's will (*id.* at § 289, subd. (a)(1)), sexual penetration with a person who is under 18 years of age (*id.* at subd. (h)), sexual penetration with a person who is under 16 years of age (*id.* at subd. (i)), and rape (*id.* at § 261, subd. (a)(2)).

No prejudice occurring, reversal of the judgment is not required for instructional error.

II

Defendant next contends (A) the trial court erred in failing to appoint a certified Nepali interpreter to translate the statements defendant made during the pretext call, and (B) it abused its discretion in permitting the victim to act as an "uncertified interpreter" of those statements.

A

Regarding his contention that the trial court erred in failing to appoint a certified Nepali interpreter to translate the statements defendant made during the pretext call, defendant claims Evidence Code section 752, subdivision (a), California Rules of Court, rule 3.1110(g), *People v. Arceo* (1867) 32 Cal. 40 (*Arceo*), and *Gardiana v. Small Claims Court* (1976) 59 Cal.App.3d 412 (*Gardiana*) support his argument.

At the time of the trial, Evidence Code section 752, subdivision (a) provided, "When a witness is incapable of understanding the English language or is incapable of expressing himself or herself in the English language so as to be understood directly by counsel, court, and jury, an interpreter whom he or she can understand and who can understand him or her shall be sworn to interpret for him or her." (Stats. 1984, ch. 768, § 1.) California Rules of Court, rule 3.1110 relates to the format of motions filed in the trial court. Subdivision (g) of that rule states, "Exhibits written in a foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter." *Arceo* held that a trial court did not abuse its discretion in excusing six potential jurors because they did not speak English where the defendant had no complaint about the jury actually empanelled. (*Arceo, supra,* 32 Cal. at pp. 41, 47-48.) *Gardiana* involved indigent small claims court litigants who did not speak or understand English and who were entitled to sue in forma pauperis. (*Gardiana, supra,* 59 Cal.App.3d at p. 416.) Citing Evidence Code section 752, the appellate court in *Gardiana* said a trial court is required to appoint the non-English speaking litigants an interpreter. (*Id.* at

pp. 419-420, 423.) The *Gardiana* court held that a trial court can order that the interpreter be paid with public funds. (*Id.* at pp. 423-424.)

In this case, unlike in *Arceo* and *Gardiana*, we do not have a witness, party, or juror who did not speak or understand English. Rather, defendant and the People presented competing pretext call transcripts with differing Nepali-to-English translations. The People initially relied on a transcript of the pretext call prepared by the Federal Bureau of Investigation (FBI).[3] And defendant had a transcript prepared by Shakti Aryal, an official Nepali interpreter for the federal courts. The authorities defendant cites do not support a conclusion that a trial court is obligated to appoint a certified foreign language interpreter to resolve differences between offered translations. And we have found no authority compelling such a conclusion. (See generally, *United States v. Zambrana* (7th Cir. 1988) 841 F.2d 1320, 1335-1337 [where the parties cannot agree on an English translation of a foreign language conversation, each side should produce its own transcript; each side may put on evidence supporting the accuracy of its version or challenging the accuracy of the other side's version; and it is the function of the fact finder to weigh the evidence presented]; *United States v. Llinas* (5th Cir. 1979) 603 F.2d 506, 509-510 [same].)

B

Defendant also claims the trial court abused its discretion in permitting S. to act as an "uncertified interpreter." The claim is forfeited because defendant did not object in the trial court on that ground. (*People v. Romero* (2008) 44 Cal.4th 386, 411; *People v. Aranda* (1986) 186 Cal.App.3d 230, 237 ["When no objection is raised to the competence of the interpreter during trial, the issue cannot be raised on appeal."].)

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[3] The People ultimately elected to use the transcript prepared by defendant's expert, but with corrections made by S., as its transcript at the trial, after defendant and the People resolved most of their disputes over the competing transcripts.

In any event, defendant fails to show prejudice. Witness credibility was an issue for the jury (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1012; *In re Katrina L.* (1988) 200 Cal.App.3d 1288, 1299; *United States v. Abonce-Barrera* (9th Cir. 2001) 257 F.3d 959, 965) and the trial court instructed the jury to consider various factors in evaluating witness testimony, including how well a witness perceived the things about which she testified, whether a witness was biased, and how reasonable the witness's testimony was when considered with all of the evidence in the case. Absent contrary indication in the record, we presume the jury understood and followed the trial court's instruction in evaluating S.'s testimony. (*People v. Brady* (2010) 50 Cal.4th 547, 574, fn. 12.) In addition, before the prosecution played a recording of the pretext call and before the jury received a copy of the People's transcript, the trial judge informed the jury, as defendant had requested, that defendant disagreed with the People's translation of the line "But you had sex with me when you were 18," and that defendant claimed the line should read, "But you kissed me when you were 18." The trial court told the jury the prosecution would present its translation, and defendant could present evidence challenging the prosecution's translation. Defense counsel then pointed the jury to a page of the People's transcript and repeated defendant's objection to the translation on that page, before the pretext call recording was played to the jury. The prosecutor again highlighted the disputed portion of the translation to the jury after the pretext call recording was played. Therefore, it was made clear to the jury that there was a conflict about what defendant said during the pretext call. Defendant subsequently offered his own transcript of the pretext call and expert testimony by Aryal to identify alleged inaccuracies in the People's transcript. The trial court instructed the jury to resolve conflicts in the evidence.

Moreover, although Aryal disputed the translation of the line "But you had sex with me when you were 18," he agreed with the People's translation of another statement by defendant which could reasonably be interpreted as an admission that defendant had sex with S. after she reached majority. In that statement, defendant said to S., "[b]ecause

you have fucked me after 18 years of your age. [¶] . . . [¶] That means you have given me consent." Defense counsel argued the words "you have fucked me after 18 years of your age" meant S. was trying to "screw up" defendant's life: "she's trying to fuck him." But the jury was not required to accept defendant's interpretation of the evidence. Defendant does not specify another portion of the People's translation with which he disagrees.

In view of these circumstances, there is no showing of prejudice.

III

Defendant also argues the trial court erred in instructing the jury with CALCRIM No. 358 because, according to defendant, the instruction directed the jury that all recorded statements made by defendant could be viewed without caution. He says the jury should have viewed the pretext call statements he made in Nepali with caution because those statements were ambiguous.

The trial court instructed the jury, pursuant to CALCRIM No. 358, as follows: "You have heard evidence that the defendant made oral or written statements before the trial. You must decide whether the defendant made any of these statements in whole or in part. If you decide that he did make such statements, consider the statements along with all the other evidence in reaching a verdict. It is up to you to decide how much importance to give to the statements. Consider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded."

The purpose of CALCRIM No. 358 is to help the jury determine whether a statement attributed to the defendant was in fact made. (*People v. Linton* (2013) 56 Cal.4th 1146, 1197.) Accordingly, the last sentence of CALCRIM No. 358 is appropriately included in the instruction if the extrajudicial statements were verbal and were not memorialized in a writing or recording, but the sentence should not be included in the instruction if the defendant's extrajudicial statements were tape-recorded and the

recording was played for the jury. (*People v. Diaz* (2015) 60 Cal.4th 1176, 1187; *Linton, supra,* 56 Cal.4th at pp. 1196-1197; *People v. Williams* (2008) 43 Cal.4th 584, 639.)

Here, the evidence of defendant's extrajudicial statements included recorded and non-recorded statements. Thus, it was not error for the trial court to include the last sentence of CALCRIM No. 358 in the instruction given to the jury. Nevertheless, with regard to the audio-recorded pretext call statements, there is no dispute that defendant made the statements; the only dispute involves the proper interpretation of his statements. The last sentence of CALCRIM No. 358 does not apply to the parties' dispute about the interpretation of defendant's recorded statements.

The trial court specifically instructed the jury that there was a dispute about what defendant said during the pretext call, and the trial court previously directed the jury to evaluate all of the evidence and to resolve any conflicts in the evidence. The trial court also instructed the jury on the factors relevant to assessing the credibility of expert witnesses and witnesses in general. We presume the jury followed the trial court's more specific instruction concerning the pretext call statements, and that the jurors were capable of understanding and correlating all of the instructions given. (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 475; *People v. Thornton* (2007) 41 Cal.4th 391, 440.) As instructed, the jury was required to consider the evidence presented by defendant and the People about what defendant said during the pretext call, and the jury was required to decide which transcript to credit.

It was evident the People and defendant disagreed about what defendant said during certain portions of the pretext call. S. and Aryal testified about some of those disagreements, including portions of the recording which Aryal determined were inaudible. And defendant showed the jury portions of the transcript containing S.'s handwritten corrections to Aryal's transcript. The jury also received defendant's exhibit 799, which contained Aryal's transcription and translation and S.'s handwritten corrections. Defense counsel and the prosecutor highlighted the existence of a significant

dispute about defendant's pretext call statement to the jury when the pretext call was played and in their closing remarks. Defense counsel emphasized, in closing, that there were two pretext call transcripts. He argued the jury should not credit the transcript authenticated by S. because she was not credible. Defense counsel said Aryal was an official translator for the federal courts and worked for the State Department, and Aryal disagreed with the transcript S. authenticated on four points. On the other hand, the prosecutor argued the translation by Aryal -- "but you kissed me when you were 18" -- did not make sense when that sentence was read in context.

Considering the entire record and all of the instructions given, defendant's claim fails. The last sentence of CALCRIM No. 358 did not apply to the parties' dispute about the interpretation of defendant's recorded pretext call statements. And as instructed, the jury would have understood there was a dispute about what defendant said to S. during the pretext call, and that the jury must resolve the dispute.

IV

Defendant further argues the trial court erred in excluding evidence of S.'s 2005 Nepal record of conviction. In particular, he contends the trial court erred in (A) not admitting a copy of a Nepal district court verdict and a Nepal appellate court decision pursuant to Evidence Code section 1530, subdivision (a)(3), (B) refusing to take judicial notice of S.'s Nepal record of conviction, (C) refusing to extend res judicata effect to the Nepal conviction, (D) finding that Evidence Code section 1530, subdivision (a)(3) was the exclusive method for authenticating the Nepal court records and refusing to consider the declarations defendant submitted, and (E) failing to allow the jury to consider the Nepal court records pursuant to Evidence Code section 403.

A

Defendant filed in limine motions to admit a copy of the verdict of a Nepal district court and the decision of a Nepal appellate court into evidence. The trial court denied the

motions, finding the documents defendant proffered did not contain the attestation required under Evidence Code section 1530. We find no error.

Evidence Code section 1530 provides that a purported copy of a writing in the custody of a public entity not within the United States is prima facie evidence of the existence and content of such writing if (1) the copy is attested as a correct copy of the writing or entry by a person having authority to make the attestation; and (2) the attestation is accompanied by a final statement certifying the genuineness of the signature and the official position of (i) the person who attested the copy as a correct copy or (ii) any foreign official who has certified either the genuineness of the signature and official position of the person attesting the copy or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person attesting the copy. (Evid. Code, § 1530, subd. (a)(3).)

Authentication under Evidence Code section 1530, thus, requires an attestation by a person having authority to make the attestation. (Evid. Code, § 1530, subd. (a)(3); *People v. Matthews* (1991) 229 Cal.App.3d 930, 938-939 (*Matthews)*.) The attestation must state in substance that the copy is a correct copy of the original. (Evid. Code, § 1531; *People v. Skiles* (2011) 51 Cal.4th 1178, 1185.)

In this case, defendant attached a copy of what purported to be the decisions of a Nepal district court (also identified as defendant's exhibit 502 in the record) and a Nepal appellate court (identified as defendant's exhibit 500) written presumably in Nepali, accompanied by what appears to be the English language translations of those court records, to his in limine motions. We will refer to those writings by their trial court exhibit numbers for clarity.

Defendant's exhibit 502 consists of a 13-page foreign language writing, an 11-page writing in English titled "Verdict Given by the Bench Of Hon'ble Judge Guna Raj Dhungel Of The Saptari District Court," and two pages which we will describe in detail

in the next paragraphs. The 11-page English language writing bears a number of stamps. One stamp reads, "Reg. No. 13245 [¶] Attested the seal of Law Books Management Board and Signature of its Production/Section Officer" followed by the signature of a person apparently holding the title of deputy chief of protocol. Another stamp reads, "His Majesty's Government of Nepal Ministry of Law, Justice and Parliamentary Affairs Law Books Management Board." That stamp is accompanied by the signature of someone apparently holding the title of production officer. Another stamp reads, "Shree Law Books Management Board." Defendant submitted the declaration of a Nepal lawyer who explained that the Shree Law Books Management Board was the official translator of all official documents from Nepali to English.

The second page of defendant's exhibit 502 contains the following statement, "I Jiban P. Shrestha, Deputy Chief of Protocol, Ministry of Foreign Affairs, Government of Nepal, Certify that the authorized translation of following Original Nepali Document to be true and the official position, seal and signature of the Section/Production/Account/ Administration officer there of. [¶] Name of the Document:- Verdict Given by the Bench of Hon'ble Judge Raj Dhungel of Saptari District Court [¶] Government Criminal Case No.:- 57 of the year 2061 B.S. [¶] Dispatch No.: - 3031 [¶] Verdict No.:- 402 [¶] Date :- June 26, 2005 A.D. [¶] Subject:- Verdict" The statement is followed by what appears to be Mr. Shrestha's signature and a stamp which reads, "Government of Nepal Ministry of Foreign Affairs Kathmandu."

The first page of defendant's exhibit 502 contains the following statement, "I Harishchandra Ghimire, First Secretary, Embassy of Nepal, Washington DC certify that the Seal of the Ministry of Foreign Affairs, Government of Nepal and Signature of Mr. Jiban P. Shrestha, Deputy Chief of Protocol of the attached document with the following particulars to be true. [¶] Name of the Document: - Verdict Given by the Bench of Hon'ble Judge Guna Raj Dhungel of Saptari District Court. [¶] Government Criminal Case No: 57 of the year 2061 B.S. [¶] Dispatch No.: - 3031 [¶] Verdict No:- 402 [¶]

Date:- June 26, 2005 AD [¶] Subject:- Verdict" The statement is followed by the apparent signature of Mr. Ghimire. There is a stamp stating "Embassy of Nepal Washington D.C." next to the signature.

Defendant's exhibit 500 includes a 6-page foreign language writing and a 13-page writing in English titled "The Appellate Court, Rajbiraj Division Bench." The 13-page English language writing bears stamps nearly identical to those in defendant's exhibit 502. The 13-page English language writing is preceded by a certification by Mr. Ghimire which is nearly identical to the one by Mr. Ghimire attached to defendant's exhibit 502. There is also a certification by a consular officer of the Ministry of Foreign Affairs of Nepal which certifies that the attached writing was "translated by the authorized body" and certifies "the seal and signature to be true and the official position of the Section/Production/Account/Administration Officer there of."

None of the certifications and stamps in defendant's exhibits 500 and 502 contain an attestation that the copy of the foreign language writing attached to defendant's exhibits 500 or 502 was a true or correct copy of the verdict of the Saptari District Court or the decision of the appellate court of the Rajbiraj Division. The declaration of Mr. Ghimire dated April 28, 2009, and the supplemental declaration of Rudra Prasad Sharma Phual, filed in the trial court on April 27, 2009, also do not supply evidence of the requisite attestation. According to Mr. Ghimire, the Shree Law Books Management Board (Board) was part of Nepal's Ministry of Law, Justice and Constituent Assembly, and its stamp signified that the Board received an official document issued by a government entity and the Board accurately translated the document to English. Mr. Phual's supplemental declaration similarly stated that the seal of the Board signified that the Board received "an authentic official document" and translated that document accurately into English.

Mr. Ghimire and Mr. Phual did not state from where the Board received the writings which it translated. Mr. Ghimire and Mr. Phual did not state that the Board or

the Ministry of Foreign Affairs had custody of the records of the Saptari District Court or the appellate court of the Rajbiraj Division, or that the Board or the Ministry of Foreign Affairs had the authority to certify that a writing was a copy of a document contained in the files of those courts. (Evid. Code § 1530, subd. (a)(3) [attestation must be made by a person having authority to make the attestation]; *Matthews, supra*, 229 Cal.App.3d at p. 938 [witness cannot certify records if he was not the legal custodian of the records and there was no evidence of his authority to provide the certification].)

Defendant now relies on Evidence Code section 1452, subdivision (c), and Code of Civil Procedure section 1930, but those statutes do not help him. Evidence Code section 1452, subdivision (c) provides that a "seal" is presumed to be genuine and its use authorized if it purports to be the seal of a nation recognized by the executive power of the United States or a department, agency, or officer of such nation. A seal is a particular sign which attests to the execution of a document. (Civ. Proc. Code, § 1930; *Jacobson v. Gourley* (2000) 83 Cal.App.4th 1331, 1334-1335.) Here, however, the Board's stamp appears on the English language writings in defendant's exhibits 500 and 502, but not on the foreign language writings in those exhibits. While the Board's stamp might attest to the verity of the English language writings in defendant's exhibits 500 and 502, there is no basis for us to conclude that the Board's stamp on the English language writings certified the execution of the foreign language writings contained within defendant's exhibits 500 and 502 or that the English language writings are translations of true or correct copies of official Nepal court records.

The case of *In re Smith* (1949) 33 Cal.2d 797, upon which defendant relies, is distinguishable. In that case, the word "attest," the signature and title of the executive secretary of the Department of Corrections Adult Authority, and the seal of the Adult Authority, were present on a document which purported to be the minutes of an Adult Authority meeting. (*Id.* at p. 801.) The California Supreme Court held that the copy of the minutes was properly certified. (*Ibid.*) No similar certification was presented here

with regard to the copies of the foreign language writings. The record in this case also does not contain the kind of certifications present in the other cases defendant cites: *Wickersham v. Johnston* (1894) 104 Cal. 407, 412-413, *People v. Brucker* (1983) 148 Cal.App.3d 230, 240-241, and *People v. Flaxman* (1977) 74 Cal.App.3d Supp. 16, 20. And defendant did not submit other evidence showing that the copies of the foreign language writings he presented were true or correct copies of the original official writings.

The trial court did not err in concluding that defendant failed to present evidence that defendant's exhibits 500 and 502 complied with the requirements of Evidence Code sections 1530, subdivision (a)(3) and 1531.

B

Defendant also claims the trial court erred in refusing to take judicial notice of S.'s Nepal record of conviction.

Defendant asked the trial court to take judicial notice of what purported to be a Nepal district court verdict and a Nepal appellate court decision pursuant to Evidence Code section 452.5, subdivision (b). Under Evidence Code section 452.5, an official record of conviction, certified in accordance with Evidence Code section 1530, subdivision (a), is admissible pursuant to Evidence Code section 1280 (hearsay exception for records made by a public employee) to prove the commission of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record. (Stats. 2002, ch. 784 (SB1316), § 102 [Evid. Code, § 452.5, subd. (b)].) Inasmuch as defendant failed to satisfy the Evidence Code section 1530 requirement of an attestation, his claim under Evidence Code section 452.5 also fails. Defendant did not cite any other authority for his request for judicial notice. We need not consider defendant's claim that the trial court erred in failing to find that the Nepal court proceeding was criminal, and not civil, in nature because defendant has not established admissibility under Evidence Code section 452.5, subdivision (b).

C

Defendant next argues the trial court should have given res judicata effect to S.'s Nepal conviction.

" '[T]he doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy.' [Citation.]" (*People v. Barragan* (2004) 32 Cal.4th 236, 252.) The doctrine requires the following: (1) a claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. (*Id.* at pp. 252-253.) Defendant's res judicata claim was based on the purported Nepal court decisions. From our review of the appellate record, it strikes us as unlikely that a claim or issue raised in the present action is identical to a claim or issue litigated in Nepal. But in any event, defendant has not established the elements of res judicata because, as a threshold matter, he did not even establish the authenticity of the foreign language writings he claimed were the decisions of the Nepal courts and upon which the English translations in defendant's exhibits 500 or 502 were assertedly based. (See generally *Domestic & Foreign Petroleum Co. v. Long* (1935) 4 Cal.2d 547, 562-563 [res judicata claim forfeited by party's failure to produce evidence of the former adjudication].) Accordingly, defendant fails to demonstrate error.

D

Defendant further argues the trial court erred in finding that Evidence Code section 1530, subdivision (a)(3) was the exclusive method for authenticating the Nepal court records.

During trial, defendant asked the trial court to reconsider its ruling on his in limine motions concerning the purported Nepal court records. The prosecutor and defense counsel argued about whether the supplemental declarations defendant submitted were sufficient to meet the Evidence Code section 1530 requirement of an attestation. As we

have explained, Mr. Ghimire and Mr. Phual's declarations did not supply evidence of the requisite attestation. In the context of addressing counsel's arguments, the trial court concluded that defendant still had not satisfied the requirements of Evidence Code section 1530. But the trial court did not say, as defendant claims, that Evidence Code section 1530, subdivision (a)(3) was the exclusive method for authenticating the foreign court records. The record also does not support defendant's suggestion that the trial court refused to consider the declarations defendant submitted or that the trial court refused to hear testimony from Mr. Phual.[4]

In any event, defendant now argues that the declarations by Mr. Ghimire and Mr. Phual and the stamps on defendant's exhibits 500 and 502 were sufficient circumstantial evidence of authentication, independent of Evidence Code section 1530. Defendant further claims prosecution witnesses conceded the authenticity of the Nepal court writings by relying on them.[5] However, "the proponent of evidence must identify the specific ground of admissibility at trial or forfeit that basis of admissibility on appeal." (*People v. Ervine* (2009) 47 Cal.4th 745, 783.) Defendant argued in the trial court that he satisfied the Evidence Code section 1530, subdivision (a)(3) requirements for authentication, but he did not raise in the trial court the additional arguments that he now asserts on appeal. We will not consider those additional arguments for the first time on appeal.

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[4] Trial counsel referred to Mr. Phual as Mr. Sharma.

[5] S. could not identify defendant's exhibit 782, which consisted of a 13-page foreign language writing and a 11-page writing in English titled "Verdict Given by the Bench Of Hon'ble Judge Guna Raj Dhungel Of The Saptari District Court." S. said she could not understand formal Nepali writing. Department of Homeland Security Immigration and Customs Enforcement agent Luz Dunn testified she read a Nepal court judgment with regard to S., but when defense counsel attempted to refer to a document, the trial court said it had previously excluded evidence of that writing. There is no evidence that Agent Dunn could authenticate the verdict of the Nepal district court.

E

Defendant also claims the trial court erred in failing to allow the jury to consider the Nepal court records pursuant to Evidence Code section 403, subdivision (a)(3).

Evidence Code section 403, subdivision (a)(3) provides that the proponent of the evidence has the burden of producing evidence as to the authenticity of a writing. The proffered evidence is inadmissible unless the court finds there is evidence sufficient to sustain a finding that the writing is what the proponent claims it is. (Evid. Code, §§ 403, subd. (a)(3), 1400.) Defendant's Evidence Code section 403 claim is based on his underlying assertion that he satisfied the Evidence Code section 1530, subdivision (a)(3) requirements and that circumstantial evidence authenticated the proffered writings. We have rejected defendant's underlying assertions and we reject his instant claim. He fails to demonstrate error in excluding defendant's exhibits 500 and 502.

V

Defendant next claims the trial court erred in admitting evidence of adult pornography found on the Dell computer tower and laptop.

Evidence of child and adult pornography was found on the computer tower and laptop seized from defendant's home. Defendant moved in limine to exclude all evidence of the pornography or, in the alternative, to limit evidence of the pornography to the three videos S. identified as videos defendant showed her.

The prosecutor argued the evidence of pornography, whether of children or adults, was relevant to (1) defendant's intent to touch a minor for a sexual purpose, (2) S.'s credibility, (3) the identity of the person who downloaded the pornographic material because defendant would argue S. was responsible for the pornography on defendant's computer, (4) defendant's intent to show child pornography to a minor and sexual interest in minors, and (5) defendant's intent when he downloaded the pornographic material.

The trial court admitted evidence of the three pornographic videos that S. said defendant showed her. The trial court did not let the jury see the other pornographic

videos and still images found on the computers, but permitted the prosecution to present evidence of the titles and dates associated with those items. The trial judge said possession of pornography on a computer was relevant to intent, state of mind, ownership and possession, noting that a large amount of pornography on a computer owned by a particular person could tend to show it was placed there by that person and go to the issues in the case, such as that something may have been shown to a person while she was a minor and was done by the person who owned the computer.

Defendant argues the trial court erred in admitting evidence relating to adult pornography because adult pornography evidence was not relevant, it was unclear the pornography belonged to defendant, the probative value of the adult pornography was not substantially outweighed by its prejudice, and the trial court did not give a limiting instruction regarding the use of adult pornography evidence. But defendant did not object or move in the trial court to exclude the evidence relating to adult pornography on the specific grounds raised here, and the trial court and the prosecutor did not have an opportunity to address the specific arguments advanced by defendant on appeal. A defendant forfeits his claim if he fails to make a specific objection on the ground asserted on appeal in the trial court. (*People v. Partida* (2005) 37 Cal.4th 428, 434-435 (*Partida*).) " 'The reason for the requirement [of a specific objection] is manifest: a specifically grounded objection to a defined body of evidence serves to prevent error. It allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal.' " (*Ibid.*) Defendant's appellate claims are forfeited. (Evid. Code, § 353; *People v. Cowan* (2010) 50 Cal.4th 401, 476-477 (*Cowan*) [blanket motion to exclude all postmortem photographs of the victims did not preserve for review the claim that the trial court should weigh the probative value against the prejudicial effect of each photograph]; *Partida, supra,* 37 Cal.4th at p. 434.)

In any event, contrary to defendant's contention, the evidence of adult pornography had probative value. "Relevant evidence" is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "Except as otherwise provided by statute, all relevant evidence is admissible." (*Id.* at § 351.) We review a trial court's ruling that evidence is relevant for abuse of discretion. (*People v. Panah* (2005) 35 Cal.4th 395, 474.)

Some of the adult pornography files found on the computer tower and laptop were relevant to the charges of lewd and lascivious conduct and knowing exhibition of harmful matter, because their file names suggested they contained child pornography even though they did not. For example, a movie file titled "9 year old rape.mpeg" depicted a man and a woman having sex and did not depict a child. But the jury could reasonably infer from possession of adult pornographic material with file names referencing "9 year old rape," "preteen rape," and "preteen daughters" that defendant obtained the material because he had a sexual interest in young girls.

In addition, evidence of adult pornography was relevant to defendant's assertion that S. or her boyfriends were responsible for the pornography found on defendant's computers. Police found adult pornography in a folder entitled "Ajay" on the computer tower. Some of the files in the "Ajay" folder were created as far back as December 15, 1999, when S. was only 15. There was adult pornography in a folder named "Ajay Dev" on the laptop. Those files were last accessed in 2004, after S. had moved out of the Dev house. Peggy testified that defendant purchased pornographic still images and placed them on his laptop. Police found deleted still image files in a folder called "paid site" on defendant's laptop. S. testified she did not like watching the pornographic videos and only watched them when defendant showed her the videos. A.T. testified S. never expressed an interest in pornography and he never watched pornography with S. The foregoing evidence tends to controvert defendant's claim that S. or her boyfriends were

responsible for the pornography on the computer tower and laptop and tends to show that defendant was the person who placed the pornography on the computers, thereby supporting S.'s credibility.

Moreover, defendant cannot show it was reasonably probable that he would have obtained a more favorable result if evidence of adult pornography had been excluded. (*McCurdy, supra,* 59 Cal.4th at p. 1103 [*People v. Watson* (1956) 46 Cal.2d 818, 836 standard applies to error in admitting pornography]; *People v. Page* (2008) 44 Cal.4th 1, 42.) The authorities defendant cites do not hold that the erroneous admission of adult pornography evidence violates a defendant's constitutional rights.

Even without the evidence of adult pornography, there was evidence that police found child pornography on defendant's computers. That evidence corroborated S.'s testimony that defendant showed her pornography which featured extremely young looking girls. (*People v. Merriman* (2014) 60 Cal.4th 1, 79 (*Merriman*) [pornographic magazines seized from the defendant's bedroom were relevant to corroborate the victims' testimonies that the defendant forced them to orally copulate him while he flipped through pornographic magazines].) The jury could also reasonably infer from the child pornography evidence that defendant had a sexual attraction to young girls and he intended to act on that attraction. (*McCurdy, supra,* 59 Cal.4th at pp. 1070-1071, 1102; *Memro, supra,* 11 Cal.4th at pp. 861-862, 864-865.) S. testified about the many sexual acts defendant committed against her from the time she was 15 until she was 19. She identified three pornographic movies involving young girls recovered from the computer tower as movies that defendant showed her. While S. provided inconsistent testimony in some respects and defendant vigorously attacked her credibility, the jury was instructed on the factors to consider in assessing witness credibility and the jury must have credited S.'s testimony because it convicted defendant on numerous counts.

In addition to S.'s testimony, defendant made a number of statements during the pretext call which the jury could reasonably conclude were incriminating. It appeared

defendant attempted to dissuade S. from reporting her allegations of sexual abuse. S. further testified that defendant attempted to dissuade her from returning to the United States after she had reported defendant's misconduct to police. Defendant's efforts to dissuade S. from disclosing, testifying, or cooperating with police indicate a consciousness of guilt. (*Merriman, supra,* 60 Cal.4th at p. 45; *People v. Pinholster* (1992) 1 Cal.4th 865, 945, overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

The prosecutor only briefly discussed pornography evidence in his closing remarks to the jury. His comments were limited to child pornography and when pornography was accessed on defendant's computer. He did not refer to the content of any adult pornography found on the computer tower or laptop.

Moreover, the trial court instructed the jury on the elements of each charged offense, and that the jury may not convict defendant of a crime unless the prosecution has proven each element of a crime beyond a reasonable doubt. It appears the adult pornography evidence did not prejudice the jurors' view of the case because the jury did not convict defendant wholesale on the charged sexual offenses. On this record, defendant would not have obtained a more favorable result in the absence of the adult pornography evidence.

As for defendant's claim that the trial court erred in failing to give a limiting instruction on the use of the pornography evidence, a trial court does not have a sua sponte duty to give a limiting instruction. (Evid. Code § 355 ["When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly"]; *People v. Collie* (1981) 30 Cal.3d 43, 63-64, superseded by statute on another point as noted in *People v. Champion* (1995) 9 Cal.4th 879, 913, fn. 9; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1316-1317; Bench Notes to CALCRIM No. 375 (2008) p. 147.) Although the California Supreme Court in *Collie*

recognized the possibility that there might be "an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose," such does not appear to be the case here. (*Collie, supra*, 30 Cal.3d at p. 64.)

VI

Defendant next claims the prosecutor committed misconduct in arguing that a person using Kazaa -- a file-sharing website -- could not inadvertently or unknowingly obtain child pornography. Defendant further argues the trial court erred in admitting People's exhibits 44-A, 44-B and 44-C (the Kazaa log).

Outside the presence of the jury and before the prosecution used the Kazaa log at trial, defense counsel objected to the use of the Kazaa log. The log contains information regarding 122 files downloaded onto defendant's laptop using the Kazaa website, files that Buehring believed contained child pornography. Defense counsel argued the information in the "keywords" and "description" columns of the Kazaa log exceeded the trial court's in limine order for pornography evidence, and the Kazaa log should be excluded under Evidence Code section 352.

The prosecutor responded that the information on the Kazaa log was relevant to the intent of the person who downloaded pornography from Kazaa. The prosecutor said, "It's -- so it's not like I typed in White House President, 1600 Pennsylvania Avenue, and, oh, my gosh, look, I got "Nine-Year-Old Gets Raped." You type in the search terms you're looking for, and this is what comes up; and that's how these things are acquired, and that's why they are relevant, because they show the intent of the person who was downloading them; and [defense counsel] is wanting to argue that the young lady downloaded this information herself, and it's extremely probative and relevant to the jury to have -- it expose the state of mind or what the person downloading this information was looking for." The prosecutor also said sometimes the result of a search on Kazaa does not match the keywords used to conduct a search. For example, according to the

prosecutor, one movie description suggests child pornography but was in fact adult pornography.

The trial court admitted the Kazaa log. The trial court said defense counsel presented evidence concerning S.'s access to pornography and whether she would view pornography, and the Kazaa log was relevant to issues raised by defendant.

Defendant now argues the prosecutor committed misconduct by falsely representing that the Kazaa log necessarily showed defendant searched Kazaa for child pornography. In addition to the prosecutor's argument about the keywords and descriptions in the Kazaa log, defendant complains about the prosecutor's questions to Buehring and closing remarks to the jury regarding Kazaa searches.

Again, however, defendant failed to preserve his prosecutorial misconduct claim for review because he did not object at trial to the remarks of which he now complains. (*People v. Adams* (2014) 60 Cal.4th 541, 569; *People v. Brown* (2003) 31 Cal.4th 518, 553 (*Brown*).) Defendant does not show that an objection would have been futile. (*People v. Williams* (2013) 56 Cal.4th 630, 672; *People v. Hill* (1998) 17 Cal.4th 800, 820.)

The claim is without merit even if it is not forfeited. While it is improper for a prosecutor to knowingly present false or misleading argument (*People v. Morrison* (2004) 34 Cal.4th 698, 717 (*Morrison*)), the prosecutor's argument about Kazaa was consistent with the trial testimony of the People's forensic expert. Buehring testified that a person looks for content on Kazaa by entering search terms. He said the "keywords" column on the Kazaa log showed the words Kazaa used to look for a particular file. He added that, for example, if a user typed any of the following words into Kazaa -- teen, lolita -- Kazaa would retrieve the file with the file name "Fouradolecent Girls (1).jpg," as shown on People's exhibit 44-A.

On appeal, defendant argues a user could unintentionally find pornography when searching for innocuous material. While that may be true, the jury could reasonably find

that the Kazaa log does not show such inadvertent file retrieval occurred here. Recurring keywords included "teen," "preteen," "pre-teen," "nude," "sex," "porn," "incest," and "kiddie" or "kiddy." The jury could reasonably conclude from the titles, descriptions, and recurring keywords on the Kazaa log and the presence of child pornography on defendant's computer tower that the Kazaa files were the result of an intentional search for child pornography. (*Tecklenburg v. Appellate Division* (2009) 169 Cal.App.4th 1402, 1413 [child pornography found on a computer did not appear to be the result of accident or involuntary computer pop-ups where the computer contained numerous images of child pornography, some of which were accessed multiple times, and there was evidence of multiple Internet word searches for terms commonly connected with child pornography]; *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1116 (*Garelick*) [the presence of 118 images of possible child pornography and the fact that those images were found in several different locations on the defendant's computer make them relevant to establish his knowledge of their existence on his computer and to establish the diminishing likelihood that the presence of such images was inadvertent].)

Defendant also contends the trial court should have excluded the Kazaa log because the probative value of the log did not substantially outweigh its prejudicial impact. He argues the Kazaa log did not prove that defendant was the person using Kazaa when the child pornography was downloaded. He also says the Kazaa log lacked probative value because the issue of intent and identity were undisputed.

Defendant objected to the Kazaa log in the trial court on the ground that information contained in the log exceeded the trial court's in limine ruling concerning pornography evidence. Defense counsel also stated, "this is basically a 352 argument," without elaboration. Defendant did not contend in the trial court that the Kazaa log was not relevant because intent or identity were undisputed or because the People did not show that defendant was the person who used Kazaa to download files which appeared to

contain child pornography. Those appellate claims have not been preserved for review. (*Partida, supra,* 37 Cal.4th at p. 434.)

The claim that intent and identity were undisputed is meritless in any case. Defendant's not guilty plea put in issue all of the elements of the charged offenses, including defendant's intent. (*Cowan, supra,* 50 Cal.4th at p. 476.) With regard to the identity of the person who downloaded apparent child pornography using Kazaa, a jury could reasonably find that defendant was responsible for the downloaded files. The Kazaa files were found on the Dell laptop. Peggy testified the Dell laptop was defendant's laptop. Defendant kept "work stuff" on that laptop. Although Peggy and S. had access to defendant's laptop, Peggy said defendant was careful about the pornography he had on his laptop. S. testified defendant had pornography depicting young looking girls on his laptop. Dr. O'Donohue opined most women had no interest in child pornography. Nothing in the record suggests S. was interested in child pornography.

Defendant suggests S. was the person using Kazaa because the Kazaa log included a file titled "h-bomb.avi" and S. worked on a school paper about the atomic bomb. "[H]-bomb.avi" is the file name for item 57 on People's exhibit 44-B. Buehring testified that the title, keyword, and description columns on People's exhibit 44-B indicate "h-bomb.avi" is related to child pornography, not an atomic bomb. The title for h-bomb.avi states, "little girl crying and choking on fathers cock." [H]-bomb.avi does not support defendant's claim.

A trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code § 352.) Here, however, the information on the Kazaa log was highly probative to show the intent of the person who downloaded the files.

The trial court admitted the evidence of pornography to prove defendant's intent as approved in *Memro, supra*, 11 Cal.4th 786. In that case, the defendant confessed he intended to take nude photographs of a seven-year-old boy, and he killed the boy and tried to engage in anal intercourse with his dead body after the boy said he wanted to leave. (*Id.* at pp. 811-812.) The defendant was charged with first degree murder on a theory of felony murder predicated on the violation of Penal Code section 288 (a lewd or lascivious act upon a child). (*Memro*, at pp. 861, 869.) The Supreme Court held it was not an abuse of discretion to admit material in the defendant's possession which depicted prepubescent males in a sexually explicit manner. (*Id.* at pp. 864-865.) That material was admissible to show the defendant's intent to violate Penal Code section 288. (*Memro*, at p. 864.) In particular, the Supreme Court concluded the jury could infer from defendant's possession of the pornographic material that he had a sexual attraction to young boys and intended to act on that attraction. (*Id.* at pp. 864-865.)

Similarly, in *McCurdy, supra*, 59 Cal.4th 1063, the California Supreme Court concluded that evidence the defendant possessed pornographic material that focused on women who were staged to appear younger than their actual ages was relevant to his intent and motive when he abducted an eight-year-old girl. (*Id.* at pp. 1069, 1102.) The defendant was charged with, among other things, kidnapping with the purpose to commit a lewd act on a child. (*Id.* at p. 1069.)

S. testified defendant showed her pornographic movies featuring young looking girls, and something sexual always happened between S. and defendant after defendant showed S. a pornographic movie. Possession of child pornography was relevant to defendant's sexual interest in young girls and whether he intended to act upon that interest. (*McCurdy, supra*, 59 Cal.4th at pp. 1101-1102; *Memro, supra,* 11 Cal.4th at pp. 864-865.) In addition, possession of child pornography was relevant to the charges in count 64 (knowing exhibition of "any harmful matter" to a minor with the intent to sexually arouse and entice a minor to engage in a sexual act with the defendant) and

count 65 (knowing possession of child pornography with intent to exhibit it to a minor). Evidence of active searches for child pornography, and the presence of over 100 images of possible child pornography on defendant's laptop, had a tendency in reason to prove that defendant knowingly possessed child pornography and that he possessed the requisite states of mind for counts 64 and 65.

Evidence of apparent child pornography downloaded using Kazaa was also relevant to whether defendant was responsible for the child pornography downloaded to his computers because there was no direct evidence of the identity of the person or persons who downloaded such pornography, and the prosecution argued defendant was responsible for the computer porn whereas defendant suggested S. and her boyfriends were responsible for that pornography. (*Garelick, supra,* 161 Cal.App.4th at p. 1116.)

The fact that the jury could reasonably infer from the Kazaa log that defendant searched for child pornography and that he had a sexual interest in young girls was damaging to defendant's case, as defendant points out. But " '[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. . . . "The 'prejudice' referred to in Evidence Code 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. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " ' " (*People v. Lopez* (2013) 56 Cal.4th 1028, 1059, overruled on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) Although the Kazaa log contained sexually graphic descriptions which the jury may have found disturbing, the information to which defendant objected was highly probative of disputed material issues. The prosecution did not show the images associated with the Kazaa files, and the evidence relating to the Kazaa log was not stronger or more inflammatory than S.'s testimony about the commission of the charged offenses. It was not likely the jury would convict defendant simply because he searched

for child pornography. The trial court did not abuse its discretion in admitting the Kazaa log.

VII

Defendant further contends the trial court erred in excluding evidence of an e-mail which purportedly showed that defendant was at work when someone was accessing child pornography on his home computer. Defendant says the e-mail was not hearsay and was admissible under *People v. Hawkins* (2002) 98 Cal.App.4th 1428 (*Hawkins*).

Defendant's exhibit 813 is a copy of what appears to be a printout of an e-mail string. The apparent e-mail string begins with a September 25, 2003 e-mail from "bijayak@yahoo.com" to "bijayak@yahoo.com." There is no indication on defendant's exhibit 813 that "bijayak@yahoo.com" sent a copy of the e-mail to defendant. Nevertheless, defendant's exhibit 813 appears to show that "Dev, Ajay" forwarded the e-mail from "bijayak@yahoo.com" to "Peggy Dev" on September 26, 2003, at 8:48 a.m., and "Peggy.Dev@gpspool.com" forwarded the e-mail to "peggy_dev@sbcglobal.net" on September 26, 2003, at 10:04 a.m. Defendant's exhibit 813 does not show the e-mail address for "Dev, Ajay." It cannot be determined from defendant's exhibit 813 that the e-mail from "Dev, Ajay" to "Peggy Dev" was sent from a work e-mail account.

Peggy identified defendant's exhibit 813 as an e-mail defendant sent her. Peggy said she received defendant's e-mail on her work e-mail account, and she forwarded the e-mail to her personal e-mail account. The trial court sustained the prosecutor's hearsay objection when defense counsel asked Peggy whether defendant's exhibit 813 showed where it was sent from and on what date it was sent. But Peggy, nevertheless, testified that defendant sent her a communication on September 26, 2003, at around 9 a.m., when she was at work, and that she knew defendant was at work when he sent the communication because the caller ID on her telephone showed defendant called from work when he called and e-mailed her.

Defense counsel sought to admit defendant's exhibit 813. He argued, outside the presence of the jury, that defendant's exhibit 813 was admissible not for the truth of the matter asserted, but to establish the date and time when defendant sent the e-mail to Peggy from his work and to confirm "that there was . . . a solid foundation for her opinion as opposed to mere speculation." Defense counsel explained the evidence was relevant to whether defendant was at work when pornography was accessed on his home computer.

The trial court did not admit defendant's exhibit 813 into evidence. It concluded the time and date on the e-mail was hearsay and the e-mail was not a business record.

Defendant later moved for a new trial, arguing, among other things, that it was error to exclude defendant's exhibit 813 because Evidence Code section 1552, subdivision (a) created a presumption that defendant's exhibit 813 was accurate, and the prosecution did not challenge the accuracy of defendant's exhibit 813. The trial court denied the new trial motion. It said Evidence Code section 1552 did not establish the accuracy of the information on a computer, and defendant failed to prove the accuracy of the computer information.

We review a trial court's ruling with regard to the admissibility of evidence for abuse of discretion. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266 (*Goldsmith*).) We will uphold an evidentiary ruling of the trial court if it is correct on any theory of the law applicable to the case, regardless of whether the trial court may have based its ruling on a wrong reason. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

Defendant argues it was error to exclude defendant's exhibit 813 as hearsay. " 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) A "statement" is an oral or written verbal expression or nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression. (*Id.* at § 225.) Computer generated data is not a statement of a person and

does not, therefore, constitute hearsay. (*Goldsmith, supra*, 59 Cal.4th at pp. 273-274 [digital photographs automatically taken by a machine and data, such as date and time, which a computer automatically generates and imprints are not hearsay]; *People v. Nazary* (2010) 191 Cal.App.4th 727, 754 [computer generated receipts, which show the date, time, and totals, are not statements inputted by a person], overruled on others grounds in *People v. Vidana* (2016) 1 Cal.5th 632, 648; *Hawkins, supra*, 98 Cal.App.4th at pp. 1447-1450 [computer generated list of when files stored on that computer were accessed is not hearsay]; *United States v. Hamilton* (10th Cir. 2005) 413 F.3d 1138, 1142–1143 [computer generated header information on digital images, which shows date when images were posted, does not constitute hearsay]; *United States v. Khorozian* (3d Cir. 2003) 333 F.3d 498, 506 [information generated by a fax machine, including the date when the fax was sent, is not hearsay].) But defendant fails to show the date and time on defendant's exhibit 813 were generated by a computer. For this reason, we conclude the trial court did not err in excluding defendant's exhibit 813.

The proponent of evidence has the burden of establishing the foundational requirements for its admissibility, and the evidence is properly excluded when the proponent fails to do so. (*Morrison, supra,* 34 Cal.4th at p. 724.) Defendant claims on appeal that a computer generated the time and date of the e-mail from "Dev, Ajay" to "Peggy Dev." He says a server at defendant's work produced the date and time shown on the e-mail, and "the office e-mail was run internally by the office server." However, he does not cite the portion of the record supporting his factual assertions. We will not consider claims that are not supported by a record citation. (*People v. Myles* (2012) 53 Cal.4th 1181, 1222, fn. 14; *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 743.)

Defendant further argues the record sufficiently shows the computer that made the date and time stamp on defendant's exhibit 813 was operating properly. Even if we assume that a computer generated the date and time shown on the exhibit, nothing in the

record establishes whether any computer that made the date and time stamp was functioning properly. Michael Mullen worked on the computer system for the state agency where defendant worked. Mullen testified that defendant did not have remote access to his work e-mail prior to 2006. Mullen did not testify about defendant's exhibit 813, how the date and time stamp on a work e-mail was generated, or whether the e-mail system for the state agency where defendant worked was operating properly in 2003. Defendant's computer expert Jeffrey Fischbach did not testify about the server at defendant's workplace. We have looked and cannot find evidence in the record about whether any machine that might have produced the date and time information on defendant's exhibit 813 was functioning properly in September 2003.

Defendant also relies on Evidence Code section 1552 to argue that the computer which time stamped defendant's exhibit 813 was operating properly. Evidence Code section 1552 provides a presumption that a computer's print function has worked properly. (*Goldsmith, supra*, 59 Cal.4th at p. 269.) "The presumption does not operate to establish the accuracy or reliability of the printed information. On that threshold issue, upon objection the proponent of the evidence must offer foundational evidence that the computer was operating properly." (*Hawkins, supra*, 98 Cal.App.4th at p. 1450.) No such foundational evidence was offered here.

Defendant fails to demonstrate trial court error with regard to the exclusion of defendant's exhibit 813.

VIII

Defendant next argues the prosecutor committed misconduct by commenting on defendant's failure to testify, in violation of *Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106] (*Griffin*).

Defense counsel argued to the jury that the case turned on S.'s credibility. He urged the jury to consider whether S.'s story was consistent in assessing her credibility. Defense counsel pointed out inconsistencies in S.'s story, including her initial testimony

at the preliminary hearing that defendant did not rape her at a place outside California and her subsequent preliminary hearing testimony that defendant raped her in Bangkok. Defense counsel called S. "pathologically manipulative." He said S. was a liar and had committed perjury.

The prosecutor addressed S.'s testimony about the rape in Bangkok in his rebuttal argument. He argued defense counsel set S. up at the preliminary hearing, first eliciting her testimony that defendant did not have sex with her outside California, and then reminding her about the rape in Bangkok. The prosecutor said, "Now, why did he ask her that question [whether defendant assaulted her in a hotel in Bangkok]? Why did he set her up like that? Because just like he told you, Terry Easley, and with Peggy, he already knew the answers to the question. But what's important is how did he know the answer to the question? Because Ajay told him. Ajay sat there and scribbled down, you can catch her, we had sex in this motel room in Nepal. There's only one other person on the planet who knows that they had sex in the motel room in Nepal."[6] Defense counsel objected to the prosecutor's comments, citing *Griffin*. The trial court overruled the objection. The trial judge said he did not hear a legal basis for defense counsel's objection. It is unclear whether the trial judge's statement meant the trial judge did not hear defense counsel's reference to *Griffin* or whether the trial judge concluded the objection based on *Griffin* was meritless. The prosecutor continued, "He asked that question -- the only one reason he would know to ask that question is because Ajay told him. The only other person in that motel room. The other only person he would know had asked that question." The prosecutor said defense counsel criticized S. and called her "pathological" but S. was "not the brightest cookie in the cookie jar" and her English language skills were no match for defense counsel's. The prosecutor commented,

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[6] The prosecutor referred to a hotel in Bangkok in the preceding paragraph. It appears he misspoke in this quoted paragraph when he referenced a motel in Nepal.

"Watching that cross-examination of her by [defense counsel] is like watching a baby seal being questioned. She was defenseless. Her memory is awful."

Griffin prohibits any comment by the prosecution on a defendant's failure to testify at trial, and it prohibits argument urging the jury to view that failure as evidence of guilt. (*People v. Avena* (1996) 13 Cal.4th 394, 443; *People v. Hardy* (1992) 2 Cal.4th 86, 153-154.) To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the prosecutor's comments as an invitation to draw an improper inference of guilt from the defendant's decision to not testify. (*People v. Taylor* (2010) 48 Cal.4th 574, 633; *Brown, supra,* 31 Cal.4th at pp. 553-554.) We view the prosecutor's statements in context and in light of the evidence before the jury. (*People v. Mincey* (1992) 2 Cal.4th 408, 446.) " '[W]e "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' " (*Brown, supra,* 31 Cal.4th at pp. 553-554.)

Read in context, there is no reasonable likelihood the jury would have construed or applied the above quoted remarks by the prosecutor as a reference to defendant's failure to testify. The prosecutor was attempting to rebut defense counsel's argument that S. provided inconsistent stories and repeatedly testified that she could not remember. The prosecutor said S. was not untruthful; rather, she had poor English language skills and poor memory, and she was no match for defense counsel's skilled cross-examination. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1228-1229; *United States v. Isaac* (3d Cir. 1998) 134 F.3d 199, 206-207.)

Contrary to defendant's claim, *Griffin* is factually distinguishable. Unlike the prosecutor in this case, the prosecutor in *Griffin* expressly referenced the defendant's failure to testify. The prosecutor argued the defendant would know how the victim got down an alley, how her wig came off, and whether he beat her. (*Griffin, supra*, 380 U.S. at pp. 610-611 [14 L.Ed.2d at pp. 107-108].) The prosecutor said, " 'These things he has

not seen fit to take the stand and deny or explain. [¶] . . . [¶] [The victim] is dead, she can't tell you her side of the story. The defendant won't.' " (*Id.* at p. 611 [14 L.Ed.2d at p. 108].) In addition, in *Griffin* the trial court instructed the jury that if the defendant did not testify as to any evidence or facts against him which he can reasonably be expected to deny or explain because of facts within his knowledge, the jury may consider the defendant's failure to testify "as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable." (*Id.* at pp. 609-610 [14 L.Ed.2d at p. 107].) No such jury instruction was given in this case.

Even if the prosecutor's statements had constituted *Griffin* error, we would conclude that such error was harmless beyond a reasonable doubt. (*People v. Hovey* (1988) 44 Cal.3d 543, 572 [applying *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] harmless error test to *Griffin* error].) The trial court instructed the jury, in accordance with CALCRIM No. 355, that a defendant has an absolute constitutional right not to testify. The trial court said the defendant may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. It said the jury should not consider for any reason the fact that defendant had chosen not to testify and should not discuss that fact during deliberations or let it influence its decision in any way. The trial court repeated the CALCRIM No. 355 instruction before closing arguments. We presume the jury followed that instruction. (*People v. Dement* (2011) 53 Cal.4th 1, 50, overruled on other grounds in *People v. Rangel*, *supra*, at p. 1216.) Consistent with the CALCRIM No. 355 instruction, defense counsel told the jury defendant need not testify and the jury may not consider whether the defendant took the stand. Defense counsel also said, consistent with the trial court's instructions, that defendant was presumed to be innocent and the People had the burden to prove defendant's guilt beyond a reasonable doubt.

In addition, the trial court admonished the jurors that they must decide the facts in the case using only the evidence presented in the courtroom, that is, the sworn testimony of witnesses, exhibits admitted into evidence, and anything else the trial judge told the jury to consider as evidence. The trial court repeatedly told the jury the attorneys' statements were not evidence that the jury could use in their deliberations.

In light of the trial court's clear instructions, the presumption that the jury followed those instructions, the brevity of the complained-of remarks, and the evidence of defendant's guilt which we have explained, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty regardless of the challenged statements by the prosecutor.

Defendant further claims the prosecutor's closing argument constituted misconduct because the prosecutor referred to facts that were not in evidence and that were untrue, and the prosecutor's statements violated defendant's Fifth Amendment rights to due process and to have the State prove its case beyond a reasonable doubt, and defendant's Sixth Amendment rights to counsel, to present a defense, and to confront witnesses. Defendant did not preserve those claims of prosecutorial misconduct for appeal because he did not object to the prosecutor's closing argument on the grounds he now asserts. Failure to make a specific and timely objection and request that the jury be admonished forfeits the issue for appeal unless such an objection would have been futile. (*Brown, supra*, 31 Cal.4th at p. 553; *People v. Kipp* (2001) 26 Cal.4th 1100, 1130 [failure to object on constitutional grounds at trial forfeits appellate contention that prosecutorial misconduct violated constitutional protections].)

Defendant claims it was futile for his trial counsel to object because the trial court instructed him not to object in front of the jury and denied him the opportunity to elaborate on his objections outside the presence of the jury. Defense counsel objected when the prosecutor asked Peggy's mother whether she was aware that defendant had accused his mother of spreading false accusations about him in Nepal. Defense counsel

said "Objection, as assuming facts not in evidence. This is misconduct. I object." The trial court excused the jury. The trial judge admonished defense counsel, outside the presence of the jury, that accusing the prosecutor of engaging in misconduct in front of the jury was improper and was itself misconduct. The trial court instructed, "it shall not happen again." The trial court ruled that the prosecutor's question was proper.

The trial court did not prohibit objections based on prosecutorial misconduct. Rather, the trial court said such accusations should not be asserted in front of the jury. There is no indication the trial judge would not permit defense counsel to make his record. In addition, the trial judge's admonition did not prevent defense counsel from subsequently interposing objections at trial. Defendant fails to show that an objection and request for an admonition would have been futile.

IX

Defendant next contends he was denied his constitutional rights to due process, equal protection and a meaningful appeal because the trial court refused to hold an evidentiary hearing to settle a proposed statement regarding (A) whether there was a missing jury note from June 24, 2009, (B) whether the jury received the recording of S.'s police interview in response to a jury note, and (C) whether the jury received certain defense evidence admitted after deliberations had begun.

Before we turn to defendant's specific concerns, we explain the law and purpose regarding a settled statement. A defendant is entitled to a record adequate to permit meaningful appellate review. (*People v. Osband* (1996) 13 Cal.4th 622, 663.) When a portion of the oral proceedings in the trial court cannot be transcribed, a party may apply to the trial court for permission to prepare a settled statement. (Cal. Rules of Court, rule 8.346(a).) The purpose of a settled statement is to fill gaps in the record of the oral proceedings, such as where there is no reporter's transcript, so that "the record transmitted to the reviewing court preserves and conforms to the proceedings actually undertaken in the trial court." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 585; see

Marks v. Superior Court (2002) 27 Cal.4th 176, 192 (*Marks*); *People v. Anderson* (2006) 141 Cal.App.4th 430, 440.) If the trial court grants the settled statement application, the clerk must set a date for a settlement hearing by the trial judge and give the parties notice of the hearing date. (Cal. Rules of Court, rule 8.137(c).) The trial judge settles the statement at that hearing. (*Ibid.*)

The trial court settles a proposed statement with the assistance of the trial participants. (*Marks, supra*, 27 Cal.4th at pp. 195-196; *People v. Gzikowski* (1982) 32 Cal.3d 580, 584, fn. 2 (*Gzikowski*).) It resolves any conflicts as to the proper contents of the statement. (*Marks, supra,* 27 Cal.4th at p. 196.) It has broad discretion to accept or reject counsel's representations of what occurred at trial, in accordance with its assessment of their credibility. (*Ibid.; Gzikowski, supra,* 32 Cal.3d at p. 584, fn. 2.) The trial court "may decline to settle a statement only if, after resort to all available aids, including the [trial] judge's own memory and those of the participants, it is affirmatively convinced of its inability to do so. [Citation.] In that case, its reasons should be stated on the record." (*Gzikowski, supra,* 32 Cal.3d at p. 584, fn. 2.) " 'The rules confer full power over such a record in the trial judge. As long as the trial judge does not act in an arbitrary fashion he has full and complete power over such a record.' " (*Marks, supra*, 27 Cal.4th at p. 195.)

Here, the trial court settled a proposed statement. In doing so, the trial judge relied on his notes, his memory, and information from the prosecutor (Steven E. Mount), defendant's trial counsel (Michael Rothschild), and courtroom clerks (T. Grimes and M. Leon). The trial court denied defendant's motions to subpoena jurors and the bailiff, but it considered the declarations submitted by the parties in the light most favorable to defendant. And those declarations included statements or declarations by jurors and the bailiff. None of the authorities defendant cites require a trial court to issue subpoenas for the purpose of conducting settled statement proceedings.

A

Defendant contends a jury note submitted on June 24, 2009, is missing from the record on appeal. Not so.

The jury submitted eight notes during deliberations: three on June 11, 2009, one on June 23, 2009, one on June 24, 2009, and three on June 25, 2009. Copies of those notes were included in the clerk's transcript filed with this court on November 4, 2009.

With regard to the note the jury submitted on June 24, 2009, the minute order for that date states the trial judge discussed the note with both counsel and that the judge would send a written response to the jury the next morning because the jury was already gone for the day. The minute order for June 25, 2009, states the trial judge sent a written response to the question the jury submitted late in the day on June 24, 2009. The prosecutor's notes concerning the jury note submitted on June 24 were consistent with the minute orders. The courtroom clerk did not stamp the jury note "filed" until June 25, 2009. But the trial judge explained that when a jury note was received at the end of the day, he told his clerk to log the note the next day. As the prosecutor pointed out at the last settled statement hearing, the minute orders corresponded with the jury notes in the record.

Mr. Rothschild and Mr. Mount were present at the first settled statement hearing, and they, along with the trial judge and courtroom clerk Grimes, provided information to defendant's appellate counsel with regard to the record.[7] Defendant's appellate counsel was concerned about jury notes and responses to jury notes. The trial judge indicated that different courtroom clerks covered the trial, and he would order the courtroom clerks to make sure all of the jury notes had been collected. The jury note submitted on June 24,

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[7] Grimes was the courtroom clerk for most of the trial.

2009, was not omitted from the record. The settled statement pertaining to the June 24, 2009 jury note is consistent with our conclusion.

B

Defendant also contends the record on appeal does not show whether the jury received the recording of S.'s police interview in response to a jury note.

Jury deliberations began the morning of June 11, 2009. Before releasing the jury to begin deliberations, the trial judge told the jurors his regular courtroom clerk was absent and it would take some time for the substitute clerk to log and organize the trial exhibits. Shortly after the jurors were escorted to the jury deliberation room, the trial court called the jurors back for further instructions at about 11:10 a.m. The jury was then released to resume its deliberations.

The trial court received three notes from the jury in the afternoon. The first June 11 note reads, "Judge Fall, [¶] We would like to watch Det. Hermann interview with [S.]" A recording of Detective Hermann's interview with S. was played at the trial, and a copy of the recording was admitted into evidence before the start of jury deliberations. The trial court's June 11, 2009 minute order shows the trial court granted the jury's request to watch the recording. But defendant contends the bailiff delivered the admitted evidence to the jury room at 10:35 a.m. on June 11. Whereas defendant says the jury submitted its June 11 note, asking for the recording of S.'s police interview, in the afternoon, indicating it had not received that recording. Defendant claims there is no notation in the June 11 minute order that the bailiff brought the jury exhibits after 10:35 a.m., and thus he argues the recording of S.'s police interview was not given to the jury. Defendant asserted in the trial court that the settled statement should show the trial judge did not respond to the jury's request to watch the recording of S.'s police interview.

The June 11 minute order reads. "10:35 AM [¶] DEREK SCHMIDT was sworn to take charge of the jury thereafter; the jurors retired to select a foreperson and begin deliberations. Verdict forms and admitted exhibits were delivered to the jury room. [¶]

The court released the alternate jurors as long as the alternates can be reached by phone. [¶] Clerk to read request from jurors re: read back of testimony and Counsel stipulate to waive presence for read back of testimony. [¶] Clerk to read any questions to counsel. Conference call or if discussion needed, counsel will appear in chambers, or will go on the record if needed. [¶] Written answers will go to jurors. [¶] Jurors recalled RE: Jury Instruction." The next entry reads, "1:45 PM [¶] Jury Deliberating [¶] Defendant and Counsel are present in open court. [¶] Defense Counsel MOTION to re-open - GRANTED." After describing the parties' motions and the trial court's rulings, the minute order states "Upon receipt of Note #1 Jurors request -Granted [¶] Upon receipt of Note #2 Jurors request-Denied as to Question#1 and Question#2 taken into consideration."

The June 11 minute order can be interpreted to state that Deputy Schmidt delivered the admitted exhibits and the verdict forms to the jury room at 10:35 a.m. But that reading would be in conflict with the reporter's transcript of the proceedings.

The reporter's transcript shows the following sequence of events. Deputy Schmidt was sworn to take charge of the jury after the trial court gave the jury its final instructions. The trial judge then gave Deputy Schmidt the verdict forms to give to the jury. The trial judge informed the jury it would receive the exhibits at the end of that morning or that afternoon, after the clerk finished logging the exhibits. The trial judge then directed the jury to "go ahead and step out." After the jurors left the courtroom, the trial judge briefly instructed the alternate jurors. There was no recess between the time the jurors left the courtroom and the time the trial judge instructed the alternate jurors. After it released the alternate jurors, the trial court had a brief discussion with trial counsel, and the trial judge decided that further jury instructions were required. Thus, the trial judge directed Deputy Schmidt to bring the jury back to the courtroom at 11:10, after the court took a 15 minute recess. There was no break in the proceedings between the time the trial court released the alternate jurors and when it gave its direction to Deputy

Schmidt. The trial court gave the jury further instructions after the recess. According to the reporter's transcript, the jurors did not receive the admitted exhibits at 10:35 am.

Where the reporter's and clerk's transcripts are in conflict " 'that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater credence [citation]. Therefore whether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case.' " (*People v. Smith* (1983) 33 Cal.3d 596, 599.) The reporter's transcript was a contemporaneous record of the proceedings that occurred when the jury was released to begin deliberations, and it is entitled to greater credence. (*In re A.C.* (2011) 197 Cal.App.4th 796, 799-800 ["Where there is a conflict between the juvenile court's statements in the reporter's transcript and the recitals in the clerk's transcript, we presume the reporter's transcript is the more accurate."]; *In re Moss* (1985) 175 Cal.App.3d 913, 928 [tape recording of proceedings prevail over inconsistent docket sheet].) The reporter's transcript shows the trial exhibits were not given to the bailiff with the verdict forms when the jury retired to begin deliberations, which according to the clerk's transcript occurred during the proceedings starting at 10:35 a.m. The reporter's and clerk's transcripts do not show the time when Deputy Schmidt delivered the exhibits to the jury room. But we note the trial judge said the jury would receive the exhibits at the end of that morning or that afternoon. The jury submitted its first June 11 note in the afternoon. A notation on that note suggests the note was written or submitted at 1:40 p.m.

Defendant's contention that the recording of S.'s police interview was not in the exhibits delivered to the jury room is premised on the assertion that Deputy Schmidt delivered the exhibits to the jury room at 10:35 a.m. and before the jury submitted the note stating that the jury would like to watch the recording. As we have explained, the reporter's transcript contradicts the first factual premise. And as for the second premise,

the trial court's minute order indicates that the trial court granted the jury's request to receive the recording.

The trial judge's recollection supported the conclusion that the jury received what it requested. The trial judge said it was not his practice to prepare a written response for "logistical requests," such as a request for a play-back device. Absent objection from counsel, the bailiff simply delivered the requested device. The trial judge's practice explained why there was no written response to the first June 11 note. The trial judge remembered asking the courtroom clerk later in the day whether she completed the exhibit log and whether the exhibits had been delivered to the jury, and that the clerk responded in the affirmative. The trial judge credited the clerk's representation to him.

Such a conclusion is consistent with what the prosecutor and courtroom clerk recounted. The prosecutor recalled that the jury had not received the exhibits when, after deliberations had begun, the trial judge heard motions to admit additional exhibits into evidence. According to the minute order, the motions were heard at 1:45 p.m. The prosecutor said all of the evidence went to the jury after the additional exhibits were admitted. The prosecutor recalled that the jury asked to watch the recording, and the trial judge told counsel the jury would get what it asked for. Defense counsel did not disagree with the prosecutor's recollection.

Declarations by two individuals working for the defense -- a private investigator and a law student -- reported that Deputy Schmidt said he watched the clerk log the evidence and then he delivered the evidence to the jury room, possibly taking two trips because there were large poster boards that did not fit in the box of evidence. Deputy Schmidt reportedly saw discs in the evidence. The statements attributed to Deputy Schmidt did not contradict the trial court's conclusion that the jury received what it requested. The trial judge said Deputy Schmidt's alleged report that he did not deliver any DVDs, VHS tapes or CDs to the jury during deliberations after he had initially

delivered the exhibits to the jury room suggested that all of the exhibits, including the late admitted exhibits, were delivered to the jury as "part of a single batch."

There were conflicting juror declarations. One juror averred the jury watched the recording of S.'s police interview during deliberations. Another declaration, describing what a juror told a defense investigator, stated that the jury did not receive the recording during deliberations. The trial court had broad discretion to accept or reject the representations in the declarations. (*Gzikowski, supra*, 32 Cal.3d at p. 584, fn. 2.)

On this record, we cannot find that the jury did not receive the recording of S.'s police interview. Defendant fails to establish that the trial court erred in declining to adopt defendant's preferred statement.

C

Defendant further argues nothing in the record confirms that the jury received the defense exhibits admitted after the start of jury deliberations. Defendant claims this omission violates his Fifth and Fourteenth Amendment rights to due process and equal protection.

"An appellate record is inadequate 'only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal.' [Citation.] The defendant bears the burden of demonstrating that the record is not adequate to permit meaningful appellate review." (*People v. Young* (2005) 34 Cal.4th 1149, 1170 (*Young*).) "No presumption of prejudice arises from the absence of parts of the usual appellate record." (*People v. Samayoa* (1997) 15 Cal.4th 795, 820.)

Even if we assume Deputy Schmidt did not deliver any of the late admitted exhibits to the jury room, defendant fails to show how such omission prejudiced him. (*Young, supra*, 34 Cal.4th at p. 1170 [argument that missing material may have contained matter that demonstrated error or reflected a constitutional violation does not satisfy the defendant's burden of establishing prejudice]; *People v. Catlin* (2001) 26 Cal.4th 81, 169-170 [argument that missing transcript might have contained generally exculpatory

evidence and might have supported other claims on appeal or assisted appellate counsel in determining which claims to raise does not satisfy defendant's obligation to establish that omissions in the record are prejudicial to his ability to prosecute his appeal].) He does not show that we are unable to consider his appellate claims because the record with regard to the late admitted defense exhibits could not be settled. We reject his claim for this reason.

X

Defendant says his convictions must be reversed and he must be granted a new trial based on the cumulative effect of the errors in this case. This contention fails because his claims of asserted error are forfeited or lack merit.

DISPOSITION

The judgment is affirmed.

/S/
MAURO, J.

We concur:

/S/
RAYE, P. J.

/S/
HULL, J.