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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. NICHOLAS ED BUSKIRK, Defendant and Appellant.	E073918 (Super. Ct. No. FMB17000090) OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed with directions.

Joanna Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant and appellant Nicholas Buskirk was convicted of various offenses related to his sexual abuse of a nine-year-old girl. The trial court sentenced him to 12 years, plus 30 years to life.

Defendant contends his convictions must be reversed because (1) the prosecution committed *Brady* error,[1] (2) the prosecutor committed multiple acts of misconduct, (3) the trial court erroneously denied his motion for a new trial, (4) the trial court erroneously excluded some of a witness's testimony, and (5) these alleged errors were cumulatively prejudicial. He also argues three one-year enhancements must be stricken. The People agree, as do we, that the enhancements must be stricken. The parties concede, and we agree, that the matter must be remanded for resentencing under newly enacted legislation. We reject defendant's remaining contentions and affirm the judgment of conviction while vacating his sentence and remanding for resentencing.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and Kimberly had a child, who they put up for adoption. Defendant did not see Kimberly for about eight years, but they reconnected around 2014 or 2015. During that time, Kimberly married and had four children: L., R., A., and B. After

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

reconnecting, defendant and Kimberly had a few sexual encounters with each other, but they also became good friends.

Around November 2015, Kimberly went to visit her sister in Arizona. She took R. and B. with her, but left A. and L. with defendant's girlfriend, Summer. When she came back, she noticed some new children's toys at defendant's house and asked where they came from. Defendant said he went to his mother's house in Wonder Valley to get the toys for the children.

Toward the end of December 2015, Kimberly asked her children if anyone had ever abused them physically or verbally. R., who was five years old at the time, said six-year-old L. had a secret. When Kimberly asked L. what her secret was, L. said that "Uncle Nick" (defendant) had touched her. L. explained that defendant had touched her vaginal area and made her perform oral sex on him. L. demonstrated what defendant had done to her. L. told Kimberly that she did not want to do it, but defendant said he would give her a dollar and take her to the park if she did. Later that day, they went to the park and L. used the money defendant gave her to buy candy.

L. also described certain features about the house where the abuse took place, including that there was children's bike outside and a white bed and a chair inside.

Kimberly knew that their friends, Vickey and Albert, were moving into the defendant's mother's Wonder Valley house, so she called them to ask about the bike and white furniture. Vickey confirmed that there was a white bed, white chair, and a children's bike at the house. Kimberly immediately reported the abuse to the police.

Law enforcement went to the Wonder Valley home to serve an arrest warrant on defendant. Defendant asked if he could call his mother because he thought he was not going to see her for a long time. He then yelled, "Oh my f—kin' God," and took off running. Defendant ran through a window and into the desert, but the officers eventually apprehended him.

Defendant was charged and convicted of sexual penetration of a child 10 years of age or younger (Pen. Code, § 288.7, subd. (b)),[2] oral copulation of a child 10 years of age or younger (§ 288.7, subd. (b); count 2), dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1); count 3); and resisting, obstructing, delaying of a peace officer (§ 148, subd. (a)(1); count 4). In a bifurcated proceeding, the trial court found true the allegations that defendant had suffered a prior strike conviction, a prior serious felony conviction, and served three prior prison terms. (§§ 1107.12, subds. (a)-(d); 667, subds. (a), (b)-(i); 667.5, subd. (b).)

The trial court sentenced defendant 12 years plus 30 years to life, consisting of double the term of 15 years to life, or 30 years to life, for count one, plus double the middle term of two years, or four years, for count three, five years for the serious felony prior, and one year for each of the three prison priors. The court also imposed a concurrent term of 30 years to life for count 2.

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[2] Unless otherwise indicated, all further statutory references are to the Penal Code.

III.

DISCUSSION

A. Brady *Error*

Defendant contends the prosecution committed *Brady* error by failing to timely provide defense counsel with information from L.'s dependency case. We disagree.

1. *Background*

About a year before trial, the prosecution gave the defense a "387 Jurisdictional/Disposition Report" (JD report) prepared by the Riverside County Department of Social Services (DPSS) in L.'s dependency case. The report included an entry from August 2015 stating that DPSS had received a referral alleging general neglect of L. and her siblings. The reporter—later discovered to be therapist Adrienne Jordan, a mandatory reporter—told DPSS that Kimberly had disclosed to another colleague during a therapy session that R. had been acting out sexually at home. According to the report, when Kimberly asked R. about her behavior, R. said that a five-year-old boy, D., touched her vaginal area and made L. perform oral sex on him.

A few months later, in April 2018, defendant moved to compel discovery of all information about the allegations involving D. A month later, defendant moved under section 782 to admit evidence of L.'s prior sexual knowledge (the alleged incident with D.) in order to impeach her testimony about defendant's alleged abuse. Defendant argued evidence of L.'s allegations about D. was relevant because her allegations against D. and defendant were similar, occurred close in time, and were both false.

At a conference in November 2018, defense counsel noted that he was aware of the allegations against D., and requested all *Brady* material. The trial court ordered discovery of all *Brady* material, noting that the court had previously ordered it.

At some point in late December 2018 or early January 2019, the prosecutor spoke with Kimberly about the D. allegations and the JD report. Kimberly then submitted a statement claiming that the JD report was inaccurate in that she had reported to her therapist, a colleague of Jordan's, that R. told her that D. had touched her vaginal area and kissed her, but L. was "never involved in this situation." Kimberly denied telling Jordan anything and insisted that she told her therapist, who then told Jordan.

The prosecution opposed both motions on January 7, 2019, arguing that records from dependency proceedings were inadmissible under Welfare and Institutions Code section 827 (section 827)[3] and California Rules of Court, rule 5.552 (Rule 5.552).[4] The prosecution argued defendant had to obtain a court order from the juvenile court to

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[3] "Under section 827, responsibility for confidential juvenile files is placed on the juvenile court, not the trial court." (*People v. Stewart* (2020) 55 Cal.App.5th 755, 773.)

[4] Rule 5.552 provides in relevant part, "Juvenile case files may be obtained or inspected only in accordance with sections 827, 827.12, and 828. They may not be obtained or inspected by civil or criminal subpoena. With the exception of those persons permitted to inspect juvenile case files without court authorization under sections 827 and 828, and the specific requirements for accessing juvenile case files provided in section 827.12(a)(1), every person or agency seeking to inspect or obtain juvenile case files must petition the court for authorization using Petition for Access to Juvenile Case File (form JV-570)."

inspect or procure records related to L.'s dependency case. The prosecutor submitted Kimberly's statement in support of the opposition.

The trial court held a hearing on defendant's motions on January 7, 2019. The court explained that it wanted to hear testimony from Kimberly and the author of the JD report before ruling on the motions. The prosecutor argued it would be better to subpoena the mandatory reporter who reported the incident with D. instead of the JD report author, but the prosecutor did not know who the reporter was. However, the trial court directed the prosecutor to subpoena Kimberly and the JD report author.

On January 15, 2019, a week before trial was scheduled to begin, the prosecutor filed opposition objecting to the admission of any dependency records under section 827 and Rule 5.552. The prosecutor also moved under Evidence Code sections 782 and 1103, subdivision (c)(1) to preclude defendant from questioning L. about her sexual knowledge. The prosecutor attached to the opposition a copy of a DPSS's Emergency Response Referral form (the Emergency Referral), which identified Jordan as the mandatory reporter who reported R.'s allegation against D., as relayed to Jordan by Kimberly.

The Emergency Referral identified Jordan as the reporting party and stated that Kimberly told her that R. had been acting out sexually. When Kimberly asked R. about her behavior, R. said that D. "grabbed her private area and made L. perform oral sex on him." The referral stated that Kimberly was "being protective" and would not allow her children to have contact with D. Jordan reported that D. and his mother, Estella H.,[5] had

[5] The referral identified Estella by her full name.

just moved from Kimberly's home about two weeks prior, but she "did not have sufficient information on the [H.] family for the referral to be completed." The prosecutor's motion also included a handwritten letter from Kimberly denying that L. was involved in the D. incident as the JD report stated. Kimberly also claimed that she reported the incident to R.'s therapist, not Jordan.

Defense counsel had never seen the Emergency Referral before, and the prosecutor had received it on January 10, 2019, only five days (three court days) before filing the motion. The prosecutor did not identify the Emergency Referral as *Brady* material, but claimed it supported Kimberly's statement.

The court held a hearing on the parties' motions on January 22, 2019, the day set for trial to begin. Defendant argued the court should believe the JD report, not Kimberly's statement denying L.'s involvement with the D. incident. The prosecutor argued the court should not even consider the JD report for several reasons, including that defendant had not obtained permission from the juvenile court to admit the report as required by section 827 and rule 5.552 and that the report was inadmissible hearsay.

The court excluded the JD report on the ground that it was inadmissible hearsay. The court, however, still wanted to hear testimony from Kimberly on whether the JD report was accurate.

Kimberly testified at the next hearing. Kimberly explained that R. told her that D. kissed her in a closet and touched her vaginal area over her clothes. Kimberly relayed this information to R.'s therapist, but never said that L. was involved in the incident.

Kimberly did not tell the police and took no further action. Kimberly also testified that she had recently spoken to the prosecutor on the phone about the issue.

The trial court ruled the JD report should not have been disseminated to the parties because there was no juvenile court order allowing the parties to possess the report. The court noted that the face of the JD report says that dissemination of the report is prohibited unless authorized by law. The court also believed Kimberly's testimony that only R., not L., was not involved with the D. incident. However, the trial court ruled that defendant could ask L. and Kimberly questions about the allegations against D. and other related questions in order to assess their credibility. Defendant could not, however, ask L. about prior sexual contact.

The jury was sworn and voir dire began on January 22, 2019. In the meantime, defendant subpoenaed social worker Candace Brady-Ramsee, who answered the hotline call from the mandatory report (Jordan) who reported the D. incident. Defendant learned from Brady-Ramsee that Jordan was the mandatory reporter, although Jordan's name was on the JD report.

On February 5, 2019, the trial court held a hearing outside the presence of the jury to determine whether Jordan could testify to impeach Kimberly. Jordan testified that she a mandatory reporter spoke with Kimberly about the D. incident. Jordan testified that the JD report was accurate and disagreed with Kimberly's testimony that it was inaccurate. Jordan explained that she was not a therapist for Kimberly or her children, but she reported the D. incident while appearing very concerned. According to Jordan, Kimberly

said that D. had put his hands down R.'s pants and forced L. to perform oral sex on him. Jordan then immediately reported what Kimberly had told her on the CPS hotline. Jordan did not know if there was any follow-up.

The trial court again ruled that the JD report was inadmissible under section 827. The court ruled, however, that defendant could question Kimberly and Jordan about whether Kimberly told Jordan that D. abused L. Because Kimberly was unavailable to testify at trial, the court admitted her prior hearing testimony denying L. was involved with the D. incident. Jordan testified that Kimberly told her L. was involved with an incident concerning oral sex with another child.

After defendant was convicted as charged by a jury, he moved for a new trial. He argued the prosecution suppressed evidence in violation of *Brady*, the prosecutor committed misconduct, and he had recently uncovered the identity of D.'s mother, Estella H., which constituted newly discovered evidence.

At the hearing on the motion, Estella testified that she was unaware of any allegations that D. had abused L. or R., which she found to be "ridiculous." When Estella and Kimberly met in 2014, Kimberly was addicted to drugs and living on the streets with her children, so Estella and her mother offered to allow them to move into their house. Kimberly made the allegations about D. two weeks after Estella and her mother moved, and Estella asked Kimberly not to move with them.

The trial court denied defendant's motion for a new trial. The court found no *Brady* error or prosecutorial misconduct and found that Estella's testimony did not warrant a new trial.

2. Analysis

Defendant contends the prosecution violated *Brady* by failing to provide defendant information from L.'s dependency case, including (1) the Emergency Referral, (2) the identity of the mandatory reporter who made the referral (Jordan), (3) D.'s mother's identity, and (4) law enforcement reports about the D. incident. We disagree.

In *Brady*, the United States Supreme Court established that due process requires the prosecution to disclose evidence that is both favorable to the defendant and material on either guilt or punishment. (*Brady*, *supra*, 373 U.S. at p. 87.) A *Brady* violation occurs when three conditions are met: (1) the evidence was "'favorable'" to the defendant, (2) the evidence was "'suppressed by the State, either willfully or inadvertently,'" and (3) the evidence was "material" (i.e., its suppression was prejudicial). We independently review whether a *Brady* violation has occurred while giving great weight to the trial court's factual findings if supported by substantial evidence. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176.)

The prosecutor received the Emergency Referral via fax on the morning of Thursday, January 10, 2019, and turned it over to the defense (via her motion) the following Monday, two weeks before trial began. The prosecutor therefore did not suppress the Emergency Referral under *Brady*. (See *People v. Morrison* (2004) 34

Cal.4th 698, 696 ["[E]vidence that is presented at trial is not considered suppressed, regardless of whether or not it had previously been disclosed during discovery."].) The Emergency Referral identified Jordan as the mandatory reporter who reported D.'s alleged abuse of L. The prosecution thus did not suppress her identity in violation of *Brady*, as defendant contends.

As for Estella's identity, the prosecution and defendant had the same information about how to locate her. Over a year before trial began, the prosecutor gave defendant the JD report, which contained the allegations about D.'s alleged abuse of L. and R. Defendant, however, did not seek further information about the allegations from L.'s juvenile case file. The Emergency Referral, which defendant received before trial, identified D. and his mother by their full names. The JD report and Emergency Referral thus gave defendant the information he needed to locate Estella before trial began. In fact, defendant located Estella after trial without any further help or evidence from the prosecution. Defendant's failure to locate Estella until after trial, even though he had the means to do so, does not mean the prosecution violated *Brady*. (See *People v. Morrison*, *supra*, 34 Cal.4th at p. 696 [defendant had no *Brady* claim because the allegedly suppressed evidence was "'fully available'" to him and was not presented at trial because "'his lack of reasonable diligence'"].)

As for the police reports, there is no evidence in the record that any police reports about the D. incident exist. Although Jordan testified that CPS told her they had referred the matter to law enforcement, the JD report says there was insufficient information for a

referral to be completed. Kimberly and Estella both testified that they were unaware of any investigation into the allegations against D. Defendant's speculation that there are police reports that the prosecution suppressed is insufficient to establish a *Brady* violation. (See *People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1214.)

B. *Prosecutorial Misconduct*

Defendant raises seven claims of prosecutorial misconduct. We find them either unpersuasive, harmless, or both.[6]

1. *Applicable Law and Standard of Review*

A prosecutor has "'wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) We do not look to isolated words or phrases, but rather "must view the statements in the context of the argument as a whole." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) So when a defendant alleges prosecutorial misconduct based on the prosecutor's closing argument, the defendant must show that in the context of the whole argument and the instructions given, there was a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Centeno* (2014) 60 Cal.4th 659, 667.) "If the challenged comments, viewed in

[6] The People contend defendant forfeited the bulk of his prosecutorial misconduct claims by failing to object. We exercise our discretion to consider them "to avert [defendant's] claim of inadequate assistance of counsel." (*People v. Yarbrough* (2008) 169 Cal.App.4th 303, 310.)

context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.' [Citation.]" (*People v. Cortez* (2016) 63 Cal.4th 101, 130.)

A prosecutor's misconduct violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Tully* (2012) 54 Cal.4th 952, 1009-1010.) Prosecutorial misconduct that violates state law warrants reversal only when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor refrained from the untoward conduct. (*People v. Milner* (1988) 45 Cal.3d 227, 245; see *People v. Crew* (2003) 31 Cal.4th 822, 839.)

We review de novo a defendant's claim of prosecutorial misconduct. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 860.) "'In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.) We presume, in the absence of evidence to the contrary, that the jury understands and follows instructions from the trial court. (*People v. Fauber* (1992) 2 Cal.4th 792, 823.) We also presume that jurors treat the court's instructions as statements of law, and the arguments of the prosecutor as words spoken by an advocate in an attempt to persuade. (*People v. Thornton* (2007) 41 Cal.4th 391, 441.)

2. *Suppressing Jordan's Identity*

Defendant argues the prosecution used "deceptive means" during pretrial proceedings to keep Jordan's identity unknown to the defense. Even if true, the error was harmless under any standard because the prosecution gave defendant the Emergency Referral a week before trial, and the referral identified Jordan as the mandatory reporter who reported R.'s allegations about D. Jordan then testified at trial for the defense. The prosecution's alleged suppression of Jordan's identity until a week before trial therefore was harmless.[7]

3. *Mischaracterizing Albert's Testimony*

L. told Kimberly that defendant abused her in a room with a white bed at the Wonder Valley house. The prosecutor asked Albert, who moved into the house, if there was a bed in one of the bedrooms. Albert testified that the master bedroom had a bed with a gray frame with a mattress. The prosecutor asked him if the bed was "a light gray or like a hospital white bed." Albert said yes. The prosecutor followed up by asking, "that particular room they had that white-ish, grayish hospital bed you were describing, what kind of walls did that room have?" The prosecutor later asked Albert if he had taken any pictures of the white bed, and he replied that he had not. In closing argument, the prosecutor argued that Albert testified the bed was "off-white, light gray" with a white mattress.

[7] As discussed in more detail below, any error was also harmless given the strength of the evidence showing defendant's guilt.

Defendant contends the prosecutor improperly mischaracterized Albert's testimony because he did not describe the bed as "off-white" or gray. We disagree. Albert agreed with the prosecutor when she asked him whether the bed was "a light gray or like a hospital white bed." It is thus unlikely the jury misconstrued Albert's testimony because of the prosecutor's argument. (See *People v. Centeno*, 60 Cal.4th at p. 667.) In any event, any error was harmless under any standard because the jury was instructed that an attorney's argument is not evidence, and we presume the jury followed that instruction. (*People v. Martinez* (2010) 47 Cal.4th 911, 957 (*Martinez*).)

4. *Intimidating Jordan*

Outside the presence of the jury, defense counsel asked Jordan if Kimberly had told her information that she thought she was required to report as a mandatory reporter. Jordan responded that she believed such information was privileged. The trial court ordered her to answer the question, and she testified that Kimberly had told her information that she felt she had to report.

Later, while before the jury, the prosecutor asked Jordan whether she had permission to divulge privileged information or whether the court had pressured her to divulge it. Defendant objected, and the trial court sustained the objection.

Defendant argues the prosecutor's question in front of the jury amounted to witness intimidation and thus prosecutorial misconduct. We disagree. The prosecutor's question did not deprive defendant of Jordan's testimony. Therefore there was no witness intimidation. (See *People v. Lucas* (1995) 12 Cal.4th 415, 457.)

5. *L.'s Testimony*

During closing argument, the prosecutor made the following argument: "You've heard [L.] obviously describing these acts. . . . [¶] You could take into consideration what she said, how she looked, and how she reacted when questions and questions were asked of her. It was a trashy house, according to her statements to detective – Deputy Campos that was owned by [defendant]. He took her into a bedroom with a white bed and he laid her down on it. And she removed her pants and panties. His fingers rubbed against her vagina, and the defendant gave her a dollar. The defendant then lowered his pants forced [L.'s] head – first forces his penis into her mouth and gave her another dollar. [¶] *I think the most revealing part of that was when that child was testifying*, if you could remember how she forced her head forward demonstrating how her head was forced forward onto the defendant's penis during this trial. Of course you also heard that the defendant made her pinky promise, do not tell or I'll never give you any more dollars. And then he took her and her brother to buy them candy and spent her dollars."

Defendant contends the prosecutor told the jury to infer from L.'s testimony that she would not have been able to demonstrate oral copulation but for defendant committing the offenses. He claims this was improper because the trial court precluded testimony from Kimberly that L. had demonstrated oral copulation before she accused defendant of the offenses.

We disagree. The prosecutor's statement that L.'s testimony was "revealing" did not suggest that she knew about oral copulation only because of defendant. The

prosecutor was simply arguing as an advocate that L.'s testimony was credible for many reasons, including because she could replicate oral copulation.

Moreover, the prosecutor could not argue that L. knew about oral copulation only because of defendant's conduct because Jordan testified that Kimberly told her that L. had been involved with an act of oral copulation with D. Defense counsel argued that it was easy for L. to "know the terms" of oral copulation and "be familiar with the act" because she had alleged that she was involved with an act of oral copulation with D. Defense counsel later argued that the jury should not infer that L.'s allegations against defendant were accurate because of "the language used and the actions demonstrated" because she had made "identical allegations . . . three months earlier." Because the jury heard evidence and argument that L. knew about oral copulation before she made the allegations against defendant, any argument that the prosecutor made suggesting that L.'s testimony was accurate because she would not have known of oral copulation but for defendant's conduct was therefore harmless.

6. *L. Needing Medication*

Kimberly testified that L. started taking medication after defendant's abuse, and the prosecutor argued L. would have to take medication for the rest of her life because of defendant's offenses. Defendant contends this was improper because there was no evidence that L. would take medication for the rest of her life. Even if defendant is correct, the error, if any, was harmless under any standard. The trial court instructed the jury that an attorney's argument is not evidence and that they had to decide the case on

the evidence alone. We presume the jury followed that instruction. (*Martinez, supra*, 47 Cal.4th at p. 957.)

7. *L.'s Pain*

Defendant contends the prosecutor improperly told the jury to consider L.'s pain and to convict defendant for the pain he caused L. We disagree.

The prosecutor argued as follows: "[L.'s] testimony – I don't want to make it repetitive, but think about a six–year old who is now almost nine and a half testifying under the most stressful conditions anyone can imagine. Her coming here and telling you about what happened to her three years ago, the most despicable criminal acts that can be committed on a child and yet even after all of that time she did the best she could to describe these sexual acts in front of you that the defendant did to her while she was inside and [A.] was outside in this home in Wonder Valley. [¶] Imagine any one of us talking to a stranger about our sexual conduct that is forced upon us. Some of the jurors in this case – perspective [sic] jurors in this case never reported they were even sexually assaulted because they were ashamed. They are embarrassed. They thought maybe they did something to cause it. And they live with that pain all these years into adulthood. *Can you imagine what this child is going through testifying before you? She didn't report it to anyone. Is that a surprise that there is a delayed reporting of these type of heinous crimes to law enforcement or to a loved one* after we know that it is one of the most under–reported crimes that anyone can imagine?"

When viewed in context, the prosecutor's comment about L.'s pain is best understood as argument about why the jury should find L.'s testimony credible. The prosecutor told the jury that they should not discount L.'s testimony because she did not immediately tell Kimberly about defendant's abuse and instead the jury should understand how difficult it was for L. to report the abuse and to testify. This was a proper argument based on the evidence presented at trial.

Even if the prosecutor's argument was improper, it was harmless under any standard. As explained, the trial court instructed the jury to base its decision only on the evidence, and we presume the jury followed that instruction. (*Martinez*, *supra*, 47 Cal.4th at p. 957.)

8. *Defense Counsel Acting Illegally*

Without citing anything in the record, defendant argues the prosecutor constantly and improperly argued "the defense was acting illegally" and demanded that "the defense admit something [the prosecutor] knew to be false." We decline to consider the argument because defendant has not properly cited the record to support it. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205.)

9. *Conclusion*

We have assumed without deciding that two alleged instances of prosecutor misconduct were harmless, but we reject defendant's remaining claims of misconduct. As a result, we conclude there was no prejudicial prosecutor misconduct. We therefore

reject defendant's claim that his defense counsel was ineffective. (See *People v. Hart* (1999) 20 Cal.4th 546, 624 ["'prejudice must be affirmatively proved'" to establish ineffective assistance of counsel].)

C. *New Trial Motion*

Defendant contends the trial court erroneously denied his motion for a new trial based on newly discovered evidence.[8] We find no abuse of discretion.

Defendant could not locate Estella until about four months after the trial. Defendant supported his new trial motion with a declaration and testimony from Estella, which he claimed was newly discovered evidence that supported his defense that Kimberly pressured L. to make up the allegations against D. Estella thought the allegations against D. were false and "ridiculous." Estella explained that she and Kimberly lived together until about two weeks before Kimberly told her therapist about the D. allegations. When Estella and her family moved, Estella asked Kimberly not to move with them because Estella did not approve of Kimberly's behavior, including using drugs, having men over, and having sex while her children slept in the same room. Defendant thus argued Kimberly had a "scorned woman motive" to retaliate against Estella, so she lied to her therapist about the D. allegations. Estella also claimed that Kimberly was "obsessed with" a man named Nicholas (defendant), which defendant

[8] Defendant also moved for a new trial based on prosecutorial misconduct. We need not address the issue because defendant does not raise it in his opening brief.

argued supported his defense that Kimberly convinced L. to lie about her allegations against defendant.

The trial court denied defendant's motion for a new trial for a number of reasons. First, Estella had no personal knowledge about the sexual contact, if any, between D. and L. (or R.). Second, Kimberly reported the allegations to her therapist, not to law enforcement, which undermined Estella's belief that Kimberly made up the allegations to retaliate against her. Third, if Estella testified that the D. allegations were false, then defendant could not have argued that L. learned about oral copulation from D., not from defendant's abuse. Fourth, Estella conceded that she had no knowledge as to whether the D. allegations were true or whether L.'s allegations against defendant were true. The trial court therefore found that Estella's testimony would not have altered the outcome of the trial. Therefore retrial was not warranted.

"A new trial motion based on newly discovered evidence is looked upon with disfavor." (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1151.) A new trial is not warranted when it is not probable that the newly discovered evidence would have produced a different result. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) """"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."""" (*People v. Howard* (2010) 51 Cal.4th 15, 42-43.)

The trial court reasonably denied defendant's motion for a new trial because it is not probable that Estella's testimony would have affected the outcome of the trial.

Estella's testimony that Kimberly was "obsessed with" or in love with defendant likely would not have swayed the jury given that the jury knew Kimberly and defendant had multiple sexual encounters in the year before L.'s allegations against him. As the trial court reasonably observed, Kimberly likely would have told law enforcement, not her therapist, about the D. allegations if she were making them up. More importantly, this case largely turned on L.'s credibility. By convicting defendant, the jury necessarily believed her. Estella's testimony was not likely to affect that. Finally, we disagree with defendant that the trial court misapplied *People v. Moten* (1962) 207 Cal.App.2d 692. The trial court correctly construed that case as standing for the proposition that newly discovered evidence impeaching a trial witness does not *mandate* granting a new trial. (See *People v. Moten*, *supra*, at p. 698 ["While it is true that the granting of a new trial upon the discovery of highly material impeaching evidence will not be held to constitute an abuse of discretion [citation], when the trial court denies such a motion, the reviewing court should not ordinarily interfere."].)

D. *Excluding Jordan's Testimony*

Defendant contends the trial court prejudicially erred by precluding Jordan from testifying that (1) Kimberly told Jordan that L. demonstrated an act consistent with oral copulation a few months before L.'s allegations against defendant and (2) R. told Kimberly about D.'s alleged abuse of L. We disagree.

We first reject defendant's argument that the trial court's evidentiary rulings violated his federal due process rights and his right to present a defense. "[T]he routine

application of provisions of the state Evidence Code law does not implicate a defendant's constitutional rights." (*People v. Jones* (2013) 57 Cal.4th 899, 957.) "[O]nly evidentiary error amounting to a *complete preclusion* of a defense violates a defendant's federal constitutional right to present a defense." (*People v. Bacon* (2010) 50 Cal.4th 1082, 1104, fn. 4, italics added.) That did not occur here.

Defendant claims the trial court's preventing Jordan from testifying that Kimberly told her that L. acted out oral copulation when telling her about the D. allegations prevented him from rebutting the inference that L. would not have been able to describe oral copulation unless she had been molested by defendant. But other aspects of Jordan's testimony rebutted that inference. In particular, Jordan testified that Kimberly told her that L. had been forced to orally copulate D. a few months before her allegations against defendant. Defense counsel emphasized this in closing argument by telling the jury that L. was "familiar with the act" of oral copulation because of the D. incident, which involved "identical allegations." It is thus not reasonably probable that defendant would have received a better outcome had Jordan testified that Kimberly told her L. imitated an act of oral copulation. (*People v. Carrillo* (2004) 119 Cal.App.4th 94, 103 ["[R]eversal is required only if it is reasonably probable the defendant would have obtained a more favorable result had the evidence been excluded."].)

It is also not reasonably probable that defendant would have received a better outcome had Jordan testified that R., not L., told Kimberly about the D. incident. This reporting sequence lends little support to defendant's theory that Kimberly made up the

allegations. Instead, L. likely was more comfortable telling R. about the incident than her mother.

In any event, the evidence of defendant's guilt was strong. L.'s testimony was consistent with her statement to a forensic interviewer when she was only six years old. Her statement was corroborated by other evidence, including Albert's description of the Wonder Valley house (which was similar to L.'s description), Albert's testimony that he saw defendant alone with L., Summer's testimony that defendant took L. and A. to Wonder Valley alone, and photos showing L. buying candy at a store with a dollar in her hand on the day of defendant's abuse. This case largely turned on L.'s testimony, which the jury reasonably found credible. It is not reasonably probable that Jordan's excluded testimony would have changed the outcome.

E. *Cumulative Error*

Defendant contends that the trial court's errors cumulatively require reversal. We disagree.

"'[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.'" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.'" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

Even considering the actual and assumed errors in the aggregate, defendant was not deprived of a fair trial or denied due process. "Lengthy criminal trials are rarely

perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Defendant has not made such a showing. We therefore reject his claim of cumulative error. (See *People v. Box* (2000) 23 Cal.4th 1153, 1214 ["The few errors that may have occurred during defendant's trial were harmless whether considered individually or collectively."], disapproved on another ground in *Martinez*, *supra*, 47 Cal.4th at p. 948, fn. 10.)

F. *Enhancements*

Defendant argues, and the People agree, that defendant's one-year prior prison term enhancements should be stricken. We agree with the parties.

While this appeal was pending, the Governor signed Senate Bill No. 136 (2019-2020 Reg. Sess.) (Stats 2019, ch. 590, § 1), effective January 1, 2020. At the time of defendant's sentencing, former section 667.5, subdivision (b), required trial courts to impose a one-year sentence enhancement for each true finding on an allegation that the defendant had served a separate prior prison term unless the defendant had remained free of both felony convictions and prison or jail custody during a period of five years since the subject prior prison term. Following the enactment of Senate Bill No. 136, only prior prison terms for sexually violent offenses, as defined in Welfare and Institutions Code section 6600, subdivision (b), are subject to the one-year enhancement under Penal Code section 667.5, subdivision (b). (Stats 2019, ch. 590, § 1.) These amendments apply retroactively to all cases, like defendant's, that were not final as of January 1, 2020. (*People v. Lopez* (2019) 42 Cal.App.5th 337, 341-342.)

Defendant's three prior prison terms were not for stalking, robbery, or felony domestic violence, and not for a "a sexually violent offense as defined in subdivision (b) of [s]ection 6600 of the Welfare and Institutions Code." (Stats 2019, ch. 590, § 1.) We therefore strike the enhancements.

G. *Remand for Resentencing*

After we issued a tentative opinion, defendant requested and we granted him the opportunity to file a supplemental brief. Defendant contends, and the People agree, that the matter must be remanded for resentencing under recently enacted section 1172.75. We agree.

In 2021, the Legislature passed and the Governor signed SB 483, adding section 1171.1 to the Penal Code, which was later renumbered as section 1172.75. (Stats. 2021, ch. 728, § 3, eff. Jan. 1, 2022; Stats. 2022, ch. 58, § 12, eff. June 30, 2022.) Section 1172.75 provides that enhancements imposed before January 1, 2020 under former section 667.5, subdivision (b), are legally invalid (with exceptions not applicable here). (§ 1172.75, subd. (a).) The statute applies retroactively "to all persons currently serving a term of incarceration in jail or prison for these repealed sentence enhancements." (Stats. 2021, ch. 728, § 1.)

Section 1172.75, subdivision (d)(2) states that when a now-legally invalid enhancement under former section 667.5, subdivision (b) must be stricken, the trial court must resentence the defendant "and apply any other changes in law that reduce sentences or provide for judicial discretion." We agree with the parties that there are recent

changes in the law that apply to defendant and may reduce his sentence. A remand for full resentencing is therefore appropriate. (See *People v. Buycks* (2018) 5 Cal.5th 857, 893.)

IV.

DISPOSITION

The judgment of conviction is affirmed, the sentence is vacated, and the matter is remanded for resentencing. The trial court is directed to strike defendant's three one-year prison prior enhancements and otherwise resentence defendant accordingly under the current law.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
Acting P. J.

We concur:

FIELDS
J.

RAPHAEL
J.