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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO ANTONIO MENDOZA,

Defendant and Appellant.

A131868, A134825

(Contra Costa County
Super. Ct. No. 1005404)

In re ROBERTO ANTONIO MENDOZA,
on Habeas Corpus.

A jury convicted defendant Roberto Antonio Mendoza of seven counts of sexual acts with a child 10 years old or younger (Pen. Code,¹ § 288.7, subd. (b) (§ 288.7(b)), and of five counts of lewd acts with a child under the age of 14 (§ 288, subd. (a) (§ 288(a.)) The jury also found true the allegations of substantial sexual conduct (§ 1203.066, subd. (a)(8)) as to each count. After vacating and dismissing one of the sexual acts counts (§ 288.7(b)), the trial court sentenced defendant to an aggregate determinate sentence of 14 years, and an indeterminate sentence of 90-years-to-life for a total commitment of 104 years-to-life. Defendant appeals raising numerous claims, including evidentiary, instructional, and sentencing error. He also petitions for habeas corpus on the ground that he was denied his constitutional right to the effective assistance of

¹ All further undesignated statutory references are to the Penal Code.

counsel at trial. The proceedings have been consolidated for decision.² We affirm the judgment in the appeal and summarily deny the habeas petition.

I. EVIDENCE AT TRIAL

A. *The Charged Sexual Offenses*

John Doe was five years old at the time of the sexual offenses. John lived with his mother, Sandra, and her boyfriend, Jose. Jose's mother, Marina, was married to defendant. In August 2009, Sandra, John, and Jose moved into Marina's house, a three-bedroom home she shared with defendant. Sandra, John, and Jose slept in the same bedroom.

In October 2009, Sandra got a job at a restaurant and John started kindergarten. Jose, Marina, and a lady from John's school would share babysitting duties when Sandra was working. From time to time, defendant would also babysit John alone when Marina was not at home.

Sandra thought defendant watched John alone on about five occasions between the end of August and December of 2009. When Sandra moved in with Marina and defendant, Sandra was unaware that defendant was a registered sex offender.

About two months before Jose, Sandra, and John moved out of Marina's house, John told his mother that defendant had touched his "pee-pee," meaning his private part. John disclosed this incident to his mother, as they walked past defendant, who was sitting in the dining room. Defendant, however, did not react to John's statement. John then went on to say that he and defendant had been "playing." Sandra testified that she believed John meant that defendant had touched him accidentally while grabbing a blanket. At that time, Sandra was not concerned about the incident. She explained she would not have let John stay there if she felt he would not be safe and comfortable there. Sandra trusted defendant,

² On the court's own motion, we consolidated defendant's habeas petition (*In re Mendoza*, A134825) with this direct appeal.

but at trial she testified that he had “fooled” her because he “seemed very religious.”

Sandra further testified that when she was living with Marina and defendant, she got along with them without any problems. After living with defendant for a while, John became attached to him and sometimes called defendant “grandpa.” Sandra, John, and Jose moved out of Marina’s and defendant’s home on the last day of November 2009.

On December 4, 2009, after Sandra, John, and Jose had been living at their new home for about five days, defendant came by to see the place. While he was there, defendant offered to babysit John the following day while Sandra was at work.

At about 8:00 a.m. on December 5, 2009, Sandra dropped John off at defendant’s house. Marina was not home when Sandra arrived. Sandra did not return until about 5:15 p.m. When Sandra arrived, John came running to the door. Defendant was lying on the couch. John was really excited, saying, “mommy, mommy, I found my underwear.” When Sandra asked where they had been, John said they were behind the pillow on defendant’s bed. Defendant seemed surprised and sat up.

At that time, Sandra was about two months pregnant. She was feeling really tired, so she just thanked defendant for watching John, and then she and John left for home. On the short drive to their nearby residence, Sandra asked John what he and defendant were playing that required him to take off his underwear. John said defendant was “playing to eat my pee-pee;” John was referring to his private part. Sandra asked John where they were playing, and he told her it was in the bed. John told Sandra that defendant had, in fact, eaten his pee-pee.

When Sandra and John got home, Sandra asked John to let her see his penis. John told her it hurt. Sandra looked at John’s penis and noticed that it was red and irritated, and the foreskin, in particular, was a little swollen. Sandra testified that, from the time when she and her family moved into the house with Marina and defendant until John

made these particular complaints, John had never previously complained to Sandra about any problems with his genital area or about his “pee-pee” being sore.

Sandra called her boyfriend, Jose, and told him what John had said. After talking to Jose, Sandra continued asking John what else happened. At trial she testified that John told her defendant put his finger somewhere near his “butthole,” and he also said some “white stuff” came out of defendant’s penis. Sandra told John she did not want to hear any more.

Sandra called Jose again and told him that John was going into details about things that she could not imagine John was capable of making up. Jose said he was going to call defendant. Sandra replied that she was going to call the police. At trial, she testified that she was scared and needed someone to be there, so she drove back to work and had her boss call the police.

The police instructed Sandra to go home and told her they would be there within ten minutes. As she was driving home, Sandra saw defendant at a stop sign. Sandra parked, and defendant parked right behind her. Defendant asked her about what John had been saying. Defendant was “really upset.” Sandra told him that John had been saying that defendant was “touching . . . his pee-pee.” John then said, “yeah, remember, you were . . . eating my pee-pee.” John directed these comments toward defendant. Although visibly upset, defendant said nothing in response. Sandra knew the police were on their way to her house, so she said to defendant, “you know kids, they say dumb things all the time. So I’m really tired. I just want to go home.”

When the police arrived at Sandra’s house, they spoke to John privately, without her. Sandra went to another part of the house. When Sandra returned, John was demonstrating to the officers by using his mouth as if he were sucking on something.

After the officers left, Sandra took John to the Contra Costa County Regional Medical Center. He was examined there by a nurse and a doctor. Sandra and John were there from about 7:00 p.m. until 1:00 or 2:00 a.m. Two days later, Jose took John to be interviewed at the Children’s Interview Center. Sandra had a doctor’s appointment that day, so she could not go with John to the interview.

B. Police Investigation

On December 5, 2009, Richmond Police Officer Cliff Calderan, was dispatched to Sandra and John's house to investigate allegations of sexual abuse of a child. When he arrived, Officer Calderan first spoke to Sandra and obtained a short explanation of what John had told her and why he had been dispatched there.

Officer Calderan then began the process of interviewing John. At the time of the interview, Officer Calderan was in full uniform, which included a silver badge and police patches on both shoulders. He was also wearing a duty belt with a gun, magazine holders, handcuffs, "OC spray," and possibly a taser.

When the interview began, John was sitting on the couch. Officer Calderan sat down beside him and asked how John was doing. He then asked John whether he knew the difference between the "truth" and a "lie." John said yes, and Officer Calderan had John demonstrate his understanding of those two words. John said that telling lies was bad, and he told Officer Calderan that he would tell him the truth.

During the interview, John's mother was seated in a chair in the front room, which was about five to ten feet away. No other officers were present during the interview. Officer Calderan took notes during the interview, recording his questions and John's responses "verbatim." After his conversation with John, Officer Calderan transcribed his notes "verbatim" into his police report, and then he shredded the notes. At trial, Officer Calderan stated that it would be easier for him to recount what was asked and answered if he could refer to his police report because the report contained verbatim quotes of what had been said during the interview. The prosecutor then referred Officer Calderan to page four of the police report. Initially, Officer Calderan asked John whether he had gone to his grandfather's house that day. John said yes. Next, Officer Calderan asked John what happened at his grandfather's house. John told Officer Calderan that his grandfather put "his . . . pee-pee in his mouth," and "his" penis was hurting. To clarify the antecedents of these pronouns in Officer Calderan's testimony, the prosecutor asked, "And when he said that, was he talking about his own penis in his grandpa's mouth?" Officer Calderan testified, "Yes, he

was.” Officer Calderan added, “ ‘John’ pointed to where the penis is located on the male body.” Officer Calderan then testified, “I asked ‘John,’ did your grandfather put *your* pee-pee in *his* mouth,” and “ ‘John’ said yes.” Referring to his report, Officer Calderan stated, “I asked ‘John’ how many times his grandfather had put *his* penis in *his* mouth.” Officer Calderan clarified that when he spoke to John, he used John’s word “pee-pee” rather than the word “penis.”

When Officer Calderan asked John “how many times did your grandpa put *his* pee-pee in *your* mouth, John responded by saying three times and holding up three fingers. The prosecutor then asked Officer Calderan if he asked John, “[D]id your grandpa take *your* pee-pee out of *his* mouth?” Officer Calderan answered, “I did,” and the officer said John responded “yes.” The prosecutor then asked, “Did you ask ‘John’ if his grandpa had put *his* pee-pee back in *his* mouth?” Officer Calderan said that, in fact, he did ask John that, and John again answered “yes.” When Officer Calderan asked John about how many times his grandpa had done that, John said “three times.”

Officer Calderan also asked John about whether his grandpa had touched his “pee-pee.” John said yes, and “made a fist with his hand, and made a stroking up-and-down motion.” Officer Calderan described it as “a masturbatory motion.” When Officer Calderan asked John about how many times his grandpa had touched his “pee-pee” with his hands, John again told the officer “three times” and held up three fingers. John told Officer Calderan that defendant had taken his hand off John’s “pee-pee” and then put it back on John’s “pee-pee”; John again repeated the stroking gesture. When Officer Calderan asked how long defendant had touched John’s “pee-pee,” John said, “A long, long time.” John told Officer Calderan that defendant was wearing a shirt, but defendant’s pants were off.

Officer Calderan asked John if he could see defendant’s “pee-pee” when this happened, and whether defendant’s “pee-pee” was soft or hard. John said his grandfather’s “pee-pee” was hard.

Officer Calderan asked John if his grandfather was touching his own “pee-pee” while his grandfather put John’s “pee-pee” in his mouth, and John said “yes.”

Officer Calderan estimated that his conversation with John lasted about 15 or 20 minutes. He described John’s demeanor, saying that, “for a five-year-old child, . . . he just really kind of answered my questions straightforward . . .” John was not distracted during the interview; Officer Calderon would ask a question, and John would immediately give an answer. According to Officer Calderan, John seemed to understand everything that Officer Calderan asked him; he did not appear confused. At the time of trial in March of 2011, Officer Calderan had been a police officer for three years. He had not received any training at the police academy in how to deal with child witnesses, but he had received training about how to talk to child witnesses from detectives in the sexual assault unit of his department. They had instructed him not to use big words, to come down to the child’s level, to make the child feel comfortable, to do only a short preliminary examination with the child and then forward a report to the detectives who would arrange for a further interview by someone who specializes in interviewing children. Officer Calderan understood that his role as a patrol officer was not to do an in-depth, detailed interview of a small child.

Following his interview with John, Officer Calderan went to defendant’s house and placed him under arrest.

C. Medical Examination and Report

After the John’s interview with Officer Calderan, Sandra took John to the Contra Costa Regional Medical Center, where he was examined by a nurse and a physician with the Sexual Abuse Response Team (SART).

1. Attending Physician

Dr. Gwendolyn Hamilton, a physician board certified in pediatrics at the Contra Costa Regional Medical Center, testified as an expert in child sexual abuse, in the conduct of child sexual abuse assessment examinations, and in interpreting the results of those examinations.

Dr. Hamilton testified that tissue in the genital area heals very rapidly, so that injury to that tissue may not readily be identified. Generally, the younger a person the quicker they heal. She also testified that in her experience, fewer than ten percent of children who undergo a sexual assault examination exhibit evidence of injury, due in part to the body's healing ability in the genital area. Dr. Hamilton noted that a child's complaint of pain associated with touching was significant because "[a] child would not complain of pain unless there is some indication for it," such as trauma.

Dr. Hamilton stated that, as part of a SART team, she would take a history from the patient. A SART team, she said, consists of a sexual abuse nurse examiner and a medical examiner. Usually the nurse examiner would see the patient first, and then Dr. Hamilton would be called.

On December 5, 2009, Dr. Hamilton participated in a sexual assault examination of John. Nurse Ana Maria Rea was the sexual abuse nurse examiner. John's mother was present during the exam. After Nurse Rea made the initial contact with John and his mother, Dr. Hamilton came in and took a history from John.

When Dr. Hamilton asked John why he was there, he told her, "Grandpa put his mouth on my pee-pee, and it hurt my pee-pee. He put his finger on my butt, and that hurt. My grandpa broke my heart." Dr. Hamilton then conducted a physical examination of John. In examining John's penis and scrotum, Dr. Hamilton noticed "a very tiny laceration at the meatus, or the opening, of the penis where urine comes out, and an area on the corona, which is the ridge of the penis, that . . . [had] a slight abrasion." The skin looked like it had been "traumatized slightly." Dr. Hamilton documented her observations by photographing portions of his body.

Dr. Hamilton's examination of John's rectum did not reveal any observable injury. Dr. Hamilton explained that the absence of an injury to John's anus or rectum was nevertheless consistent with John's report of defendant having put his "finger in [John's]

butt and that it hurt,” because the tissue in that area is capable of expanding without injury.

Dr. Hamilton was not able to definitively say that the abnormal findings of a tiny laceration and redness on John’s penis was caused by sexual abuse. She explained that although the injuries were entirely consistent with the history that John provided about his “grandpa eating his pee-pee,” the injuries could have been caused by something else.

Dr. Hamilton testified that SART personnel are trained in the proper ways of collecting and handling physical evidence such as swabs, and in obtaining a history from a victim. They are specifically taught not to ask leading questions, but to pose questions in a way that invites honesty and openness. As such, Dr. Hamilton asks open-ended questions, and she was familiar with Nurse Rea’s practice of doing likewise. When John was speaking to Dr. Hamilton, he was “interactive and open,” and he was forthcoming with information.

2. *Stipulated Testimony of Examining Nurse*

Nurse Ana Rea was on vacation at the time of trial, and the parties agreed to the following stipulated testimony. “[O]n December 5th of 2009, at approximately 6:50 p.m., John Doe was seen at the Contra Costa County Regional Medical Center. [¶] He was interviewed and examined by Ana Rea, a [SART] nurse. During that exam, John Doe told Nurse Rea that his grandpa, Roberto Mendoza, did the following: [¶] “my grandpa made my pee-pee hurt. My grandpa’s name is Roberto. He wanted me to be naked, and I said no. He made me naked, pulled down my pants. He put my pee-pee on his mouth, and it was really gross. He licked my pee-pee with his tongue, and I told him no. He put his pee-pee on my butt. He put his finger in my butt. It hurt. Grandpa put some lotion on his pee-pee and was shaking it up and down. Yellow stuff came out. He told me not to tell my mommy. My grandpa broke my heart.”

“During the exam, Nurse Rea used a sterile sexual assault collection kit to take swabs of the following areas of John Doe’s body: [¶] She obtained two oral swabs, two anal swabs, two penile swabs, two scrotal swabs, and two additional external genitalia swabs.”

D. Victim's Videotaped Interview at Children's Interview Center

1. Background

Retired Richmond Police Department Detective Kenneth Greco³ testified that on the morning of Monday, December 7, 2009, he was on duty with the Richmond sexual assault unit when he was requested to do a follow-up investigation into allegations of sexual abuse by defendant against John. After gathering reports relating to the ongoing investigation, Detective Greco immediately arranged for John to be interviewed at the Children's Interview Center (CIC). That same day, John's mother's boyfriend, Jose, brought John to the CIC.

Detective Greco testified that children often do not recall everything when initially interviewed. As the interview progresses, more information tends to come out. He also testified that, in his experience, interviews with young children that were conducted at CIC tended to produce more information than interviews that Detective Greco, himself, had conducted. During an interview with a police officer, a child may be nervous and very scared, whereas, at CIC, children can color or play with teddy bears. The interview may take longer, but the child, feeling comfortable with the interviewer at CIC, has a tendency to be more forthcoming. The majority of CIC interviewers are female, and they are not uniformed officers with a gun and a badge. Detective Greco described the child-friendly nature of the CIC, the interview process there, and the specialized training that the CIC interviewers undergo with respect to various interview techniques, such as avoiding the use of leading questions and using language that is easily understood by children.

³ Detective Greco retired on May 5, 2010.

Detective Greco identified the videotaped DVD copy of John's CIC interview as complete and accurate. The videotape was admitted into evidence without any objection, and it was played for the jury, but not reported.⁴

Detective Greco noted that in the various statements John had made to Detective Calderan, to the SART personnel, and at the CIC interview, some things John said were different, but Detective Greco stated that, in his experience, that was not unusual, and the inconsistencies in his statements did not demonstrate that John was not molested.

2. *John's Interview*

Debbie McCann interviewed John at the CIC on December 7, 2009. John had been examined by the doctor prior to the interview. At the time of the interview, John was five years old and in kindergarten. McCann told John that it was really important to tell the truth during the interview. She asked John if he knew what it meant to tell the truth, and at first, John said he did not know. However, he then demonstrated that he knew what a lie is, and he knew it was not right to tell a lie to the teacher at school. He promised to tell McCann the truth, and he said he would not tell her any lies.

When McCann asked John why he came to talk to her, he said he had gone to the doctor and talked to the police about Roberto "eating my pee-pee all the times." Roberto, he said, was his "grandpa." McCann asked John where he was when his grandpa was eating his "pee-pee." John said it happened in his grandpa's room at his grandpa's house. John said he was five the first time his grandpa ate his "pee-pee." John said he did not like his grandpa.

McCann showed John a drawing of a boy, front and back, without any clothes. She asked John to circle his "pee-pee." John said the boy's butt was on the back. He said the doctor grabbed his butt. McCann asked John what his grandpa had done to his butt, and John said, "Uh, put his pee-pee on my butt." John said no when McCann asked whether defendant put his hands on John's body or his "pee-pee." Later, John

⁴ We have viewed the entire video-recorded interview, following along with the transcript of the interview contained in the record on appeal.

said appellant put his hands “on the back.” Still later, John said no when McCann asked whether defendant’s hands touched John’s “pee-pee.”

John initially said his grandpa did not eat his pee-pee on a different day. Later, John said his grandpa did eat his pee-pee on a different day.

John said he did not tell anybody about his grandpa eating his pee-pee. Eventually, though, John did tell his mother, and she took him to the doctor. When asked what his mother said, John started to say something, and then said, “I mean just kidding. Just kidding.” McCann asked what he meant, and John answered, “That he—Roberto put my pee-pee on his—on his mouth.” McCann asked John what he meant when he said that defendant ate John’s “pee-pee all the time.” John’s answer was nonresponsive.

McCann noted that John had been telling her about being in defendant’s room at his house and about them playing. John responded, “Mmm. . . . that’s happens when he do that.” McCann asked, “When he does what?” John replied, “Put his — my pee-pee on his mouth.”

McCann asked John about what happened to defendant’s and John’s clothes. John said his clothes and defendant’s clothes went “on the ground.” When asked what happens next, John said, “Uh, he ate my pee-pee.” Then he added, “All day long.”

John reaffirmed his earlier statement that defendant put his “pee-pee” on John’s butt. When McCann asked him if “something happened with [his] mouth,” John said no. John also said his grandpa’s hands did not touch his (John’s) “pee-pee.” McCann then asked John what the police asked him “about that.” The following colloquy ensued: “A: Uh, he—he puts pee-pee in *my* mouth. [Italics added.] [¶] Q: Put his pee-pee on your mouth? Okay. [¶] A: No, no. Just kidding. [¶] Q: Huh? [¶] A: I mean . . . [¶] Q: Did he put his pee-pee in your mouth? [¶] A No. He put my pee-pee on—at his mouth. [¶] Q: You put—he put your pee-pee on his mouth? Okay. Okay. What did your pee-pee feel like? [¶] A: Uh, bad.”

McCann asked where in defendant’s room John was when defendant put John’s “pee-pee” in his mouth. John said he and defendant were both lying down on the bed. John said it was defendant’s idea to lie down on the bed.

John said that defendant “did that” to him on two days. John said that defendant did “that stuff” to him when he lived with defendant. John said he told his mother, but she did not do or say anything. John did not tell Jose or Marina.

At some point, John saw teddy bears in the interview room. McCann told John he could hold one, and later asked him to pretend he was one of the bears and the other was his grandpa. She asked him to pretend they were on the bed, and she asked John to show her, using the bears, what his grandpa had done. John then identified the “pee-pee” on the bear. He also identified the butts on both bears, referring to “my butt” and “his butt.” John stated, “And then he put his pee-pee on my butt.” He added, “And then I was . . . letting his pee-pee on—on his butt”

McCann asked about “the part about the mouth,” and John said, “And then he was eating my pee-pee.” He also added, “And then . . . he ate it.” Shortly thereafter, McCann stated, “So you just showed me that you put your pee-pee on your grandpa’s butt too?” John answered, “Mmm. Yeah.” McCann sought further clarification of what John said had happened. She asked: “Q: Did you tell me that—did you show—show me that your pee-pee went on your grandpa’s butt too? Yeah? Okay. And that your pee-pee went on your grandpa’s mouth? And did your grandpa’s pee-pee go on your mouth too? (John Doe nods yes.) Yeah? Okay. All right. Okay? Thank you for telling me that. [¶] A: Yeah, you’re welcome.”

E. Defendant’s Videotaped Confession

1. Background

After the CIC interview with John was complete, Detective Greco went to Contra Costa County’s main detention facility and interviewed defendant. He conducted the interview in a room equipped with a camera and a microphone embedded in the walls. The interview was audio-visually recorded. After the interview, Detective Greco reviewed the tape in order to prepare his report. At trial, Detective Greco identified the videotaped DVD copy of his interview with defendant

as a complete and accurate recording of his entire interaction with defendant. The videotape was admitted at trial, and it was played for the jury, but not reported.⁵

During the interview, Detective Greco invited defendant to write an apology letter to John. Reviewing the apology letter in court, Detective Greco said that the letter did not provide any details of abuse, noting “it’s kind of a general letter,” in which defendant referred to what had transpired as “the incident.”

Detective Greco said defendant initially minimized what had happened, but gradually, over about an hour, he provided more information. Detective Greco testified, “By the end of the interview, I would say he was probably the most honest person in two years of doing this.”

On cross-examination, Detective Greco added that defendant was one of the most cooperative persons he had interviewed. On redirect, however, Detective Greco noted that during the interview, defendant minimized his involvement. For instance, he specifically denied penetrating John with his penis, saying he did not want to harm John.

2. *Defendant’s Pretrial Statements*

The interview began with Detective Greco advising defendant of his *Miranda* rights and defendant stating he understood his rights and agreeing to talk to Detective Greco. Defendant said that John’s family had been living at defendant’s house for about a month and that after they found a place to live, John’s mother brought John over to stay with defendant when she went to work. Defendant’s wife was working at the time, so defendant and John were alone in the house. On that occasion, a Saturday, defendant was playing with John. They were on the couch in the living room, when “suddenly” defendant performed oral sex on John. Defendant said he did not know why he did it.

As they were playing, John came to defendant, and defendant started hugging him. Defendant then took John’s pants off. Defendant grabbed John and started

⁵ We have reviewed the entire video-recorded interview of defendant, following along with the transcript of the interview contained in the record on appeal.

tickling him by putting his face to John's body. Then, defendant put his mouth on John's penis for about a minute. John had "a little erection."

After that, defendant asked John to suck on defendant's penis, and John did so twice. At the time, they were on the couch in the living room. Defendant pulled his own pants down to the thigh; his penis was "kind of" hard. Defendant asked John "to eat his pee-pee." John put the head of defendant's penis in his mouth about an inch or two and moved his head up and down. John did this twice; he did it for a few minutes. Defendant denied ejaculating. Defendant said that this was the first time that this happened. He denied that it had occurred earlier when John's family was staying with defendant and his wife. He also denied ever touching John's penis before this particular occasion. Defendant said he loved John like a grandchild.

Detective Greco informed defendant that John told his mother that defendant had touched his "pee-pee" when John and his family were still living at defendant's house, which would have been about a month or two before the instant occasion. When Detective Greco asked defendant why John might have said that, defendant said, "I uh, probably did, yes." Detective Greco then asked, ". . . [F]rom the day that he moved in with you, how long do you think it was before you started to touch him . . . in a sexual manner?" Defendant replied, "After a month or so."

Defendant said the first instance happened when he and John were alone in defendant's bedroom. John's mother had dropped him off early that day, and defendant was asleep. John came into the bedroom, laid down with defendant and watched cartoons. Defendant touched John's penis. Defendant then sucked John's penis, and later, John sucked defendant's penis. Defendant said that these acts occurred about a month after John's family had begun living with defendant. Defendant said these acts "only happened about twice" before John and his family moved. Defendant said he did not ejaculate, explaining that he did not want to do that in front of John.

Defendant also confirmed that once while John's family was still living at defendant's house, he rubbed the head of his penis around the outside of John's butt,

but he did not try to penetrate John. Defendant said he knew it would harm John, and defendant did not want to do that to John because, defendant said, “. . . I feel love for him, . . . like my grandson.” Defendant acknowledged that his penis was hard at that time, and that it felt good by doing that, but he said it never came to his mind to “introduce to him [full anal sex] . . . [b]ecause I know he’s . . . too small . . .” Defendant said that even though it felt good, he also felt like he should not be doing that with John. Defendant said that this incident went on for only a few seconds. He also said it occurred the same day as when defendant sucked John’s penis and vice versa, but after the mutual oral copulation.

Defendant said he did not feel like he was about to ejaculate when he rubbed his penis around John’s anus. Defendant said John was positioned on the bed with his arms down and his butt up in the air. Defendant was on his knees when he came up behind John. Defendant’s pants were down to his knees, and he had pulled John’s jogging suit down to John’s knees.

That same day, defendant said he put lotion on his own penis. Defendant thought John saw him put the lotion on his penis. Defendant said he did not put any lotion on John. Defendant said he did not put the lotion on himself for the purpose of penetrating John. Defendant said sperm never came out of his penis on that day.

Defendant said that he engaged in sexual conduct with John a second time before John and his family moved out. Defendant described the second time as when he and John were on the couch in the living room at about 1:00 or 2:00 p.m. on a Saturday afternoon. On this occasion, defendant sucked John’s penis, and John sucked defendant’s penis. Defendant again denied ejaculating on this occasion. Detective Greco told defendant that John said that during this incident, he “saw something like yellow come out of your . . . pee-pee.” Defendant then explained that he “didn’t fully ejaculate,” but that it was “like a little drop of water.”

Defendant stated that on this second occasion, after the mutual oral copulation, he again rubbed his penis against John’s butt, but defendant did not use

any lotion that Saturday on the couch. Defendant was sitting on the couch, and John was standing. Defendant pulled John's pants down and rubbed his penis around, in the crack of John's butt. Defendant said he "went twice like this."

Defendant then described another incident of sexual conduct with John. This was about two weeks before John's family moved out. On that occasion, when they were on the couch in the living room, John sucked defendant's penis, and defendant sucked John's penis. Later, defendant removed John's pants. Defendant positioned himself on his knees in the living room, with his pants pulled down, and John was behind him, naked. Defendant asked John something to the effect of "get on top of me," and to "put [your] pee-pee on . . . my butt." John rubbed his body up and down. Defendant could not feel John's penis rubbing on him; defendant only felt John's belly.

Altogether, defendant said he had done things to John about three times. Later, he said it happened a "few times," adding that it was "[t]hree or four times." He said it only happened at his house—nowhere else.

Detective Greco noted that defendant was a registered sex offender as a result of another case and asked defendant about that case. Defendant said the incident was in 1993. He confirmed that it involved another boy, who was nine years old. Defendant was not related to the boy, but he was a family friend. Defendant admitted that he was convicted in 1994 of felony sexual battery, based upon a plea. Since that time, defendant had been registering every year as a sex offender at the Richmond Police Department.

Detective Greco asked defendant if he had ever sought treatment, and defendant said he had gone for treatment for some time in San Francisco, and the meetings helped, but not completely. He said he "fell again." He said he just gets urges for little boys. He also stated that he, himself, had been molested when he was eight years old by a neighbor. Defendant said he never told anyone about it at the time; his mother was strict, and he was afraid she would beat him.

Detective Greco asked defendant if, in this case, defendant told John not to tell anyone what defendant had done. Defendant admitted that he told John, “ ‘Don’t tell your mom,’ ” but he denied threatening John. He also denied penetrating anyone. He said he did not want to harm John. Defendant described John as a “baby,” and defendant said he told his wife, “This is like [], an angel came to our house. You know? Bring happiness.”

F. Victim’s In-Court Testimony

At the time of trial, John was six years old and in first grade. He wore his Batman cape at trial, explaining that he liked superheroes because they can “save the day and they . . . could help people . . . that are in trouble.”

He demonstrated that he understood the difference between the truth and a lie, and he said it is better to tell the truth than to lie; people who lie, he said, get in trouble. He promised that everything he talked about in court would be the truth.

When John was five, he lived in Richmond with his Dad’s mom and Roberto. While John was living at Roberto’s house, Roberto did something that John did not like—Roberto touched John’s private part with his mouth. When that would happen, John would pull his pants halfway down; Roberto’s pants would be down just like his. Roberto touched John’s private with his mouth “many times. Like . . . infinity.” John was in Roberto’s room when this happened.

At trial, John testified that defendant never touched John’s body with any other part of defendant’s body, and said that defendant did not want John to do anything to defendant’s body. John testified that when defendant would put this mouth to John’s private part, the rest of the family—his mother, father, and Marina— would be in the kitchen. John said that when defendant would put his mouth to John’s private part, John would feel bad.

John also testified that defendant told him not to tell anyone what he was doing because it was a secret. John complied, but eventually he told his mother when his mother came to pick him up and he could not find his underwear. John

said that, when he told his mother that he could not find his underwear, she asked why, and so he told her.

John said that when defendant's mouth touched John's private part, defendant was in defendant's room. John was on defendant's bed, and defendant was urging John to remove his pants.

John testified that he did not see defendant put any lotion on defendant's private part. He further testified that defendant did not touch his private to John's mouth or bottom. John remembered that the police came after he told his mother what defendant had done, but he did not remember talking to the police about what defendant had done.

John remembered having seen a doctor about what had happened. John testified that he told the doctor the truth about what had occurred. John also recalled going to talk to a lady at a place with teddy bears, and Legos, where he and the lady colored together. John said he told her the truth too.

John testified that he had been trying to forget what defendant had done to him because it made him feel "sad." Asked whether defendant was supposed to be touching John's private, John answered "not at all." At trial, John maintained that defendant did not use his hands to touch John's private. John said that defendant only used his mouth to touch John's private. John also testified that defendant did not contact John's butt with defendant's private.

The prosecutor then asked John to circle the private part and the butt on two pictures of a naked boy, front and back. The prosecutor then stated for the record that John had circled the male genitalia and the butt on the pictures, both of which were admitted without objection.

G. *Expert Testimony*

Criminalist Angela Hiteshew of the Contra Costa County Sheriff's Office's crime lab testified as an expert in the area of biological fluid identification and the interpretation of sexual assault evidence. Hiteshew examined John's sexual assault kit, which contained five swabs. Three of the swabs were from the genital area, specifically the penis, the scrotum, and external genitalia. The other two were from the anus and the mouth. Hiteshew examined them for body fluids. She was primarily looking for evidence of semen and saliva.

On the swab from the penis, she did not find any spermatozoa, but she did find two nucleated epithelial cells and a moderate-to-low level of amylase activity. On the swab from the scrotum, her findings were similar—no spermatozoa, but two nucleated epithelial cells, and a very low level of amylase activity. On the external genitalia swab, she found no spermatozoa, but she found twelve nucleated epithelial cells, as well as a moderate-to-low amylase level. On the anal swab, Hiteshew did not detect any spermatozoa or any seminal protein fluid, nor did she find any nucleated epithelial cells, but there was a moderate-to-low level of amylase activity. On the oral swab, as well as an oral smear on a slide that was provided by the hospital, Hiteshew found nothing of significance.

Hiteshew explained that amylase protein is present at a very high level in saliva. However, the level of amylase can degrade over time, especially in moist environments. She further explained that the finding of twelve nucleated epithelial cells on the swab from the external genitalia was significant because one would not ordinarily expect to find such cells on the skin's surface. Surface skin cells are dead, and they have no nucleus. Nucleated epithelial cells are found lining body cavities, like the mouth, vagina, rectum, the gut, the stomach, and any internal areas.

Although one could expect to find nucleated epithelial cells in the urethra, there would not ordinarily be any nucleated epithelial cells on the exterior surface of a penis or the exterior surface of the genitalia. Hiteshew found nucleated epithelial cells on the samples from the external genitalia, the penis, and the scrotum. Based upon the

number of nucleated epithelial cells that Hiteshew found in these three swabs and the additional findings of moderate-to-low level of amylase activity on the swabs from the penis and external genitalia, Hiteshew opined that saliva could be present at those sites. Her findings were consistent with a child who had reported being orally copulated the morning that the swabs were taken, although there was no way for Hiteshew to determine whether her findings were due to the presence of certain other types of bodily fluids. Amylase could be detected in urine, feces, semen, and vaginal secretions, but its presence is about a thousand times greater in saliva. Here, because the amylase activity was no more than moderate-to-low, Hiteshew could not rule out the possibility that the source of the amylase was some bodily fluid other than saliva.

Hiteshew noted that nucleated epithelial cells can be shed with urine, but normally in very low levels. Given the nucleated epithelial cells in the samples she analyzed, she said she would be “more comfortable” saying that the source of those cells was “possibly saliva.” On the other hand, if the amount of amylase actively were smaller than moderate-to-low, she would be more comfortable saying the source was urine. Since she found the activity to be moderate-to-low, she said, “I was confident saying it was possibly saliva.”

H. Defendant’s Prior Sexual Offenses

1. Sexual Offenses Against Oscar L.

Oscar L. was 28 years old at the time trial. When he was about eight or nine years old, he lived in Concord with his father, mother, and his sisters. Oscar first met defendant when Oscar was in about the third grade. Defendant was a good friend of Oscar’s father. Defendant was “around,” so Oscar saw him often.

Oscar’s father did construction work, and he and defendant worked together. Oscar’s family and defendant’s family would also socialize together from time to time. At that time, defendant had a wife and two children—a girl who was old enough to walk and a newborn son.

In the summertime, when Oscar was still little, he would go with his father on certain jobs and would help out, doing things like carrying tools. Early one weekend

morning, probably when Oscar was going from the third grade to the fourth grade, defendant came and picked up Oscar at Oscar's house and took him to defendant's house in Vallejo. The house looked as if defendant had just bought it or as if someone had just finished construction there. The backyard was a mess. There was a large pile of dirt there that Oscar was supposed to move to another side of the house. Oscar's father would be coming to defendant's house later to pick up Oscar.

Oscar testified that he felt awkward and uncomfortable while traveling alone to Vallejo with defendant in his truck, explaining he did not feel very close to defendant. He further explained that he did not feel that defendant was like an uncle with whom he could have free conversations. While en route to Vallejo, defendant tried to touch Oscar's genitals. His hand made contact with Oscar's lap. Defendant tried about two or three times, and each time, Oscar slapped defendant's hand away. Defendant tried to convince Oscar that it was okay. At trial, Oscar recalled how defendant offered money to try to induce Oscar not to resist doing the things defendant wanted him to do. Oscar understood that defendant wanted to fondle him.

Once they arrived at defendant's Vallejo home, Oscar set to work and moved the dirt. After finishing his work, Oscar remembered being alone in the garage with defendant, and as defendant was paying him for moving the dirt he offered to give Oscar some additional money if Oscar would touch defendant. Defendant told Oscar that he wanted Oscar to touch his penis. Oscar refused the offer. Shortly thereafter, Oscar's father arrived.

Oscar did not tell his father what defendant had done because he was very young, and because Oscar was aware that his father had a relationship with defendant, he thought, perhaps, defendant's conduct was okay. Oscar had never experienced anything like that before. He had been pretty sheltered as a child, and he felt that if his father trusted defendant enough to be in Oscar's home, then even though Oscar felt uncomfortable, he believed that defendant's conduct must be acceptable. Oscar added that defendant might have told Oscar not to tell anyone what defendant had done, but he was not sure. If so, then, Oscar said, that might have also been another

reason why he did not tell his parents about defendant's conduct. Eventually, Oscar did tell his father what appellant had done to him, but not until after defendant molested Oscar's sister Rosa.

2. *Sexual Offenses Against Oscar L. and Rosa L.*

On a subsequent occasion, defendant came home with Oscar's father after work and defendant spent the night. Oscar stated that was the only time he recalled defendant ever spending the night at Oscar's house. Oscar had gone to bed about 10:00 or 11:00 p.m. He fell asleep in his own bed with one of his four sisters. At some point, Oscar woke up to find defendant hovering over him with one knee on the side of Oscar's bed and with one of his hands under the covers trying to touch Oscar's penis. Defendant's hand was inside Oscar's pant leg, and defendant moved it from the bottom of the pant leg. Oscar thought defendant's act of touching his penis probably caused Oscar to wake up.

When Oscar pushed defendant's hand away, defendant tried again to touch Oscar, so Oscar got out of bed and tried to run out of the bedroom. Defendant grabbed Oscar's arm, but Oscar held onto the doorknob while defendant was pulling on him. Oscar then broke away from defendant and ran down the hallway to the bedroom where his other three sisters, Alicia, Rosa, and Vanessa, slept. Oscar then jumped into the closet in the girls' room. He was "horrified" and "very scared." He did not want to go back to bed, but he did not know whether he should wake up his parents.

As soon as Oscar jumped into the closet, he saw defendant enter the girls' bedroom. That caused Oscar to become even more afraid. He ran out the door of the bedroom, right past defendant, down the hallway, and into his parent's room. Oscar then woke his mother and told her that defendant had been in his room. Oscar's mother then woke up Oscar's father. By the time Oscar's parents reached the girls' room and turned on the lights, defendant had already gone back to the sofa bed in the living room, where defendant had been sleeping.

Rosa L. was 26 years old at the time of trial. She knew defendant in 1993, when her family was living in Concord. Rosa said he had been a family friend for many years. She did not see him as much as her brother did, however, because her brother would go to work with their father and defendant.

Rosa recalled defendant having stayed at their house in Concord on three or four occasions when defendant and her father had been working late. Defendant would sleep on a pull-out bed in the living room. Rosa, who was born in September 1984, was just a small girl when defendant would stay at her family's house in 1993. On one of those occasions, Rosa and two of her sisters were asleep in their room, when Rosa became startled by the presence of someone kneeling against her bed. She woke up to find defendant kneeling next to her bed and touching her vagina. He was touching her bare skin underneath her clothes. When Rosa woke up, defendant told her to be quiet. Rosa testified that she was too scared to say anything.

Rosa testified that defendant did not touch her for very long because, unbeknownst to her, her brother, Oscar was hiding in her bedroom closet. Once she woke up and defendant told her to be quiet, she saw Oscar dash out of the closet. As soon as defendant saw Oscar run out of the girls' room, defendant ran back to the living room. When Rosa's parents came into her bedroom, she was in shock, unable to say anything. Only after about two days was Rosa able to tell her parents about what had happened.

The People introduced into evidence, without objection, an 11-page package of documents that included a certified copy of an information filed by the Contra Costa District Attorney on April 29, 1994, charging defendant with two counts of sexual battery (§ 242, 243.4, subd. (a)) by feloniously touching an intimate part of Rosa L., against her will, while she was unlawfully restrained, on or about September 2, 1993. The information also charged defendant with one misdemeanor count of child molestation (§ 647.6) by willfully and unlawfully annoying and molesting Rosa L., a child under the age of eighteen, on or about September 3, 1993.

The admitted documents also contained a copy of a minute order from June 20, 1994, memorializing defendant's entry of pleas of no contest on April 14, 1994 to the charges in the information and a certified copy of the order of probation, showing that among the conditions of defendant's probation, he was to participate in treatment, was to register as a sex offender, was not to have any contact with children under the age of eighteen (including his own children) unless another adult is present, and he was to serve nine months in county jail.

II. DISCUSSION

A. *Corpus Delicti Rule*

Defendant contends there was insufficient evidence to support his conviction with respect to three violations of section 288.7(b) because the corpus delicti had not been proved to establish that John orally copulated him. This claim is meritless.

1. *Applicable Law*

“In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.] Though mandated by no statute, and never deemed a constitutional guaranty, the rule requiring some independent proof of the corpus delicti has roots in the common law. [Citation.] California decisions have applied it at least since the 1860's [¶] . . . This rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened. [Citations.]” (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169, fn. omitted.)

“The California decisions have addressed the independent-proof requirement in various contexts. It has been held that the defendant may not be held to answer if no independent evidence of the corpus delicti is produced at the preliminary examination. [Citations.] At trial, the defendant's extrajudicial statements have been deemed *inadmissible* over a corpus delicti objection absent some independent evidence of the crime to which the statements relate [citations], and we have said that the corpus delicti

rule is one governing the admissibility of evidence [citations]. Whenever an accused's extrajudicial statements form part of the prosecution's evidence, the cases have additionally required the trial court to *instruct* sua sponte that a finding of guilt cannot be predicated on the statements alone. [Citations.] Finally, appellate courts have entertained direct claims that a conviction cannot stand because the trial record lacks independent evidence of the corpus delicti. [Citations.]" (*People v. Alvarez, supra*, 27 Cal.4th at pp. 1169-1170, fns. omitted.)

"The independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. [Citations.] There is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. [Citation.] In every case, once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues. [Citations.]" (*People v. Alvarez, supra*, 27 Cal.4th at p. 1171.)

"We reemphasize that the quantum of evidence the People must produce in order to satisfy the corpus delicti rule is quite modest; case law describes it as a 'slight or prima facie' showing. [Citations.] This minimal standard is better understood when we consider that the purpose of the corpus delicti rule is 'to protect the defendant against the possibility of fabricated testimony which might wrongfully establish the crime and the perpetrator.' [Citation.] As one court explained, 'Today's judicial retention of the rule reflects the continued fear that confessions may be the result of either improper police activity or the mental instability of the accused, and the recognition that juries are likely to accept confessions uncritically.' [Citation.] [¶] Viewed with this in mind, the low threshold that must be met before a defendant's own statements can be admitted against him makes sense; so long as there is some indication that the charged crime actually happened, we are satisfied that the accused is not admitting to a crime that never occurred." (*People v. Jennings* (1991) 53 Cal.3d 334, 368.)

2. *Corpus Delicti of John's Oral Copulation of Defendant Was Established*

Defendant was charged with eight counts of oral copulation or sexual penetration of a child age ten or younger (§ 288.7(b)). The prosecutor elected to proceed on the theory that, as to six of these counts, three were based upon evidence that defendant orally copulated John's penis, and three were based upon evidence that defendant had John orally copulate defendant's penis. The jury convicted defendant on all six counts. Defendant argues his conviction for the three counts involving John's oral copulation of defendant violated the corpus delicti rule because John's "testimony at trial was somewhat limited in describing the multiple sexual offenses charged" and, thus, this testimony did not establish that John orally copulated defendant.

Despite John's inexact trial testimony, we disagree that the corpus delicti had not been established that John orally copulated defendant. First, Officer Calderan's testimony clearly established that John told him that defendant put his penis in John's mouth three times. Second, in the recorded interview at the CIC, which was shown to the jury, John at one point said that defendant "puts pee-pee in my mouth," but then said, "No, No. Just Kidding." When the interviewer asked, "Did he put his pee-pee in your mouth?" John replied, "No. He put my pee-pee on . . . his mouth." Then, later, in summing up, the CIC interviewer asked, "Did you tell me that—did you show—show me that your pee-pee went on your grandpa's butt too? Yeah? Okay. And that your pee-pee went on your grandpa's mouth? *And did your grandpa's pee-pee go on your mouth too?* (*John Doe nods yes*) *Yeah? Okay. All right. Okay? Thank you for telling me that.*" (Italics added.)

On appeal, defendant does not deny that the record contains verbal and non-verbal evidence from John affirming that defendant had him suck defendant's penis. Rather, he claims this evidence was insufficient to establish the *corpus delicti*. Not so. Although defendant contends the interviewer's questioning was compound and leading, that John's responsive nod was unreliable and inadmissible hearsay, and that John made other contradictory statements, we conclude there was prima facie evidence

from which a reasonable juror could infer that defendant committed oral copulation with John by placing his penis in John's mouth. (See, e.g., *People v. Culton* (1992) 11 Cal.App.4th 363, 368-369 [where physical evidence was at least not inconsistent with multiple, rather than single, sexual assaults on child, corpus delicti requirement was satisfied]; *United States v. Norris* (9th Cir.2005) 428 F.3d 907, 914-915 [corpus delicti satisfied where inexact testimony of seven-year-old victim/witness did not exclude possibility she had been molested on two occasions rather than just once].) John's statements to Officer Calderan and to the CIC interview about multiple acts of child molestation, including acts of oral copulation, lent reliability to defendant's confession that John orally copulated him. In the circumstances of this case, we can be confident defendant described the acts of John orally copulating defendant because they actually took place, not because of " 'improper police activity or [defendant's] mental instability.' " (*People v. Jennings, supra*, 53 Cal.3d at p. 368.)

B. CALCRIM No. 359

The trial court instructed the jury on the corpus delicti rule pursuant to CALCRIM No. 359, which included a bracketed clause regarding lesser included offenses: "The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant's out-of-court statements to convict him if you 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 statements alone. [¶] You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt." (Italics added.)

The jury was also instructed on the elements of battery as a lesser included crime of all the charged offenses.

Defendant claims that the reference to a lesser included offense in CALCRIM No. 359 diluted the standard of proof and allowed the jury to convict him of the charged offenses by slight evidence that he committed a simple battery.

As an initial matter, defendant failed to object to the challenged portion of the instruction, and this failure waives the issue on appeal. Nevertheless, we exercise our discretion to review this legal claim and conclude it fails on the merits. (See *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984.)

“In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant’s rights.” (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) We evaluate whether an instruction is misleading by reviewing the jury charge as a whole. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237 (*Campos*)). “ “[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” ’ ” (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) “An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words.” (*Campos, supra*, 156 Cal.App.4th at p. 1237.)

CALCRIM No. 359 correctly expresses the corpus delicti rule. (*People v. Reyes* (2007) 151 Cal.App.4th 1491, 1498.) The corpus delicti is established when it is shown that a crime has been committed by someone, and the rule consists of two elements: (1) the injury or harm; and (2) a criminal agency causing that harm to exist. (*People v. Zapien* (1993) 4 Cal.4th at 929, 985-986.) As discussed above, the purpose of the corpus delicti rule is to assure that an accused does not admit to a crime that never occurred, and the rule is satisfied by a “ ‘slight’ ” quantum of proof. (*People v. Jennings, supra*, 53 Cal.3d at p. 368.)

The bracketed portion of CALCRIM No. 359 merely advised the jury that the corpus delicti rule was applicable to the charged offenses as well as to any lesser included offenses. There is no reasonable probability that the jury would have believed that it

could convict defendant of the charged offenses by simply finding slight evidence that defendant committed a battery.

In any event, even if instructing with the bracketed portion of CALCRIM No. 359 was somehow erroneous (a position we do not take), under the facts of this case, where the evidence of defendant's guilt of multiple sexual offenses was overwhelming, there is no probability a miscarriage of justice occurred as a consequence.

C. Admissibility of John's Prior Statements Under Evidence Code Section 1360

Defendant next argues that John's statements to Officer Calderan regarding the frequency of the offenses was inadmissible hearsay. Specifically, defendant challenges Officer Calderan's testimony regarding his questions to John about "how many times different acts [] occurred," to which John "repeatedly responded, 'three times,' holding up three fingers." According to defendant, these statements were not sufficiently reliable to be admitted into evidence under Evidence Code section 1360.⁶ Although defense counsel failed to specifically object to the reliability of John's statements, we nevertheless address defendant's claim on appeal and conclude that it is without merit.

⁶ Evidence Code Section 1360 provides: "(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply: [¶] (1) The statement is not otherwise admissible by statute or court rule. [¶] (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability. [¶] (3) The child either: [¶] (A) Testifies at the proceedings. (B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child. [¶] (b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement. [¶] (c) For purposes of this section, 'child abuse' means an act proscribed by Section 273a, 273d, or 288.5 of the Penal Code, or any of the acts described in Section 11165.1 of the Penal Code, and 'child neglect' means any of the acts described in Section 11165.2 of the Penal Code."

1. *Applicable Law*

Evidence Code section 1360 allows for the admission of hearsay statements by a person under 12 years of age describing an act of child abuse or neglect, in a criminal prosecution. This section safeguards the reliability of a child's hearsay statements by requiring that: "(1) the court find, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances surrounding the statement(s) provide sufficient indicia of reliability; (2) the child either testifies at the proceedings, or, if the child is unavailable to testify, other evidence corroborates the out-of-court statements; and (3) the proponent of the statement gives notice to the adverse party sufficiently in advance of the proceeding to provide him or her with a fair opportunity to defend against the statement. [Citations.]" (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367, fn. omitted.)

The parties disagree regarding the standard of review. Although noting that evidentiary rulings are reviewed for an abuse of discretion, defendant, citing two pre-*Crawford v. Washington* (2004) 541 U.S. 36 cases, *People v. Roberto V., supra*, 93 Cal.App.4th at page 1367 and *People v. Eccleston* (2001) 89 Cal.App.4th 436, 445-446, contends a de novo standard of review should apply to the trial court's reliability determination under Evidence section 1360. The Attorney General asserts the abuse of discretion standard applies to questions of admissibility and that the cases upon which defendant relies do not support his position. We agree.

In determining whether the evidence was admissible under Evidence Code section 1360, which is our present concern, we will apply the ordinary abuse of discretion standard. (See *In re Cindy L.* (1997) 17 Cal.4th 15, 35; *People v. Roberto V., supra*, 93 Cal.App.4th at p. 1367; *People v. Brodit* (1998) 61 Cal.App.4th 1312, 1330.) In other words, we must uphold the trial court's findings leading to its admissibility determination, and that determination itself, if they are supported by substantial evidence. (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1249.)

2. *Reliability of John's Statements*

Reliability is determined "by examining 'the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of

belief.’ ” (*People v. Roberto V.*, *supra*, 93 Cal.App.4th at p. 1374.) In evaluating the reliability of a victim’s extra-judicial statements, we consider the following four nonexhaustive criteria: “(1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected from a child of that age; and (4) lack of a motive to fabricate.” (*People v. Eccleston*, *supra*, 89 Cal.App.4th at p. 445.) Additional factors may include the competency of the victim as a witness, and whether the victim could differentiate between truth and falsehood. (*People v. Eccleston*, *supra*, 89 Cal.App.4th 436.)

Officer Calderan spoke with John on December 5, 2009, the same day he excitedly and spontaneously told his mother that he had found his underpants. Officer Calderan testified that he had been trained by the detectives in the police department’s sexual assault unit on how to talk to child witnesses on their level, to make the child feel comfortable, to keep the interview short, and then to forward a report to the detectives who would arrange for a more detailed interview by experts trained in interviewing children.

During the interview, John demonstrated his knowledge of the meanings of, and the differences between, the “truth” and a “lie.” He also stated that telling lies was bad, and he said he would tell Officer Calderan the truth. John’s mother was nearby but not in the same room.

Officer Calderan took “verbatim” notes during the interview and transcribed them “verbatim” into his police report. His police report demonstrated that Officer Calderan asked John, open-ended questions about what had happened at the defendant’s house after his mother left him there alone with defendant. As he told his mother, John told Officer Calderan that defendant touched John’s “pee-pee” with his mouth, and then John’s penis hurt. Officer Calderan then asked John if defendant had put John’s “pee-pee” in his mouth. John said yes. Officer Calderan asked how many times defendant did that, and John answered, three times and held up three fingers.

Officer Calderan then asked John if defendant touched John’s “pee-pee” with his hands. John said, “Yes,” and while making a fist, John moved his hand in an up

and down stroking motion. When asked how many times defendant touched John's "pee-pee" with his hands, John said three times, and again, he held up three fingers.

Not only does the police report of Officer Calderan's interview of John show a consistent repetition of accusations and types of accusations, but John displayed familiarity with sexual conduct, i.e., oral copulation and masturbation, and terminology that would not be expected of a child his age.

Nothing about John's mental state suggested his disclosures were unreliable. He understood that it was better to tell the truth, and he said he would not lie. He was capable of rational conversation and demonstrated a clear understanding about the basic factual matters he was describing. His mental state was consistent with what one would expect from a child victim in these circumstances. Moreover, nothing suggests that John had a motive to lie. Although it is true that when asked during the CIC interview whether he liked his grandfather, John said no, this response reasonably can be interpreted to mean that he did not like defendant because of the things that he had done to him, not because of any vendetta or ill-will.

In sum, John's statements to Officer Calderan met all the criteria of Evidence Code section 1360 and, thus, they were properly admitted into evidence. There was no abuse of discretion here.

D. Admissibility of Defendant's Prior Sexual Offenses Under Evidence Code Section 1108

Defendant next challenges the admission of his prior sexual offenses as irrelevant and highly prejudicial. Defendant claims his prior sexual offenses were not admissible under Evidence Code section 1108 because lewd intent, propensity, and identity were not at issue in the instant case due to his confession. According to defendant, the "only real issue at trial was the number of counts," and as such his "prior misconduct was not probative whatsoever, but . . . was highly inflammatory." This contention is without merit.

1. *Applicable Law*

Subject to Evidence Code section 352, Evidence Code section 1108 permits a jury to consider prior incidents of sexual misconduct for the purpose of showing a defendant's propensity to commit offenses of the same type, and essentially allowing such evidence to be used in determining whether the defendant is guilty of the current sexual offense charge. (Evid. Code, § 1108, subd. (a).) Inasmuch as Evidence Code section 1108 conditions the introduction of uncharged sexual misconduct upon whether it is admissible under Evidence Code section 352, any valid objection to such evidence, as well as any derivative due process claim, necessarily depends on whether the trial court sufficiently and properly evaluated the proffered evidence under that section. (See *People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1096-1098.) "A careful weighing of prejudice against probative value under [Evidence Code] section [352] is essential to protect a defendant's due process right to a fundamentally fair trial." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

In evaluating prior sexual offense evidence under Evidence Code section 352, "trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other . . . offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917 (*Falsetta*)). Additionally, the trial court must determine "whether '[t]he testimony describing defendant's uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offenses.'" (*People v. Harris* (1998) 60 Cal.App.4th 727, 737-738.)

On appeal, we review the admission of other acts or crimes evidence under Evidence Code section 1108 for an abuse of the trial court's discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) The determination as to whether the probative value of such

evidence is substantially outweighed by the possibility of undue consumption of time, unfair prejudice or the potential of misleading the jury is “entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence.” (*People v. Fitch* (1997) 55 Cal.App.4th 172, 183.) The weighing process under Evidence Code section 352 “depends upon the trial court’s consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules.” (*People v. Jennings, supra*, 81 Cal.App.4th at p. 1314.) We will only disturb a trial court’s ruling under Evidence Code section 352 where the court has exercised its discretion in a manner that has resulted in a miscarriage of justice. (*People v. Frazier* (2001) 89 Cal.App.4th 30.)

2. *Evidence Properly Admitted*

Defendant does not dispute that evidence of a person’s commission of other sexual offenses is ordinarily relevant in a prosecution against the person for another sex crime. (*Falsetta, supra*, 21 Cal.4th at p. 922, *People v. Fitch, supra*, 55 Cal.App.4th at p. 179.) Nevertheless, defendant argues the testimony of Oscar and Rosa about his sexual assaults against them was irrelevant because he “admitted lewd intent and propensity in his videotaped statement.” According to defendant: “The issue was not identity or state of mind. The only real issue at trial was the number of counts.” As such, he claims that the evidence of his prior sexual offenses “was not probative whatsoever, but it was highly inflammatory.” We disagree.

Preliminarily, we reject defendant’s specious contention that the challenged evidence was irrelevant because he admitted to committing the offenses against John with a lewd intent. As discussed *ante*, the jury was instructed that it could not convict defendant of the charged offenses based solely on his statements. (See *People v. Alvarez, supra*, 27 Cal.4th at pp. 1169-1171.) Thus, other evidence was required to establish defendant’s intent and propensity for sexually molesting children. Evidence of defendant’s sexual offenses was, thus, relevant. (See *Falsetta, supra*, 21 Cal.4th at p. 922.)

The uncharged acts against Oscar and Rosa share significant similarities with molestations of the victim in this case. In each instance, defendant took advantage of a position of trust and preyed on particularly vulnerable victims. Oscar and John were both young children who were left alone with defendant when the offenses occurred. Additionally, defendant initiated assaults against Oscar and Rosa while he was a guest in their home, and while they were sleeping. Defendant seized on these opportunities even when it was particularly risky to do so. Moreover, defendant's refusal to accept no for an answer and his repeated attempts to molest Oscar established his propensity to commit numerous sexual offenses. In the Vallejo incident with Oscar, defendant repeatedly tried to grab at Oscar's genitals even as the boy slapped defendant's hands away. Then, later that same day, defendant offered Oscar money to touch defendant's penis. The Concord incident further established defendant's propensity to commit numerous sexual offenses. Specifically, once Oscar ran away after waking up to defendant fondling him, defendant continued his pursuit of sexual gratification by going into Rosa's bedroom where he then fondled her genitals. As to the victim in this case, defendant committed numerous offenses while John was alone with him and entrusted in his care.

Thus, his prior offenses against Oscar and Rosa were relevant not only because they were sexual offenses, but also because they demonstrated his propensity to prey upon particularly vulnerable victims, committing numerous offenses against them.

We similarly reject defendant's argument that the evidence of his sexual offenses against Oscar and Rosa was so prejudicial the court abused its discretion in not excluding it pursuant to Evidence Code section 352. Defendant does not explain why evidence of his sexual offenses against Oscar and Rosa were, in his words, "highly inflammatory" such that the evidence was unduly prejudicial within the meaning of Evidence Code section 352.

"The 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. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is

“prejudicial.” The “prejudice” referred to in 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.’ ” (*People v. Karis* (1988) 46 Cal.3d 612, 638; *Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1009.)

Here, the sex offense testimony of Oscar and Rosa was probative as to defendant’s propensity to sexually molest the victim in this case. The nature of the prior sex offenses was not unduly prejudicial within the meaning of Evidence Code section 352 because it was unlikely to inflame the jurors’ emotions and thus was unlikely to motivate them to use it, “not to logically evaluate the point upon which it [was] relevant, but to . . . punish [defendant] because of the jurors’ emotional reaction.” (*Vorse v. Sarasy, supra*, 53 Cal.App.4th at p. 1009.) Indeed, the testimony regarding the prior sexual offenses were not nearly as graphic and incendiary as that regarding the charged offenses. We conclude that while evidence of the prior sexual offenses was undoubtedly damaging to defendant, it was not unduly prejudicial within the meaning of Evidence Code section 352.

In sum, the trial court properly exercised its discretion in allowing, pursuant to Evidence Code section 1108, the introduction of Oscar’s and Rosa’s testimony regarding defendant’s prior sexual offenses against them.

Accordingly, finding no error in admission of this evidence, we need not conduct any harmless error analysis. (See *People v. Walker* (2006) 139 Cal.App.4th 782, 808 [“ ‘the erroneous admission of prior misconduct evidence does not compel reversal unless a result more favorable to the defendant would have been reasonably probable if such evidence were excluded’ ”].) For the same reasons, we reject defendant’s claim that admission of the challenged evidence violated his due process rights.

E. Evidence Submitted at Preliminary Hearing

Defendant argues that one of his “three convictions for lewd act on a child based upon hand-to-penis contact must be dismissed because there was no evidence supporting a third offense supplied at the preliminary hearing.” Defendant asserts that the evidence at the preliminary hearing “showed three front-to-back acts and two hand-to-penis acts,” but during closing argument “the prosecution argued two front-to-back acts and three

hand-to-penis acts.” Thus, according to defendant, the prosecutor “. . . swapped one of the three front-to-back counts for a penis fondling count.” This contention is meritless.

1. Background

a. Preliminary Hearing

At the preliminary hearing, Officer Calderan testified as follows: “ Q. [by the prosecutor] Okay. And did you ask [John] about any other types of touching [in addition to John’s statement that his penis went into defendant’s mouth three separate times]?

[¶] A. I asked him if he had—if his grandfather, Mr. Mendoza, had touched his penis with his hand. [¶] Q. What did he say to that? [¶] A. He said yes. [¶] Q. Now, when he answered that question, did any gestures accompany his answer? [¶] A. Yes. He

made a fist made [sic] and up and down stroking motion with his hand. [¶] [The prosecutor]: For the record, the officer has made a fist with his right hand, held it in front of his body, and moved it up and down simulating what I would submit is a masturbatory kind of motion. [¶] THE COURT: The record will so reflect. [¶] [The prosecutor]:

Q. Did he do that on his own? [¶] A. Yes, he did. [¶] Q. Did you ask him how many times his grandfather had done that with his hand? [¶] A. I did. He said three times.

[¶] Q. And, again, did you attempt to clarify whether the hand had been removed from his penis between each occasions? [¶] A. Yes. [¶] Q. Now, were you able to

determine, during this point in your conversation, whether the three times were three times in the same day or three separate occasion? [¶] A. From what I got from [sic], it seemed like he meant three times in the same day, but to tell you the truth, I could not—

[¶] Q. So that clarification wasn’t asked? [¶] A. It was a little foggy. I tried to get that, but it was a little foggy. [¶] Q. Okay. Did you ask [John] how long his grandfather had touched his penis? [¶] A. Yes. [¶] Q. And what did he say? [¶] A. A long, long time.”

b. Closing Argument

When relating the evidence to various counts and explaining how the instructions on juror unanimity applied to counts eight through twelve, the prosecutor argued as follows: “The evidence you heard relating to these [five lewd and lascivious acts]

counts is as follows. John Doe told Officer Calderan the defendant touched his penis with his hand three times. That's when he makes the masturbating motion. The defendant admits to touching John Doe's penis, . . . and does also admit that there's three or four incidents of abuse. [¶] The defendant also goes on to say that he had the victim touch his own penis, [¶] I think right there, you have five, five acts. Three acts described—sorry, four acts. Three acts described by 'John,' the defendant touching his penis three times, and one act of having to touch the defendant's penis. All of those, I would submit to you, are substantial sexual conduct. [¶] Now, you also have some additional evidence you heard, which supports Counts 11 through 12, which do not have the substantial sexual conduct allegation. And this is the description of penile-to-anal contact. 'John' described to the nurse grandpa putting his pee-pee on, on his butt. And then at the interview center, I'm sure you remember, he uses the bears to show what was happening, and describes the defendant putting his penis on 'John's' butt, and 'John' having to put his penis on the defendant's butt. The defendant admits to putting his own penis on, on 'John's' butt twice, and admits to having 'John' do it to him one time. So that's three acts, but there's only two counts charged."

2. *Applicable Law*

"Notice of the specific charge [against a defendant] is [the] constitutional right of the accused. (*People v. Puckett* [(1975)] 44 Cal.App.3d [607,] 611.) An information which charges a criminal defendant with multiple counts of the same offense does not violate due process so long as (1) the information informs defendant of the nature of the conduct with which he is accused and (2) the evidence presented at the preliminary hearing informs him of the particulars of the offenses which the prosecution may prove at trial. (*People v. Jordan* (1971) 19 Cal.App.3d 362, 369–370; *People v. Tolbert* (1986) 176 Cal.App.3d 685, 690, fn. 2.) The information plays a limited but important role—it tells a defendant what kinds of offenses he is charged with and states the number of offenses that can result in prosecution. However, the time, place, and circumstances of charged offenses are left to the preliminary hearing transcript. This is the touchstone of

due process notice to a defendant. (*People v. Gordon* [(1985)] 165 Cal.App.3d 839, 870–871 (conc. opn. of Sims, J.), [overruled on other grounds in *People v. Lopez* (1998) 19 Cal.4th 282, 292, and *People v. Frazer* (1999) 21 Cal.4th 737, 765.]) So long as the evidence presented at the preliminary hearing supports the number of offenses charged against defendant and covers the timeframe(s) charged in the information, a defendant has all the notice the Constitution requires. The defendant may demur if he or she believes the lack of greater specificity hampers the ability to defend against the charges. (§ 1004, subd. 2.) Failure of a defendant to demur bars any assertion on appeal of vagueness in the information. (§ 1012.)” (*People v. Jeff* (1988) 204 Cal.App.3d 309, 341-342.)

3. *No Due Process Violation*

Given Officer Calderan’s testimony at the preliminary examination that defendant engaged in at least three acts of hand-to-penis fondling, defendant had ample notice of the prosecution’s theory of the evidence underlying three counts charging lewd and lascivious conduct (§ 288(a)). An accusatory pleading which identifies section 288(a) as the offense charged, on its face, is adequate to provide fair notice with a “ ‘reasonable degree of certainty’ ” such that “ ‘ordinary people can understand what conduct is prohibited.’ ” (*Burg v. Municipal Court* (1983) 35 Ca1.3d 257, 270-271.) The preliminary hearing transcript, together with the information charging defendant with five lewd act counts (§ 288(a)) allowed defendant to adequately prepare his defense.

F. Sentencing

Finally, defendant claims the court should have stayed execution of the sentence for three of the lewd acts counts (§ 288(a)) pursuant to section 654. He argues that the “hand-to-penis contact was inextricably related to the act of oral copulation.”

Section 654 provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” The focus of section 654 is to protect against

multiple punishment in situations where “there are several offenses committed during ‘a course of conduct deemed to be indivisible in time.’ [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

A claim under section 654 is reviewed for substantial evidence. (*People v. Jimenez* (2002) 99 Cal.App.4th 450, 456-457.) In assessing whether the crimes were divisible, the court must make factual determinations on the defendant’s intent and objectives, and the court’s implied factual findings will be upheld if supported by substantial evidence. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271.)

In the instant case, there was evidence that defendant used his hand to rub John’s penis in a masturbatory fashion, and that defendant also orally copulated John. According to defendant, the hand-to-penis contact was merely “preparatory action[]” that was “inseparable from the resultant act” of oral copulation. In *People v. Madera* (1991) 231 Cal.App.3d 845 (*Madera*) the court rejected a similar claim. There, the defendant rubbed the penis of the minor victim before orally copulating him. (*Id.* at p. 854.) In upholding separate sentences for both acts, the court analyzed whether the first act “directly facilitates or is merely incidental to” the second act, i.e., oral copulation, or whether the first act was “intended to sexually arouse either the perpetrator or the victim.” (*Id.* at p. 855.) Only in the first instance does section 654 apply. (*Ibid.*)

In *Madera*, the record established that the defendant sometimes rubbed the victim’s penis before the oral copulation. (*Madera, supra*, 231 Cal.App.3d at pp. 848, 854.) But even with such evidence the court stated that “[t]he fact that the touching or rubbing of [the victim’s] penis preceded the oral copulation and/or sodomy . . . does not establish that the touching of [the victim’s] penis was merely incidental to or facilitative of the later acts.” (*Madera, supra*, 231 Cal.App.3d at p. 855.)

Here, there is substantial evidence to support the implied findings that each act of hand-to-penis touching was separate from each other, and each was a source of independent sexual gratification, rather than merely an act that “directly facilitate[d] or [was] merely incidental to” the other acts. (*Madera, supra*, 231 Cal.App.3d at p. 855.) The three distinct acts of hand-to-penis touching, separated in time from each other (even

though perhaps only briefly), were not inextricably related to the pursuit of orally copulating John. Thus, substantial evidence supports a reasonable inference that defendant's acts of manually touching John's penis were for the purpose of arousal, rather than being preparatory or incidental to the oral copulations.

G. Assistance of Counsel

On direct appeal and in his habeas petition, defendant contends that he was denied effective assistance of counsel to the extent his trial counsel failed to: 1) challenge the corpus delicti; 2) object to the bracketed portion of CALCRIM No. 359 instructing the jury that the corpus delicti rule applied to any lesser included offenses; and 3) adequately object to John's statements as lacking sufficient reliability under Evidence Code section 1360. Inasmuch as we have addressed all of defendant's claims of error and have concluded that they all fail on the merits we summarily deny his petition for writ of habeas corpus based on ineffective assistance of counsel.

III. DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

REARDON, J.

We concur:

RUVOLO, P. J.

HUMES, J.