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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

VALENTIN BARRETO,

Defendant and Appellant.

A135108

(Contra Costa County
Super. Ct. No. 51101591)

I. INTRODUCTION

Appellant Valentin Barreto appeals following his conviction by a jury of multiple counts of sexual abuse (Pen. Code, §§ 288.7, 269, 288, subd. (b)(1))¹ against his two young daughters, JD1 and JD2.² On appeal, he argues his trial was prejudicially tainted by several errors relating to the admission of evidence regarding Child Sexual Abuse Accommodation Syndrome. Appellant also argues that the exclusion of evidence pertaining to a key witness and juror misconduct require reversal. We will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 27, 2010, the Contra Costa County District Attorney filed a felony complaint charging appellant with sexually abusing his two daughters. The complaint was amended several times. The fifth amended information charged 20 counts, 15 involving JD1 and five involving JD2, as follows: six violations of section 288,

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

² The alleged victims were referred to as “Jane Doe 1” or “JD1” (the older daughter) and “Jane Doe 2” or “JD2” (the younger daughter) throughout the proceedings.

subdivision (a) (lewd act upon a child under age 14) (three against JD1 and three against JD2); four violations of section 288, subdivision (b)(1) (forcible lewd act upon a child) (against JD1); four violations of section 288.7, subdivision (a) (sexual acts with a child under age 10) (sodomy) (two against JD1 and two against JD2); two violations of section 288.7, subdivision (b) (oral copulation or sexual penetration) (against JD1); two violations of section 269, subdivision (a)(4) (aggravated sexual assault) (oral copulation) (against JD1); one violation of section 269, subdivision (a)(1) (rape) (against JD1); and one violation of section 269, subdivision (a)(3) (sodomy) (against JD1).

Appellant's two daughters, JD1 and JD2, both testified that their father, appellant, touched them sexually multiple times over the course of several years. In July 2010, JD1 first disclosed this information to a cousin, and was told to tell her aunt. Both girls then gave several statements to a family member, a pastor, police, a social worker, a doctor, and an investigator during the next several months. These statements were either testified to, or, if recorded, introduced at trial for the jury's consideration. Both girls also testified at trial.

Testimony of JD1 and JD2

At the time of trial in August 2011, JD1 was 12. JD1 testified that she had three brothers (Older Brother, Younger Brother, and Baby Brother) and one sister (JD2).³ JD1 was living with her aunt and uncle, Aunt M. and Uncle J.

JD1 testified that the "bad situation" with appellant started when she was six or seven. The "bad things" were appellant touching her "private parts."⁴ It began with

³ In the interest of protective nondisclosure, and for readability, we will refer to certain witnesses using status or a label in lieu of a name. At the time of trial, JD2 was 9, Older Brother was 14, and Younger Brother was 6. The youngest sibling was less than one year old.

⁴ To indicate specifically which parts of the body she was referring to, JD1 circled areas on pictures of the front and back of a female figure and a male figure. JD2 also circled on drawings the parts she called the "private," the "butt," and appellant's "weenie."

appellant asking if she wanted to learn how to kiss. She and appellant were sitting on her bed and appellant kissed her. The rest of the family was at the store.

Appellant touched her private parts with his hands under her clothing. His touching her like that made her “feel real weird.” JD1 said his touching made her privates feel “weird” and that it hurt to pee. Appellant touched both her front and back privates, both underneath and over her clothing. Many times he touched his penis to her vagina.⁵ Sometimes he tried to put it inside her vagina. JD1 said this hurt and she would say, “ow;” appellant responded, “oh, it’s almost in.” Appellant also touched his penis to her bottom and attempted to put it inside her. JD1 told him this hurt, and he responded, “I’m not hurting you.” This kind of touching would happen in his bedroom with the door closed and locked. Appellant would get JD1 into his bedroom by asking her to come give him a massage. JD1 testified that appellant touched her each of these ways more than once and at more than one place where they lived. Sometimes other family members were at home when appellant touched her.

JD1 testified that sometimes appellant had both JD1 and JD2 in his bedroom. Appellant told the girls to kiss each other and touch each other’s private parts. JD2 was four years old when this started. JD1 also testified that her cousin, Cousin C., came into the bedroom and appellant touched Cousin C. The touching happened with JD2 “a couple of times,” and “the same” with Cousin C.

Appellant also touched JD1 on the couch in the living room and in the shower. JD1 said she saw appellant’s penis; she did not know how to explain what it looked like and did not remember if it ever changed. JD1 said liquid would come out of his penis and onto her stomach. Appellant told her that, with the liquid, “I can make you a baby.” JD1 described the liquid as “kind of greenish” and “light green.” Appellant would clean it off her stomach with his shirt. The liquid would come out “every time.”

⁵ Throughout the proceedings, the parties and witnesses referred to the female genitalia almost exclusively as the *vagina*. We acknowledge that the correct term for the external genitals is the *vulva*, but for consistency we will use the parties’ and witnesses’ terminology.

In the shower, appellant put his penis in JD1's mouth. She did not remember if that happened more than once. Also in the shower, appellant put his tongue on her private. JD1 said this happened more than once.

JD1 testified that this touching happened from the time she was six or seven until she was 11 and moved in with her aunt. Appellant told her that if she told anyone, her mother would go to jail. She never told appellant to stop because she was afraid. JD1 said she tried to tell her mother (Mother), but when Mother got pregnant, JD1 got scared that something would happen to the baby if Mother knew. JD1 said she felt mad at appellant and would wish he was dead so the touching would stop.

JD1 also testified that her father touched her chest with his hands, under her clothing or he would tell her to take her clothing off. His clothing was off when he touched her with his penis.

JD1 also testified that when she was about five, she remembered kissing Older Brother. During the time that appellant was touching her, she began touching some of her cousins.

JD1 told no one about the molestations until she was staying at Aunt M.'s house and was playing with her cousin, Cousin M. Cousin M. told JD1 to tell Aunt M. JD1 testified that, before she told Cousin M., her aunt had told her "about ten times" that if anyone in her family touched her she should tell someone. JD1 did not tell Aunt M. right away because she did not feel comfortable. When she told her aunt, Aunt M. said the same thing happened to her when she was a little girl. JD1 said telling Aunt M. made her feel better.

On cross-examination, JD1 said she remembered living with a foster family before Younger Brother was born, but she did not remember seeing adult videos that showed private parts when she was in foster care or telling her mother she did. She did not remember how long she was in foster care. A number of different extended family members lived with her family. JD1 watched novellas on television, but did not remember telling appellant's counsel's investigator that sometimes kids would get touched by their fathers on the novellas. JD1 remembered Aunt M. telling her she had a

feeling JD1 had been molested, that someone was touching her, and that she (Aunt M.) was praying for JD1. Aunt M. told her the same thing had happened to her when she was a girl, but when she told her aunts, they did not believe her and were mean to her. JD1 acknowledged that she told JD2 to tell Aunt M. that appellant was touching her, and that she and JD2 talked together with Aunt M. and her pastor about the touching.

JD2 was nine at the time of trial. She, her sister JD1, Older Brother and Younger Brother were living with Aunt M. and Uncle J. and their three children, who are her cousins. JD2 did not remember the first time appellant touched her, but thought she was six. Appellant touched her “private,” where she “pee[s],” with his “weenie.” The touching happened in her parents’ bedroom with the door locked. JD2 was alone with appellant most of the time when the touching happened, but sometimes JD1 was with her. Appellant tried to put his penis inside her vagina but stopped when she said it hurt. Appellant also touched her “butt” on the outside with his “weenie,” and tried to put it inside her butt. He stopped when she told him it hurt. Sometimes it hurt afterward when she went to the bathroom.

JD2 said something “light green” came out of appellant’s penis “[w]hen he was done touching us.” Appellant would clean it off with his boxers. JD2 never touched “the green stuff.” Appellant stopped touching her when she was eight. JD2 said appellant touched her with his penis in the front and the back more than once. JD2 also said the touching only happened at their home in Pittsburg.

JD2 testified that the same kind of touching that happened on the bed also happened in the shower: appellant put his “weenie” on her “private.”

JD2 did not tell anyone about the touching because she thought appellant would hit them and because appellant told them not to tell.

JD2 saw appellant kiss her sister and put his weenie on, but not in, her sister’s private. JD2 also testified that appellant told her and JD1 to do to each other what he did to them, so they “got on top of each other” and their privates touched. They only kissed each other once, she said. Appellant also wanted JD2 to put her mouth on his weenie; she did it but it felt “not right.”

When JD2 was very little, her uncle from Mexico also touched her the way appellant did. She never told anyone about that. She also said Older Brother would kiss her before her dad started touching her.

The touching stopped when she went to live with Aunt M. and Uncle J. She did not tell anyone about the touching until after JD1 told their aunt because she was afraid appellant would know. JD2 testified that no one asked her if she was being touched or said they thought she was being touched.

On cross-examination, JD2 acknowledged that she used to watch novellas on television at home with her mother, that people kissed each other, and that she saw “a dad and a little girl in bed together on one of those shows.” JD2 remembered telling the police that Older Brother put his penis on her privates. She did not remember the first time appellant touched her or how old she was when it started; JD1 told her it started when she was six. Her uncle in Mexico put his private part on her private part, but not inside her. He kissed her and touched her breast area with his hands. JD2 testified that Older Brother was living with Aunt M. and Uncle J. during the whole time appellant was touching her. JD2 remembered telling the police that only appellant had ever touched her and that she and JD1 had not touched each other. She did not know if she told the truth to everyone who asked her questions about the molestations. She did not remember saying that appellant’s “weenie was green like a turtle.” JD2 remembered talking about the green stuff that would come out and saying it was dark green like the plant in her aunt’s living room. JD2 testified that she saw appellant “getting on top of” Cousin C., “just once.” She remembered saying during an interview that she never saw appellant do anything to Cousin C. JD2 testified that she never saw appellant do anything to a certain other cousin, but she said during an interview that appellant touched this other cousin. JD2 admitted that, when she went to live with Aunt M., she was angry at appellant for spanking her. The first time Aunt M. asked if anyone was touching her, JD2 said nothing had happened to her. JD2 acknowledged that JD1 told her to tell what had happened. JD2 agreed that, when she, JD1, and Aunt M. talked to the pastor, JD2 listened as JD1

told what happened; JD2 then described what happened to her as the same thing that happened to JD1.

Statements by JD1 and JD2 to Other Witnesses

Cousin M.

Cousin M., in sixth grade with JD1 at the time of trial, testified that JD1 is one of her best friends. When they were playing at Aunt M.'s house, JD1 told Cousin M. that appellant touched her. Cousin M. told JD1 to tell Aunt M.

Aunt M.

Aunt M. is appellant's older half-sister. She testified that she had become much closer to appellant's children in the last three years. Appellant's wife (Mother) had asked her for help with their oldest child, Older Brother, who was having trouble with gangs. Older Brother moved in with Aunt M., Uncle J., and their three children.

Aunt M. saw JD1 and JD2 for church on Sundays. JD1 always seemed sad. Mother asked for Aunt M.'s help because JD1 was making disturbing drawings and was always mad. Since Older Brother was doing well at their house, Aunt M. thought it would be a good idea for JD1 to come for the summer.

In the beginning of July, when JD1 had been playing with Cousin M., JD1 told Aunt M. that something was happening with her dad. Aunt M. asked what she meant, and JD1 told her that he would kiss her and touch her private parts. Aunt M. and JD1 were both crying. Aunt M. could not believe her brother would do that to her niece. Aunt M. told JD1 not to worry and that she would help her.

Aunt M. denied ever telling JD1, prior to her disclosure, that she thought JD1 might have been molested. She did, however, ask JD1 several times, "what's up with you." After JD1 disclosed, Aunt M. told her she understood and told JD1 that she had been molested as a child.

Aunt M. testified that she was molested by her grandfather, who was also appellant's grandfather, when she was a child. She denied telling appellant that their grandfather had molested her. She denied asking appellant if he had been molested by their grandfather. She also denied wanting other people to be molested or that she asked

JD1 repeatedly if she had been molested. After JD1 disclosed the molestation by appellant, JD1 told Aunt M. that Older Brother had also touched her and that she had touched Younger Brother. Aunt M. explained to her that people who have been victims of abuse sometimes become abusers.

The day JD1 told Aunt M. about being abused, Aunt M. tried to contact her pastor for advice. That evening, JD2 spent the night at her house. When Aunt M. asked JD2 if something had happened to her, JD2 seemed scared and just looked at her. Later, JD1 comforted JD2 and told her that Aunt M. already knew and would help them. A couple of days later, Aunt M.'s pastor came to the house and talked to the girls. The pastor told Aunt M. to call the police.

Theresa Zamora

Theresa Zamora is the pastor of the church Aunt M. and Uncle J. attend; she has known Aunt M. for about 16 years. Aunt M. had expressed concern about her niece JD1 to Zamora because she seemed sad and was drawing violent pictures. In late July 2010, Aunt M. told Zamora that JD1 said her father was sexually abusing her. According to Zamora, Aunt M. was worried and did not know what to do. Aunt M. asked Zamora to talk to both girls.

JD1 and JD2 were in Aunt M.'s living room together with Aunt M. when Zamora spoke with them. Zamora began by asking JD1 what happened between her and her father. JD1 told her that appellant touched her in the vaginal and anal areas. JD1 said he touched her with the part of his body that he urinates with and that there had been no penetration because it hurt. JD1 described something "sticky" coming out of appellant's penis and getting on her stomach. JD1 told her the abuse started when she was between seven and eight years old; "her father had told her he was going to teach her how to kiss because she was old enough to learn." JD1 said appellant also touched her chest with his hands. JD1 said she had not told anyone because appellant told her she would be put in a foster home and would not see her parents again. JD1 seemed embarrassed or ashamed, and said she had "a lot of hatred" toward appellant "because of what he had done to her."

Zamora also spoke with JD2. All JD2 would say was that appellant did the same thing to her that he did to JD1; she would give no details.

*Dr. James Carpenter*⁶

Pediatrician Dr. James Carpenter is on the advisory board of the Children's Interview Center (CIC), where JD1 and JD2 were questioned. He saw JD1 and JD2 on August 3, 2010. JD1 wanted to have Aunt M. present during the interview. JD1 said her father touched her in a way she did not like starting when she was eight or nine; the touching stopped when she was 10 or 11. JD1 described touching with his hand and "where he goes pee" on her vagina, chest, and rear. He also licked her privates and her chest. JD1 described appellant trying to put his penis inside of her, that it "hurt a lot," and that she told appellant, "ow." JD1 said appellant had her put her mouth on his penis, "and that was nasty."

JD1 told Carpenter that appellant did the same things to JD2. He put them "together to kiss" and "touch privates." Appellant told JD1 "if the green stuff comes in my private, he could make me a baby." Appellant said that if JD1 told her mother, then appellant and her mother could go to jail and she would never see them again. JD1 could not remember the last time appellant touched her.

Carpenter also interviewed JD2 with Aunt M. in the room. JD2 told Carpenter that appellant touched her from ages six to eight. JD2 said appellant touched her "private part" and her "back part where I poop" with "his thing where he goes pee." JD2 said the touches did not make her bleed, but sometimes it hurt to pee. JD2 said appellant kissed her on the mouth but did not put his mouth anywhere else on her body. No one else touched her in a way she did not like, and no one else ever saw the touches happening. JD2 said she told JD1 about the touching, but JD2 did not say JD1 was present during the

⁶ Dr. Carpenter appeared as (1) a percipient witness to statements by JD1 and JD2, (2) the examining physician, and (3) a prosecution expert in the conduct and interpretation of child sexual assault examinations. The percipient witness testimony is described here; the other areas of his testimony are summarized below.

abuse. JD2 did not say appellant made the girls touch each other. Appellant told her not to tell anyone.

Police Investigation

Antioch Police Officer Devany Dee responded to the call on July 22, 2010, from Theresa Zamora regarding the girls' allegations of sexual abuse. Officer Dee interviewed both girls at Aunt M.'s home. Shortly after she interviewed them, another police officer and a social worker from Child and Family Services (CFS) arrived at the scene and conducted further interviews. These interviews were recorded, transcribed, and played for the jury.

Officer Dee first interviewed JD1 on July 22, 2010. JD1 told Officer Dee that her father first touched her when she was six or seven; appellant asked her if she wanted him to show her how to kiss. JD1 said he told her to open her mouth and that his mouth was open. The next day, appellant told JD1 to go into his room and massage his feet, but this was a lie, according to JD1, because he just wanted her to take off her pants and underpants. He put "his thing" "where they pee" on her "where I pee too." JD1 said sometimes he licked her where she goes pee. JD1 could not remember when exactly was the last time appellant had touched her, but she thought it was while she was still in school. She saw appellant touch her sister JD2. Appellant made them kiss each other. JD1 said she would try to avoid appellant's touches by claiming to be sleepy or pretending that something was hurting. JD1 said appellant also touched her "boob" and "in the back in my butt." He tried to put "the part where he pees" inside of her, "but it hurts a lot." JD1 described "green stuff" coming out from the part where appellant pees. Sometimes appellant "doesn't finish" when he gets telephone calls; when that happens, JD1 would go in the bathroom and "just clean myself really good. Really good in the front." JD1 said appellant had also touched Cousin C. when she was six or seven; sometimes the touching happened with all three girls together, sometimes two of them, and sometimes just one.

JD1 said appellant would touch her when her mother was not home. Sometimes it happened when her brothers were home playing or watching movies. JD1 did not tell

anyone besides JD2 because appellant told her that, if she told anyone, he would go to jail and they would be taken away from their mother and would never see her again.

JD1 admitted that she had kissed Older Brother when they were playing house, and once he put “[h]is thing where he goes pee on [her] head.” She also admitted touching Younger Brother.

Shortly thereafter, Officer Dee interviewed JD1 again. Officer Dee asked JD1 if appellant ever made her touch him. JD1 said appellant made her touch “his thing where he peed and sometimes he made me lick the thing where he peed.” JD1 said appellant also made her and JD2 do this in the shower.

Later that day, JD1 was interviewed a third time by Officer Blair Benzler and Michelle Clement, a social worker, with Officer Dee also present. JD1 stated the touching starting when appellant offered to show her how to kiss. She described appellant putting “his thing” in her “private,” and “green stuff” coming out. Sometimes he tried to put his private part inside her, “but it hurt.” When she told him it hurt, he said, “just a little bit more.” When the “green stuff” came out, he wiped it with his shirt and JD1 went to the bathroom and cleaned herself. The interviewers asked her to draw a picture of appellant’s penis. She described him “grab[bing] it” and “shak[ing] it” until the “green stuff” came out; “when it didn’t come out no more, he just cleaned it.” According to Officer Benzler, JD1 gestured with her hand raised in a loose fist, mimicking the process of male masturbation. Appellant told JD1 that if the green stuff went inside her, she could have a baby.

JD1 said she and her sister did what appellant said because they were afraid he would hit them. He did not say that he would hit them, but JD1 was still scared. Appellant would have JD1 put her hand around his penis and sometimes he told her to put her mouth on it. She thought that was “real nasty,” but she was scared to say so. Appellant told her to “come on” and she complied because she was afraid. JD1 described appellant trying to put his penis in her “butt;” he only tried a few times because it hurt so much.

JD1 said sometimes appellant would take a shower with her and JD2. He “put his thing” in her private “and then my sister’s too,” and he made them “touch each other.” Appellant touched her private with his hand and made her and JD2 touch each other’s privates. JD1 said it hurt to pee sometimes; she told appellant, “but he kept doing it.” JD1 also stated that appellant used to touch Cousin C. JD1 admitted touching Younger Brother and kissing Older Brother when they were playing house. She also mentioned that once Older Brother put his “thing” on top of her head.

JD1 said she decided to tell someone now because her aunt told her she felt “something,” like someone had touched her or “someone was going wrong in my life.” Her aunt told her not to tell her mother until she had the baby because “she could get sick and the baby could die.”

Officer Dee also interviewed JD2 on July 22, 2010. Eight-year-old JD2 told Officer Dee that appellant kissed her and touched her “private” and her bottom with “the thing where he pees,” and “something green came out.” She thought she was six years old the first time it happened. JD2 said she was afraid to tell anyone because she thought appellant would hit her. She said she and her sister had not touched each other; appellant did not make her touch her sister, but sometimes she and her sister were together when he touched them. JD2 also said Older Brother touched her and JD1 with his penis. Appellant told her to touch his “thing where he pees and then move it.” After Officer Dee asked several times, JD2 admitted that appellant made her and JD1 touch each other, but “we said no because it’s not good.”

Later that day, JD2 was interviewed a second time by Officer Dee along with Officer Benzler and CFS social worker Michelle Clement. JD2 said appellant touched her in his bedroom when her mother was not home. JD2 did not remember if appellant made her and her sister kiss each other. JD2 described trying to hide with JD1 from appellant by locking their door, but appellant would open the door with something and tell them to go into his room. Appellant told JD2 not to tell anyone. He did not threaten her or say what would happen if she did, but she was afraid he would hit her. Sometimes he hit her with a belt on the backside. JD2 said sometimes, after appellant touched her,

her privates hurt when she went pee. She never took a shower with appellant. After JD1 and JD2 told their aunt about the molestation, Aunt M. told them not to tell their mother yet because it might hurt the baby. JD2 was afraid to talk about it; she only told because her sister told.

During the course of these interviews, the girls were shown human figures and identified the vagina [vulva] and anus as places touched by appellant with his hands and penis.

Antioch Police Detective Robert Green was assigned to conduct a follow-up investigation into the allegations made by JD1 and JD2. He requested a forensic interview for both girls, who were interviewed at the Children's Interview Center (CIC). These interviews were played for the jury.

On July 28, 2010, JD1 was interviewed at CIC by Pat Mori. JD1 disclosed that appellant first touched her when she was six or seven by offering to show her how to kiss. JD1 remembered that it happened in her bed in the morning; she was still in her pajamas. His mouth was open and he put his tongue in her mouth. The next time something happened, appellant was in his room and asked her to come in and give him a foot massage after playing soccer. When she came in, he told her to lock the door and get in bed. He told her to take off her pants and underwear, and she did because she was scared. Appellant got on top of her, put his penis on her "private" and started "moving up and down." Then "green stuff came out" and sometimes it went on her stomach or her leg. Her mother was never home when appellant touched her; sometimes her brothers were home playing games or watching a movie. Sometimes appellant would lick her privates and she had to open her legs. It hurt, so she asked if she could stretch first. Appellant would also touch and lick her "boob." JD1 said "the licking thing" started in the shower and mostly happened there. She described seeing "veins" in his "thing." She also described his privates as "itchy." There was only "a little bit" of hair because he always shaved there. Appellant told her that if he put the "green stuff" in her "private," it "could make [her] pregnant and [she] could have a baby." She said sometimes the "green stuff" went on her face because it came out "like a hose of the water." JD1 said "the

green stuff came out when he was . . . done.” Appellant would get on top of her and move “up and down.” He tried to put his “thing” in her private, but “[i]t just hurt a lot.” Appellant also tried to put it inside her “butt”, but “it hurt too,” so he just put it on top.

JD1 said appellant sometimes made her and JD2 kiss and touch their privates. Sometimes appellant “put his thing on her private.” JD1 described appellant telling JD2 to “lick his thing,” but JD2 refused because she could see “a little thing in it . . . [l]ike he had like water in his thing.” JD2 thought it was “pee,” and she refused. JD1 was not sure what appellant did with JD2 because they were each alone with him. She thought they might have been together with appellant three times. JD1 did lick appellant’s “thing,” and then she would go “to the bathroom and brush[] [her] teeth really good.”

JD1 stated that sometimes Cousin C. was in the room, too, and appellant would tell them to touch each other’s privates and kiss. Sometimes her brothers would knock on the door and JD1 had to pull up her pants and underwear “really quick.” JD1 admitted kissing Older Brother and “do[ing] stuff to [her] cousins” and Younger Brother.

After JD1 told Aunt M. everything, her aunt told her she understood because the same thing happened to her when she was little. Her aunt tried to tell some adults, but they were mean and did not believe her.

JD1 was interviewed again at CIC a few months later, on November 17, 2010. JD1 stated that the first time appellant touched her was to show her “how to kiss.” She thought she was six or seven when this happened. The next time appellant touched her she thought occurred when she was seven. She remembered appellant telling stories when she was in bed, and appellant started touching her privates with his finger. The family was sharing a room; her mother was sleeping on the floor and the kids had bunk beds. JD2 had been in the top bunk bed with JD1, but she moved to the floor to sleep with their mother. Appellant got in the top bunk bed with JD1. She remembered she was wearing green short pajamas.

JD1 thought appellant touched her that way three times when she was seven. She said “different stuff . . . started going on” when she was eight. Indicating on drawings of a girl and a boy the parts of the body she was talking about, JD1 stated that appellant

sometimes tried to put his penis in her “private.” Appellant would touch her when her mother was not there or when she was busy in the kitchen. She said she thought it happened every day, “kind of.” It happened even more when she was 10. She remembered they moved to a “big house” with stairs; the bedrooms were upstairs and the kitchen was downstairs. The touching only happened “a couple of times” when she was 11; it stopped when she moved in with her aunt and uncle. She said appellant touched her privates with his mouth a few times. She remembered it happening in the shower. Sometimes he tried to put his penis inside her “back private part,” but he “pushed too hard and it hurt.” She said appellant had her put her mouth “on his thing.” This happened when she was nine and 10, not when she was seven and eight, and “just a couple of times. Not all the time.”

JD2 was also interviewed at CIC by Pat Mori on July 28, 2010. JD2 said she remembered appellant first touching her “private” with “the thing that he goes to pee” with when she was six and he called her into his room. She was in first grade and they lived in Antioch. She told him to stop but he did not. Appellant would close and lock the bedroom door. The touching happened from the time she was six until eight years old, until she went to live with her aunt and uncle. She described appellant telling both her and JD1 to take off their clothes. When he was done, “something like comes out,” and “he wipes it off with a shirt.” She told appellant she “didn’t want that to happen again.” JD2 drew circles on drawings of a girl and a boy around the parts of the body she was talking about. She also described appellant touching her in the bathtub during a shower. Once appellant told her to put his “thing” in her mouth, but she refused.

JD2 was also interviewed a second time at CIC by Pat Mori on November 17, 2010. JD2 was then nine years old and in third grade. JD2 reiterated that she was six years old when appellant started touching her. He would get on top of her in the bed with his privates touching her privates. JD2 described appellant “put[ting] his hand on his thing and then he would shake it.” “Sometimes like things came out of his thing when he was done.” Appellant touched her until she was eight years old. He did not touch her when her mother was home, but did touch her when her mother left to go to work or to

buy food. She thought it happened about once a week when she was six, sometimes more. Appellant also touched her “back private.” He touched her “back private” more than once, but not as many times as her “front private.” Appellant sometimes wanted to touch JD2 in the shower. He wanted her to “grab his thing” in the shower and in the bedroom. She described appellant’s private part as “like a sausage,” and “it has like lines.” Sometimes when appellant was on top of her, he put her hand on his “thing.” Sometimes he put his thing in her private and sometimes on her private. When he put it in her, it hurt. When appellant was touching her “back private” with his “thing,” JD2 felt like something was “attacking me,” and she could feel his stomach and his hands moving.

Antioch Police Officer Vince Augusta collected a sexual assault kit from appellant at the time of his arrest. He was unable to obtain any pubic hair from appellant because it was shaved off.

Older Brother’s Testimony

Older Brother was 14 at the time of trial. He lived with his family in an apartment in Antioch before moving in with Aunt M. and Uncle J. He had been on the “wrong path,” and his mother thought it would help him to live with his aunt and uncle. Before moving in with his aunt and uncle, Older Brother did not see his father much because his father was always working and was away a lot. His mother did not work outside the house. The family lived in a couple of different places, and sometimes extended family members lived with them. Older Brother testified that, before going to live with their aunt and uncle, JD1 was “always down,” “always sad,” and had been that way for a “couple of years.” She was angry and would draw pictures of killing someone. JD2, he said, was “still the same;” he “never really saw anything wrong with her.” Since going to live with their aunt and uncle, JD1 was better now, she was happy.

Older Brother remembered appellant asking his sisters to give him a massage. Sometimes appellant would get the massage in front of Older Brother; sometimes they went to his parents’ room. This would happen in whatever place they were living. Sometimes one sister would go, sometimes the other, sometimes both. Sometimes, when the phone rang, Older Brother would try to go into his dad’s room to give him the phone.

Sometimes it was locked and his sisters were in there. Older Brother said this happened a “[c]ouple times. I don’t really remember.” He later said it might have been five times. Older Brother did not think anything of it at the time. He said his mother was always doing something, like cleaning or washing clothes, and that she was the one who did the shopping. In his initial interview with the police, Older Brother said his father did not spend any time alone with his sisters or either one of them. Older Brother told police he had never seen his father go into his room and close the door with JD1 or JD2, saying he needed to talk to them with the exception of times when they misbehaved. Older Brother also told interviewers that his father used to spank him, sometimes with a belt, when he was younger. Older Brother was aware that his oldest sister had wet the bed.

Older Brother remembered being in foster care when Younger Brother was born; he and JD1 and JD2 were separated. Older Brother admitted to “kiss[ing] and stuff” with JD1 when he was seven and she was five. He remembered touching JD1’s private parts under her clothes.

Medical Evidence

Dr. Carpenter conducted non-acute physical examinations of both JD1 and JD2 in August of 2010. Neither girl had any abnormalities or physical signs of abuse. Dr. Carpenter testified that he had heard children report the color of semen to be many colors, most often white or gray and sometimes blue or clear, but that this was the first time he had heard semen described as green. He was aware that a gonorrhea infection could cause a yellow-green discharge from the penis.

A defense urology expert testified that semen is not green. It can have a greenish tint in very rare cases of disease. Appellant had chlamydia in 2004, but there was no record of his having green semen.

Dr. Craig Desoer, the pediatrician who saw JD1 and JD2 over the years, testified that he neither heard nor saw anything that alerted him to the fact that the girls were being sexually abused by their father.

Foster Care Evidence

Sandra Andrade was the CFS social worker assigned to appellant's children in 2004. The children were in foster care because the mother had shaken the youngest and had hit the older ones. Andrade met with the family. She would have documented it and reported it if JD1 or the parents ever said JD1 was exposed to pornography or adult movies while in foster care. There was nothing in her files that reflected any such report.

Expert Testimony Regarding Child Sexual Abuse

Dr. Carpenter testified that most of the sexual assault examinations he does on children are non-acute, meaning that there has been a significant time lapse between the sex act and the examination. He explained that, because sexual abuse of children is kept secret, there is often a delay between the abuse and the examination. Dr. Carpenter also testified that it is not very common in the course of a non-acute examination to find injuries from sexual abuse because the body heals rapidly, leaving little forensic evidence. Only 10 percent of non-acute examinations have definitive findings consistent with sexual trauma. Thus, in most non-acute examinations, the most significant evidence of sexual abuse comes from the history reported by the victim.

Dr. Carpenter testified that sexual abuse often leads to stress-related changes in behavior in a child. The most common behavior changes observed are aggression, sadness, sexual acting-out, and the development of bed-wetting.

Child Sexual Abuse Accommodation Syndrome, False Memory, and Suggestibility

Dr. Anthony Urquiza

Testifying for the prosecution, Dr. Anthony Urquiza was qualified as an expert in Child Sexual Abuse Accommodation Syndrome (CSAAS) and children's memory and suggestibility. Dr. Urquiza stated that he was not there to testify about the facts of the case; rather, his testimony would be about "what the research has to say about children who have been sexually abused, what kinds of behaviors . . . they exhibit, what types of situations that they're in, the context that they're in." Dr. Urquiza explained that CSAAS is useful in the context of a child who has been sexually abused, that the abuse is assumed. Dr. Urquiza stated that it was "not [his] place" to render an opinion on whether a particular person was abused or whether a particular person committed a crime.

CSAAS is “not a diagnostic tool;” it is a “description of . . . what commonly happens with a child who has been sexually abused.”

CSAAS was first described in a 1983 article by Dr. Roland Summit, who intended the piece as an educational tool for therapists treating sexually abused children to help them understand the dynamics of a sexually abusive relationship in order to better treat the child and better educate the parents, and also to dispel any myths, misunderstandings, or misconceptions on the part of the therapist. Dr. Urquiza described five components of CSAAS: secrecy, a sense of helplessness, entrapment and accommodation, delayed and unconvincing disclosure, and retraction. As a framework for understanding sexual abuse, Dr. Urquiza noted that it occurs as part of a relationship involving an imbalance of power, i.e., “a bigger, stronger, more powerful person,” usually older and in a position of authority, and “a weaker, younger, smaller person.” Dr. Urquiza also pointed out that “by far most children who are sexually abused” are abused by someone with whom they have an ongoing relationship, not a stranger.

Secrecy refers to the efforts of the abuser to keep the child quiet and coerce them into keeping the abuse secret. These efforts can involve overt threats, intimidation, or more subtle coercive strategies that manipulate the child.

Helplessness refers to the child’s inability to do anything about being victimized by someone who is bigger and stronger and has consistent access to the child. Dr. Urquiza discussed the misconception that a child who is approached in a sexually inappropriate way will do something about it to protect him or herself. However, the child cannot fight off the perpetrator, and does not because the perpetrator has ongoing access to the child. The more frequent the contact, the more vulnerable and helpless the child feels.

Entrapment and accommodation refer to the victim’s sense of being stuck in the situation. Children often try to cope with the experience of sexual abuse and the feelings it generates by dissociating or disconnecting the bad feelings, detaching from feelings that are “difficult to tolerate” so that it is “easier to function, . . . easier to live your life.” “If you can shut down the sense of shame or humiliation, then it’s easier to cope with the

sense that you're going to get abused again, or you're going to get abused again after that." The misconception there, Dr. Urquiza testified, is that a child who has been sexually abused will be crying, distraught, visibly upset. Sometimes that is the case, but others have learned to shut down their feelings and talk about the abuse without any access to those feelings, that is, they talk about it with "a flat affect."

Delayed disclosure addresses the misconceptions that a child who is abused will immediately run and tell someone. Dr. Urquiza testified that it is uncommon for a child to tell right away. Unconvincing disclosure refers to how children disclose abuse. Dr. Urquiza testified that often children will say something and then assess the reaction of the person to whom they disclosed. If they feel comfortable, they will tell more, and then more and more. Disclosure is a process for some children. The disclosures can appear unconvincing because each one may be different as the child tells about different incidents and becomes more comfortable talking. Children may also make mistakes in disclosing sexual abuse, or there may be inconsistencies, such as in describing how long something lasted or how many times something happened.

Retraction, the last component of CSAAS, refers to the fact that some percentage of children who disclose sexual abuse take back some or all of what they allege happened. Dr. Urquiza testified that the research showed that approximately 20 to 25 percent of children who disclose abuse retract some or all of what they disclose.

Dr. Urquiza also testified regarding false memory and suggestibility. Suggestibility is the idea that a child who is being interviewed about sexual abuse may change his or her understanding of what happened under certain circumstances, if asked improper questions. The child's answers will no longer reflect what is in the child's head, but instead will reflect what the child believes the questioner wants to hear. Suggestibility is of greatest concern when interviewing preschool-age children.

Dr. Urquiza testified that there is no consistent body of research indicating that a memory can be implanted or a child can be manipulated into making allegations that are false or into believing incorrectly that he or she was sexually abused. However, Dr. Urquiza acknowledged that it could happen. He further testified that there was no

research to support the assertion that a parent or guardian who talks to a child about abuse creates a false memory.

Dr. Annette Ermshar testified for the defense and was qualified as an expert regarding CSAAS, memory, and suggestibility. She described CSAAS as Dr. Roland Summit's attempt to describe what he saw in children who were known to have been sexually abused and common misperceptions about sexually abused children. Dr. Ermshar testified that CSAAS is not listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM) and is never used for diagnostic purposes. Rather, it is a clinical opinion developed by Dr. Summit to help clinicians working with children "to have a better understanding of what they may expect to see in known child sexual abuse victims"

Dr. Ermshar testified that children who suffered other forms of abuse would just as likely show signs of the components of CSAAS, and that the appearance of those behaviors would not be inconsistent with a child having experienced no trauma at all.

Dr. Ermshar testified that CSAAS does not have as much relevancy today as it did in the early 1980's because it has not become generally accepted in the scientific community and because the public is much more knowledgeable today about child sexual abuse. In Dr. Ermshar's opinion, CSAAS is misleading in certain contexts if it is applied in situations where the abuse is in question rather than confirmed. Observing the behaviors or symptoms, and then assuming that abuse must have occurred, "is an abuse of the science," according to Dr. Ermshar. She also noted that there have been very few scientific studies about CSAAS, that the data is conflicting, and that retraction has been largely discredited—less than four percent of child sexual abuse victims retract.

Dr. Ermshar also testified about memory and suggestibility. Suggestibility, according to Dr. Ermshar, refers to the "science behind memory," and how memories are subject to the stories, statements, and suggestions we hear from other people. There are many stages involved in the creation and storage of memories which are subject to distortion. Memory in children from ages three to eight is "really variable" and "subject to a lot of fantasy." Memory starts to improve in adolescence as the brain further

develops, but the child's frontal lobe, which is necessary for accurate memories, is not fully developed until late adolescence/early 20's. Suggestibility is not limited to young children, but, in general, the younger the child, the more suggestible.

Based on stories they have been told, children can come to believe that something is true and it becomes part of their memory. Dr. Ermshar discussed a study showing that, as a result of repeated leading questions or suggestions by a trusted adult, a child can come to believe that she was abused and create descriptions of events that did not occur.

Dr. Ermshar testified that studies have shown that children may be highly susceptible to suggestion. Leading or repeated questioning can suggest answers to a child. Memory can also change over time or if new information is provided. False memories can become elaborate and very detailed. Progressive disclosure, meaning that a child discloses more and more through repeated interviews, does not mean the disclosures are true. Dr. Ermshar agreed with Dr. Urquiza that it is uncommon for a child to be abused with anyone else present. The presence of another person in the room, including another child, is a central detail a child is likely to remember.

Dr. Ermshar testified that the use of adult language by a child suggests that the child has adopted the perspective of an adult questioner. A child's awareness of something coming out of a penis may be due to exposure to pornography or other sources. If a child has been molested in the past, that child is more suggestible to believing that she had been molested again.

Dr. Ermshar discussed a study indicating that where child sexual abuse allegations are made in the context of parental separation, only 11 percent were considered substantiated, 34 percent were suspected, 36 percent were unsubstantiated but made in good faith, and 18 percent were considered to be intentionally false. Another study involving post-separation litigation indicated that the number of unfounded allegations, both intentional and good faith errors, ranged from 36 to 79 percent.

Dr. Ermshar testified that an 11-year-old would not typically be aware of the so-called "cycle of violence," that is, the concept that a person who is sexually abused may

abuse others. Similarly, an 11-year-old would not typically be aware of the idea of sexual addiction.

Appellant's Testimony

Appellant testified that he came to the United States from Mexico in 2002. After Younger Brother was born in 2004, his older children were placed in foster care for about three and a half months. When they returned, he and Mother got along well for three years. Appellant was working and was the main source of support for the family. In 2008-2009, appellant's family lived in an apartment with his brother's family and his sister-in-law's family.

Aunt M. is appellant's older half-sister; they have the same grandfather. She left Mexico to come to the United States when appellant was very young. After coming to the United States, appellant worked for some time for Aunt M.'s husband, Uncle J. Often appellant would not get paid and he had to go to Aunt M. to get his money. The last time this happened, Aunt M. told him she did not want him to work for Uncle J. anymore. Appellant agreed and got a job in a cabinet shop and then at a grocery store. Appellant worked a lot and was rarely home.

Appellant testified that he and Mother started having problems in their marriage in 2007. He began seeing other women and only came home two or three times a week. Aunt M. told Mother she should divorce him; Aunt M. urged appellant to go to her church so he could change his life.

On several occasions, Aunt M. asked appellant if he had been sexually abused by their aunts, uncles, or grandfather in Mexico. Aunt M. told him their grandfather had abused her. Appellant told her several times that he had not been abused. In a final conversation two or three months before his arrest, appellant got angry and told Aunt M. he was sorry she had been abused, but that she should stop asking him whether he had been abused. The two did not speak thereafter.

Appellant testified that he did not permit his son Older Brother to go live with Aunt M. At that time, he was not home very much. By the time he found out about it, Older Brother had already left. He went to get Older Brother, but his son wanted to stay

at his aunt's house because she had nicer things than appellant could provide. Similarly, appellant did not allow JD1 to live with Aunt M.. When he went home after a week away, JD1 was already living with Aunt M.

Appellant testified that, in the months before his arrest, he had not been getting along with his daughters. They heard him fighting with his wife about his infidelity. Both girls asked him if he was with another woman.

Appellant denied sexually molesting either of his daughters or any other child. Appellant denied ever entering his bedroom with either daughter and locking the door. Appellant admitted that he contracted a sexually transmitted disease in 2010 and passed it to Mother. He denied that the disease ever caused his semen or any other discharge to be green. He also denied asking the girls to give him a massage.

Appellant's Character Witnesses

Mother

Mother is appellant's wife and mother of JD1, JD2, and their three brothers. After Younger Brother was born in 2004, she had post-partum depression and the three older children were placed in foster care for about four months. JD1 told her that while in foster care, she had seen television shows with people kissing and taking off their clothes. Mother stated that this conversation happened in front of the social worker, who said she would look into it. JD1's behavior changed noticeably when she returned from foster care—she was mad all the time.

The family lived in a series of small apartments, at times with as many as nine family members in addition to her own family. Mother cleaned houses only when the children were in school; otherwise, she did not work outside the home. Mother was the primary caretaker of the children; her husband did not take care of the children and he was not often with them.

Mother testified that she and her husband fought because he spent so little time at home. They also fought about his infidelity and her having contracted the sexually transmitted disease from him in 2010. She never observed appellant's semen to be green. She never saw appellant do anything sexual with either of their daughters. Appellant was

hardly ever home or alone with them; from 2007 until he was arrested, appellant only came home once or twice a week. The children were angry about how much time appellant spent away from home.

Mother testified that JD1 never had any problem with bed-wetting and she never reported bed-wetting to Aunt M. Aunt M. asked Mother if she could adopt Older Brother and JD1 so they could get papers to study in the United States. Mother did not want Aunt M. to adopt the children, but she permitted Older Brother and then the girls to stay with Aunt M.. Mother described her relationship with Aunt M. as not very good. She testified that Aunt M. was always trying to get involved in her family's life and had told her she should leave appellant and come to work in her hair salon.

Cousin C.'s Father

Cousin C.'s Father, who is appellant's brother, testified that his family (himself, his wife, and three children) lived in an apartment with appellant's family (appellant, Mother, and their children) for more than a year, ending in 2009. Mother's sister and her three children also lived there for awhile. He never observed appellant do anything inappropriate with any of the children. Mother left the house sometimes, but other adults remained in the house. Appellant was rarely alone with the children.

Cousin C.'s Mother

Cousin C.'s Mother, the wife of appellant's brother, testified that appellant was occasionally, but not often, alone with the children. She also testified that her daughter Cousin C. never acted out or showed any behavior changes that would suggest she had been molested.

Betzida Sanchez

Betzida Sanchez testified that she has known appellant for nine years through church. She spent a lot of time with his family over the years. She recalled that, after returning from foster care in 2004, JD1 was more serious, sad and angry. In 2010, she saw the family daily. She would see appellant when he got home from work and they would have dinner together. His children were happy when he got home from work. She never saw any inappropriate touching.

Ramon Garcia

Ramon Garcia has known appellant for about six years; they did construction work together for about two years for Uncle J., Aunt M.'s husband. Uncle J. was often late paying them. Garcia said Uncle J. seemed to be happy when appellant was arrested, "like he was pleased with that." He never saw appellant behave inappropriately around his (Garcia's) children or appellant's own children.

Nancy Barreto

Appellant's cousin, Nancy Barreto, grew up with him in Mexico. She does not spend as much time with appellant as when they were growing up because now they both are married and work. She never saw abnormal sexual behavior between appellant and his children.

Cousin C.

Ten year-old Cousin C. testified that appellant had never touched her inappropriately. Cousin C. also testified that neither JD1 nor JD2 ever told her about inappropriate touching by their father.

III. DISCUSSION

A. *Child Sexual Abuse Accommodation Syndrome.*

Appellant contends the trial court made several errors related to the CSAAS testimony, the testimony violated his due process rights, and a new trial is required.

1. *Legal Principles.*

It is well settled in California that CSAAS testimony is admissible only to rebut common misconceptions the jury might hold about how child victims react to sexual abuse. (See *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301 (*McAlpin*); *People v. Perez* (2010) 182 Cal.App.4th 231, 243-245; *People v. Sandoval* (2008) 164 Cal.App.4th 994, 1001-1002; *In re S.C.* (2006) 138 Cal.App.4th 396, 418; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1747 (*Patino*); *People v. Housley* (1992) 6 Cal.App.4th 947, 957 (*Housley*); *People v. Bowker* (1988) 203 Cal.App.3d 385, 392-394 (*Bowker*)). The admissibility of CSAAS evidence is based on Evidence Code section 801, subdivision (a), which authorizes expert testimony on a subject "that is sufficiently beyond common

experience that the opinion of [the] expert would assist the trier of fact” (See *People v. Brown* (2004) 33 Cal.4th 892, 905 (*Brown*)). Because child sexual abuse victims often behave in ways that seem contrary to what would be expected of a typical crime victim, it has been recognized by the courts that expert testimony is helpful on these issues. (See *Patino, supra*, 26 Cal.App.4th at p. 1745; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 735-736 (*Sanchez*)). “ ‘Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children’s seemingly self-impeaching behavior.’ ” (*McAlpin, supra*, 53 Cal.3d at p. 1301; see also *Patino, supra*, 26 Cal.App.4th at p. 1744.) “CSAAS assumes a molestation has occurred and seeks to describe and explain common reactions of children to the experience. [Citation.]” (*Bowker, supra*, 203 Cal.App.3d at p. 394.)

Thus, the evidence is admissible to rehabilitate a child victim’s credibility when the defense suggests that the victim’s conduct after the incident, such as secrecy or delayed reporting, is inconsistent with his or her testimony regarding the molestation. (*McAlpin, supra*, 53 Cal.3d at p. 1300; see also *Brown, supra*, 33 Cal.4th at p. 906.)

CSAAS evidence is not admissible to prove that a molestation actually occurred. (*McAlpin, supra*, 53 Cal.3d at p. 1300; *Bowker, supra*, 203 Cal.App.3d at p. 391.) Because of the danger that a jury improperly could use such evidence to corroborate the victim’s testimony and infer that the abuse occurred, courts have imposed limitations on the admission of the evidence. (*Housley, supra*, 6 Cal.App.4th at p. 955; *Bowker, supra*, 203 Cal.App.3d at pp. 393-394.) First, the CSAAS testimony must be addressed to specific myths or misconceptions suggested by the evidence. (*Housley, supra*, 6 Cal.App.4th at p. 955; *Bowker, supra*, 203 Cal.App.3d at p. 394.) “Identifying a ‘myth’ or ‘misconception’ has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim’s credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation. [Citations.]” (*Patino, supra*, 26 Cal.App.4th at pp. 1744-1745.) Second, courts have a duty to instruct the jury that the CSAAS testimony is not evidence that the victim’s molestation claim is true, but is

admissible solely to show that the victim’s conduct is not inconsistent with having been molested. (*Housley, supra*, 6 Cal.App.4th at p. 955; *Bowker, supra*, 203 Cal.App.3d at p. 394.)

“[T]he decision of a trial court to admit expert testimony ‘will not be disturbed on appeal unless a manifest abuse of discretion is shown.’ ” (*McAlpin, supra*, 53 Cal.3d at p. 1299; see also *People v. Catlin* (2001) 26 Cal.4th 81, 131 [review decision to admit expert testimony for abuse of discretion].) “The erroneous admission of expert testimony only warrants reversal if ‘ it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’ [Citations.]” (*People v. Prieto* (2003) 30 Cal.4th 226, 247; see *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

2. *Admissibility of the CSAAS Testimony.*

Appellant argues that the trial court improperly admitted the CSAAS testimony without first holding a hearing to establish a foundation for the evidence. Appellant argues that, under *Bowker*, it was error to admit expert testimony on CSAAS because the prosecution had made no showing that the jury needed to be disabused of any myths or misconceptions about the presumed behavior of child victims.

Before trial, the prosecution filed a motion in limine to admit expert testimony on CSAAS, arguing the relevance of the evidence and noting that California courts have long admitted this testimony. Appellant opposed the motion, claiming the testimony was unjustified, unnecessary, and inadmissible, and requested a hearing (on both *Kelly-Frye*⁷ and Evid. Code, § 402 grounds) on these issues. After hearing from both parties, the court granted the motion to admit the testimony, observing that “there’s abundant authority that allows for this type of evidence to come forward,” and denied the request for a separate hearing.

⁷ *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*); *Frye v. United States* (D.C.Cir. 1923) 293 Fed. 1013 (*Frye*).

Appellant argues that the prosecution made no showing that the jury needed to be disabused of any myths or misconceptions about the presumed behavior of child victims. Furthermore, according to appellant, although California courts continue to admit CSAAS testimony, there ought to be serious doubts as to whether the evidence remains necessary or useful given changes in the public's knowledge and perceptions of child abuse. As evidence that the myths and misconceptions Dr. Summit addressed may no longer exist, appellant refers us generally to media discussion on the subject, campaigns to educate children on how to avoid, identify, and respond to sexual assaults, and disclosures by celebrities and others of childhood sexual abuse. If the trial court had held an evidentiary hearing on the CSAAS testimony, appellant argues, the evidence would have been excluded.

Appellant has not shown that the court abused its discretion in admitting the CSAAS testimony. First, the *Kelly/Frye* rule governing the admissibility of scientific evidence is inapplicable here. (See *People v. Harlan* (1990) 222 Cal.App.3d 439, 449 [“The *Kelly/Frye* rule does not apply to this type of evidence.”], citing *People v. Stoll* (1989) 49 Cal.3d 1136, 1161[.] The *Kelly/Frye* rule precludes the admission of CSAAS evidence to prove that a child has been abused, but the evidence remains admissible “to dispel common misconceptions that the jury may hold as to how such children react to abuse.” (*Sanchez, supra*, 208 Cal.App.3d at pp. 734-735.) The CSAAS evidence here was not admitted to prove that either girl had been molested; rather, it was admitted “ ‘for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation. [Citations.]’ [Citation.]” (*People v. Wells* (2004) 118 Cal.App.4th 179, 188.) Evidence Code section 402 *authorizes* but does not *require* the trial court to hold a hearing on the admissibility of evidence. (Evid. Code, § 402, subd. (b) [“The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury”].)

Second, appellant's argument that the prosecution was required to identify the alleged myths and misconceptions at issue, establish the existence of such myths and misconceptions, and then limit the expert's testimony to the areas of established jury

confusion is an overly narrow reading of *Bowker*. The court in *Patino* explained that “[i]dentifying a ‘myth’ or ‘misconception’ has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim’s credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation. [Citations.]” (*Patino, supra*, 26 Cal.App.4th at pp. 1744-1745.)⁸ Here, the victims’ credibility was clearly at issue due in part to behavior seemingly inconsistent with having been molested, including delayed reporting. The defense was largely based on the theory that the victims’ claims were incredible.

Finally, the myths and misconceptions surrounding child sexual abuse have been acknowledged repeatedly in California case law. (See, e.g., *McAlpin, supra*, 53 Cal.3d 1289, *In re S.C., supra*, 138 Cal.App.4th at p. 418; see also *Brown, supra*, 33 Cal.4th at pp. 905-907.) Appellant’s argument that times have changed and numerous high-profile individuals have shared their stories, and therefore the jury would not have been constrained by any myths or misconceptions about how a child reacts to sexual abuse, is entirely speculative. Although it is certainly the case that public awareness of child sexual abuse is higher now than it was 30 years ago, appellant cites no evidence that the public is now so well informed that CSAAS evidence no longer meets the criteria for admissible expert testimony. Expert testimony is admissible on any subject “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (Evid. Code, § 801, subd. (a); see also *Brown, supra*, 33 Cal.4th at pp. 904-907 [concluding that expert evidence of behavior of domestic violence victims was admissible and noting the close analogy to expert testimony concerning victims of child sexual abuse].) Based on the papers filed and the arguments of counsel, the trial court’s determination, without a foundational hearing, that expert testimony on CSAAS would assist the jury was not an abuse of discretion.

⁸ We note that, in his brief, appellant included this point in a footnote.

In arguing that jurors do not need help understanding apparently paradoxical behavior, appellant discusses case law from other states that exclude CSAAS evidence altogether. However, appellant clarifies that he is not arguing that CSAAS evidence is now inadmissible in California. This is undoubtedly correct as our Supreme Court's precedent is to the contrary (see *Brown, supra*, 33 Cal.4th at pp. 905-906; *McAlpin, supra*, 53 Cal.3d at pp. 1301-1302), and we are bound by its reasoning. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

3. *Scope of the CSAAS Testimony.*

Again relying on *Bowker*, appellant contends that Dr. Urquiza's testimony exceeded the scope of permissible CSAAS testimony. The court in *Bowker* held that the expert evidence was invalid for four reasons: (1) it was presented in the prosecution's case-in-chief, thus "suggesting that its purpose was not to rebut defense attacks on the credibility" of the alleged victims; (2) the expert's testimony was filled with comments designed to elicit sympathy for the victims; (3) the expert's testimony closely followed the facts of the case in which he was supposed to be testifying generally about professional findings in the area; and (4) by describing the five stages of CSAAS, the expert "constructed a 'scientific' framework into which the jury could pigeonhole the facts of the case." (*Bowker, supra*, 203 Cal.App.3d at p. 395.) Appellant argues that Dr. Urquiza's testimony suffered from the same defects.

We disagree. Dr. Urquiza's testimony was within the prescribed boundaries of CSAAS testimony. Dr. Urquiza provided a general explanation of how children who are sexually abused may react. He stated that CSAAS is not a diagnostic tool; it is "actually, quite simply, a description of what . . . commonly happens with a child who has been sexually abused." Dr. Urquiza explained that CSAAS is helpful in understanding the dynamics of sexual abuse because "if you don't understand the dynamics, then the things that kids do may not make sense to you." Dr. Urquiza made the point repeatedly that CSAAS starts with the assumption that sexual abuse has occurred; the abuse is assumed. "We're starting with the fact that [a child was] abused, and [CSAAS is] an educational tool to describe what typically or commonly happens." He took care to explain that he

did not know anything about the facts of this case, nor did he need to know them, because he was not testifying about this case: “[I]t’s not my place to render an opinion, and I’m not going to render an opinion related to the specific instance of abuse, whether a particular person was abused or not, or whether a particular person was guilty of a crime or not.” Dr. Urquiza did not vouch for the statements of JD1 or JD2, and did not opine that the behavior of either child manifested characteristics of CSAAS.

The jury also heard from the defense expert on CSAAS. Consistent with Dr. Urquiza, Dr. Ermshar testified that CSAAS was Dr. Roland Summit’s attempt to describe common “misperceptions of how individuals perceive[] child sexual abuse, and what they expected of [children] who were claiming that they were . . . sexually abused.” Her testimony that CSAAS is not recognized in the DSM and should never be used to diagnose whether a child has been sexually abused was also consistent with Dr. Urquiza’s testimony. Rather, the purpose of CSAAS “was to help those clinicians that worked with children to have a better understanding of what they may expect to see in known child sexual abuse victims”

Thus, the jury was informed by both experts that CSAAS has a limited purpose, was only relevant when the abuse was independently established, and could not be used as a forensic or diagnostic tool. In addition, the court instructed the jury at the close of evidence pursuant to CALCRIM No. 1193: “You have heard testimony from Dr. Anthony Urquiza regarding Child Sexual Abuse Accommodation Syndrome. [¶] Dr. Urquiza’s testimony about Child Sexual Abuse Accommodation Syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [JD1’s] and/or [JD2]’s conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of their testimony.”

Appellant’s arguments based on *Bowker, supra*, 203 Cal.App.3d 385, that Dr. Urquiza’s testimony exceeded the scope of permissible CSAAS evidence, are unpersuasive. With respect to the timing of the testimony, the prosecution was not required to wait until rebuttal to introduce CSAAS evidence when paradoxical behavior

by JD1 and JD2, such as the delay in reporting and keeping the abuse secret, would raise obvious questions in the minds of the jurors. (See *Patino, supra*, 26 Cal.App.4th at p. 1745.)

We also disagree that the testimony was designed to elicit sympathy for JD1 and JD2. Appellant cites portions of Dr. Urquiza's testimony describing the difference in power between the abuser and the victim, the fear and helplessness victims feel, that "[w]e expect big people to take care of little people," and that abused children feel "ashamed, embarrassed, disgusted, humiliated." This testimony was general and objective, as CSAAS evidence is required to be. Dr. Urquiza never mentioned the victims by name or suggested or implied that he was describing them specifically. The testimony in this case differed markedly from that in *Bowker*, where the expert not only responded as a hypothetical child ("If they believe me, why are they taking me away from my mom?"), but also stated, when asked about a child's ability to disclose abuse: "It is very important that a young child, say, any age from four to ten, 12 years old, that they be believed." (*Bowker, supra*, 203 Cal.App.3d at p. 389.)

Appellant also argues that Dr. Urquiza's testimony regarding inconsistencies in reporting by child victims of sexual abuse was intended to bolster the credibility of JD1 and JD2 and was improper under *Bowker*. Again, we disagree. As we have discussed, CSAAS testimony is admissible if an issue is raised as to the victim's credibility, as was the case here. Consistent with this limited admissibility, the jury was instructed pursuant to CALCRIM No. 1193 that it could use the evidence to assess the "believability" of the witness. The danger that the jury might use the evidence as corroboration that the abuse in fact occurred is minimized by the court's duty to render a sua sponte instruction limiting the use of the evidence, including an admonition that the testimony is not evidence that the defendant committed the charged crimes. (*Housley, supra*, 6 Cal.App.4th at p. 959; *Bowker, supra*, 203 Cal.App.3d at p. 394.) Moreover, Dr. Urquiza testified generally about inconsistencies in the disclosures of child sexual abuse victims, such as mistakes in correct identification of details, how long something lasted, or how

many times something happened, but he did not testify about the facts of this case, much less suggest that the jury should believe JD1 and JD2.

Next, appellant complains that the third impropriety identified by the *Bowker* court is also present here, i.e., certain parts of Dr. Urquiza's testimony matched too closely the allegations in this particular case, such as that children are abused by family members; they may not report the abuse because they love the abuser; there are no witnesses to the abuse; the abuser has consistent access to the child; a victim's mother would not necessarily be aware of the abuse; and a child is more likely to report the abuse when removed from the abusive situation and when other children have disclosed. Appellant emphasizes two examples in particular. First, in describing "the strategies used to keep kids quiet" in Dr. Summit's original article, Dr. Urquiza explained, "if you tell, your mom and dad are going to get a divorce. So it's sort of the threat of something bad's going to happen. If you tell, you're going to have to go live in an orphanage. It's an old 1983 article, so now we say foster care." Second, the prosecutor asked Dr. Urquiza about a situation in which a parent is abusing the child. Dr. Urquiza responded: "[I]f you're a child, we expect parents are going to take care of kids. We expect big people to take care of little people. . . . I don't mean to say it in such a trite way, but that's kind of what it is. . . . [A]nd we expect people in a position of authority to be the ones who make sure kids are safe, or sexually safe, at least. If that person of authority is the person who is abusing the child, there's not much they can do, that [a] child can do about the situation." Based on the testimony as a whole, we do not find that any of Dr. Urquiza's testimony hewed too closely to the facts of this case. Appellant has selected the examples he cites from among many given by Dr. Urquiza, none of which point specifically to this case. Many of the points made by Dr. Urquiza flow from the fact that CSAAS is based upon (1) an imbalance of power between the abuser and the child and (2) an ongoing relationship between them. We discern no impropriety in noting that 1983's "orphanage" is 2013's "foster care," or that sexual abuse by the child's own parent is a particularly difficult situation from the child's perspective.

Finally, appellant argues that Dr. Urquiza's testimony was overbroad and, as in *Bowker*, established a scientific framework into which the jurors could fit the facts of the case and conclude that the abuse must have happened. The *Bowker* court was concerned that the CSAAS evidence in that case would be used as a predictor of child abuse: "It is one thing to say that child abuse victims often exhibit a certain characteristic or that a particular behavior is not inconsistent with a child having been molested. It is quite another to conclude that where a child meets certain criteria, we can predict with a reasonable degree of certainty that he or she has been abused." (*Bowker, supra*, 203 Cal.App.3d at p. 393.) Here, the court took sufficient care to ensure that the evidence was adequately tailored to the purpose for which it was received and that the jury was properly instructed as to the limited relevance and purpose of the evidence.

In any event, even if the CSAAS evidence was improperly admitted, any error was harmless. (*Watson, supra*, 46 Cal.2d at p. 836.) The jury also heard testimony from the defense CSAAS expert that the behaviors or symptoms identified as part of CSAAS could as likely be present in children who had suffered no trauma or in those who had been subjected to a different trauma. Moreover, other evidence presented in the case strongly supported the verdicts. Two victims testified to extensive sexual abuse over a course of years. Both victims suffered separation from their mother and youngest brother as a result of the disclosures. Both consistently described in detail the abuse in multiple statements given over time. In addition to both victims corroborating each other's accounts, Older Brother saw appellant asking them for massages and taking them into his bedroom and locking the door.

Both victims also had specific sexual knowledge that would not be common for their ages and for which no other source was identified.⁹ Both girls were able to describe acts of sodomy, oral sex, and attempted vaginal intercourse. JD1 described incidents

⁹ Appellant suggests that the girls were exposed to pornography while in foster care. However, the social worker testified that there were no reports of pornography exposure from appellant, his wife, or the children. The only testimony in support was that the girls saw adults kissing and taking their clothes off.

with appellant where he would attempt penetration, respond to her protestations of pain with, “it’s almost in,” ejaculate on her stomach, and explain that if the liquid goes inside her it will make a baby. JD1 was also able to simulate male masturbation and to describe appellant’s shaved pubic hair and that it felt “itchy” on her skin. JD1 described appellant’s penis as having veins in it, which would only appear in a state of erection. She described JD2 refusing to put her mouth on appellant’s penis because JD2 saw something like “water” in the tip of his penis. JD2 corroborated this account, describing appellant’s attempt to get her to orally copulate him and her refusing.

Finally, the jury was instructed pursuant to CALCRIM No. 1193 that Dr. Urquiza’s testimony “is not evidence that the defendant committed any of the crimes charged against him.” Considering this instruction, the defense’s CSAAS expert, and the strong evidence of appellant’s guilt, any error in admitting Dr. Urquiza’s testimony was harmless.

4. *Police Officers’ Testimony.*

Appellant contends the trial court erred in allowing testimony by the investigating police officers regarding their experiences in conducting child sexual abuse investigations. First, appellant argues that neither officer was qualified as an expert before offering expert opinion testimony on the common behaviors of sexual assault victims. Second, appellant contends that the officers’ testimony suffered from the same defects as Dr. Urquiza’s testimony and was invalid witness credibility testimony because the prosecution failed to adhere to the foundational requirements and scope limitations set forth in *Bowker* for testimony on the behavior of sexual abuse victims. The Attorney General responds that neither officer was presented as an expert in CSAAS or testified as such. Respondent further contends, and we agree, that any claims of error regarding the officers’ testimony were waived because none of the specific testimony complained of on appeal was objected to on that basis at trial.

Prior to trial, the prosecutor sought to introduce testimony from the two investigating officers regarding their experience with the behavior of child victims that might appear to be inconsistent with having been sexually abused. After an extended

discussion on the record, the court indicated that it might be inclined to permit such testimony to rehabilitate a witness, citing *McAlpin, supra*, 53 Cal.3d 1289, but that it would reserve its ruling for trial. Thereafter, the court revisited the issue and ruled as follows:

“THE COURT: . . . The next issue that I have on the agenda is the issue of whether a police officer can testify as to what their experience is in child molestation cases, and we’ve talked about this previously. We’ve talked about the *McAlpin* case.

“[Defense Counsel]: Your Honor, I—I would seek a clarification. I—I believe the court has previously ruled that that evidence will be allowed in only as rebuttal, if at all, and that we would take it up at that point if the court’s ruling changed, or did I misinterpret the court’s ruling?”

“THE COURT: I—I believe that I ruled that she [the prosecutor] could present it in her case in chief, and that the—the limitation was is that the officer would have to be—it’s under *McAlpin*, would have to be qualified as an expert because that’s what the *McAlpin* case refers to. And—and, of course, an expert can be someone who has information to provide that it’s beyond a lay witness’s information, and it can be based on their training and experience.

“So she—[the prosecutor] had requested that she be allowed to put this evidence in her case in chief, and she indicated, as I recall, that she possibly didn’t have to establish that he was an expert, but I believe that *McAlpin* does require that.

“[Prosecutor]: And I’ve provided his curriculum vitae to [defense counsel]. I don’t think I’ll have any problems qualifying him. Obviously, I would do that and make the proffer before I start questioning him about any opinions he has, and so [defense counsel] would have the opportunity to conduct her own voir dire at that point.”

At trial, Officer Blair Benzler testified regarding his experience investigating child sexual assault cases. He was not proffered as an expert in this area. On direct examination, he testified that, because of his background, he was assigned to assist on the call involving JD1 and JD2. Officer Benzler arrived after Officer Dee had spoken with the girls. He called an emergency social worker and an interpreter to the scene, and

stayed for the social worker's interview with JD1 and JD2. He authenticated and provided the foundation for admission of the recorded interviews of JD1 and JD2 that were played for the jury, as well as for the drawings done by JD1 and JD2 during those interviews.

On cross-examination, Officer Benzler was asked about the interviews. Defense counsel pointed out that JD2 was asked several times during the interview about whether she and her sister had touched each other, and that JD2 denied it. Officer Benzler clarified that JD2 initially denied it, but eventually admitted it. Defense counsel pointed out that JD2 did not admit it until she was asked multiple times. Officer Benzler confirmed that that was the case, but explained that, in his experience investigating sexual assaults, that was not uncommon; "we may have four or five different sessions at the CIC [Child Interview Center] before the child totally discloses, so that—that was not strange to me that she did that, or it wasn't—it didn't worry me that she did that." Defense counsel continued to question the officer about JD2's incomplete disclosures and denials.

On redirect examination, the prosecutor asked Officer Benzler about partial and delayed disclosures by children over multiple interviews. Following up on defense counsel's questions about JD2's initial denials of touching her sister, the prosecutor asked the officer whether he had observed children embarrassed to admit things they have done to others. Officer Benzler responded: "Very embarrassed, shameful. [¶] And I noticed that in this case with [JD1], she—hum, what I especially took note of is the fact that she had got together with her cousins or her sister, and they had prayed about it, prayed to God, and asked for forgiveness, or said they were sorry. And that— . . . you know, it's pretty deep for me, as far as an investigator goes, hum, for a child to make a statement like that."

The prosecutor examined Officer Benzler regarding whether a child's failure initially to disclose his or her conduct is inconsistent with the fact that the conduct may have occurred. She also asked about Officer Benzler's experience with gradual disclosures by children over multiple interviews.

Detective Robert Green also testified regarding his experience conducting child sexual assault investigations. He also was not proffered as an expert in this area. On direct examination, he testified regarding his involvement in the investigation: he requested a forensic interview of the children and observed the interviews at CIC. He provided authentication and foundation for several follow-up interviews with JD1 and JD2, as well as drawings by JD1 and JD2 during those interviews. After playing the interviews for the jury, the prosecutor asked Detective Green whether he had observed interviews in which children gave reasons for not disclosing their abuse. Detective Green testified that some of the reasons children give are that they still love the abuser, they are afraid of the abuser, or that they do not want to break up the family. He also testified that he had seen cases of delayed disclosure by children and reasons given for why they ultimately disclosed the abuse. Over a defense relevancy and hearsay objection, the trial court permitted this testimony: “I believe this is relevant, going to the testimony that you both presented with regard to the expert testimony about why kids disclose and why they don’t. So it’s corroboration or not, depending. [¶] And it’s not being offered for the truth of the matter, but for that—for that reason. So it will be allowed.”

A trial court’s decision to admit an expert opinion or a lay opinion is reviewed for abuse of discretion. (*McAlpin, supra*, 53 Cal.3d at p. 1299; *People v. Medina* (1990) 51 Cal.3d 870, 887.)

Appellant argues that neither officer was offered as an expert, Officer Benzler’s testimony on redirect recounting JD1 and JD2’s shame and embarrassment was improper, and Detective Green’s testimony regarding why children delay disclosing abuse was improper CSAAS testimony. Both officers were questioned regarding their training and experience with child sexual assault investigations. In addition to percipient witness testimony, both also provided opinion testimony. Appellant is correct that neither officer was offered as an expert, an error or oversight we find perplexing. Equally surprising, no objection on this basis was lodged below. In fact, appellant did not timely object on any of the same grounds he now raises on appeal, and thus the claims are forfeited. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

Finally, even if the claims were not forfeited, and even assuming the trial court erred by admitting the police testimony that appellant characterizes as invalid witness credibility testimony, any error in admitting the testimony was harmless. It is not reasonably probable that one or more jurors, having heard all of the testimony in the case, would have voted to acquit based on Officer Benzler’s testimony that the girls were embarrassed and shameful about their own conduct and/or Detective Green’s testimony about his experience investigating child sexual assault cases. (*Watson, supra*, 46 Cal.2d at p. 836.) For the reasons we discussed in section III.A.2., above, any error was harmless.

5. *Prosecutor’s Closing Argument.*

Appellant argues that the prosecutor made several statements during closing argument that constituted prosecutorial misconduct when she used the invalid CSAAS testimony “to attack the defense and to inflame the jurors[’] passions.” Specifically, appellant contends the prosecutor improperly characterized the defense as based on “myths and stereotypes” about victims and attacked the integrity of defense counsel.

a. *Legal Principles.*

“A prosecutor’s misconduct violates the Fourteenth Amendment to the United States Constitution when it ‘infects the trial with such unfairness as to make the conviction a denial of due process.’ [Citations.] In other words, the misconduct must be ‘of sufficient significance to result in the denial of the defendant’s right to a fair trial.’ [Citation.] A prosecutor’s misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ [Citations.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1202 (*Cole*); accord, *Darden v. Wainwright* (1986) 477 U.S. 168, 181.)

“When the issue ‘focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’ [Citations.] Moreover, prosecutors ‘have wide latitude to discuss and draw inferences from the evidence at trial,’

and whether ‘the inferences the prosecutor draws are reasonable is for the jury to decide.’ [Citation.]” (*Cole, supra*, 33 Cal.4th at pp. 1202-1203.) “ ‘A prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury.’ [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1195.)

b. Factual Background.

In her initial closing argument, the prosecutor stated: “Now I anticipate—and I will talk more about some pretty bold assertions that [defense counsel] made in her opening statement. I’m—I’m going to save that for rebuttal, but I want you to keep in mind as she argues that, basically, the defense case boils down to trying to perpetuate the very types of myths and stereotypes about victims that we know not to be true given the expert testimony in this case. [¶] She put up a chart that basically said nobody saw anything, the allegations didn’t come from nowhere, there were these inconsistencies, no physical evidence, and they were fantastic and false allegations. [¶] Most of the arguments that support any of those assertions really just perpetuate myths and stereotypes about victims. So I would ask that you keep that in mind.”

During rebuttal, the prosecutor argued: “I told you during my initial closing that the defense would perpetuate myths and stereotypes about victims, and that’s exactly what she did. The first myth that she has perpetuated is that nobody saw anything. We’ve heard testimony from both experts and the detective that these are crimes that occur in secrecy, not in front of other adults, and that children act normal around a perpetrator, they don’t necessarily display behaviors of what’s going on. So for her to say, well, somebody would have noticed, that is a myth, plain and simple.” The defense lodged no objection to this argument.

Subsequently, the prosecutor argued: “She goes on to say there’s glaring inconsistencies, which again perpetuates this myth about sex abuse victims. We’ve had testimony, substantial testimony that inconsistencies are common in disclosures, and

disclosures are gradual. This does not prove the children are lying.” The court overruled a defense objection that the argument was improper.

Shortly thereafter, the following exchange took place:

“[The prosecutor]: No physical evidence. Another myth that the defense is trying—

“[Defense counsel]: Objection. Misconduct.

“THE COURT: Overruled.

“[The prosecutor]: —to perpetuate.”

Finally, the prosecutor told the jurors: “All children who are victims deserve justice. And I wish that we lived in a world where people could always tell when children were being abused. I wish we lived in a world where fathers would never do these things to their daughters. [The court overruled a defense objection.] [¶] I wish we lived in a world where every touching of a child resulted in some kind of scientific evidence that couldn’t be questioned. I wish that every time a child was touched, they ran and told. These are just wishes, though. This isn’t reality. The reality is, children are molested behind closed doors through people who love them, and despite substantial sexual conduct, frequently no physical evidence is ever left. [¶] I’ll reiterate to you, corroboration is not required. The testimony of a single witness alone is sufficient to prove the charges in this case. [¶] This case is not about [Aunt M.], or suggestive questioning, or green semen. It’s about getting justice for two little girls. [The court overruled a defense objection.] [¶] Justice for two little girls who went through something no child should ever have to experience. Justice for two little girls who were finally brave enough to tell somebody. [¶] And what is justice? Holding accountable people like the defendant who exploit the weak and the helpless. It’s not about people getting off on technicalities.”

c. *Analysis.*

Appellant argues that the prosecutor used the CSAAS evidence to attack the defense and inflame the jurors’ passions. Specifically, appellant complains that the

prosecutor repeatedly accused defense counsel of perpetuating myths and misconceptions about sexual abuse victims.

We find no prosecutorial misconduct in any of these arguments. The prosecutor's statement in her initial closing argument regarding myths was a direct response to defense counsel's opening statement and immediately followed her discussion of the defense case, specifically, witnesses Dr. Ermshar, appellant himself, and the character witnesses, one of whom, Nancy Barreto, appellant's cousin, testified to her belief that a child would not allow herself to be sexually abused and would exhibit fear of the perpetrator if it were happening.¹⁰ The arguments appellant objects to were fair comment on the evidence, and no reasonable juror would construe them as an attack on anything other than the defense theory of the case.

The prosecutor's remarks on rebuttal were also fair comment on the evidence and the defense theory of the case. Defense counsel argued that there were a number of "pretty obvious falsehoods and glaring inconsistencies" in the case, and that JD1 and JD2

¹⁰ During cross examination of Nancy Barreto, the following colloquy took place:

"[The prosecutor]: Do you think people molest children in front of a group of others?"

"[Defense counsel]: Objection. Relevance.

"THE COURT: Overruled.

"THE WITNESS: The question, do I think that—

"[The prosecutor]: Do you think that people molest children in front of a roomful of people?"

"THE WITNESS: I think a child would refuse a person who—who does that, whether they're in a roomful of people or not.

"[The prosecutor]: So you think that if a child tells a grownup, no, they won't get molested?"

"[Defense counsel]: Objection. Relevance.

"THE COURT: Overruled.

"THE WITNESS: You can see the child's personality when they are afraid of a person who's abusing them."

should not be believed because their testimony contained inconsistencies, no one saw anything, and there was no physical evidence to corroborate the sexual abuse. There was expert testimony on each of these alleged deficiencies in the evidence. Moreover, in denying the defense motion for a mistrial, the court stated, “The court overruled your objections . . . with regard to perpetuating myths because it seems to the court that your argument parallels what the evidence at the trial showed were myths, so I thought it was fair game for the—for the prosecutor to comment on that.”

Appellant also argues that the prosecutor improperly expressed her personal view of the case and improperly appealed to juror sympathy when she told jurors that the case is about “[j]ustice for two little girls who were finally brave enough to tell somebody.” Appellant acknowledges that this remark was brief, but argues that it must be seen in light of testimony by Dr. Urquiza, who described the courage of sexual abuse victims who come forward, and Officer Benzler, who described being moved when the girls prayed for forgiveness, which blurred the line between objective testimony and appeals to jurors’ sympathy.

First, we have already addressed appellant’s arguments concerning the testimony of these two witnesses. Second, we find the prosecutor’s brief comment unobjectionable, both on its own and in light of the testimony appellant cites, because we see no reasonable probability that the comment could have influenced the jury’s determination. (See *People v. Medina* (1995) 11 Cal.4th 694, 759-760 [considering similar *justice for the victim* language].)

Appellant also argues that the prosecutor’s closing remark asserting that people like appellant should be held accountable and should not “get[] off on technicalities” was an improper attack on defense counsel. Appellant contends the “technicalities” referred to must have been “defense counsel’s supposed perpetuation of myths and misconceptions—i.e., her strategy to allow her client to avoid conviction despite ‘brave’ claims by the alleged victims.” We find no misconduct. It is not clear to us from the record what “technicalities” the prosecutor meant, but she was entitled to argue her

interpretation of the evidence, including her contention that various aspects of the complaining witnesses' testimony could be explained by CSAAS.

6. *Due Process Violation Involving CSAAS Evidence.*

Appellant contends that the foregoing errors, i.e., the admission of the CSAAS evidence and the police testimony, considered together with the improper closing argument, rendered his trial fundamentally unfair and amounted to a federal due process violation. As an initial matter, the Attorney General argues that appellant forfeited this argument by failing to object on this ground below. However, we understand appellant's argument to be that the cumulative effect of these separate errors had the legal consequence of violating his due process rights. To the extent that this argument is based on trial objections appellant contends were erroneously overruled, the errors were preserved and the argument is cognizable on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 438-439 (*Partida*).

“[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564; *People v. Falsetta* (1999) 21 Cal.4th 903, 913 [‘The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant’s trial fundamentally unfair.’]; see also *Duncan v. Henry* [(1995)] 513 U.S. [364,] 366.) Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. (*People v. Earp* (1999) 20 Cal.4th 826, 878; *Watson, supra*, 46 Cal.2d at p. 836.)” (*Partida, supra*, 37 Cal.4th at p. 439.)

In support of his contention that the cumulative effect of the errors was prejudicial, appellant argues that the CSAAS evidence and its use by the prosecutor in her closing argument impermissibly bolstered the credibility of the victims. He cites the inconsistencies in the girls' testimony, the absence of any physical evidence, the close and crowded living quarters, that appellant had never previously been accused of,

charged with, or convicted of any sex offenses, the girls' experience in foster care, and the influence of Aunt M., among other circumstances, in urging that the case was close and that a new trial must be ordered.

We find no due process violation. First, the California Supreme Court has acknowledged that CSAAS evidence is admissible. (*Brown, supra*, 33 Cal.4th at p. 906; *McAlpin, supra*, 53 Cal.3d at pp. 1300-1301.) Moreover, we agree with the *Patino* court's analysis: "The United States Supreme Court has held the admission of relevant evidence of the battered child syndrome does not violate the due process clause of the Fourteenth Amendment. (*Estelle v. McGuire* (1991) 502 U.S. 62, 69-70.) Battered child syndrome evidence is analogous to CSAAS evidence. ([*Bowker*], *supra*, 203 Cal.App.3d at pp. 393-394.) For this reason, there can be little doubt the due process dimensions of both types of evidence [are] similar if not identical. Therefore, introduction of CSAAS testimony does not by itself deny [a defendant] due process." (*Patino, supra*, 26 Cal.App.4th at p. 1747.) The CSAAS evidence was properly admitted.

Second, as we have discussed, the CSAAS testimony was properly limited in scope and the jury was properly instructed on the limited use of CSAAS testimony.

Third, even assuming the complained-of portions of the testimony of Officer Benzler and Detective Green were improperly admitted because neither officer was qualified as an expert and/or because it was improper credibility evidence, we have already discussed our conclusion that any error was harmless.

Finally, we reject appellant's contention that cumulative prejudicial error requires a new trial. The contention fails because the trial was not tainted by significant errors. The record simply does not "raise[] the strong possibility" that aggregated prejudice from trial court error denied appellant a fair trial. (See *People v. Hill* (1998) 17 Cal.4th 800, 845.)

B. *Limitation of Evidence Regarding Aunt M.'s Alleged Obsession with Child Molestation.*

Appellant's defense at trial was based on two prongs: (1) that the girls' claims were incredible; and (2) that the abuse allegations had been engineered by Aunt M.

Appellant contends that his constitutional rights under the due process and confrontation clauses were violated by the trial court's rulings limiting cross-examination of Aunt M. regarding her questioning of family members and others about whether they had been victims of child sexual abuse and excluding corroborative testimony by several witnesses that Aunt M. had asked them whether they had been molested as children. He asserts that this evidence was relevant and admissible as bearing on Aunt M.'s possible motive for manufacturing a molestation claim.

1. *Factual Background.*

Before trial, the defense sought to admit evidence that Aunt M. was molested as a child in Mexico and repeatedly asked family members if they too had been victims of child sexual abuse. The defense argued that the evidence was admissible under several theories: (1) Aunt M. had a habit and custom of asking people who seemed sad if they had been molested due to her own personal preoccupation with molestation (Evid. Code, § 1105); (2) as probative of Aunt M.'s modus operandi, motive, and intent to procure allegations of molestation from persons she believed were sad, including JD1 (Evid. Code, § 1101, subd. (b)); and (3) as relevant to Aunt M.'s and JD1's state of mind.

The prosecution opposed admission of the evidence that Aunt M. had been molested and that she had questioned others about having been molested on the bases that it was improper character evidence and would result in an undue consumption of time on a collateral matter.

The trial court decided that it would permit evidence regarding what Aunt M. said to JD1 and JD2, but that her statements to others were irrelevant. The court also ruled that it would permit evidence that Aunt M. was molested as a child for the non-hearsay purpose of explaining her actions with respect to JD1 and JD2.

The defense requested reconsideration. The court conducted an in camera hearing and reviewed briefing by the parties on the issue of whether the defense should be allowed to question Aunt M. about an alleged preoccupation with molestation and whether she questioned others regarding molestation. Relying on *People v. Foss* (2007) 155 Cal.App.4th 113 (*Foss*), the court affirmed its earlier ruling excluding this evidence.

On the stand, Aunt M. testified that she did not suspect that JD1 was being molested before JD1 told her, and that she did not speak with JD1 or JD2 about sexual abuse before they disclosed it.

2. *Legal Principles.*

The confrontation clause of the Sixth Amendment guarantees a criminal defendant the right to confront and cross-examine the witnesses against him. “A criminal defendant states a violation of the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show bias on the part of the witness, and thereby to expose facts from which the jury could appropriately draw inferences relating to the reliability of the witness.” (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1385, citing *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679-680 and *Davis v. Alaska* (1974) 415 U.S. 308, 318.)

However, the trial court retains broad discretion to limit cross-examination on issues of a witness’s credibility. (*Davis v. Alaska, supra*, 415 U.S. at pp. 315-316.) A limitation on cross-examination does not violate the confrontation clause “ ‘unless the prohibited cross-examination might reasonably have produced “ ‘a significantly different impression of [the witness’s] credibility. . . .’ ” (*People v. Belmontes* (1988) 45 Cal.3d 744, 780, quoting *Delaware v. Van Arsdall, supra*, 475 U.S. at p. 680.) “As long as the cross-examiner has the opportunity to place the witness in his or her proper light, and to put the weight of the witness’s testimony and credibility to a reasonable test which allows the fact finder fairly to appraise it, the trial court may permissibly limit cross-examination to prevent undue harassment, expenditure of time, or confusion of the issues.” (*In re Ryan N., supra*, 92 Cal.App.4th at p. 1386; see also *Delaware v. Van Arsdall, supra*, 475 U.S. at p. 679 [court must consider the relevance and probative value of the proposed cross-examination]; *United States v. Guthrie* (9th Cir. 1991) 931 F.2d 564, 568-569 [no violation where defense is permitted to impeach the witness by other lines of questioning that afford “ ‘sufficient information to appraise the biases and motivations of the witness’ ”].) As the Supreme Court has observed, “the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in

whatever way, and to whatever extent, the defense might wish.” (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20 (per curiam).)

Similarly, a defendant’s constitutional right to present a defense is not unlimited. The due process right to present a defense requires that a defendant be able “ ‘to present all relevant evidence of significant probative value to his defense.’ ” (*People v. Babbitt* (1988) 45 Cal.3d 660, 684, quoting *People v. Reeder* (1978) 82 Cal.App.3d 543, 553.) “As a general matter, the ‘[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant’s right to present a defense.’ ” (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103 (*Fudge*); see also *People v. Snow* (2003) 30 Cal.4th 43, 90; *People v. Frye* (1998) 18 Cal.4th 894, 945.)

A trial court’s decision to admit or exclude evidence is reviewed for abuse of discretion. “Evidentiary rulings will not be overturned on appeal in the absence of a clear abuse of that discretion, upon a showing that the trial court’s decision was palpably arbitrary, capricious, or patently absurd, and resulted in injury sufficiently grave as to amount to a miscarriage of justice.” (*In re Ryan N.*, *supra*, 92 Cal.App.4th at p. 1385, and cases cited therein.) A reviewing court should declare a miscarriage of justice only if, after an examination of the entire cause, including the evidence, that court is of the opinion that it is reasonably probable that a result more favorable to the appellant would have been reached in the absence of the error. (*People v. Rains* (1999) 75 Cal.App.4th 1165, 1170, citing *Watson*, *supra*, 46 Cal.2d at p. 836.)

3. *Analysis.*

We find no violation of appellant’s right to confront witnesses. Appellant sought to cross-examine Aunt M. on her alleged preoccupation with child molestation and to present witnesses who would testify that she questioned them regarding child molestation. Appellant intended to use this evidence to show, circumstantially, that Aunt M. was preoccupied with child molestation and convinced that JD1’s behavioral problems were the result of such abuse, thereby raising an inference that Aunt M. must have questioned JD1 repeatedly about sexual abuse and, in so doing, she suggested the allegations to JD1, or that JD1, having been repeatedly questioned by Aunt M., invented

the allegations to please Aunt M.. After considering appellant's offer of proof, the trial court found no evidence, only appellant's speculation, that Aunt M.'s communications with others regarding child molestation had any impact on JD1 and JD2. The witnesses from whom appellant gathered proposed testimony were all adults, some of whom had been children in Mexico with Aunt M. and in contact with the same individual who abused her. Appellant was not prevented from vigorously cross-examining Aunt M. and attempting to prove that, prior to JD1's disclosure, Aunt M. suspected JD1 had been molested and asked JD1 repeatedly if she had been molested. Appellant was prevented from pursuing a line of questioning that, in the court's view, was a collateral matter with insufficient probative value to the material issues before the jury. The court did not abuse its discretion by excluding this evidence.

Moreover, it is not reasonably probable that the excluded testimony would have produced a significantly different impression of Aunt M.'s credibility. (See *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680.) The defense had ample opportunity to cross-examine Aunt M. and probe issues of her motivation and credibility by questioning her on, among other things, inconsistencies in her statement to Officer Dee; whether she discussed with appellant her history of being sexually abused and asked him if their grandfather also molested him; whether she suspected JD1 had been molested and repeatedly asked her about it; problems in her relationship with appellant and her involvement in his family's affairs, such as whether she argued with appellant a couple of months before the allegations were made; her wanting appellant and Mother to go to marital counseling to deal with appellant's infidelity, her wanting appellant's family to attend her church; her reasons for expressing an interest in adopting appellant's children; and her reminding Older Brother during defense counsel's investigatory interview to tell counsel about locked doors in the home. Thus, appellant was permitted to fully probe issues of Aunt M.'s intentions and credibility by other lines of questioning that afforded "sufficient information to appraise the biases and motivations of the witness." (*United States v. Guthrie*, *supra*, 931 F.2d at pp. 568-569.) The trial court's exercise of discretion

to exclude the evidence did not implicate appellant's confrontation rights. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611; *In re Ryan N.*, *supra*, 92 Cal.App.4th at p. 1386.)

Furthermore, any error would not require reversal of the judgment. We see no reasonable probability of appellant's achieving a more favorable result if the evidence had been admitted, and thus no miscarriage of justice. (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203 (*McNeal*).) Even if the evidence showed that Aunt M. asked others about sexual abuse and seemed to others to have an excessive interest in the subject, an excessive interest she denied, we do not find it reasonably probable that at least one juror would have changed his or her verdict. With no physical evidence, the case largely depended on the credibility of JD1 and JD2, whose testimony regarding years of abuse was extensive and largely consistent in material substance. The jury believed JD1 and JD2, and did not believe appellant. And, as we have discussed, appellant had ample opportunity to cross-examine Aunt M. to give the jury a fair chance to judge her credibility and bias.

Appellant also contends the trial court's reliance on *Foss*, *supra*, 155 Cal.App.4th 113, was misplaced because, unlike here, the ruling excluding the evidence in *Foss* was not based on a finding that the evidence was irrelevant. In our view, appellant reads *Foss* too narrowly. In the trial court below, the parties debated at length the relative merits and applicability of *People v. Scholl* (1964) 225 Cal.App.2d 558 (*Scholl*) and *Foss*. Both are child sexual abuse cases that address the exclusion of defense evidence. *Scholl* reversed the denial of a motion for new trial on the basis that the defendant should have been allowed to cross-examine the complaining witness's mother concerning her alleged "morbid fear of sexual advances," on the theory that the mother had unduly influenced the complaining witness. In *Foss*, the appellate court rejected *Foss*'s attempt to rely on *Scholl* in arguing that he should have been allowed to cross-examine his girlfriend, to whom the complaining witness disclosed the allegations of molestation, concerning her alleged "morbid fear of sexual matters," also on the theory that the girlfriend had unduly influenced the complaining witness. (*Foss*, *supra*, 155 Cal.app.4th at p. 123.) The *Foss* court took issue with a number of aspects of the *Scholl* decision, including its failure to

address the appropriate standard of review, the apparent absence of an offer of proof in the trial court as to what the excluded evidence would show, and its outdated, “archaic” assumptions and reasoning: “Just as the testimony of victims of sexual crimes is no longer deemed inherently suspect, we conclude the testimony of a non-complaining witness in a sex crime case who may have been a victim herself of unwanted sexual attention or advances, likewise should not be inherently distrusted.” (*Foss, supra*, 155 Cal.App.4th at pp. 123-130.)

As in this case, the defendant in *Foss* sought to admit the evidence for the purpose of showing that the witness had influenced the victim to make the molestation claims. (*Foss, supra*, 155 Cal.App.4th at p. 123.) The *Foss* court found no abuse of discretion by the trial court in denying the defense’s attempt to question the witness regarding an alleged “morbid fear of sexual matters and child molestation” because the offer of proof of the evidence to be produced was unspecific and speculative. Although we gather that the offer of proof here was more specific, we nevertheless, for the reasons already stated, find no abuse of discretion by the trial court in excluding appellant’s proffered evidence.

With respect to appellant’s contention that the exclusion of the evidence violated his federal due process right to present a defense, again, we disagree. That right requires that a defendant be able “ ‘to present all relevant evidence of significant probative value to his defense.’ ” (*Babbit, supra*, 45 Cal.3d at p. 684, quoting *People v. Reeder, supra*, 82 Cal.App.3d at p. 553.) The trial court did not exclude all evidence relevant to the defense presented by appellant, i.e., that the molestation allegations were incredible and were fabricated by either Aunt M. or JD1. Rather, the court merely precluded appellant from presenting testimony with limited probative value and that would have consumed significant time if it had been introduced. The inference appellant sought to raise, that Aunt M. must have repeatedly questioned and coached JD1 about molestation prior to JD1’s disclosure, was simply too attenuated. If appellant had been allowed to present evidence related to Aunt M.’s alleged preoccupation or obsession with child molestation, the prosecutor would have been permitted to call witnesses to the contrary, resulting in a mini-trial concerning Aunt M. herself. This minimally relevant evidence would not only

confuse the issues in the case, it would also result in undue consumption of the court's time. Under the circumstances, any error in excluding the additional evidence was harmless unless appellant can demonstrate that he would have received a more favorable result at trial had the evidence been admitted. (*McNeal, supra*, 46 Cal.4th at p. 1203; *Fudge, supra*, 7 Cal.4th at pp. 1102-1103.) As we have explained, appellant cannot meet this standard.

C. *Juror Bias and Misconduct.*

Appellant argues that one of the jurors should have been removed from the panel because he was biased against the defense and admitted to inattention during the first witness's testimony. Appellant contends that, as a result of the juror's misconduct, a new trial is required.

1. *Factual Background.*

In her opening statement, defense counsel utilized a flip chart detailing the defense view of the molestation claims. Inadvertently, counsel left the flip chart up during the first witness's testimony, that is, JD1's testimony, which took place later that day.

After JD1 testified, the court received a note from Juror No. 128 stating: "Due to the biased backdrop that occurred Thursday afternoon, against which the testimony was given, I regret to inform you that I can no longer be a fair & unbiased juror."

The court and counsel spoke with Juror No. 128. The juror explained that defense counsel's "talking points" were visible behind the witness during JD1's testimony, which distracted him from listening to the witness and was "extremely" inappropriate. The court asked the juror "not to hold it against" the defense, but the juror replied, "I can't do that at this point." The juror said he would not be able to keep an open mind during trial. He told the court he thought the chart was left up intentionally, as a matter of "strategy."

The court reminded the juror of the opening instructions, including to keep an open mind throughout the trial. The juror stated that he would need to hear the first witness's testimony again, and explained that "it's as if the defense attorney is standing over the shoulder of the witness reminding us of her talking point, and her job ... is to

introduce as much reasonable doubt as possible, but not while the witness is trying to testify.”

After consulting with the attorneys, the court told the juror that the chart was inadvertently left there and that the court was “satisfied that it was unintentional.” The court asked the juror, “And knowing that now, would you keep an open mind throughout the trial and not hold that opening statement faux pas against the defense?” The juror answered, “Yeah,” followed by, “And how do I somehow re-listen to the first witness?” The court informed him that read back of the testimony was available, and also observed: “I recall looking at you, and you looked like you were paying attention, and you are, obviously, a very intelligent fellow so I . . . I think you can do this.” The court instructed the juror to keep an open mind throughout the trial and not to make up his mind on any issues until after discussing the case with the other jurors. The court also informed Juror No. 128 that it had accepted his statement that he would not hold leaving up the flip chart against the defense.

Defense counsel sought to question the juror herself; the court denied the request. After Juror No. 128 left the court room, defense counsel objected to his remaining on the panel. She argued that the juror had made clear his bias and admitted that he was unable to pay attention to the first witness. Counsel argued that the juror had missed the most important testimony in the case and that a future reading of a transcript was not an adequate substitute. The court declined to release the juror, observing that it was confident that the juror, upon understanding that the chart was left up inadvertently, could keep an open mind and was no longer upset with the defense. Regarding the juror’s inattention to the first witness, the court reiterated that read back was available. The prosecutor stated for the record that she had seen Juror No. 128 taking notes during JD1’s testimony and that Juror No. 128 had written a note to the court asking a question during her testimony. The prosecutor also noted her impression that Juror No. 128 had calmed down significantly. The court agreed that Juror No. 128 was no longer upset by the end of the discussion, and felt that both what the juror said and how he said it indicated that he would be fair to the defense and would follow the law.

The next day, the court spoke again with Juror No. 128. The court summarized the prior proceedings and then asked the juror, “So what are your feelings today?” The juror answered, “I think I can be fair, especially if key testimony from the first witness can be—I think the word was re-read?” The court directed the juror to ask for any read back he wanted, and noted for the record that Juror No. 128 was in the court’s line of vision and that “it looked to me . . . during the questioning of that witness, that you were paying attention to what she was saying, and I remember that you did write a question with regard to that witness’s testimony.” Juror No. 128 acknowledged the court’s comments and stated that he would request read back if needed at the time of deliberations. The court also instructed the juror not to discuss the issue regarding the flip chart with the other jurors, but, if the issue came up, to encourage other jurors to write a note to the court to address it.

The following day, the court received another note from an undisclosed juror: “Would the judge please advise the jurors on ‘what to make of’ the incessant legal/tactical maneuvering that is taking place? (e.g., multiple objections, approaches, questions being asked just to get them asked, when they are obviously inappropriate, etc.)[.]” Defense counsel expressed her concern that the note might be from Juror No. 128, argued that it suggested that the juror was unable to focus on the evidence and continued to be concerned with defense tactics, and requested that he again be questioned by the court. The court refused, noting first that Juror No. 128 had already been extensively questioned, and second that both sides had made multiple objections and had engaged in the activities described in the note. The court then reminded the jurors that what the attorneys say is not evidence.

2. *Legal Principles.*

a. *Law Regarding Juror Inattention.*

Penal Code section 1089 authorizes the trial court to discharge and replace a juror who “becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty” (Pen. Code, § 1089.) “Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court’s duty ‘to make whatever

inquiry is reasonably necessary’ to determine whether the juror should be discharged.” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1348 (*Bradford*)). Such good cause may exist if a juror is sleeping or inattentive. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411 (*Hasson*); *Bradford, supra*, 15 Cal.4th at p. 1349; *People v. Bonilla* (2007) 41 Cal.4th 313, 350.)

A juror’s failure to pay attention to the evidence at trial constitutes misconduct. (*Hasson, supra*, 32 Cal.3d at p. 411; *Bradford, supra*, 15 Cal.4th at p. 1349.) In considering claims of juror inattentiveness, our Supreme Court has observed that “ [a]lthough implicitly recognizing that juror inattentiveness may constitute misconduct, courts have exhibited an understandable reluctance to overturn jury verdicts on the ground of inattentiveness during trial. In fact, not a single case has been brought to our attention which granted a new trial on that ground. Many of the reported cases involve contradicted allegations that one or more jurors slept through part of a trial. Perhaps recognizing the soporific effect of many trials when viewed from a layman’s perspective, these cases uniformly decline to order a new trial in the absence of convincing proof that the jurors were actually asleep during material portions of the trial. [Citations.]’ ” (*Bradford, supra*, 15 Cal.4th at p. 1349, quoting *Hasson, supra*, 32 Cal.3d at p. 411.) The inattention in *Hasson* took the form of reading a novel and doing crossword puzzles during the presentation of evidence; the court found that this significant diversion of the jurors’ attention constituted misconduct and raised the presumption of prejudice. (*Hasson, supra*, 32 Cal.3d at p. 410, 412 [affirming denial of new trial because presumption of prejudice was rebutted].)

Although misconduct may constitute grounds to believe a juror will be unable to perform his or her duty in accordance with Penal Code section 1089, “such misconduct must be ‘serious and willful.’” (*People v. Daniels* (1991) 52 Cal.3d 815, 864.)” (*People v. Bowers* (2001) 87 Cal.App.4th 722, 729.) “Juror misconduct raises a rebuttable presumption of prejudice; a trial court presented with competent evidence of juror misconduct must consider whether the evidence suggests a substantial likelihood that one

or more jurors were biased by the misconduct.” (*People v. Dykes* (2009) 46 Cal.4th 731, 809.)

Both the scope of any inquiry and the court’s decision whether to retain or discharge the particular juror are committed to the sound discretion of the trial court. (*People v. Bonilla, supra*, 41 Cal.4th at p. 350, citing *Bradford, supra*, 15 Cal.4th at p. 1348.)

b. *Law Regarding Juror Bias.*

A criminal defendant has a constitutional right to a fair trial by a panel of unbiased, impartial jurors. (*People v. Nesler* (1997) 16 Cal.4th 561, 582 (*Nesler*); *People v. Cissna* (2010) 182 Cal.App.4th 1105, 1115 (*Cissna*); U.S. Const., amends. VI, XIV; Cal. Const., art. I, § 16.) An impartial jury is one in which no member has been improperly influenced and every member is willing and able to decide the case based solely on the evidence presented. (*Cissna, supra*, 182 Cal.App.4th at p. 1115.) A juror may be discharged for actual bias as well as for misconduct affecting other jurors. “A sitting juror’s actual bias, which would have supported a challenge for cause, renders him ‘unable to perform his duty’ and thus subject to discharge and substitution under [Penal Code section] 1089” (*People v. Keenan* (1988) 46 Cal.3d 478, 532.)

“When the record shows there was juror misconduct, the defendant is afforded the benefit of a rebuttable presumption of prejudice. (*People v. Pierce* (1979) 24 Cal.3d 199, 207; *People v. Loker* (2008) 44 Cal.4th 691, 746-747.) . . . If a review of the entire record shows no substantial likelihood of juror bias, the presumption has been rebutted. (*In re Hamilton* [(1999) 20Cal.4th 273,] 296; *In re Carpenter* [(1995) 9 Cal.4th 634,] 653.)” (*Cissna, supra*, 182 Cal.App.4th at p. 1116.)

“Juror bias does not require that a juror bear animosity towards the defendant. Rather, juror bias exists if there is a substantial likelihood that a juror’s verdict was based on an improper outside influence, rather than on the evidence and instructions presented at trial, and the nature of the influence was detrimental to the defendant. [Citations.]” (*Cissna, supra*, 182 Cal.App.4th at p. 1116.)

We accept the trial court’s credibility determinations and its factual findings if they are supported by substantial evidence. The question whether the presumption of prejudice has been rebutted is a mixed question of law and fact subject to our independent determination. (*People v. Ramos* (2004) 34 Cal.4th 494, 520; *Nesler, supra*, 16 Cal.4th at p. 582.) The prosecution is not required to make an affirmative showing rebutting prejudice; a reviewing court’s examination of the entire record may itself dispel any suggestion of prejudice resulting from the misconduct. (*In re Carpenter, supra*, 9 Cal.4th at p. 657.)

The verdict will be set aside only if there is a substantial likelihood that any of the jurors were actually biased. (*Nesler, supra*, 16 Cal.4th at pp. 578-579; *Carpenter, supra*, 9 Cal.4th at p. 653.) Actual bias is defined as “ ‘a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.’ [Citations.]” (*Nesler, supra*, 16 Cal.4th at p. 581.)

“Ultimately, the test for determining whether juror misconduct likely resulted in actual bias is ‘different from, and indeed less tolerant than,’ normal harmless error analysis. (*People v. Marshall* (1990) 50 Cal.3d 907, 951; *In re Carpenter, supra*, 9 Cal.4th at p. 654.) If the record shows a substantial likelihood that even one juror ‘was impermissibly influenced to the defendant’s detriment[,]’ reversal is required regardless of whether the court is convinced an unbiased jury would have reached the same result. (*People v. Marshall, supra*, [50 Cal.3d] at p. 951; *In re Carpenter, supra*, [9 Cal.4th] at pp. 651, 654; *In re Malone* (1996) 12 Cal.4th 935, 964.)” (*Cissna, supra*, 182 Cal.App.4th at p. 1117.)

3. *Analysis.*

Appellant contends Juror No. 128 committed misconduct, that prejudice is presumed and cannot be rebutted, and that reversal is required. Appellant relies on the juror’s statement that he had been unable to pay attention to JD1’s testimony because he was distracted by defense counsel’s “talking points” and angry about what he perceived to be improper defense tactics. He argues that the trial court’s conclusion that any

problem could be cured by having the testimony read back failed to take into consideration the fact that only 11 jurors were attending to the most important evidence in the case, which included assessing JD1's credibility. Appellant also points out that read back of the testimony never took place.

We agree with respondent that Juror No. 128's self-described distractedness did not rise to the level of misconduct. Both the prosecutor and the court observed the juror to be taking notes during JD1's testimony and to have submitted a question to the court during that testimony concerning the content of that witness's testimony. These observations support the trial court's finding that, although the juror considered himself distracted during the testimony, the juror was obviously alert and demonstrably attentive during the testimony. We defer to the observations and credibility determinations of the trial court. (*People v. Pride* (1992) 3 Cal.4th 195, 260 (*Pride*).)

Moreover, in denying appellant's motion for new trial on this basis, the court stated: "I talked to him [Juror No. 128] about whether I perceived him to be paying attention because I was looking right at him. And—and I said, at the time, that he definitely appeared to be paying attention, and he did write at least one note that I remember, which was during the first victim's Jane Doe 1's testimony. [¶] So we did talk about it. The record speaks for itself. But I do recall that he was—he was actually quite focused, and he was actually a very intelligent man, who I—I felt was—was paying attention. Hum, I didn't have any—any doubt really, that he was paying attention."

The trial court's conclusion that Juror No. 128 had been paying attention is further supported by the fact that the juror, who was aware that read back of the testimony was available, declined to have any testimony re-read. From the court's communications with the juror on the record, it appears that the juror was conscientious. There is no suggestion that the juror was ever asleep or engaged in any distracting activities. We infer from the juror's decision not to have read back of the testimony that the juror was satisfied that he had not missed anything of substance during the testimony of JD1. Moreover, the juror had multiple opportunities to hear from this witness, as she was interviewed multiple times and those interviews were presented to the jury. Based on our review of the record,

the trial court's inquiry into Juror No. 128's claimed inattention was adequate and its specific observations supported its finding that the juror had in fact been attentive. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1234.) The trial court did not abuse its discretion in declining to remove the juror for alleged inattention.

We also find no error by the trial court in concluding that Juror No. 128 was not biased against the defense because of the flip chart that remained displayed during JD1's testimony. The record reflects that the court questioned Juror No. 128 twice about the chart and explained that it was left up after opening statements inadvertently. The court asked, and then reconfirmed, that Juror No. 128's initial declaration of bias had changed. The court expressed confidence in its assessment that Juror No. 128 was being truthful when he told the court that he could keep an open mind and judge the case based on the evidence. The court stated: "He—he was saying some things, but we talked about it. And it's all on the record as to what happened, where he was basically offended because your—your chart was behind the victim. And—and I—I couldn't see the—the chart. It was turned sideways to me. But he could see it, and he was offended. [¶] And we had—we had a hearing with regard to that, and we brought him in independently, and it was explained to him that after discussion with [the prosecutor] and with you [defense counsel] that—that you had represented that it was inadvertent, and his—his demeanor changed completely after that. And I was satisfied then, and I am satisfied now, that he was very much mollified by the court's representation that your – your error was inadvertent."

Appellant focuses on the juror's initial statement that he could not put the matter behind him, but our review of the record and the above-quoted statement from the court demonstrates that both the juror's words and demeanor changed considerably after the court communicated defense counsel's assurance that the chart had been left up by mistake.

Next, citing *People v. Lomax* (2010) 49 Cal.4th 530, 589, and *People v. Robinson* (2005) 37 Cal.4th 592, 618, appellant argues that, had Juror No. 128 declared during voir dire that he was biased and could not keep an open mind, he would have been subject to

dismissal for cause. Accordingly, his mid-trial announcement of bias should have resulted in his dismissal. Appellant's conclusion does not follow from the premise. There is no evidence or suggestion whatsoever that Juror No. 128 harbored any bias during voir dire. Rather, Juror No. 128's concern about bias was the result of a mistake on the part of defense counsel *during trial*.

Appellant also argues that Juror No. 128's misconduct, i.e., his failing to pay attention during the testimony of JD1, was itself "powerful evidence of bias." As we have just discussed, however, the trial court established that there were no grounds for removal based on inattentiveness.

Next, appellant contends that Juror No. 128 never unequivocally stated that he could be fair to the defense. Appellant quotes statements by the juror that he could "try to get over it" and that "I think I can be fair, especially if key testimony from the first witness can be . . . re-read." According to appellant, the juror never said he would be fair, never took back his earlier statement that he could not keep an open mind, and conditioned his ability to be fair on read-back of the testimony, which never occurred. We disagree with appellant's reading of the record, and defer, as we have stated, to the trial court's observations and credibility determinations. (*Pride, supra*, 3 Cal.4th at p. 260.)

Finally, appellant argues that it is clear that Juror No. 128 never got over his animus towards the defense because later in the proceedings he sent a note to the court expressing concern regarding the "incessant legal/tactical maneuvering," such as "multiple objections, approaches, questions being asked just to get them asked, when they are obviously inappropriate," et cetera. Appellant contends that the court's determination that the juror could have been referring to either side was unfounded since the juror had already complained about the defense.

The note was presented to the court immediately after the noon recess on August 25, 2011, which followed brief concluding testimony from prosecution witnesses Aunt M. and Dr. Anthony Urquiza, and the testimony (out of order) of defense witness Dr. Craig Desoer, the family physician who conducted annual physical examinations of JD1

and JD2. Both attorneys questioned Dr. Desoer specifically about his examinations of the girls as well as how he conducts and documents routine physical examinations of children, specifically inspection of the genitalia and investigation of possible sexual abuse. Our review of the reporter's transcript of the proceedings that morning revealed that both attorneys conducted direct and cross examinations, made objections, some of which were sustained, and both requested, once, during the testimony of Aunt M., to approach the bench for a sidebar conference. Based on this review of the record, we see nothing to suggest that the juror's note regarding "incessant legal/tactical maneuvering" referred to one party or the other. Rather, the record supports the trial court's conclusion that the note referred to the conduct of both attorneys during the proceedings.

Finally, appellant argues that, in light of all of defense counsel's complaints regarding Juror No. 128, the court should have questioned the juror about the note. He urges that, in the absence of a clear statement from the juror that his note referred to both parties, "the only rational conclusion is that the bias [against the defense] remained." The record supports the trial court's conclusion to the contrary. The trial court did not err in declining to further question the juror or in leaving him on the panel.

IV. DISPOSITION

The judgment is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.