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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH DONALD HUTCHINS,

Defendant and Appellant.

A141037

(Sonoma County  
Super. Ct. No. SCR-629054)

Defendant Kenneth Donald Hutchins was convicted by a jury of sexual intercourse with a child under age ten (Pen. Code, § 288.7, subd. (a)),<sup>1</sup> two counts of oral copulation with a child under age ten (§ 288.7, subd. (b)), commission of a lewd and lascivious act on a child under age 14 (§ 288a), and possession of child pornography (§ 311.11, subd. (a)). He was sentenced to 55 years to life in prison for the section 288.7 violations, plus eight years and eight months for the violations of sections 288a and 311.11. His appeal raises issues regarding admission of evidence, ineffective assistance of counsel, failure to properly instruct the jury, and prosecutorial misconduct. Apart from a misstatement of law by the prosecutor during closing argument, there was no error, and we conclude that error was harmless. Accordingly, we affirm the judgment.

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<sup>1</sup> Unless otherwise indicated, subsequent statutory references are to the Penal Code.

## I. BACKGROUND

### A. Prosecution Case-in-Chief

Zoe, the victim of the sexual assault charges, was born in November 2004 and lived with her mother, Shauna, her father, Lewis, and her older brother, Gavin. Hutchins, born in 1948, is Zoe's great uncle and lived three miles away. Other family members who lived nearby were: Sherry, who is Hutchins's sister and Shauna's mother; John, who is Sherry's husband and Shauna's stepfather; D., who is Shauna's sister; and Rachel, who is D.'s spouse.<sup>2</sup>

Zoe's mother, Shauna, testified that before 2011 she saw Hutchins on special occasions such as birthdays and holidays. In 2011 Hutchins offered to help her take care of Zoe and Gavin. Gavin, who was born in 1999 and testified that he suffered from "high-functioning autism," was having trouble in school, and Hutchins offered to take the children one or two days a week to give Shauna a respite from caring for them. Shauna said that Hutchins and the children would spend three or four hours together after school and had a ritual where he would take them to get fast food and buy toys, "maybe go to the pet store and go look at the animals, and then they'd go to his house."

Shauna testified that Hutchins spent more money on Zoe than on Gavin, and the gift-giving "became more and more excessive as time went on." John testified that he told D. to keep an eye on Hutchins. John said, "I know enough about mental health, deviant behavior, to know the antecedents to child molesting is gift-giving, grooming, excessive amount of time with a child." D. told Shauna of John's concerns, and Shauna, who was unfamiliar with the term "grooming," was "pretty shaken up" when she researched the concept and discovered that it was "an act that's done by pedophiles to win children over."

Shauna convened a family meeting at John and Sherry's house in the winter of 2011, without Hutchins present, to discuss her concerns about Hutchins's relationship

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<sup>2</sup> We refer to the family members by their first names to protect Zoe's privacy, and mean no disrespect by the informality.

with Zoe. Shauna said that John and D., who had planted the thought in her mind that the relationship might be inappropriate, did not “back me up, I guess you could say,” and expressed no concerns about Hutchins and Zoe at the meeting. Her mother, Sherry, told Shauna “that, if I felt that way about my uncle . . . she couldn’t have a relationship with me.” This made her feel guilty about her suspicions, and she continued to let Hutchins see the children.

In early 2012, “[t]hings with Gavin were increasingly getting more difficult,” she asked Hutchins for more help with the children, and he began taking them two or three times a week. She asked Hutchins repeatedly to stop spending more money on Zoe than Gavin, and the gift-giving eventually evened out. She said that beginning in the late winter or early spring of 2012, Zoe had temper tantrums after returning from visits with Hutchins, but she believed at the time the tantrums had to do with the toys he was giving her, and she did not report the tantrums before trial.

Gavin, who was 14 years old at the trial in November 2013, testified that he “always had suspicions” about Hutchins’s conduct with Zoe. He said that a few months before January 15, 2013, he saw Hutchins “[m]essing around with her chest area” in his bedroom. Hutchins had both his hands under Zoe’s shirt, and moved them in a circular motion over Zoe’s breasts.

Gavin said that when Zoe got home from school on January 15, 2013, she begged Shauna to let them spend time with Hutchins. Shauna agreed, and Hutchins picked them up, bought them toys as usual, and drove them to his house. Gavin watched television in the living room, Zoe and Hutchins went into the back yard for a short time, and then went to Hutchins’s bedroom. Gavin said he went to the bedroom, opened the door, and saw Hutchins “quote, unquote, tickling” Zoe, although tickling was “not really what it looked like.”

Hutchins drove them home, and went upstairs with Zoe to her bedroom. Shauna was home schooling Gavin at the time, and they read *The Hobbit* together downstairs for school. Gavin heard noises from upstairs that made him feel “kind of weird.” He “felt there was something out of the ordinary” going on, or “just something I should go check

on.” He went to Zoe’s bedroom, opened the door, and saw Hutchins on top of Zoe, asking her to give him kisses. He was saying it over and over, and Zoe was saying “no.” Gavin saw Hutchins kiss Zoe, and said that Hutchins was “basically forcing her to kiss him.” Zoe was on her back, and she and Hutchins were clothed.

Gavin was “kind of in shock,” and went downstairs and thought for 15 or 20 minutes “about how I was going to confront my mom about the whole situation.” Gavin told Shauna what he had seen, and Shauna asked Hutchins to leave the house. After Hutchins left, Shauna asked Zoe if anything had happened between them, but Zoe did not tell her. Gavin asked Zoe if she would like to talk about it privately with him, she said “yeah,” and they went to her bedroom. Gavin asked her questions, and recorded her answers on his iPod. The recording of the conversation was played at trial.

Gavin began by asking Zoe about the “tumble game” she played with Hutchins, and Zoe said, “we tumble on top of each other.” He asked her to show him with a pillow how the game was played, she demonstrated, and started laughing. They had the following exchange: “[Gavin:] I need you to pay attention, okay? [Zoe:] Mh-hm. [Gavin:] Is there any secrets you want to tell me? [Zoe:] Mh-hm. [Gavin:] You don’t have to tell Mom. [Zoe:] I don’t? [Gavin:] No. You don’t have to tell Mom, you just tell me. [Zoe:] But you’re gonna tell Mom. Are you sure? [¶] . . . [¶] Okay, you got me, I am lying. [Gavin:] Okay, well, what, what about? What has been going on with you and Uncle? [Zoe:] It’s inappropriate. [Gavin:] That’s what I thought.”

Gavin showed Zoe a picture of a vibrator that looked like a penis. He had seen a vibrator on Hutchins’s bed and suspected that Hutchins had been using it on Zoe. Gavin told Zoe he was going to show her an “item that you may be familiar with, okay? Now tell me if you are familiar with this item? Now, tell me what have you been doing with your uncle? Zoe answered: “Playing games. Talking about ordering stuff.” They then had the following exchange:

“[Gavin:] Anything else that you do not want to tell Mom? [Zoe:] Um . . . [Gavin:] If it’s anything that’s not going to hurt you or anyone else, I don’t have to tell her. If it’s not hurting you or anyone else, I don’t have to tell her. [Zoe:] Uh, it’s hurting

me. [Gavin:] It is? [Zoe:] Mh-hm. [Gavin:] You must tell me. [Zoe:] But I'm gonna hide when I tell you, okay? [Gavin:] That's fine. Go ahead and hide. [Zoe:] I'm hiding. But don't look at me. [Gavin:] Okay, I'm not looking at you at all. You just have to tell me. Don't be ashamed. Now please tell me. . . . Go ahead. Tell. [Zoe:] Okay. But it may be something gross. [Gavin:] That's fine. I am prepared for gross. [Zoe:] Really? [Gavin:] Really. [Zoe:] Um . . . . Pee-nie. [Gavin:] Where does he stick his pee-nie? [Zoe:] In my pee-nie. [Gavin:] He puts his penis in your vagina? [Zoe:] Yes. [Gavin:] Say that. [Zoe:] He puts his penis in his b—, in my bengina.” Gavin said, “Okay. Now I'm going to leave you alone,” and stopped the tape.

Shauna testified that Gavin gave her the tape and asked her to listen to it. After listening to all or part of it, she told Zoe she wanted to talk to her about Hutchins, and Zoe screamed at Gavin, “You told, you told her.” Shauna told Zoe she did not have to feel guilty, Zoe told her that Hutchins hurt her, and “that's when she sat down and she talked to me.” Shauna got her husband Lewis from a martial arts class, and called the police. They went to the Redwood Children's Center, where Zoe had a forensic interview and sexual assault examination in the early morning hours. Later that morning, the police took Hutchins into custody and searched his home.

Zoe, who turned nine years old during trial, testified that when Hutchins was in her bedroom on the night of January 15, he took off his jeans and her pajamas and underwear, and put his peepee inside her peepee, “sting[ing]” her. He put his mouth on her peepee and sucked on it and it felt really wet. He grabbed her arm and made her rub his peepee. He shoved her face onto his peepee and made her suck it. It felt squishy and tasted rotten and gross. Nothing came out of his peepee.

Zoe said that when she was at Hutchins's house earlier that day, he touched her peepee with his mouth, and used his massager on her peepee. She said that Hutchins hurt her “every day,” and that he kissed her with his tongue inside her mouth every time she went to his house. He also put his massager on her peepee every time she went to his house, although she had not mentioned the massager before trial. When Hutchins bathed her at her grandparents' house they had a motorized penguin that moved around the tub,

and he put the penguin's motor in her peepee. She said that it vibrated and hurt her and gave her a bad rash inside her peepee.

During cross-examination, Zoe said that she was "all the way naked" when she was in Hutchins's bedroom on January 15, but had never been naked in his room before. The following exchange ensued: "Q. You remember when you came to court, not today, but a couple months ago? Remember telling us that you were naked every time? [¶] A. Oh yeah. Yeah, I was. [¶] Q. And remember you told us that he was naked every time, too? [¶] A. Yes. Q. Is that true? [¶] A. Yes. [¶] Q. You remember that now? [¶] A. Yes. [¶] Q. And— [¶] A. I just forget." Gavin testified that he tried to check on Zoe whenever she was alone in a room for a long time with Hutchins, and they were always fully clothed when he looked in on them.

Psychologist Anthony Urquiza, a member of the faculty and director of a child abuse treatment program in the pediatrics department at the University of California Davis Medical Center in Sacramento, testified as an expert in child sexual abuse and Child Sexual Abuse Accommodation Syndrome (CSAAS). CSAAS has five facets: (1) secrecy, which explains how threats, gifts, or special attention cause children to keep the abuse secret; (2) helplessness, which explains why children do not generally resist being abused; (3) entrapment and accommodation, which explains why a child who is being abused can appear normal, and continue to have a pleasant relationship with the abuser; (4) delayed and unconvincing disclosure, which explains why disclosures of abuse may be slow and piecemeal; and (5) recantation, which explains that family pressure can cause some children to recant their allegations.

Nurse practitioner Maria Pacheco conducted a sexual assault examination of Zoe at the Redwood Children's Center from 2:45 to 4:00 a.m. on January 16. Before the examination, Pacheco observed Zoe's interview, in which Zoe reported that she had been sexually assaulted earlier that night and "described it clearly." Pacheco found an abrasion on the right side of Zoe's clitoral hood, an uncommon spot for a child, which would have been caused by friction. She also found a petechia—a ruptured capillary—near the urethra. The petechia was tiny, too small to be seen in the photos Pacheco took.

Zoe complained of pain in her perineum, the area between the entrance to the vagina and the anus. Pacheco collected a foreign hair from Zoe's labia majora.

Because of the abrasion and the petechia, Pacheco described the result of the examination as "abnormal," and consistent with Zoe's claim of sexual assault. However, Pacheco wrote in her report of the examination that the injuries were "nonspecific," which meant that they could have been caused by something other than sexual assault. She acknowledged that findings consistent with sexual assault did not prove that an assault occurred. Two days after this examination, Pacheco reexamined Zoe's genital area and found that the injuries had healed.

The dress and underwear Zoe wore on the day of the assaults, other items collected from her sexual assault examination, and items collected from a sexual assault examination of Hutchins were sent to the California Justice Department for testing. No incriminating DNA evidence was found. Kay Belschner, a Justice Department criminalist, testified that she compared the foreign hair collected from Zoe during Pacheco's examination with head and pubic hair samples from Hutchins, and found they did not match. Belschner reported her findings to the Sonoma County Sheriff's Department, advised that the foreign hair could have come from a limb or a chest, and requested additional hairs to test.

In September 2013, Detective Koepfel obtained two hairs from Hutchins's arm, and one hair from the side of his chest. Koepfel testified the hairs on Hutchins's arms, chest, and stomach were very short and uniform in size. He took photos of Hutchins, compared them with photos taken of Hutchins when he was arrested in January, and determined that Hutchins had shaved his arms, chest and stomach. Koepfel had difficulty obtaining any samples because the hairs were so short. Belschner tested the arm hairs Koepfel recovered, and found no match with the foreign hair on Zoe. She testified that two hairs were not a large enough sample for her to conclude that the hair on Zoe did not come from Hutchins.

When the police searched Hutchins's residence, they found children's underwear stuffed inside a roll of masking tape in the kitchen, and a vibrator under a bed. In a living

room cabinet Koeppel found a video cassette and a DVD with the name “Ken” written on it that contained child pornography. The cassette and the DVD were in the front of the cabinet, and Koeppel did not recall seeing any layers of dust on them indicating that they had been there for a long time without being touched.

#### B. Defense Case

In her opening statement, defense counsel said that she expected Hutchins to testify and deny ever molesting Zoe. However, Hutchins did not take the stand, and instead called his sister Sherry, his niece, D., and D.’s spouse, Rachel, to testify to their belief in his innocence.

Sherry said that Hutchins’s moral character around children was “impeccable,” and she did not believe that he was capable of sexually abusing a child. She said, “He raised his boys, and he loves them. And he was around my children from the time they were little, and he just . . . loves children. And he likes to play with them.” She said she had been a victim of child abuse, was always vigilant of Hutchins’s interactions with Zoe, and never observed anything inappropriate. She acknowledged that she and Hutchins were very close, and that she would do just about anything to help him.

Sherry denied telling Shauna at the family meeting that she would disown her if Shauna continued to express concerns about the gifts Hutchins was giving Zoe. She said that Shauna discussed sexual matters, including intercourse and sodomy, in an inappropriate way in front of Zoe and Gavin. Sherry was a retired nurse and recalled Shauna asking her about redness in Zoe’s vaginal area. She did not recommend that Zoe see a doctor because vaginitis is very common in little girls, and Zoe was “not really very clean.”

D., like her mother, did not believe that Hutchins was capable of child molestation. D. said that, if she had a daughter, she would let Hutchins babysit her. She had known Hutchins all her life, he played with her when she was growing up, he was her favorite uncle, and he never did anything inappropriate with her. She confirmed that John was the first one to raise concerns about Hutchins’s relationship with Zoe, and said she thereafter spied on Hutchins even though she “felt horrible” doing it. She saw

nothing inappropriate between Hutchins and Zoe, except what she considered excessive gift-giving. She admitted telling a defense investigator she thought it was “weird” that Hutchins wanted to spend so much time with Zoe, adding, “I mean, I wouldn’t want to spend all my time with Zoe.” Like Sherry, she reported hearing Shauna have age-inappropriate conversations about sexual matters in front of her children.

Rachel testified that she was “a leery person in nature,” kept an eye on Hutchins and Zoe both before and after the family meeting concerning their relationship, and never saw any inappropriate behavior on his part. She also saw his interactions with her sister’s four children. She did not believe he was capable of molesting a child, and would be comfortable with him being around any children. She, too, reported that Shauna had inappropriate conversations about sex around her children. She said that she and D. were very close with Hutchins.

Psychiatrist Lee Stewart Coleman testified as an expert in memory, suggestibility, and the impact of questioning techniques. He said that people of all ages, including young children, are vulnerable to various influences affecting their memory. Suggestible questioning can create a memory of a nonexistent event, and a child who had not been molested could be pressured into believing that she had been. Suspicions of the first person to broach the subject with the child can be “absolutely critical.” When given a hypothetical involving questions like those Gavin recorded asking Zoe, Coleman opined that the questioning was on the “very, very severe end of the scale” of suggestiveness, and amounted to an “indoctrination.”

Dr. James Crawford-Jakubiak, a board-certified pediatrics specialist and the medical director of the Center for Child Protection at Children’s Hospital in Oakland, testified as an expert in forensic sexual assault (SART) examinations. He had conducted over 2000 such examinations, and had taught their performance and interpretation. He had testified hundreds of times, 80 to 85 percent of them at the request of the prosecution.

Crawford-Jakubiak opined that Zoe’s examination had been done well, and that it was inconclusive, as in most cases. The findings did not prove that Zoe had been sexually abused. They were consistent with the possibility that Zoe had been molested,

and the possibility that she had not. The “nonspecific” finding meant “we’re talking about something that could be present for any number of reasons.” Zoe’s abrasion could have resulted from “something abusive,” or from “scratching or itching, the wiping with the toilet paper, something that’s going to cause a small, basically superficial scraping of the skin.” He noted that, at Zoe’s second examination, quite a bit of toilet paper had accumulated in her genital area. Zoe had mild generalized erythema, a medical term for redness, at the time of both exams. Although the erythema could have been caused by sexual abuse, it was a common, hygiene-related finding in young children.

In her opening statement, defense counsel said that Hutchins would likely be testifying about roommates he had “a few years back” who were “swingers” who “liked to do the wife-swapping thing, and they watched a lot of porn, and they had a lot of porn in the house.” When he “threw them out” they left behind pornographic videotapes, which he did not realize contained child pornography. Hutchins would testify that he never viewed the tapes and did not know what was on them.

D. testified that Hutchins had roommates sometime within the last five or six years. He had lived with a couple, and then with a man. She did not know who the roommates were or how long they lived with Hutchins.

### C. Prosecution’s Rebuttal

Shauna testified that she never had any kind of discussion about sexual details in front of Zoe.

## II. DISCUSSION

### A. Admission of Videos Showing Child Pornography

Hutchins contends that the court abused its discretion when it overruled his Evidence Code section 352 objection to introduction of excerpts from the videos found in his residence that depicted child pornography.

#### (1) *Record*

The prosecution filed a motion in limine for permission to play the videos for the jury. When the motion was discussed, the defense objected to admission of the videos, describing them as “very disturbing, very shocking,” and arguing that they would serve

only “to enflame prejudice on the jury,” and “bootstrap Mr. Hutchins to very serious allegations, obviously, involving a young girl . . . .” The defense offered to stipulate that the videos portrayed child pornography, and observed that an officer who had watched the videos could testify to that fact. The defense advised that it was not conceding “actual possession of the those items, meaning, that Mr. Hutchins knew of the presence of the items and knew of the substance of those items.”

The People argued the videos were admissible under *People v. Holford* (2012) 203 Cal.App.4th 155, 158–162 (*Holford*), where the defendant was charged with possessing child pornography, and the prosecution was allowed to introduce a 25-minute video found on his computer notwithstanding his offer to stipulate that it contained child pornography. The *Holford* court applied *People v. Salcido* (2008) 44 Cal.4th 93, which held “that the prosecution is not required to accept a stipulation if the effect would be to deprive the state’s case of its persuasiveness and forcefulness, nor is it obligated to present its case in the sanitized fashion suggested by the defense. The prosecutor need not stipulate to proof in place of photographic evidence.” (*Id.* at p. 147 [citations and internal quotation marks omitted].) The court here viewed a portion of the videos, and preliminarily determined that in light of *Holford* they should not be entirely excluded, but that no more than ten or 15 minutes of their content could be displayed.

The People ultimately narrowed down the footage it proposed to play to two clips of 30 seconds and one minute in length. Hutchins renewed his Evidence Code section 352 objection to admission of the videos, and the court overruled it stating: “I think that . . . all the evidence in this case is prejudicial. One of these charges is possession of child pornography. I think that the evidence is illustrative of the point without being unduly inflammatory, and it is direct evidence of the points that are going to be made. [¶] So I don’t find that it’s more prejudicial than probative. It’s highly probative. It is somewhat prejudicial, but . . . it’s not any more prejudicial than the other evidence that’s related to the other causes of action . . . that are at issue in this case. [¶] So I will allow the clips. I think that [the prosecutor has] done a good job of distilling it down to a small part to play in front of the jury.”

Detective John Buerghler assisted serving the search warrant on Hutchins's residence, where the DVD and the VHS tape containing child pornography were recovered. He testified that the DVD contained 58 snippets of child pornography, along with adult pornography, and a portion of the DVD was played for the jury. The VHS tape contained 15 scenes, two of which depicted child pornography. Buerghler testified that the portion of the tape played for the jury was from the "Vicky series of child pornography," which was "popular among child pornography circles" and depicted a girl who was approximately nine years old.

(2) *Analysis*

Hutchins concedes that, under *Holford*, "[w]ere this *only* a child pornography case, it is clear that the court had discretion to allow portions of the video to be played." But, even though molestation charges were joined in this instance with the child pornography possession charge the court could reasonably find that the videos would not unduly prejudice the defense. As the court observed, limiting the videos to one and a half minutes minimized their potential prejudicial effect, and evidence of the child pornography Hutchins possessed was no more inflammatory than the evidence of his multiple molestations of Zoe. Admission of the videos was not an abuse of discretion under Evidence Code section 352.

B. Failure to Move to Sever the Child Pornography Charge

Hutchins argues that his counsel was ineffective because she did not move to sever the trial of the pornography charge from the other charges in the case. Hutchins contends that the defense had "nothing to lose" with a severance motion, and that it would have been a "grave error" for the court to deny it.

A defendant claiming ineffective assistance of counsel must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that counsel's ineffective representation had an effect on the judgment. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 691.) Here, there was no reasonable probability that a

motion to sever would have been granted. Thus, we conclude any motion to sever could not have affected the judgment of conviction.

Section 954 provides: “An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts . . . [T]he court in which a case is triable, in the interest of justice and for good cause shown, may, in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately . . . .” However, “consolidation or joinder of charged offenses ‘is the course of action preferred by the law.’ ” (*People v. Soper* (2009) 45 Cal.4th 759, 772 (*Soper*)). “The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.” (*Id.* at p. 773.)

“The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial. Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a weak case has been joined with a strong case, or with another weak case, so that the spillover effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.” (*People v. Vines* (2011) 51 Cal.4th 830, 855 [citations and internal quotation marks omitted].)

“[T]he first consideration in evaluating a motion to sever is ‘cross-admissibility,’ i.e., the extent to which evidence of charge A would have been admissible in a hypothetical separate trial of charge B, and vice versa.” (*People v. Earle* (2009) 172 Cal.App.4th 372, 388 (*Earle*)). “If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court’s refusal to sever properly joined charges.” (*Soper, supra*, 45 Cal.4th at pp. 774–775.) Evidence that Hutchins possessed

child pornography, including depictions of a girl the same approximate age as Zoe, would have been admissible under Evidence Code sections 1101, subdivision (b) and 1108, in a separate trial of the sexual assault charges. For this reason alone, there was no reasonable probability that a motion to sever would have been granted. (*Ibid.*)

Evidence Code section 1101, subdivision (a), prohibits introduction of “evidence of a general character for good or bad conduct, or a predisposition or propensity to engage in conduct of a particular kind, to show conduct on a particular occasion.” But, Evidence Code section 1101, subdivision (b) “creates an exception to subdivision (a): evidence of conduct may be admitted to prove motive or intent, although it may not be admitted to show a disposition to do the type of conduct shown by the evidence.” (*People v. Memro* (1995) 11 Cal.4th 786, 864 (*Memro*)). *Memro* upheld admission of evidence that the defendant possessed magazines and photographs depicting naked prepubescent males to prove that he intended to perform a lewd or lascivious act on a seven-year old boy. *Memro* held:

“The court did not abuse its discretion by ruling the magazines admissible under Evidence Code section 1101, subdivision (b), to show intent. We believe the photographs were admissible to show defendant’s intent to molest a young boy in violation of section 288.

“Defendant’s intent to violate section 288 was put at issue when he pleaded not guilty to the crimes charged. [Citations.] Although not all were sexually explicit in the abstract, the photographs, presented in the context of defendant’s possession of them, yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction. [Citation.] The photographs of young boys were admissible as probative of defendant’s intent to do a lewd or lascivious act with [the victim].

“Defendant also contends that the items were substantially more prejudicial than they were probative. Hence, in his view, their introduction was barred by Evidence Code section 352. We find no abuse of discretion in admitting the magazines or the photographs. To be sure, some of this material showed young boys in sexually graphic

poses. It would undoubtedly be disturbing to most people. But we cannot say that it was substantially more prejudicial than probative, for its value in establishing defendant's intent to violate section 288 was substantial." (*Memro, supra*, 11 Cal.4th at pp. 864–865.)

Hutchins's child pornography would thus have been admissible in a separate molestation trial. Hutchins argues that "[t]here was never any doubt that if [he] touched Zoe in the ways she testified to, he had the required intent to arouse either his sexual passions or hers." However, his not guilty plea to the sexual abuse charges put his intent at issue (*Memro, supra*, 11 Cal.4th at p. 864), and there was some potential ambiguity regarding his intent when he rubbed Zoe's chest area under her shirt in the incident Gavin described.

Hutchins's child pornography would also have been admissible in a separate molestation trial under Evidence Code section 1108, which "allows evidence of the defendant's uncharged sex crimes to be introduced in a sex offense prosecution to demonstrate the defendant's disposition to commit such crimes." (*People v. Reliford* (2003) 29 Cal.4th 1007, 1009.) Possession of child pornography is among the enumerated sexual offenses (Evid. Code, § 1108, subd. (d)(1)(A)) that are specifically admissible in a sexual offense prosecution notwithstanding the general prohibition of Evidence Code section 1101 (Evid. Code, § 1108, subd. (a)). It was reasonable to infer from Hutchins's possession of pornography involving children like Zoe that he was sexually attracted to her. By the same token, evidence that Hutchins had molested Zoe would have been admissible in a trial of the child pornography charge. The molestation evidence had a "tendency in reason to prove" that Hutchins harbored a specific, deviant prurient interest in young girls. (Evid. Code, § 210 [defining relevant evidence].)

Hutchins argues that the court would have been compelled to sever the trial of the child pornography charge from the other offenses under the decision in *Earle, supra*, 172 Cal.App.4th 372. But that case is distinguishable. In *Earle*, refusal to sever indecent exposure and sexual assault charges was an abuse of discretion that resulted in a "grossly unfair" trial. (*Id.* at p. 379.) *Earle* held that evidence of indecent exposure was not

admissible under Evidence Code section 1108 on a sexual assault charge without expert testimony that “commission of indecent exposure rationally supported an inference that the perpetrator has a propensity or predisposition to commit rape.” (*Earle, supra*, at p. 398.) Unlike the attenuated inference to be drawn in *Earle*, the proposition here is simply that possession of pornography depicting a girl as young as nine could be found probative of a prurient interest in an eight-year-old girl like Zoe—a matter of common sense that required no expert support.

The futility of moving for severance was also supported by factors other than cross-admissibility. Hutchins argues that trying the charges together would have been impermissible because while the evidence that he possessed child pornography was “very strong,” the evidence that he molested Zoe was “very weak.” He argues she was an “unreliable witness . . . . Probably no one in the courtroom believed that Zoe and [Hutchins] were naked from the waist down and having sexual contact every time they were alone in a bedroom together . . . .” But even if some of Zoe’s trial testimony was implausible, the court would not have been in a position to assess that testimony when it decided a severance motion, and it would not have been clear at that point that the child pornography case was substantially stronger than the case on the sexual assaults. (*Earle, supra*, 172 Cal.App.4th at p. 387 [ruling on a severance motion is evaluated in light of the facts and circumstances apparent to the court when it ruled].) According to defense counsel’s opening statement, Hutchins was planning to testify and explain away the discovery of the pornography in his home. “In any event, as between any two charges, it is always possible to point to individual aspects of one case and argue that one is stronger than the other. A mere imbalance in the evidence, however, will not indicate a risk of prejudicial ‘spillover effect,’ militating against the benefits of joinder and warranting severance of properly joined charges.” (*Soper, supra*, 45 Cal.4th at pp. 774–775.)

Moreover, while the child pornography charge and the evidence introduced to support it was potentially inflammatory, the sexual assaults of an eight-year-old girl were far more egregious offenses than possession of child pornography, and the court acted to

prevent any undue prejudice by limiting the amount of the pornographic videos that could be displayed at trial.

Finally, the court would also have been required to balance the potential prejudice against considerations of efficiency and judicial economy that make joinder of charged offenses “ ‘the course of action preferred by the law.’ ” (*Soper, supra*, 45 Cal.4th at p. 772.) The court must “take into account the circumstance that, as a general matter, a single trial of properly joined charges promotes important systemic economies.” (*Id.* at p. 782.) “Although our courts work diligently to ensure due process in all proceedings, their resources are limited. . . . [T]he opportunity for joinder with its attendant efficiencies provided by section 954 is integral to the operation of our public court system. Manifestly, severance of properly joined charges denies the state the substantial benefits of efficiency and conservation of resources otherwise afforded by section 954.” (*Ibid.*)

For these reasons, a severance motion would have been denied and had no likely effect on the judgment, and defense counsel cannot be deemed incompetent for failing to move to sever the child pornography charge.

### C. Unanimity Instruction

“When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.] The duty to instruct on unanimity when no election has been made rests upon the court sua sponte. [Citation.]” (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) When an election has been made, the prosecutor must “directly inform” the jury which acts are at issue. (*Id.* at p. 1536.)

Hutchins contends that the court erred when it failed to give a unanimity instruction in connection with the sexual intercourse and oral copulation charges. The information charged a single act of intercourse (Count I), and two acts of oral copulation (Counts II and VI), on January 15, 2013. Hutchins says, “The question is, *when* on that day, and where?” Zoe testified that Hutchins put his mouth on her peepee twice on

January 15: when they were in his bedroom, and when they were in her bedroom. She also testified that in her bedroom he made her suck on his peepee. But while Hutchins asserts that Zoe testified that penis-vagina contact occurred in both bedrooms, as we read the transcript, she was referring only to what transpired in her room.

Here the prosecution made clear to the jury in closing argument that sexual intercourse was alleged to have occurred in Zoe's bedroom on January 15. The prosecutor stated:

“Zoe got on the stand, and she talked to you about what happened in her bedroom on the night of January 15th, 2013. Prior to that, Mr. Hutchins had picked Zoe and Gavin up somewhere in the neighborhood of 4:00 . . . . They went to the toy store, he bought her toys, he went and bought Gavin some kind of game, they got a bite to eat, they went back to his house. Things happened at his house. They came home. Gavin and Shauna, his mom, they stayed downstairs; they read ‘The Hobbit.’ And Zoe and Kenneth went upstairs to her bedroom.

“Zoe [R.] testified that, during that time that they were up there, Kenneth Hutchins put his peepee on her peepee. This 288.7(a), sexual intercourse with a child under 10. That was her testimony. He put his peepee in her peepee. He put it inside. It hurt. She said it stung when he put his peepee on her peepee.”

The acts of oral copulation were also argued to have occurred in Zoe's bedroom that night:

“Count II is oral copulation. And what evidence do we have? Again, we're talking about the evidence right now of Zoe . . . . And she said, that same night in the bedroom upstairs on the rug, that the defendant forced her to put her mouth on his peepee and suck on it. She said it was wet, and it tasted like sweat. She said it was gross.

“[¶] . . . [¶] . . .

“Count VI, that's another count of 288.7. Remember that Zoe described three incidents that occurred that night, somewhere in the span of a half an hour to 45 minutes, perhaps an hour. And she described two acts of oral copulation: One where he forced

her head onto his penis and made her suck on it, and the other one where he put his mouth on her peepee. That's the way she described it, and said that he sucked on it."

Thus, the prosecution elected the acts being charged and explained the elections to the jury. Consequently, no unanimity instruction was required.

#### D. Prosecutorial Misconduct

Hutchins contends that the prosecutor improperly disrupted his counsel's closing argument and misstated the law when she argued to the court and the jury that the abrasion and petechia revealed in Zoe's sexual assault examination were direct, rather than circumstantial evidence, of his guilt.

##### (1) *Record*

The jury was instructed pursuant to CALCRIM Number 223 ("Direct and Circumstantial Evidence: Defined") as follows:

"Facts may be proved by direct or circumstantial evidence or a combination of both. Direct evidence can prove a fact by itself. For example, if a witness testifies that he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. Circumstantial evidence may also be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence, because it may support a conclusion that it was raining outside.

"Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based upon all the evidence."

The jury was instructed pursuant to CALCRIM Number 224 ("Circumstantial Evidence: Sufficiency of Evidence") as follows:

“Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

“Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and the other to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.”

In closing argument, the prosecutor paraphrased these instructions, cited the clitoral abrasion in support of the contention that “if you believe the testimony of Zoe . . . you can find beyond a reasonable doubt that there was penetration,” and stated that the petechia “also could be evidence . . . of his penis rubbing against that area, and popping that little capillary.”

The defense argued that, apart from Zoe’s and Gavin’s testimony, all of the other evidence of guilt, including the abrasion and the petechia, was circumstantial. When counsel referred to the injuries, the prosecutor said, “I’m going to object and ask to approach for a moment.” After a sidebar conference, the court called a recess and excused the jury. The prosecutor argued that defense counsel was erroneously characterizing the abrasion and petechia as circumstantial, rather than direct, incriminating evidence. The parties debated the issue, and the court stated at one point that it did not think the abrasion and petechia were circumstantial evidence. The court eventually ruled: “Here’s what we’re going to do. I’m going to let you both argue it. I think . . . if the jury wants to reject the findings, they’re free to do that. But they’re also free to accept them and consider them in the way that you are arguing.”

Defense counsel then proceeded to discuss other possible circumstantial evidence of guilt, including the gifts Hutchins gave Zoe, adding: “There may be some debate about whether or not this is really circumstantial evidence, because people saw it. But

you have the instructions there.” Counsel then reiterated the distinction between direct and circumstantial evidence set forth in CALCRIM Number 223, and argued: “The abrasion, the petechiae, the erythema, SART discomfort, everything else I have listed there, is circumstantial evidence that could go in either direction. And if you believe there’s two reasonable interpretations, the instructions are clear. If one points to innocence and another to guilt, you must accept the one that points to innocence. That’s how the law says we’re supposed to deal with circumstantial evidence.”

Toward the end of her closing argument, defense counsel reminded the jury of the language in CALCRIM Number 224 that “if there can be two reasonable interpretations and you think both are reasonable . . . you must adopt the interpretation that points to innocence. You might hear in rebuttal some argument against that. Don’t be afraid to follow the law. Don’t be afraid to read this carefully, understand that that is circumstantial evidence of his guilt, and if there are two interpretations, and one points to innocence, you need to adopt it.” Counsel continued with respect to the circumstantial evidence: “The People might also say, wow, that’s a lot of things; it adds; the totality of the circumstances, it looks bad. That’s a lot of things that could point to guilt. It is. But it’s also a lot of things that point to innocence.”

The prosecutor argued in rebuttal: “[Defense counsel] says there’s a lack of corroborating physical evidence. She stated that as a fact. Dr. Crawford-Jakubiak said, often there are no findings in sexual assault cases, especially in sexual assault cases where this kind of allegation has been made, not of a penis going into a vagina, but of a penis going . . . inside the labia; that often there are not findings. But guess what? We had a finding. We had a finding. And that was this abrasion that [defense counsel] calls circumstantial evidence. And I respectfully disagree with her that the evidence that is up on that board is circumstantial evidence. That is corroborating evidence. The abrasion is a piece of direct evidence. Why is it direct evidence? Because two people saw it. Two people saw it. Maria Pacheco saw it, and Dr. Jakubiak saw it when he reviewed the video and when he reviewed the photos. That is not circumstantial evidence.”

Defense counsel asked to approach the bench, and after an unreported sidebar conference, the prosecutor continued:

“As you can see, we have a little disagreement.

“This evidence has been presented to you, an abrasion, a petechia, an erythema, the redness, pain. . . . Maria Pacheco said that Zoe experienced pain when she was being examined on January 16th. You look at those pieces of evidence and evaluate them together. Do they point to the possibility that Zoe was molested? The abrasion on the clitoral hood, Maria Pacheco said it is consistent with the history that Zoe gave on the morning of January 16th, 2013. She gave an extensive interview to a forensic examiner at the Redwood Children’s Center. Maria Pacheco listened to the entirety of that interview. And then Maria Pacheco’s opinion, that abrasion, that petechia, that redness, was consistent with what Zoe reported.

“Look at it together. Look at this evidence together. Don’t take it individually and reject it. Take it together and make a decision. It is evidence, and I don’t believe it’s circumstantial.”

Toward the end of her rebuttal argument, the prosecutor stated: “There is a lot of evidence in this case. Some of it’s direct; some of it’s circumstantial. It’s up to you to decide. It’s up to you to evaluate.”

During deliberations, the jury asked for clarification of the difference between circumstantial, direct, and corroborating evidence. After conferring with counsel, the court referred the jury to the CALCRIM 223 and 224 instructions. While conferring with counsel, the court said it had been caught off guard by the prosecutor’s claim that the medical evidence was direct evidence of Hutchins’s guilt, and now realized that the evidence was only circumstantial.

## (2) *Analysis*

We reject Hutchins’s argument that the prosecutor committed misconduct when she objected to defense counsel’s argument that the abrasion and petechia were only circumstantial evidence because it “so seriously interrupted the defense argument as to deny the defense a proper opportunity to argue its views on the case.” The recess the

court called to address the objection was relatively brief, lasting less than six pages of reporter's transcript. This interruption was far shorter than many breaks that arise during argument. For example, the lunch recess that interrupted the prosecutor's initial closing argument according to the clerk's minutes lasted more than an hour and a half. The objection cannot be deemed to have unduly disrupted the defense argument.

But the prosecutor did commit misconduct when she argued that the medical evidence was direct, rather than circumstantial, evidence of guilt. As the court ultimately realized and as the People concede on appeal, this argument misstated the law because the evidence was in fact merely circumstantial. Misstatement of the law is a form of prosecutorial misconduct. (*People v. Boyette* (2002) 29 Cal.4th 381, 435; *People v. Hill* (1998) 17 Cal.4th 800, 829–830.) However, such a misstatement is not reversible error unless it is reasonably probable that it changed the outcome of the case. (*People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353.)

Hutchins maintains that the prosecutor's mischaracterization of the medical evidence affected the outcome of the trial because that evidence "was the *only* evidence as to the alleged intercourse that did not depend on Zoe's credibility." But there was a considerable amount of other incriminating circumstantial evidence that bore on the veracity of Zoe's sexual assault allegations. As defense counsel admitted in her closing argument: "There's a whole lot about this case that looks really bad for Mr. Hutchins. I'm well aware of that. Number one, child pornography was found in his house. Wow." In addition to Hutchins's possession of child pornography, the jury would also have considered, among other things: Hutchins's offer to assume a caretaker role in Zoe's life; John's concern that Hutchins was spending an excessive amount of time with Zoe, and grooming her with gifts; D.'s thinking it was "weird" that Hutchins wanted to spend so much time with Zoe; the photos showing that Hutchins had shaved his body hair before he was required to provide samples of it; and the vibrator and child's underwear found at his home. Defense counsel did her best to provide innocent explanations for all of the incriminating circumstantial evidence. For example, with respect to Hutchins's shaved body, counsel acknowledged that the contrasting photos of Hutchins when he was

arrested and when the hair samples were taken “did look very damning. . . . Certainly looks like he could have shaved. What if he did? Why would he do that? The People will say he did that because he knows he’s guilty and he’s trying to suppress evidence, and it’s a consciousness of guilt. Or maybe here’s a guy sitting in jail panicking, knowing that he had physical contact with Zoe that day; they played at his house, they played at . . . her house, they tumbled around. What if he freaked out and thought, if they find anything in there, no one’s ever going to believe me? Everybody will think I’m guilty.”

Contrary to Hutchins’s claim, the medical evidence was only one part of a larger body of evidence that tended to corroborate Zoe’s testimony. And while the prosecutor tried to emphasize them, Zoe’s abrasion and the petechia were comparatively weak evidence of Hutchins’s guilt. Nurse Pacheco conceded that the injuries did not prove Zoe was sexually assaulted, and any suggestion to the contrary was authoritatively refuted by Crawford-Jakubiak. There is no reasonable likelihood that the verdict on the unlawful intercourse count or any other charge hinged on the jury’s consideration of Zoe’s injuries.

### **III. DISPOSITION**

The judgment is affirmed.

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Siggins, J.

We concur:

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McGuinness, P.J.

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Pollak, J.