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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES CHRISTOPHER STEINWAY,

Defendant and Appellant.

C057907

(Super. Ct. No.
62031871)

Defendant was convicted by a jury of three counts of lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288, subd. (a)), five counts of lewd and lascivious conduct with a child 14 or 15 years old by one who is at least 10 years older (*id.* § 288, subd. (c)(1)), three counts of oral copulation by one more than 21 years old with another who is under 16 (*id.* § 288a, subd. (b)(2)), and two counts of sexual penetration by one more than 21 years old with another who is under 16 (*id.* § 289, subd. (i)). He admitted a prior serious

felony conviction for purposes of both enhancement and the three strikes law, but the trial court later granted his motion to strike the prior for purposes of three strikes sentencing. Defendant was sentenced to an aggregate, unstayed term in state prison of 15 years 8 months.

He appeals, claiming various evidentiary errors, primarily regarding the exclusion of evidence relating to the victim's credibility and the admission of expert testimony on child sexual abuse accommodation syndrome (CSAAS). Defendant also claims the prosecutor committed misconduct during closing argument by reading from various publications that had not been introduced into evidence.

We reject defendant's evidentiary claims. We further conclude defendant forfeited his prosecutorial misconduct claim by failing to object. On defendant's alternate claim of ineffective assistance based on counsel's failure to object, we conclude he was not prejudiced thereby. We therefore affirm the judgment.

FACTS AND PROCEEDINGS

Defendant and the victim are related by marriage in that the victim's step-mother, Margaret R., had previously been married to defendant's father. Defendant was born in 1969; the victim was born in 1987.

The victim's parents, Mark R. and Regina M., divorced in 1996. Mark first met defendant in December 1996. In 1998, Mark was living in San Bruno, Regina was living approximately one and

one-half to two miles away in Millbrae, and defendant resided with his wife and newborn daughter less than two blocks from Regina.

On one occasion in either 1998 or 1999, when the victim was 11 or 12 years old and was staying with her father, Mark and the victim visited defendant and his family at their home. Later, Mark departed, leaving the victim behind. While defendant's wife and baby were away from the house, defendant laid the victim on the floor, got on top of her and touched her breasts. He took off her shirt and his clothes and told her to follow him into the bedroom. Defendant told the victim to touch his penis but she refused. When defendant heard someone arrive at the house, he put his clothes back on. Later that evening, defendant drove the victim to her father's house and told her she could not tell anyone what had happened.

Defendant and the victim had very little contact thereafter, until the summer of 2002. At that time, the victim was living with her mother and her mother's new husband, David M. However, the victim stayed with her father and his new wife, Margaret R., during the periods of June 12 through June 23, June 30 through July 14, and July 19 through August 4.

Between May 29 and August 21, 2002, the victim placed many calls to defendant, either at his workplace or at his home. She called nearly every day and some days called multiple times. On July 26, the victim placed 11 calls to defendant's workplace. Three days later, she called his workplace seven times from her mother's home and seven more times using her father's cell

phone. She also called defendant's home five times that day. Defendant called the victim many times as well during that period.

The victim sent defendant many email messages during the summer of 2002, and defendant sent her several as well. The victim also maintained a journal of her interactions with defendant over the summer.

Between June 17 and June 19, the victim stayed with defendant and his family at his house. When defendant's wife and children were not around, defendant would touch the victim's vagina with his hand and would put his mouth over her breasts. During the night of June 17, defendant came into the room where the victim was sleeping, got in bed with her and moved his hands down her back and onto her buttocks. He told the victim that if she had not been wearing pants she would be in trouble and that his feelings for her had not changed. On June 19, the victim went inside the house after swimming and defendant followed her. He hugged her from behind, kissed her neck, turned her around, and kissed her again. Defendant later spoke to the victim on the phone and said they would find ways to see each other.

In her journal for June 24, the victim wrote: "Jimmy is so sweat [*sic*]. He cares about me and I care about him. I will never ever stop thinking about him. I think about him every day, minute, hour, second and more. I dream about him too. I wish I lived across the street from him. I used to see him almost every weekend but then he moved far away. Ever since we

got together and had a fling I have been in love with him. Get back to you soon."

In an entry for June 27, the victim wrote: "I am so horny 4 him and I want to fuck him. If I didn't have my pants on last week like he said then I would be in trouble (ya know)!"

On July 13, the victim was staying with her mother. While Regina and David were away from the house, defendant came over and laid on top of the victim on the floor. He touched her breasts and kissed her. He also sucked on her breasts and "left a hickey on them." Defendant put his finger in the victim's vagina and kissed her on the neck and mouth. Before he departed, defendant gave the victim condoms.

In a journal entry for July 13, the victim indicated that defendant came to her house at 10:30 for about 20 minutes. It also says, "Finger Me Again," "You gave me a hickie," and "he gave me condoms for us!" An entry for the next day refers to defendant giving her the "hickie" and the condoms on Saturday.

On July 15, defendant wrote the following email to the victim: "Hey, Sweetie, I only have a few minutes here, but I do really miss you and love you too. Hopefully soon we can be together in heated passion. Call me tomorrow at work, K? Love Jimmy."

On July 18, the victim sent defendant an email containing the following: "But otherwise I can't wait because when you were fingering me, it felt so good and that's all I can think now if [sic] the feeling inside of me when you are doing that."

The victim next saw defendant at his house on August 3 for a barbecue and pool party. Also in attendance were the victim's father and stepmother, defendant's wife and children, a neighbor and his family, and the sister of defendant's wife and her two sons. At some point during the afternoon, defendant and the victim were in the pool and defendant placed his finger inside her vagina while she held onto the side of the pool. Later, defendant swam up to the victim while she was sitting on a pool step and pulled her into the water. He then went under the water, pulled the victim's bathing suit to the side and inserted his tongue in her vagina.

After defendant got out of the pool, he went inside and signaled the victim from an upstairs window to join him. The victim did as directed. She and defendant went into a guest bathroom where he took off their clothes, rubbed his penis against her buttocks and then inserted his penis into her anus. He also put his tongue inside her vagina and forced her to orally copulate him. Eventually they got dressed and went back downstairs. When it was time to leave that evening, the victim locked herself in a bathroom and refused to come out because she wanted to stay at defendant's house. However, the victim's father eventually convinced her to come home with him.

In a journal entry for August 4, the victim wrote: "He has fingered me, sucked me, now all he has to do if [sic] fuck me! He was trying to get hard yesterday but we (he) was too, too nervis [sic] with everybody in the house! . . ."

On August 12, defendant wrote the following email:

"Listen, you want to make love to me and I want to make love to you. What do we do? Maybe I will take a week off--a week day off so we can get together if you are not working and I will visit you at your house and we can make the sweetest love together. Where are you? How come are [sic] are not writing back? When you call tomorrow if you are in the bath, I want to turn you on. I really want to fuck you hard and make you come. I want to lick your body. Sweetie, I think that you are so fine. You are the bomb and you are so beautiful. You are so sexy. Never be ashamed of your body while you are with me. Your body is a treasure. Where are you? I wrote a hell of a lot. I love you and miss you. Don't turn me in."

On August 18, defendant wrote: "I guess you're mad at me and won't write back. I don't blame you. If I had my choice, I'd be licking your clit 24/7 making you CUM. Hopefully you still love me. Please tell that you do. I need you. I kill myself if you won't be mine. You have to be my main and only lover. When you become 18, I will take you on a trip to a different country like Mexico to make love to you on the beach, in the hotel and everywhere we can think. But please, please, don't run away. Things would get complex. Don't do it or you and I can never be. So don't do it. You also need to do well in school. For every A I will fuck you harder. K?"

On August 20, defendant wrote: "Hey, my little fuck bunny, how are you? Need to know directions to your house. Also when

does your mom leave for work? And lastly I can only stay in the morning. I'll have to be at work by noon."

On August 22, defendant wrote: "Hey sweetheart! I'm sure that you're not on line right now, but I just wanted to say hello. I guess tomorrow you'll be babysitting. Right? Anyways, I really want to know what you are doing this weekend, okay? Seriously though I'm over the emotion of the last day, and I really miss you a lot. I need to know if you're busy this weekend. Next weekend I'm going to Monterey for my birthday. I really want us to last forever, but you really have to be patient. I will make love to you as much as we can until you are able to move away from your mother legally, so that we can spend the rest of our lives together. We can have your little love nest where we can make love, (not fuck, but make love) 24/7. You are the sweetest thing to come into my life, but I don't want you to be controlling, only in bed. Okay?" [¶] "Sweetie, if you can be patient like this, I will give you the world!!!! And I'd like to ask you a formal question if I may. Will you marry me? I want you to be my loving and caring wife. To be with me for the rest of my life. When you become 18, I want us to run away together at that time. Can you expect that? So, will you be my one true love? Will you run off with me on your 18th birthday? I will make you so happy! But in the meantime our meetings may be infrequent, but they will be the best times you will ever have. Love you."

That same day, the victim's stepfather happened to see her journal lying open on a desk in her room. He glanced at it and

saw things that didn't look right to him. When the victim's mother got home 15 to 20 minutes later, he showed her the journal. They later confronted the victim about it. David then sent an email message to defendant using the victim's account saying something about the cat being out of the bag. Several days later, they reported the matter to the police.

Defendant was charged with various sex offenses as described above. At trial, he testified in his own behalf. He denied ever touching the victim inappropriately, but acknowledged sending the various emails described above. Defendant claimed these were nothing but a fantasy that he was living out online. He testified he was not attracted to the victim sexually but was concerned about her. He also testified that once he started down this road, he could not stop for fear that the victim would turn him in for having sent sexually explicit emails. Defendant admitted he knew he had crossed the line with the emails but was caught up in the fantasy. Defendant claimed he made plans with the victim to meet but never intended to follow through. Defendant denied that he had ever been alone with the victim in Millbrae and denied even getting in the swimming pool on August 3. According to defendant, in August he was trying to work out an exit strategy to break off the communications with the victim.

Defendant was convicted on all charges. On the principal charge of lewd and lascivious conduct with a child under the age of 14, defendant was sentenced to the middle term of six years. On seven other counts, defendant received consecutive one-third

middle terms of eight months. On all other charges, defendant received the middle term of two years, to run concurrently. He also received an enhancement of five years for a prior serious felony conviction (Pen. Code, § 667, subd. (a)), for a total sentence of 15 years 8 months.

DISCUSSION

I

Exclusion of Evidence

Prior to trial, the prosecution moved in limine to exclude evidence concerning a sexual relationship between the victim and her step-brother, A.S., two years after the latest offenses charged in this matter. Defendant in turn moved for admission of the evidence.

According to defendant's offer of proof, in 2004, when the victim was not yet 18 years old, she engaged in a sexual relationship with A.S. During an investigation of that matter, the victim made several false statements to a police officer. In particular:

"a. [The victim] [f]irst stated that a condom wrapper found in a bag next to her bed belonged to 'a girlfriend' who had come over to her house after school the previous day.

"b. [The victim] denied that [A.S.]'s fingerprints would be on the condom wrapper. After [O]fficer Eichler explained the concept of DNA testing, [the victim] admitted that DNA from the condom would 'probably' match that of Mr. [S.]

"c. [The victim] then told the officer that any DNA found on the exterior of the condom would not match her own DNA. She again tried to tell the officer the unnamed 'girlfriend' who had supposedly accompanied her home from school the previous day must have been the one who had intercourse with Mr. [S.]

"d. When pressed, [the victim] was evasive about the identity of the 'girlfriend,' refusing to give a name, location, or any identifying details.

"e. When asked to explain why she and Mr. [S.] had spent so much time alone in his bedroom when she visited his (their) father, [the victim] stated that [A.]'s bedroom was the only place they could watch television.

"f. [The victim] again denied having sexual relations with her half-brother, Mr. [S.]

"g. As the investigation progressed, both [the victim] and [A.S.] admitted to police that they had been involved in a a [sic] sexual relationship."

Defendant argued the evidence demonstrated the victim's willingness to lie to police and therefore was relevant on the issue of her credibility.

The trial court determined the evidence was inadmissible under Evidence Code section 782, as it related to the victim's sexual conduct. (Further undesignated section references are to the Evidence Code.) The court also found the A.S. matter to be totally different from that presented here. Although the court granted the motion to exclude, it did so without prejudice to defendant presenting a sanitized version of the evidence.

Defendant later proposed a sanitized version containing the following four proposed questions, the last two of which are essentially the same:

"1. Ms. Doe, you were interviewed by a Police officer on December 16, 2004, in relation to [A.S.]?"

"2. The police officer asked you specific questions during that interview related to [A.S.]?"

"3. Your answers to the officer were not truthful?"

"4. You lied to the officer when you answered the questions?"

The trial court again excluded the evidence, this time under section 352. The court found the relevance of the evidence to be limited due to remoteness in time and the differences in the situations presented. Defendant renewed his request to admit the evidence following the victim's testimony, but the court again excluded it.

Defendant contends the trial court erred in excluding the foregoing evidence. He asserts the prosecution was permitted to present the victim in a false light of veracity as to everything except her relationship with him, and this denied him a fair trial. We disagree.

Unless otherwise excludable, all relevant evidence, including evidence concerning the credibility of a trial witness, is admissible. (*People v. Mizchele* (1983) 142 Cal.App.3d 686, 690; see §§ 210, 351, 780.)

Section 782 provides that, in a case such as this, "if evidence of sexual conduct of the complaining witness is offered

to attack the credibility of the complaining witness," certain procedures must be followed. (§ 782.) "A written motion must be made which includes an offer of proof of the relevancy of the evidence of sexual conduct and its relevancy in attacking the credibility of the complaining witness. If the court finds the offer of proof sufficient it shall order a hearing out of the presence of the jury at which the complaining witness may be questioned. If at the conclusion of the hearing the court finds the evidence relevant and not inadmissible pursuant to . . . section 352, it may make an order stating what evidence may be introduced and the nature of the questions permitted." (*People v. Daggett* (1990) 225 Cal.App.3d 751, 757.)

Section 782 is only tangentially related to the present matter. The defense was not attempting to present evidence of the victim's subsequent sexual conduct on the issue of credibility. The defense was trying to get before the jury an instance of the victim's dishonesty, i.e., that she lied to a police officer about her relationship with A.S. It is only coincidental that the lie related to a sexual matter. (See, e.g., *People v. Franklin* (1994) 25 Cal.App.4th 328, 335-336 ["The instance of conduct being placed before the jury as bearing on credibility is the making of the false statement, not the sexual conduct which is the content of the statement. Even though the content of the statement has to do with sexual conduct, the sexual conduct is not the fact from which the jury is asked to draw an inference about the witness's credibility"].)

The trial court attempted to get around this situation by permitting the defense an opportunity to sanitize the evidence so that it revealed an instance of dishonesty without revealing the sexual nature of the circumstances. However, as the court pointed out at the time of its first ruling, evidence regarding the sexual nature of the relationship between the victim and A.S. was going to have to come out in order for the jury to put her statements to the officer in context. This, according to the court, would implicate section 782.

Ultimately, the court excluded the evidence on the basis of section 352. Section 352 permits the exclusion of relevant evidence where "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.) Prejudice as used in section 352 refers to the possible misuse of evidence. (*People v. Hoze* (1987) 195 Cal.App.3d 949, 954.) Evidence should be excluded as unduly prejudicial "when it is of such nature as to inflame the emotions of the jury, motivating [jurors] to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1009.)

We review a trial court's order excluding evidence under section 352 for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 213.) "'A trial court's exercise of discretion

will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citations.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered.'" (*People v. Green* (1995) 34 Cal.App.4th 165, 182-183.) Although a determination under section 352 is within the sound discretion of the trial court (*People v. Barrow* (1976) 60 Cal.App.3d 984, 995, disapproved on other grounds in *People v. Jimenez* (1978) 21 Cal.3d 595, 608), "'section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of *significant* probative value to his defense.'" (*People v. Babbitt* (1988) 45 Cal.3d 660, 684, quoting from *People v. Reeder* (1978) 82 Cal.App.3d 543, 553.)

Defendant contends the trial court's ruling under section 352 was tainted by its earlier ruling under section 782. Not so. Although the court made reference to its earlier ruling, it did so in the context of a proper weighing of prejudice and probative value. The court explained that if it allowed defendant to question the victim about having lied to the police, without any specifics, the prosecution would be hamstrung by section 782 in trying to rehabilitate the victim. Thus, the jury would be left with only half the story and no ability to place the victim's statements in context.

Defendant contends the court cannot bar admissible questions and answers by one party on the ground that an opposing party might seek to introduce inadmissible evidence to

counter it. But that is not what is involved here. Defendant's questions sought to present a sterile version of the story regarding the victim's lies. The relevance of that evidence necessarily depended on its context. Defendant may not simply ignore the context to suit his purposes. The trial court was correct to take this context into consideration.

The court also found the probative value of the evidence to be minimal, because the situation presented in 2004 was much different than that in 2002. Defendant argues similarity of the circumstances may be relevant to whether evidence of prior uncharged conduct should be admitted, but has no role to play here. We disagree. Defendant was attempting to show the victim was lying about having had a sexual relationship with him. In 2004, the victim purportedly lied about just the opposite, that she did *not* have a sexual relationship with A.S. As the trial court recognized, this fundamental difference significantly reduced the probative value of the evidence. The fact the victim might have lied in 2004 to keep secret a contemporaneous sexual relationship with someone she thought she loved has little bearing on whether she was lying in her revelations about another sexual relationship many years earlier with a man for whom she apparently no longer had feelings.

Defendant contends that only days after an arrest warrant was issued for him in this matter, the victim found herself in "real trouble" both because she lied to authorities about the A.S. matter and because the person she supposedly loved, A.S., was himself facing serious charges. Thus, defendant argues, he

"was entitled to cross examine [the victim] as to whether such circumstances in 2004 created a strong incentive for her to fully cooperate with the state thereafter in order to curry leniency"

The foregoing argument was never raised below. As a general matter, appellate courts will not consider issues or theories raised for the first time on appeal unless the question is one of law to be applied to undisputed facts. (*Johanson Transp. Service v. Rich Pik'd Rite, Inc.* (1985) 164 Cal.App.3d 583, 588.) We are not presented here with a question of law to be applied to undisputed facts.

Defendant contends there was little chance of undue prejudice to the victim by revelation that she had a sexual relationship with A.S. when she was 17 years old. According to defendant, "[t]he prosecution had already introduced in its case in chief a plethora of evidence that at the age of 15 [the victim] had stated in the most graphic terms her desire to have sexual intercourse with an older adult." This may well be true. However, by the same token, if defendant was merely trying to get before the jury evidence of an instance where the victim lied, there was already plenty of that available to defendant without getting into the victim's sexual relations with others. Thus, the probative value of one more lie was minimal.

The trial court concluded the probative value of the evidence was substantially outweighed by its prejudicial effect. On the record before us, we cannot say the court abused its discretion in this regard.

Defendant nevertheless contends the trial court erred in barring him from presenting any evidence whatsoever regarding the victim's sexual conduct with anyone other than defendant. In particular, defendant takes issue with the court's refusal to allow him to question the victim about her relationship with a prior boyfriend, despite the fact the prosecution put before the jury the victim's journal, which contained a reference to her having done sexual acts with that boyfriend. Defendant argues such evidence would have been relevant to explain the victim's knowledge of matters such as being "fingered" and orally copulated and the presence of a "hickie."

As the People point out, defendant never filed a motion under section 782 to admit such evidence. Hence, the issue has been forfeited. (*People v. Sims* (1976) 64 Cal.App.3d 544, 553-554.)

II

Other Credibility Evidence

Defendant contends the trial court erred in excluding other relevant evidence regarding the victim's credibility. In particular, he argues the court improperly precluded him from cross-examining certain key prosecution witnesses about the victim's propensity for lying. Defendant asserts the court based its ruling on his failure to interview those witnesses in advance of trial and to provide the prosecution with interview statements in discovery. Defendant argues he had no obligation to interview or provide discovery for *prosecution* witnesses.

Defendant further argues the court erroneously barred him from questioning the victim's stepfather about a letter he purportedly wrote to the victim which asserted, among other things, the victim was addicted to lying. Defendant argues the court erroneously excluded the evidence as a sanction for late discovery and abused its discretion in excluding the evidence under section 352.

As we shall explain, defendant's arguments are based on a misreading of the record. The evidentiary rulings with which he takes issue were not based on discovery abuses but on other grounds which defendant does not challenge.

Prior to trial, the prosecution moved in limine to exclude character evidence regarding the victim. The prosecution explained: "The Defendant has not discovered any witnesses he intends to call regarding the character of the victim. In addition, there are no relevant areas this defendant can attack regarding this victim in this case with these charges that is [*sic*] admissible." At a pretrial hearing, the court asked defense counsel if he intended to call any character witnesses regarding the victim and counsel responded: "I don't believe we have character witnesses as [*sic*] the victim." The court granted the prosecution's motion in limine.

However, immediately thereafter, defense counsel indicated he believed there were several people on his witness list who would testify the victim has a character for lying. The court asked the basis for this belief, given that counsel had not yet interviewed those witnesses. Counsel acknowledged he was

guessing as to what the witnesses would say based on information provided to him by defendant. Counsel explained he had been informed that, in 2006, the victim was no longer living with her mother because of the victim's lies and the victim's father refused to allow her to live with him because of her history of lying. For a while, the victim lived with her uncle, but this ended because of her lying.

The court expressed its concern with calling witnesses whose expected testimony is not known in advance: "I am concerned about calling witnesses that no one knows what they are going to say and calling witnesses cold, anticipating they may have some relevant information in the case. That is just not the way things should be conducted. It's basically a fishing expedition. In order to call a witness, the witness should have relevant, material information, and you should know what that is, number one, to not waste time and, number two, to give the other side an opportunity to evaluate whatever testimony that person may present for whatever grounds they have. It works both ways." The court then reiterated its grant of the prosecution's motion in limine. However, the court explained its ruling was without prejudice to defendant interviewing witnesses and providing an offer of proof as to what they would say.

Defendant contends the court thereafter sustained objections to various questions posed to the victim's mother and stepfather and the victim's friend, Samantha M., regarding whether the victim had ever lied to them. He argues the

victim's mother, stepfather, and friend were all key corroborating witnesses for the prosecution and, when defense counsel questioned them, "he was fettered by the trial court's granting of the prosecution's pretrial motion 'to exclude the defendant from attacking the character of the victim.'"

Defendant takes issue with the trial court's initial ruling to exclude character evidence, claiming it betrayed "a fundamental misunderstanding of California discovery law." Defendant points out that while he would have been required to provide discovery of pretrial statements made by *defense* witnesses, he had no such obligation with respect to *prosecution* witnesses. Thus, the court could not preclude him from cross-examining the victim's mother, stepfather and friend simply because he failed to interview them before trial.

Defendant apparently does not take issue with the court's decision to preclude him from presenting character witnesses in his case-in-chief where there had been no prior interviews of those witnesses and, thus, no discovery provided to the prosecution. Instead, defendant's attack is limited to the court's refusal to allow him to cross-examine *prosecution* witnesses on the issue of the victim's dishonesty. However, a close look at the specific instances where defendant claims the court precluded questioning about the victim's honesty reveals there was no such preclusion.

Defendant cites three such instances. The first was during the following cross-examination of the victim's mother:

"Q. Upon finding pieces of paper with [defendant's] name written on it, did you ask [the victim] about it?

"A. Yes.

"Q. What did she tell you?

"A. She--when she would visit her father, that was part of his new family and that they would go visit them and see his family.

"Q. From your perspective she wasn't honest when you asked her about it?

"MS. GAZZANIGA [the prosecutor]: Objection. Assumes facts not in evidence.

"THE COURT: Sustained. Next question."

In this instance, the court did not sustain the objection based on lack of discovery or improper impeachment, but on the fact the question assumed facts not in evidence. Defendant does not contend exclusion of the evidence on that basis was improper.

The next instance, also during cross-examination of the victim's mother, concerned pages from the victim's journal:

"Q. Could you please look at August 1st and let me know if you recall ever reading that page?

"A. Yes.

"Q. And on this page [the victim] expresses her hatred of you and her desire to run away.

"MS. GAZZANIGA: Objection, argumentative. Assumes facts not in evidence.

"THE COURT: Well, I have to overrule that. Counsel, it appears to me you are just reading the diary. The diary is in evidence. Is there some relevance to reading--

"MS. GAZZANIGA: It's the characterization. He is not quoting it.

"THE COURT: I am asking you--you are asking the witness has she read it, and whether she did or didn't, there needs to be some relevance to your questions. I don't see the relevance to asking her--I just would like for you to tell me what it is.

"MR. AMPARAN [defense counsel]: You honor, my previous questions the court has sustained--

"THE COURT: Please tell me what the relevance is to you reading those to this witness. That is what I am asking you. What is the relevance?

"MR. AMPARAN: It goes to statements being made by [the victim], it goes to honesty and credibility.

"THE COURT: These are all in evidence. You can argue that at any time you choose. What was the objection by the People?

"MS. GAZZANIGA: I will make a relevance objection.

"THE COURT: On 352 grounds, I will grant the objection, more time consuming than probative of any issue that you told me, Counsel. Certainly I am not preventing the jury from seeing this, from arguing it, but your questions are irrelevant, did she read them. Next question."

Here, again, the court did not exclude the question based on lack of discovery but on lack of relevance. Defendant was

not precluded from questioning the victim's mother about the victim's reputation for honesty or dishonesty.

The last instance defendant cites came during the cross-examination of the victim's friend, Samantha M. There, we find the following exchange:

"Q. When you were fifteen, was [the victim] always completely honest with you?

"MS. GAZZANIGA: Objection, beyond the scope, lack of foundation.

"THE COURT: Yes, sustained.

"Q. BY MR. AMPARAN: Was there ever a period of time where you know [the victim] was dishonest with you?

"MS. GAZZANIGA: Objection. Same objection, lack of scope.

"THE COURT: Improper impeachment. Sustained.

"Q. BY MR. AMPARAN: Back in the summer of 2002 do you have any way of knowing whether or not what [the victim] told you about finger banging or oral sex, do you have any way of knowing if that was true?

"MS. GAZZANIGA: Objection, calls for speculation.

"THE COURT: Overruled. You may answer.

"THE WITNESS: What was the question again?

"Q. BY MR. AMPARAN: Do you have any way of knowing if that stuff was true?

"MS. GAZZANIGA: I am going to make another objection.

"MR. AMPARAN: I will rephrase it.

"MS. GAZZANIGA: It invades--

"MR. AMPARAN: It's outside 782.

"THE COURT: I am going to sustain it on vague [*sic*]. I am not preventing you from questioning, but the question can certainly call for an answer in many forms.

"MR. AMPARAN: Sure.

"Q. BY MR. AMPARAN: Samantha, when [the victim] told you that she had gone down--she had had oral sex, do you have any way of knowing whether or not that was true or not?

"A. No.

"Q. When [the victim] told you she had been finger banged, do you have any way of knowing that was actually true or not?

"A. No."

Once again, the court did not preclude any evidence because of discovery violations. Defense counsel at first purportedly failed to lay a foundation for asking about Samantha's knowledge of the victim's honesty. The court also found a question to be improper impeachment. Finally, the court permitted questioning about whether Samantha had reason to believe that what the victim told her about sex acts with defendant was true.

Assuming the trial court erred in sustaining objections to defense counsel's questions to Samantha about whether the victim had always been honest with her and whether there was a period of time when the victim had been dishonest, such error was harmless under the circumstances. Contrary to defendant's assertions, this was not simply a credibility contest between defendant and the victim. It was a credibility contest between defendant on the one hand and the victim, the emails, the telephone calls, and the victim's journal on the other. Much of

the victim's testimony was bolstered by the damning emails between defendant and the victim, in which defendant described sexual acts he wished to engage in with the victim and failed to refute, thereby tacitly admitting, statements made by the victim about acts already performed by defendant on the victim. The countless telephone calls between defendant and the victim demonstrated much more than just an internet fantasy, as defendant described, and the victim's journal painted a consistent picture that corroborated the victim's chronology and version of the events.

At oral argument, defendant asserted there is nothing in the journal entries that refers to the 1998 incident and, hence, the journal does not corroborate the victim's testimony as to those earlier offenses. But an entry for June 24, 2002, reads: "I used to see him almost every weekend, but then he moved far away. Ever since we got together and had a fling, I have been in love with him. Get back to you soon." A June 25 entry reads: "I have been in love with him for almost three to four years before the first fling." The victim testified the "fling" refers to the incident when she and defendant were living in Millbrae, in either 1998 or 1999.

Defendant attempted to refute the evidence against him by claiming the emails were part of an *anonymous* internet fantasy in which the precise identity of the other party was inconsequential, notwithstanding the fact the victim and defendant were obviously well known to each other. Defendant's explanations in this regard were both internally inconsistent

and illogical. Hence, it is not reasonably probable the result of the case would have been any different had the court allowed the credibility questions to Samantha.

Defendant also contends the court erred in precluding him from questioning witnesses about a letter purportedly written by the victim's stepfather. Late in the trial, after both sides had rested and the prosecution was presenting rebuttal evidence, defense counsel brought to the court's attention a letter he had just received from Margaret R., the stepmother of both the victim and defendant. The typewritten letter was purportedly written by David M., the victim's stepfather, to the victim and allegedly began, "Happy Mother's Day, [the victim]." In it, David purportedly said, "You lied to us today when you said you were going to Jennifer's. Why do you think we owe you anything? You know, like letting you stay in this house." According to defendant, the letter further stated: "When your mouth is moving, chances are you are lying. You have lied to your friends and us so much that to you it is normal behavior. You are addicted to lying."

Defendant contends the trial court improperly excluded evidence regarding the letter based on late discovery, despite having permitted the prosecution to introduce evidence about other matters that had first been discovered during trial. However, lateness of discovery was only one factor mentioned by the trial court. The court also excluded the evidence on the basis of section 352. The letter in question was hearsay and the court questioned counsel as to whether David M. had ever

been asked his opinion about the victim's honesty, thereby making the letter admissible as a prior inconsistent statement. Counsel could not point to any such question, and the court therefore assumed it had not been asked. The court then found the letter more prejudicial than probative, given that it had apparently been written three to five years after the incidents at issue here and David had never been asked his opinion about the victim's honesty.

Defendant argues the evidence was proper impeachment because David previously testified the victim was an "honest girl." However, defendant cites as support only his representations to the court at the time of the parties' argument over admission of the letter. He does not cite anything from David's actual testimony. At oral argument, defendant proclaimed that David M. had in fact been questioned about the victim's credibility and testified he had no reason to doubt her veracity. However, we have reviewed David's entire testimony and find no reference to the victim's credibility.

We find no abuse of the trial court's discretion in excluding the indicated testimony. Even assuming the letter was authentic and had been written by David M. to the victim, it contained obvious hyperbole. It was written many years after the incidents at issue in this case and, as the trial court pointed out, may not have been admissible in any event because there was no testimony for which it could serve as a prior inconsistent statement, for purposes of a hearsay exception. By the time the letter was brought to light, both sides had already

presented their cases in chief. It was essentially too late to begin a mini-trial on the victim's character for truthfulness.

III

Expert Testimony

The prosecution presented the expert testimony of Dr. Anthony Urquiza to explain child sexual abuse accommodation syndrome. Dr. Urquiza explained CSAAS is based on a 1983 article written by Dr. Roland Summit "to provide an understanding about what typically occurs with a child who has been sexually abused," which may be different from what would normally be expected. Dr. Urquiza testified CSAAS has many components, including the following: (1) secrecy, (2) helplessness, (3) entrapment or accommodation, and (4) delayed or unconvincing disclosure.

Secrecy involves some type of manipulation or coercion to keep the child quiet about the abuse. This manipulation need not be of a negative nature, such as threats. It might involve "providing special attention or gifts to the victim" or "developing a special or unique relationship with the victim," such that the victim will not tell others in order to avoid getting the special friend in trouble.

Helplessness involves the misconception that a child will do something about the abuse like run away, fight off the perpetrator, or report the abuse. This belief ignores that the perpetrator is usually bigger and stronger and may be an authority figure.

The third component, entrapment or accommodation, deals with how child sexual abuse victims learn to cope with the situation. According to Dr. Urquiza, many children have a sense of shame or embarrassment at being sexual assault victims, and they will shut down and suppress a lot of unpleasant feelings. He explained it is not unusual for the victim to maintain a normal relationship with the perpetrator aside from the abuse. In fact, some victims may actually welcome the sexual abuse because they want to be in a special relationship with the perpetrator.

The fourth component of CSAAS is delayed disclosure which, according to Dr. Urquiza, is "pretty straightforward." He testified it is not unusual for a victim to delay revealing the abuse or to disclose it a little bit at a time or to fail to disclose it altogether.

Defendant contends there was no valid basis for admitting Dr. Urquiza's testimony. According to defendant, "although there may have been some empirical support in the 1980's for the existence of a societal misperception that children who suffer sexual abuse against their will would report it immediately, no such 'myth' persists today." Further, defendant argues, "even if there still existed a societal myth that children subjected to unwanted abuse would immediately report it, that myth would not have come into play in this case," inasmuch as the prosecution's theory was that the victim engaged in sexual conduct with defendant willingly. Thus, "there was no 'myth' that would lead jurors to erroneously believe that a teenager in

love with an older man would none the less immediately report her 'fling' to her parents."

Expert opinion testimony is admissible if it relates "to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" and it is based on information "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates" (§ 801.) The governing rules on the admission of expert opinion testimony are well settled. "First, the decision of a trial court to admit expert testimony 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.' [Citation.] . . . Second, 'the admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness."' [Citation.]" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300.)

Expert testimony on CSAAS is not admissible to prove that a molestation took place. (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744; accord *People v. Bledsoe* (1984) 36 Cal.3d 236, 251

[rape trauma syndrome evidence may not be used to prove a rape occurred].) It may be admitted, however, "for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation," where the victim's credibility has been placed in issue by such paradoxical behavior as delayed reporting. (*Patino*, at p. 1744; see also *id.* at pp. 1744-1745; *People v. Housley* (1992) 6 Cal.App.4th 947, 955.)

In *People v. Bowker* (1988) 203 Cal.App.3d 385, the Court of Appeal concluded the trial court erred in admitting CSAAS evidence without any restriction on its use by the jury. The court indicated that, while it is clearly impermissible to admit such evidence to prove abuse occurred, it is also improper to permit the expert to present "'general' testimony describing the components of the syndrome in such a way as to allow the jury to apply the syndrome to the facts of the case and conclude the child was sexually abused." (*Id.* at p. 393.) The court indicated that, "at a minimum [CSAAS] evidence must be targeted to a specific 'myth' or 'misconception' suggested by the evidence." (*Id.* at pp. 393-394.)

Defendant contends the trial court's admission of Dr. Urquiza's testimony was based on an erroneous assumption that a societal myth persists regarding the failure of children to report abuse, and the court erred in denying him a hearing to prove otherwise. Defendant argues it is questionable whether such myth existed at the time of Dr. Summit's original article. But even assuming it did, no such myth exists today given more

recent widespread reporting of sexual abuse cases involving delayed disclosure.

Assuming defendant is correct regarding the changing nature of public perception about child sex abuse victims, this would appear to be a matter for the experts to sort out. Defendant presented his own expert on CSAAS, Dr. Mitchell Eisen, to try and refute the testimony of Dr. Urquiza. Dr. Eisen explained that child victims react differently, so there is no model that can be followed. He further testified the child's disclosure pattern should not be used as an indicator of truth.

At any rate, defendant did not try to exclude the evidence on the basis of changing public perception. At the hearing on defendant's motion to exclude Dr. Urquiza's testimony, the trial court indicated it could not rule on the motion until other evidence was presented that might make such expert testimony relevant. Defendant argued the evidence was being presented to buttress the victim's credibility and there is no evidence any of the CSAAS myths apply to the victim. Later, the prosecution proposed to question Dr. Urquiza on the four myths noted above. By that time, the victim had already been examined at length, and the court indicated the evidence is admissible by virtue of the fact the victim's credibility had been placed in issue due to her paradoxical behavior, including delayed reporting. In response, defense counsel expressed his concern that the prosecution not be permitted to draw any correlation between the CSAAS analysis and the facts of this case. The court indicated that would not be allowed.

Thus, defendant did not take issue with the specific myths identified by the prosecution. Rather, defendant's concern at the time was that the prosecution not be able to use CSAAS expert testimony to prove the molestation actually occurred in this instance. There is no indication the prosecution violated the court's restriction.

Defendant contends the trial court erred in failing to conduct a hearing to permit him to challenge the factual foundation for the various CSAAS myths. However, except for requesting such a hearing in his motion in limine, defendant never pressed the matter and the trial court never expressly refused to hold such a hearing. Where a defendant fails to secure a ruling on a point, it is not preserved for appeal. (*People v. Rowland* (1992) 4 Cal.4th 238, 259.)

Defendant argues there is no societal myth "that a teenager like [the victim], who indisputably wanted to engage in sexual activity that she knew her parents disapproved of, would nonetheless immediately report the sexual conduct."

This argument betrays a fundamental misunderstanding of the CSAAS evidence. Assuming, as defendant asserts, the evidence showed the victim wanted to engage in sexual activities with the defendant, this in itself could be viewed by a reasonable jury as paradoxical behavior. Defendant assumes it is perfectly reasonable for a 15-year-old to want to engage in sex with an adult more than twice her age. We believe a reasonable jury could conclude otherwise and that the victim's assertions to the contrary, in her emails and journal entries, were either part of

an elaborate fantasy concocted out of whole cloth, as defendant asserts, or a means of coping with what was happening to her or to preserve her *special* relationship with defendant. The CSAAS evidence would be useful in order to give the jury a reason to conclude it is the latter.

Defendant's argument also ignores the fact that this case involved not just the incidents in 2002, when the victim was 15 years old, but the incidents in 1998 or 1999, when the victim was only 11 or 12. A reasonable jury could wonder why a child that age would not report a sexual assault by an adult which, according to the victim's testimony, came without any prelude or provocation.

Defendant contends the trial court nevertheless erred in permitting the prosecution to present evidence through Dr. Urquiza that the statistical likelihood of a false claim of child sexual abuse is low. Defendant initially objected to any such evidence, and the prosecutor agreed she would not offer any evidence about false allegations. No such evidence was presented during Dr. Urquiza's direct testimony.

However, during cross-examination, defense counsel asked repeatedly whether Dr. Summit's report assumes that claims of sexual abuse are true. This culminated in the following testimony:

"Q. In terms of the--let me ask you this: Have you ever participated in any research on false allegations of child sexual assault?

"A I have not done research on false allegations. I know about that research, but it's not the area of research that I do.

"Q. Are you familiar with the term 'intentional misrepresentation'?

"A Not as a researcher, no.

"Q. What about confabulation?

"A Confabulation, yes.

"Q. What--how is confabulation important in terms of [CSAAS]?

"A Well, not with regard to that, because [CSAAS] doesn't address confabulation. And I am not sure that the child sexual abuse research field addresses it. Confabulation is sort of--a simple version is a misrepresentation or a lie about something. But that is not addressed in the [CSAAS] article.

"Q. In terms of child sexual abuse, can there be non-intentional false allegations?

"A With regard to child sexual abuse? Certainly. A child can make a false allegation because of intentional reasons and they can make a false allegation because of non-intentional reasons.

"Q. Such as they dream about something or they fantasize about something?

"A It could be a variety of reasons; those could be two, yes.

"Q. Mental health issues, lack of perception or false perceptions?

"A Those are possibilities."

At the end of the cross-examination, the prosecutor announced that, in light of defense counsel's questions regarding false claims, she intended to ask questions on re-direct on that issue.

The next day, the prosecutor asked Dr. Urquiza "what the research tells us about false allegations[.]" Dr. Urquiza indicated false allegations do occur but "at a very infrequent rate." At that point, defense counsel objected and the court overruled the objection. Dr. Urquiza then testified the frequency of false claims was in the range of 4 to 6 percent. He also mentioned a Canadian study which found a 1 percent frequency of false claims.

The People contend defendant invited the foregoing testimony by questioning Dr. Urquiza on the issue of false allegations. We agree. Defense counsel asked specifically whether Dr. Urquiza "participated in any research on false allegations of child sexual assault." He also asked about intentional and unintentional false claims and the possible bases for such claims. Under these circumstances, the prosecution had a right to explore further the issue of false claims, including an inquiry about studies of which Dr. Urquiza was aware on the likelihood of false claims. (§ 773; see, e.g., *People v. Hefner* (1981) 127 Cal.App.3d 88, 98 [where defense elicited testimony from the defendant's wife that she had never seen him molest their children, the prosecution was permitted to question her about a prior conviction of the defendant for child

molestation].) “Cross-examination . . . “may be directed to the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given . . . on direct examination.”” (*People v. Farley* (2009) 46 Cal.4th 1053, 1109.)

Thus, while Dr. Urquiza may not have been the proper witness to opine about the likelihood of false claims, given his testimony that this was not his field of research, defendant invited such testimony by questioning him on the subject.

IV

Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct during jury argument by reading from various materials that had not been admitted into evidence. We agree.

In the first instance, the prosecutor read the following from an unidentified source: “Sex offenders are motivated by a need to feel good, be it sucking on toes, the power and control of rape or having sex with children. The motivation is a need to feel good. It’s not about attraction. It’s the arousal of the offender.”

Immediately thereafter, the prosecutor purported to read the following from a book: “Since rape, child molestation and other sex offenses are illogical by nature, you cannot expect the crimes to act themselves out logically. Therefore, it makes sense that illogical elements will exist within the sexual assault with a child. [¶] Anti-logic can actually be seen in

two different ways, the first being need-driven behavior versus a thought-driven behavior. Due to the compulsive nature of some sex offenses, the need to commit the sex offense overpowers any thought to delay the behavior and/or wait until a more opportune time to attack. This often acts itself out in child molest scenarios. Frequently during family gatherings, a trusted member of the family will take a small child into an adjoining room and actually molest the child behind an unlocked door with many people nearby who could enter the room at any moment. Logic would dictate that someone should not do something this risky when the probability of being caught is so high. However, the necessity or need to commit this sex offense overpowers the logical thought processes that would prevent the behavior."

During closing argument, the prosecutor read the following from an unidentified source: "Someone who normally has sexual partners that are age appropriate, he seeks out underage relationships. [¶] This offender may molest pre-puberty or post-puberty children. He tends to see the victims as being older than their actual age and as being the sexual aggressors. His sexual contacts with these children are relatively few in number and occur during a brief time period. During the time frame of the molestations he will also continue having sex with age appropriate partners."

By virtue of the foregoing, the prosecutor got before the jury statements from presumed experts characterizing conduct similar to that of defendant here as being typical of child molestation scenarios. None of this had been presented in

evidence, either through an expert witness or otherwise. Nor is it likely any such evidence could have been admitted, given its tendency not to dispel a societal myth or otherwise educate the jury but to prove molestation occurred in this instance. (See *People v. Bledsoe, supra*, 36 Cal.3d at p. 251; *People v. Patino, supra*, 26 Cal.App.4th at p. 1744.)

During closing argument, the prosecutor also read the following from an unidentified article regarding defendant's fantasy defense: "The internet protects the user's identity, thereby fostering relationships with people without ever meeting them. These online relationships are different than the traditional letters and phone calls, in that the online relationships are governed by the new culture values of the internet virtual communities. The online relationships have social norms that allow for, and even encourage contact with, relative strangers. [¶] Anonymity is an important aspect of the internet that has brought about these new social norms. It leaves open the possibility that certain aspects of the person's physical appearance, social characteristics or standing or other details will be omitted, exaggerated or falsified. For example, in one study the chat room user with the handle 'The Stud' told young females in the chat room he was 23 years old, muscular, blond hair and blue-eyed. In reality the stud was a 49-year-old balding man, who used false characteristics to attract women. [¶] There are hundreds of sexually explicit chat rooms where these fantasies can be played, including rooms entailing

submission, dominance, incest, fetishes and other child molestation fantasies.”

The prosecutor continued from the same unidentified article: “The defense is based on the argument that people using the internet do not always believe the identities of those with whom they are communicating. The disbelief is premised on the idea that the internet and the anonymity it allows, encourages people to change their identities or role play in order to socialize on the internet. [¶] . . . [¶] It argues that the internet chat rooms are a playground for fantasy, and that no one really is who he says he is. It is a world in which a gorgeous 19-year old girl in a chat room is almost always a 14-year old.”

Here again, none of this was presented in evidence through expert testimony.

Defendant contends it was misconduct to present the foregoing materials to the jury. However, defendant failed to object to any of these instances. Failure to object to alleged prosecutorial misconduct forfeits the claim on appeal. (*People v. Jones* (2003) 29 Cal.4th 1229, 1262.) Such failure to object deprived the trial court of an opportunity to correct the abuse and prevent its harmful effects.

Defendant contends his counsel did preserve the issue for appeal by objecting to the introduction of any profile evidence which, he argues, was what the prosecutor was talking about in closing argument. However, it is one thing to object to the introduction of evidence and another to object to a prosecutor’s

arguments about the evidence. The one does not encompass the other.

Defendant contends an objection during argument "would have been futile, would have drawn undue attention to prejudicial matter, or was otherwise excusable." An objection to prosecutorial misconduct is not required where it is demonstrated that a sustained objection and admonition would not have cured the situation. (*People v. Hendricks* (1988) 44 Cal.3d 635, 649-650.) However, there is no reason to believe a timely objection to any improper references to texts not in evidence would not have cured the situation. It would have been a simple matter for the trial court to have prohibited reading from such texts as soon as it became apparent that is what the prosecutor was doing, which she in fact announced in each instance.

Defendant lastly contends counsel's failure to object amounted to ineffective assistance. He argues there could be no tactical reason for his counsel to have objected to the admission of profile evidence but then allow the prosecutor to read such evidence from unidentified texts during argument.

The People contend any objection by counsel would have been futile and, hence, failure to object was not ineffective assistance. The People argue it was not misconduct for the prosecutor to read from the unidentified texts. We disagree.

The People cite *People v. Cook* (2006) 39 Cal.4th 566, 613, where the state high court said: "As we have observed in the past, the text read to the jury is a reminder that the victims of murder are absent from the courtroom, but the living

defendant is present." In that case, the prosecutor opened his penalty phase argument by reading from the prologue of a book written about an unrelated murder victim. The passage mentioned the fact the victim ceases to exist and the murderer, who stands trapped, anxious and helpless before the court, unfairly usurps the sympathy that should rightly belong to the victim. (*Id.* at p. 612.) However, the defendant in that case did not argue the prosecutor improperly referred to inadmissible evidence but that he improperly appealed to the jury's sympathies. The court found no such improper appeal.

The People also cite *People v. Ward* (2005) 36 Cal.4th 186, 215, for the proposition that a prosecutor may quote common literature in argument. In *Ward*, the court said a prosecutor may, during argument to the jury, "'state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.'" (*Ibid.*, quoting from *People v. Wharton* (1991) 53 Cal.3d 522, 567-568.) However, the fact a prosecutor may refer to matters of common knowledge from literature is a far cry from saying he may read from any source that is not well known or was not admitted into evidence through expert testimony or otherwise. There is nothing to suggest any of the materials read by the prosecutor were common knowledge.

Finally, the People cite *People v. Gionis* (1995) 9 Cal.4th 1196, 1219-1220, where the court found no misconduct in the prosecutor quoting from the Book of Proverbs. However, in that case the question was whether the prosecutor had improperly

appealed to the religious beliefs of the jury. The court indicated there was probably no misconduct but ultimately found it unlikely the defendant would have received a more favorable result had the comment not been made. (*Id.* at p. 1220.)

None of the foregoing cases supports the proposition that a prosecutor may bypass the normal process of presenting expert testimony regarding the conduct and attributes of offenders or victims, to the extent such evidence would be admissible, and simply read to the jury during argument from texts which purport to be those of experts in the field, as was done here. Nevertheless, we agree with the People defense counsel's failure to object did not amount to prejudicial misconduct.

"[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674, 693-694, 104 S.Ct. 2052]; [*People v.*] *Ledesma*, [(1987)] 43 Cal.3d [171,] 215-216.) Second, he must also show prejudice flowing from counsel's performance or lack thereof. (*Strickland, supra*, at pp. 691-692 [80 L.Ed.2d at pp. 695-696]; *Ledesma, supra*, at pp. 217-218.) Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*In re Sixto* (1989) 48 Cal.3d 1247, 1257 [259 Cal.Rptr. 491, 774 P.2d

164]; *Strickland, supra*, at p. 694 [80 L.Ed.2d at pp. 697-698].)' (*People v. Jennings* (1991) 53 Cal.3d 334, 357 [279 Cal.Rptr. 780, 807 P.2d 1009].)" (*In re Avena* (1996) 12 Cal.4th 694, 721.)

The evidence against defendant in this matter was overwhelming. As explained earlier, although to some extent this was a credibility contest between defendant and the victim, the victim's testimony was bolstered by the damning emails between defendant and the victim, the countless telephone calls between defendant and the victim, and the victim's journal, all of which painted a consistent picture and corroborated the victim's chronology and version of the events. Defendant's attempt to refute this evidence by his claim of an anonymous internet fantasy, despite the fact defendant and the victim were obviously well known to each other, was unavailing. Under these circumstances, even if the prosecutor had been prohibited from reciting from the various texts, it is not reasonably probable the result of the case would have been any different.

DISPOSITION

The judgment is affirmed.

We concur: _____ HULL _____, J.

_____ BLEASE _____, Acting P. J.

_____ BUTZ _____, J.