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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
CORY KENT ADAMS,  
  
Defendant and Appellant.

C063750

(Super. Ct. No.  
CM029224)

Defendant Cory Kent Adams appeals from his conviction of one count of felony continuous sexual abuse of a child. (Pen. Code, § 288.5, subd. (a).) He claims the trial court committed prejudicial error when it (1) allowed the prosecution’s expert witness, the nurse practitioner who examined the victim, to give opinion testimony regarding her findings; (2) determined defendant’s proposed expert witness, a psychiatrist, was not qualified to testify as an expert regarding sexual abuse physical examinations; and (3) denied defendant’s motion for a new trial that was based in large part on a claim of ineffective assistance of counsel. Defendant also claims the trial court

abused its discretion when it (4) denied him probation; and (5) sentenced him to the middle term of 12 years in state prison.

We disagree with defendant's contentions and affirm the judgment.

#### FACTS

The victim, M., was 13 years old at the time of trial. She testified her father, defendant, began molesting her when she was six years old. The abuse first occurred at a family friend's house in San Jose, and then in the family's home in Butte County. The abuse continued approximately weekly until 2008 when she was 12 years old. M. testified to numerous incidents where defendant performed or attempted to perform various sexual acts with her and made her perform sexual acts with him.

After the last incident, M. went to Carson City, Nevada, with her grandmother to visit relatives. On her way home from that trip, she sent a text message to her older half sister stating defendant rapes her. Her sister told her to go to a hospital to be examined and to file a report. M. then told her grandmother about the abuse and the need for an examination. The grandmother took M. to Mercy General Hospital in Sacramento, where M. spoke with a doctor and a police officer.

Eight days later, nurse practitioner Sally Vertolli examined M. She had administered over 200 sexual abuse examinations. The court deemed her an expert in the field of sexual abuse examinations for children. Vertolli stated that as

part of her examination of M., she used a colposcope to view and photograph M.'s hymen.<sup>1</sup> When M. was in the "knee-chest" position, Vertolli noticed a large "tag" of hymen was protruding from the vaginal opening. Vertolli determined the tag was abnormal, explaining that the hymen should be intact without a "pointy remnant sticking out." Vertolli stated this abnormality was more consistent with, and more likely than not to have been caused by, attempted vaginal penetration because M.'s hymen appeared to have been altered. A tear in the hymen would appear like a "tag sticking down." Vertolli testified she had never "seen one protrude like that in the 205 exams" she had administered.

Defendant sought to qualify Dr. Lee Stewart Coleman, a psychiatrist, to testify as an expert witness regarding sexual abuse physical examinations and to counter Vertolli's testimony. The trial court ruled Dr. Coleman did not qualify as an expert on the proposed subject.

Defendant testified on his own behalf. He denied ever molesting M.

We provide additional facts in context as necessary. We turn to address defendant's contentions.

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<sup>1</sup> A colposcope is "a magnifying instrument designed to facilitate visual inspection of the vagina and cervix." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 246, col. 1.) The colposcope used by Vertolli also had a camera and flash attached to it.

## DISCUSSION

### I

#### *Admission of Vertolli's Expert Opinion*

Defendant claims the trial court committed prejudicial error when it admitted Vertolli's testimony. He claims her testimony that the hymenal tag was more likely than not caused by attempted penetration was a surprise, and it contradicted the report Vertolli had prepared documenting her examination of M. He asserts he was prejudiced by the introduction of Vertolli's opinion, and by the trial court's refusal to grant him a continuance to obtain expert evidence to challenge Vertolli's opinion. We conclude there was no error and no prejudice.

#### A. *Additional background information*

Prior to trial, defense counsel made an oral motion to exclude all of Vertolli's testimony on the basis of relevance. During trial, he clarified his objection, saying Vertolli had expanded her opinion beyond what she had set forth in her examination report. In that report, completed by checking boxes, Vertolli stated the examination was normal, and that she could neither confirm nor negate sexual abuse. Counsel sought to exclude anything beyond what was stated in her report as speculative and nonscientific, and he requested an Evidence Code section 402 hearing.

The prosecutor informed the court that in addition to completing the section of the report that required checking boxes, Vertolli had included a narrative description of her

examination of M. in which she summarized her findings. In this narrative section, which had been provided to the defense, Vertolli noted she had found an abnormality. The abnormality (the hymenal tag) was not specific to sexual abuse, but it was consistent with the history of sexual abuse M. had provided. The prosecutor had asked Vertolli to explain this comment. She stated the comment meant she could not state absolutely that the abnormality was a result of sexual abuse. However, the abnormality was consistent with the way the tissue would appear if over a six-year period M. had been subject to repeated attempted penetrations or continual rubbing of the area.

Based on these arguments, the trial court ruled the testimony was relevant, and it would allow Vertolli to testify. Nevertheless, on the following day, the court conducted an Evidence Code section 402 hearing regarding Vertolli's expected testimony. Vertolli explained she examined M. in two different positions. First, M. reclined on her back with her knees bent and spread apart, and Vertolli examined and photographed the genitalia with the colposcope. From this position, M.'s hymen appeared to be "a fairly normal anatomical-looking hymen" "within normal limits."

Second, M. reclined on her abdomen with her knees pulled up to her chest, and Vertolli examined and photographed the genitalia again. Photographs from this position showed a "large hymenal remnant or tag that's flopped forward out of a child's body" that was not visible in the first position. Vertolli stated hymenal tags are evidence that the hymen had been

altered. They are most commonly associated with penetration. They are usually not as protuberant as M's.

Vertolli agreed a child could be born with this condition, but it would be an anomaly. It was not a normal hymen. She had seen the condition before in children who had suffered penetration or attempted penetration.

On cross-examination, Vertolli agreed she had checked the boxes on the report form that stated the examination was normal and that she could not confirm or negate sexual abuse. She also agreed she had not checked the box for "nonspecific, may be caused by sexual abuse or other mechanism." However, she stated that box should have been checked. Vertolli discussed the hymenal tag in her narrative report and that it was not absolutely specific for sexual abuse.

Under questioning from the court, Vertolli stated she had performed 205 sexual abuse examinations, and that she had never seen a hymenal tag as big as M.'s. She also stated, in response to a question from the bench, that it was more likely than not that M.'s hymenal tag was caused by sexual activity.

Following the witness testimony, defense counsel renewed his objection on the basis of surprise. He claimed Vertolli's testimony was not consistent with her report, went far beyond the findings in her report, and was a "complete surprise to the defense." Allegedly nowhere in the report did Vertolli say the abnormality was likely caused by repeated attempted penetrations. Because the report had contained minor findings, counsel had not arranged to have a child sexual examination

expert testify. He asked at least for a continuance to prepare for Vertolli's testimony.

The prosecution reminded the court Vertolli's report had included a narrative summary stating the abnormality was consistent with, but not absolutely specific of, ongoing molestation for six years. If counsel had wanted more specific information from Vertolli, he could have contacted her as the prosecution did.

Defense counsel admitted he had not spoken with Vertolli. He also had not made a demand for an independent medical examination of M. He claimed Vertolli's report was so understated he had no reason to do so.

The trial court denied the objection and ruled Vertolli's testimony would be admitted. It found there was enough information in the report to put counsel on notice that Vertolli would state the hymenal abnormality was more likely than not caused by sexual abuse. The court refused to exclude Vertolli, and it also denied counsel's request for a continuance.

Before the jury, Vertolli was designated by the court as an expert in the field of examination of children for sexual abuse. She repeated her testimony from the earlier evidentiary hearing. Under cross-examination, Vertolli explained the apparent discrepancy between the boxes she checked on the form report and her narrative summary. She filled out the form and checked the boxes without the aid of the photo review. She prepared her narrative after viewing her magnified photos, and that was when she noticed the abnormal hymen. She agreed that after she

checked the boxes on the form report, she changed her opinion about her findings, and she relayed her revised opinion in her narrative.

On redirect, Vertolli stated in her opinion M.'s hymen "was most likely altered or has its appearance by penetration."

#### B. *Analysis*

Defendant argues the trial court abused its discretion by admitting Vertolli's testimony. He claims he was surprised by her testimony that the abnormality was more likely than not caused by attempted penetration. He asserts he at least should have been granted a continuance to prepare for Vertolli's testimony.

The court did not abuse its discretion by admitting Vertolli's testimony. The testimony was certainly relevant. Relevant evidence is evidence that tends "logically, naturally, and by reasonable inference" to establish material facts.'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1166; see Evid. Code, § 210.) Vertolli's testimony satisfied that standard, as it tended to establish a material fact -- whether M. had been sexually abused.

Vertolli's testimony also was not a surprise. Defense counsel had in his possession prior to trial a copy of Vertolli's narrative summary, in which she stated she had found an abnormality in M.'s hymen that was consistent with repeated sexual abuse. This report put defendant on notice that Vertolli would testify as to physical evidence of sexual abuse and, as an expert, would opine on the significance of that evidence.

Defendant thus could not have been completely surprised by Vertolli's testimony, and the trial court did not err in admitting it or in denying defendant's request for a continuance.

## II

### *Exclusion of Dr. Coleman's Testimony*

Defendant claims the trial court erred when it determined Dr. Coleman could not testify as an expert on the issue of sexual abuse physical examinations. He claims it was an abuse of discretion to exclude Dr. Coleman's testimony, as Dr. Coleman allegedly qualified as an expert on sexual abuse examinations and his opinion was not based on incompetent material. We conclude the trial court did not abuse its discretion.

#### *A. Additional background information*

Defendant sought to introduce Dr. Coleman to challenge Vertolli's examination of M. and her testimony that M.'s abnormal hymen was consistent with sexual abuse. The court convened an Evidence Code section 402 hearing to determine whether Dr. Coleman qualified as an expert witness on the issue of sexual abuse physical examinations.

At the hearing, Dr. Coleman first testified as to his education and experience. He graduated from Occidental College in 1960 with a degree in premedicine and biology. He graduated from the University of Chicago Medical School in 1964. He served a one-year internship from 1964 to 1965 in pediatrics at the Children's Medical Center in Seattle, Washington. Thereafter, he served a four-year residency from 1965 to 1969 in

adult and child psychiatry at the University of Colorado. Since 1969, he has been working in adult and child psychiatry.

Dr. Coleman has testified as an expert witness between 700 and 800 times. By 1985, testifying as an expert witness constituted half of his work. He began cutting back his therapy work at that time and continued to do so until about 2006, when he completely retired from providing therapy and partially retired from legal work. He now works about 15 hours a week, all of it in the legal area.

Beginning in 1975, Dr. Coleman began testifying primarily for prosecutors. He was critical of the reliability of psychiatric evaluations in insanity and diminished capacity trials. His work led him to believe the tools of psychiatry were not really able to determine or evaluate whether a person was insane or to assist jurors at making that decision.

Starting around 1985, another issue became a major part of Dr. Coleman's work -- the interaction between mental health professionals and law enforcement regarding the process by which an allegation of child sexual abuse is investigated. He has written a book and articles on the issue. He has never testified for the prosecution on this issue.

His work in this area involves several aspects. He has studied approximately 600 legal cases of child abuse involving a total of several thousand children. This included examining investigative files, administrative agency files, medical reports, recorded interviews, and court records.

He has also familiarized himself with research on memory and how it could be altered, government investigations on abuse and altered memory, and medical research on sexual abuse examinations, including studies of formations of the hymen.

His investigations in these areas have led him to conclude the community of examiners performing sexual abuse examinations "is operating outside the standard methods of medicine. It's not being reviewed in the normal peer way. They're not following the normal guidelines of the medical community. It's a small split-off community which really evolved in collaboration with law enforcement and as part of the whole political context of these cases. [¶] And I think the evidence is overwhelming, the result, interpretations, and methods are highly biased and not reliable."

To prepare for this case, Dr. Coleman reviewed Vertolli's report and photographs, the police reports, and videotapes of interviews with M. He also interviewed defendant, his wife, and his mother-in-law. Based on this review, he believed Vertolli's opinion of an injury or residual of an injury to M. was contradicted by the records in the case and the medical evidence. He viewed Vertolli's photographs and stated he saw no medical evidence of hymenal injury.

In Dr. Coleman's opinion, there would have to be evidence that there had been a bleeding, tearing injury before someone could say there was a healed injury. Here, there was no claim M. had suffered from such an injury. In fact, Vertolli checked

a box on her report form saying there had been no bleeding in the patient's past.

Dr. Coleman believed the manner in which law enforcement investigated M.'s allegations was "a rush to judgment." They had already formed an opinion of defendant's guilt before more neutral investigations could be performed.

On cross-examination, Dr. Coleman admitted that during his career he had performed a total of "something like" six examinations on children suspected to have been sexually abused. All of those occurred while he was a medical intern between the years of 1964 and 1965. He may have performed such examinations while he was in the Air Force from 1969 to 1971 while on emergency room duty, but he could not recall if in fact he had done so. Dr. Coleman also admitted he has not had any specific training in performing sexual abuse examinations on children, or how to use equipment specifically designed to examine a child in a sexual assault examination, such as a magnifying instrument.

In all of the different cases and photographs he has reviewed, Dr. Coleman has consulted with a pediatrician or gynecologist about "half a dozen times" to ask them what they thought of the photograph. He did not do this in this case. He has not received any specific training in the investigation of sexual assault cases.

After hearing the evidence, the trial court determined Dr. Coleman did not qualify as an expert on sexual abuse examinations. The court stated, "The Court is not going to allow Dr. Coleman to testify on any medical issues

whatsoever. . . . [¶] . . . [T]his is a man who has not done a sexual examination of a child, if at all, for at least 45 years. [¶] . . . [¶] He will not testify on any medical issues dealing with hymenal formation or hymenal abnormalities in this particular patient."

The court also stated Dr. Coleman could not inform the jury about studies done by a Dr. McCann on hymenal formations and variations in general. Defense counsel summarized what the McCann study concluded, but the court said Dr. Coleman is "not Dr. McCann, okay? [Dr. Coleman] can't testify to that because all this is hearsay. All of this is rank hearsay for him to repeat what's in a book." Counsel argued he could not bring in the people who did the actual research to testify in every case. The court retorted, "Why? Why? That's what they do the research for, so that they can be tested in a court of law. That's what they anticipate doing. [¶] There is no reason that Dr. McCann or some other expert who's actually seen kids, who's actually looked at the bottom line whether the allegations was true or false, okay, or even proven one way or the other -- this man can't do that. He read a book and he's going to tell us what the book said, period. [¶] He's not going to testify on matters involving medicine, pure medicine."

#### B. *Analysis*

"Expert opinion testimony is admissible only if it is '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (Evid. Code, § 801, subd. (a).) 'A person is

qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.' (Evid. Code, § 720, subd. (a).) "The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement." (People v. Kelly (1976) 17 Cal.3d 24, 39.) (People v. Watson (2008) 43 Cal.4th 652, 692.)

"The qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court. [Citations.] That discretion is necessarily broad: 'The competency of an expert "is in every case a relative one, i.e. relative to the topic about which the person is asked to make his statement." [Citation.]' [Citation.] Absent a manifest abuse, the court's determination will not be disturbed on appeal. [Citations.]" (People v. Ramos (1997) 15 Cal.4th 1133, 1175.)

The trial court determined Dr. Coleman did not possess the experience, training, or education sufficient to qualify him as an expert on the subject of sexual abuse physical examinations. The court did not abuse its discretion in reaching this determination.

The trial court reasonably could determine Dr. Coleman was not qualified as an expert on sexual abuse examinations. He had little expertise regarding the topic on which he was asked to

testify. His career was in psychiatry, and not in a medical field that would concern sexual abuse examinations. He had performed only six sexual abuse examinations in his career, and the most recent of those examinations occurred in 1965, more than 45 years ago. He also had never been specifically trained on how to perform sexual abuse examinations. The trial court was within its discretion to determine Dr. Coleman was not an expert on this subject.

### III

#### *Denial of Motion for New Trial*

Defendant sought a new trial based on three grounds: the trial court's preclusion of Dr. Coleman's testimony, the court's admission of Vertolli's testimony, and ineffective assistance of trial counsel. The trial court denied the motion. Defendant claims the court's denial was in error, based on the same three grounds. We have already rejected his arguments concerning Dr. Coleman's and Vertolli's testimony. We are left to determine whether the court erred in denying defendant's motion for new trial on the basis of ineffective assistance of trial counsel. We conclude the court did not err.

#### *A. Additional background information*

At an evidentiary hearing on defendant's motion for new trial, defendant called attorney Michael Rothschild as an expert witness on the standard of practice for effective assistance in defending child molestation cases. Rothschild testified defendant's trial counsel, Kevin Sears, rendered ineffective assistance as follows:

(1) Sears failed to retain an expert witness regarding sexual assaults and child molestations. The expert could have reviewed and refuted Vertolli's findings.

(2) Sears did not issue subpoenas early in the case to obtain records from third parties who had contacts with M., such as the hospital where M. was first seen and examined, the therapists who treated M., Child Protective Services, and M.'s school. Rothschild stated defense counsel needed to have access to every recorded statement made by M. about the molestations in order to look for inconsistent statements as well as to examine the victim's ability to perceive, recollect, and relate what actually occurred.

(3) Sears allegedly did not cross-examine witnesses effectively. For example, he asked M. too many "why" questions, which allowed M. to explain away prior inconsistent statements.

(4) Sears's investigation into the case allegedly was worthless. He apparently did not start his investigation until within 30 days of trial, and the investigation he did was cursory. For example, counsel's interview with Dawna Eriksson, defendant's sister and a potential witness regarding M.'s veracity, was incomplete and too cursory to be helpful. Also, counsel did not investigate defendant's wife's mental health history or her drug use, and so the jury learned through the prosecution that she suffered from bipolar disorder and had a prescription for medical marijuana.

(5) Sears did not call witnesses to testify to defendant's good character. He could have obtained an expert psychological

evaluation for character testimony as well as obtained lay character testimony. This allegedly was a missed opportunity because the prosecution introduced no evidence of defendant's bad character.

(6) Sears allegedly failed to investigate possible evidence of M.'s bad character, such as instances of dishonesty and manipulative behavior. He could have called Eriksson, defendant's sister, as a possible witness in this regard.

(7) Sears failed to call Dr. Coleman to testify on those matters for which he would qualify as an expert, namely investigation techniques and their effect on memory recall and reporting.

(8) Sears failed to bring a motion to exclude evidence that defendant had massaged M.'s half sister on a different occasion, and that defendant's wife, M.'s mother, suffered from bipolar disorder and used medical marijuana.

(9) Sears failed to obtain the records of text messages and telephone calls between M. and her half sister to whom M. first disclosed the molestations.

(10) Sears improperly prepared transcripts of interviews.

Attorney Sears testified as a witness called by the prosecution on defendant's motion for new trial. Sears stated he had been in practice for 12 years, handling almost exclusively criminal defense work. This case was his first jury trial on a sexual assault case. He practices by himself but shares an office with Dennis Lattimer, a veteran defense

attorney in Butte County. He consulted with Lattimer on this case, who has experience trying sexual assault cases.

Sears was aware of instances where M. allegedly was untruthful, such as when, as a young girl, she claimed an injury to her face was caused by a dog when in fact it occurred when she fell off a wall. He and his investigator explored all such leads and interviewed the potential witnesses, but he ultimately decided not to call any of them to testify. Eriksson was the only potential witness who claimed M. had a reputation for lying, but the biggest example she could give was when M. told her she was allergic to pineapple in a salad Eriksson had given her to eat when she was not allergic to pineapple. M. had also told Eriksson she was intending to skip a grade in school when no such plans had been made. None of the other potential witnesses provided Sears with any solid specific instances of a blatant lie.

Sears explained why he did not call the doctor who spoke with M. at Mercy General Hospital to testify. He had hoped to develop a theory that M.'s disclosures to third parties had initially been small, but over the course of interviews, had expanded in scope and detail and become inconsistent with each other. There were significant differences in what the Sacramento police officer who had interviewed M. at Mercy General Hospital had documented and what M. later told the Butte County investigator. During trial, Sears received the reports from Mercy General Hospital. He noticed the doctor's report was much fuller than what the officer had stated and was more

consistent with M.'s statement to the Butte County investigator. He did not call the doctor as her statement "shot down" his theme of expanding disclosure. Sears did, however, cross-examine the Sacramento police officer, who was called as a witness by the prosecution. He questioned the officer about inconsistencies in the records.

Sears discussed certain medical reports he received early on in the case that he did not disclose to the prosecution. The reports were from San Jose and recorded an emergency room examination of M. when she was five years old. She had a bladder infection, and there was concern expressed about the formation of her hymen at that time. This would have been around the same time M. claimed defendant began molesting her. Sears concluded the records were not helpful. He did not disclose them because he never intended to use them. He "diffused" the likely prosecution argument that the records indicated symptoms consistent with molestation.

Sears stated he was aware of the possibility of having an expert psychological evaluation conducted for character testimony, but he did not seriously consider it. He felt juries do not put a lot of weight on psychiatric examinations. He also believed it was "such a peripheral issue" to have a paid doctor testify defendant was not "the molester type."

Sears explained his reason for not calling Dr. Coleman to testify regarding the way this case was investigated. He met with Dr. Coleman several months before trial. Dr. Coleman's main criticism arose from his review of the colposcopic photos,

and he directed Sears to some studies regarding variations of hymenal formation which Sears had already read, and "that was really the bulk of what I needed him for." Dr. Coleman was not able to point to many opportunities for suggestive questioning in the investigation.

Sears met with Dr. Coleman again after the Evidence Code section 402 hearing, and this time Dr. Coleman's opinion was clearer: "He said, 'I don't think that this was a suggestive questioning situation.'" Sears believed he had already pointed out the bias and inconsistencies he thought were present in the investigation, and he "didn't feel like the jury needed to hear from a psychiatrist in order to see that."

The trial court, after reviewing the evidence, denied defendant's motion for a new trial. The court stated it had correctly refused to allow Dr. Coleman to testify as an expert on the issue of sexual abuse examinations. It did allow Dr. Coleman to testify to other aspects of the case more suited to a psychiatrist, but Sears believed Dr. Coleman could not add anything on those issues.

The trial court also denied the motion for new trial because Sears's actions at trial satisfied the standard of care expected of trial counsel. The court stated: "Each position taken by defendant appears to have been considered by Mr. Sears balanced against the possible negative consequences and rejected in a strategic way. Of course tactics during trial are left completely to trial counsel. Mr. Rothschild did testify and suggested that there were many things that could have been done

differently, but the Court finds that Mr. Rothschild's testimony was highly speculative at best and there was no indication that would have resulted in a different verdict."

B. *Analysis*

"A trial court may grant a motion for new trial on the ground of ineffective assistance of counsel. [Citation.]" (*People v. Chavez* (1996) 44 Cal.App.4th 1144, 1148.) To establish ineffective assistance of counsel, defendant must show his "counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." (*People v. Kelly* (1992) 1 Cal.4th 495, 520; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 [80 L.Ed.2d 674, 693-694, 697-698].)

"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' [Citation.] Defendant's burden is difficult to carry on direct appeal, as we have observed:

"Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.'" [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

Defendant claims he suffered ineffective assistance because Sears failed (1) to investigate, (2) to object, (3) to present favorable psychological evidence, and (4) to present expert testimony regarding suggestibility and investigative techniques. We address each contention in turn.

1. *Failure to investigate*

Defendant claims Sears rendered ineffective assistance when he failed to investigate claims by defendant's sister, Dawna Eriksson, of M.'s bad character trait of telling lies and manipulating. He also argues Sears failed to obtain records from Mercy General Hospital, a therapist M. saw, and other persons who had contact with M. that would have impeached M.'s testimony. Defendant also asserts Sears was deficient by not retaining a child sexual examination expert.

Sears gave reasonable tactical reasons for not pursuing additional investigation of Eriksson's claims and not obtaining third party records. Eriksson could not provide specific, significant instances to support her claims, and the third party documents Sears obtained were contrary to his defense theory and supported M.'s testimony. It was not unreasonable for Sears not to pursue fruitless or harmful investigations.

Sears's decision not to consult with a child sexual examination expert is questionable. However, Sears believed he had obtained one in the form of Dr. Coleman. Dr. Coleman was critical of Vertolli's report and directed Sears to studies regarding variations in hymenal development, which, according to Sears, was his purpose for retaining Dr. Coleman. Sears sought

to obtain an expert on sexual assault examinations; it was his choice of experts that was faulty.

However, even if we were to conclude Sears's performance was deficient, we still would find no prejudice to defendant. There is no evidence in the record that a qualified expert on sexual assault examinations would have disagreed with Vertolli's conclusion. Rothschild, in his testimony, named two physicians he uses in trials who specialize in this area, but there was no evidence they or any other expert would have called into question Vertolli's findings. With no showing of prejudice, there is no basis for or finding of ineffective assistance for Sears's alleged failure to investigate.

## 2. *Failure to object*

Defendant faults Sears for not objecting to the testimony of M.'s sister, Jessica Haun, that she received a massage from defendant, and for not objecting to Vertolli's claim that M.'s hymenal tag was "more likely than not" caused by penetration or attempted penetration, as speculative. We disagree.

"[O]nly if a meritorious basis for an objection exists does failure to make the objection suggest possible incompetence, and only if admission of the objectionable evidence is prejudicial does that incompetence warrant reversal. Manifestly, the failure to make a meritless objection to the admission of evidence neither affects the outcome of the case nor demonstrates performance that falls below accepted standards of professional competence." (*People v. Williams* (1988) 44 Cal.3d 883, 911-912.)

Defendant suffered no ineffective assistance regarding Jessica's testimony that defendant once massaged her. This subject first arose from *defendant's* testimony on cross-examination. The prosecutor asked defendant if he ever went into M.'s bedroom at night and if he ever gave her a massage while he was in there. Defendant said he had gone into her room on occasion at night to watch television but had not given her a massage in her room. He said he had given M. a massage in his bedroom.

The prosecutor then asked if defendant had ever gone into Jessica's bedroom at night. Defendant said he had. The prosecutor next asked if he ever gave Jessica a massage on those occasions. Defendant said he had once done so. Jessica was 14 years old at the time. He was wearing pants and a shirt. Jessica had asked him to rub her shoulders because they were sore from playing sports. This occurred around 8:00 or 8:30 in the evening. Defense counsel Sears did not object to this testimony.

On re-cross, the prosecutor asked defendant if, after he finished giving Jessica the massage, he told her not to tell her mother. Defendant said no. When he went into Jessica's room to give her the massage, she was wrestling around on the bed, and he told her to stop so she would not wake up her mother.

Jessica then testified on surrebuttal. She said defendant came into her room late one night when she was about 11 years old and massaged her back side and legs because she was sore from playing sports. She had not asked him for the massage.

When he came in the room, he was wearing only his underwear briefs. Jessica stated that after the massage, defendant told her not to tell her mother.

Defendant faults Sears for not objecting to Jessica's testimony, claiming it was evidence of another sexual offense and was inadmissible and prejudicial. Such an objection would not reasonably have been sustained. Jessica's testimony was relevant and admissible to impeach defendant's earlier version of the massage event. The earlier version, provided by defendant, established the massage event was not another sexual offense. The prosecution was entitled to introduce evidence that contradicted defendant's earlier claims. Sears did not render ineffective assistance by not making a futile objection.

As to defendant's second alleged failure to object to Vertolli's "more likely than not" opinion, we conclude an objection to her opinion as speculative would also not have been meritorious. Vertolli qualified as an expert, and her opinion was relevant and supported by her experience. That Vertolli admitted the unusual hymenal tag could have occurred at birth did not render inadmissible or speculative her expert opinion that the tag more likely than not resulted from attempted penetration. Defendant suffered no ineffective assistance for Sears's decisions not to object in these instances.

3. *Failure to present favorable psychological evidence*

Defendant faults Sears for not introducing expert psychological evidence showing defendant did not possess the type of personality or character consistent with someone who

would engage in sex offenses. According to *People v. Stoll* (1989) 49 Cal.3d 1136, 1161, "[e]xpert opinion that defendants show no obvious psychological or sexual problem is circumstantial evidence which bears upon whether they committed sexual acts upon children, and is admissible 'character' evidence on their behalf."

Defendant claims he provided such evidence as part of his motion for new trial. To support that motion, he was examined by Eugene Roeder, Ph.D., a clinical psychologist, who concluded defendant did not possess the type of personality or character consistent with someone who would engage in sex offenses. Defendant claims Sears's failure to introduce this type of evidence constitutes ineffective assistance.

Sears, however, determined psychological evidence would not be beneficial. In his experience, juries do not put much weight on psychiatric examinations. Also, in his experience, having a paid expert testify that defendant was not "the molester type" was just a "peripheral issue."

Sears's conclusion was a reasonable tactical choice which we will not overturn. It was not arbitrary for him to conclude psychiatric character testimony would not help sway this particular jury. As a result, defendant did not suffer ineffective assistance on this point.

4. *Failure to present expert testimony regarding suggestibility and investigative techniques*

Defendant claims Sears rendered ineffective assistance when he did not call Dr. Coleman to testify as an expert regarding

suggestibility and investigative techniques. M. was allegedly interviewed on as many as nine different occasions by law enforcement personnel, a therapist, a doctor, and the district attorney. Defendant asserts Dr. Coleman, had he been called to testify by Sears, could have provided evidence that the techniques applied in this case could have adversely influenced the reliability of M.'s claims.

Dr. Coleman, however, told Sears otherwise. According to Sears in his sworn testimony, Dr. Coleman said on at least two different occasions that he did not believe this case involved "a suggestive questioning situation." Thus, Sears had a reasonable, tactical reason for not calling Dr. Coleman. He did not render ineffective assistance by not calling a witness who would not help his case, but would have harmed his case.

For all of the above reasons, we conclude Sears did not render ineffective assistance in his representation of defendant at trial. As a result, the court did not err when it denied defendant's motion for new trial.

#### IV

##### *Denial of Probation*

Defendant argues the trial court abused its discretion when it denied probation and sentenced him to state prison. He asserts denial was improper because (1) the basis of the court's denial, his maintaining his innocence and not showing a lack of remorse, is not a proper basis for denying probation; and (2) such denial and lack of remorse does not mean defendant

would not be successful on probation. We conclude the court did not abuse its discretion.

A. *Additional background information*

The trial court ordered Kent Caruso, Ph.D., a clinical-forensic psychologist, to examine defendant and evaluate his mental condition and suitability for probation. As part of determining defendant's suitability for probation, Dr. Caruso was required to evaluate whether defendant posed a threat to M. and to determine defendant's "potential for positive response to treatment." (Pen. Code, § 1203.067, subd. (a)(3).)

Dr. Caruso concluded defendant was a low threat to M. but he would benefit from a treatment program only if he made appropriate disclosure of his guilt and remorse. Otherwise, participating in a treatment program would "end up as a waste of time without his ever taking responsibility." Dr. Caruso stated defendant's denial of abusing M. was "very definitely a factor in aggravation in his case . . . ."

Defendant's own clinical-forensic psychologist, Dr. Roeder, conducted an independent psychological investigation. Defendant maintained his innocence throughout his interviews with Dr. Roeder. In fact, he told Dr. Roeder he had rejected a plea deal of one year in prison because it was conditioned on him admitting the crime, which he would not do. Dr. Roeder concluded defendant would be amenable to a treatment program, "although the fact he is denying he sexually abused his daughter would be a complicating and limiting factor in any sex offender rehabilitation program . . . ."

At the sentencing hearing and after reading both Drs. Caruso and Roeder's reports, the trial court denied probation. The court determined defendant would not benefit from sex offender treatment because he continued to deny his guilt and he showed no remorse, "the sine qua non of sex offender treatment . . . ." The court stated it could not find defendant was amenable to treatment because of defendant's "denial of the facts and his lack of remorse, even towards his own biological daughter[]."

B. *Analysis*

Defendant contends the court abused its discretion by relying on his refusal to admit guilt and his lack of remorse to deny probation. The record, however, establishes the trial court determined defendant was not amenable to treatment based on the facts, including the opinions of Drs. Caruso and Roeder. That was the basis of its decision, not just defendant's continued denial of guilt.

Penal Code section 1203.067 required the court, before granting probation to defendant, to appoint a qualified psychiatrist or psychologist to evaluate the defendant's potential for positive response to treatment. (Pen. Code, § 1203.067, subd. (a)(3).) The experts both indicated defendant's refusal to admit guilt and show remorse would limit his ability to benefit from a treatment program. With this evidence, the court was well within its discretion to deny probation.

*Sentencing to the Middle Term*

Lastly, defendant claims the trial court abused its discretion when it sentenced him to the middle term of 12 years in state prison instead of the low term of six years. We disagree.

The court imposed the middle term because M. was "extremely vulnerable as a six-year old and all the way through to age 12." This is a valid aggravating circumstance on which a court can rely when it determines the appropriate sentence. (Cal. Rules of Court, rule 4.421(a)(3).) Adding to M.'s vulnerability was the fact that her abuser was her father. The court did not abuse its discretion by relying on this factor.

Defendant claims his lack of a prior record justified imposing the low term. The court considered this fact, but determined it "doesn't overcome what the jury found the defendant had done."

Under the facts of this case, we cannot conclude the court's sentencing decision was arbitrary or capricious, and thus we uphold imposition of the middle term.<sup>2</sup>

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<sup>2</sup> Because we have rejected each of defendant's arguments, we do not consider his claim of cumulative error.

DISPOSITION

The judgment is affirmed.

\_\_\_\_\_  
NICHOLSON, J.

We concur:

\_\_\_\_\_  
RAYE, P. J.

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HULL, J.