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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT GUCCIARDO,

Defendant and Appellant.

C064533

(Super. Ct. No.
08F05324)

Defendant Robert Gucciardo sexually abused his adopted daughter from ages 11 to 18. An information charged him with nine counts of committing lewd acts with a child under 14, four counts of committing lewd acts with a child of 14 or 15, and two counts of unlawful intercourse with a minor. A jury found defendant guilty on all counts, and the court sentenced him to 24 years 8 months in state prison. Defendant appeals, contending insufficiency of the evidence, improper admission of expert testimony, ineffective assistance of counsel, prosecutorial misconduct, and the court erred in denying defendant probation. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 1999 defendant began dating the victim's mother, and eventually the pair married. The victim, her mother, and her younger brother moved into defendant's home. Not long afterward, defendant began abusing the 11-year-old victim. The abuse continued until the victim was 19 and reported it to law enforcement.

An information charged defendant with nine counts of committing lewd acts with a child under 14 years of age (counts one through nine), four counts of committing lewd acts with a child of 14 or 15 years of age (counts ten through thirteen), and two counts of unlawful intercourse with a minor (counts thirteen through fifteen). (Pen. Code, §§ 288, subds. (a), (c)(1), 261.5, subd. (c).)¹ A jury trial followed.

Defendant's Relationship with the Victim

When the victim was 11, defendant touched her breasts while rubbing ointment on her chest. He later told her the touching was intentional and asked her how she felt about it. Three weeks later, the victim touched defendant's penis when he asked her to. Around the same time, defendant rubbed her vagina with his hand.

The victim was happy in her new home. Defendant took her and her brother to an amusement park and museums, and bought

¹ All further statutory references are to the Penal Code unless otherwise designated.

clothes for them. Defendant also paid for ballet and piano lessons for the victim.

Beginning when the victim was 12, defendant had her touch his penis with her hand. Defendant had sexual intercourse with her when she was 12. The victim provided details of the incident, including the location and her position. Defendant also coached her on how to perform various sexual acts.

Following these incidents, defendant began coming into the victim's room three times a week; on most of these occasions, defendant would have sexual intercourse with her. Defendant and the victim would orally copulate one another. Defendant occasionally abstained from sexual intercourse, but never for more than two weeks.

When the victim was 13, defendant and her mother separated and ultimately divorced. The victim's mother moved out of the home; the victim and her brother remained with defendant.

The victim wanted to stay with defendant because he was a good father and she loved him. Defendant also told the victim her mother was unfit. Throughout the legal proceedings surrounding the guardianship, child custody, and adoption, the victim never revealed the ongoing sexual abuse, though she spoke to a court-appointed therapist and a family therapist. Even when specifically questioned about abuse, she lied and said there were no problems. She testified defendant told her if she said anything, the authorities would take her away and no one would take care of her.

When the victim was 14, she began sleeping in defendant's bedroom. Defendant began to attempt anal intercourse with her, trying on several occasions. Defendant put his finger in her anus four times.²

The sex acts became less frequent when the victim turned 15. However, the type of sex acts, including oral sex and intercourse, remained constant.

When the victim turned 16, defendant abused her once or twice a week. The frequency lessened to once a week when she turned 17. The frequency of the sexual acts was also affected by defendant's heart attack and knee surgeries. The frequency of abuse lessened further when the victim turned 18, to once a month or once every three months.

During these years, defendant had the victim watch sex videos and played them during sexual activity. Defendant also encouraged her to take nude photos of herself and bought her lingerie. The videos, photos, and lingerie were entered into evidence.

At age 19, the victim told defendant she had had sex with her boyfriend. Defendant threatened to kill himself and the victim, and she moved out of defendant's house that night.

² Defense counsel insisted the police report stated only one attempt at anal intercourse.

The Victim Reports the Abuse—The Pretext Call

In 2008 the victim reported the sexual abuse to police. Law enforcement arranged for her to make a pretext call to defendant.

The transcript of the call omits part of the conversation between the victim and defendant. The victim could not recall the omitted portion but speculated they merely exchanged greetings. The officer who recorded the call testified the gap consisted of only five seconds and the transcript was accurate. The jury heard the taped conversation.

During the call, defendant admitted having sex with the victim. He also admitted having sex with her over a long period of time. Defendant claimed he was not having sex with her anymore.

The victim said she was not comfortable having sex with defendant anymore. Defendant responded: "That's fine. The sex has never been an issue. And you know that." The victim later asked, "But like you used to enjoy having sex with me, right?" Defendant replied, "Sure."

Defendant and the victim discussed what they would have done had she become pregnant. Defendant told her if she became pregnant they did not have to tell anyone he was the father.

The victim said she might want to tell others about their relationship. Defendant told her it was not a good idea, because people would not understand.

The victim testified defendant sometimes had a hard time understanding things that are said during phone conversations.

She also testified she saw no scarring on defendant's genitalia. She admitted perjuring herself with respect to the location of a meeting she had had with the prosecutor.

Expert Testimony

Dr. Anthony Urquiza testified about child sexual abuse accommodation syndrome. Urquiza admitted he was not familiar with the victim, had not read documents related to the case, and was not offering an opinion as to whether the victim was, in fact, molested.

Urquiza testified victims often delay disclosing abuse when the abuser is someone with whom they have a long-term relationship. He also stated that approximately one-third of abuse victims do not disclose the abuse until they are over 18. Some victims conceal the abuse even when asked directly about it.

The syndrome consists of the following components:

(1) secrecy—generally child victims do not immediately disclose the abuse; (2) helplessness—abusers often have control over the child; (3) entrapment and accommodation—the victim feels trapped and copes by compartmentalizing feelings about the abuse; (4) delayed and unconvincing disclosure; and (5) rejection, a retraction of truthful abuse allegations.

Urquiza acknowledged that research reveals some children do make false allegations. During cross-examination, defense counsel posed a hypothetical based on the facts at trial. Defense counsel asked Urquiza to assume there was regular contact between a child and a therapist for two-and-a-half

years; the therapist gave assurances of confidentiality and then asked the child if anything was happening. Would that afford an opportunity for the child to disclose abuse? Urquiza responded that although the situation might be comfortable, it was not confidential because therapists are required to report abuse to law enforcement. A therapist would also have to disclose this requirement to a patient.

Urquiza testified abuse distorts the victim's world view. This distortion can cause problems later in life with relationships, mental health issues, and drug or alcohol abuse.

Defense Case

Defendant presented testimony by the victim's brother, defendant's biological daughter, a woman who had a relationship with defendant, defendant's ex-wife, and a urologist. Defendant also testified in his own behalf.

The Victim's Brother

The victim's 16-year-old brother testified he never saw the victim sleep anywhere but in her own bed. According to the brother, he never saw any inappropriate behavior between defendant and his sister.

Prior to defendant's arrest, the victim moved out of the house and into an apartment with her boyfriend. When her brother was 15, the victim offered him marijuana. When the victim's brother told defendant about this, he became angry and confronted the victim and her boyfriend. The boyfriend pushed defendant in the chest. After moving in with her boyfriend, the

victim developed a bad temper and began speaking very rapidly. She constantly talked about her boyfriend.

One day the victim and her boyfriend came to her brother's school. According to the brother, "She basically told me that my father had been raping her like since we met him" The victim's brother said something in response and her boyfriend grabbed him by the shoulder, threatened him, and told him to support his sister.

The victim's brother testified that she wanted him to lie to support her abuse allegations against defendant. He also questioned her truthfulness. He never discussed sexual matters with defendant.

Defendant's Daughter

Tia, one of defendant's daughters, testified her father was hard of hearing, especially on the phone. Because of this, defendant would sometimes say "yes" even though it was obvious he had not heard the question. Tia learned of the pretext call between the victim and defendant prior to speaking with a defense investigator.

Diane Vergonet

Diane Vergonet dated defendant and had a sexual relationship with him beginning in July 2007, when she was about 63. Defendant had sexual problems and could not achieve an erection despite the couple's trying many different techniques. Vergonet also testified defendant was hard of hearing, particularly on the phone. Vergonet also stated defendant had scars on his penis.

Defendant's Ex-Wife

JoAnne McCracken, defendant's ex-wife, testified they were married from 1972 through 1982.³ They had one daughter, born in 1975. After surgery, defendant became impotent and unable to achieve an erection. The scar on defendant's penis was visible during sex.

McCracken noticed defendant had developed hearing problems in the six months prior to trial. Even before his hearing problems appeared, defendant would sometimes seem confused.

Urologist

Dr. Robert Carter, defendant's urologist, testified defendant complained of erectile dysfunction. They discussed a possible penile prosthesis, involving a pump, in September 2008. Dr. Carter's review of defendant's medical records revealed defendant first reported erectile dysfunction in 2004.

Other Evidence

The defense presented evidence that the victim sent affectionate text messages to defendant in April and May 2008.

The victim's ballet teacher, Pamela Hayes, testified that she taught the victim for seven years. She was a gifted dancer but changed after meeting her boyfriend. After the victim became disruptive in class, Hayes began to fear she had become involved with drugs. Concerned, Hayes tried to talk to her, but

³ Defendant was not sure if he had been married five or six times.

the victim told her, "Dad loves [my boyfriend]" and that she and her boyfriend were going to marry.

One morning, the victim called Hayes and began making allegations against her father. Hayes could hear a voice in the background prompting her. When the victim came to ballet class, Hayes saw her rush up to each student to see if they had heard about her, behavior Hayes found odd.

Defendant's Testimony

Defendant testified in his own behalf. When he first met the victim and her brother, they lived with their mother in a filthy apartment. There was no food in the house and a neighbor took care of them because their mother was gone for long periods. After they moved in with defendant, he found their mother very verbally abusive. The couple married in 1999.

When the couple divorced, the children wanted to remain with defendant. Defendant spent approximately \$100,000 and three years fighting for guardianship and later adoption. Defendant adopted the children because he was a Vietnam veteran and he wanted them to be entitled to his benefits.

In 1964 defendant's scrotum was crushed in an auto accident, resulting in ongoing sexual problems. In 1977, after several operations, defendant became completely impotent. Efforts to remedy his erectile dysfunction failed.

Defendant denied all of the victim's allegations and denied sexually abusing her in any way. Had he molested her, defendant would not have allowed her to go to counseling.

Prior to meeting her boyfriend, the victim had been devoted to dance and music and was well behaved. She aspired to be a model, and defendant found she was sending photos of herself over the Internet to people who claimed to be photographers.

The victim met her boyfriend when she was 18. She lied about spending the night with him, and when defendant confronted her, she moved out.

Defendant worried about the relationship because the boyfriend wore a shirt with a marijuana leaf and sported numerous tattoos, including a big marijuana leaf on his back. However, the victim told defendant her boyfriend used marijuana for medical purposes. Defendant also noted changes in the victim's behavior that led him to believe she was using drugs, concerns echoed by her ballet teacher, Hayes.

After the victim offered marijuana to her 14-year-old brother, defendant decided to go to her apartment. He saw a water pipe and white powder with a razor blade on a table. When he confronted the boyfriend, the latter became angry and a violent confrontation ensued. Defendant believed the boyfriend was controlling the victim.

Defendant testified he was shocked when he read the transcript of the pretext call because he "didn't remember the conversation to that degree." At the time of the call, defendant had arrived home in the early morning hours after

attending his sister's funeral out of state. He did not have hearing aids.⁴

According to defendant, a significant portion of the call was not recorded. In the unrecorded portion, the victim said she was in trouble and needed defendant's help. She told defendant her boyfriend was controlling and abusive. Defendant was frightened for her. All he wanted to do was to get her away from her boyfriend and back home.

During the call, defendant could not follow everything the victim said. At times he did not know whether she was talking about her boyfriend. When she talked about pregnancy, defendant thought she was talking about having a baby with her boyfriend. When she talked about having sex with him, defendant assumed she was talking about sex with her boyfriend. Defendant also assumed, when the victim talked about having sex when she was 12, that she was talking about sexual activity she engaged in after a school dance. Defendant described the victim's comments about marrying him as a joke.

Defendant denied ever seeing the lingerie before the items were introduced at trial. He also denied seeing the pornographic videos prior to trial.

Verdict and Sentencing

Following nine hours of deliberation, the jury found defendant guilty on all counts. The court sentenced defendant

⁴ Defendant got hearing aids in September 2008. He was arrested in June 2008.

to 24 years 8 months in state prison: six years on count one; consecutive sentences of two years for each count on counts two through nine; consecutive sentences of eight months for each count on counts ten through thirteen; and on counts fourteen and fifteen, a concurrent jail sentence. Defendant filed a timely notice of appeal.

DISCUSSION

SUFFICIENCY OF THE EVIDENCE

Defendant argues the prosecution provided evidence on only three counts, leaving the remaining counts supported by only generic accusations. This generic testimony is insufficient to support the other counts. Although defendant acknowledges that under *People v. Jones* (1990) 51 Cal.3d 294 (*Jones*) such generic testimony does not necessarily violate the constitutional jury unanimity requirement, he argues *Jones* is distinguishable and contrary to United States constitutional law.⁵

When considering the sufficiency of the evidence in support of a criminal conviction, we determine whether, after considering the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. We view the evidence in the light most favorable to the prosecution and presume the existence of every fact the trier could reasonably deduce from the evidence. We must ensure the evidence is reasonable, credible, and of solid value, but we defer to the

⁵ The court instructed the jury on unanimity pursuant to CALCRIM No. 3501.

trial court to determine the credibility of witnesses and the veracity of the facts on which that determination depends.

(*Jones, supra*, 51 Cal.3d at p. 314.)

Jones took up the troubling issue of "generic" testimony by child abuse victims and its impact on the due process rights of defendants in the context of the sufficiency of the evidence. The court noted molestation cases present unique, paradoxical problems of proof. A young victim, molested over a long period by someone residing in the home, may not have the ability to distinguish or identify specific incidents or dates of molestation. In recognition of this problem, the court sought to craft an evidentiary standard to assure a resident child molester is not immunized from liability because he molested his victim over an extended period of time. (*Jones, supra*, 51 Cal.3d at p. 305.)

Jones developed the level of specificity needed to provide sufficient evidence in abuse cases involving generic testimony: "The victim, of course must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment Finally, the victim must be able to describe *the general time period* in which these acts occurred . . . to assure the acts were committed within the applicable limitation period. Additional details regarding the

time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction."

(*Jones, supra*, 51 Cal.3d at p. 316.)

In *People v. Matute* (2002) 103 Cal.App.4th 1437, the court in rejecting the defendant's due process challenge extended *Jones's* approach to generic testimony to a victim who was 15 and 16 years old at the time of the crimes. The *Matute* court reasoned: "The *Jones* court acknowledged that 'even a mature victim might understandably be hard pressed to separate particular incidents of repetitive molestations by time, place or circumstance.' [Citation.] The fact J. M. was 15 and 16 at the time of the crimes involved here makes little difference with regard to her inability to differentiate among the continual rapes perpetrated by defendant." (*Id.* at p. 1447.)

Defendant challenges the bulk of his convictions on a variety of grounds based on *Jones*.⁶ Preliminarily, defendant asserts sufficient evidence supports only, at most, counts one, four, and five. We disagree.

The victim testified extensively about numerous sexual acts over a long period of time. However, she also specifically described the kind of act, the number of acts, and the general time period sufficient to support each of the counts as required

⁶ Specifically, defendant contends the record is sufficient to support conviction on counts one, four, and five, and that counts two, three, and six through fifteen should be reversed. (Reply 5, fn. 3)

by *Jones*. She testified about defendant's touching when she was 11; sexual intercourse three times a week beginning when she was 12 and lasting until she was 13 or 14; sexual acts that became less frequent when she turned 15, occurring only once or twice a week; and defendant's performing the same sex acts only once a week when the victim was 17.

Defendant argues the victim's testimony differs from that of the victim in *Matute*, which the appellate court found sufficient. He contends the charges in *Matute* were uniform, with only one type of act allegedly committed once a month. In addition, in *Matute*, one allegation was confirmed by a rape examination revealing the defendant's sperm, and another resulted in an abortion. Defendant also stresses the victim's failure to disclose the abuse despite the counseling in conjunction with the guardianship and adoption proceedings.

Despite defendant's attempts to distinguish *Matute*, we find its basic tenets apply in the present case. The multiplicity of sexual activity, the gaps due to defendant's health issues, and the lack of physical evidence do not render the victim's testimony insufficient to support defendant's convictions. She testified to specific acts at a specific frequency during a specific time period. This is what *Jones* and *Matute* found sufficient. As for the lack of physical evidence, the prosecution produced the phone call between defendant and the victim, providing corroboration for her claims.

The court, mindful of the victim's generic testimony, instructed the jury on the need for unanimity with CALJIC

No. 3501, an instruction based on *Jones*. The court instructed: "The defendant is charged in counts 1 through 15, inclusive, of alleged offenses occurring sometime during the period of December 1, 1999, to April 27, 2005. [¶] The People have presented evidence of more than one act to prove that the defendant committed these offenses. [¶] You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense; or [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged."

Defendant also contends that, unlike *Jones*, the prosecution here informed the jury it could use the first and last sex acts within each age bracket to convict him. According to defendant: "In order for the jury to convict appellant as charged they had to agree he committed each and every one of some 5,100 sex crimes." Not so. The jury had only to agree on the first and last act of each time period, satisfying the requirement under *Jones* that the victim testified to the number of acts with sufficient certainty to support each of the counts. Here, the victim testified as to specific acts and their frequency at each age alleged in the information.⁷

⁷ We also reject defendant's contention that the lack of a jury unanimity requirement granted the prosecutor unbridled

Defendant argues *Jones* conflicts with federal constitutional law. However, as defendant concedes, we must follow *Jones*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

EXPERT TESTIMONY ON CHILD SEXUAL ABUSE ACCOMODATION SYNDROME

Defendant challenges the admission of expert testimony by Dr. Urquiza regarding child sexual abuse accommodation syndrome. He argues the testimony improperly allowed the jury to infer the victim's allegations were true, and the court erred in instructing the jury that it could use this evidence in evaluating her credibility. Defendant acknowledges defense counsel failed to object to the testimony or instruction at trial, but he argues such failures constitute ineffective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must show counsel's performance was deficient and fell below an objective standard of reasonableness; and it is reasonably probable that a more favorable result would have been reached absent the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674, 693-694].) A reasonable probability is a "probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694 [80 L.Ed.2d at p. 698].)

discretion. The prosecution complied with *Jones* in specifying the kinds of acts committed, the number of acts, and the general time period within which the acts occurred. (*Jones, supra*, 51 Cal.3d at p. 316.) These requirements curtail any possible prosecutorial overcharging of sex crimes.

Expert testimony is admissible if it is related to a subject sufficiently beyond common experience that the expert would assist the jury. (Evid. Code, § 801, subd. (a).) Such testimony is excluded only if it would add nothing to the jury's common fund of information. We reverse the trial court's ruling admitting expert testimony only where the court abused its discretion. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300 (*McAlpin*)).

Numerous courts have found expert testimony concerning the syndrome properly admitted in abuse cases. (*People v. Wells* (2004) 118 Cal.App.4th 179, 188; *People v. Yovanov* (1999) 69 Cal.App.4th 392, 406-407.) Such expert testimony is admissible to show that a victim's reactions are not inconsistent with having been molested. However, expert testimony regarding the syndrome may not be used to determine whether a victim's claims are true. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 393-394.)

We do not find Urquiza's testimony improperly led the jury to infer the victim's claims were true. Urquiza testified he was not familiar with the victim, had not read the documents related to the case, and was not offering an opinion as to whether she had been molested. The heart of Urquiza's testimony was a generalized account of the syndrome and its impact on an abused child. Urquiza also acknowledged research revealed some children have made false abuse allegations.

Defendant also claims similarities between Urquiza's testimony and the facts of the present case allowed the jury to

conclude the victim had been molested. According to defendant, "Here, Dr. Urquiza's testimony effectively placed [the victim] in the group of molested children abused by someone they had an on-going relationship with and [who] delay disclosure until after the age of eighteen."

We disagree. Urquiza's testimony regarding the syndrome centered on general characteristics of abused children and their reactions to molestation. Not surprisingly, some of the aspects of the syndrome applied to the facts of this case and some did not. Such expert opinion did not invade the jury's province, denying defendant a fair trial.

The court in *People v. Housley* (1992) 6 Cal.App.4th 947 (*Housley*) faced a similar challenge to expert testimony regarding child sexual abuse accommodation syndrome. In *Housley*, the expert testified she had never met or examined the victim and explained it was not uncommon for abuse victims to delay reporting the abuse or to later recant their stories. (*Id.* at p. 952.)

The *Housely* court rejected the defendant's claim that the testimony was improperly used to suggest the molestations actually occurred. (*Housely, supra*, 6 Cal.App.4th at p. 954.) The court noted the expert testimony was clearly intended to help explain the victim's delay in reporting the abuse and her last-minute recantation of the charges. Therefore, the expert testimony aided the jury's assessment of the victim's behavior. Moreover, "[c]ontrary to appellant's position, the doctor did not suggest Maryella's claims were credible simply because she

exhibited some behaviors common to abuse victims. The doctor advised the jury . . . that she had never met Maryella and was unfamiliar with the particulars of the case. It is thus unlikely the jury would interpret her statements as a testimonial to Maryella's credibility." (*Id.* at pp. 955-956.)

Here, defendant argues that since the victim did not recant her accusations against him, *Housely* does not apply. However, *Housely* found the "psychological testimony was properly used to dispel certain common misconceptions regarding the behavior of abuse victims." (*Housley, supra*, 6 Cal.App.4th at p. 956.) In the instant case, the psychological testimony provided an explanation for the victim's failure to report the years of abuse until she turned 18.

Defendant also contends the court erred by instructing the jury that syndrome evidence could be used in evaluating the credibility of the victim's testimony. According to defendant, CALCRIM No. 1193 improperly lightens the prosecution's burden of proof.

The court instructed the jury with CALCRIM No. 1193: "You have heard testimony from Dr. Anthony Urquiza regarding Child Sexual Abuse Accommodation Syndrome. Dr. Anthony Urquiza'[s] testimony about Child Sexual Abuse Accommodation Syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [the victim's] conduct was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of her testimony." The

court also instructed on the reasonable doubt standard.

(CALCRIM No. 220.)

CALCRIM No. 1193 told the jury that expert testimony on the syndrome was not evidence of defendant's guilt, but such evidence could be considered only to determine whether the victim's conduct was consistent with that of a molestation victim. In *McAlpin, supra*, 53 Cal.3d 1289, the Supreme Court reasoned: "expert testimony on the common reactions of child molestation victims is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation. [Citations.] 'Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior.'" (*Id.* at pp. 1300-1301, fn omitted.)

CALCRIM No. 1193 comports with *McAlpin*. In the present case, defendant challenged the credibility of the victim's accusations of abuse. Evidence of child sexual abuse accommodation syndrome is pertinent and admissible when a defendant challenges the victim's credibility. (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1745.) We find no error in the court's instructions and no ineffective assistance of counsel in connection with the expert testimony.

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues counsel performed ineffectively in two other instances: failing to recognize that psychologists are mandated reporters, and failing to obtain and introduce a psychological evaluation at trial. Defendant argues this was a close case and such errors were prejudicial.

In the first instance, defense counsel cross-examined Urquiza regarding the victim's contact with a psychologist during the adoption proceedings. Defense counsel posed the hypothetical in which an alleged victim had contact with a psychologist. Urquiza stated a report of sexual abuse could not be confidential since psychologists are required to report such abuse and disclose the requirement to the patient.

Defendant argues trial counsel's failure to recognize psychologists are required to report abuse led him to raise an "illusory defense that evaporated completely . . . , leaving behind a solid explanation for [the victim's] delay of disclosure." However, the victim herself provided a plausible explanation during trial for her failure to report the abuse to psychologists during the adoption proceedings. She testified defendant told her if she told anyone about the abuse she would be taken away from him and left with no one to take care of her. Defense counsel's misstep on the issue of confidentiality did not constitute ineffective assistance of counsel.

In the second instance, defendant argues counsel performed ineffectively in failing to obtain and introduce a psychological evaluation at trial. Defendant notes Dr. Nakagawa's report

found defendant not predisposed to commit a sexual offense; therefore, there can be no satisfactory explanation for defense counsel's error.

If the record sheds no light on why defense counsel failed to act in the manner challenged, we must reject a claim of ineffective assistance unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Here, the record does not reveal why defense counsel did not introduce a psychological evaluation at trial. Nor can we find there is no satisfactory explanation for defense counsel's conduct. Even though Dr. Nakagawa's report was positive, there is no guarantee another psychologist would have reached an identical conclusion. Nor under *Jones* is the trial court required to admit expert testimony as to a defendant's character. Given the risks in introducing such testimony, we cannot find counsel ineffective for failing to do so.

PROSECUTORIAL MISCONDUCT

Defendant posits three instances of prosecutorial misconduct. He argues the prosecutor invoked the prestige of his office, misstated the unanimity requirement, and asked the jury to look at the events through the victim's eyes.

Background

During closing argument, the prosecution noted it was difficult for a victim to specify particular dates on which offenses occurred. The prosecution stated: "What we typically

do" is to determine if it happened twice or more, then "we talk about the first and last. [This is] the easiest way for us to kind of break it down when we have more than one."

On the unanimity instruction, the prosecution commented the jury could comply with the instruction by finding "that I proved that the defendant committed at least one of these acts and you all agree which one. So you have to agree there was a first time that he touched her."

Finally, the prosecution advised the jury to "think about it from [the victim's] perspective. If she's making this up" Defense counsel objected and the court sustained the objection. The prosecution then stated: "Think about it from [the victim's] perspective." Defense counsel again objected and the trial court sustained the objection.

Discussion

A prosecutor's conduct violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to deny the defendant due process. Prosecutorial conduct that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*)).

As a general rule, a defendant must object to prosecutorial misconduct and request an admonition when the misconduct occurs. (*Samayoa, supra*, 15 Cal.4th at p. 841.) The defendant's failure

to object or request an admonition is excused if either would be futile or an admonition would not have cured the harm caused by the misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Invoking Prestige or Experience

A prosecutor commits misconduct by invoking his or her personal prestige or experience in an effort to bolster the case against a defendant. (*People v. Riggs* (2008) 44 Cal.4th 248, 302.) Defendant argues the prosecution invoked the prestige of his office and referred to facts not in evidence when he argued that "we typically" use first and last offenses in abuse cases based on generic testimony.

The prosecutor made the comments in question while discussing an approach to the numerous counts against defendant. He suggested count one was defendant's rubbing the victim's breasts or another crime against her when she was 11; counts two and three, the first and last oral copulations at age 12; counts four and five, the first and last acts of sexual intercourse at age 12; counts six and seven, the first and last acts of oral copulation at age 13; counts eight and nine, the first and last acts of sexual intercourse at age 13; counts ten and eleven, the first and last acts of sexual intercourse at age 14; counts twelve and thirteen, the first and last acts of sexual intercourse at age 15; and counts fourteen and fifteen, the first and last acts of sexual intercourse at ages 16 and 17.

The prosecution commented that "What we typically do . . . we know there is a first time . . . we know there is a last time. . . . [¶] . . . [¶] So what we do when we have multiple

counts, we talk about the first and last." These comments outlined the approach approved in *Jones* and provided the jury with a permissible approach for evaluating the evidence. The prosecutor did not invoke the prestige of his office, or refer to his legal experience, in providing this approach.

Unanimity Instruction

The prosecution, in discussing the unanimity instruction, told the jury one approach would be for the jury to agree on an act for each count. Since defendant claimed no molestations took place, the jury could agree that the prosecution proved defendant committed all the acts and therefore the 15 counts alleged. Defendant argues these comments misstated the law.

We disagree. The court instructed the jury on the unanimity requirement, an instruction based on *Jones*. (CALCRIM No. 3501.) The prosecution's comments did not run afoul of either *Jones* or the instruction.

The Victim's Perspective

A prosecutor commits misconduct when he invites jurors to view the case from the perspective of the alleged victim. Such comments invite the jury to depart from their required impartiality and, to the extent they appeal to the jury's sympathy or passion, they are inappropriate. (*People v. Fields* (1983) 35 Cal.3d 329, 362; *People v. Lopez* (2008) 42 Cal.4th 960, 969-970.) Defendant asserts the prosecution's statement that the jury should "think about it from [the victim's] perspective" was an effort to garner the jury's sympathy.

However, when the prosecutor urged jurors to view the case through the victim's eyes, he referred to the pretext phone call she made with the police, which he argued she would not have participated in if she were concocting the molestation allegations. Seeing the case through the victim's eyes in this context was considering her credibility given her participation in the phone call, which, if she were lying, would have resulted in adamant denials from defendant during the course of the call.

In addition, defense counsel objected to the statements, and the court sustained the objections. The court also instructed the jury not to let sympathy influence its decision. (CALCRIM No. 200.) We find no misconduct.

PROBATION

Finally, defendant argues the trial court abused its discretion by denying probation. According to defendant, the court focused nearly entirely on the factors relating to the crime and gave inadequate consideration to the factors supporting probation.

Background

Prior to sentencing, defense counsel requested an evaluation under section 288.1, which requires a report from a psychiatrist or a psychologist before sentence can be suspended for a person convicted of violating section 288, subdivision (a). The trial court granted the request.

The psychological evaluation found defendant not predisposed to the commission of a sexual offense: "A combination of factors including the convenience and ready

availability of his adopted daughter as the focus of sexual attention and his absence of coming to terms of [sic] his sexual impotence likely contributed to his inappropriate behaviors."

The report found defendant did not appear to be a danger to the health and safety of others and would probably meet any and all probation conditions. However, "The defendant is not very psychological [sic] minded and may not be inclined to participate in treatment focused on child molestation if left to his own devices. Still, if such a recommendation is made, he will do so, but he likely would not gain much benefit from such participation. It does not appear that if the defendant were in the community he would pose a threat or [sic] physical harm to the victim."

The probation officer's report noted defendant was 66 years old with no prior criminal convictions. He served five years in the military and received an honorable discharge. Defendant suffers from hepatitis C and posttraumatic stress disorder. On the Static-99 test for sexual offense recidivism, defendant scored in the low-risk category.

The probation report noted two circumstances in aggravation. Defendant's crimes indicated planning, sophistication, and professionalism. In addition, defendant took advantage of a position of trust. In mitigation, the report noted defendant had an insignificant prior criminal record. The probation report recommended a denial of probation, finding defendant's crimes more serious when compared to other instances of the same crime.

The court sentenced defendant to 24 years 8 months in state prison. At the sentencing hearing, defense counsel argued that, given the state of defendant's health, the term amounted to a death sentence. Defendant was currently eligible for a liver transplant, and defense counsel believed defendant, without the transplant, would have only a couple of years to live. Defense counsel urged the court to grant probation, hold the 24-year sentence over defendant, put him on a global position system tracker, and require 20 years of counseling.⁸

The court stated it had read the probation report, the psychological evaluation, and defendant's character reference letters. In denying probation the court stated "that the nature, the seriousness, and the circumstances of the crimes committed as compared to other instances of these same crimes warrants a state prison commitment. [¶] The manner in which the crimes were carried out indicates planning, sophistication, and professionalism and the Court finds that [defendant] took advantage of a position of trust and confidence with a young and vulnerable victim to commit these offenses. [¶] The Court has considered the fact that [defendant] has no prior convictions."

Discussion

The determination of whether to grant or deny probation lies within the trial court's discretion. A defendant challenging the exercise of this discretion bears a heavy

⁸ We find defense counsel did not forfeit this claim, as the People suggest, by failing to object.

burden. We reverse the court's decision only if it is arbitrary or capricious, or exceeds the bounds of reason. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 825.)

Defendant argues the court did not give adequate consideration to the "undisputed evidence that appellant presented no danger to society or to [the victim] herself and who fully met the conditions necessary to receive probation."⁹ In addition, defendant stresses his ill health.

However, the court specifically explained its reasons for its decision, both the facts in support of and in opposition to a grant of probation. Defendant sexually abused his adopted daughter continually over a period of many years. He took advantage of his position as a beloved stepfather and victimized a vulnerable young girl. The court properly balanced these facts against defendant's lack of prior convictions and the observations in the psychological evaluation. We find no abuse of discretion.

DISPOSITION

The judgment is affirmed.

We concur: _____ RAYE _____, P. J.

_____ BLEASE _____, J.

_____ DUARTE _____, J.

⁹ The fact that the psychological evaluation made these observations does not constitute "undisputed evidence."