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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. BARRY THOMAS MICKLE, Defendant and Appellant.	C065162 (Super. Ct. No. 08F7303)

Defendant Barry Thomas Mickle was convicted of two counts of lewd and lascivious acts with a child under the age of 14 years. He was sentenced to 10 years in prison.

Defendant contends on appeal that (1) the trial court erred in denying his motion to suppress sexually explicit images and web addresses found on a computer seized from his residence, and abused its discretion and violated his due process rights in admitting such evidence; (2) the trial court abused its discretion in admitting evidence of prior sexual acts with

substantially older victims; and (3) the prosecutor committed prejudicial misconduct during his closing argument.

We conclude (1) any error in denying the motion to suppress or in admitting the evidence from defendant's computer was harmless beyond a reasonable doubt given the overwhelming evidence in the case; (2) the trial court did not abuse its discretion in finding that the prior acts were sufficiently similar, not too remote or inflammatory, and highly relevant, and thus that the probative value outweighed any prejudicial effect; and (3) defendant forfeited his claims of prosecutorial misconduct by failing to object to the prosecutor's remarks during trial and by failing to request a curative admonition, and defendant's trial counsel was not ineffective for failing to object.

We will affirm the judgment.

BACKGROUND

During 2007 and 2008, C.C. (minor) lived in Redding with his parents, B.C. (father) and S.C. (mother), and minor's sister. Minor was born in 2002 and turned six years old in January 2008. Defendant is minor's maternal grandfather. Defendant and his wife (grandmother) lived in Willits, California.

Defendant and grandmother were frequent visitors to minor's home in Redding. They visited during holidays and often attended the grandchildren's sporting events. Less frequently, approximately twice a year, minor's family traveled to defendant's home in Willits. Defendant and grandmother visited

minor’s home in November 2007, in late January 2008, and prior to Easter 2008. While at minor’s home, defendant spent a lot of time doing activities with minor. They frequently watched movies and cartoons.

During the pre-Easter 2008 visit, while father, minor and defendant were together in minor’s room, minor said, unsolicited, “‘Daddy, papa told me [that] I could touch my dinky when he’s not here.’” “Papa” was minor’s word for defendant, and “dinky” was his word for penis. Defendant had no reaction to the statement. Neither did father, who assumed that minor misspoke or misunderstood what he heard.

About a month later, on April 23, 2008, father was home during the day with the children. Again unsolicited, minor said to father, “Papa said it was okay for me to touch my dinky when he’s not here.” Father’s “heart drop[ped],” and he asked minor, “[w]ho touches your dinky when papa is here?” Minor responded, “Papa does.” Later, father asked minor what he meant by “touching.” Using his hand, minor made a “rubbing” motion in his genital area.

Father informed mother of minor’s statements when she arrived home that afternoon. Mother spoke with minor separately from father, and minor confirmed his earlier statements. The next day mother contacted her parents and cancelled their scheduled visit to the minor’s house.

On May 23, 2008, Redding Police Investigators Doug Carney and John Poletski interviewed minor. Minor confirmed that defendant had touched his “dinky,” that the touchings sometimes

were underneath minor's clothing, and that the touchings occurred in his bedroom or his parents' bedroom.

At trial in March 2010, minor's recollection was in many respects less certain than it had been in April and May 2008, when he had spoken to his parents and the investigators. At trial minor had difficulty remembering the frequency and timing of his visits with defendant and grandmother. He recalled that defendant had visited his house and that they had done fun things together such as watching movies in his bedroom. But minor did not remember talking with Detective Carney at the police interview room when minor was a kindergartener. Nor did minor recall telling his father what defendant said about minor touching his penis.

Nevertheless, although minor was nervous and embarrassed about testifying, he testified that defendant had touched him on his "privates" (the term he then used for his penis) and that the touching made him feel strange and weird. Minor could not remember whether defendant touched him once or more than once. Nor could he recall whether the touching occurred in his house, although he thought it did. Minor could not recall what part of defendant's body touched minor's body; whether the touch was firm, gentle, or in between; or whether the touch lasted more than a minute. A tape recording of minor's 2008 interview with Investigators Carney and Poletski was introduced in evidence as a prior inconsistent statement.

Redding Police Investigator Chris Rathbun did a forensic evaluation of two computer towers taken from defendant's house.

One computer tower, which had indicia of belonging to defendant, contained information related to the insurance industry. The other computer tower, which had the log-in name “Barry Mickle,” contained images of males close to or at the age of majority engaged in various sexual acts. Most of the males were unclothed and “having sex of some sort,” including oral copulation or masturbation. The images were “thumbnail images” found in the “Internet history” portion of the computer, which indicated they had been viewed on the Web browser. It was not possible to determine which Web site supplied the images. Nor was it possible to determine whether any of the thumbnails had been “click[ed] on” to make them appear larger. No pornographic images had been saved to the computer, other than in the browser history file. The computer user viewed the images on September 9, 2008, approximately five months after minor’s second disclosure. Samples of the images were submitted to the jury in People’s Exhibits 2 and 3. Investigator Rathbun determined that the computer had visited four Web sites that suggested an interest in underage males: youngboys.com, allboysshare.com, dirtyboys.net, and lovingboys.com. Rathbun’s analysis determined that the four sites had last been visited within a five-minute period on July 10, 2004. No content from any of the Web sites was submitted to the jury.

Grandmother’s nephew M.G. (nephew) testified. At the time of trial, nephew’s age was 32, but he recalled an incident that occurred at defendant’s house when nephew was 10 or 11 years old. After nephew finished swimming, he went into the house to

play video games. Defendant entered the room and sat behind nephew near the foot of the bed. Defendant put his hands on nephew's shoulders, told him to relax, and then slid his hands down to the front of nephew's swim trunks. Defendant then began moving his hands in a rubbing motion over the penis area of the suit. Nephew froze and didn't remember saying anything in response to the touching. Defendant or nephew got up and left the room. Thereafter, nephew and his parents continued their regular visits with defendant and grandmother. Nephew did not tell anyone about the incident until he was 19 years old.

In addition, J.B., a 42-year-old retired police officer, also testified. He had an encounter with defendant while he was growing up in Willits. When J.B. was 14 years old, he had a paper route and went to defendant's house to sell a subscription. During a conversation, J.B. noticed that defendant's dog recently gave birth and asked if he could see the puppies. Defendant showed J.B. the puppies but was uncertain whether any would be available for adoption. Defendant suggested that J.B. return the next day.

J.B. returned and met with defendant inside the house. Defendant advised that the puppies were not available but he offered to show J.B. some newspaper advertisements listing similar puppies for sale. Defendant retrieved the newspapers, sat them on J.B.'s lap, and then sat down next to him. Defendant slid his hand under the papers, put his hands on J.B.'s pants, and began fondling his penis through the pants. J.B. was shocked and said nothing in response. Defendant

stopped, picked up another paper, put it on J.B.'s lap, and then resumed fondling him. J.B. ultimately pushed defendant's hand away, stood up, and told defendant that he was going outside to pick up another paper. J.B. left the house and fled on his bicycle. Defendant followed him in his car. J.B. rode into an open garage and successfully hid from defendant. J.B. immediately reported the incident to a parent and the police.[1]

Dr. Michael Fraga, a clinical neuropsychologist with a practice in forensic neuropsychology and psychopharmacology, testified for the defense. He met with defendant in August 2009 and performed seven tests to assess defendant's condition. Dr. Fraga explained that the current Diagnostic and Statistical Manual of Mental Disorders differentiates sexual interest in children into two groups: pedophilia, for an interest in children 12 years old or younger, and hebephilia, for an interest in children over age 12. Both terms refer only to sexual interest; neither includes the act of touching children. A person who touches children is referred to as a molester.

Dr. Fraga testified that, generally, men who are sexually interested in children are interested in a particular age group. A man who is interested in a 12-year-old boy typically would not be interested in a 5- or 6-year-old boy. However, there are exceptional and statistically rare individuals who are "all over the spectrum." Based on his testing, Dr. Fraga opined that

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[1] Defendant received a misdemeanor conviction for the J.B. incident.

defendant could not neatly be classified as a pedophile or a hebephile. Dr. Fraga also opined that it would be unusual for a molester to go 20 years between molestations.

The jury convicted defendant of two counts of lewd and lascivious acts with a child under the age of 14 years. (Pen. Code, § 288, subd. (a); counts 1 & 2.) The trial court sentenced defendant to prison for 10 years, consisting of the upper term of eight years on count 1 plus two years consecutive on count 2, and awarded defendant 50 days of custody credit and seven days of conduct credit.[2]

DISCUSSION

I

Defendant contends the trial court erred in denying his motion to suppress the images and Web addresses found on one of the computers seized from his home, because Investigator Carney's affidavit failed to establish probable cause to believe the computers contained pornographic images.

Investigator Carney's affidavit included a statement of expertise which said, among other things, that affiant had "investigated sexual assault cases resulting in the seizure of computers and computer software containing illegal pornographic material." The affidavit also contained a recitation of the facts (including facts pertaining to the incidents involving

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[2] Defendant is not entitled to additional conduct credit because, among other things, he was ordered to register as a sexual offender. (Former Pen. Code, § 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

minor, J.B., and two other incidents) and a description of defendant's residence. The affidavit added: "Based upon [my] training, experience and conversations that [I] had with other Law Enforcement Officers and/or reports that [I have] read, [I am] aware that the following characteristics are generally found in varying combinations in people who produce, trade, distribute or possess images/pictures of minors engaged in sexually explicit conduct: [¶] These people view children as sexual objects. They receive gratification from sexually explicit images/pictures of minors. They collect sexually explicit images/pictures of minors, which they use for their own sexual gratification and fantasy. They rarely, if ever, dispose of sexually explicit images of minors because the images are treated as prized possessions. They store such images in many different formats including photographs, printouts, magazines, videotapes, and many other forms of digital media such as hard drives, diskettes, CD's and/or DVD's and other storing devices. They store the images in many different locations such as their home, their vehicle, their work areas, and other areas under their control. [¶] They use sexually explicit images/pictures of minors as a means of reliving fantasies or actual sexual encounters. They use the images as keepsakes and as a means of gaining acceptance, status, trust, and psychological support by exchanging, trading, or selling the images/pictures to other people with similar interests. [¶] [I know] that it is common for Child Pornographers to use computers to produce both still and moving images of child pornography. A Suspect that creates

Child Pornography can use a digital camera to take photographs or videos then load them directly onto computers. [¶] The output from the camera can be stored, transferred and/or printed directly from the computer. Producers of Child Pornography can use devises [*sic*] known as scanners to transfer photographs into computers in readable formats. All of these devices, as well as computers, used with Child Pornography contain evidence of the violations of the crime."

The search warrant, issued by Magistrate Monica Marlow, authorized the officers to seize, among other things, "[a]ll electronic data processing and storage devices, computers and computer systems, such as central processing units, internal and peripheral storage devices such as fixed disks, internal and external hard drives, floppy disk drives and diskettes, tape drives and tapes [and] optical storage devices."

"In reviewing denial of motions under [Penal Code] section 1538.5, '[w]e apply the Fourth Amendment standard in deciding what remedy may be available following a claim of unlawful search or seizure. [Citations.] [¶] "'An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] "The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review."

[Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review.'" [Citation.]' [Citation.]

"'The question facing a reviewing court asked to determine whether probable cause supported the issuance of the warrant is whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing. [Citations.] "The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." [Citation.] . . . The magistrate's determination of probable cause is entitled to deferential review. [Citations.]' [Citation.]

"However, we independently determine whether, on the facts as found by the magistrate, the search was reasonable under the Fourth Amendment. [Citation.]" (*People v. Nicholls* (2008) 159 Cal.App.4th 703, 709-710 (*Nicholls*).)

In addition, the parties agree that, if the seized evidence was improperly admitted, the appropriate standard of prejudice is the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].) "The beyond-a-reasonable-doubt standard of *Chapman* 'requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' [Citation.] 'To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citation.] Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is 'whether the . . . verdict actually rendered in this trial was surely unattributable to the error.' [Citation.]" (*People v. Neal* (2003) 31 Cal.4th 63, 86, italics omitted, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [124 L.Ed.2d 182, 189].)

We conclude that on this record, even if the trial court erred in denying the suppression motion, any such error could not have been prejudicial.

Defendant claims the "remaining evidence in the case was far from overwhelming," first because minor testified at trial that he did not "remember today" his "grandpa touching" him. However, any failed recollection was cured by the videotaped interview in which minor unequivocally testified that defendant had touched his penis.

Defendant claims minor's statements to father had been consistent with father's assumption that defendant had "basically told [minor] to stop playing with himself when [defendant] was present," but that father "asked [minor] the leading question, '[w]ho touches your dinky when Papa is here?'" In convicting defendant, the jury necessarily rejected the possibility that minor fabricated the molestation claims in response to father's question. The jury surely rejected such "inventiveness" because minor was a six-year-old child, not because of any prejudicial effect caused by the information on defendant's computer.

Defendant claims the computer evidence was prejudicial in light of the prosecutor's closing argument. The prosecutor argued: "And when I say talked about where the defendant touched all these boys, including [minor], that's a piece of evidence as to sexual intent. He chooses to touch them on the sex organ. And we have the evidence of the computer that Investigator Rathbun searched to show is [*sic*] the defendant's sexual interest in boys. We have a window into his mind, to show that he has that sexual interest. . . . [¶] [T]here were pictures on the defendant's computer of young boys, underaged boys, arguably, when you look at those pictures. That shows a sexual intent, a sexual desire towards underaged males. The Web sites that the defendant's computer -- that the defendant had visited on the computer give a window into his mind. The web sites that Investigator Rathbun talked about -- dirty boys [*sic*], loving boys [*sic*], young boys [*sic*], allboyshere.com

[*sic*]. That's pretty good evidence of what's going through his mind. He's got an interest, a sexual interest in underaged boys."

We conclude that any "window" into defendant's "mind" assertedly opened by the pornographic pictures and Web addresses were "'unimportant in relation to everything else'" the jury considered on the intent issue (see *People v. Neal*, *supra*, 31 Cal.4th at p. 86), especially the three victims' consistent testimony that defendant had rubbed their penises. The four named Web addresses had been accessed four years before the present offense, during a session that lasted five minutes. Due to their age and brevity, these samplings add little if anything to the overwhelming inference of intent supplied by the three live witnesses. In fact, the lack of more recent and lengthy Web samplings supports an inference of relative disinterest in the subject matter prior to the instant offenses. A similar inference arises from the fact that defendant waited several more months after the offenses to visit the Web sites that supplied the thumbnail images. Denial of defendant's suppression motion was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24 [17 L.Ed.2d at pp. 710-711].)

Defendant further contends the trial court abused its discretion and violated his due process rights when it admitted into evidence the computer images and Web sites that we have discussed. But for the reasons we have just explained, any

abuse of discretion and denial of due process in connection with the admission of that evidence could not have been prejudicial.

II

Defendant next contends the trial court abused its discretion and violated his due process rights when it admitted the evidence regarding nephew and J.B. pursuant to Evidence Code section 1108. The evidence was admitted over defense objection that the incidents were remote, had not resulted in incarceration, and were dissimilar in that the victims were substantially older and the conduct had been limited to touchings of outer clothing.

Prior to trial, the prosecution made a motion to admit the prior sexual offenses and the defense made a motion to exclude them. The trial court ruled that the prior acts were sufficiently similar to the charged offense because all of the victims were age 14 or below; all of the victims were male; all of the acts were nonforcible; all of the victims were touched on their penises as opposed to any other private part or organ; none of the victims touched defendant; all of the victims were expected to remain passive and submit to defendant's touching; defendant had orchestrated an opportunity to get the victims alone or had taken advantage of situations in which they were alone; and all the incidents occurred in a home as opposed to some other indoor or outdoor location. The court recognized that the prior incidents occurred "a long time ago" but ruled they were not too remote because the behavior recurred, with J.B., six years after the original incident with nephew.

Defendant was not “a particularly young man” at the time of the earliest incident and his behavior could not be dismissed as a “youthful indiscretion.” The trial court found the prior incidents were “highly relevant” to defendant’s intent to arouse or achieve sexual gratification and to corroborate the testimony of minor. The trial court found the prior acts were “not particularly inflammatory” because there had been no force or violence, and the acts “were not particularly involved sexually in things like penetration or other pursuits.” Thus, the trial court concluded the prejudicial effect did not substantially outweigh the probative value.

“Evidence Code section 1108 permits a jury to consider prior incidents of sexual misconduct for the purpose of showing a defendant’s propensity to commit offenses of the same type and essentially permits such evidence to be used in determining whether the defendant is guilty of a current sexual offense charge. [Citation.] Although before Evidence Code section 1108 was enacted, prior bad acts were inadmissible when their sole relevance was to prove a defendant’s propensity to engage in criminal conduct [citations], its enactment created a statutory exception to the rule against the use of propensity evidence, allowing admission of evidence of other sexual offenses in cases charging such conduct to prove the defendant's disposition to commit the charged offense [citation]. The California Supreme Court has ruled that Evidence Code section 1108 is constitutional and does not violate a defendant’s due process rights. [Citation.]

“However, because Evidence Code section 1108 conditions the introduction of uncharged sexual misconduct or offense evidence on whether it is admissible under Evidence Code section 352, any objection to such evidence, as well as any derivative due process assertion, necessarily depends on whether the trial court sufficiently and properly evaluated the proffered evidence under that section. ‘A careful weighing of prejudice against probative value under [Evidence Code section 352] is essential to protect a defendant’s due process right to a fundamentally fair trial. [Citations.]’ [Citation.] As our Supreme Court stated in [*People v. Falsetta* (1999) 21 Cal.4th 903], in balancing such Evidence Code section 1108 evidence under Evidence Code section 352, ‘trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other . . . offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]’ [Citation.] In evaluating such evidence, the court must determine ‘whether “[t]he testimony describing defendant’s uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offenses.”’ [Citation.]

“On appeal, we review the admission of other acts or crimes evidence under Evidence Code section 1108 for an abuse of the trial court’s discretion. [Citation.] The determination as to whether the probative value of such evidence is substantially outweighed by the possibility of undue consumption of time, unfair prejudice or misleading the jury is ‘entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence.’ [Citation.] The weighing process under section 352 ‘depends upon the trial court’s consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules.’ [Citation.] ‘“The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’” [Citation.]’ [Citation.] We will not find that a court abuses its discretion in admitting such other sexual acts evidence unless its ruling ‘“falls outside the bounds of reason.” [Citation.]’ [Citation.] In other words, we will disturb a trial court's ruling under Evidence Code section 352 only where the court has exercised its discretion in a manner that resulted in a miscarriage of justice. [Citation.]” (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1103-1105; fns. omitted.)

Defendant claims the evidence regarding nephew and J.B. had little probative value because, at ages 11 and 14, those victims were substantially older than five- or six-year-old minor.

However, defendant's in limine motion did not include evidence similar to Dr. Fraga's trial testimony that a person sexually attracted to the older children may not be attracted to the younger minor. Absent an evidentiary basis for doing so, the trial court was not compelled to find that the age differences rendered the prior acts dissimilar to the present offense.

Defendant claims the evidence involving J.B., "a paperboy whom [defendant] barely knew," was "not particularly probative of the defendant's predisposition to commit these 'breach of trust' sex crimes." (Quoting *People v. Harris* (1998) 60 Cal.App.4th 727, 741.) We disagree.

In *Harris* the defendant committed the prior sexual act by breaching his employer's trust (using his position as apartment manager to obtain a key to the prior victim's apartment) but not necessarily that of the sleeping victim who had been unaware of his using the key to enter her apartment. (*People v. Harris*, *supra*, 60 Cal.App.4th at p. 733.) Here, in contrast, defendant created both a business relationship with 14-year-old J.B. (by subscribing to J.B.'s newspaper) and a more personal relationship (by holding out the possibility of supplying him a new puppy). Because J.B. evidently wanted both the subscription and the puppy, defendant's maneuvers created incentives for J.B. to trust rather than shun him. The trial court could conclude that the J.B. incident is more akin to the circumstances involving defendant's grandchild, minor, than to the sleeping *Harris* victim.

Defendant further argues that the J.B. and nephew evidence should have been excluded because both incidents occurred more than 20 years previously, and there was no evidence he had molested any children in the interim. (Citing *Harris*, *supra*, 60 Cal.App.4th at p. 739 [the facts that the prior incident occurred 23 years previously, and that the defendant led an unblemished life thereafter, "weigh[] strongly in favor of exclusion"].) But as the trial court noted in this case, the J.B. and nephew incidents occurred several years apart. The trial court properly deduced from the later incident that defendant had not led a legally blameless life. Notwithstanding the age differences of the past and present victims, the court was entitled to conclude that the great similarity in the three physical acts of molestation balanced out the considerable remoteness. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 535-536.)

Defendant notes that there was no evidence he had been charged or convicted of the nephew incident and no evidence he had been incarcerated following his misdemeanor conviction for the J.B. incident. He argues these circumstances increased the danger that the jury might have been inclined to punish him for the uncharged offenses. (Citing *People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) However, as in *Ewoldt*, the testimony describing the uncharged acts was no more inflammatory than the testimony concerning the charged offense. Although the older victims' trial testimony was stronger than that of the much younger minor, minor's recorded interview closer in time to the

charged offense made up for the deficiency in his trial testimony. Under similar circumstances, the court in *Ewoldt* declined to find that the lack of discernable punishment for the prior offenses made their admission an abuse of discretion. (*Ibid*.)

Because the trial court's in limine ruling was not an abuse of discretion, we do not consider defendant's argument that the ruling was prejudicial in light of the prosecutor's closing argument urging the jury to "end the defendant's career as a child molester."

Having rejected defendant's argument that the prior acts were more prejudicial than probative, we also reject his claim that admission of the prior acts rendered his trial fundamentally unfair. There was no due process violation.

III

Defendant further contends that the prosecutor committed misconduct during his closing argument when he (1) argued that defendant "had done something wrong by exercising his Sixth Amendment right to a jury trial," and (2) implied that there were victims in addition to the three who testified at trial. But defendant has forfeited both claims by failing to object to the prosecutor's remarks and by failing to request a curative admonition. (*People v. Cook* (2006) 39 Cal.4th 566, 606.)

Notwithstanding the forfeiture, defendant invites this court to "review the claim to forestall a claim of ineffective assistance" of counsel. Claiming both arguments implicated his federal constitutional rights, defendant argues the Attorney

General has the burden to prove beyond a reasonable doubt that neither comment contributed to the jury's verdict.

But "'"[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.' [Citation.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] 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.' [Citations.]" [Citation.]'" (*People v. Avena* (1996) 13 Cal.4th 394, 418; fn. omitted.) We evaluate defendant's claims according to this well-established standard.

A

In his closing argument, the prosecutor argued in relevant part: "What was the defendant thinking when he committed this heinous crime against a little boy of five or six years old, who was in kindergarten at the time? Was he thinking he's a little kid, he's not going to understand what I'm doing, he won't -- probably won't tell anybody. And maybe even if he tells someone, no one's going to understand him or believe him, so I can get away with this. Are those the things that were going through the defendant's head as he touched his 6-year-old grandson on the penis and rubbed it on more than one occasion? Perhaps. [¶] But as you know, the reason why we're here is

that [minor] did tell someone. He told his dad. And that started the chain of events that gets us here almost two years later now. . . . [¶] [Minor] talked to the police. He talked to his dad. But ladies and gentlemen, the embarrassment and the pain for [minor] wasn't over. Because as if the defendant's betrayal of the trust of his grandson wasn't enough, nearly two years later, last week, a boy who's now barely 8 years old, in the second grade, has to come into this courtroom, sit in that chair, barely reach the microphone, and tell about what his grandfather did to him; and answer questions about something that's embarrassing, something that's private, something that he doesn't want to think about. All with the person who did it in the room with him. [¶] And he did it. You saw him. You heard him. It was difficult. It was embarrassing. He told you that there were some things that he couldn't remember. And that's probably true, that it's been a long time. There's certainly details that would be difficult for any of us to remember, let alone a small child who had something so traumatic happen to them when they were so young and now has to come in and talk about it. [¶] But I would submit to you, ladies and gentlemen, that there is probably also the sense that there are things that [minor] doesn't really want to remember. There are things that [minor] really doesn't want to talk about, especially with the person who's responsible for these crimes present in the room listening. Can you really blame him? Can you really blame [minor] for having difficulty talking about these things?"

Defendant claims that when the prosecutor mentioned the minor having to come to court and testify, the prosecutor in essence told the jury defendant "had done something wrong by exercising his Sixth Amendment right to a jury trial." However, defendant's trial counsel could have understood the prosecutor's remarks as being founded not upon defendant's election of a jury trial, but upon his commission of an offense he thought he could get away with. By arguing "the reason why we're here is that [minor] did tell someone," the prosecutor emphasized the crime rather than the jury trial. Absent some reason to suspect the jurors had understood the comments as referring to the jury trial right, defense counsel could have found it tactically prudent to say nothing that might plant that suggestion in their minds. Thus, defense counsel's failure to object does not constitute deficient performance. (*People v. Avena*, *supra*, 13 Cal.4th at p. 418.) Moreover, it is not reasonably probable that defendant could have fared better had the jury been admonished not to construe the remarks as referring to defendant's right to jury trial. (*Ibid*.)

B

During closing argument the prosecutor also argued: "We have these three people, [J.B.], [nephew], [and minor]. They have no real connection with each other. [Nephew is] a member of the family but not really a close member of the family. There's been no evidence that he's every [*sic*] even had any contact with [minor]. These three people have no real close connection, but they tell remarkably the same story. [¶] At

some point you have to stop and think about this: Somebody who does this over and over and over again, did it this time. And not [*sic*] what the law explains to you. That's what propensity is, because a child molester doesn't change. And the defendant didn't change from 1982 to 1988, to 2007, 2008. He didn't change. The defendant's been molesting boys for going [*sic*] back many years."

The prosecutor subsequently added: "Folks, [minor] may be the only charged victim in this case, but this case is about a child molester who has left a trail of victims behind him for many, many years. And I'm here to tell you that that trail, that career, should end here. The defendant's guilty. You've heard the evidence that he's guilty. You've heard from [minor]. You've heard from his parents. You you've [*sic*] heard from these other member [*sic*] who were boys when the defendant victimized them. [¶] And it's your job now, ladies and gentlemen, to end the defendant's career as a child molester. And I would urge you to find him guilty of those -- of both of those counts involving [minor], because the evidence is clear that he is guilty."

Read together, these passages indicate that the "trail of victims" left behind by defendant referred to the three victims who recounted incidents during the years specified in the argument and did not refer, as defendant claims, to other "victims in addition to those who testified."

In fact, near the end of his closing argument, the prosecutor remarked: "[T]he defendant has left this trail

behind him, the trial [*sic*] of evidence of boys who he's victimized over the years, culminating with his own grandson, somebody who he should have protected, somebody who he should have loved. He had the opportunity, and he took it. He got the child alone, and he molested him; just like he did with [J.B.], just like he did with [nephew]." The prosecutor continued, "it's time for the defendant to be held accountable. 26, 27 years of this, it's time for him to be held accountable."

By referring to the one present and two prior victims by name or title, the prosecutor made plain that his argument was based upon those three victims and not upon some additional unidentified person or persons. Because the evidence showed that the three boys' victimizations had been separated by many years, any reasonable juror would understand the prosecutor's reference to "26, 27 years" as referring to the time frame in which the three boys had been victimized. Trial counsel was not ineffective for having failed to object that the argument

referred to additional unidentified victims. (*People v. Avena*, *supra*, 13 Cal.4th at p. 418.)

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

HULL, Acting P. J.

ROBIE, J.