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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH CHAPA,

Defendant and Appellant.

C070207

(Super. Ct. No. 09F06867)

Defendant Joseph Chapa appeals following conviction on eight counts of sex offenses against two male minors. (Pen. Code, §§ 288, subd. (a), 288a, 286; unless otherwise stated, statutory references are to the Penal Code.) Defendant contends (1) the prosecutor improperly elicited testimony from the expert on Child Sexual Abuse Accommodation Syndrome (CSAAS) about infrequency of false accusations; (2) the CSAAS expert’s testimony about “grooming” victims was improper profile evidence; (3) CALCRIM No. 1193 does not satisfy the court’s sua sponte duty to caution the jurors on

the limited use of CSAAS evidence; (4) the court erred in permitting evidence that defendant possessed homosexual pornography and sex toys; (5) the prosecutor committed misconduct by arguing to the jury that the charges of the male defendant sexually abusing male victims was not inconsistent with defendant's sexual orientation; and (6) the trial court erred in instructing the jury with CALCRIM No. 371 (attempt to hide evidence as consciousness of guilt) because it was unsupported by the evidence and contained an unconstitutional permissive inference. Insofar as defendant failed to raise some of these points in the trial court, he claims ineffective assistance of counsel. We affirm the judgment.

FACTS AND PROCEEDINGS

The prosecution charged defendant with three counts of lewd touching (§ 288, subd. (a)) committed between December 2005 and October 2007, against victim Jeremy, a child under age 14 (Counts 1, 2, and 3); two counts of oral copulation (§ 288a, subd. (b)(2)) between an adult over age 21 and Jeremy, a child under age 16, between October 2006 and July 2009 (Counts 4 and 5); sodomy (§ 286, subd. (b)(2)) committed against Jeremy between 2007 and 2009 (Count 6); lewd touching committed between January 2008 and December 2008, against victim Manuel, a child under age 14 (Count 7); and oral copulation with Manuel between January 2009 and December 2009 (Count 8). The pleading alleged an enhancement for multiple victims under section 667.61, subdivision (e).

In 2005, defendant, then age 53, lived in a mobile home park with his elderly mother and his boyfriend, Richard Comer, whom defendant initially introduced as his brother. The victims lived in the same mobile home park. Jeremy lived with his mother (who was in poor health), three brothers, and a sister. Manuel lived with his mother, who worked outside the home, and his brothers. The victims were not friends. Jeremy was 11 years old when he met defendant and 18 years old when he testified at trial. Manuel was

seven or eight years old when he met defendant and 16 years old when he testified at trial.

The victims performed yard work and other chores for which they were paid by defendant and Comer. Each victim spent increasing amounts of time at defendant's home, sometimes days, and grew to consider defendant as a father figure and Comer like an uncle. Defendant and Comer paid for the victims' cell phone service and gave them gifts, including clothes, shoes, a television, computer, stereo, iPod, and Xbox. The Xbox was kept at defendant's home, in the master bedroom, where the victims played it. Defendant and Comer also took the victims out to eat and took them on trips. Defendant did not work and got his money from Comer, who had inherited money when his mother died. Each victim testified Comer never touched him inappropriately.

In 2005 or 2006, when victim Jeremy was 12 or 13 years old and was alone with defendant, defendant touched the victim's leg, rubbed the victim's penis over clothing, and took the victim's hand and rubbed it over defendant's clothed penis. Defendant said it was okay and had happened to him when he was young. On a later occasion and many occasions thereafter, defendant had the victim orally copulate him as "a favor." Jeremy sometimes told defendant he did not want to engage in oral copulation, but defendant got angry and cursed and threatened to stop being Jeremy's friend. When Jeremy protested during a trip to Santa Cruz, defendant convinced him by saying, "You can do something for me since I brought you all the way out here." When defendant developed a urinary tract infection, he had the victim put his penis in defendant's anus.

A few times, defendant told Jeremy not to tell anyone because nobody would believe him.

One day, when Jeremy was 12 or 13 years old, defendant pulled a bag out from under the bed and displayed "sex toys" (fake penises) and lubricant. Comer was there and said defendant should not be showing Jeremy the items. Another day, before watching a movie, defendant removed a DVD from the player and said Jeremy could not

watch it because it was X-rated “gay porn.” Defendant then placed the DVD with others in a cubbyhole within easy access.

Around Father’s Day 2009, Jeremy told defendant he did not want to do anything sexual anymore. Around the same time, Jeremy and defendant got into a fight because defendant objected to Comer renewing Jeremy’s cell phone contract. Defendant became mean, stopped buying things for Jeremy, and stopped taking him places. Jeremy grew “tired of holding it in” and disclosed the sex abuse to Comer, then to his (Jeremy’s) mother, who called the police.

Manuel testified he was age seven or eight when he started doing chores and spending time at defendant’s home. Manuel developed a relationship with defendant’s elderly mother. When he was 10 or 11, he started helping her care for herself, because she complained her son would let her sit in her own filth. The inappropriate touching started when he was nine or 10 years old; defendant fondled Manuel’s penis and masturbated him. Defendant said, “It’s okay, I love you.” When Manuel “got comfortable” with that activity at age 10 or 11, defendant began orally copulating him regularly.

Defendant got angry when Manuel said he did not want to do it anymore. Manuel was afraid to tell his mother. Defendant never threatened him but did say that Manuel should not tell anyone.

The last incident of oral copulation occurred on September 12, 2009, when Manuel was 14. On that day, Manuel’s mother learned of Jeremy’s accusations against defendant, asked her son, learned he had also been abused, and called police, who sent Manuel for a medical examination.

Manuel went to stay with his father in Utah for a few months. When he returned, defendant was in jail. Manuel visited Comer, who said he did not believe the accusations and did not want defendant to be in trouble. Manuel felt bad for defendant. At Comer’s urging and with Comer telling him what to write, Manuel wrote a letter to former defense

counsel, stating “I . . . was not telling the truth. Because I felt really pressured by everyone around me because I was moving to Utah because my mom called my dad and asked him if he wanted to raise me [until] I was [18] years of age. But [defendant] did not do anything to me at all and I lied because I was mad!!” After his signature, Manuel added, “I’m sorry I lied about [defendant].” At trial, Manuel testified the letter was a lie. He felt pressured by Comer to write the letter, and at the time Manuel felt bad for getting defendant in trouble because defendant had been like a father to Manuel.

A criminalist found DNA consistent with defendant’s DNA profile in swabs from Manuel’s genitals. The swabs from Manuel’s genitals also showed moderate levels of amylase, which might indicate saliva, though saliva has higher levels of amylase.

A police search of defendant’s home revealed a bag of sex toys and pornographic DVDs. On cross-examination of the police detective who did the affidavit for the search warrant, the defense elicited that no child pornography was found on defendant’s computer, contrary to the profile for child molesters. On redirect examination, the prosecutor tried to ask the detective about child molesters “grooming” victims but gave up in the face of defense objections that the witness was not qualified.

The next witness was clinical psychologist, Dr. Anthony Urquiza, who testified about the use of CSAAS to dispel misconceptions about how a sexually-abused child should act. After establishing Dr. Urquiza’s credentials, the prosecutor asked him about “grooming.” The doctor testified, “The simplest way to explain it is rather than think about sexual abuse as an act, it’s better to think about it as behaviors that occur as a part of a relationship between a child and an adult. Sexual abuse is really best described as a relationship. And we know from research, both from children and from adults who are perpetrators and children who have been sexually abused, that there are a number of behaviors that occur prior to actual sexually inappropriate behavior. That is, kids are -- the phrase is groomed, but they are desensitized or prepared for being sexually abused as a part of that relationship, often by some very innocuous types of things. So, for

example, it's a process of gradually increasing the amount of sexualized material or affection or behavior into the relationship before you actually sexually abuse the child.

“One example would be children, before they get abused, may have established a warm, friendly, comfortable enjoyable relationship with the perpetrator. That may actually step a little further by being in a relationship in which there's a lot of physical affection. Not sexual abuse, just a lot of touching, lot of hugging, lot of putting your back [sic] on the shoulder, lots of things to get kids comfortable with the notion of being physically touched . . . by the perpetrator.

“Maybe even a step more towards physically touching in places that are not common for kids, touching on the bottom, touching on the back, or maybe sometimes touching on the stomach or chest or breasts. Maybe even introducing some direct sexualized material.”

The prosecutor asked whether introducing sex toys to a child would constitute grooming. The expert said, “Certainly. I mean, it wouldn't start out that way. It would start out with -- or it's not likely to start that way. It would start out with maybe X-rated magazines or Playboy magazines or maybe R-rated movies, and then it would graduate. So the process is to make the child feel more comfortable with what would eventually be sexually inappropriate material or behavior. Because you can't just walk up to a child and -- it's difficult to walk up to a child and engage in direct sexual activity. But you can get them used to that topic, used to that behavior, used to that material by taking it in smaller incremental steps.”

The prosecutor then asked Dr. Urquiza to explain CSAAS and the five categories of secrecy, helplessness, entrapment/accommodation, delayed/unconvincing disclosure, and retraction. Whereas people assume a molested child will sound an alarm, minors molested by someone they know may keep it a secret because they have a relationship with the perpetrator and have been coerced to keep quiet or have received gifts or affection they do not want to lose. Whereas people often assume an abused child will

scream or run, an ongoing relationship with a bigger, stronger person can leave a child feeling helpless. Accommodation refers to how children cope with being abused, such as dissociating from the experience as it happens. Whereas one might expect a child to report sexual abuse right away, abused children may delay reporting out of embarrassment or fear they might cause trouble for themselves or the abuser, and they may make inconsistent statements where abuse has occurred over a period of time. An abused child will sometimes succumb to pressure to recant the accusation.

The expert acknowledged CSAAS *assumes* abuse has occurred; it is not used to determine whether or not abuse has occurred. Dr. Urquiza had not spoken with defendant or his accusers, had not reviewed any documents in this case, and had no opinion whether the allegations were true or false.

On cross-examination, Dr. Urquiza acknowledged CSAAS does not address *false* allegations of child sexual abuse; he had not done any research on false allegations; and it would be inappropriate for him to opine whether a particular child was lying.

On redirect examination, the prosecutor asked the expert about empirical studies regarding false allegations. The expert began with a caveat, that it was a very difficult matter to research. He then said that 12 to 15 research studies had been done and indicated that one to six percent of allegations had been determined to be false by researchers or by admission. One Canadian study in 2009 looked at 795 accusations and found about four percent were determined to have been false, and in those cases the accusations were made by a parent, not the child. The doctor concluded, “So my opinion is . . . false allegations of sexual abuse do happen, but they happen very infrequently or rarely.”

On recross-examination, defense counsel asked how those studies determined whether allegations were false. Dr. Urquiza replied, “Usually they identify a population of children who have made the claim that they were sexually abused, do a follow-up investigation to identify which of those cases were determined by them, the researchers,

to have been a false allegation, and sometimes the child or the family member themselves will acknowledge that it was a false allegation, and sometimes it was made by the researchers. And there was a degree of tentativeness, which is why I started off with a caveat that, you know, this is a tough area to do research on.”

Defendant did not testify at trial. The defense theory was that the victims were lying, perhaps to get back at defendant for ending his generosity, or to blame someone else for their own behavioral problems. The defense explored inconsistencies between the victims’ trial testimony and previous statements to police, e.g., as to when, where, and how often the inappropriate touching occurred, and failure to mention anal sex in initial reports. Defendant presented neighbors and his housekeeper as character witnesses that he was a kind and generous person. Defendant’s mother testified Manuel did not help her with “filth” but helped give her injections. Police officers testified Jeremy made unnecessary 911 calls in 2004 and 2007 about fights with his brothers. Social workers testified to routine interviews in 2004, before Jeremy met defendant, and a 2006 interview -- all unrelated to this case and unrelated to any sexual abuse -- in which Jeremy was asked a standard question about sex abuse and said he had not been touched and would report it if it happened.

The jury found defendant guilty on all counts and found true the allegation of multiple victims.

The trial court sentenced defendant to a total indeterminate term of 30 years to life plus a determinate term of 12 years and eight months as follows: Consecutive terms of 15 years to life on Counts 1 and 7 due to multiple victims; eight years consecutive for Count 2, two years consecutive for Count 3, and eight months consecutive for Counts 4, 5, 6, and 8.

DISCUSSION

I

Infrequency of False Accusations

Defendant complains the prosecutor improperly elicited testimony from the CSAAS expert about infrequency of false allegations of child sexual abuse, in violation of the trial court's in limine evidentiary ruling.

Prior to trial, the prosecution moved in limine for evidentiary orders including an order allowing the testimony of Dr. Anthony Urquiza on the subject of CSAAS. Specifically, the prosecution asked the court to allow Dr. Urquiza to provide expert testimony to the jury relating to "delayed disclosure, entrapment, helplessness, and the secrecy aspect" of CSAAS.

In its written points and authorities in opposition to this part of the prosecution's motion, the defendant argued that the prosecution was required to "articulate the specific myth or misconception which (*sic*) the expert is expected to disabuse the jury about; and must tailor the expert's testimony to address this myth or misconception." The defense went on to argue that the "prosecution should be prevented from eliciting testimony outside of this particularized area, including areas such as this witness's opinion of frequency, in general, of false allegations."

Prior to jury selection, the court took up these arguments. The defense reiterated its claim that the prosecution was required to identify "a misconception or myth that Dr. Urquiza is trying to clarify with the jury." The People responded that Dr. Urquiza would explain why "delayed disclosure is common, and the reason it's common is because of the entrapment, helplessness and secrecy aspects of the syndrome."

During oral argument on the motion, neither party made mention of the admissibility or exclusion of testimony relating to false accusations of sexual abuse.

The trial court, observing that the misconception that the prosecution was “targeting” was “the misconception that a victim would want - - immediately report, a victim would tell someone versus keep it a secret, and a victim would not cooperate versus sort of accommodate to the situation, and those are areas - - some of the areas Dr. Urquiza would testify,” allowed that testimony. The court went on to say that it was “very clear that Dr. Urquiza is not to testify about whether abuse occurred in this case.”

Asked by the defense to clarify the ruling, the court added, regarding Dr. Urquiza’s testimony, that its “purpose is to address the misconceptions of - - out there, people thinking that molest victims would immediately report. He’s going to talk about delayed reporting, is my understanding, that molest victims would tell someone versus keeping it secret, which I believe is what Dr. Urquiza is going to testify about. And that they would not accommodate - - the issue of accommodation.”

By oversight or otherwise, the parties did not argue, and the trial court did not rule, specifically as to the admissibility of testimony relating to false accusations of sexual molestation by minors in general. A reasonable reading of the proceedings in the trial court allows one to conclude that the court excluded, at most, testimony by Dr. Urquiza that he thought the minors in this case were not making false accusations, thus leading to the conclusion that the defendant was guilty of the crimes alleged against him.

During cross-examination by the defendant’s attorney, the following testimony was elicited:

“Q. And you haven’t done any research in the area of false allegations, right?”

“A. I have not.

“Q. Okay, and you have never met Jeremy, who has made false allegations in this case, right?”

“[The Prosecution] Objection, misstates the testimony and the evidence.

“[The Court] Sustained.

“[Defense Counsel] You haven’t met Jeremy who may have made false allegations in this case, right?”

“A. I’ve met no one related to this case.

“Q. Okay. And that would be the same for Manuel, the other one, right?”

“A. I would agree with that.

“Q. You haven’t read any of the police reports in this case?”

“A. Correct.

“Q. Okay. You haven’t reviewed any of the many statements that these young men have made?”

“A. I have met no one, and I have reviewed no documents related to this case.

“Q. Okay. So certainly you don’t know if these young men are credible witnesses, right?”

“A. I know of no information about this case.

“Q. You will not say that their allegations are true?”

“A. It would be inappropriate for me to have an opinion as to whether the allegations are true or not, whether somebody was abused or not, or whether somebody was guilty or innocent.

“Q. And you don’t know whether Jeremy or Manuel would be capable of lying?”

“A. I have no information about this case, so I can’t provide you an opinion as to that.”

The prosecution did not object to this line of cross-examination.

On re-direct examination, the prosecution elicited the following from Dr. Urquiza:

“Q. [The defense attorney] asked you about false allegations. Are you familiar with research that [has] conducted empirical studies on false allegations?”

“A. Yes.

“Q. And what has that research found?”

“A. Well, there’s a caveat. I can tell you what the research found, but there’s a caveat which is important to say, which is the area of child sexual abuse is really hard to do research on. You’re doing research with children and dealing with research that is often kept secret, or they don’t want to talk about, dealing with abuse, dealing with sexuality. It’s a tough area to do research.

“In addition to that, if you’re doing research on false allegations of sexual abuse, I think it’s even more difficult. So it’s as important to recognize that the difficulty in being able to do research and what the data has to say with regard to false allegations. I always say that, and I think it’s important.

“Given that, there are probably about 12 to 15 research studies on false allegations made by children related to child sexual abuse. And what I typically say is that it is very infrequent or rare, given the data that we have, that a child would make an allegation of sexual abuse that was identified as being false. Does it happen? Certainly. But the data seems to show that it’s somewhere in the range of about one to six percent of kids who have been abused - - or I’m sorry, who have not been abused and come to the attention of law enforcement, make an allegation that is, at some point later on, determined to be false.

“I made note of probably one of the best studies, it’s a Canadian study 2009 that looked at about 795 kids, or something like that. And what they found was about four percent of those allegations were deemed to have been false, somewhere in that one to six percent range.

“What they also found is [that] in none of those four percent . . . cases was it the child who made the allegation that was determined to be false. It was somebody else involved in the case, parent, stepparent, somebody else like that, not the child who made the allegation. So my opinion is sexual - - false allegations of sexual abuse do happen, but they happen very infrequently or rarely.”

It is significant to note that neither party objected when this line of questioning was pursued by the other.

As one can see from the record, other than a passing reference to false accusation evidence in defendant's written points and authorities in opposition to the People's motion in limine, there is no mention of the matter further and certainly no express mention of that subject in the court's ruling regarding limitations on Dr. Urquiza's testimony. We take the court's order - "Dr. Urquiza is not to testify about whether abuse occurred in this case" - to simply mean that Dr. Urquiza could not render an opinion that the victims *in this case* were sexually abused.

Also, defendant first broached the subject of false accusations with Dr. Urquiza, strongly suggesting that defendant did not believe the subject had been ruled inadmissible by the court's earlier order. Moreover, defendant did not object when the prosecution followed the suggestion of false accusations by, quite understandably, eliciting testimony as to the frequency of false accusations in child sexual abuse cases generally, further strongly suggesting that the defendant's attorney did not find the People's questions on redirect examination improper.

While it is correct that Dr. Urquiza's testimony on redirect examination provided the jury with relevant information bearing on the defendant's guilt, so did all of the rest of Dr. Urquiza's testimony and, indeed, so did the testimony of all of the prosecution witnesses. Dr. Urquiza did not give an opinion that abuse had occurred in this case; he went to some lengths to make sure the jury knew he was not doing so. There was no prosecutorial misconduct. There was no error.

II

"Grooming"

Defendant argues the trial court erred by permitting the CSAAS expert to testify about "grooming," because it profiles an *abuser's* conduct rather than an *abused child's*

reactions, and therefore exceeds the limited purpose of CSAAS to dispel misconceptions about how the *child* reacts to molestation. We find no error under the circumstances of this case and, assuming error, no prejudice.

The prosecution's motion in limine specified the CSAAS evidence would include grooming, delayed reporting, secrecy, helplessness and accommodation.

When issuing its in limine ruling allowing the CSAAS evidence, the trial court stated it would allow evidence of grooming because it is not common knowledge. Defendant protested that grooming was not one of the five misconceptions addressed by CSAAS (secrecy, entrapment/accommodation, delayed disclosure, helplessness, and retraction). The prosecutor retorted grooming explained why children accommodate the abuser, "because the person has groomed them to trust them, to say I'm your friend and you should rely on me because we have this relationship. So grooming as an aspect of those factors, that's how it's incorporated in all of those." The trial court concluded the grooming evidence was relevant to the CSAAS factors of delayed reporting, secrecy, and accommodation.

The trial court's decision to admit the testimony will not be disturbed on appeal unless a manifest abuse of discretion is shown. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299 (*McAlpin*).

On appeal, neither side cites any authority regarding "grooming" evidence.

Generally, "profile" evidence is a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity. (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084 (*Robbie*) [rapist profile].) Profile evidence is generally inadmissible to prove guilt because of its potential for including innocent persons as well as the guilty. (*Id.* at pp. 1084-1085.) "[P]rofile evidence is inherently prejudicial because it requires the jury to accept an erroneous starting point in its consideration of the evidence. We illustrate the problem by examining the syllogism underlying profile evidence: criminals act in a certain way; the defendant acted that way;

therefore, the defendant is a criminal. Guilt flows ineluctably from the major premise through the minor one to the conclusion. The problem is the major premise is faulty. It implies that criminals, and only criminals, act in a given way. In fact, certain behavior may be consistent with both innocent and illegal behavior” (*Id.* at p. 1085.)

Robbie, supra, 92 Cal.App.4th 1075, held the trial court erred in allowing a law enforcement officer to testify as an expert in the behavior and conduct of rapists, i.e., that not all rapes involve violence or injury, and it is common for rapists to engage in small talk with their victims or acquiesce in a victim’s request not to have sexual intercourse and to negotiate with her regarding other sex acts. (*Id.* at p. 1082.) The questions were put to the expert as hypothetical questions but mirrored the trial evidence. (*Id.* at p. 1084.) The expert admitted the described conduct was also consistent with consensual activity. (*Id.* at p. 1083.) *Robbie* rejected the Attorney General’s argument that the evidence was admissible to disabuse the jury of misconceptions about rapists. (*Id.* at pp. 1085-1086.)

Here, there was no law enforcement testimony about grooming as a characteristic of child molesters. Instead, the defense used the police detective to say defendant did *not* fit certain characteristics of child molesters (computer storage of child pornography) and successfully prevented the prosecutor from using the detective for evidence of grooming as profile characteristics of child molesters. Dr. Urquiza’s testimony about grooming explained how a child victim might come to tolerate improper touching by an adult perpetrator, but that would apply only if child molestation actually occurred. The doctor did not opine that grooming behavior was a characteristic of child molesters. The grooming evidence was relevant to rebut the inference that the defense hoped the jury would draw, i.e., that an abused child would not accommodate the abuse by continuing to visit the abuser, as the minors did in this case. The grooming testimony was not presented in a manner that urged the jury to find defendant guilty because he fit a profile of a typical child molester. There was no error in admitting the evidence.

Even assuming for the sake of argument that the evidence should have been excluded, defendant fails to show prejudice warranting reversal. “Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test [*People v. Watson* (1956) 46 Cal.2d 818, 836]: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]” (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

Defendant presents no prejudice analysis specific to the grooming evidence but simply refers to his perception that the prosecution’s case was weak and asserts that, even if this error is not prejudicial, the cumulative effect of all errors is prejudice.

The grooming evidence does not warrant reversal.

III

CALCRIM No. 1193

Defendant argues CALCRIM No. 1193 did not satisfy the trial court’s sua sponte duty to give an appropriate cautionary instruction on the use of CSAAS evidence. Assuming the issue is preserved for appeal, the contention fails.

As indicated, the trial court instructed the jury with CALCRIM No. 1193: “You have heard testimony from Anthony Urquiza regarding child sexual abuse accommodation syndrome. [¶] 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 Jeremy’s and/or Manuel’s conduct was not inconsistent with the conduct of someone who has been molested, *and in evaluating the believability of their testimony.*” (Italics added.)

Defendant notes the predecessor instruction, CALJIC No. 10.64, did not include the phrase about “evaluating the believability” of the victims. Defendant claims this phrase violates the legal principle that CSAAS evidence may *not* be used to determine the

victim is telling the truth or to corroborate the victim's claims. Defendant maintains the instruction allowed the jury to use CSAAS evidence to corroborate the victims, reducing the prosecution's burden.

However, the phrase challenged by defendant was a correct statement of law. CSAAS evidence is properly used to help the jury evaluate the credibility, i.e., believability, of the child's testimony. (*McAlpin, supra*, 53 Cal.3d at p. 1300 [CSAAS evidence is admissible to "rehabilitate such witness's credibility" when the defense suggests the child's conduct is inconsistent with the claim of molestation].)

A defendant challenging an instruction as being subject to an erroneous interpretation by the jury must demonstrate a reasonable likelihood the jury understood the instruction in the manner asserted by the defendant. (*People v. Cross* (2008) 45 Cal.4th 58, 67-68.) In our de novo review, we determine the correctness of jury instructions from the entire set of instructions, not just an isolated part of an instruction. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1075.)

Here, defendant is isolating a single phrase and ignoring the rest. CALCRIM No. 1193 as a whole told the jurors they could *not* use CSAAS evidence to find defendant committed the crimes. Nothing in the latter portion of the instruction about evaluating the minors' believability contradicted the former. Additionally, the trial court gave the full panoply of instructions on the presumption of innocence, the prosecution's burden, and evaluation of witness credibility.

Defendant claims that, because the instruction on witness credibility said the jurors could consider "anything" that tends to prove the truth of the testimony, the jury must have concluded they could use the CSAAS evidence to find the victims were truthful. However, jurors are routinely instructed to make fine distinctions about the purposes for which evidence is to be considered, and we presume jurors are capable of understanding and following the instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139 (*Yeoman*).)

There was no instructional error.

IV

Pornography and Sex Toys

Defendant contends the trial court erred by permitting evidence that he possessed sex toys and homosexual pornography. We disagree.

Relevant evidence means evidence having any tendency in reason to prove or disprove any disputed fact of consequence to the determination of the action. (Evid. Code, § 210.) A trial court's ruling that evidence is relevant and not more prejudicial than probative (Evid. Code, § 352) is reviewed for abuse of discretion. (*People v. Panah* (2005) 35 Cal.4th 395, 474; *People v. Harris* (1998) 60 Cal.App.4th 727, 736-737.)

Defendant moved in limine to exclude the items as irrelevant and more prejudicial than probative. At an Evidence Code section 402 hearing, Jeremy testified consistent with his trial testimony (except he said at the hearing that defendant showed him how to use the sex toys, but in front of the jury said he did not recall defendant explaining how the toys worked). The trial court noted there were no pictures on the DVD cases. The court ruled the evidence more probative than prejudicial because defendant exposed a child to items of a sexual nature, making the child familiar with those items, and defendant's possession of the items was not illegal.

On appeal, defendant argues there was no evidence he used the toys with either boy and no evidence that Jeremy watched the videos, and the evidence did not speak to delayed disclosure. However, the relevance of the toys and DVDs did not depend on their being used or viewed, but on the child being exposed to the topic of sex, which could factor into the CSAAS categories of secrecy and accommodation. That defendant does not consider the evidence convincing does not matter.

Defendant argues the evidence of the toys and videos had little probative value because it came from the same complaining witness who accused defendant of

molestation. However, evidence of the toys and videos also came from the law enforcement officer who discovered those items in the search of defendant's bedroom.

Defendant argues the evidence was "prejudicial" within the meaning of Evidence Code section 352 because it would tend to evoke an emotional bias having little effect on the issues (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823), in people who retain negative stereotypes about homosexuals. However, defendant's sexual orientation was already part of the record, and the toys and videos were not used in any activities with the victims. The evidence had no tendency to evoke emotional bias having little effect on the issues.

We conclude the trial court did not abuse its discretion in allowing evidence of the videos and toys.

V

Prosecutorial Misconduct

Defendant claims the prosecutor committed misconduct by arguing to the jury that the charged offenses were "something that a homosexual would do," which supposedly inflamed prejudice against homosexuals by playing on an unfounded stereotype that homosexuals are predatory child molesters. Defendant did not object in the trial court but on appeal cites the Standards of Judicial Administration imposing on the trial court a duty to prohibit courtroom participants from engaging in conduct that exhibits bias based on sexual orientation. Assuming defendant did not forfeit the contention by failing to object in the trial court, it lacks merit because the prosecutor never said anything that could be viewed as an insinuation that homosexuals are child molesters.

A prosecutor who uses deceptive or reprehensible methods to persuade the jury has committed misconduct. (*People v. Hill, supra*, 17 Cal.4th at p. 819.) Where a claim of misconduct is based on the prosecutor's arguments to the jury, the question is whether

there is a reasonable likelihood the jury construed or applied the remarks in an objectionable fashion. (*People v. Smithey* (1999) 20 Cal.4th 936, 960.)

In his initial argument to the jury, the prosecutor made no reference to sexual orientation, other than to argue that, had the minors fabricated the allegations as revenge for being cut off from gifts, the victims would have accused defendant's "partner," Richard Comer, because it was Comer who had the money and shut off the phone.

Defense counsel argued to the jury that defendant "is not like everyone. He's a gay man. He lives with his partner and his elderly mother. In their bedroom, he and his partner had pornographic DVDs, adults that engage in sexual acts. These are legal. They were gay adults engaged in consensual acts, also legal. They had sexual aids that they kept in the bedroom, also legal. Their consensual sexual interest, though, could be described as nontraditional, and still [defendant] is not a sex offender. [¶] He's a generous man. That's what we learned. He seems to have attracted a partner that is also a generous man. You saw Rick [Comer] wheeling [defendant's] mother into the courtroom. And I'll call Rick a generous man because he is still caring for [defendant's] mother. That's what they are, they're both generous, and they seem to have become attracted to each other. What you learned was that was decades ago. They've been together for a very long time." Defense counsel also said Comer was "standing by his man"

In rebuttal, the prosecutor argued to the jury:

"And the defendant's a gay person. I could care less whether he's homosexual, heterosexual, does not matter to me. The only reason the fact that he's a homosexual matters is because the acts that he did is something that a homosexual would do. [¶] If he was heterosexual, I guarantee the defense would get up and say, there's no way that he would allow a man to orally copulate him. He has a girlfriend. If he was heterosexual, I guarantee that the defense would say, there's no way he would allow another man to put

his penis up his anus because he is heterosexual. So the things that these boys are alleging that he did to them is not beyond what [defendant] is interested in.

“Second, regarding the grooming, I don’t care that he had sex toys. I don’t care that he had gay porn. When we all start to care when you are showing those sex toys to a child. He had no reason to show those sex toys to Jeremy. The only reason that you are showing those sex toys to a child and explaining how they work is because you’re grooming them. You want them to feel comfortable with those sex toys. You want them to feel comfortable with that kind of sex. [¶] The gay porn, it is true that Jeremy saw it. He asked what it was, and [defendant] said, it’s gay porn. Don’t look at it. That’s fine. But then why did he put it in an easily accessible place right after that Jeremy had access to? If he really didn’t want Jeremy to see it, why didn’t he close the door and hide it? But Jeremy said, no, he had it easily accessible. [¶] What did Detective Lawrie say? When I came into that room, there they were. I saw the gay porn videos. Why are you keeping them easily accessible? Is that part of the grooming?”

Contrary to defendant’s claim, the prosecutor’s argument did not invite the jury to infer guilt based on an unfounded stereotype that homosexuals are likely to molest children. Defendant cites ancient inapposite case law where the People claimed homosexuality predisposes a person to molest children. (*People v. Giani* (1956) 145 Cal.App.2d 539.) Defendant also cites out-of-state cases that evidence of a defendant’s homosexuality is inadmissible to establish propensity to engage in sex with children. (E.g., *State v. Blomquist* (Kan.App. 2008) 39 Kan.App.2d 101 [178 P.3d 42].) That did not happen in this case.

There was no prosecutorial misconduct.

VI

CALCRIM No. 371

Defendant contends the instruction about attempts to hide evidence as reflecting consciousness of guilt was unsupported by the evidence and contained an unconstitutional permissive inference. We disagree.

The trial court instructed the jury with CALCRIM No. 371: “If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.”

The trial court gave the instruction because of the evidence that defendant told each of the victims not to tell anyone about the sexual contact.

Defendant argues “hide evidence” in CALCRIM No. 371 means “hide *physical* evidence,” because *testimonial* evidence is covered under the alternative phrase about discouraging someone from testifying, and the latter means only testifying at trial and therefore does not apply to telling victims not to report the crime. Defendant cites inapposite authority distinguishing between the crime of dissuading “testimony,” meaning testifying in court, and the crime of dissuading someone from reporting a crime. (*People v. Fernandez* (2003) 106 Cal.App.4th 943, 948-950.) *Fernandez* is not authority for the proposition that “hide evidence” in CALCRIM No. 371 means only “hide *physical* evidence.”

But, even assuming for the sake of argument that “hide evidence” means “hide physical evidence” and further assuming the court erred in instructing with CALCRIM No. 371, it was harmless. “[A]t worst, there was no evidence to support the instruction and . . . it was superfluous. . . . [E]vidence of defendant’s guilt was strong. Under the

circumstances, reversal on such a minor, tangential point is not warranted.” (*People v. Pride* (1992) 3 Cal.4th 195, 249.)

Defendant argues the jury may have misapplied CALCRIM No. 371, because the prosecutor suggested in closing arguments that *Comer* may have cleared out defendant’s computer before the police seized it, and *Comer* pressured Manuel to write the retraction letter. Defendant argues such misapplication of the instruction would constitute an unconstitutional permissive inference. However, the prosecutor did not argue these items as consciousness of guilt, but to counteract the defense theory that the retraction letter meant Manuel lied in accusing defendant, and that the absence of child pornography on the computer showed defendant did not fit the profile of a child molester. Moreover, the jury would not have misapplied the instruction to impute *Comer*’s actions to defendant, because the instruction on its face was clearly limited to acts by *defendant*, and there was no evidence or argument that defendant committed these acts or even requested or authorized *Comer* to do so. (*Yeoman, supra*, 31 Cal.4th at p.139 [we presume the jury followed the instructions].)

We conclude defendant fails to show grounds for reversal.

DISPOSITION

The judgment is affirmed.

_____ HULL _____, J.

We concur:

_____ RAYE _____, P. J.

_____ HOCH _____, J.