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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD MANANSALA PARUNGAO,

Defendant and Appellant.

D061932

(Super. Ct. No. SCD234122)

APPEAL from a judgment of the Superior Court of San Diego County, Amalia L. Meza, Judge. Affirmed.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Lilia E. Garcia and Kristine Alton Gutierrez for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Ronald Manansala Parungao appeals from a judgment of conviction entered after a jury convicted him of five counts of lewd acts with a child, three of which included true findings on substantial sexual contact enhancements. The victim was Parungao's girlfriend's daughter.

On appeal, Parungao contends that there is insufficient evidence to support the jury's findings, in connection with counts 3 through 5, that he had substantial sexual contact with the victim. Parungao also contends that the trial court was required to instruct the jury with a unanimity instruction with respect to those three counts, and that the court's failure to do so constitutes prejudicial error. Finally, Parungao contends that the trial court erred in admitting the testimony of an expert on the behavior of sexually abused children, and in particular, that the court erred in allowing the expert to testify concerning children's tendencies to delay disclosure of sexual abuse and to report inconsistent information or minimize the abuse.

We reject Parungao's contentions on appeal, and affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

In August 2008, Justine G., who was 11 years old, was in the sixth grade. She lived with her mother, two older brothers, her grandparents, and Parungao, her mother's boyfriend. Justine's mother worked the night shift at a hospital. That August, and on a

number of occasions over the course of the ensuing year, Parungao entered Justine's bedroom while Justine's mother was at work and gave Justine "massages." Justine was uncomfortable with Parungao's conduct, but did not tell him to stop.

In August 2009, Justine told a church friend about Parungao's conduct. Justine's aunt and uncle ultimately learned about Parungao's actions and confronted him.

Parungao admitted that he had touched Justine inappropriately. Parungao also called Justine's mother and admitted to the inappropriate touching. The family met and discussed what to do regarding Parungao. Parungao told family members that he had touched Justine's breasts and back. The family decided to give Parungao a "second chance," and allowed him to continue living in the family home.¹ After that discussion, Parungao did not again touch Justine in an inappropriate manner.

In early 2011, Justine was attending middle school in San Diego. Justine was talking with a school employee about a problem that Justine was having with a classmate. The school employee inquired about Justine's home life, and Justine disclosed that Parungao had touched her inappropriately. The school employee immediately reported Parungao's sexual abuse of Justine to Child Protective Services.

In February 2011, Leticia Abrego, a Child Welfare Services officer, interviewed Justine at school. Justine explained that when she was in the sixth grade, Parungao had touched her breasts and vaginal area, both over and under her clothing. Justine estimated that the touching had occurred on 10 occasions.

¹ Parungao was the family's provider.

The following day, Abrego interviewed Justine's mother, who acknowledged that Parungao had previously admitted that he had touched Justine inappropriately. Abrego then interviewed Parungao. During this interview, Parungao admitted that he had touched Justine inappropriately, at night, while Justine's mother was at work, and that he knew that it was wrong. Parungao explained that his inappropriate touching would start off as a massage, and that he would caress Justine's back, breast area and vaginal area. He acknowledged that he had touched her both over and under her clothing.

After these interviews, Abrego initiated a "safety plan" for the family. This plan allowed Parungao to remain living in the family home, but he was not to be left alone with Justine. They would install a lock on Justine's bedroom door, and she would begin therapy.

In April 2011, Albert Ambito, a detective with the San Diego Police Department, interviewed Parungao. During this interview, Parungao acknowledged that he had inappropriately touched Justine's breasts on approximately four occasions, under her shirt, and also admitted to having touched her legs. Parungao denied having touched Justine's vaginal area.

The following month, Laurie Fortin, a child abuse specialist at Children's Hospital, interviewed Justine. Justine told Fortin that Parungao had begun touching her when she was in the sixth grade, and that the touching happened on approximately four occasions. Justine said that Parungao had touched her on her arms, thighs, and under her shirt. The same day Fortin interviewed Justine, Detective Ambito also interviewed her. Justine told

Ambito that Parungao had touched her breasts on approximately four occasions, and also said that Parungao had touched her on her vagina.

After talking with Justine, Detective Ambito re-interviewed Parungao. This time Parungao admitted having touched Justine's vaginal area, and added that he believed that Justine was getting "turned on" by his touching.

Following these interviews, Abrego initiated a new "safety plan." This plan required Parungao to move out of the family home. Abrego noticed that Justine's mother appeared to be worried about how the family would pay its expenses without Parungao living there.

Justine's trial testimony differed from what she had told Abrego and Detective Ambito. At trial, Justine testified that Parungao had massaged her calves and thighs, and acknowledged that he had touched her breasts on a single occasion. She said that she could not recall that Parungao had touched her under her underwear, and stated that Parungao had touched only her stomach area, and had not touched her vagina. Justine said that she had exaggerated Parungao's conduct when she told Detective Ambito that Parungao had touched her vagina. Justine explained that when she had said that Parungao touched her "on top" of her vagina, she had meant that he touched her several inches above her vaginal area, on her abdominal area. Justine admitted that she told Fortin that the touching had occurred on four occasions, but stated at trial that it was possible that it had only occurred twice.

B. *Procedural background*

The San Diego County District Attorney charged Parungao with five counts of committing lewd and lascivious acts with a minor (Pen. Code, § 288, subd. (a)²; counts 1-5). The information also alleged that Parungao had substantial sexual contact with the victim with respect to counts 3, 4, and 5 (§ 1203.066, subd. (a)(8)).

A jury found Parungao guilty on all counts and found true the three enhancement allegations regarding substantial sexual contact in connection with counts 3 through 5.

The trial court sentenced Parungao to the low term of three years in state prison on count 1, and sentenced him to concurrent three-year terms on each of the remaining counts.

III.

DISCUSSION

A. *Substantial evidence supports the jury's verdicts on counts 3 through 5*

Parungao contends that there is insufficient evidence to support the jury's findings that he had substantial sexual contact with Justine, as was alleged with respect to counts 3 through 5.

1. *Applicable law*

In determining the sufficiency of the evidence to support a guilty verdict, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime

² Further statutory references are to the Penal Code unless otherwise indicated.

beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.] [Citation.] We ' ' 'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " [Citation.] [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 943.)

If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

We review the sufficiency of the evidence to support an enhancement using the same standard that we apply to a conviction. (See *People v. Augborne* (2002) 104 Cal.App.4th 362, 371.)

Parungao challenges the sufficiency of the evidence to support the jury's findings that he had substantial sexual conduct with the victim, as identified in section 1203.066.

That that statutory section provides in relevant part:

"(a) Notwithstanding Section 1203 or any other law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provisions of this section be stricken pursuant to Section 1385 for, any of the following persons:

"[¶] . . . [¶]

"(8) A person who, in violating Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age."

The provision further provides that "[s]ubstantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender." (§ 1203.066, subd. (b).)

B. *Analysis*

According to Parungao, "there is not substantial evidence to support the conclusion [that he] actually touched Justine's vagina." In making this argument, Parungao suggests that there is insufficient evidence that the extent of his "touching" of Justine's vagina was enough to constitute "masturbation" under the statute. Parungao acknowledges, however, that the court in *People v. Chambliss* (1999) 74 Cal.App.4th 773, 783, concluded that the definition of "masturbation" for purposes of showing "substantial sexual conduct" under the Sexually Violent Predators Act (Welf. & Inst. Code, § 6600.1) "encompasses any touching or contact, however slight, of the genitals of either the victim or the offender, with the requisite intent." Parungao argues that the *Chambliss* court's definition of "masturbation" disregards the "dictionary definition" of "masturbation" and is illogical.

We disagree with Parungao's suggestion that "any touching or contact, however slight, of the genitals of either the victim or the offense, with the requisite intent" (*Chambliss, supra*, 74 Cal.App.4th at p. 783), is not enough to establish "masturbation" under section 1203.066, subdivision (b). Rather, we conclude that "masturbation" under

section 1203.066, subdivision (b) "encompasses any touching or contact, however slight, of the genitals of the victim or the offender done with the intent to arouse the sexual desires of the victim or the offender." (See *People v. Dunn* (2012) 205 Cal.App.4th 1086, 1098, fn. 8 [adopting definition of masturbation from *Chambless* and *People v. Terry* (2005) 127 Cal.App.4th 750, for purposes of application of "substantial sexual conduct" requirement of section 1203.066, subs. (a)(8) and (b)].)

Under this definition, there is clearly substantial evidence to support the jury's findings. Specifically, there is evidence from which the jury could have reasonably concluded that Parungao did, in fact, touch Justine's vagina. During her interview with Abrego, Justine said that Parungao had touched her "vaginal area under and over her clothes." Justine told Abrego that Parungao would put his hand inside her underwear and touch her "private parts." Justine estimated that this occurred on approximately 10 occasions. In addition, Abrego testified that when she interviewed Parungao, he admitted to having touched Justine "inappropriately," including her "vaginal area," and acknowledged putting "his hands inside her underwear." Further, upon being asked what "private parts," other than Justine's breasts, he had touched, Parungao told Detective Ambito, "[E]verything." He explained that he had touched her "over her clothing first" in the "crotch area." Parungao even suggested to Ambito that as he was touching Justine, she was "turning on or something." When asked if he was "fondling her vagina," Parungao said, "Uh-huh," and he admitted that while he was touching Justine, he had an erection. Parungao indicated that this inappropriate touching occurred "between five to ten times."

This evidence is more than sufficient to support the jury's finding that Parungao touched Justine's vagina with the requisite intent to constitute "masturbation" for purposes of section 1203.066, subdivision (b).

B. *The trial court did not prejudicially err with respect to the giving of a unanimity instruction*

Parungao contends that his convictions must be reversed because the trial court failed to give the jury a unanimity instruction. He argues that a unanimity instruction was required because the jury could have disagreed as to the number of times Parungao touched Justine and whether he touched her vagina on any particular occasion. Parungao specifically challenges the lack of a unanimity instruction with respect to the counts charging that he had substantial sexual contact with Justine based on his touching her vagina.

If a criminal act is charged, but the evidence tends to show the commission of more than one such act, "either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "Where no election is made, the court has a duty to instruct sua sponte on the unanimity requirement. [Citation.]" (*People v. Curry* (2007) 158 Cal.App.4th 766, 783 (*Curry*).) "The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt

that a defendant must have done something sufficient to convict on one count.'

[Citation.]" (*Russo, supra*, at p. 1132.)³

However, the erroneous failure to give a unanimity instruction is harmless if disagreement among the jurors concerning the different specific acts proved is not reasonably possible. (*People v. Burns* (1987) 196 Cal.App.3d 1440, 1458; accord, *People v. Brown* (1996) 42 Cal.App.4th 1493, 1500-1502 [failure to give a unanimity instruction is harmless unless there is evidence from which reasonable jurors could both accept and reject the occurrence of at least the same number of acts as there are crimes charged.]; see also *People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

There is a split of authority as to whether a trial court's error in failing to give a unanimity instruction should be reviewed under the standard of prejudice set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836—i.e., reasonable probability of a more favorable outcome—or the more stringent standard of harmless beyond a reasonable doubt, as applied in *Chapman v. California* (1967) 386 U.S. 18, 26 (*Chapman*). (See *People v. Smith* (2005) 132 Cal.App.4th 1537, 1545 [identifying split of authority]; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-186 (*Wolfe*) [same].) In *Wolfe*, the court noted that the *Chapman* standard applies to errors that violate a defendant's federal constitutional rights, and concluded that the failure to provide a unanimity instruction

³ CALCRIM No. 3500 is a standard unanimity instruction. That instruction provides: "The defendant is charged with _____ [in Count __] [sometime during the period of ___ to ___]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless 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/she) committed."

constitutes such a violation. The *Wolfe* court reasoned, "When the trial court erroneously fails to give a unanimity instruction, it allows a conviction even if all 12 jurors (as required by state law) are not convinced that the defendant is guilty of any one criminal event (as defined by state law). This lowers the prosecution's burden of proof and therefore violates federal constitutional law." (*Wolfe, supra*, at pp. 187-188; accord *Smith, supra*, at p. 1545.) For the reasons articulated in *Wolfe* and *Smith*, we agree that the *Chapman* standard of prejudice should apply in determining whether a trial court's failure to provide a unanimity instruction requires reversal of the judgment.

In applying the *Chapman* test to a claim of unanimity instruction error, "the question is ' "whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on *evidence* establishing the requisite [elements of the crime] independently of the force of the . . . misinstruction." ' [Citation.]" (*Curry, supra*, 158 Cal.App.4th at p. 783.) " 'Where the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. [Citation.]' [Citation.]" (*Ibid.*)

Even if we assume for purposes of Parungao's argument that the trial court should have provided the jury with a unanimity instruction, the People argue that any such error was harmless because it is apparent from the verdicts that the jury rejected Parungao's defense and found credible Justine's claims of abuse prior to trial. We agree. By convicting Parungao on all of the counts, the jury clearly must have believed Justine's statements to investigators about the number of occasions on which Parungao molested

her and concluded that if Parungao committed any of the acts of molestation, he necessarily committed all of the charged acts of molestation. There was no basis for distinguishing one of the incidents of vaginal touching from another.

People v. Jones (1990) 51 Cal.3d 294, 307, 321-322, is instructive. The *Jones* court considered the jury unanimity requirement in a situation in which a young victim testifies to more offenses than have been charged, and the testimony is generic in nature, devoid of specific details concerning the time, place and circumstances of the many assaults. In *Jones*, the defendant was charged with 28 acts of molestation of four children, including six acts of molesting one of the children. (*Id.* at p. 301.) That child testified that he had been molested once or twice a month for a period of 23 months. (*Ibid.*) The defendant testified, denied having molested any of the victims, and provided a theory as to the victims' motive for fabricating their stories. (*Id.* at p. 303.) The *Jones* court noted that credibility was the "true issue" in the case, as it commonly is in cases of this nature. That is, the victim relates that a "consistent, repetitive pattern of acts occurred" and the defendant denies it. The jury either believes or disbelieves the defendant, but "there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them" (*Id.* at pp. 321-322; accord *People v. Riel* (2000) 22 Cal.4th 1153, 1199-1200.)

In this case, although Parungao did not testify, the issue was Justine's credibility. Obviously the jury did not believe Justine's trial testimony, in which she stated that Parungao had touched her on only two occasions. Instead, the jury must have credited

Justine and Parungao's pretrial statements to Child Welfare Services Officer Abrego and Detective Ambito, which the jury was entitled to do. Justine had told Abrego that Parungao had touched her on approximately 10 occasions, and that he had touched her breasts and vaginal area, and had told Ambito that Parungao had touched her breasts and vagina on what she estimated at the time was at least four occasions. Parungao essentially admitted to a police investigator that he had touched Justine's vaginal area on an estimated five to 10 occasions. Any failure to give the jury a unanimity instruction was therefore harmless. "In order for the unanimity instruction to be significant, there must be evidence from which reasonable jurors could *both accept and reject* the occurrence of at least the same number of acts as there are charged crimes." (*People v. Schultz* (1987) 192 Cal.App.3d 535, 540.) Where, as here, the record provides no rational basis for the jury to distinguish between the various acts, by way of argument or evidence, and the jury must have believed beyond a reasonable doubt that defendant committed all of the acts if he committed any of them, the failure to give a unanimity instruction is harmless. (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.) Given that the jury clearly believed what both Justine and Parungao had said prior to trial about Parungao's conduct, as opposed to Justine's trial testimony, a unanimity instruction would not have changed the outcome. Any error in failing to instruct the jury on unanimity as to any of the substantial sexual contact counts was therefore harmless beyond a reasonable doubt.

C. *The trial court did not abuse its discretion in admitting the expert testimony of Catherine McLennan*

Parungao contends that the trial court abused its discretion in admitting the expert testimony of Catherine McLennan.

1. *Additional background*

Prior to trial, the prosecutor moved to admit the expert testimony of McLennan regarding myths about the behavior of sexually abused children. In particular, the prosecutor proffered that McLennan would testify regarding children's delayed disclosure of sex abuse, as well as children making inconsistent statements about sexual abuse. The defense objected to the admission of McLennan's testimony, arguing that expert testimony was unnecessary because Parungao had conceded that some molestation had occurred—i.e., the conduct underlying counts 1 and 2. Defense counsel requested an Evidence Code section 402 hearing to determine the permissible scope of any expert testimony. The court granted the request.

At the Evidence Code section 402 hearing, McLennan testified that she is a supervisor for Palomar Pomerado Health, in the Forensic Health Department. She testified as to her training and experience that qualify her as an expert. According to McLennan, the least understood aspect of child abuse reporting by the lay public is the issue of "delay in disclosure." Most people are not aware of the "prevalence of delayed disclosure." Numerous studies have shown that delayed disclosure is the norm when it comes to child abuse, and in her own experience, the overwhelming majority of children whom she has interviewed have delayed disclosing the abuse. Age plays a factor, with

younger children more likely to delay disclosing, and older children tending to disclose earlier, but to friends, not authority figures. In addition, the closer the victim is to the offender, the less likely a child is to disclose the abuse.

Children may also recant allegations of sexual abuse. A study looked at the factors that play a role in children recanting allegations of abuse, and found that lack of support from the nonoffending parent made it much more likely that a child would retract his or her story.

After McLennan testified, defense counsel argued that her testimony was unnecessary because the public is already aware that delayed disclosure is common. Defense counsel also questioned the conclusions of the study regarding recantation.

The trial court ruled that it would allow McLennan to testify if Justine's credibility was challenged, even if the challenge came about as a result of the prosecution impeaching its own witness, i.e., Justine. The court further ruled that it would give a limiting instruction as to how the jury could use McLennan's testimony, both prior to her trial testimony, and again when the court gave the general jury instructions.

Before McLennan testified, defense counsel again objected, arguing that Justine had impeached herself by acknowledging that she had lied and exaggerated, such that neither of the parties had challenged her credibility. The trial court concluded, however, that Justine's credibility had been called into question, and that it was therefore appropriate to allow an expert to testify regarding the delay in Justine's disclosing the abuse, her inconsistent statements, and her eventual recantation.

McLennan testified at trial in a manner consistent with the testimony that she provided at the Evidence Code section 402 hearing. Prior to McLennan's testifying, the trial court instructed the jury with a limiting instruction as follows: "The next witness that the People are calling is an expert witness. This is their final witness, and this witness is being offered—her testimony is being offered and may be considered by you only for the purpose of understanding and explaining the behavior of Justine G. in this case and not as proof that the molestation occurred."

2. *Analysis*

Expert opinion testimony is admissible if it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." (Evid. Code, § 720, subd. (a).)

"We review the trial court's ruling on the admissibility of expert testimony for abuse of discretion. [Citation.]" (*People v. Watson* (2008) 43 Cal.4th 652, 692.)

Expert testimony on the common reactions of child molestation victims "is admissible to rehabilitate [a] 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.' . . . [Citation.]" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301, fn. omitted.)

Although the prosecution must identify the "myth" or "misconception" sought to be explained by the expert's testimony, "[i]dentifying a 'myth' or 'misconception' has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation. [Citations.]" (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745.) Further, the court's admission of expert evidence regarding children's behavior surrounding sexual abuse "is not error merely because it was introduced as part of the prosecution's case-in-chief rather than in rebuttal. The testimony is pertinent and admissible if an issue has been raised as to the victim's credibility. [Citations.]" (*Id.* at p. 1745.)

McLennan's testimony was directly relevant to the issues at trial, including the extent of the abuse and the number of times that it occurred, given Justine's delay in reporting the abuse and her inconsistent statements about the abuse. Although the defense did not directly impeach Justine, her trial testimony essentially constituted a recantation of her earlier statements about the abuse in that she testified to fewer occasions and less significant sexual touching than she had previously described. Under these circumstances, it was within the trial court's discretion to permit the prosecution to present McLennan's expert testimony, which was pertinent and admissible on the subject

of Justine's credibility. Further, the defense did challenge the veracity and meaning of the statements that Justine made to Abrego and Detective Ambito during cross-examination of those witnesses. McLennan's testimony was helpful in explaining why Justine may have made inconsistent statements and minimized the abuse at different times, including at trial. The trial court did not abuse its discretion in determining that McLennan's testimony could disabuse jurors of commonly held misconceptions about a child's reporting of sexual abuse. Further, although Parungao contends that McLennan's testimony allowed the jury "to apply syndrome-type testimony to the facts of this case and then conclude the molestations actually occurred as charged," the trial court instructed the jury with a limiting instruction as to how it could use McLennan's testimony. Specifically, the trial court instructed the jury that it could not use McLennan's testimony as proof that the molestation occurred. We presume that the jury understood and followed this instruction. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 670.) We conclude that there was no error with respect to the trial court's admission of McLennan's expert testimony in this case.

IV.
DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.