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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GORDON EMMETT HEADLEE,

Defendant and Appellant.

E052550

(Super.Ct.No. BAF006007)

OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez, Judge. Affirmed in part, reversed in part with directions.

The Law Office of Correen Ferrentino and Correen Ferrentino for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Kristen Kinnaird Chenelia, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant Gordon Emmett Headlee guilty of four counts of willfully committing a lewd or lascivious act upon a child under the age of 14 years (Pen. Code § 288, subd. (a))¹ and one count of penetrating the genital openings of a child under the age of 14 years with a foreign object for the purpose of sexual arousal, gratification, or abuse (former § 289, subd. (j)). As to all five counts, the jury found true the allegations allowing the statute of limitations to be extended. (§ 803, subd. (f).) Also, as to all five counts, the jury found true the allegations that defendant committed the offenses against more than one victim. (Former § 667.61, subd. (e)(5).) The trial court sentenced defendant to prison for an indeterminate term of 15 years to life.

Defendant raises five contentions on appeal. First, defendant asserts substantial evidence does not support the findings, in two of the counts, that the offenses involved substantial sexual conduct. (§ 803, subd. (f)(1)(B).) Second, defendant contends the trial court incorrectly instructed the jury on the law related to “substantial sexual conduct.”² Third, defendant contends the prosecutor committed misconduct during closing arguments by implying that an expert believed defendant was guilty. Fourth, defendant asserts the trial court erred by denying his motion for a new trial, which was based, in part, on ineffective assistance of counsel. Fifth, defendant contends the trial

¹ All subsequent statutory references will be to the Penal Code, unless indicated.

² In defendant’s opening brief, he asserts substantial evidence does not support the findings related to substantial sexual conduct because the jury was improperly instructed. Defendant has bundled two separate issues into a single argument. In this opinion we unbundle the two issues. We separate the issues as follows: (1) Is there substantial evidence supporting the statute of limitations findings; and (2) was the jury properly instruction on the law related to substantial sexual conduct.

court erred by sentencing defendant to an indeterminate term, because the trial court did not realize it had the authority to grant defendant probation. We reverse the sentence and direct the trial court to resentence defendant, but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

In this section, we present the facts related to defendant's offenses. The facts and procedural history related to defendant's other contentions will be presented *post*.

A. JANE DOE TWO

Jane Doe Two (JD2) was born in December 1985. Defendant is JD2's maternal grandfather. JD2's immediate family consisted of her mother, father, and three sisters. When JD2 was seven years old, around 1993, her immediate family shared a house, in the San Timoteo Canyon area, with defendant and JD2's maternal grandmother (Grandmother). The address for the San Timoteo Canyon neighborhood reflects that it is in the City of Redlands; however, the area is technically in Riverside County. Defendant lived with JD2's immediate family for a "[c]ouple of years." JD2's immediate family resided in the house's downstairs bedrooms, while defendant and Grandmother had the upstairs rooms.

On one occasion in 1993, JD2 was upstairs in the house looking for defendant. The only other person home at the time was Grandmother. JD2 walked through a bathroom doorway, and saw defendant sitting on a toilet. Defendant's jeans were down, and he was "exposed." Defendant asked JD2, "'Would you like to touch it[?]" JD2 "reached over" and touched defendant's penis. JD2 described defendant's penis as not "soft" when she touched it. JD2 touched defendant's penis for "[j]ust a quick second,"

then Grandmother came in the bathroom area and asked what was happening, so JD2 “ran out.”

In the summer between fifth and sixth grades, in 1997 or 1998, when JD2 was either 11 or 12 years old, JD2 and defendant were together in the above-ground pool at the house. Defendant was squatting in the pool, and JD2 was sitting on defendant’s lap. JD2 was sitting sideways on defendant’s lap, so the side of her face was towards defendant’s face. JD2 was wearing a two-piece bathing suit, and defendant was wearing swim trunks. Defendant asked JD2 if she “could feel him.” JD2 felt “he was hard.” JD2 could not recall the length of time she felt defendant’s penis on her body. Defendant kissed JD2. Defendant put his tongue in JD2’s mouth, and JD2 bit him. Defendant began bleeding. JD2 left the pool.

JD2’s father (Father) drove up the home’s back driveway, along where the pool was located, while defendant and JD2 were in the pool. Father walked over to the pool area. Father recalled seeing defendant bleeding from his mouth and spitting blood. Defendant told Father that he bit his tongue. JD2 appeared “visibly upset” to Father, but defendant explained that JD2 was upset due to defendant biting his tongue. JD2 did not immediately tell anyone about the two incidents with defendant, because she figured it only happened to her and she would “deal with it, it was fine.”

B. JANE DOE ONE

Jane Doe One (JD1) was born in May 1992. JD1 and JD2 are sisters. In 1996 or 1997, when JD1 was four or five years old, defendant was no longer living in the San

Timoteo house; defendant lived in a mobile home in Calimesa.³ JD1 went to defendant's home in Calimesa to visit him. JD1 was wearing spandex pants, a shirt, and underwear. Defendant was wearing denim shorts and a tank top or T-shirt. JD1 sat in defendant's lap, while defendant sat on a couch recliner. Defendant put his hand down JD1's pants, inside her underpants. Defendant touched JD1's vagina. Defendant rubbed JD1's vagina, and placed at least one finger inside JD1's vagina. While rubbing JD1's vagina, defendant asked JD1, "Does that feel good?" Defendant stopped rubbing JD1's vagina when Grandmother arrived at the house.

A "couple weeks" later, JD1 was in a bedroom at defendant's home. JD1 was again wearing spandex pants, a t-shirt or tank top, and underpants. Defendant was wearing denim shorts, but was not wearing a shirt. Defendant was sitting on the couch, and JD1 was sitting on his lap. Defendant put his hand down JD1's pants, inside her underpants. Defendant again rubbed JD1's vagina and placed at least one finger inside her vagina. JD1 could not recall how long the incident lasted. Defendant again asked JD1 "if it felt good." JD1 did not recall responding to defendant. JD1 could not recall what caused defendant to stop during the second incident.

A similar incident occurred a third time in 1997 at defendant's home. The incidents occurred more than three times, but less than 10 times, and they all took place

³ After trial, the crimes associated with the Calimesa home were found to have occurred in Yucaipa, as will be explained *post*. During trial, JD1 identified the location of the offenses as Calimesa. Since one of defendant's contentions relates to substantial evidence, we limit our Statement of the Facts to the evidence that was available during trial.

in Calimesa; however, JD1 could not recall all the details of the incidents. JD1 did not immediately tell anyone about the incidents because she was afraid of defendant.

C. INFORMING OTHERS

In July 2007, when JD2 was approximately 21 years old, she was speaking to JD1; the two were speaking at night in their shared bedroom. JD2 told JD1 to tell her if anyone ever hurts her. At that point, JD1 told JD2 about defendant harming her. In turn, JD2 told JD1 about defendant harming her.

The day after JD1 and JD2 (collectively “the victims”) discussed the molestation incidents, they were caught shoplifting at a department store. The store did not contact the police, but it did contact the mother of the victims (Mother). Mother disciplined the victims. Mother informed JD2 she could no longer live in the family home. JD1 had to pay a fine and was grounded.

As part of JD1’s punishment, she was required to do chores. While JD1 was doing yard work, Mother asked JD1 why JD2 “did the stuff she did.” JD1 did not respond, but Mother “kept asking and asking.” Eventually, JD1 began crying. JD1 told Mother “what had happened” to JD2. Mother asked why it affected JD1 so greatly, and then JD1 explained “what had happened” to her. JD1 denied creating the story for the sake of avoiding her punishment.

Mother telephoned JD2, who had left town after being told to leave the family home. Mother told JD2 to come home. JD2 denied she created the allegations against defendant due to being in trouble for shoplifting. JD2 admitted she suffered a felony

conviction for grand theft in 2008. The victims spoke to a detective about the incidents involving defendant in November 2007.

DISCUSSION

A. SUBSTANTIAL EVIDENCE

Defendant contends there is insufficient evidence to support the finding that he engaged in substantial sexual conduct with JD2. (§ 803, subd. (f).) We disagree.

When determining whether the evidence at trial was sufficient to support defendant’s convictions “we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] ‘We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] 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. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility. [Citation.]’ [Citation.]” (*People v. Wyatt* (2010) 48 Cal.4th 776, 781.)

The statute of limitations may be extended in certain sex crimes cases if the prosecution satisfies the elements set forth in section 803, subdivision (f)(2). One of the elements in subdivision (f)(2) is that the crime involved “substantial sexual conduct.”

Specifically, former section 803, subdivision (f)(2)(B),⁴ provided: “The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual.” Former section 1203.066, subdivision (b),⁵ provided: “‘Substantial 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.”

People v. Chambless (1999) 74 Cal.App.4th 773, 787-788 (*Chambless*), sets forth a definition of masturbation to be used in determining whether “substantial sexual conduct” had occurred for purposes of the Sexually Violent Predators Act. In *People v. Fulcher* (2006) 136 Cal.App.4th 41 (Fourth Dist., Div. Two) (*Fulcher*), this court cited with approval the definition set forth in *Chambless*. The definition provides: “[A]ny contact, however slight of the sexual organ of the victim or the offender would be sufficient to qualify as masturbation and in turn as substantial sexual conduct under the [Sexually Violent Predators] Act.’ [Citation.]” (*Fulcher*, at p. 52.) Masturbation “can occur under clothing and over clothing.” (*People v. Whitlock* (2003) 113 Cal.App.4th 456, 463.) Thus, pursuant to the *Chambless* line of cases, masturbation is

⁴ The parties do not raise an argument concerning which version of the statute should be applied in this case. We will assume, without deciding, that the April 2008 version of section 803 is applicable to this case, because that is the time when the felony complaint was filed against defendant.

⁵ We again assume, without deciding, that the version of the statute in effect on April 2008 is applicable in this case, because that is the time the complaint was filed against defendant.

“inappropriate contact” involving “genital touching” even if there is not “skin-to-skin” contact. (*Whitlock*, at pp. 463-464.)

During the prosecutor’s closing argument, he identified the two offenses involving JD2 as (1) the incident in bathroom where she touched defendant’s penis; and (2) the incident in the pool where defendant asked JD2 if she could feel his penis, he kissed JD2, and placed his tongue in her mouth.

As to the bathroom incident, the jury could reasonably conclude substantial sexual conduct occurred based on JD2’s testimony that (1) defendant asked her if she wanted to touch his penis; (2) JD2 touched defendant’s penis; and (3) defendant’s penis was not “soft” when she touched it. The evidence reflects JD2 had sexual contact with defendant’s genitals. A jury could reasonably infer from the fact defendant was not “soft” that he had a lewd or sexual intention in asking JD2 to touch his penis. Further, JD2 had direct skin-to-skin contact with defendant’s penis, which a jury could reasonably conclude elevated the sexual nature of the offense. Thus, we conclude substantial evidence supports the jury’s finding the bathroom incident involved substantial sexual conduct.

Next, as to the pool incident, JD2 testified she was sitting on defendant’s lap as he was squatting in the pool. JD2 and defendant were both wearing bathing suits. Defendant asked JD2 if she “could feel him.” JD2 felt “he was hard.” JD2 could not recall the length of time she felt defendant’s penis on her body. Defendant kissed JD2, and put his tongue in JD2’s mouth.

Given that JD2 could feel defendant's erect penis on her body, there was contact between JD2 and defendant's genitals, albeit through clothing. The sexual nature of the touching is supported by (1) defendant's penis being erect; (2) defendant kissing JD2; and (3) defendant placing his tongue in JD2's mouth. Thus, given that the victim had contact with defendant's erect penis in a sexual context, the jury could reasonably find the incident involved substantial sexual conduct. Accordingly, we conclude substantial evidence supports the finding the incident involved substantial sexual conduct.

As to the bathroom incident, defendant asserts the offense only lasted "a quick second," and did not involve any "rubbing, stroking, [or] grabbing." Defendant asserts the incident does not rise to the level of substantial sexual conduct. We do not find defendant's argument to be persuasive, because substantial sexual conduct can take place when there is the slightest genital touching. (*Fulcher, supra*, 136 Cal.App.4th at p. 52.) Thus, there does not need to be evidence of rubbing, stroking, or grabbing; and one second of touching can be substantial evidence.

As to the pool incident, defendant asserts a reasonable jury could not have found substantial sexual conduct because defendant and JD2 were both wearing clothes, she could not recall where on her body she felt defendant's penis, and she could not recall the length of time she felt defendant's penis on her body. We do not find defendant's argument to be persuasive, because masturbation qualifies as substantial sexual conduct (§§ 803, subd. (f)(2)(B), 1203.066, subd. (b)), and masturbation is defined as "[a]ny contact, however slight of the sexual organ of the victim or the offender." (*Fulcher, supra*, 136 Cal.App.4th at p. 52.) Additionally, masturbation "can occur under clothing

and over clothing.” (*People v. Whitlock, supra*, 113 Cal.App.4th at p. 463.) Given the foregoing law, the facts that (1) JD2 and defendant were wearing clothes; and (2) JD2 could not recall how long the touching lasted, are not determinative. Rather, the determinative facts are that there was contact between defendant’s penis and JD2, and the contact occurred in a sexual context, e.g., defendant’s penis was erect and he placed his tongue in JD2’s mouth. In sum, we find defendant’s argument to be unpersuasive.

B. JURY INSTRUCTION

1. *FACTS*

During a discussion about jury instructions, defense counsel suggested using CALCRIM No. 3410, which is a general instruction related to the statute of limitations, for instructing the jury on the section 803 allegations. The prosecutor told the court he did not believe there was a specific instruction correlated with section 803, and that the parties would “have to fashion one,” for the specific allegations. The prosecutor said he believed he had a jury instruction from a prior case that could be used in the instant case. Defense counsel offered to work with the prosecutor on the jury instruction. The trial court instructed the parties to bring the jury instruction to the court the next morning.

The trial court instructed the jury on the law related to the statute of limitations extension, with a modified version of CALCRIM No. 3410. The trial court said, “If you find that the defendant is guilty of the crimes charged in Counts 1 through 5 pursuant to Penal Code section 803(f), you must then decide whether [for] each of those crimes the People have proved the following allegations by a preponderance of the evidence. [¶]

. . . [¶] Three, the crimes involved substantial sexual conduct. Substantial sexual conduct means masturbation of either the child or perpetrator, or penetration of the child’s vagina by any foreign object. Masturbation is defined as the touching of another person’s genitals.”

2. DISCUSSION

Defendant contends the trial court erred by incorrectly instructing the jury on the definition of masturbation. We disagree.⁶

“The rules governing a trial court’s obligation to give jury instructions without request by either party are well established. “Even in the absence of a request, a trial court must instruct on [the] general principles of law that are . . . necessary to the jury’s understanding of the case.” [Citations.]” (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012.)

“The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law [citation]” (*People v. Posey* (2004) 32 Cal.4th 193, 218.) We are reviewing the trial court’s modification of the statute of limitations instruction; therefore, we apply the independent standard of review. When

⁶ The People assert defendant waived his jury instruction contention by not objecting to the instruction in the trial court. Defendant is contending the trial court gave an incorrect instruction on the law related to substantial sexual conduct, which implicates a violation of his due process rights. Thus, defendant’s claim is not the type that must be preserved by an objection in the lower court. (§ 1259 [“[T]he appellate court may, without exception having been taken in the trial court, review any . . . instruction . . . which affected the substantial rights of the defendant.”]; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) Accordingly, we conclude defendant has not forfeited this issue.

determining whether a trial court correctly informed the jury of the general principles of law, we consider how a reasonable jury would have likely interpreted the instruction, “and whether the instruction, so understood, accurately reflects the applicable law. [Citations.]’ [Citation.] ‘Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury. [Citation.]’ [Citation.]” (*People v. James* (1998) 62 Cal.App.4th 244, 273-274 [Fourth Dist., Div. Two].)

As set forth *ante*, former section 803, subdivision (f)(2)(B), describes the second statute of limitations exemption element as follows: “The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual.” Former section 1203.066, subdivision (b), provided: “‘Substantial 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.”

Chambless set forth a definition of masturbation to be used in determining whether “substantial sexual conduct” had occurred for purposes of the Sexually Violent Predators Act. The definition provides, “[A]ny contact, however slight of the sexual organ of the victim or the offender would be sufficient to qualify as masturbation and in turn as substantial sexual conduct under the [Sexually Violent Predators] Act.”

(*Chambless, supra*, 74 Cal.App.4th at pages 787-788.) This court cited with approval the definition set forth in *Chambless*. (*Fulcher, supra*, 136 Cal.App.4th at p. 52.)

Additionally, masturbation “can occur under clothing and over clothing.” (*People v. Whitlock, supra*, 113 Cal.App.4th at p. 463.)

The trial court instructed the jury: “Masturbation is defined as the touching of another person’s genitals.” Given the foregoing law, from the *Chambless* line of cases the trial court’s instruction was correct: Masturbation is contact with the victim’s or defendant’s genitalia. Given that the trial court’s explanation of masturbation nearly mirrored the case law definition of the term, we conclude that the trial court did not incorrectly instruct the jury on the law related to substantial sexual conduct.

Defendant contends the trial court erred because *Chambless* and the line of cases that follow the *Chambless* opinion are incorrect. Defendant asserts the definition from *Chambless* cannot be correct, because the slightest touching cannot qualify as substantial sexual contact. Essentially, defendant asserts the *Chambless* definition does not comport with the Legislature’s intent—the Legislature meant for masturbation to mean more than a slight touching.

In support of his argument, defendant asserts the plain meaning of the statute should control. Defendant asserts “slight” contact is directly contrary to the plain meaning of “substantial”—the word used in the statute. Thus, defendant reasons that “slight” contact cannot be the correct way to define “substantial” sexual conduct, under the plain meaning rule.

While defendant’s assertion is reasonable, we do not find it persuasive. *Chambless* was decided in 1999. The Legislature has amended section 803 multiple times since the *Chambless* opinion was issued, yet it has not amended the statute to indicate a disagreement with the *Chambless* definition of masturbation. (See Assem.

Bill No. 78 (2001-2002 Reg. Sess.) § 1; Assem. Bill No. 949 (2003-2004 Reg. Sess.) § 1; Sen Bill No. 111 (2005-2006 Reg. Sess.) § 3.)

The courts presume that the Legislature is ““aware of ““judicial decisions already in existence, and to have enacted or amended a statute in light thereof. [Citation.]” [Citation.]’ [Citation.] Moreover, where the Legislature uses a term well understood by the common law, we must presume that the Legislature intended the common law meaning. [Citation.]” (*People v. Newby* (2008) 167 Cal.App.4th 1341, 1346-1347.)

Given the foregoing law, we must presume that when the Legislature amended section 803 it was aware of the common law definition of masturbation set forth in *Chambless*. Thus, the fact the Legislature did not modify the language in the statute to indicate a disagreement with *Chambless* indicates an acceptance of the *Chambless* definition. Therefore, while defendant sets forth a reasonable plain language argument, we are not persuaded by it, because it appears the Legislature has accepted the common law definition of masturbation set forth in *Chambless* and adopted by this court in *Fulcher, supra*, 136 Cal.App.4th at page 52.

In a second argument, defendant asserts the *Chambless* definition is incorrect because if a term is ambiguous then it should be construed in favor of the defendant. We are not persuaded by this argument for the same reason given *ante*. We presume the Legislature was aware of the common law definition set forth in *Chambless* when it amended section 803. The Legislature did not amend section 803 to alter the *Chambless* definition. Thus, it appears the common law definition of the terms

“masturbation” and “substantial” have been accepted. As a result, the terms are not ambiguous; rather, they are clearly defined in the common law.

C. PROSECUTORIAL MISCONDUCT

1. *FACTS*

The defense presented the testimony of Dr. Laura Brodie (Brodie), a forensic psychologist. Brodie conducted various psychological tests on defendant. Brodie concluded defendant “does not suffer from any major mental disorder, specifically, a major mental disorder that . . . tend[s] to [be found] in incest perpetrators.” Brodie also found defendant “does not show a devi[ant] sexual interest in children. Brodie testified defendant’s test results did not “fit with an incest perpetrator.”

During the direct examination, the following exchange took place:

“[Defense Counsel]: Given your findings, what is the probability that he committed the molest?

“[Prosecutor]: Objection.

“The Court: Counsel, you we [*sic*] just talked about that. She cannot give the ultimate opinion. Sustained.

“[Defense Counsel]: Thank you, Your Honor. I apologize.”

During closing argument, the prosecutor made the following statements: “Okay. And what was [Brodie’s] opinion based on? It was based on a two-hour interview. A two-hour interview. And then a test where they show a bunch of slides. And what was she saying? [¶] ‘Currently, he’s not a sexual deviant.’ [¶] All right. And she’s not saying that he didn’t commit these crimes. All right. And this test was done after my

case in chief last Wednesday. Think about that, ladies and gentlemen. What else did she say I thought was key? We went over the false allegations.”

2. DISCUSSION

Defendant asserts the prosecutor committed misconduct by implying that Brodie believed defendant was guilty, because Brodie did not testify defendant was innocent. We disagree.⁷

A prosecutor “has broad discretion to state [his] views as to what the evidence shows and what inferences may be drawn therefrom.’ [Citations.]” (*People v. Sims* (1993) 5 Cal.4th 405, 463.) “To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.’ [Citation.]” (*People v. Dykes* (2009) 46 Cal.4th 731, 772-773.)

The prosecutor told the jury: “And she’s not saying that he didn’t commit these crimes.” Defendant is encouraging this court to infer the most damaging and extreme

⁷ The People assert defendant forfeited his prosecutorial misconduct contention by failing to raise it at the trial court. “To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury.’ [Citation.] However, ‘the failure to request that the jury be admonished does not forfeit the issue for appeal if an admonition would not have cured the harm caused by the misconduct.’ [Citation.]” (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 512.) In defendant’s reply brief, he asserts that an admonition would not have cured the harm, because the jury had already heard the prosecutor’s remark. Rather than analyze the forfeiture issue, we address the merits of defendant’s contention, because the issue is easily resolved.

meaning from the prosecutor's statement: that Brodie implied defendant was guilty. Contrary to this position, a more reasonable interpretation of the prosecutor's statement is that Brodie did not render an opinion either way regarding defendant's guilt or innocence. The prosecutor's statement: "And she's not saying that he didn't commit these crimes," does not necessarily imply that Brodie believed defendant was guilty, rather, it simply implies that Brodie's testimony did not provide an opinion about defendant's guilt or innocence—that Brodie's testimony in no way settled the issue of guilt or innocence. Given that the jury could reasonably interpret the prosecutor's remarks in a neutral fashion, we conclude there is not a reasonable likelihood the jury understood or applied the complained-of remarks in an improper or erroneous manner. As a result, we conclude the remark does not amount to prosecutorial misconduct.

D. SENTENCING

1. *TIMELINE*

In the Amended Information it was alleged defendant's crimes occurred in 1992, 1993, 1997 and 1998.⁸ Section 667.61 did not exist in 1992 and 1993. Section 667.61 was created in 1994. (Sen. Bill No. 26 (1993-1994 Ex. Sess.) § 1.)

In 1997 and 1998, section 667.61 provided that a person who was found guilty of violating section 288, subdivision (a), and who was convicted in a case of molesting more than one victim, must be sentenced to prison for life, with a minimum sentence of

⁸ JD1 testified that the crimes against her may have occurred in 1996 or 1997, but we focus on the allegations made by the prosecution.

15 years before being eligible for parole, unless the defendant qualified for probation under section 1203.066, subdivision (c). (Former § 667.61 subs. (c)(7) & (e)(5).)

In 1997 and 1998, section 1203.066, subdivision (c), provided probation could be granted to a defendant if the following criteria were satisfied: (1) the defendant was the victim's relative; (2) a grant of probation was in the victim's best interest; (3) it was feasible to rehabilitate the defendant, the defendant was amenable to treatment, and the defendant was placed in a recognized treatment program for child molesters immediately following the grant of probation; (4) the defendant was removed from the victim's household until the court determined it was in the victim's best interest to return the defendant to the household; and (5) there was no threat of physical harm to the victim if probation was granted.

Defendant was sentenced in October 2010. In 2010, section 667.61, subdivision (c)(8) provided that a person convicted of committing lewd or lascivious acts, in violation of section 288, subdivision (a), against more than one victim must be punished "by imprisonment in the state prison for 15 years to life." (Former § 667.61, subs. (c)(8) & (e)(4).) Probation was not included as an option. (Former § 667.61, subd. (c)(8).)

2. *PROCEDURAL HISTORY*

During defendant's sentencing hearing, defense counsel argued that section 667.61, subdivision (e)(5), was not effective in 1997, and therefore, "there's an ex post facto situation" in regard to sentencing.

The trial court explained that some laws are applied retroactively. The trial court gave the example of the “Three Strikes” law and the statute of limitations statute in this case (§ 803, subd. (f)). The trial court found that defendant was not eligible for probation because defendant was convicted of molesting more than one victim, which relates to section 667.61, subdivision (e)(5).⁹ Nevertheless, the trial court then said, “[H]e’s older, and he had a lot of good things in his life before that. So there’s [a] counter balancing [of] things, but the Rules of Court [*sic*] say I can’t grant probation. So I can’t grant probation.”

The trial court stated that if section 667.61, subdivision (c)(7) were not applicable, then it would sentence defendant to prison for a term of 11 years. The trial court explained it would have imposed the low term of three years on the principle count, due to defendant’s advanced age, and then two-year consecutive terms for the remaining four counts. However, the trial court then stated that due to section 667.61, subdivision (c)(7), it was required to impose the sentence of 15 years to life. The trial court then sentenced defendant to an indeterminate term of 15 years to life.

3. ANALYSIS

Defendant contends the trial court erred in sentencing him because the court did not realize it had the authority to grant defendant probation. We reframe the issue in order to address the heart of defendant’s contention. We reframe the issue as follows:

⁹ The trial court stated defendant could not be granted probation since he was convicted of molesting more than one victim, but the trial court cited California Rules of Court, rule 4.413(a) to support its conclusion. California Rules of Court, rule 4.413 provides for granting probation in unusual cases.

Defendant contends the trial court violated the ex post facto clauses of the state and federal Constitutions when imposing defendant's sentence, because the trial court applied the post-1998, sentencing laws, in which defendant was not eligible for probation. (Cal. Const., art. I, § 9; U.S. Const., art. I, § 10, cl. 1.) We agree with defendant's contention.

We apply the de novo standard of review. (*U.S. v. Mason* (9th Cir. 1990) 902 F.2d 1434, 1437; see also *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799-801 [question of law is reviewed de novo]; see also *Bullard v. California State Automobile Assn.* (2005) 129 Cal.App.4th 211, 217 [retroactivity of a statute is reviewed de novo].) The ex post facto clauses are violated when a statute, which substantially alters the consequences for an offense in a manner adverse to the offender, is applied to a crime that was completed before the statute became effective. (*People v. Delgado* (2006) 140 Cal.App.4th 1157, 1164.) A law may violate the ex post facto clause not only if it alters the length of the sentence, but also if it changes the decision to impose the maximum sentence from a discretionary decision to a mandatory decision. (*Id.* at pp. 1167-1168.)

The trial court found that defendant was not eligible for probation because defendant was convicted of molesting more than one victim. The October 2010 version of section 667.61 prohibits granting probation when there are multiple molestation victims, but the 1997 and 1998 versions of the statute did not contain such a prohibition, and the statute did not exist during 1992 and 1993. Thus, the punishment for the offenses has increased since the crimes were committed. A new statutory scheme has been implemented since the 1992 or 1993 offense was committed, and the sentencing

decision changed from discretionary to mandatory since the 1997 and/or 1998 offenses were committed.

The trial court went on to say: “[H]e’s older, and he had a lot of good things in his life before that. So there’s [a] counter balancing [of] things, but the Rules of Court [sic] say I can’t grant probation. So I can’t grant probation.” Given the trial court’s statement, it appears the trial court may have considered granting defendant probation, if it had known probation was an available option. Thus, the trial court’s statement that it could not grant probation due to the law, could reasonably be interpreted as the court applying the 2010 version of section 667.61, especially in light of the trial court’s statement about some laws being retroactively applied.

We note that the trial court went on to say it would have sentenced defendant to 11 years, if not for the required 15-years-to-life sentence, but it is not clear if the trial court would have still selected that 11-year sentence if it knew it could have granted defendant probation. In other words, we cannot determine from the record if the trial court would have granted defendant probation if it knew it had the authority to do so.

Further, we note that count 3 was alleged to have occurred “on or about [the] year of 1992, through and including [the] year of 1993,” before section 667.61 was created. However, the trial court still sentenced defendant to a term of 15 years to life for count 3. Thus, it appears from the record the trial court was applying the 2010 version of section 667.61 retroactively, despite the fact that the 2010 version of section 667.61 substantially altered the consequences for the offense in a manner adverse to defendant. (*People v. Delgado, supra*, 140 Cal.App.4th at pp. 1167-1168.)

“[F]undamental fairness requires that sentencing decisions be based upon the court’s informed discretion. [Citations.]” (*People v. Tatlis* (1991) 230 Cal.App.3d 1266, 1274.) As set forth *ante*, it appears from the record that the trial court was unaware it should not have applied the 2010 version of section 667.61. Thus, the trial court did not fully exercise its sentencing discretion. Accordingly, defendant is entitled to a resentencing hearing as to all of his convictions. We express no opinion regarding whether probation should be granted or denied.

The People assert the trial court did not err because defendant failed to present evidence proving he would have qualified for probation under the prior version of the law. We do not find the People’s argument to be persuasive. At defendant’s sentencing, his trial counsel informed the trial court, “there’s an ex post facto situation” in regard to sentencing. The trial court explained that some laws are applied retroactively. The trial court gave the example of the Three Strikes law and the statute of limitations statute in this case (§ 803, subd. (f)). Thus, defendant’s trial counsel tried to raise the issue of applying the prior version of the law. Perhaps trial counsel would have offered evidence proving that defendant was eligible for probation if the trial court had permitted counsel to do so. Given that defendant’s trial attorney tried to raise the issue with the trial court, and the trial court rejected the issue, we do not see how we can fault defendant on appeal for failing to have provided proof on the issue—he was not given an opportunity to provide the necessary proof.

In a secondary argument, the People assert the trial court did not err because there is no way the trial court could have found that probation was in the victims’ best

interests. Specifically, the People assert the victims are now adults so there are no “children” whose interests can be evaluated. The relevant statute provided probation could be granted if doing so “is in the best interest of the child.” (§ 1203.066, subd. (c)(2).) It appears from the plain language of the statute that “child” refers to the victim. There does not seem to be an implicit requirement that the victim still be a child in order for a defendant to be granted probation. Thus, we find the People’s argument to be unpersuasive.

In a third argument, the People assert defendant has not shown a likelihood the trial court would grant him probation, and therefore resentencing is not needed. The People point out the trial court stated it would sentence defendant to prison for a term of 11 years if it were not required to impose an indeterminate term. We do not find the People’s argument to be persuasive, because prior to announcing that it would impose an 11-year term, the trial court implicitly stated that it would consider probation if it had the authority to do so. Specifically, the trial court said, “[H]e’s older, and he had a lot of good things in his life before that. So there’s [a] counter balancing [of] things, but the Rules of Court [*sic*] say I can’t grant probation. So I can’t grant probation.”

It is unclear from the trial court’s comments whether it would grant defendant probation. However, it is clear from the trial court’s comments that it believed it did not have the authority to grant defendant probation. Thus, we are not persuaded by the People’s argument. The sentencing matters need to go back to the trial court so that the trial court can exercise its discretion with the knowledge of all its sentencing options. Again, we do express any opinion as to what sentence should be imposed.

E. MOTION FOR NEW TRIAL

1. *FACTS AND PROCEDURAL HISTORY*

a) Venue

Defendant's crimes were committed in (1) San Timoteo, and (2) Calimesa; the "Calimesa" location is actually in Yucaipa. The San Timoteo house is in Riverside County. The Yucaipa home is in San Bernardino County, and it is more than 500 yards from the border with Riverside County. Nevertheless, defendant was tried, convicted, and sentenced for all the offenses in Riverside County.

b) Trial

During trial, defense counsel, Reginald Alberts (Alberts), cross-examined the victims. During the cross-examination of JD2, Alberts questioned her in detail about the shoplifting incident. Alberts questioned JD2 about her prior felony arrest and conviction, as well as her recollection of the events involving defendant. Alberts told the trial court, outside the presence of the jury, that his questions were designed to cast JD2 as a "liar and manipulator."

When examining JD1, Alberts questioned her about the shoplifting incident. Alberts asked JD1 about her and JD2's history of lying. During cross-examination, JD1 admitted JD2 has "a lot of influence" over her. Alberts asked JD2 about her relationship with defendant. JD2 stated that she continued going on camping trips with defendant and giving defendant cards and letters, despite the alleged molestation.

Alberts called a dozen witnesses to testify. First, Alberts called Rodney Headlee (Rodney),¹⁰ defendant's son. Rodney testified that defendant raised him to respect women. Rodney recalled defendant and the victims always having happy interactions with one another. Rodney testified that the victims continued to be happy and affectionate with defendant until one month before the allegations came out. Rodney never saw defendant do anything inappropriate with a young girl.

Second, Alberts called Patricia Headlee (Patricia). Defendant is Patricia's father-in-law. Patricia had seen defendant with the victims since the victims were children. Patricia described defendant's relationship with the victims as loving and caring.

Third, Alberts called Jesse Wooley (Wooley). Wooley is not related to defendant, but has known defendant for over 55 years. Wooley observed defendant with the victims, when the victims were children. Wooley described defendant's relationship with the victims as loving and affectionate.

Fourth, Alberts called Peggy Headlee (Peggy). Peggy has been defendant's wife for approximately 60 years. Peggy never witnessed any interaction between defendant and the victims that concerned her. Peggy testified defendant had back surgery in 1993, and had a somewhat difficult time getting an erection after the surgery. Defendant had surgery for prostate cancer during the summer of 1997; defendant was impotent following the prostate surgery. Peggy described defendant's relationship with the victims as affectionate.

¹⁰ We refer to witnesses with the last name "Headlee" by their first names, as there are multiple witnesses that share this last name; no disrespect is intended.

Fifth, Alberts called Karen Ewing (Ewing). Ewing has known defendant since the late 1970s. Ewing saw defendant with his grandchildren approximately a dozen times. Ewing described defendant's relationship with his grandchildren as normal and happy.

Sixth, Alberts called Cathleen Rinehart (Rinehart). Rinehart lived next door to defendant in San Timoteo Canyon for 26 years and saw defendant with his grandchildren "[m]any times." Rinehart described the children as excited to see defendant.

Seventh, Alberts called Robert Murray (Murray). Murray has known defendant since 2002. Murray rents a space on defendant's property for his truck and boat. Murray often talked to defendant when he was at the property working on his truck and boat. Murray knows the victims. Murray saw the victims being very loving and nice towards defendant. Murray believed defendant had a good relationship with the victims.

Eighth, Alberts called Marcelene Tanner (Tanner). Tanner has known defendant for 40 years. Tanner saw defendant with the victims at holiday gatherings. Tanner thought defendant and the victims had a great relationship; she did not see anything wrong and believed the victims loved defendant.

Ninth, Alberts called Katheryn Mack (Mack). Mack has known defendant for 55 years. Defendant helped to raise Mack after her father broke his neck in the early 1960s, and Mack's mother had to go to work. Mack spent time at defendant's house; her mother would drop her off at defendant's home before school and she spent

weekends at defendant's home. Mack knew the victims from holiday gatherings. Mack described defendant's relationship with the victims as "[v]ery loving."

Tenth, Alberts called Gordon Headlee, Jr. (Gordon). Defendant is Gordon's father. Gordon saw defendant and JD1 together in 2007. Gordon described defendant's and JD1's interactions with one another as "normal family" interactions.

Eleventh, Alberts called defendant. During direct examination, defendant testified he was 76 years old and had never been convicted of a felony. Defendant testified he was not sexually attracted to young girls. Defendant stated he had prostate surgery in August 1997, and it "[t]otally" affected his sex drive.

Defendant denied ever asking JD2 to touch his penis while he was in the bathroom, and he denied that JD2 ever touched his penis. Defendant testified that JD2 would sometimes come into the shower area of the bathroom while he was drying himself, but JD2 never touched defendant. Defendant did not recall JD2 sitting on his lap in the pool at the Redlands house. Defendant denied kissing JD2 in the pool. Defendant denied placing his hand in JD1's pants and touching her genitalia.

Defendant testified he has seen the victims "[q]uite often" since 1997. JD1 would visit defendant every weekend at his woodworking shop. JD2 would visit defendant when she needed repair work done on her vehicle; defendant also helped JD2 with repairing her apartment. The victims always had a "normal" relationship with defendant.

Twelfth, Alberts called Brodie, the forensic psychologist. Brodie testified as an expert on the topic of sexual offenders and sexual abuse of children. Brodie explained

that she conducted psychological tests on defendant, and found he did not fit the psychological profile of an “incest perpetrator.” Brodie also testified defendant did not fit the profile of a molester.

Brodie further testified the victims could have contaminated one another’s stories by speaking with one another about the allegations. Brodie stated that the potential contamination makes the victims’ allegations questionable. Brodie also asserted there were problems with the victims having been interviewed multiple times, because leading questions can contaminate a person’s allegations.

During the defense’s closing argument, Alberts argued: “[T]hese charges did not come out under the most credible of circumstances. These charges came out after shoplifting, after they had time to think. On the one hand the girls’ testimony is somewhat believable, but at the same time inherently suspect, because of all the stuff that’s going around. [¶] That, ladies and gentlemen, right there, is reasonable doubt.” Alberts argued that the victims had a motive to lie about the allegations against defendant—in order to not be in trouble for shoplifting.

As Alberts continued, he pointed out defendant was a “well-respected man” without a criminal history. Further, Alberts argued: “And the charges as to [JD2] are 1992, ’93. My God, ladies and gentlemen of the jury, that’s 17 years ago. There’s no wonder people don’t remember. And that alone, again, is reasonable doubt—17 years, 12 years after the fact? Come on. That’s not reasonable doubt—I mean, that is reasonable doubt. There’s no way they can make a hurdle over that.”

c) Motion for New Trial

(1) *Motion*

After the jury returned its verdict, defendant hired a new attorney, Daryl Anthony (Anthony). On August 6, 2010, Anthony filed a motion for new trial. (§ 1181.) Anthony argued that the motion should be granted because Alberts provided defendant with ineffective assistance. Anthony argued Alberts's assistance was ineffective because Alberts (1) failed to argue that Riverside County lacked jurisdiction over the offenses relating to JD1; (2) failed to investigate and present evidence that JD1 told her mother defendant touched her only one time; (3) failed to present evidence that JD2 never told her mother about touching defendant's penis in the bathroom; (4) failed to cross-examine the victims about their police interview, wherein they displayed faulty memories; (5) failed to present "bad character" evidence of the victims, which would cast doubt on their credibility; (6) failed to investigate and present evidence of the victims' counseling records, which would have provided additional inconsistent statements; (7) failed to investigate and present evidence of JD2's arrest for grand theft and impeach her credibility; (8) failed to adequately "combat" expert testimony regarding Child Sexual Abuse Accommodation Syndrome; (9) failed to develop and present testimony regarding the unreliability of memories of events in the distant past; (10) failed to object to incidents of prosecutorial misconduct during closing arguments; and (11) failed to make proper requests for discovery.

In a second argument, Anthony argued the motion should be granted because Riverside County lacked jurisdiction over the charges involving JD1, which took place

in San Bernardino County. In a third argument, Anthony asserted the conviction in count 4 should be “reversed” because there was not substantial evidence that the offense involved substantial sexual conduct, and thus, the conviction was time-barred. Finally, Anthony argued that when the foregoing alleged errors were combined, they caused defendant to have been denied a fair trial.

(2) *Opposition*

The prosecution opposed defendant’s motion for new trial. (§ 1181.) As to the jurisdiction/venue issue, the prosecution argued Calimesa is a city within Riverside County, and thus, the charges were properly brought in Riverside County. Additionally, the prosecution argued there was substantial evidence of substantial sexual conduct. As to the ineffective assistance counsel allegations, the prosecution argued none of the allegations showed Alberts was ineffective or incompetent.

(3) *Hearing*

A hearing on defendant’s motion for new trial was held on August 20, 2010. Alberts testified at the hearing. Alberts stated he has been a lawyer since 1988, but defendant’s case was the first time Alberts handled a sex crime matter. Alberts explained his niece (Amanda) gave birth to a baby in October, and four days later Amanda contracted swine flu and was placed in intensive care. Amanda was in an induced coma for over one month; she was on life support, and she nearly died “several” times. Alberts and his wife visited Amanda every day, and helped to take care of her four year-old child as well as her newborn. Amanda’s medical problems were taking place during defendant’s trial.

Alberts stated he had not slept for more than an hour at a time for the month prior to defendant's trial. Due to the family stress, Alberts found it difficult to concentrate on defendant's case. Alberts stated he was "out of sorts and did not process information during the trial as quickly or efficiently as [he] normally do[es]." Alberts opined that defendant did not receive a fair trial, because Alberts "did not aid him in his defense." Alberts stated he did not provide defendant with effective assistance of counsel.

Alberts testified he had information suggesting defendant's Calimesa home was in San Bernardino County. He explained that he believed the home was in the Yucaipa area of San Bernardino County. Alberts stated he did not cross-examine the victim about the exact Calimesa location, because Alberts believed that if there were multiple sex crimes, then the defendant could be charged in any county where one of the crimes took place. Alberts stated that he believed the San Timoteo Canyon house was in Riverside County, despite having a Redlands mailing address.

Alberts was not aware the joinder law required the prosecutor to present written evidence that district attorneys from the relevant counties agree to the venue. If there was no written agreement, then the crimes must be charged in the county where the crimes were committed.¹¹ (§ 784.7, subd. (a).) Alberts stated that his failure to present evidence about the exact location of the Calimesa residence was due to his lack of knowledge about the joinder law, and the fact he "didn't know that it would help."

¹¹ This information about joinder pertains to the current law, not the law that was in effect at the time the crimes were committed.

Alberts explained that it was not a strategic decision on his part to ignore the evidence and argument related to venue.

A law enforcement report about the crimes reflected the crimes against JD1 occurred at “San Timoteo Canyon, Riverside County, [C]ity of Redlands.” After looking at the report, Alberts explained he failed to ask JD1 about her testimony that the crime occurred in Calimesa, because he overlooked the issue due to an inability to focus and concentrate. Alberts believed that the crimes involving JD1 took place in defendant’s mobile home in Yucaipa, on Calimesa Boulevard.

The victims’ mother made the initial child abuse report to a Riverside County law enforcement agency. An employee of the State of California Department of Housing testified that defendant’s mobile home was located on Calimesa Boulevard, in Yucaipa, based on an ownership certificate. The employee also testified defendant had a mailing address on San Timoteo, in Redlands. Defendant testified that he did not live in the City of Calimesa, within Riverside County.

The trial court found that “defendant lived just off of Calimesa Boulevard in a trailer park at the time of the particular incident. But Calimesa Boulevard starts in Calimesa, which is in Riverside County, but it goes off into Yucaipa which is in the neighboring city, which is in San Bernardino [C]ounty.” The trial court continued, “We all know there’s a law that says if the incident occurs within 500 yards of the border, that’s still within the jurisdiction of the county. But I’m satisfied, based on the maps that it was, maybe 1200 yards, but it was more than 500 yards away from the county line. So it doesn’t fall under that section. So, clearly, it was in another county.”

The trial court concluded that Alberts purposefully waived the jurisdiction/venue issue. The trial court reasoned: “The obvious possibilities are he, [Alberts], didn’t want to expose [defendant] to two separate trials, in which case he wouldn’t necessarily have both girls there to contradict each other, which was a main point of his [Alberts’s] strategy. He wouldn’t have control—it would be difficult to work with two different DAs who may have different—entirely different approaches to the case. And he said, [Alberts] said—that he knew it was in Yucaipa, but he didn’t bother to cross-examine the witnesses on it, and nobody ever asked him why. But I’m just saying there could be reasonable reasons.” The trial court denied defendant’s motion for a new trial.

2. ANALYSIS

a) Venue

Defendant contends the trial court erred by denying his motion for a new trial. Defendant asserts that at the motion for new trial “attorney Anthony presented evidence conclusively establishing that the offenses against [JD1] . . . were all committed in San Bernardino County and not in Riverside County where the trial occurred.” Defendant asserts the trial court erred in concluding Alberts strategically waived the venue argument. Defendant asserts that if the crimes against JD1 were tried separately in San Bernardino County, then defendant would not have been eligible for the multiple-victims sentencing, which increased the possible maximum sentence to life in prison.

(§ 667.61, subd. (b).)¹² In other words, if the crimes against JD2 were tried in Riverside County, and the crimes against JD1 were tried in San Bernardino County, then the allegations concerning multiple victims in a single case could not have been made, and defendant would not have been eligible for a sentence of life in prison. On appeal, defendant has raised these ex post facto venue issues under a new trial/ineffective assistance of counsel contention—the issues have not been raised directly—thus we focus on the new trial/ineffective assistance of counsel issue. We disagree that the trial court erred.

“When a verdict has been rendered or a finding made against the defendant, he may move for a new trial on various statutory grounds (§ 1181.)” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1159.) “Although ineffective assistance of counsel is not among the grounds enumerated for ordering a new trial under . . . section 1181, motions alleging ineffective assistance are permitted pursuant to ‘the constitutional duty of trial courts to ensure that defendants be accorded due process of law.’ [Citation.] We review such orders for an abuse of discretion. [Citation.]” (*People v. Callahan* (2004) 124 Cal.App.4th 198, 209 (*Callahan*)). “A party seeking to overturn a court’s decision in this regard ‘has the burden to demonstrate that the trial court’s decision was “irrational or arbitrary,” or that it was not “grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.’

¹² The 1997 version of section 667.61, subdivision (e)(5), provided: “The defendant has been convicted *in the present case or cases* of committing an offense specified in subdivision (c) against more than one victim.” (Italics added.)

[Citation.]” [Citations.]’ [Citation.]” (*Id.* at p. 211.) In evaluating the record, we must remember, ““the trial court is in the best position to make an initial determination, and intelligently evaluate whether counsel’s acts or omissions were those of a reasonably competent attorney.” [Citation.]’ [Citation.]” (*Id.* at p. 212.)

““A new trial may be granted where the trial court finds that the defendant received ineffective assistance of counsel. [Citations.] To prevail on this ground, a defendant must show both that his counsel’s performance was deficient when measured against the standard of a reasonably competent attorney and that counsel’s deficient performance resulted in prejudice to defendant in the sense that it “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” [Citations.]’ [Citation.]” (*Callahan, supra*, 124 Cal.App.4th at p. 212.)

Alberts testified that he did not raise the jurisdiction/venue issue during the trial phase because he was unaware of the joinder law and he “didn’t know that it would help.” Alberts admitted he knew the offenses against JD2 occurred in Yucaipa, a city in San Bernardino County. The trial court found Alberts could have had a strategic reason for not raising the venue issue. The trial court explained that Alberts may have believed having the witnesses testify in a single trial would show contradictions in the victims’ stories and/or that dealing with a single prosecutor would produce better results. Essentially, the trial court did not believe Alberts’s testimony that there was no strategy behind the failure to raise the venue issue. In support of its decision, the trial court cited the evidence that Alberts knew the offenses against JD2 occurred in San Bernardino

County. The trial court also remarked that Alberts was “pretty feisty” during trial and “combative the whole way.”

The trial court’s decision turns on an evaluation of the credibility of Alberts’s testimony. The trial court could reasonably infer that as a “feisty” and “combative” attorney, who was aware that some offenses occurred in San Bernardino County, Alberts had to have realized that trying all the offenses in Riverside County was problematic, and therefore Alberts had to have a reason, or reasons, for not raising the venue issue. In other words, it is somewhat unbelievable that an attorney, who is well-enough versed in the law to be combative throughout trial, would have been completely unaware of the law related to joinder and venue. Thus, given the record, there was a reasonable basis for the trial court to not believe Alberts’s testimony that there was no strategic basis for failing to raise the venue issue.

Credibility determinations are the exclusive province of the trial court. (*People v. Hoeninghaus* (2004) 120 Cal.App.4th 1180, 1198.) We cannot reevaluate Alberts’s testimony. The trial court did not believe Alberts, and there is evidence in the record supporting the decision to not believe Alberts. Thus, the trial court’s decision was reasonable, and not an abuse of discretion. Accordingly, we conclude the trial court did not err.

Defendant asserts, “A reasonable attorney understanding the law and that section 784.7 was not applicable to the charges since its enactment post dated the date of the offenses, would have sought to prevent joinder, and thereby not subject his client to a mandatory life sentence.” Defendant’s argument does not address the trial court’s

reasoning. Defendant is essentially asking this court to review the ruling on a motion for new trial de novo, which is not the correct standard. (*Callahan, supra*, 124 Cal.App.4th at p. 209.) Thus, defendant's argument is unpersuasive.

b) Cross-Examination

Next, defendant contends the trial court erred by not granting his motion for new trial because Alberts was ineffective for failing to cross-examine JD1 about her report to law enforcement that defendant molested her two times, not three times. We disagree.

The law for ineffective assistance of counsel and the standard of review is detailed *ante*, so we do not repeat it here.

In ruling on the motion for new trial, the trial court said: "As to [Alberts's] overall performance, he was pretty feisty attorney. He was combative the whole way. It wasn't this DA, but with the other DA, and he went to great lengths to poke holes and to undermine the testimony of the two girls using their testimony against each other, using their comments they made against themselves, and pointing out what you pointed out, the fact that they had something to lose and that all came out. So I can't say on a reasonably objective standard he fell below what an average, reasonably competent attorney would do. So the Motion for New Trial is denied."

The trial court found Alberts's decision to not question JD1 about her statement to law enforcement did not fall below the performance of a reasonably competent attorney. The trial court could reasonably conclude that one missed question during cross-examination did not lower Alberts's performance below that of a reasonably competent attorney, especially in light of Alberts's presentation of multiple defense

witnesses, and Alberts's questioning of the victims about their motives to lie, i.e., the shoplifting incident.

Moreover, during the law enforcement interview, JD1 was asked, "And there was a third time for sure?" JD1 responded, "I want to say[,] yeah, but again . . . it could just be . . . in my head like repeating that. Because I . . . remember . . . he was always wearing the jeans and . . . the first time he didn't have any shirt on, and the second time he had a shirt on and then again the third time . . . I'm not quite for sure. I'm not for sure."

During trial, the prosecutor asked JD1, "[D]id it ever happen to you again, a third time?" JD1 responded, "Yeah, but I don't remember." Upon further questioning, JD1 said that she believed the third incident happened around 1997 at the home in Calimesa, but she could not recall any other details.

The trial court could have reasonably concluded that Alberts made a tactical decision to not question JD1 about her statement to law enforcement because JD1's statement was mostly consistent—JD1 believed she was molested a third time, but could not recall the details of the incident. Thus, we conclude the trial court did not abuse its discretion in denying defendant's motion for new trial as it pertained to the cross-examination of JD1.

Defendant contends, "Trial counsel failed to confront [JD1] with the fact that she could not remember whether a third incident may just have been in her head and also failed to call the officer to prove up the inconsistencies. A reasonably competent

attorney would have cross examined [JD1] about this. Particularly given the vagueness of her trial testimony.”

Defendant fails to address the trial court’s reasoning. Defendant is essentially asking this court to reconsider the trial court’s ruling on the motion, which is not persuasive given the abuse of discretion standard of review that is applicable to this issue. (*Callahan, supra*, 124 Cal.App.4th at p. 209.) When asserting an error in a ruling on a motion for new trial, the defendant “has the burden to demonstrate that the trial court’s decision was “irrational or arbitrary,” or that it was not “grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.” [Citation.]” [Citations.]’ [Citation.]” (*Id.* at p. 211.) Thus, the argument must focus on the trial court’s reasoning. Since defendant’s argument is not focused on the trial court’s reasoning, we do not find it to be persuasive.

c) Counseling Records

Defendant contends the trial court erred by not granting his motion for new trial because Alberts was ineffective due to not requesting discovery of the victims’ counseling records. Defendant asserts Alberts should have filed a subpoena duces tecum (§ 1326) for the counseling records, which could then be reviewed in camera to discover if the victims made any “impeaching” statements during counseling sessions.

During the hearing on the motion for new trial, Alberts testified he knew the victims were seeking counseling, and that he requested the victims’ counseling records through his investigator. Alberts identified Irene Durado as a social worker the victims had spoken to. He then stated he did not make a request for the victims’ counseling

records. Alberts said he believed the counseling records were confidential, and therefore he “could not get them.” Alberts testified that he was unaware of the law allowing a defense attorney to seek an in camera review of confidential counseling records. (See *People v. Hammon* (1997) 15 Cal.4th 1117, 1123, 1128 [discussing disclosure of psychotherapist’s records].)

The trial court concluded that Alberts’s performance fell within the performance of a reasonably competent attorney. The trial court’s conclusion was reasonable because Alberts initially testified that he did request disclosure of the victims’ counseling records, via his investigator, and he named the social worker whom the victims spoke with. The fact that Alberts later contradicted himself and testified he was unaware that the records could be disclosed goes to Alberts’s credibility. As set forth *ante*, credibility is a determination that is exclusively within the province of the trial court. (*People v. Hoeninghaus, supra*, 120 Cal.App.4th at p. 1198.)

In sum, there is evidence in the record supporting the trial court’s finding that Alberts’s performance did not fall below that of a reasonably competent attorney, because Alberts stated that he requested the documents through his investigator. Further, Alberts mounted a vigorous defense on behalf of defendant, calling multiple witnesses and cross-examining the victims about their motives to lie. Therefore, it appears the trial court reasonably concluded Alberts’s failure to file a subpoena duces tecum (§ 1326) did not ““so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” [Citations.]’ [Citation.]” (*Callahan, supra*, 124 Cal.App.4th at p. 212.)

Moreover, although the trial court did not reach the issue of prejudice, the People aptly point out that prejudice was not shown, in that the counseling records have not been reviewed by the trial court, so it is impossible to know if any impeachable statements would have been found in the records. Since it is unclear what information is included in the records, or if the records even exist, prejudice to defendant is only speculative—it was not affirmatively shown. (*People v. Maury* (2003) 30 Cal.4th 342, 389 [affirmative showing is required].)

d) Prosecutorial Misconduct

Defendant contends the trial court erred by denying his motion for new trial because Alberts was ineffective for failing to object on the basis of prosecutorial misconduct during the prosecutor’s closing argument. In defendant’s opening brief, he provides no argument related to this assertion; rather, he writes, “Counsel incorporates his arguments made under Argument II.”

Defendant does not direct this court with page numbers, but we looked through “Argument II” and found the following, “[C]ounsel’s failure to object and request an immediate admonition from the court, was ineffective assistance of counsel. (See *Infra.*) At a motion for new trial, counsel admit[ted] he was incompetent for failing to object and he had no tactical reason for his failure to object.” Defendant provides no analysis on the issue, and no presentation or discussion of the trial court’s reasoning. The “Prosecutorial Misconduct” section of the appellant’s opening brief refers the reader to the “Ineffective Assistance of Counsel” section and vice versa.

Since we have already concluded prosecutorial misconduct did not occur, and defendant provides no analysis of the ineffective assistance of counsel issue as it pertains to prosecutorial misconduct, we deem this issue to be waived. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 [“[E]very brief should contain a legal argument[.] If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]”]; see also *In re Masoner* (2009) 179 Cal.App.4th 1531, 1538-1539 [failure to provide legal analysis forfeits issue on appeal].)

e) Summary

In conclusion, the trial court did not abuse its discretion in denying defendant’s motion for new trial.

DISPOSITION

Defendant’s sentences as to all counts are reversed. The trial court is directed to resentence defendant, applying the sentencing laws that were effective at the time of the offenses. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

RICHLI
J.