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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.

DALLAS LEE EAGLE,

Defendant and Appellant.

E054831

(Super.Ct.No. FBA900341)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Victor R. Stull,
Judge. Affirmed.

Michelle May Peterson, 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, Assistant Attorney General, and Lynne G. McGinnis and
Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant Dallas Lee Eagle was charged with one count of committing a lewd and lascivious act upon a child under 14 years of age. (Pen. Code, § 288, subd. (a).) Certain prior convictions were also alleged. The prosecution's evidence included the five-year-old victim's statements made in a videotaped interview and in a second, unrecorded interview with an investigating police officer. The child testified at trial, but had no recollection of the alleged abuse and did not know or recognize defendant. However, she did remember the videotaped interview, telling the interviewer that "Uncle Dallas" had touched her in a bad place, and that she told the interviewer the truth. A jury found defendant guilty as charged. In a bifurcated trial, the court found true the allegations of prior convictions. He was sentenced to prison for 75 years to life plus five years.

Defendant makes the following arguments on appeal: (1) the trial court erred by excluding evidence indicating the victim may have been subjected to sexual abuse prior to defendant's contact with the victim; (2) evidence of the victim's prior interviews was admitted in violation of his Sixth Amendment right to confront the victim-accuser because, although the victim testified at trial, she had no recollection of defendant or the alleged conduct; (3) evidence of the videotaped interview of the victim was inadmissible hearsay and should have been excluded; (4) the investigating officer's testimony regarding his interview with the victim was inadmissible hearsay that should have been

excluded; and (5) the cumulative prejudicial effect of the errors requires reversal. We reject these arguments and affirm the judgment.

II. SUMMARY OF FACTS

A. *Background*

In 2008, Gilbert and Nicole P. lived with their daughter Jane Doe and their son A. in Barstow. Gilbert was disabled and Nicole cared for him in their home. Doe was four years old at that time.

The P.'s met defendant near the beginning of summer 2008 when defendant delivered pizza to their home. Defendant became friends with Gilbert and Nicole and they began spending time together. Defendant was at their home once or twice per week and, on one occasion, stayed overnight. Defendant babysat the P. children on two or three occasions during the daytime for short periods of time. According to Gilbert and Nicole, Doe called defendant "Uncle Dallas."

About three months after defendant and the P.'s met, defendant told Gilbert he was a registered sex offender. Gilbert told his wife, and the two of them took steps to make sure defendant would not be alone with their children. Gilbert also told Doe not to be alone with defendant and to talk to them if someone touched her privates. Defendant did not thereafter babysit the children and, as far as Gilbert and Nicole were aware, defendant was never alone with Doe. Doe never told Gilbert or Nicole that defendant had touched her privates.

In late November 2008, Gilbert was arrested for domestic violence based upon an altercation with Nicole. He was released on bail in early December 2008.

Because Gilbert used their rent money to pay for his bail bond, the P.'s needed to move out of their house. They accepted defendant's invitation to stay at his house on Fredricks Street in Barstow. Defendant's sister, brother, and a brother-in-law also lived at the Fredricks Street house.

The Fredricks Street house had two floors. Defendant slept in a living room area on the lower level. The four members of the P. family slept in a single bedroom on the lower level, off of the living room. There was no door on the bedroom. There was one bathroom on the lower level of the house, which did not have a door. The P.'s stayed at that house for two or three weeks. Gilbert, who was disabled and unemployed, was generally in the house during this time. Defendant's sister took care of the children in the mornings. As far as she knew, there was never a time when defendant was alone with the children.

In early January 2009, the P.'s moved into an apartment above a business on West Main Street in Barstow. Defendant helped them move and, on one occasion, visited Gilbert and spent the night at the apartment.

On January 15, 2009, Gilbert was again arrested for domestic violence and remained in custody until February 3. While Gilbert was in jail, Nicole and the two children stayed with defendant at the Fredricks Street house. During this time, Nicole

and defendant began a sexual relationship.¹ Nicole did not leave the children alone with defendant; if she went out on errands, defendant's sister babysat the children.

When Gilbert was released from custody, the P. family returned to their apartment on West Main Street. Defendant stayed with the P.'s at their apartment on one occasion.

On February 26, 2009, social workers removed Doe and A. from Gilbert and Nicole's custody and placed the children in foster care. The removal was based upon allegations of general neglect and the incidents of domestic violence in November 2008 and January 2009; there were no allegations of sexual abuse.

B. Doe's Children's Assessment Center Interview

In late February or early March 2009, Doe's foster parents reported to a social worker that Doe had disclosed suspected sexual abuse. A medical examination of Doe in March 2009 showed no physical signs of abuse. The social worker arranged for Doe to be interviewed at the Children's Assessment Center (CAC).

The CAC interview took place in April 2009. Doe was five years old at that time. The interview was videotaped and the recording was shown to the jury, over defense objections. As both sides acknowledge, Doe had a speech impediment that made many of her statements in the interview difficult to understand.

¹ Nicole testified that while she stayed at defendant's house in January 2009 she and defendant slept in the same bed. When asked where the children slept, she answered: "My children actually slept with me." This suggests that defendant, Nicole, and the two children slept together in one bed. However, the nature of the sleeping arrangements was not clarified.

In the interview, Doe said that “Uncle Dallas” touched her. When asked how he touched her, she answered: “Really bad.” When asked what Uncle Dallas did to her, she said he touched her “pee-pee” with his arm, and touched her “butt” with a foot or arm. She initially said Uncle Dallas touched her pee-pee once. On that occasion, Doe was in the bathroom “going pee-pee” when Uncle Dallas came in and touched her. Nothing went inside her pee-pee or her butt. She did not feel Uncle Dallas’s pee-pee and did not see his pee-pee because she closed her eyes. She opened her eyes as he ran out of the window.

The interviewer asked Doe about playing doctor. She said she played doctor with Uncle Dallas. When asked how she played doctor with him, she responded: “Really bad.” When asked “what happened to your pee-pee” when they played doctor, Doe said: “He got it out.” When asked, “[o]ut of what?” she responded, “[o]f my pee-pee.” No other parts of her were touched when they played doctor.

Uncle Dallas did not kiss her anywhere and she did not kiss Uncle Dallas. Her pee-pee and her butt were never hurt and nothing was ever put in her mouth. She did not have to touch Uncle Dallas.

When asked to describe Uncle Dallas, Doe made unintelligible comments and seemed to indicate that Uncle Dallas had no head, purple hair, and red skin.²

² In a probation report, defendant is described as Caucasian with brown hair. A fingerprint card admitted into evidence in the trial on the allegations of defendant’s prior convictions states that defendant is native American with a light complexion and brown hair.

Doe said she did not like Uncle Dallas. When asked why she did not like him, she responded: “Cuz he touched me everywhere.” He would touch her while her mom and dad were sleeping in bed. The touching made her throw up. She said she did not tell her parents because her father would get mad at her.

Although Doe initially said she had been touched one time, she later said Uncle Dallas touched her three times. When asked where she was on each occasion, she said: “I took a bath on my own and he touched me right there.” Uncle Dallas told her not to scream. When asked if he did anything to her mouth, she said he “ripped it and it all bleeding.” She added that he ripped it with a knife, which made her feel like she was dead.

C. Investigation and Defendant’s Arrest

On April 13, 2009 (five days after the CAC interview), Barstow Police Sergeant Andrew Espinoza interviewed Doe. The interview was conducted at Doe’s foster parents’ home with her foster mother present. It was not recorded. Over defense objections, Sergeant Espinoza testified about this interview at trial. According to Sergeant Espinoza, Doe said that “she had played doctor with Uncle Dallas. That he had touched her butt. That it hurt her. That her parents were napping at the time.” Doe also said that “Uncle Dallas” had touched her underneath her clothes and that it was a “bad touch.” On cross-examination, Sergeant Espinoza agreed that Doe’s speech impediment made her difficult to understand and required him to “decipher what she was saying[.]”

On the same day he interviewed Doe, Sergeant Espinoza spoke with defendant by telephone about the investigation. That day or the next, defendant went to stay with his uncle in Pahrump, Nevada. Sergeant Espinoza was thereafter unable to locate defendant. Although defendant's mother knew defendant had gone to Pahrump, she told the officer she did not know where he went.

In June 2009, defendant was located in Pahrump, taken into custody, and transported to California. While defendant was being booked into jail, he told Sergeant Espinoza that this case existed only because Gilbert was mad at him for sleeping with his wife. Sergeant Espinoza told defendant his assumption was wrong and that Gilbert did not initiate the complaint or the investigation. Defendant responded by saying: "Well, it's not only me. Gilbert's responsible. And there's others involved in the molestation."³ When Sergeant Espinoza asked who else was involved, defendant did not respond. The officer then told defendant that Doe had identified him and disclosed what he had done to her. Defendant responded by saying: "I didn't do it."

D. Doe's Trial Testimony

Doe testified at trial. She was seven years old at that time. She was sworn and promised to tell the truth. She testified she did not know anyone with the name of Dallas and did not remember an Uncle Dallas. She was shown a picture of the Fredricks Street

³ The quoted language is Sergeant Espinoza's trial testimony about the booking statements. When asked about his police report concerning this conversation, Sergeant Espinoza testified that he had written defendant's statements as: "Well, I'm not the only one," and "Gilbert is the one."

house and remembered living there with her parents, but not with anyone else. She did not recognize defendant in court.⁴ When she was shown a picture of herself taken during the CAC interview, the following colloquy took place:

“Q. . . . Now, in Picture 11, do you remember—

“A. Yes.

“Q. —being there that day?

“A. Yes.

“Q. You do, okay. Do you remember talking to someone that day.

“A. Yes.

“Q. Do you remember talking to that person about someone who had touched you?

“A. Yes.

“Q. Do you remember saying that or—

“A. I don’t.

“Q. I’m sorry?

“A. I don’t remember saying that.

“Q. Okay. Do you remember telling the lady that someone named Uncle Dallas touched you in a bad place?

⁴ After Doe said she did not remember anyone named Dallas or Uncle Dallas, counsel directed her to “look right over there” and asked her if she recognized “the guy with the blue tie[.]” Doe said: “No.” Although the record does not reflect that the man in court “with the blue tie” was defendant, the parties agree that Doe did not recognize defendant in court.

“A. Yes. [¶] . . . [¶]

“Q. . . . Do you remember telling the lady that or is that something you don’t remember what you said?

“A. I remember. [¶] . . . [¶]

“Q. . . . What do you remember telling the lady?

“A. The stuff that where he touched me.

“Q. Okay. Do you remember that when you’re here today, do you remember that happening, the touching?

“A. No. [¶] . . . [¶]

“Q. . . . Now, I want to make sure we understand, okay. You remember being— talking to that lady?

“A. Yes.

“Q. Do you remember what you said?

“A. No.

“Q. Okay. When you were talking to that lady, were you telling her the truth?

“A. Yes. [¶] . . . [¶]

“Q. Now, when you were four, five, and then just so we’re clear, you don’t remember anyone that you used to call Uncle Dallas?

“A. No.

“Q. And do you remember telling anyone that uncle Dallas touched you in a bad place?

“A. No.

“Q. Do you remember anyone named Uncle Dallas touching you?

“A. No, none of that.

“Q. None of that, okay. And are you telling us the truth about what you remember today?

“A. Yes.”

Doe was not asked about her interview with Sergeant Espinoza.

Defense counsel did not conduct any cross-examination of Doe.

E. Evidence of a Prior Incident Involving Defendant

Over defense objection, the prosecutor introduced evidence of a prior incident involving defendant. Vincent S. is defendant’s cousin. He testified to the following. In September 1999, Vincent and his family visited his grandparents at their home in Barstow. Defendant was living with the grandparents at that time. When Vincent went to get his two daughters and one stepdaughter to leave, he found two of the girls in a back room where there were toys. They told Vincent that the third girl, D., was in the bathroom. D. was six years old at that time. When Vincent knocked on the bathroom door, there was no response. When he “banged” on the door, D. opened it. The lights in the bathroom were turned off. D.’s voice was “crackling” and she sounded nervous. Vincent found D. standing behind the door holding her panties in her hand and looking “[e]xtremely scared.” Vincent opened the shower curtain and found defendant standing behind it with a terrified look on his face. Vincent screamed at defendant, grabbed him,

and threw him into another room. Vincent's wife called the police. Defendant left the residence before the police arrived.

D., who was 17 years old at the time of trial in the present case, testified about the incident. Defendant had told her to go to the bathroom, pull down her pants and underwear, and sit on the toilet. She took her pants and panties off. Defendant pulled his pants down, put his penis against her vagina, rubbed his penis, and ejaculated on her. At that time, D. thought defendant was peeing on her. Prior to this incident, defendant had done similar acts to her "[m]any times." On one occasion, defendant told her he was going to put his penis in her mouth and told her "that if pee comes out, you know, not to be scared, just to swallow it" She put her mouth on his penis on more than one occasion.

Additional facts will be discussed below where pertinent to the issues raised in this appeal.

III. DISCUSSION

A. *Exclusion of Evidence that Doe Had Acted Out Sexually While in Foster Care*

Defendant contends the court erred in excluding evidence from which it could be inferred that Doe had been subjected to sexual abuse while she was in foster care. We conclude that the court's ruling was not an abuse of discretion.

1. Factual and Procedural Background

During Nicole's cross-examination, defense counsel asked if Doe had ever come to Nicole to say that something had happened after defendant babysat her. Nicole

responded: “Not towards [defendant]. She did mention, when she had come home to my custody, that something had happened at her” At that point, the prosecutor interposed a relevance objection and the matter was addressed outside the presence of the jury. In that hearing, Nicole testified that Doe and A. had been “taken away” from her by child protective services in 2007 and returned to them in May 2008. (This removal is different from and prior to the removal of the children in February 2009 described above.) While they were in foster care, Gilbert and Nicole had unsupervised visits with the children. During one of these visits, Nicole observed that A. had a rash on his genitals. During a subsequent visit, Nicole saw that A.’s scrotum was black and blue as if someone had punched him, and that his “butt” was bleeding. A. was too young to tell them what had happened to him. Nicole reported the matter to a social worker, the foster care agency, and to her attorney in the dependency case.

Nicole further testified that on a couple of occasions, following unsupervised visits, they would take Doe and A. to their foster mother and her boyfriend, but Doe did not want to go. Nicole described Doe’s conduct as “rebellious.”

After the children were returned to Gilbert and Nicole’s custody in May 2008, Nicole twice found Doe naked outside in their doghouse during the daytime. Nicole told Doe she could not do that and instructed her to go inside the house and put clothes on. On one of these occasions, defendant was visiting the P.’s and was with Nicole when she found Doe in the doghouse. Nicole said she talked to Doe that night and that Doe told

her “that something had happened at the foster home.” However, Doe would not say anything more about it.

After argument on the admissibility of such evidence, the court stated that Nicole’s testimony “with respect to what happened, when it happened, how it could have happened is so amorph[o]us as to lose any real value of relevance.” The court then made an initial ruling that the evidence was inadmissible under Evidence Code sections 782 and 352.⁵ As to section 352, the court stated that “the probative value of that evidence is so slight and it’s so open to question in that I don’t think you’re ever going to be able to pin anything down with any more specificity than what we’ve heard from [Nicole] right now or just now, that it’s going to assist the jury in any way, shape, or form.”

The court later revisited the issue and concluded that section 782 did not apply because “there is nothing to indicate that anything of a sexual nature ever occurred anywhere other than what’s alleged occurring as to [defendant]” The court added that, “under [section] 352, I don’t believe that [the evidence] is probative of anything. It invites speculation, perhaps even wild speculation, that something may have occurred. And I think for that reason, it is prejudicial to the extent of overwhelmingly having no probative value whatsoever. [¶] I think that’s going to consume time, which is not only going to be not productive, but counterproductive because of the prejudice involved.”

⁵ All further statutory references are to the Evidence Code unless otherwise indicated.

After defense counsel argued that the evidence would not be unduly time consuming, the court acknowledged that counsel “probably [has] a point there.” Nevertheless, the court explained that the evidence is “just totally unworthy of gaining anything in this trial. I think it just invites the real speculation that has no real value whatsoever in terms of proving anything.”

2. Analysis

On appeal, defendant argues that the court prejudicially erred in excluding the evidence because it “was relevant, admissible, and crucial to the defense.” We review rulings on the admissibility of evidence under the abuse of discretion standard. (*People v. Waidla* (2000) 22 Cal.4th 690, 724; *People v. Bautista* (2008) 163 Cal.App.4th 762, 782.) Although “the trial court is vested with wide discretion in determining relevance and in weighing the prejudicial effect of proffered evidence against its probative value,” such “discretion is not . . . unlimited, especially when its exercise hampers the ability of the defense to present evidence.” (*People v. Cooper* (1991) 53 Cal.3d 771, 816.)

Defendant contends that Doe’s acts of being naked in the doghouse and her statement to Nicole that “something had happened at the foster home,” permit the inference that what happened at the foster home was sexually related. An inference of sexual abuse while in foster care, defendant continues, is strengthened by Nicole’s testimony that Doe did not want to return to foster care after visits and that A. suffered injuries to his genitals and rectum while in foster care. Defendant argues that without this evidence, the jury will assume that the child’s knowledge of sexual activities came from

defendant; and with such evidence, the jury must consider the possibility that such knowledge came from another source.

“Evidence of prior sexual activity of a crime victim is generally excluded. [Citations.] A limited exception to these general rules exists for prior molestation incidents involving child victims. (Evid. Code, § 782.) The theory behind the admission of a molestation victim’s prior molestation is that a child would not have knowledge of certain sexual practices other than as a result of the prior molestation.” (*People v. Woodward* (2004) 116 Cal.App.4th 821, 831 (*Woodward*).

Defendant relies upon *People v. Daggett* (1990) 225 Cal.App.3d 751 (*Daggett*). In that case, the defendant was accused of sexually molesting Daryl, a child under age 14. The defendant sought to introduce evidence that Daryl had been molested at age five by two older children. (*Id.* at p. 754.) The court excluded the evidence without holding a hearing pursuant to section 782.⁶ (*Daggett, supra*, at p. 754.) This was error. (*Id.* at p. 757.) As the Court of Appeal explained: “A child’s testimony in a molestation case involving oral copulation and sodomy can be given an aura of veracity by his accurate description of the acts. This is because knowledge of such acts may be unexpected in a child who had not been subjected to them. In such a case it is relevant for the defendant to show that the complaining witness had been subjected to similar acts by others in order

⁶ As the *Daggett* court noted: “Evidence Code section 782 provides a procedure for admitting evidence of the complaining witness’s sexual conduct in certain sex offense prosecutions, including prosecutions brought under Penal Code sections 286, 288 and 288a.” (*Daggett, supra*, 225 Cal.App.3d at p. 757.)

to cast doubt upon the conclusion that the child must have learned of these acts through the defendant. Thus, if the acts involved in the prior molestation are similar to the acts of which the defendant stands accused, evidence of the prior molestation is relevant to the credibility of the complaining witness and should be admitted.” (*Ibid.*)

This rule was applied with different results in *Woodward, supra*, 116 Cal.App.4th 821 and *People v. Mestas* (2013) 217 Cal.App.4th 1509 (*Mestas*). In *Woodward*, the six-year-old child victim told a sheriff’s deputy that the defendant was in the shower with her, made her wash his penis with soap, and that the defendant’s penis was ““standing up.”” (*Woodward, supra*, at p. 826.) At trial, the defendant sought to introduce evidence of the three prior incidents of sexual contact between the child and others. (*Id.* at pp. 829-830.) The trial court excluded the evidence. On appeal, the defendant asserted that the prior incidents were relevant to show the victim had knowledge of an erect penis at the time she described the alleged crime to the deputy. He argued that “[e]xclusion of evidence of prior exposure to an erection created a ‘false aura of veracity because a six-year-old child’s knowledge of an erect penis would be unexpected unless the child had been subjected to lewd conduct with sexually lustful intent.’” (*Id.* at p. 831.)

The Court of Appeal in *Woodward* acknowledged that evidence of a molestation victim’s prior molestation may be admissible on the theory “that a child would not have knowledge of certain sexual practices other than as a result o

f the prior molestation.” (*Woodward, supra*, 116 Cal.App.4th at p. 831.)

However, the court emphasized *Daggett*’s requirement that the prior incidents be similar

to the defendant's alleged criminal acts. (*Woodward, supra*, at p. 831.) In rejecting the defendant's argument, the *Woodward* court explained: "[T]he prior sexual contacts were dissimilar to the charged crimes. In the first incident, although there was apparently ejaculation, the two-year-old victim was blindfolded and the contact was oral and digital. The second incident did not involve lewd conduct by a male. The third incident had no genital exposure." (*Id.* at p. 832.) The court further held that even if the incidents were relevant, the trial court acted within its discretion in excluding the evidence as more prejudicial than probative under section 352 "[b]ecause the relevance of the prior incidents was so minimal and the risk of confusing the jury so palpable" (*Woodward, supra*, at p. 832.)

In *Mestas*, the defendant was accused of various lewd acts and oral copulation on a six-year-old child and a seven-year-old child. (*Mestas, supra*, 217 Cal.App.4th at pp. 1512-1513.) The defendant sought to admit evidence of prior incidents involving the victims under section 782. (*Mestas, supra*, at pp. 1515-1516.) The incidents included one in which one of the victims reported being molested while in foster care when she was three years old, although "the specifics were 'sketchy and unconfirmed'" (*Id.* at p. 1515.) The trial court understood this incident "involved some kind of 'gentle rubbing'" (*Id.* at p. 1516.) Regarding another incident, the child's foster mother observed the child, when she was four years old, "humping her younger brother and wanting to get under the covers" (*Id.* at pp. 1515-1516.) The trial court declined to hold an evidentiary hearing as to these incidents. The molestation when the child was three years

old, the trial court explained, “was too vague to permit proper Evidence Code section 782 analysis.” (*Id.* at p. 1516.) The humping incident, the court reasoned, “was not relevant, even though it was sexualized conduct, because it was not similar to the facts of this case.” (*Ibid.*) The Court of Appeal affirmed the trial court’s rulings. (*Id.* at p. 1518.)

Here, the evidence of defendant’s alleged acts against Doe include her statements that “Uncle Dallas” touched her pee-pee and her butt when she was on the toilet, while playing doctor, and when she was taking a bath. Under *Daggett*, evidence of similar activity might be relevant to the issue of Doe’s credibility; that is, by creating the possibility that Doe’s knowledge about such sexual conduct is the result of contact with someone other than defendant, the evidence could cast doubt on her statements about “Uncle Dallas.”

Initially, we note that the evidence that Doe was found naked in a doghouse on two occasions does not, by itself, indicate any sexual activity or touching by anyone; nor do those instances share any similarity to the acts she attributed to defendant. Likewise, Doe’s statement to Nicole that “something had happened at the foster home” does not indicate any sexual activity, let alone any acts “similar to the acts of which the defendant stands accused.” (See *Daggett, supra*, 225 Cal.App.3d at p. 757.)

More importantly, if we accept defendant’s argument that a jury could reasonably infer from all the excluded evidence that what happened to Doe while in foster care was some type of sexual activity or abuse, the nature of such activity would still be unknown. There was simply no evidence of what, if anything, actually happened to Doe in foster

care. Even if sexual abuse of some kind can be inferred, there is nothing to suggest that the kind of abuse Doe suffered was similar to the acts defendant is accused of committing. Indeed, the evidence regarding the nature of such abuse is more “sketchy and unconfirmed” than the report of molestation and gentle rubbing that did not merit an evidentiary hearing in *Mestas*. The trial court could therefore reasonably conclude that such evidence was not relevant. To the extent that it might have had some slight probative value, the court could have further reasonably concluded that such value would have been substantially outweighed by the probability of confusing the issues or misleading the jury. (See § 352; *Woodward, supra*, 116 Cal.App.4th at p. 832.) There was, therefore, no abuse of discretion in excluding such evidence.

B. *Doe’s Interviews and the Confrontation Clause*

Defendant contends the admission of the CAC interview and Sergeant Espinoza’s testimony about his interview of Doe violated his right of confrontation under the Sixth Amendment to the United States Constitution. Although Doe testified at trial, defendant contends she was merely a “warm body” without any recollection of her prior statements. As such, defendant continues, he had no opportunity to effectively cross-examine Doe as to her prior statements and was therefore denied his right of confrontation. We reject the argument.

1. Legal Principles

Under the Sixth Amendment’s confrontation clause (made applicable to the states through the 14th Amendment) an accused has the right to be “confronted with the

witnesses against him.” (U.S. Const., 6th Amend.; *Pointer v. Texas* (1965) 380 U.S. 400, 403.) When the confrontation clause applies, it bars the use of a testimonial hearsay statement against a criminal defendant unless the declarant is unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant. (*Crawford v. Washington* (2004) 541 U.S. 36, 59, 68-69 (*Crawford*); *People v. Lopez* (2012) 55 Cal.4th 569, 580-581.) In this case, there is no dispute that Doe’s statements to Sergeant Espinoza and in the CAC interview are testimonial, or that defendant did not have a prior opportunity to cross-examine Doe. The issue in this case is whether, in light of Doe’s testimony at trial, the confrontation clause is implicated at all.

Our analysis begins with *California v. Green* (1970) 399 U.S. 149. In that case, a prosecution witness made pretrial statements identifying the defendant as a supplier of marijuana. (*Id.* at p. 151.) But when the witness testified at trial he was unable to remember how he came to possess the marijuana (*id.* at pp. 151-152), the trial court admitted the witness’s prior statements as substantive evidence against the defendant (*id.* at p. 152). The California Court of Appeal and California Supreme Court held that such use of the prior statements violated the defendant’s confrontation rights. (*Id.* at p. 153.) The United States Supreme Court disagreed and held that the admission of the witness’s prior statements for their truth did not violate the confrontation clause. (*Id.* at pp. 164, 168.)

The *Green* court identified three “purposes of confrontation”: (1) to ensure the witness’s statements are given under oath; (2) forcing the witness to submit to cross-

examination; and (3) permitting the jury to observe the demeanor of the witness. (*California v. Green, supra*, 399 U.S. at p. 158.) Although the witness may not have made his prior statements under circumstances subject to these protections, the court held that these purposes are adequately fulfilled by the subsequent opportunity to cross-examine the witness about the prior statements at trial. (*Id.* at p. 168.)

The majority of the Supreme Court expressly declined to address a “question lurking” in *Green*; specifically, whether a witness’s lapse of memory implicated the accused’s rights under the confrontation clause. (*California v. Green, supra*, 399 U.S. at pp. 168-169.) However, Justice Harlan, in a concurring opinion, said he would have reached that question, and concluded: “The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence. The prosecution has no less fulfilled its obligation simply because a witness has a lapse of memory. The witness is, in my view, available. To the extent that the witness is, in a practical sense, unavailable for cross-examination on the relevant facts, . . . I think confrontation is nonetheless satisfied.” (*Id.* at pp. 188-189 (conc. opn. of Harlan, J.), fn. omitted.)

The question left lurking in *Green* was “squarely presented” in *U.S. v. Owens* (1988) 484 U.S. 554, 556 (*Owens*). In *Owens*, a federal correctional counselor was attacked and beaten with a metal pipe. (*Id.* at p. 556.) As a result, his memory was severely impaired. Three weeks after the attack, while still hospitalized, he was able to

describe the attack to a Federal Bureau of Investigation agent and identified the defendant as the attacker. At trial, the victim recalled telling the agent that the defendant was the attacker, but could not remember seeing the assailant during the attack. (*Ibid.*) The court framed the issue before it as “whether . . . the Confrontation Clause of the Sixth Amendment . . . bars testimony concerning a prior, out-of-court identification when the identifying witness is unable, because of memory loss, to explain the basis for the identification.” (*Id.* at pp. 555-556.)

The court agreed with the views of Justice Harlan expressed in *Green*. (*Owens, supra*, 484 U.S. at p. 559.) It explained that: “[T]he Confrontation Clause guarantees only “an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” [Citations.]” (*Ibid.*) “It is sufficient,” the court continued, “that the defendant has the opportunity to bring out such matters as the witness’ bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination [citation]) the very fact that he has a bad memory.” (*Ibid.*) Although the “weapons available to impugn the witness’ statement when memory loss is asserted will of course not always achieve success, . . . successful cross-examination is not the constitutional guarantee.” (*Id.* at p. 560.) While the *Owens* court acknowledged the “dangers associated with hearsay,” it concluded that an inquiry under the confrontation clause is not “called for when a hearsay declarant is present at trial and subject to unrestricted cross-examination.” (*Ibid.*) A “witness is regarded as ‘subject to cross-

examination,”” the court explained, “when he is placed on the stand, under oath, and responds willingly to questions.” (*Id.* at p. 561.)⁷

In 2004, the United States Supreme Court altered the nature of confrontation clause analysis in *Crawford, supra*, 541 U.S. 36. Prior to *Crawford*, the focus of a court’s inquiry under the confrontation clause was whether the challenged hearsay statement fell within a “firmly rooted hearsay exception” or contained “particularized guarantees of trustworthiness.” (*Ohio v. Roberts* (1980) 448 U.S. 56, 66, fn. omitted, overruled in *Crawford, supra*, at p. 68.) In *Crawford*, the court declared that the primary object of the confrontation clause is “testimonial hearsay,” and held that such hearsay may not be admitted into evidence unless the declarant is unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant. (*Crawford, supra*, at pp. 59, 68-69; see also *People v. Lopez, supra*, 55 Cal.4th at pp. 580-581.)

Although *Crawford* reflected “a dramatic departure from prior confrontation clause case law” (*People v. Harris* (2013) 57 Cal.4th 804, 840), it left the *Owens* rule untouched (see *People v. Cowan* (2010) 50 Cal.4th 401, 468 [“Nothing in *Crawford* casts doubt on the continuing vitality of *Owens*”]; see also *People v. Clark* (2011) 52 Cal.4th 856, 927 [relying on both *Owens* and *Crawford* in concluding that a witness with

⁷ *Owens* must be distinguished from cases in which the hearsay declarant appears at trial but refuses to testify, such as when the witness invokes a testimonial privilege or is so recalcitrant as to effectively prevent cross-examination. (*Douglas v. Alabama* (1965) 380 U.S. 415, 419-420; *People v. Rios* (1985) 163 Cal.App.3d 852, 864; *Mayes v. Sowders* (6th Cir. 1980) 621 F.2d 850, 856.) Defendant does not contend that this rule is applicable here.

memory loss appeared for cross-examination at trial]). Indeed, the declarant of the challenged statement in *Crawford* did not testify at trial; thus, there was no question presented as to the adequacy of the declarant's trial testimony or recollection.

Nevertheless, citing *Green*, the *Crawford* court stated, in a footnote, that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. [Citation.] . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." (*Crawford, supra*, 541 U.S. at p. 59, fn. 9.)

Defendant argues that the court's use of the phrase "to defend or explain" the witness's prior statements implies that the witness can recall the statements; one who has a complete loss of memory about her prior statements, he contends, cannot defend or explain them at trial. Our state Supreme Court addressed a similar argument in *People v. Dement* (2011) 53 Cal.4th 1. In that case, the prosecution introduced certain statements made by witnesses Johnson and Martinez to investigating detectives. (*Id.* at p. 22.) When called to testify at trial, Johnson either did not recall, or denied having made, the statements. (*Ibid.*) Martinez said he did not recall being interviewed and, when shown his prior statements, testified that he "didn't remember saying any of that." (*Ibid.*) Our state Supreme Court stated that *Crawford*'s use of "the phrase 'defend or explain' . . . does not mean that when a witness denies making, or claims lack of recollection of, a particular statement, admission of the statement violates a defendant's right to confrontation. [Citation.]" (*People v. Dement, supra*, at p. 24.) The court concluded that

“[n]othing in *Crawford* casts doubt on earlier cases holding that the confrontation clause is not violated by the introduction of out-of-court statements a witness denies or does not recall making.” (*Ibid.*, citing *Owens, supra*, 484 U.S. at pp. 555-556, 559; *Nelson v. O’Neil* (1971) 402 U.S. 622, 629-630.)

People v. Clark, supra, 52 Cal.4th 856 is also instructive. In that case, a witness who had been choked by the defendant to the point of losing consciousness was interviewed by Dr. Fisher in the hospital as part of a sexual assault examination. (*Id.* at p. 924.) At trial, the victim said she could remember that people asked her questions, but could not recall who asked the questions, where she was when she was interviewed, or what was asked. (*Ibid.*) The court allowed Dr. Fisher to testify that the victim told the physician ““that the person who injured her would kill them if not quiet.”” (*Id.* at p. 925.) The state Supreme Court rejected the defendant’s confrontation clause argument because the victim ““appeared as a witness at trial and was subjected to extensive cross-examination. No more was constitutionally required.”” (*Id.* at p. 927.) It did not matter that the victim could not remember the interview with Dr. Fisher. After discussing *Owens*, the court explained that ““defense counsel cross-examined [the victim] extensively and elicited from her that she could not remember various details of the crimes. Her inability to recall making the statement to Dr. Fisher was a factor for the jury to consider in determining the weight to give that evidence, but did not render its admission a violation of the confrontation clause.”” (*People v. Clark, supra*, at p. 927; see also *People v. Cowan, supra*, 50 Cal.4th at p. 468.)

The witness in *Owens* was an adult whose lapse of memory was caused by a physical beating to his head. The application of the *Owens* rule in situations involving child victims of alleged sexual abuse, whose inability or refusal to testify about past events may be due to fear or intimidation, has not been addressed in any published California state court opinion. However, *Owens* has been applied in numerous cases involving child witnesses in sexual abuse cases—both before and after *Crawford*—in other jurisdictions.⁸ In the overwhelming majority of cases, courts have held there was no confrontation clause violation in admitting the child’s prior statements despite the child’s failure to recall or testify to the details of the alleged abuse. However, some cases indicate that the mere physical presence of the declarant at trial—or, as defendant put it, a “‘warm body’ on the witness stand”—will not suffice. As one frequently cited federal case commented, “simply putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns. If, for example, a child is so young that she cannot be cross-examined at all, or if she is ‘simply too young and too frightened to be subjected to a thorough direct or cross-examination[,]’ [citation], the fact

⁸ Such cases include: *State v. Baker* (2013) 370 Mont. 43, 46-48 [300 P.3d 696, 699-700], *State v. Cameron M.* (2012) 307 Conn. 504, 515-521 & fn. 17 [55 A.3d 272, 280-284 & fn. 17], *People v. Garcia-Cordova* (Ill.Ct.App. 2011) 963 N.E.2d 355, 368-372, *Yanez v. Minnesota* (8th Cir. 2009) 562 F.3d 958, 963-964, *Cookson v. Schwartz* (7th Cir. 2009) 556 F.3d 647, 651-652, *People v. Bryant* (2009) 391 Ill.App.3d 1072, 1079-1083 [909 N.E.2d 391, 399-401], *State v. Price* (2006) 158 Wn.2d 630, 637-648 [146 P.3d 1183, 1186-1192], *State v. Carothers* (S.D. 2006) 724 N.W.2d 610, 617-618, *United States v. Kappell* (6th Cir. 2005) 418 F.3d 550, 554-556, *Bugh v. Mitchell* (6th Cir. 2003) 329 F.3d 496, 508-509, *United States v. McHorse* (10th Cir. 1999) 179 F.3d 889, 900, *Carson v. Collins* (5th Cir. 1993) 993 F.2d 461, 464, and *United States v. Spotted War Bonnet* (8th Cir. 1991) 933 F.2d 1471, 1473-1475.

that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the Clause.” (*United States v. Spotted War Bonnet, supra*, 933 F.2d at p. 1474.)

We will briefly discuss three pertinent cases: *United States v. McHorse, supra*, 179 F.3d 889, *State v. Price, supra*, 146 P.3d 1183, and *Yanez v. Minnesota, supra*, 562 F.3d 958.

In *McHorse*, the prosecution introduced the testimony of a family doctor and a psychotherapist, both of whom testified to statements made to them by four-year-old “Jane Doe E.” (*United States v. McHorse, supra*, 179 F.3d at p. 895.) The family doctor said that Jane Doe E reported to her that the defendant had touched her in her private parts. The psychotherapist said that Jane Doe E “described Defendant’s sexual abuse . . . in detail.” (*Ibid.*) Jane Doe E was seven years old at the time of trial. (*Ibid.*) The entire description of her trial testimony is as follows: “When asked whether Defendant ever did ‘anything to you,’ she responded ‘yeah.’ She stated, however, that she could not remember what Defendant did to her.” (*Ibid.*) Defendant’s counsel did not cross-examine the child. (*Id.* at p. 896.)

The Tenth Circuit Court of Appeals noted that while ““simply putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns,”” “the demands of the Confrontation Clause are satisfied where a defendant has the opportunity to reveal weaknesses in the witness’ testimony. [Citation.]” (*United States v. McHorse, supra*, 179 F.3d at p. 900.) In

rejecting the defendant's argument, the court explained: "In this case, Defendant had the opportunity to use Jane Doe E's lack of memory to attack her credibility as a witness. But because Jane Doe's testimony was minimally, if at all harmful to Defendant, he had little, if anything to attack. [Citations.] Defendant chose not to cross-examine Jane Doe E because cross-examination may have jogged her memory, resulting in testimony damaging to Defendant. Accordingly, we conclude that Jane Doe's failure to recall the alleged incidents of sexual abuse against her coupled with Defendant's strategy choice not to cross-examine her regarding her lack of memory did not violate Defendant's rights under the Confrontation Clause." (*Ibid.*) The hearsay testimony by the family doctor and the psychotherapist were thus admissible, the court concluded, "because Jane Doe E, the declarant, testified as a witness and Defendant had the opportunity to cross-examine her." (*Ibid.*)

In *State v. Price, supra*, 146 P.3d 1183, four-year-old R.T. disclosed to her mother and a detective that the defendant had touched her vaginal area at a day care facility. (*Id.* at p. 1184.) The mother and the detective testified to these disclosures at trial. (*Id.* at pp. 1184-1186.) R.T. was six years old at the time of trial. (*Id.* at p. 1184.) She indicated she knew the defendant as "Chucky." (*Id.* at p. 1185.) However, when asked about the alleged abuse, she would answer only: "Me forgot." (*Ibid.*) When asked what she had told her mother, the prosecutor, and the detective about Chucky, she merely "shrugged." (*Ibid.*) Defense counsel did not cross-examine R.T. (*Ibid.*) Following an extensive discussion of *Green, Owens, and Crawford* (among other authorities), the Washington

Supreme Court held that there was no confrontation clause violation. (*State v. Price, supra*, at p. 1192.) The court explained: “In sum, all of the purposes of the confrontation clause are satisfied even when a witness answers that he or she is unable to recall. Thus, we hold that when a witness is asked questions about the events at issue and about his or her prior statements, but answers that he or she is unable to remember the charged events or the prior statements, this provides the defendant sufficient opportunity for cross-examination to satisfy the confrontation clause. We conclude that a witness’s inability to remember does not implicate *Crawford* nor foreclose admission of pretrial statements. [Citations.] Admission of R.T.’s out-of-court statements to her mother and to [the detective] did not violate the confrontation clause in this case. Indeed, R.T. was physically present in the courtroom and she confronted [the defendant] face to face; she was competent to testify and testified under oath; the defense retained the full opportunity to cross-examine her and in fact called attention to her lack of memory in closing; and the judge, jury, and defendant were able to view R.T.’s demeanor and body language while she was on the stand such that they could evaluate for themselves whether R.T. was being truthful about her lack of memory.” (*Ibid.*)

In *Yanez v. Minnesota, supra*, 562 F.3d 958, the prosecution introduced a videotape of a social worker’s interview with L.P., the alleged child victim of the defendant’s sexual abuse. (*Id.* at p. 960.) As summarized by the circuit court: “L.P.’s testimony was vague, and she was unable to remember what [the defendant] did or the specifics of what she had told the police officer, the social worker, or her family members

about [the defendant]. L.P. did testify, however, that she remembered telling her aunt, grandmother, and the police something about [the defendant], and while she did not remember what she had told them, she had told them the truth[.]” (*Ibid.*) “The most specific information that the State elicited from L.P. at trial regarding the abuse concerned whether [the defendant] had ever lain down beside L.P. at night. L.P. responded ‘yeah’ but did not remember what [the defendant] did while in bed with her and was not able to recall how many times he lay with her.” (*Id.* at p. 961.) Defense counsel cross-examined L.P., but it “revealed no further details regarding the videotape testimony or the sexual abuse.” (*Ibid.*)

The *Yanez* court noted that “whether there may ever be an instance in which memory loss can inhibit cross-examination to such a degree as to violate the Constitution is still an ‘open question.’” (*Yanez v. Minnesota, supra*, 562 F.3d at p. 964.) However, relying on *Owens* and *Crawford*, the court concluded that “L.P.’s inability to recall the details of her prior statements or the incidents that led to those statements did not render the admission of the out-of-court testimonial statements constitutionally defective.” (*Ibid.*) “L.P. appeared for cross-examination at trial. And she was more than just physically present: she took the oath, took the stand, and was subject to questioning. [Citation.] . . . [The defendant’s] cross-examination provided him an opportunity to remind the jury of L.P.’s inability to recall the abuse or any details related to the criminal acts and thus call into question her reliability. [Citations.]” (*Id.* at p. 963.)

2. Application in This Case

Here, Doe recalled talking with the CAC interviewer and said she told the truth when she spoke to the interviewer. She initially testified that she remembered telling the interviewer that someone named Uncle Dallas touched her in a bad place. When asked what she remembered telling the interviewer, she answered: “The stuff that where he touched me.” However, Doe also said she did not recognize defendant in court, did not remember anyone named Dallas, and did not remember “the touching.” By the end of direct examination, Doe contradicted her earlier testimony by saying she did not remember telling anyone that Uncle Dallas touched her in a bad place. In his closing argument, defense counsel asserted that the “most compelling reason” to acquit defendant was Doe’s lack of recollection regarding the alleged events and her testimony that she did not know defendant.

Under these circumstances, defendant was not deprived of his right of confrontation. Initially, we note that Doe took the oath and acknowledged that her oath was a promise to tell the truth and the importance of that promise. She did not refuse to testify or decline to answer any question posed, and there was no restriction placed upon defendant’s opportunity for cross-examination (although defense counsel did not make use of the opportunity). The jury was able to observe her demeanor and evaluate her credibility. There is authority to support a conclusion that this is enough. (See *People v. Clark, supra*, 52 Cal.4th at p. 927 [the memory-impaired victim “appeared as a witness at trial and was subjected to extensive cross-examination. No more was constitutionally

required.”]; *People v. Perez* (2000) 82 Cal.App.4th 760, 766 [although witness “professed total inability to recall the crime or her statements to police, . . . her presence at trial as a testifying witness gave the jury the opportunity to assess her demeanor and whether any credibility should be given to her testimony or her prior statements. This was all the constitutional right to confrontation required.”]; *Yanez v. Minnesota, supra*, 562 F.3d at p. 963 [no confrontation clause violation where child “took the oath, took the stand, and was subject to questioning”]; *State v. Price, supra*, 146 P.3d at p. 1192 [although witness could not recall the charged events or her prior statements, there was no confrontation clause violation because she was physically present in the courtroom, testified under oath, and subject to cross-examination].)

Here, however, Doe did more than just appear at trial and take the oath; i.e., she was more than what defendant describes as merely a “warm body.” By testifying that she talked with the CAC interviewer and spoke truthfully about being touched in a bad place, she provided more substance to the charges than the child witnesses in *McHorse*, *Price*, and *Yanez*, discussed above. Although she did not have a present recollection of the events or defendant, her testimony that she told the truth to the CAC interviewer significantly enhanced the credibility and reliability of the prior statements. Moreover, as in *Price*, the defense relied on the child’s testimony in closing argument, which strongly suggests her testimony was “effective” in the sense of bringing out the witness’s bad memory—a “prime objective” of cross-examination. (*Owens, supra*, 484 U.S. at p. 559.)

Indeed, the situation is analogous to the situation in *Owens*, where the victim recalled telling a Federal Bureau of Investigation agent that the defendant was the attacker, but could not independently recall seeing the defendant at the time of the attack. (*Owens, supra*, 484 U.S. at p. 556.) Here, although Doe remembered the CAC interview, said she told the truth in that interview, and recalled telling the interviewer that Uncle Dallas touched her in a bad place, she could not independently recall the bad touching itself, knowing someone named Dallas, or identify defendant in court. As in *Owens*, defendant in this case had the “““opportunity for effective cross-examination,””” even if it was “““not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”” [Citations.]” (*Id.* at p. 559.)

To the extent that the opportunity for *effective* cross-examination requires something more than an opportunity to bring out such matters as the witness’s bias or bad memory (see *Owens, supra*, 484 U.S. at p. 559), defendant, by failing to undertake any cross-examination of Doe, has failed to establish a record for the claim. In this regard, the observations of the court under similar circumstances in *State v. Nyhammer* (2009) 197 N.J. 383 [963 A.2d 316], are pertinent here. “That counsel decided to forgo critical cross-examination because of [the child witness’s] unresponsiveness to many questions on direct does not mean that defendant was denied the opportunity for cross-examination. Had counsel directly confronted [the child] on her claims on cross-examination and had she remained completely silent or unresponsive, then we would have a record on which to decide whether her silence or unresponsiveness effectively denied defendant his

constitutional right of confrontation. [Citation.] We cannot presume that [the witness] would have remained silent or unresponsive to questions defense counsel never asked.” (*Id.* at p. 334; accord, *State v. Cameron M.*, *supra*, 55 A.3d at p. 283; see also *People v. Garcia-Cordova*, *supra*, 963 N.E.2d at p. 370 [“Where a defendant does not attempt to cross-examine a witness on her out-of-court statements, he cannot complain that the witness was unavailable for cross-examination.”]).⁹

This point is particularly apt as to the evidence of Doe’s statements to Sergeant Espinoza. Even if it would have been futile to elicit additional information from Doe regarding the CAC interview, the same cannot be said of Sergeant Espinoza’s interview. The prosecutor asked Doe no questions on direct examination. It is entirely speculative to suggest, as defendant does, that any cross-examination of Doe regarding her statements to the officer would have been ineffective.

Defendant relies heavily on a Mississippi Supreme Court case, *Goforth v. State* (Miss. 2011) 70 So.3d 174. That case involved a witness who, because of an accident, had suffered a “total loss of memory” and had no recollection of the underlying events surrounding his prior statement. (*Id.* at p. 186.) In that situation, the court held that the

⁹ The cited cases suggest that the failure to cross-examine a witness precludes the defendant from claiming on appeal that he was deprived of the right to cross-examine the witness. We requested supplemental briefing on the question whether defendant’s failure to cross-examine Doe constituted a waiver or forfeiture of his confrontation clause claim on appeal or deprived this court of an adequate record to review the claim. Although we agree with defendant that his objections at trial adequately preserved his confrontation clause claim on appeal, we will not presume that cross-examining Doe would have been wholly ineffective.

defendant “simply had no opportunity to cross-examine [the witness] about his statement.” (*Ibid.*) *Goforth* is distinguishable on its facts. Unlike the witness in that case, Doe did not have a total memory loss. Although she was not consistent in her trial testimony, she did say she remembered talking to the interviewer, that she told the interviewer the truth, and that she had told the interviewer that Uncle Dallas had touched her in a bad place. To the extent that *Goforth*’s holding could apply to our facts, it conflicts with the authorities discussed above and is rejected. Finally, as one court noted, *Goforth* appears to be an outlier and is in contrast to the majority of cases that have considered the issue, which hold “with near uniformity, that a testifying ‘witness who forgets both the underlying events and her prior statements nonetheless appears for cross-examination at trial’ for purposes of *Crawford*” (*State v. Cameron M., supra*, 55 A.3d at p. 282, fn. 18.)

Defendant also asserts that the question of whether a witness appears for cross-examination for purposes of the confrontation clause should be evaluated according to standards used for determining the “unavailability” of a witness in other contexts. A similar argument was addressed and rejected in *Perez*. That court stated: “[The defendant] contends the professed memory loss made [the witness] ‘unavailable as a witness,’ implying by this argument that [the defendant] was unable to confront the witness. This argument takes out of context language from cases which construed ‘unavailable as a witness’ in Evidence Code section 240, subdivision (a), which is a foundational requirement for admission of certain types of hearsay, such as prior

testimony. [Citations.] . . . The United States Supreme Court rejected a similar evidentiary argument in *United States v. Owens, supra*, 484 U.S. at pages 561-564 [108 S. Ct. at pages 843-845]. It said there was no fatal contradiction under the Federal Rules of Evidence that a witness with genuine memory loss could be found ‘subject to cross-examination’ for the purpose of one evidence rule, while at the same time be found ‘unavailable as a witness’ for the purpose of a different evidence rule. ‘[T]he two characterizations are made for two entirely different purposes and there is no requirement or expectation that they should coincide.’ (*Id.* at p. 564 [108 S. Ct. at p. 845].)” (*People v. Perez, supra*, 82 Cal.App.4th at p. 767, fn. 2.) Thus, one can both “appear” and be “subject to cross-examination” under *Owens*, and still be deemed “unavailable” for purposes of allowing hearsay statements into evidence. (*People v. Gunder* (2007) 151 Cal.App.4th 412, 419 & fn. 8.) We therefore reject defendant’s attempt to conflate the two concepts.¹⁰

¹⁰ Defendant’s reliance on *People v. Alcala* (1992) 4 Cal.4th 742 is misplaced. In that case, the Supreme Court held that the introduction of hearsay statements by a witness who was “unavailable” for purposes of sections 240 and 1291 due to memory loss did not, under *Green* and *Owens*, violate the defendant’s confrontation clause rights because the witness testified “under oath and [was] subjected to extensive cross-examination by the defense” (*People v. Alcala, supra*, at pp. 784-785.) *Alcala* does not support defendant’s argument.

People v. Brock (1985) 38 Cal.3d 180, which defendant also relies upon, is inapposite. The relevant witness in that case died before trial. (*Id.* at p. 186.) There was thus no opportunity to cross-examine the witness at trial. Therefore, it has no bearing on the question before us.

For all the foregoing reasons, we conclude that, under the circumstances presented here, the evidence of Doe’s statements in her CAC interview and to Sergeant Espinoza did not violate defendant’s rights under the confrontation clause.

C. Denial of Defendant’s Motion for Judgment of Acquittal Under Penal Code Section 1118.1

Following the close of the prosecution’s case-in-chief, defendant moved for a judgment of acquittal under Penal Code section 1118.1.¹¹ The court indicated that it would grant the motion if the CAC interview was inadmissible under the confrontation clause and invited further argument on the issue. The court ultimately decided that the use of the CAC interview did not violate the confrontation clause and, therefore, denied the Penal Code section 1118.1 motion.

On appeal, defendant argues that the court was correct in understanding that the Penal Code section 1118.1 motion would need to be granted if the CAC interview was inadmissible, but erred by concluding that there was no confrontation clause violation. Because the admission of the CAC interview did violate the confrontation clause, he contends, the court erred in denying the Penal Code section 1118.1 motion.

¹¹ “On a motion for judgment of acquittal under [Penal Code] section 1118.1, the trial court applies the same standard as an appellate court reviewing the sufficiency of the evidence. The court must consider whether there is any substantial evidence of the existence of each element of the offense charged, sufficient for a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. [Citation.] We independently review the trial court’s ruling. [Citation.]” (*People v. Harris* (2008) 43 Cal.4th 1269, 1286.)

Defendant acknowledges that the success of his argument on this point depends upon the success of his confrontation clause argument. Because, as we explained in the preceding part, the admission of the CAC interview did not violate the confrontation clause, his argument regarding the ruling on his Penal Code section 1118.1 motion fails.

D. Admissibility of the CAC Interview Under Section 1360

At trial, the prosecutor indicated he intended to introduce the videotape of the CAC interview based upon section 1360. Defendant objected to the admission of the CAC interview on various grounds, including improper impeachment, improper notice, lack of foundation, and lack of reliability. Following a hearing, the court ruled that the interview was admissible under section 1360. On appeal, defendant challenges this ruling on the ground that the interview lacked the reliability required by section 1360.

Section 1360 provides, in part:

“(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply: [¶] . . . [¶]

“(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.”

We review the court's ruling for an abuse of discretion. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.)

Reliability in this context is determined “by examining ‘the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.’” (*People v. Roberto V., supra*, 93 Cal.App.4th at p. 1374.) In addition to considering the child's competency as a witness, courts have identified the following nonexclusive factors relevant to determining reliability: (1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected of a child of a similar age; and (4) lack of motive to fabricate. (*Ibid.*; *People v. Eccleston* (2001) 89 Cal.App.4th 436, 445-446.)

Regarding Doe's competency as a witness, she made statements that suggest she had trouble distinguishing what is real. For example, as defendant points out, Doe said that the paintings of birds on the interview room wall were “real birds” and a stuffed elephant was a “real elephant.” Doe may, however, have understood the interviewer to be asking whether the pictures of birds were pictures of real birds, rather than pictures of imaginary birds; in this sense a lifelike picture of a blue jay is “real” and a picture of Daffy Duck is not. The stuffed elephant could be honestly perceived as a “real” elephant if it appears to look like an elephant, rather than Dumbo. These possibilities aside, Doe's description of defendant as having no head, purple hair, and red skin seems inexplicable, as is her comment that defendant ripped her mouth with a knife and made her feel like she was dead. In addition, Doe's speech impediment made some of her statements

difficult to understand. However, in reviewing the interview in its entirety, Doe appeared to be competent to testify. Doe correctly told the interviewer she was five years old and counted out five with her fingers. She correctly identified the colors of crayons and could recite most of the alphabet. She could identify parts of the body on a diagram and follow the interviewer's instructions. With some exceptions, Doe's answers were comprehensible and responsive to the questions posed. Despite her speech impediment and the bizarre description of defendant, the trial court could have reasonably concluded that Doe was a competent witness.

The spontaneity factor weighs in favor of reliability. Doe was asked nonleading questions, such as “[h]as anybody hurt or touched your body?” and “[w]ho hurt or touched your body?” Doe unhesitatingly indicated that “Uncle Dallas” had touched her. When asked how he touched her, she responded: “Really bad.” Her descriptions of defendant's specific acts appear genuine and unrehearsed.

The factor of repetitiveness with respect to Doe's statements is difficult to evaluate on our record. Although a social worker testified that Doe told her foster mother something that made the social worker suspect sexual abuse, our record does not indicate what Doe said to the foster mother. In one significant respect, Doe's statements to the interviewer were inconsistent. She initially referred to defendant touching her “one time”—when defendant touched her pee-pee while she was using the toilet—but later said defendant touched her three times and described another incident in which he

touched her while she was taking a bath. Her statements were, however, generally (though not entirely) consistent with her statements five days later to Sergeant Espinoza.

The “mental state” factor weighs in favor of finding reliability. Doe appears generally comfortable during the interview and becomes only slightly uneasy when discussing defendant’s touching. She appears confident and unequivocal in her answers. She explained that defendant touched her pee-pee when she was in the bathroom. When she said that no one took her clothes off, the interviewer asked her how defendant could touch her pee-pee if she had her clothes on. Doe explained: “[W]hen I pulled my pants down and I going pee-pee and he touch me.” When the interviewer seemed to not understand, Doe persisted: “He touch while I go pee-pee.” Doe’s denials of other possible acts—such as defendant putting something in her mouth or in her pee-pee, or having to touch defendant—tends to increase the likelihood that she was telling the truth about the acts she said did happen.

The factor regarding the use of terminology unexpected from a child of Doe’s age does not weigh for or against reliability. Doe described the touching of her “pee-pee,” not body parts or acts that a five-year-old girl would not be expected to know.

Finally, as defendant acknowledges, there is nothing in the record to suggest a motive for Doe to fabricate. Indeed, if she was going to lie about defendant, one would expect her to concoct a more egregious tale of abuse or to answer affirmatively the interviewer’s questions about more abusive acts.

After evaluating the foregoing factors and considering the totality of the circumstances surrounding the interview, we conclude that the trial court could reasonable conclude that the CAC interview satisfied the reliability requirement of section 1360.

E. Admissibility of Sergeant Espinoza’s Testimony Under Section 1360

Defendant contends the court erred in allowing Sergeant Espinoza’s testimony concerning his interview with Doe under section 1360. Section 1360 is discussed in the preceding part. Our standard of review is, again, abuse of discretion. (*People v. Roberto V., supra*, 93 Cal.App.4th at p. 1367.)

1. Factual and Procedural Background

As noted above, Sergeant Espinoza interviewed Doe five days after the CAC interview. After defendant objected to Sergeant Espinoza testifying as to what Doe said, the court held a hearing pursuant to section 402 at which the following evidence was adduced. Sergeant Espinoza said Doe’s foster mother was in the room with her during the interview. He described Doe as “a wiggly four-year-old girl” and “a little hyperactive.” He asked Doe one question—whether she was inside or outside—to determine whether Doe understood the difference between a truth and a lie. He also asked questions about her school, the foster home, and friends to build rapport and calm her down. Her answers seemed to him appropriate. The prosecutor asked Sergeant Espinoza: “What information were you able to garner from [Doe] during that interview?” He responded: “That she had played doctor with Uncle Dallas. That he had

touched her butt. That it hurt her. That it was a bad touch. . . . I think she said her parents were sleeping at the time, or napping.”

The court asked Sergeant Espinoza if he had anything else to say about the interview that was important to him. He responded: “Just that she was able to identify Uncle Dallas and basically told me that he touched her. That’s what I was looking for. Other than that, she reminded me of a typical child. A little hyperactive, seemed like, but she still answered the questions. [¶] In fact, if I asked a question and I didn’t understand it, I asked it again, and she gave me the same answer. I had to decipher basically what she was saying.” When asked whether, as “to the important things that [Doe] said in terms of the importance to this case,” “you [are] clear in your own mind that she said exactly what you have represented here in court,” Sergeant Espinoza said: “Absolutely.”

Following argument, the court allowed Sergeant Espinoza to testify under section 1360. The court explained that “[w]ith respect to the strength of the deciphering as it’s been described, ultimately, I think that’s a question for the jury.”

Before the jury, Sergeant Espinoza was asked: “What information were you able to garner from your discussion with [Doe]?” He testified: “She told me several things. That she had played doctor with Uncle Dallas. That he had touched her butt. That it hurt her. That her parents were napping at the time. What else? That’s basically it.” Upon further questioning, he testified that Doe told him the touching was underneath her clothes and “was a bad touch.” On cross-examination, Sergeant Espinoza said he did not

record his interview with Doe, that Doe was difficult to understand, and that he had to “decipher” what she said.

2. Discussion

Defendant addresses the issue of reliability in a cursory manner by incorporating the arguments made with respect to his challenge to the CAC interview. He adds that Sergeant Espinoza’s testimony, which was based on what he garnered and deciphered “was far more unspecific than [Doe]’s actual statements in the taped CAC interview” and that “there were still more indicia of unreliability in [Sergeant] Espinoza’s hearsay that weren’t present in the CAC interview.”

Doe’s statements to Sergeant Espinoza do not appear to be inconsistent with the statements made in the CAC interview; i.e., she and Uncle Dallas played doctor and he touched her butt in a “bad” way underneath her clothes, and that her parents were sleeping at the time. Although it is difficult to evaluate considerations of spontaneity and Doe’s mental state based on this record, we cannot conclude that the court abused its discretion with respect to determining reliability.

Defendant further argues that section 1360 provides an exception to the hearsay rule for the *statements* of the child victim, not for what an interviewing witness “garners” or “deciphers” from the child victim’s statements. He points out that the definition of hearsay encompasses “evidence of a statement,” which would include what Sergeant Espinoza garnered about Doe’s statement. (See§ 1200.) Section 1360, by contrast, does not use the phrase “evidence of a statement,” but rather the narrower phrase, “a

statement.” Although Sergeant Espinoza’s testimony as to what he garnered from Doe is “*evidence* of a statement” and therefore hearsay, it was (defendant asserts) not the *statement* itself. Therefore, he concludes, Sergeant Espinoza’s testimony does not fall within the terms of section 1360.

We need not decide defendant’s statutory interpretation issue. Although Sergeant Espinoza was asked what he “garner[ed]” from his discussion with Doe, Sergeant Espinoza responded by testifying that “[s]he told me several things.” He then listed what she told him: “That he had touched her butt. That it hurt her. That her parents were napping at the time.” As for whether the touching was on top of or underneath Doe’s clothes, Sergeant Espinoza was asked: “What did she tell you?” He responded: “That he had touched her underneath her clothes.” He further stated that he asked Doe about the nature of the touch and she said it “was a bad touch.” To the extent that “statement” in section 1360 could be construed as narrower than “evidence of a statement,” it is clear from Sergeant Espinoza’s testimony that he was testifying as to Doe’s actual statements.

Sergeant Espinoza’s testimony during the evidentiary hearing that he “had to decipher basically what she was saying” indicates only that, because of Doe’s speech impediment, he had to make an extra effort to determine—or decipher—what Doe was telling him: “[I]f I asked a question and I didn’t understand it, I asked it again, and she gave me the same answer.” On this point, the court sought certainty by asking Sergeant Espinoza if he was clear that Doe “said exactly” what he testified to in court. Sergeant Espinoza responded: “Absolutely.” This exchange further supports our conclusion that

Sergeant Espinoza testified to Doe’s statements within the meaning of section 1360, even if the statute is construed in the manner suggested by defendant.

We conclude there was no error in allowing Sergeant Espinoza to testify regarding his interview with Doe.¹²

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.

¹² Defendant argues that if we find multiple errors in the trial court proceedings, we should consider the prejudicial effect of the errors cumulatively and in conjunction with each other. Because we find no error, we do not reach this issue.