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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY BRIAN FOSTER,

Defendant and Appellant.

F061174

(Super. Ct. No. 08CM2826)

**OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Steven D. Barnes, Judge.

Robert Derham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, Janet E. Neeley, Kelly E. LeBel and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, appellant Anthony Brian Foster, was convicted of aggravated assault of a child, based on sodomy (Pen. Code, § 269, subd. (a)(3)),<sup>1</sup> forcible sodomy upon a child under 14 years of age (§ 286, subd. (c)(2)), sodomy upon a child under 14 years of age (§ 286, subd. (c)(1)), making a criminal threat (§ 422), sodomy upon an unconscious or sleeping person (§ 286, subd. (f)), and contributing to the delinquency of a minor (§ 272, subd. (a)(1)).

The trial court sentenced appellant to a total term of 27 years and 8 months to life in state prison.

On appeal, appellant contends that the trial court erred when it allowed an officer to testify on his assessment of the victim's credibility; when it allowed evidence that appellant had been molested by an older brother; when it allowed testimony concerning Child Sexual Abuse Accommodation Syndrome (CSAAS); and when it allowed the victim's pretrial statement to an officer and investigator as a prior consistent statement. Appellant contends that the trial court erred when it denied his request for a continuance to prepare for cross-examination of and surrebuttal to the CSAAS testimony. He also contends cumulative error occurred, that several of the terms imposed should have been stayed, and that the court's order that he undergo medroxyprogesterone acetate treatment upon parole violated his right to due process and amounted to cruel and unusual punishment. We find no prejudicial error and affirm.

### **STATEMENT OF THE FACTS**

Appellant and his 10-year-old son, A.F. lived together alone between April and July of 2007. In April of 2007, appellant began making A.F. watch pornographic movies two or three times a week. Often after watching part of a movie, appellant would have A.F. go to his room, where appellant had A.F. simulate the sexual acts on a doll and

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

appellant simulated the sexual acts on A.F. Appellant began sodomizing A.F. in June of 2007 and did so on numerous occasions. After the first incident, A.F. noticed blood in his stool. His anus continued to bleed and feel tender when he defecated. On one occasion, appellant told A.F., "If you tell anybody, I will break your neck and bury you where nobody will find you. And if they do find you, I'll tell them that I don't know you." A.F. was afraid of appellant because he had hit, kicked, and choked him in the past. The last time appellant sodomized A.F. occurred in July of 2007. On that occasion, appellant entered A.F.'s bedroom. A.F. was awake, but pretended to be asleep. Appellant pulled off A.F.'s pants and underwear and inserted his penis into A.F.'s anus.

In the summer of 2007, A.F. told his mother about the acts. For unknown reasons, it was not until March of 2008, when mother, who was divorced from appellant, reported the acts to law enforcements officials. At that time, Deputy Sheriff Scott Ward spoke with A.F. and his mother. A.F. told Ward about appellant's insistence that he watch pornographic movies with him and the simulated sexual acts and sodomies that followed. According to Ward, A.F. described in detail one sodomy that occurred when A.F. pretended to be asleep, and another sodomy which A.F. suspected occurred while he was asleep because his anus was sore and bleeding in the morning. When Ward asked why A.F. had not reported the sodomies sooner, A.F. said he was scared because appellant had threatened to kill him and bury him where nobody would find him. A.F. repeated similar allegations to District Attorney Investigator Keith Prewitt. The interview was recorded and played for the jury.

Deputy Ward spoke with appellant on March 26, 2008. Ward informed appellant of the allegation against him and conducted a taped interview. When Ward attempted to locate appellant the following week, his trailer was vacant. Appellant was located in North Dakota six months later.

Appellant's aunt and grandmother testified that A.F. told them that someone else told him to make the allegations and they were lies. Appellant's mother and a church pastor testified that A.F. often lied.

On rebuttal, Investigator Prewitt testified as an expert on the five stages of behavior children who suffer from CSAAS go through: secrecy, helplessness, entrapment and accommodation, delayed or unconvincing disclosure, and retraction.

## **DISCUSSION**

### **1. Deputy Ward's Assessment of A.F.'s Credibility.**

Appellant first contends that the trial court erred in overruling his objection to Deputy Ward's opinion testimony about A.F.'s veracity when he interviewed him about the allegations against appellant. We find no prejudicial error.

At trial, after the prosecutor asked Deputy Ward if he recalled A.F.'s demeanor during his conversation with him, Ward replied:

“As I talked to [A.F.] and watched him, every time I'd ask him to recall an event, he would look up into the light, like he was searching in his head for a memory and never looked away from me or looked down towards the ground as though he was trying to fabricate or make something up. As he talked, he was very articulate, even though he had a little bit of a stutter. Very graphic in his descriptions to me. And it seemed to me each time I asked him a question, he was searching for that particular memory to recall that.”

Defense counsel objected, stating the answer called for speculation. He also asked that the statement that A.F. was not fabricating be stricken. The court sustained the objection and asked that the prosecutor to lay a further foundation for Ward's statement. The prosecutor then asked Ward, “What caused you to believe that?” to which Ward replied:

“This would be through my experience as a deputy sheriff, through the training I've had, interview and interrogation. I've learned when people fabricate things, they tend not to look you in the face, down to the ground or away from you. And when somebody's telling you the truth, they tend

to ... look up, like they're looking into their brain searching for a particular memory that recalls a certain set of circumstances that they're trying to explain to you.”

Defense counsel again objected on grounds of foundation and speculation. The court overruled the objection. The prosecutor then asked Ward whether it was something he was taught or his personal opinion based on experience. Ward replied: “Something I was taught in interrogation interview school and my own personal experience.”

The law in this area clearly supports appellant's position. In *People v. Zambrano* (2004) 124 Cal.App.4th 228, the court stated:

“Our state Supreme Court [in *People v. Melton* (1988) 44 Cal.3d 713, 774-745] has recognized that a lay witness's opinion about the veracity of another person's particular statements is inadmissible and irrelevant on the issue of the statements' credibility. [Citation.] The high court reasoned that such lay opinion testimony invades the province of the jury as the ultimate fact finder, is generally not helpful to a clear understanding of the lay witness's testimony, is not 'properly founded character or reputation evidence,' and does not bear on 'any of the other matters listed by statute as most commonly affecting credibility' in Evidence Code section 780, subdivisions (a) through (k). [Citation.]” (*People v. Zambrano, supra*, at pp. 239-240, italics omitted.)

The court in *People v. Sergill* (1982) 138 Cal.App.3d 34 (*Sergill*), considered a situation in which the defendant was charged with committing a sexual offense against his niece, who was eight years old at the time of trial. The prosecutor asked one of the investigating officers his opinion of whether the child was telling the truth. (*Id.* at p. 38.) The officer testified that in his opinion the girl was truthful, and explained that as a result of his dealings with many children he could usually determine with a high degree of accuracy whether their statements were true. The trial court overruled the defense's objection to this testimony saying, “ ‘this officer has had ... seven years of experience, and has written ... a thousand or more reports, ... and I think [in] the course of that he would be normally expected to judge whether a person, in his opinion, is telling the truth or not.’ ” (*Ibid.*) Additionally, the court allowed another police officer, who had also

interviewed the girl, to express an opinion that the girl was telling the truth when she reported that her uncle had molested her. (*Ibid.*)

The *Sergill* court held that the veracity of those who report crimes to the police is not a proper subject of expert testimony; and, even if it were, the fact that the officers had taken numerous reports during their careers would not qualify them as experts in judging truthfulness. (*Sergill, supra*, 138 Cal.App.3d at p. 39.) The appellate court held,

“... Both these officers were able to describe their interviews with the girl in concrete detail and their opinions or conclusions as to her truthfulness were not ‘helpful to a clear understanding of [their] testimony.’ [Citation.] [¶] We also conclude that this opinion testimony was inadmissible because it was not relevant. [Citation.]... [¶] ... [T]hese officers neither knew the child, nor knew her reputation for truthfulness. [Citation.] Instead, their conclusions that she was telling the truth were based on their own self-proclaimed expertise in assessing victim veracity, but the record is devoid of any evidence to establish their qualifications in this regard.” (*Id.* at p. 40; see also *People v. Smith* (1989) 214 Cal.App.3d 904, 914-915 [trial court erred in admitting a police officer’s testimony that he believed the victim’s dying declaration identifying defendant].)

Consequently, Deputy Ward’s personal opinion about the credibility of a witness did not assist the trier of fact, but instead drew conclusions on issues reserved for the jury. The instant record does not establish that Deputy Ward was an expert on judging witness credibility or on the truthfulness of persons who provide him with information in the course of investigations. Nor is there any evidence that prior to investigating the allegations, he knew anything about A.F.’s reputation for veracity. While Deputy Ward was certainly free to describe his interview with A.F. in detail, leaving the jury to decide A.F.’s credibility for itself based on such factors as his physical demeanor and motives to lie, he should not have been allowed to offer an opinion regarding the veracity of A.F.’s out-of-court statement.

Having concluded the trial court erred in admitting Deputy Ward’s testimony concerning A.F.’s veracity, we now examine the entire record in order to determine

whether it is reasonably probable a result more favorable to appellant would have been reached in the absence of the erroneously admitted evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)). We conclude that any error was harmless, because the prosecution's evidence in this case was strong and Deputy Ward's improper opinion testimony was an exceedingly minor factor in the trial.

While A.F.'s credibility was the crux of the trial, the jury was able to observe A.F.'s demeanor for themselves, as A.F. testified at trial, and his interview with Investigator Prewitt was played for the jury. It appears that the jury did not abdicate its function of determining a witness's credibility to Deputy Ward. During deliberations, the jury asked for a read back portion of A.F.'s trial testimony on "practicing [with the] Dora doll," and for a replay of the video of A.F.'s interview with Investigator Prewitt. The jury also had before it evidence that after appellant was confronted with the allegations, he demonstrated his consciousness of guilt by fleeing the state. In defending these charges, appellant offered little or no evidence to disassociate himself from the allegations, but he thoroughly attacked A.F.'s credibility by calling to the stand appellant's mother, aunt, grandmother, and church pastor, who all claimed A.F. either lied in making the allegations or had a propensity to lie. Finally, the jury was instructed, pursuant to CALCRIM No. 226, that they "alone must judge the credibility or believability of the witnesses."

Given the strong evidence of appellant's guilt and his weak defense, we conclude it is not reasonably probable he would have obtained a more favorable verdict had the trial court excluded the improper opinion testimony on A.F.'s veracity. (*Watson, supra*, 46 Cal.2d at p. 836.)

## **2. Evidence that Appellant Had Been Sexually Molested.**

Appellant next contends that the trial court abused its discretion when it allowed the prosecutor, on cross-examination, to ask appellant's mother whether appellant had

told her when he was 15 that he had been molested by his older brother. The trial court overruled defense counsel's objection on hearsay grounds. Appellant's mother then testified that appellant did not tell her he had been molested when he was 15, but that she first learned of the molestation a year ago. Defense counsel again objected on hearsay grounds, asking that the answer be stricken, and the trial court again overruled the objection.

Appellant now claims that the question had no possible relevance, and that it was prejudicial to appellant because the prosecutor used it to argue that appellant's "shame" over being molested "mutated into something that was erotic for him," leading to the molestation of A.F. Realizing that his argument may not be cognizable on appeal because defense counsel did not object on the ground he now argues (*People v. Seijas* (2005) 36 Cal.4th 291, 302-303), he asserts counsel was ineffective for failing to do so.

A defendant will prevail on an ineffective assistance of counsel claim only where the defendant is able to show that counsel's performance was deficient and the defendant would have obtained a more favorable result absent the deficiency. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694.) Here, appellant would not have obtained a more favorable result had the trial court not allowed evidence of appellant's prior molestation by his brother. As noted above, the critical issue for the jury appeared to be A.F.'s credibility, not anything related to appellant's propensity for sexually deviant behavior. We reject appellant's claim to the contrary.

### **3. CSAAS Testimony.**

Appellant raised several claims concerning the expert testimony that the People presented regarding CSAAS. Specifically, appellant contends that the trial court erred in concluding that Investigator Prewitt was qualified to provide such testimony and when it commented in front of the jury that Prewitt was a "clearly qualified" expert. He also contends that the court erred when it refused to give defense counsel a continuance to

prepare for the “surprise” evidence. We address each claim in turn but first set forth the procedural background and a more detailed summary of the expert’s testimony.

**A. Factual and Procedural Background.**

Jury trial began on September 7, 2010. There was no testimony on Friday, September 10, 2010, because defense counsel had a “family emergency.” On the following Monday, September 13, 2010, the third day of testimony, the court noted the prosecution sought to introduce CSAAS evidence in rebuttal through Investigator Prewitt. An Evidence Code section 402 hearing was held outside the presence of the jury to determine whether Prewitt was qualified to testify on the matter.

During the hearing, Investigator Prewitt testified that he was a district attorney investigator, he had been a peace officer for 23 years, and he had investigated hundreds of child sexual assault cases. He had taken a course in how to be a forensic interviewer and, as part of that course, was taught CSAAS. Prewitt described in some detail the concept of CSAAS and the five behavior patterns of sexual abuse victims: secrecy, helplessness, entrapment, delayed or unconvincing disclosure, and retraction. Prewitt had handled his own child sexual abuse cases, and, because he was the district attorney investigator, had been involved in the investigations of many other investigators as well.

Defense counsel questioned Investigator Prewitt as well, focusing on Prewitt’s education, which consisted of an associate degree in criminal justice at a community college. Counsel also questioned Prewitt about his knowledge of Dr. Roland Summit, the person who first originated the term CSAAS. Counsel specifically asked if Prewitt was familiar with Summit’s later published paper which criticized the way CSAAS had been used in the courts. Prewitt said he was not. He also asked whether Prewitt was familiar with Debbie Nathaniel and Michael Nestor’s critique on Summit’s paper because Summit had had no children as patients prior to publishing his original paper. Prewitt said he was not. Counsel asked whether Prewitt was aware that Summit had claimed in his paper that

half of all women had been sexually abused as children. Again Prewitt said that he was not. Prewitt described the CSAAS course he had taken as a one-hour block, which was then referred to consistently throughout the one-week course on forensic interview techniques. Counsel asked whether the class taught him that CSAAS is not to be used as a diagnostic tool “to prove that any child was sexually abused.” Prewitt stated that his understanding was that it was “supposed to be a model for us to improve our understanding and acceptance of a child’s position as a victim of sexual abuse.” When asked if Prewitt had been taught that CSAAS should not be used in court to bolster the credibility of a testifying child, Prewitt stated that the use of CSAAS in courts was not emphasized in his training. When asked if Prewitt was aware that Summit had said he had mislabeled CSAAS as a syndrome, Prewitt testified that he was not.

The trial court then asked Investigator Prewitt if he had testified before as an expert witness with respect to CSAAS or whether he had ever qualified as an expert witness with respect to CSAAS before. Prewitt answered he had not to both questions.

Defense counsel objected to Investigator Prewitt as an expert “for lack of qualifications,” because the defense had no notice that the People planned to call Prewitt or any other witness to testify regarding CSAAS, and because CSAAS “lacks scientific validity under the Kelly Frye standard.”

The prosecutor argued that he was not required to give notice because Prewitt was testifying as a rebuttal witness in response to defense testimony that A.F. had allegedly retracted his allegations. The prosecutor also argued that, while Prewitt was not a doctor or psychiatrist, he did have special knowledge, skill, experience or training in the area of CSAAS.

After defense counsel complained that the prosecution was using Investigator Prewitt’s testimony to improperly “bolster the credibility of” A.F.’s testimony and to

prove the sexual abuse did occur, the trial court overruled defense counsel's objections and designated Prewitt as an expert in CSAAS. In doing so it stated:

"I would remind the parties that this is a trial, and the purpose of this trial is to determine whether [appellant] is guilty or not guilty. To do that, the People are required to put on evidence that is prejudicial to the defendant. When ... the defendant presents witnesses, that, in essence, say[] that the Prosecution's witnesses are not being truthful, the Prosecution then is entitled to put on rebuttal witnesses. Those witnesses would provide evidence that would be prejudicial to the defendant as well because they're going to be the opposite of what the defendant says.

"In this particular instance, the Defense witnesses, in essence, call the Prosecution's victim witness a liar. In no uncertain terms, he said that he fabricated items and made up fancy trips to Disneyland and back-flips on a skateboard. And because of that, he's a liar. In no uncertain terms, the minister ... found him to be absolutely untruthful with respect to that. The proposed testimony of this witness with respect to the Child Sexual Abuse Accommodation Syndrome, which the Court would find that the witness has education, training, and substantial experience in this particular area, and the Court would provide a substantial limiting instruction under Cal[.] Crim. 1193 as well as the Evidence Code Section -- Cal[.] Crim. 332, expert witness testimony instructions. The testimony and trial Sexual Abuse Accommodation Syndrome instruction will specifically advise the jury that the testimony is not evidence that the defendant committed any of the crimes charged against him. That they can consider the evidence only in deciding whether or not his conduct was consistent with the conduct of someone who had been molested and in evaluating the believability of his testimony. So Court would find that that substantially limits it. Further, that the Judicial Council[] has made a determination that this particular syndrome is something that is not to be taken lightly. They've taken with the opportunity to provide us with a particularized instruction with respect to that."

Defense counsel then asked for a continuance so he could "have additional time to be prepared to address this issue." Defense counsel acknowledged that he had notice of the prosecution's intent to use Investigator Prewitt as an expert on CSAAS the previous Friday, but that his personal situation (his wife had delivered a baby on Friday) did not allow him to "delve into researching this particular issue." Defense counsel then added

that before Friday he had “never even heard of the Child Sexual Abuse Accommodation Syndrome” and that this was “the first trial of this nature” he had done. The trial court denied defense counsel’s request.

Thereafter, in the presence of the jury, Investigator Prewitt testified that he had been a police officer in Missouri for five years, a Hanford police officer for five years, and, for the past 13 years, had been a district attorney investigator. Investigator Prewitt testified that he had investigated hundreds of child sexual assault cases and, in his position, had been exposed to many more, and that he had taken a one-week course (in November of 2007) at the National Child Protection Training Center, which had included instruction on CSAAS. While the specific instruction on CSAAS had been a one-hour course, he had read Dr. Summit’s paper on CSAAS and had been tested on it. Prewitt then explained the various stages associated with CSAAS.

Defense counsel cross-examined Investigator Prewitt, repeating the various questions he had asked during the Evidence Code section 402 hearing, emphasizing his lack of education and the fact that this was the first time he had testified as an expert, and questioning Prewitt on various aspects of the syndrome. At the end of questioning, the trial court stated it would “declare this witness to be clearly qualified as an expert witness, as proffered by the People.”

### **B. Qualification of Expert Witness.**

With respect to appellant’s claim pertaining to the expert’s qualifications, “ ‘We are required to uphold the trial judge’s ruling ... absent an abuse of discretion. [Citation.] Such abuse of discretion will be found only where “ ‘the evidence shows that a witness clearly lacks qualification as an expert ...’ ” [Citation.]’ [Citation.]” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1062-1063, italics omitted.)

A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to

which his testimony relates. “Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert,” and “may be shown by any otherwise admissible evidence, including his own testimony.” (Evid. Code, § 720, subs. (a), (b).) “[T]he qualifications of an expert must be related to the particular subject upon which he is giving expert testimony.” (*People v. Hogan* (1982) 31 Cal.3d 815, 852 (*Hogan*), disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836.) Consequently, “the field of expertise must be carefully distinguished and limited” (*People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 37), and “[q]ualifications on related subject matter are insufficient” (*Hogan, supra*, 31 Cal.3d at p. 852). Thus, “[w]hether a person qualifies as an expert in a particular case ... depends upon the facts of the case and the witness’s qualifications.” (*People v. Bloyd* (1987) 43 Cal.3d 333, 357.) “[T]he determinative issue in each case is whether the witness has sufficient skill or experience in the field so his testimony would be likely to assist the jury in the search for truth.” (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 219.)

Additionally, “[t]he trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown.” (*People v. Bloyd, supra*, 43 Cal.3d at p. 357.) Moreover, an appellate court may find an error regarding a witness’s qualifications as an expert only if “ ‘the evidence shows that a witness *clearly lacks* qualification as an expert ....’ [Citation.]” (*Hogan, supra*, 31 Cal.3d at p. 852; *People v. Panah* (2005) 35 Cal.4th 395, 478.) Once it is established that a witness has adequate credentials to qualify as an expert, questions as to the degree of his or her expertise go to weight not admissibility. (*People v. Bolin* (1998) 18 Cal.4th 297, 322; *People v. Brown, supra*, 96 Cal.App.4th at Supp. 37.)

Appellant argues his case is similar to that in *Hogan*, in which the California Supreme Court held that mere observation without analysis or inquiry cannot qualify a witness as an expert. (*Hogan, supra*, 31 Cal.3d at p. 853.) In *Hogan*, the defendant was convicted of first degree murder of a woman and her son. (*Id.* at p. 820.) When the defendant surrendered to the police, he had bloodstains on his pants and shoes. (*Id.* at p. 821.) He claimed he discovered the victims and the bloodstains on his clothes were from kneeling near the victims. (*Ibid.*) At trial a criminalist offered his expert opinion on the source of the bloodstains, testifying that some stains on the defendant's clothes were "splatters," caused by blood drops flying through the air following impact rather than by a surface-to-surface contact with a bloody object. (*Id.* at pp. 851-852)

The California Supreme Court in *Hogan, supra*, 31 Cal.3d 815 decided the trial court abused its discretion in qualifying the criminalist as an expert on the subject of the source of bloodstains. (*Id.* at pp. 852-853.) The criminalist had never performed laboratory analyses to determine the source of bloodstains either in past cases or the present case. (*Id.* at p. 852.) He had received no formal education or training to make such a determination. (*Ibid.*) Several years before the case, the criminalist had viewed an exhibit, which demonstrated patterns of human blood dropped from various heights and angles, and had read a book about flight patterns of blood. (*Ibid.*) The criminalist had also observed bloodstains at many crime scenes. (*Ibid.*) Consequently, the criminalist's qualifications "boiled down to having observed many bloodstains" and, thus, he was not qualified to render an expert opinion on the source of the bloodstains. (*Id.* at p. 853.)

Appellant contends that Investigator Prewitt had no significant training or education in CSAAS, and that his investigation of sexual abuse cases was in his role as a law enforcement officer, not as a social worker or psychologist. The record shows that Prewitt, who had been a peace officer for 23 years, attended a one-week course at the National Child Protection Training Center, which had included a one-hour session on

CSAAS. The syndrome was discussed throughout the course and he had been tested on the concept. He had participated in the investigation of hundreds of child sexual abuse allegations. Prewitt limited his testimony to the defined behavior patterns of CSAAS, which was aimed at debunking myths regarding the behavior of abused children. He did nothing to misrepresent his credentials, acknowledging that he did not have a Ph.D., Master's Degree, or a four-year college or university degree, but instead had a two-year degree in criminal justice. Under these circumstances, appellant's complaints about Prewitt's qualifications go to the weight of his testimony, not its admissibility. (See *People v. Chavez* (1985) 39 Cal.3d 823, 829.)

The trial court stressed the limited use of the CSAAS evidence when it instructed with CALCRIM No. 1193, as follows:

“You have heard testimony from Keith Prewitt regarding Child Sexual Abuse Accommodation Syndrome. Keith Prewitt's testimony about Child Sexual Abuse Accommodation Syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [A.F.'s] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of his testimony.”

The jury was also instructed with CALCRIM No. 332, as follows:

“Witnesses were allowed to testify as an expert and to give an opinion. You must consider the opinion, but you're not required to accept it as true or correct. The meaning and importance of any opinions are for you to decide. [¶] In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. [¶] In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. [¶] You must decide whether information on which the expert relied is true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.”

Even if we were to find that the trial court abused its discretion in qualifying Prewitt as an expert on CSAAS, the error does not warrant reversal. “The erroneous

admission of expert testimony only warrants reversal if ‘it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’ ” (*People v. Prieto* (2003) 30 Cal.4th 226, 247, citing *Watson, supra*, 46 Cal.2d at p. 836.)

Applying the *Watson* standard, it is not reasonably probable that a jury would have reached a different result in the absence of Investigator Prewitt’s testimony on CSAAS, which was primarily introduced in response to appellant’s aunt’s and grandmother’s testimony that A.F. had retracted his claims, and appellant’s mother’s and a pastor’s testimony that A.F. often lied. As was apparent from the jury’s request for a read back of portions of A.F.’s testimony concerning “practicing” with a doll and for a replay of the video of A.F.’s interview with Prewitt, the jury carefully considered A.F.’s testimony and interview with Prewitt before finding appellant guilty.

Appellant also contends that the trial court erred when it “gratuitously commented at the end of the cross-examination that Prewitt was ‘clearly qualified as an expert witness as proffered by the People.’ ” Appellant contends the error was compounded when the court refused to instruct the jury on how to view comments of a judge during a trial. At a jury instruction conference, defense counsel had requested that the court give CALCRIM No. 3530, which is to be given when the court comments on the evidence in front of the jury. The trial court refused, stating that its comment was not made concerning the evidence but, because defense counsel’s questioning of Prewitt was “a combination voir dire and cross-examination,” was required to indicate on the record whether it found him to be qualified.

A trial court has “broad latitude in fair commentary, so long as it does not effectively control the verdict.” (*People v. Rodriguez* (1986) 42 Cal.3d 730, 768.) A trial court’s “ ‘comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw

material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power. [Citations.]' [Citations.]" (*People v. Proctor* (1992) 4 Cal.4th 499, 542.) "The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made." (*People v. Melton* (1988) 44 Cal.3d 713, 735.) Here, we find the trial court's comment was proper. It was, as merely stated by the court, finding the expert to be qualified after defense counsel argued otherwise.

### **C. Motion for Continuance.**

Appellant next contends that the trial court erred when it denied his motion for a continuance so that he could prepare for cross-examination and surrebuttal.

"... ' "The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion. In the lack of a showing of an abuse of discretion or of prejudice to the defendant, a denial of his motion for a continuance cannot result in a reversal of a judgment of conviction." ' [Citations.] Entitlement to a midtrial continuance requires the defendant 'show he exercised due diligence in preparing for trial.' [Citation.]" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1105-1106.)

Appellant argues that, since counsel was not familiar with CSAAS, he should have been allowed a continuance in order to properly examine the expert witness. As argued by appellant, "Although it is hard to know what counsel's preparation would have produced, there is enough controversy over CSAAS to believe he would have been able to contact an expert to rebut Investigator Prewitt's testimony." And yet, despite a claim that he had never heard of CSAAS, defense counsel effectively cross-examined Prewitt on his qualifications and his knowledge of CSAAS. He also asked him numerous pointed questions about criticism of Dr. Summit and his initial paper on CSAAS. Finally, the

jury was aware, through Prewitt's testimony and jury instruction, that CSAAS was not a diagnostic tool, but rather an explanatory tool to improve the understanding and acceptance of how children may react and cope with sexual abuse.

It is not reasonably probable that appellant would have achieved a more favorable result if defense counsel had been allowed a continuance to prepare for cross-examination and to perhaps, find an expert to rebut Investigator Prewitt's CSAAS testimony. (*Watson, supra*, 46 Cal.2d at p. 836.) We therefore conclude that appellant has not borne his burden of showing that the trial court abused its discretion in denying his midtrial request for a continuance. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

#### **4. Admission of A.F.'s Pretrial Statements.**

Appellant argues that A.F.'s prior statement to Deputy Ward and taped interview with Investigator Prewitt should not have been admitted into evidence. He contends the statement and video constituted inadmissible hearsay and the video did not satisfy the statutory requirement for notice.

The trial court admitted the statement and taped interview pursuant to Evidence Code section 791, subdivision (b), and in the alternative, pursuant to Evidence Code section 1360. We review a trial court's ruling on the admissibility of evidence for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

##### **A. Factual and Procedural Background.**

At trial, defense counsel attempted to impeach A.F.'s credibility by questioning him about several statements he made to officers prior to trial and his testimony. Following A.F.'s testimony, Deputy Scott Ward testified that he spoke to A.F. on March 25, 2008, and asked him what had happened between him and appellant. Defense counsel objected on hearsay grounds. The trial court overruled the objection, stating it was a prior consistent statement pursuant to Evidence Code section 791, subdivision (b), and admissible because "[t]here's been an express, implied charge made that the

testimony was recently fabricated or influenced by bias or some other improper motive.” Deputy Ward’s testimony then followed.

Following Deputy Ward’s testimony, the trial court held a hearing to determine the admissibility of Investigator Prewitt’s pretrial video interview of A.F. Defense counsel argued that the video was inadmissible under Evidence Code section 791, subdivision (b), because A.F.’s bias or motive for fabrication at trial was the same as at the time of the interview. Defense counsel also argued that the video was inadmissible under Evidence Code section 1360, because, although he had received the video and transcript of the interview before trial, he was not given notice of the prosecution’s intent to offer the video into evidence.

The prosecutor argued:

“... This discovery has been discussed informally and certainly was provided to him.... I don’t believe I ever went on the record and said, ‘I’m giving you notice under 1360 of my intent,’ but I certainly think, looking at the spirit of the statute or at least the language, he was certainly given time to prepare or fair opportunity to prepare to meet the statement. There’s no reason why we would transcribe something if we didn’t intend to potentially use it. And as he stated, we gave him copies of the video. We also gave him an audio only copy.”

Following a hearing in which Investigator Prewitt took the stand to testify about his interview with A.F., the court admitted the entire recorded statement under either Evidence Code section 791, or as rehabilitation or impeachment. The court added:

“... In the event some court, tribunal, or other entity determines that this court is incorrect, Court would find it would be admissible under 1360 of the Evidence Code. Court’s had a hearing, it meets the following requirements: It would have already been determined to be not admissible under any other statute or rule. We had a hearing outside the presence of the jury. I’ll go through my determination as to the reliability. [¶] The child did testify at the hearing, which is a substantial factor in favor of the Court’s finding that this applies. The reasonable notice argument is overruled because the People did everything they could to provide notice of

intent to use the statement; they provided the video and provided the transcription....

“The Court has determined the child was able to understand relevant concepts and to differentiate between what is true and what is not. The statements provided by the child in the interview were spontaneous, consistently repeated. The child demonstrated an understanding of the statements and independence of thought. The child had an abnormal understanding of sex for a person of similar age. There did not appear to be a motive for the child to fabricate. Leading questions were not asked during the interview, and there was nothing in the child’s mental state that would indicate untrustworthiness. Therefore, the Court finds that there is evidence that corroborates the statement and provides sufficient indicia of reliability. So it’s going to get played for the jury.”

**B. Applicable Law and Analysis.**

Evidence Code section 791 provides:

“Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.”

Appellant argues, and respondent concedes, that the temporal component of Evidence Code section 791 is not present here. To admit a prior consistent statement to support a witness’s credibility, it is not enough that the prior consistent statement was made before the witness testified at trial. The prior statement must have been made before the motive to lie arose. Typically, a witness’s consistent statement made prior to trial, but not preceding an inconsistent statement or the development of motive to fabricate, is inadmissible. “[I]f the consistent statement was made *after* the time the improper motive is alleged to have arisen, the logical thrust of the evidence is lost and the statement is inadmissible.” (Cal. Law Revision Com. com., 29B pt. 2 West’s Ann. Evid.

Code (1995 ed.) foll. § 791, p. 688.) “The reason for this limitation [on the admission of prior consistent statements] is that when there is a contradiction between the testimony of two witnesses it cannot help the trier of fact in deciding between them merely to show that one of the witnesses has asserted the same thing previously.” (*People v. Gentry* (1969) 270 Cal.App.2d 462, 473.)

Respondent argues that the evidence was admissible under Evidence Code section 1360 instead. Appellant does not dispute that A.F.’s pretrial statements to Deputy Ward and Investigator Prewitt met the requirements of Evidence Code section 1360, subdivision (a), but argues that, in the case of the video, the prosecutor did not satisfy the notice requirement of subdivision (b).

We agree that the trial court did not abuse its discretion in admitting A.F.’s interviews with Deputy Ward and Investigator Prewitt under Evidence Code section 1360. That section provides, as relevant here, that:

“(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 ... is not made inadmissible by the hearsay rule if all of the following apply:

“(1) The statement is not otherwise admissible by statute or court rule.

“(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.

“(3) The child either:

“(A) Testifies at the proceedings.

“(B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.

“(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention

to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.” (Evid. Code, § 1360.)

The notice requirement of Evidence Code section 1360, subdivision (b), is “to give a criminal defendant a fair opportunity to prepare his or her defense.” (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1372.) The prosecutor in this case provided pretrial discovery to appellant’s defense counsel, including the interview video, a transcription of the interview video, and presumably, A.F.’s statements to Deputy Ward as well. Appellant’s argument that he had no fair notice to prepare to meet the statements is without merit.

Even if the notice was not given prior to trial, we discern no prejudice under any standard of review. Appellant had sufficient notice to have “a fair opportunity to prepare to meet the statement.” (Evid. Code, § 1360, subd. (b).) Aside from having been given a copy of the video and transcript before trial, it was evident that A.F.’s pretrial statements were vital to the prosecution’s case. At the preliminary hearing, Deputy Ward testified about what A.F. told him on March 25, 2008. Deputy Ward also testified at the preliminary hearing that he was present at the July 7, 2008, interview with Investigator Prewitt, and he detailed what A.F. told Investigator Prewitt at that time.

#### **5. Cumulative Error.**

Appellant contends that the cumulative impact of all of the above evidentiary errors deprived him of a fair trial. We have either rejected appellant’s claims of error and/or found that any errors, assumed or not, were not prejudicial. Viewed cumulatively, we find that any errors do not warrant reversal of the judgment. (*People v. Stitely* (2005) 35 Cal.4th 514, 560.)

#### **6. Section 654.**

Appellant contends that the terms imposed on counts 2 and 3 should have been stayed under section 654.

### **A. Procedural Background.**

Four counts of sodomy were presented to the jury: count 1, aggravated sexual assault (based upon forcible sodomy); count 2, forcible sodomy; count 3, sodomy; and count 7, sodomy upon an unconscious person. All four counts were alleged to have occurred between April 1, 2007 and July 26, 2007. The trial court sentenced appellant on these counts as follows: count 1, 15 years to life; count 2, the upper term of eight years; count 3, one-third the midterm of two years; and count 7, one-third the midterm of two years.

During closing, the prosecutor stated to the jury:

“[A]ll these ... sodomy counts, except Count Seven, I believe really have [to] do with the same event. A defendant can violate numerous Penal Code Sections with the same ... conduct. What I’m arguing to you is that all of these counts have to do with the, I believe he referred to it as ‘July 14th incident.’ The specific incident where he feigned being asleep, but he wasn’t.”

The prosecutor also argued that, because A.F. described numerous instances when he experienced pain and bleeding from his anus in the morning, the jury could conclude that “he did it other times.”

At sentencing, appellant’s defense counsel argued that any punishment imposed on counts 2, 3 and 7 should be stayed under section 654 because no specific findings were made by the jury regarding whether or not there was more than one act and the information pled the same time period for all the counts.

The prosecutor disagreed, stating:

“... It is true that I made an argument to the jury in trying to anticipate any appellate arguments that appellate counsel’s going to make, it is true that I argued to the jury that they could find that Counts 1, 2, and 3 all referred to the -- what I argued to be the July 14th event. That’s a specific incident

that he described in detail in court. [¶] However, during the MDIC<sup>[2]</sup> the jury was provided with testimony that would substantiate additional counts, Count 2 and Count 3. Actually more than that, I believe he testified it happened more than four times, I forgot what his actual estimate was, but it was definitely more than four.”

In response to questioning by the court, the prosecutor stated:

“[M]y argument is based on the fact that [A.F.] alleged that this same conduct happened to him more than four times. So that’s why I’m saying that the Court could in its discretion sentence him fully consecutive on Count 2 and Count 3. [¶] The jury could have found the Count 1 and Count 2 referred to two separate occasions, albeit within the same time frame that was alleged April 1st to July 26th of 2007.”

Following some additional argument, the trial ruled:

“With respect to the argument under Penal Code Section 654, the Court would determine and agree with the People that Count 2 and Count 3 both being Penal Code Section 286 violations need to be found as true by the jury before they can make a guilty finding among other things as to Count 1. [¶] The code -- the way the testimony was presented, it appears to the Court that the offenses as alleged in ... Count[] 2 and Count 3 occurred at different times and at different dates with respect to the offenses as alleged therein with respect to the determinate term components.”

## **B. Applicable Law and Analysis.**

Section 654, subdivision (a) provides:

“An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

The underlying purpose of section 654 is “to insure that a defendant’s punishment will be commensurate with his culpability.” (*People v. Perez* (1979) 23 Cal.3d 545, 552.)

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<sup>2</sup> This is referred to in appellant’s opening brief as “the second statement given by A.F. to law enforcement in July 2008.”

“[T]he application of section 654 to any particular case depends upon the circumstances of that case. ‘The initial inquiry in any section 654 application is to ascertain the defendant’s objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.] Whether the defendant maintained multiple criminal objectives is determined from all the circumstances and is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is any substantial evidence to support it.” (*People v. Porter* (1987) 194 Cal.App.3d 34, 38.)

“Although the question of whether defendant harbored a ‘single intent’ within the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law. [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Here, despite the prosecutor’s somewhat confusing argument to the jury, the evidence supports multiple punishments on counts 1, 2, and 3. Aside from the July 14th incident when A.F. pretended to be asleep, A.F. told Investigator Prewitt that appellant sodomized him while he slept, on six or seven different dates. The first time occurred in June of 2007, and on each occasions, he would awake the next morning and find his anus was bleeding and his back was sore. And A.F. testified at trial that aside from the July 14th incident, appellant put his penis in his butt “way more than” three times.

And, as argued by respondent, even if we were to find that counts 1, 2, and 3 relate only to the July 14th incident, multiple punishment would still be appropriate on those counts. A.F. told Investigator Prewitt that the July 14th incident lasted about two and a half to three hours; that during this time period, appellant put A.F.’s body in a certain position and then inserted his penis into A.F.’s anus; that appellant would pull his penis out, rest and think of another position, and repeated the process. According to A.F., appellant put his body into about three to five different positions, which he described as

on his stomach, on his side, and on his back with his legs lifted up, during that one occasion.

“[S]ection 654 does *not* bar multiple punishment simply because numerous sex offenses are rapidly committed against a victim with the ‘sole’ aim of achieving sexual gratification.” (*People v. Harrison, supra*, 48 Cal.3d at p. 325.) A “‘broad and amorphous’ view of the single ‘intent’ or ‘objective’ needed to trigger the statute would impermissibly ‘reward the defendant who has the greater criminal ambition with a lesser punishment.’” (*Id.* at pp. 335-336.) Therefore, multiple punishment is appropriate here.

## **7. Medroxyprogesterone Acetate Treatment**

Appellant contends that the order for medroxyprogesterone acetate treatment, or “chemical castration,” upon parole violates his right to due process and amounts to cruel and unusual punishment.

### **A. Procedural Background.**

The probation report recommended that the trial court order appellant to undergo “Medroxyprogesterone Acetate Treatment” (MPA) upon parole, pursuant to section 645, subdivision (a). At sentencing, the court indicated it did not intend to make such an order. The prosecutor asked the court to reconsider, stating it was appropriate in this case. Defense counsel disagreed, stating that “probation assessed his level of recidivism in the low to moderate range,” and that, due to appellant’s lengthy sentence, he was “not going to be around children any time soon.” The court then ordered appellant to undergo MPA upon parole.<sup>3</sup>

### **B. Applicable Law and Analysis.**

Section 645 provides in pertinent part,

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<sup>3</sup> The trial court incorrectly made the order pursuant to section 654; the correct code section is 645.

“(a) Any person guilty of a first conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, may, upon parole, undergo [hormone suppression] ... in addition to any other punishment ... at the discretion of the court. [¶] (b) Any person guilty of a second conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, shall, upon parole, undergo [hormone suppression] ... in addition to any other punishment ....”

Subdivision (c) includes the offenses for which the jury convicted appellant.

Appellant argues for the first time on appeal that the order for hormone suppression violates the Due Process Clause of the Fourteenth Amendment and constitutes cruel and unusual punishment in violation of the Eighth Amendment because the trial court made no finding that appellant is a pedophile or that he was an appropriate candidate for MPA treatment.

Whether a form of punishment is unconstitutional under the Eighth Amendment is determined based on an evaluation of evolving standards of decency, as reflected in objective indicia of public attitudes toward a given sanction. (*Atkins v. Virginia* (2002) 536 U.S. 304, 311-312 & fn. 7; *Gregg v. Georgia* (1976) 428 U.S. 153, 171; *People v. Kennedy* (2005) 36 Cal.4th 595, 640, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Moreover, even if acceptable to the public, a punishment must not be excessive, either through inflicting unnecessary pain or being disproportionate to the offense or offender. (*Ewing v. California* (2003) 538 U.S. 11, 21.) Under the state Constitution, punishment can be disproportionate in light of the nature of the offense or offender, the sentences for similar offenses in this state, or the sentences for similar offenses in other states. (*In re Lynch* (1972) 8 Cal.3d 410, 425-427.) The essential requirements of due process are notice and an opportunity to respond. (*In re Large* (2007) 41 Cal.4th 538, 552.)

By not challenging the constitutionality of the order in the trial court, appellant has failed to preserve the issue for review. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229.) We do not have before us a developed record and appellant’s argument from which

we can evaluate what is likely a complicated medical procedure and associated physical consequences. Habeas corpus proceedings are the better forum to address the constitutionality of the order requiring appellant to undergo MPA treatment if he is released on parole. It is also the better forum to address appellant's alternate argument that counsel was ineffective for failing to object at trial. (See *People v. Pope* (1979) 23 Cal.3d 412, 426, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) We therefore decline appellant's invitation to reach the merits of his claim.

**DISPOSITION**

The judgment is affirmed.

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LEVY, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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CORNELL J.