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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO VALENCIA-OLIVARES,

Defendant and Appellant.

F061319

(Kern Sup. Ct. No. BF131346A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Janet J. Gray, 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, Julie A. Hokans and Ryan B. McCarroll, Deputy Attorney General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Antonio Valencia-Olivares appeals from a judgment of conviction of multiple sexual offenses against a surrogate daughter that occurred during a 10-year period in the outskirts of Oildale, Kern County.

STATEMENT OF THE CASE

On September 7, 2010, a Kern County jury returned verdicts finding appellant Antonio Valencia-Olivares guilty of one count of continuous sexual abuse (Pen. Code,¹ § 288.5, subd. (a)), five counts of lewd and lascivious acts on a child under age 14 (§ 288, subd. (a)), and one count of oral copulation of a person under age 18 (§ 288a, subd. (b)(1)).

On October 27, 2010, the court sentenced appellant two a total term of 22 years 8 months in state prison. The court imposed the middle term of 12 years on the continuous sexual abuse count, consecutive two-year terms (representing one-third of the middle term) on the lewd and lascivious conduct counts, and a consecutive term of eight months on the oral copulation count.

On October 29, 2010, appellant filed a timely notice of appeal.

STATEMENT OF FACTS

Eighteen-year-old K.I. testified that she grew up in Bakersfield and, at the age of seven, met appellant through her grandmother. K.I. never knew her own father and considered appellant to be like a father, since he was frequently around, took her family out, and had them over for holidays.

K.I. said appellant lived in a trailer on the road to Oildale and molested her over a 10-year period, with 85 to 90 percent of the incidents occurred at his trailer home. K.I. said appellant began touching her one summer when she was seven or eight years of age. She went inside her home while her mother and grandmother were outside. When K.I. came out of her bedroom, appellant approached and began touching her leg for almost a minute until she told him to stop. K.I. did not know whether appellant's conduct was appropriate so she did not say anything about the incident at that time.

¹ All further statutory references are to the Penal Code unless otherwise stated.

When K.I. was still seven years old, she accepted appellant's invitation to eat out with him. Appellant drove K.I. to his trailer and asked her to go inside and get his wallet. Appellant eventually entered the bedroom area of the trailer, placed her hand on his sexual organ, and then removed her hand. K.I. remembered that appellant had removed her shirt, and that she was old enough to be wearing a bra.

K.I. said appellant touched her breasts and vaginal area and the touching was both skin-to-skin and through her undergarments. K.I. said appellant attempted to put his sexual organ in her body, but she would not allow him to do so. She said he put his mouth on her breasts and moved his fingers inside her body. She remembered that white fluid emanated from appellant's sexual organ and onto her body. K.I. said appellant cleaned the fluid with a towel and told her to get dressed. K.I. said appellant acted as if nothing happened, and he told K.I. not to tell anyone. K.I. said she was scared and was unsure whether the behavior was appropriate. K.I. said she had never been touched like that before.

K.I. testified that other incidents occurred when she was between seven and nine years of age. She said she could not remember every incident but estimated that she was touched between 30 and 40 times. She said the touching occurred two to four times every two weeks. Appellant touched her posterior, breasts and vaginal area on a regular basis. She said appellant did not remove her clothing when he touched her at her house. She also said the touching occurred under her clothing and while others were not around. K.I. said the touching when she was seven and eight years of age occurred during the summer months.

K.I. testified the touching continued when she was nine years old. After the death of K.I.'s grandmother, appellant began inviting K.I.'s family over to his house for barbecues. K.I. said appellant started pressing his sexual organ against her vaginal area. Around Christmas time, he touched K.I. while K.I.'s mother was watching television. On

one occasion around Easter, K.I. came out of the bathroom and appellant touched her posterior and breasts. K.I. indicated that appellant's conduct was skin-to-skin. When K.I. tried to decline appellant's advances, he would say everything was going to be okay.

K.I. said her encounters with appellant changed for the worse when she turned nine, during which time she estimated that appellant inappropriately touched her 15 to 20 times. K.I. said appellant's conduct changed again when she was 10 years old. She said appellant started to place his sexual organ in her body and would also engage in oral/genital contact. These incidents took place in his trailer, and K.I.'s mother did not know what was happening. K.I. said her mother did visit appellant's home at that time but appellant was careful not to touch K.I. in her mother's presence. K.I. said appellant continued to tell her not to tell anyone.

K.I. said appellant's inappropriate sexual behavior continued when she was age 11 and 12. She said appellant started giving her money when she was 12, and he also made purchases for her. She estimated that he touched her in a sexual manner between 10 and 15 times when she was age 12 and said the encounters occurred when "[i]t was going summer to winter." K.I. said when she turned 13, appellant gave her money and bought clothes for her. He would give her different amounts of cash, depending upon what he had in his pocket. Appellant would give her the money after engaging in sexual contact with K.I. and then drop her off at her own home. K.I. said appellant unsuccessfully attempted to orally copulate her on several occasions when she was 13. When K.I. was 13, appellant touched K.I.'s breasts in the storage area near his trailer.

Sometime between Halloween and Christmas, when K.I. was 13, she, her brother, and her mother were at appellant's trailer. K.I.'s mother went to the bathroom, and appellant quickly touched K.I.'s private area and had her touch his sexual organ. K.I. said appellant's sexual behavior continued when she was between 14 and 17 years of age. She said he engaged in sexual activity with her 70 to 80 times during that period. K.I.

said that by the time she turned 16, she started feeling “weird,” “guilty,” and “nasty.” She experienced nightmares and felt “sad for myself, ashamed.” She also said that she “was scared that nobody was going to believe me, and I was scared of him, you know.” K.I. also said that when she turned 15 or 16, appellant’s attitude changed because he would regularly want to engage in genital intercourse. When K.I. resisted, he would verbally pressure her. K.I. said appellant told her he had been with other teenage girls.

K.I. said the last incident in which appellant touched her occurred before she turned 18. Appellant picked her up from school and took her to his house. She said appellant would often pick her up from school an hour before classes started and then bring her back to the campus for the start of the school day. On this occasion, K.I. and appellant both undressed and engaged in kissing and touching. Shortly after that encounter, K.I. saw a video at school about teenage sexual abuse. K.I. spoke to a female teacher, who in turn took K.I. to a counselor. The counselor contacted police, and the responding officer took K.I. to meet with Kern County Sheriff’s Detective Kim Millinder. K.I. told Detective Millinder about everything that had happened. Detective Millinder spoke to K.I. about doing a pretext telephone call with appellant to get him to admit his past behavior.

During a March 11, 2010, pretext call, appellant told K.I., “I want to hug you, kiss you, kiss your beautiful breasts that you have” He also said, “[T]here are others there [*sic*] that have been with me but I love you more.” Appellant acknowledged touching K.I. with his sexual organ when she was eight or nine years old. He said, “Yes, mija, I just touched you down there with it. I didn’t put it in. I just had it there against you ... you said it felt good.” Appellant said at one point, “You didn’t tell me to put it in you or I would have. I want you to tell me you want it” Appellant told K.I. she was “real hot” and “very tasty.”

Detective Kim Millinder testified that K.I. provided her with an address for appellant. Kern County Deputy Sheriff Alfred Juarez testified that he and other deputies placed appellant under arrest in East Bakersfield on March 12, 2010. Deputy Juarez said he interviewed K.I. on the same date, and she told Juarez that appellant had molested her 30 to 40 times between January 1, 2010, and the date of his arrest. Juarez said K.I.'s mother was present during his interview with K.I.

Michael Musacco, Ph.D., a clinical psychologist, testified about Child Sexual Abuse Accommodation Syndrome (CSAAS). Dr. Musacco testified that CSAAS consists of five stages – secrecy, helplessness, accommodation, delayed disclosure, and retraction. Dr. Musacco acknowledged he did not review any police reports of the case or talk with K.I. or appellant before testifying.

Defense Evidence

Cornie Hafeli testified that she lived across from appellant in a Bakersfield-area trailer park and that they had been neighbors for seven years. She said she had never seen appellant alone with children or teenage girls at his trailer. Robert Williams said he was a neighbor of appellant at the trailer park for over two years and had never seen appellant in the company of young children or females. Williams said he did not see a female teenager go into appellant's trailer on multiple occasions between January and March 2010.

Yolanda Valencia, appellant's daughter, said she, her husband, and her son lived in appellant's trailer for about seven months. Yolanda and her family stayed in the trailer about two years before the trial. Yolanda said her father did hold barbecues at his trailer and that she was present during such gatherings. Yolanda remembered K.I., her mother, and her brother at appellant's trailer on one occasion.

Deputy Sheriff Juarez testified he went to East Bakersfield High School on March 11, 2010, to investigate K.I.'s allegations. Juarez met with K.I. and her mother. K.I. told

Juarez that appellant had molested her several hundred times since she was seven years old. K.I. also told Juarez that appellant had molested her 30 to 40 times since January 2010. K.I.'s mother told Juarez that "appellant has to be made to pay." Juarez said Detective Millinder took over the investigation from him.

After appellant's arrest, Kern County Sheriff's Detective Abel Lombera² accompanied Detective Millinder to an apartment on Oregon Street for an interview with K.I.'s mother. Detective Lombera said Millinder conducted the interview and provided Spanish-to-English translation.

K.I.'s mother testified that she had two sons and one daughter, K.I. She said K.I. was the middle child. K.I.'s mother said appellant would invite her and her family to eat at his home on Christmas or other occasions. K.I.'s mother said she knew appellant for more than 10 years, trusted him during that period of time, and said he seemed like a "decent and a good person." K.I.'s mother first learned of the alleged abuse when she was called to K.I.'s school, East High School, in March 2010. K.I.'s mother said she was shocked and angry because appellant took advantage of her family's trust.

Detective Millinder testified that she interviewed both K.I. and her mother regarding the events of the preceding 10 to 12 years. Millinder said she arranged for the pretext call between K.I. and appellant on March 11, 2010, and noted that appellant was arrested on March 12, 2010. Millinder said she interviewed K.I. and her mother again on March 16 to get a few more details. Millinder said she and Detective Lombera participated in the March 16 interview.

Appellant testified on his own behalf. He said he developed a close relationship with K.I.'s mother and her family. K.I.'s mother would call him occasionally, and he

² The court reporter at trial spelled Detective Lombera's given name as "Able." !(RT 563)! In preparing the applicable minute order, the clerk of court spelled Detective Lombera's given name as "Abel." We will use the more familiar spelling, "Abel."

would give them a ride to the store because they did not have a car. Appellant said this did not occur when K.I. and her siblings were little. Appellant said K.I. and her siblings were between 10 and 12 years of age when they would visit. Appellant said he never sexually touched K.I. but did give her mother money because the family was poor, and appellant liked to help them. Appellant also said he began giving K.I. money in 2010, when she was a teenager.

Appellant said he considered the pretext call a “setup” and said K.I. spoke provocatively because “she wanted to feel good.” Appellant admitted that he twice engaged in sexual touching with K.I. in early March 2010. Appellant implied that on the first occasion, K.I. came to his home and disrobed first, inviting the sexual encounter. Appellant admitted driving K.I. to school many times in 2010. Appellant admitted touching K.I. but said he never had sexual intercourse with her. Appellant also said that K.I. asked him to engage in unprotected intercourse with her and a girlfriend. Appellant said K.I. became angry when he declined her invitation and “then she reported me immediately.” Appellant said he cannot have sex due to medical problems. Appellant said he lied when he told K.I. during the pretext call that he wanted to have intercourse with her. Appellant said he was also lying when he made various other sexual statements during the pretext call.

Appellant testified that he had an interview with law enforcement officers on March 12, 2010. Appellant told the officers that K.I. was a family friend and that she and her family would come to his home once in awhile. Appellant denied taking advantage of K.I. from the time she was seven years old. Appellant said K.I. used to flirt around with him, borrow small sums from him, and ask him for rides.

Rebuttal Evidence

Kern County Sheriff’s Detective Adrian Olmos testified that he assisted Detective Millinder in interviewing appellant after his arrest. Detective Olmos said that appellant

initially said he was going to pick up K.I. to take her to school on March 12, 2010. Olmos said appellant later changed his story to say he was going to take her to eat. Olmos said that during the interview, appellant admitted placing his tongue on K.I.'s breasts and her vaginal area and doing so a year earlier. He also said he rubbed the outside of her vaginal area with his sexual organ, but denied any penetration. Appellant told the two detectives that K.I. had touched his sexual organ. At some point, appellant said it was K.I.'s fault. However, appellant also admitted that he intended to have sex with K.I.

DISCUSSION

I. THE TRIAL COURT DID NOT MISSTATE THE BURDEN OF PROOF FOR CONVICTION BY GIVING CALJIC NOS. 2.50.01, 2.50.1, AND 2.50.2.

Appellant contends the trial court misstated the burden of proof necessary for conviction by giving CALJIC Nos. 2.50.01 [“evidence of other sexual offenses” (Evid. Code, § 1108)], 2.50.1 [“evidence of other crimes by the defendant proved by a preponderance of the evidence”], and 2.50.2 [“definition of preponderance of the evidence”].

A. The Challenged Instructions

CALJIC No. 2.50.01, as read to the jury, states:

“Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. Sexual offense means a crime under the laws of the state or of the United States that involves any of the following: Any conduct made criminally [*sic*] by Penal Code Sections 288.5(A), 288(A), and 288(A)(B)(1).

“The elements of these crimes are set forth elsewhere in these instructions. If you find that the defendant committed a prior sexual offense, you may, but are not required to infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to infer that he was likely to commit and did commit the crime or crimes of which he is accused.

“However, if you find by preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider along with all other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime. You must not consider this evidence for any other purpose.”

“Within the meaning of the preceding instruction, if the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed sexual offenses other than those for which he is on trial, you must not consider this evidence for any purpose unless you find by a preponderance of the evidence that the defendant committed the other sexual offenses.

“If you find other sexual offenses were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before Defendant can be found guilty of any crime charged or any included crime in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime.

CALJIC No. 2.50.2, as read to the jury, states:

“Preponderance of the evidence means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. You should consider all of the evidence bearing upon every issue regardless of who produced it.”

B. The Parties' Specific Contention

Appellant contends the court admitted Evidence Code section 1108 evidence of uncharged acts over his objection, the jury was not instructed as to which body of evidence related to the charged acts and which body of evidence related to the uncharged acts, and that the jurors “were left, unguided, to review any part of the evidence with the preponderance standard.” Respondent agrees “it may have been a mistake for the

prosecutor to obtain admission of evidence of uncharged sex crimes against K.I., and to have the jury instructed on his burden of proving such crimes by a preponderance of the evidence, without ever identifying which alleged crimes described by K.I. were charged, and which were uncharged.” Respondent nevertheless “submits that, under the facts of the case, appellant was not prejudiced by the giving of instructions on uncharged sex crimes and the standard of proving such crimes.”

C. Governing Law

In *People v. Falsetta* (1999) 21 Cal.4th 903, the Supreme Court rejected a due process challenge to Evidence Code section 1108, which allows evidence of a defendant’s uncharged sex crimes to be introduced in a sex offense prosecution to demonstrate that the defendant’s disposition to commit such crimes. In *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*), the Supreme Court held a modified 1999 version of CALJIC No. 2.50.01, somewhat similar to the version given in this case, correctly states the law. (*Reliford, supra*, 29 Cal.4th at p. 1009.) CALJIC Nos. 2.50.01, 2.50.1, and 2.50.2 are appropriate instructions on the jury’s consideration of propensity evidence admitted pursuant to Evidence Code section 1108. (*People v. Reliford, supra*, 29 Cal.4th at pp. 1012-1016.) The Supreme Court has expressly approved CALJIC No. 2.50.1, summarily rejecting the argument defendant now asserts. (*People v. Medina* (1995) 11 Cal.4th 694, 763-764.) Accordingly, defendant’s present attack on the instruction is foreclosed. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) CALJIC Nos. 2.50.01, 2.50.1, and 2.50.2 are the appropriate instructions on the jury’s consideration of propensity evidence admitted pursuant to Evidence Code section 1108. (*Reliford, supra*, 29 Cal.4th at pp. 1012-1016; *People v. Carpenter* (1997) 15 Cal.4th 312, 381-382.) To the extent appellant is contending that CALJIC Nos. 2.50.01, 2.50.1, and 2.50.2 misstate the law, his contention must be rejected in light of the foregoing authorities.

To the extent appellant is contending the jury misunderstood or misapplied the instructions as given, his contention must again be rejected. The court instructed the jury on the prosecution's burden of proving the charged offenses beyond a reasonable doubt. That burden of proof was reflected in CALJIC No. 2.01 ["sufficiency of circumstantial evidence – generally"], CALJIC No. 2.90 ["presumption of innocence – reasonable doubt – burden of proof"], CALJIC NO. 10.42.6 ["continuous sexual abuse of a child" (§ 288.5, subd. (a))], CALJIC No. 10.67 [belief as to age – unlawful oral copulation], CALJIC No.17.10 ["conviction of lesser included or lesser related offense – implied acquittal – first"], and CALJIC No. 4.71.5 ["when proof must show specific act or acts within time alleged"].

CALJIC No. 2.50.01 clearly advised the jury that it related to evidence introduced for the purpose of showing that appellant engaged in a sexual offense on more than one occasion *other than that charged in the case*. CALJIC No. 2.50.1, while defining the term "preponderance of the evidence" within the meaning of CALJIC No. 2.50.01, reminded the jury that "before a defendant can be found guilty of any crime charged or any included crime in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime." In their respective arguments, both counsel discussed the prosecutor's burden of proving the charged offenses beyond a reasonable doubt.

"In reviewing claims of instructional error, we look to whether the defendant has shown a reasonable likelihood that the jury, considering the instruction complained of in the context of the instructions as a whole and not in isolation, understood that instruction in a manner that violated his constitutional rights. [Citations.] We interpret the instructions so as to support the judgment if they are reasonably susceptible to such interpretation, and we presume jurors can understand and correlate all instructions given. [Citations.]" (*People v. Vang* (2009) 171 Cal.App.4th 1120, 1129.)

The instructions given in this case clearly delineated the prosecution's burden of proof beyond a reasonable doubt with respect to the charged offenses and reversal for alleged instructional error is not required.

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY FAILING TO GRANT A MISTRIAL AFTER THE DEFENSE LEARNED OF A MARCH 16, 2010, REPORT CONTAINING EXCULPATORY INFORMATION.

Appellant contends the trial court deprived him of his federal constitutional rights to due process and fundamental fairness by refusing to grant a mistrial arising from a discovery violation by the prosecution.

A. Procedural History

On September 1, 2010, Detective Kim Millinder testified during the defense case. (RT 501-502) Early in her testimony, Detective Millinder testified that he had met with K.I. and her mother on two occasions and wrote a report of the second interview. Defense counsel described the report as a two-page document relating to an interview conducted by Detective Millinder on March 16, 2010. Counsel also said the pages were numbered "15 of 15 and 16 of 16." During a recess outside the presence of the jury, Deputy District Attorney Wilson advised the court that he was unaware of the report until that morning. Wilson explained, "[W]hen Defense asked for a sidebar, we approached. Immediately thereafter, I contacted my investigator, asked that he locate [K.I.'s mother] and we're bringing her into court today, and she's present." Deputy Public Defender Castro then moved for a mistrial. He explained the report came to light during his examination of Detective Millinder, he was surprised by the exculpatory content of the report, he noted that Wilson was previously unaware of the report, and he suggested that the report predated the preliminary hearing.

Castro maintained the absence of the report was prejudicial to the defense because the report "would have been very, very useful in rebutting the People's charges" at the

time of the preliminary hearing. Castro further argued that “forcing the trial to continue” would deprive his client of due process under the California and United States Constitutions. Counsel noted that his motion in limine number six required the prosecution to provide all notes and/or statements from law enforcement that had not previously been provided to the defense. Castro explained that he set forth his trial strategy in his opening statement and the missing report would have caused him to revise that strategy. He explained the contents of the report “throws my whole theory of the case upside down in a [sense] that I have made certain representations ... to the jury, and this information here is not consistent with what I would have said to them had I known this information was available.”

In her statement to police, K.I.’s mother said she would usually go with appellant and K.I. when appellant would take K.I. out to eat. K.I. testified that her mother let her go alone with appellant from the time she was between 7 and 14 years of age. K.I.’s mother said she let her daughter go to the store with appellant only once, and that occurred when K.I. was 15. She also said appellant had taken K.I. out to eat by herself on one occasion, and that occurred when K.I. was 16. K.I.’s mother also told Millinder that from the time K.I. was 16, appellant took K.I. out by herself for about one hour at a time and they would visit a store on those one-hour trips.

Castro also maintained he would have taken a different approach in examining K.I. had he been aware of the allegedly exculpatory statements in the report. Counsel claimed the late discovery constituted error under *Brady v. Maryland* (1963) 373 U.S. 83, was prejudicial because the report could not be used at the preliminary hearing and required him to “reinvent” his defense strategy on appellant’s behalf. The prosecutor agreed the report “should have been discovered.” However, he pointed out that both the prosecution and defense learned of the existence of the report at the same time and that

any error did not rise to the level of requiring a mistrial. He noted the defense still had the opportunity to examine witnesses and to convey pertinent information to the jury.

After hearing the arguments of counsel, the court found there was an untimely disclosure of the two-page report and noted there was no evidence that the failure to disclose was willful or intentional. The court denied appellant's motion for mistrial. The court concluded that appellant's right to a fair trial could be satisfied with a brief continuance so that defense counsel could be better prepared. The court observed that the prosecutor and Detective Millinder had made efforts to locate and arrange for the presence of several pertinent witnesses, including K.I.'s mother, Detective Juarez, and Detective Lombera. To the extent that defense counsel questioned whether K.I. and her mother had conversations during the trial, the court noted that it could conduct an Evidence Code section 402 hearing to discover the extent of such conversations, if any. The court also indicated that it was prepared to instruct the jury consistent with CALJIC No. 2.28 about the failure to timely disclose evidence.

After hearing the arguments of counsel, the court granted the defense until the next morning to prepare. The court had the jurors convene in the courtroom, explained that unexpected circumstances had arisen, and declared a recess until the following morning. After the jurors departed, the court and counsel conducted an Evidence Code section 402 hearing and questioned K.I.'s mother about her communications with K.I. during the course of appellant's trial and also questioned K.I.'s mother about her knowledge of K.I.'s interviews with police in March 2010. Counsel also questioned K.I. about her communications during the trial, and she said she followed the court's instructions and did not talk to her mother about the case. After K.I. testified, the court heard further arguments of counsel regarding the proposed mistrial and denied the defense motion, finding there was no "prejudice that would deny the defendant a fair trial."

At the conclusion of the Evidence Code section 402 hearing, appellant renewed his request for a mistrial. His counsel claimed that the story of K.I.'s mother had changed over a lunch break and suggested that mother and daughter violated the court's order precluding witnesses from speaking with one another. The prosecutor maintained the mother was confused about the time frame to which defense counsel was referring in his questions. The trial court denied the motion again, agreeing with the prosecution that "it was possible the witness was confused as to what period of time our questions were focused on." The court also noted that K.I.'s mother could be "impeached following the normal rules of evidence and procedure" and "[t]o the extent that there may be any evidence that the mother discussed the case with her daughter after the daughter testified, counsel can present that evidence to the jury, and then that will be a fact for the jury to consider as to whether that would [a]ffect the credibility of either of the witnesses or to [a]ffect the weight ... of the testimony." The trial continued with testimony by Detective Abel Lombera, Detective Millinder, K.I.'s mother, Deputy Sheriff Alfred Juarez, the appellant, and Detective Adrian Olmos. At the end of all the evidence, the court instructed the jury in CALIC No. 2.28 [failure to timely disclose evidence (§ 1054.5, subd. (b))].

B. Appellant's Specific Contention

Appellant contends the trial court erroneously denied his motion for mistrial based upon the prosecution's failure to provide discovery, claiming among other things: (1) the prosecutor had no legitimate explanation for not discovering the statement; (2) the statement of the mother of K.I. was key to the formulation of a defense and did not arise until after the prosecutor had presented the case-in-chief; (3) the statement surfaced at trial due to the questioning by defense counsel; (4) defense counsel did not have an opportunity to develop his opening statement and trial strategy in light of that statement; (5) K.I.'s mother was "less than straight-forward when testifying during the Evidence

Code section 402 hearing about her discussion of K.I.'s testimony at trial; and (6) appellant was given only a brief continuance, i.e., an afternoon, to readjust his trial strategy.

C. Governing Law

A trial court should grant a motion for mistrial “only when ‘ “a party’s chances of receiving a fair trial have been irreparably damaged” ’ ” (*People v. Ayala* (2000) 23 Cal.4th 225, 282), that is, if it is “apprised of prejudice that it judges incurable by admonition or instruction. [Citation.]” (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) “Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]” (*Ibid.*) Accordingly, we apply an abuse of discretion standard when reviewing a trial court’s ruling on a motion for mistrial. (See *People v. Valdez* (2004) 32 Cal.4th 73, 128.)

Applying these standards, we conclude the trial court did not abuse its discretion in denying the mistrial motion. Respondent concedes a discovery violation occurred and that information in Detective Millinder’s report was not timely supplied to the defense prior to the start of trial. Respondent correctly points out that the defense was able to present the information from Millinder’s report to the jury, the court instructed the jurors on the discovery violation and its impact on the prosecution and defense pursuant to CALJIC No. 2.28, and appellant’s trial counsel discussed at length the impact of the late discovery during closing argument. Respondent acknowledges that the defense considered K.I.’s mother “less than straight-forward.” However, respondent maintains it is equally likely that K.I.’s mother was confused by defense questioning. Respondent points out that defense counsel was allowed to confront and impeach K.I.’s mother with testimony she gave at the Evidence Code section 402 hearing. The court granted appellant’s counsel a continuance until the following morning, as requested by counsel.

In granting the continuance, the court noted that “the alleged victim is subject to recall.” Defense counsel vigorously questioned Detective Millinder during the defense case and sought to highlight inconsistencies between the People’s case-in-chief and Millinder’s newly-discovered report.

A motion for mistrial should be granted only if the trial court is informed of the existence of prejudice and it judges the prejudice to be insusceptible of being cured by admonition or instruction. (*People v. Lucero* (2000) 23 Cal.4th 692, 713-714.) In view of the steps taken by the trial court, including the giving of CALJIC No. 2.28 as explained in further detail in issue III, *post*, the denial of the motion for mistrial did not constitute an abuse of discretion in this case.

III. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY GIVING CALJIC NO. 2.28 [FAILURE TO TIMELY DISCLOSE EVIDENCE].

Appellant contends the trial court committed reversible error by denying his motion for mistrial and instead giving the CALJIC No. 2.28 instruction after learning of a March 16, 2010, report by Detective Millinder.

A. Challenged Instruction

At the conclusion of the trial, the court instructed the jury in CALIC No. 2.28 as follows:

“The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial, so as to promote the ascertainment of the truth, save court time and avoid any surprises which may arise during the course of the trial.

“Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the noncompliant party’s evidence. Disclosures of evidence are required to be made at least 30 days in advance of trial. If new evidence is discovered within 30 days of trial, it must be disclosed immediately.

“In this case, the People failed to timely disclose the following evidence: The two-page report by Detective Millinder concerning the March 16th, 2010 interview of [appellant’s mother], although, the People’s failure to timely disclose ... evidence was without lawful justification, the Court has under the law permitted the production of this evidence during the trial.

“If you find that the delayed disclosure was by the prosecution and relates to a fact of importance rather than something trivial, and does not relate to subject matter already established by other credible evidence, you may consider that delayed disclosure in determining the believability or weight to be given to that particular evidence.”

B. Appellant’s Specific Contention

Appellant contends CALJIC No. 2.28 as given to the jury was erroneous because Detective Millinder’s interview with K.I.’s mother, which was the subject of the newly-discovered two-page report, “was in fact exculpatory, in light of her statement that she did not allow her daughter, K.I. to go with appellant alone, and had only allowed her to do so on one occasion when she was 16 years old. That disclosure completely contradicted K.I.’s testimony that she was molested several times at appellant’s trailer, and had been taken there on the premise that appellant was taking her out to eat. The instruction, as given, actually exacerbates the discovery violation because it is subject to the interpretation that the jury can consider the late discovery to discount the non-disclosed evidence.... [¶] ... [¶] The instruction should have been modified so as to state that the jury could consider the delayed disclosure in determining the believability of the claims made by the complaining witness, K.I.”

C. Analysis

CALJIC No. 2.28, as given to the jury, cited the failure of the People to timely disclose evidence. As respondent points out on appeal, the instruction as given did not inform the jury that it could discount or reject the exculpatory portion of K.I.’s mother’s statement to Detective Millinder. CALJIC No. 2.28, as given, simply advised the jurors that they could consider the prosecution’s discovery violation when determining the

weight or believability of evidence relating to a fact of importance, thus enhancing the exculpatory value of that evidence. Finally, appellant's trial counsel argued at length about the adverse impact of the late discovery on the presentation of his client's defense.

The trial court did not commit reversible error by giving CALJIC No. 2.28.

IV. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY DENYING ADMISSION OF EVIDENCE OF K.I.'S PRIOR COMPLAINTS OF MOLESTATION AGAINST A THIRD PARTY.

Appellant contends the trial court denied him of his right to present a defense by erroneously denying admission of evidence of K.I.'s prior complaints of molestation against a third party.

A. Procedural History

On August 24, 2010, the prosecution filed a written motion in limine noting that “[d]uring the course of [K.I.’s] interview with Detective Millinder, the victim referenced being abused by another individual she identifies as Jesse.” The prosecution moved to exclude any reference to Jesse or any acts he may or may not have committed against K.I. The prosecution argued: “The only purpose for introducing that evidence would be to improperly attempt to damage the credibility of the victim in the eyes of the jury without any evidentiary foundation.” The prosecution further requested that the court preclude such evidence or questioning absent defense compliance with Evidence Code section 782 [procedure to determine relevancy of sexual conduct evidence proposed to attack credibility of complaining witness].

On August 25, 2010, the court conducted a contested hearing on the motion in limine, which the court referred to as “People’s Motion No. 7.” The court “expressed a tentative [ruling] that Evidence Code Section 782 must be complied with unless [the defense] can argue that you are offering evidence that would be an exception to those [statutory] requirements.” Defense counsel maintained the “issue relating to Jesse” did not come within Evidence Code section 782 because the code section only applies where

the defense is attempting to introduce the victim's prior sexual conduct. According to counsel, the defense was attempting to introduce evidence to show that K.I. lacked the ability to recollect, was confused, or was attributing to appellant the molestation committed by Jesse. In response, the prosecutor pointed out that the defense had no documentary evidence to show that K.I.'s statement was "demonstrably false," as required by Evidence Code section 782.

After hearing the respective arguments of counsel, the court ruled:

"I do find that the provisions of Evidence Code Section 782 are applicable as to the allegation that the alleged victim had prior sexual contact at an early age with a person named Jesse. I do find that the statutory intent in enacting Evidence Code Section 782 was to require some showing be made before the Court would allow the ... alleged victim to be examined further with regard to her alleged sexual history.

"And for the reasons that it's being offered I am exercising my discretion also to find that the evidence that the alleged victim did or did not have sexual conduct with a person named Jesse would have dubious relevance to her credibility as to the allegations that this defendant engaged in sexual conduct with her over an extensive period of time, starting at age – I believe we said six? ... And continuing through to the ages of [17]. [¶] ... [¶]"

On direct examination, K.I. testified about a sexual encounter with appellant and said appellant "was the first guy, you know. I was pretty small. I didn't know nothing." The prosecutor asked, "If I understand you right, you didn't really know what it was?" K.I. replied, "Huh-uh. Not at all, sir." The prosecutor then asked, "And you said no one had ever touched you like that before?" She replied, "No, sir." On cross-examination, defense counsel asked, "Now [K.I.], you said nobody had done this to you before. And Mr. Wilson [deputy district attorney] said nobody has ever done this to you before. Is that correct? [¶] That's what you told him. No, nobody has. Is that correct?" K.I. responded, "What do you mean by that? Like no what?" At that point, the court conducted an unreported sidebar and advised on the record, "We will make a record on

the Court's ruling at sidebar. You have preserved that for the record, Mr. Castro [defense counsel]."

After the examination of K.I. was completed, the following exchange occurred outside the presence of the jury:

"THE COURT: ... Mr. Castro, you did ask at sidebar to be allowed to cross-examine this witness with regard to the allegation that she had had sexual contact with a man named Jesse. Why don't you make a brief record on that request.

"MR. CASTRO: Your Honor, the People made an in limine motion to exclude reference to a Jesse. The victim in this case has acknowledged to two investigating officers that she had a prior molestation experience by a gentleman by the name of Jesse. And within the testimony or her statements she said that these things were happening or seemed to have happened concurrent. And it was my intent to question her about Jesse to see if she was mistaken as to which individual at those early years was the one that's actually molesting her. It wasn't to introduce evidence that she is encouraging or more likely to engage in sexual activity herself. It was simply to question her recollection, ability to recollect, or to impeach her if it was a false statement and it wasn't correct. So those were the reasons why I had meant to ask her about that. [¶] ... [¶]

"Within her testimony on Friday she volunteered, in the People's direct examination, that it had never happened to her before, it was all a surprise to her, and she went into some detail about that. And then that may have been a slip. But then Mr. Wilson specifically asked her. He said you have never been molested before, you have never, in those words in his examination, direct examination, and then she said no.

"That, in my mind, opens up the door to impeach her on that. Because she has been molested. She's lying on the witness stand. She is saying it never happened. He asked her specifically has it happened. She denied it. And we have this whole history. And I set it up for that when I asked the Court if I may approach, because I believe he opened the door. And I wanted to clarify that and impeach her on those false statements.

"THE COURT: Mr. Wilson.

"MR. WILSON: Your Honor, I don't think this rises to the level that it's a false accusation against Jesse. I think the testimony was it never

happened before that. We have limited information as to when Jesse engaged in any behavior against the victim. And I don't think this changes or opens the door....

“THE COURT: And I did make my ruling already. I reconsidered your request to allow you to go into that. And I found that you had not persuaded the Court to reconsider my earlier decision based upon the subsequent events. I found, under [Evidence Code section] 352, that the probative value was still substantially outweighed by the prejudicial effect. It's excluded.”

B. Appellant's Specific Contention

Appellant contends he was attempting to attack K.I.'s credibility and not “demonstrate consent or a character to engage in sexual conduct.” He claims the trial court's ruling deprived him “of his right to defend against the several claims made by the witness that, due to their general nature, were highly difficult to defend against.” Appellant maintains the trial court's ruling denied him of his right to present a defense under article I, section 15 of the California Constitution and under the Sixth and Fourteenth Amendments to the U.S. Constitution and that reversal is required.

C. Governing Law

Evidence Code section 782 requires a defendant seeking to introduce evidence of the witness's prior sexual conduct to file a written motion accompanied by an affidavit containing an offer of proof concerning the relevance of the proffered evidence. (Evid. Code, § 782, subs. (a)(1), (2).) The trial court is vested with broad discretion to weigh a defendant's proffered evidence, prior to its submission to the jury, “and to resolve the conflicting interests of the complaining witness and the defendant.” (*People v. Rioz* (1984) 161 Cal.App.3d 905, 916.) “[T]he trial court need not even hold a hearing unless it first determines that the defendant's sworn offer of proof is sufficient.” (*Ibid.*; see § 782, subd. (a)(2).)

If the offer of proof is sufficient, however, the court must conduct a hearing outside the presence of the jury and allow defense counsel to question the complaining

witness regarding the offer of proof. (Evid. Code, § 782, subd. (a)(3); *People v. Fontana* (2010) 49 Cal.4th 351, 365-368.) “The defense may offer evidence of the victim’s sexual conduct to attack the victim’s credibility if the trial judge concludes following the hearing that the prejudicial and other effects enumerated in Evidence Code section 352 are substantially outweighed by the probative value of the impeaching evidence.” (*People v. Chandler* (1997) 56 Cal.App.4th 703, 708; see § 783, subd. (a)(4).)

Evidence Code section 782 has been found to apply where the defense seeks to introduce relevant evidence of prior sexual conduct by a child. (*People v. Daggett* (1990) 225 Cal.App.3d 751, 757.) As applied in child molestation cases, Evidence Code section 782 is designed to protect persons complaining of molestation from “embarrassing personal disclosures” unless the defense is able to show in advance that the witness’s sexual conduct is relevant to his or her credibility. (*People v. Harlan* (1990) 222 Cal.App.3d 439, 447; *People v. Bautista* (2008) 163 Cal.App.4th 762,782.) The term “sexual conduct,” as used in Evidence Code sections 782 and 1103, encompasses any behavior that reflects the complaining witness’s “willingness to engage in sexual activity.” The term should be broadly construed and, “[j]ust as a prior false accusation of rape is relevant on the issue of a rape victim’s credibility, a prior false accusation of sexual molestation is equally relevant on the issue of a molest victim’s credibility.” (*People v. Franklin* (1994) 25 Cal.App.4th 328, 334-335, fn. omitted.)

In prosecutions for various sexual offenses, including rape, Evidence Code section 1103 prohibits a defendant from introducing opinion evidence, reputation evidence, or evidence of specific instances of the complaining witness’s (alleged victim’s) sexual conduct in order to prove consent, other than such conduct with the defendant. (Evid. Code, § 1103, subs. (c)(1), (3), (6).) “In adopting this section the Legislature recognized that evidence of the alleged victim’s consensual sexual activities with others has little relevance to whether consent was given in a particular instance. [Citation.]” (*People v.*

Chandler, supra, at p. 707.) The statute does not, however, render inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Evidence Code section 782. If the prosecutor introduces evidence, or the complaining witness testifies, concerning his or her sexual conduct, the defendant may cross-examine that witness on the subject and may offer relevant rebuttal evidence (Evid. Code, § 1103, subd. (c)(4), (5)). In other words, “[w]hile strictly precluding admission of the victim’s past sexual conduct for purposes of proving consent, Evidence Code section 1103, subdivision (c)(4), allows the admission of evidence of prior sexual history relevant to the credibility of the victim.” (*People v. Chandler, supra*, at p. 707.) “... California courts have not allowed the credibility exception in the rape shield statutes to result in an undermining of the legislative intent to limit public exposure of the victim’s prior sexual history. [Citations.] Thus, the credibility exception has been utilized sparingly, most often in cases where the victim’s prior sexual history is one of prostitution. [Citations.]” (*Id.* at p. 708.) Where a defendant offers no credible evidence that the complaining witness previously made false accusations of molestation, the trial court does not abuse its discretion in excluding evidence of such previous accusations. (*People v. Waldie* (2009) 173 Cal.App.4th 358, 364.) We review the court’s rulings on admissibility of evidence for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) The court abuses its discretion if its decision exceeds the bounds of reason. (*People v. Beames* (2007) 40 Cal.4th 907, 920.)

D. Analysis

Evidence Code section 1103, subdivision (c)(4) provides that if a complaining witness gives testimony that relates to his or her “sexual conduct,” the defense may cross-examine the witness and offer relevant evidence limited to the rebuttal of that testimony. “Sexual conduct” means behavior that reflects the complaining witness’s “willingness to engage in sexual activity,” as required by Evidence Code section 782. (*People v.*

Franklin, supra, 25 Cal.App.4th at p. 334.) Appellant’s innuendo that K.I. was molested at a young age by a person named Jesse did not necessarily clearly reflect a “willingness” on K.I.’s part to engage in sexual activity. Appellant nevertheless contends the trial court’s exclusionary ruling denied him his constitutional right to present a defense. “Application of the ordinary rules of evidence generally does not deprive a criminal defendant of the opportunity to present a defense [citation]...” (*People v. Snow* (2003) 30 Cal.4th 43, 90.)

The trial court did not abuse its discretion in precluding appellant from inquiring into K.I.’s relationship or contacts with a third party named Jesse.

V. THE TRIAL COURT DID NOT ERRONEOUSLY RULE THAT THE EVIDENCE OF PRIOR CLAIMS OF MOLESTATION WAS INADMISSIBLE UNDER EVIDENCE CODE SECTION 352.

Appellant contends the trial court committed reversible error by excluding evidence of K.I.’s prior claims of molestation.

A. Evidentiary Ruling

The court heard the arguments of counsel with respect to motion in limine number seven regarding K.I.’s alleged sexual conduct with a person named Jesse when she was seven or eight years of age. After reading and considering the motion and hearing the arguments of counsel, the court ruled:

“So under all the circumstances I am exercising my discretion. I am concluding that the balance between probative value and prejudicial effect weighs in favor of excluding any evidence that the alleged victim had sexual conduct or lied about sexual conduct with a person named Jesse.

“So under [Evidence Code section 352] I am finding the prejudicial effect substantially outweighs any probative value of that evidence. And the Motion No. 7 is granted, meaning we are excluding evidence of any alleged sexual conduct with a person named Jess or any other third person.”

B. Appellant's Specific Contention

Appellant contends “the probative value of the evidence was significant while its prejudicial effect was minimal at best.” Appellant contends he sought to attack the credibility of K.I., the chief witness against him. He claims “[t]he evidence demonstrated that she had either lied under oath about never having been molested by anyone else, or had lied to police about the prior incident with Jesse.” According to appellant, the evidence was relevant on the issue whether a witness had committed misconduct, a consideration in evaluating the credibility of that witness’s testimony (CALCRIM No. 316). Appellant further contends the prosecution did not specify how the proffered evidence would have prejudiced its case. Appellant also characterizes the trial court’s explanation for its ruling under Evidence Code section 352 as “hollow.”

C. Governing Law

Evidence Code section 352 states:

“The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

The decision on the admission of past misconduct involving moral turpitude to impeach a witness in a criminal trial is subject to the trial court’s discretion under Evidence Code section 352. “The statute empowers courts ... from degenerating into nitpicking wars of attrition over collateral credibility issues.” (*People v. Wheeler* (1992) 4 Cal.4th 284, 295, 296.) Impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Courts should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value. (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 120-121.)

“ ‘ “The weighing process under [Evidence Code] section 352 depends upon the trial court’s consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules....” [Citation.]’ [Citation.]” (*Id.* at p. 121.)

Evidence Code section 354 states:

“A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

“(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;

“(b) The rulings of the court made compliance with subdivision (a) futile; or

“(c) The evidence was sought by questions asked during cross-examination or recross-examination.”

A trial court’s exercise of its discretion under Evidence Code section 352 “must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]” (*People v. Jordan* (1986) 42 Cal.3d 308, 316; accord *People v. Karis* (1988) 46 Cal.3d 612, 637 [such discretion “will not be disturbed on appeal absent a clear abuse, i.e., unless the prejudicial effect of the evidence clearly outweighs its probative value”]; *People v. Tran* (1996) 47 Cal.App.4th 759, 771 [“A trial court’s exercise of discretion under Evidence Code section 352 will not be reversed unless it ‘exceeds the bounds of reason, all of the circumstances being considered’ ”].)

D. Analysis

Our Supreme Court has recognized, “when ruling on [an Evidence Code] section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the

trial court understood and fulfilled its responsibilities under Evidence Code section 352. [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 153, 213-214; see also *People v. Waidla, supra*, 22 Cal.4th at p. 724, fn. 6 [disavowing language in earlier cases indicating trial court was required to weigh probative value against prejudice explicitly on the record].) Here, the trial court stated on the record that it found under Evidence Code section 352 that “the prejudicial effect substantially outweighs any probative value of that evidence.” This was procedurally sufficient.

As to the substance of the ruling, admission of the evidence of K.I.’s complaint against Jesse would have been of marginal probative value with respect to the issue before the jury – whether the numerous charged allegations against the appellant were true. Inquiry into K.I.’s complaints about Jesse would have required a mini-trial into the truth or falsity of K.I.’s statements. Such a mini-trial would have consumed time and created the substantial danger of undue prejudice, by confusing the issues and misleading the jury. This is particularly true where Jesse’s alleged molestation occurred when K.I. was six or seven years of age, and appellant’s multiple molestations occurred during that same span of time and continued in succeeding years.

Where a trial court’s ruling did not constitute a refusal to allow defendant to present a defense, but simply rejected evidence concerning the defense, the ruling does not constitute a violation of due process. The appropriate standard of review is whether it is reasonably probable the admission of the evidence would have resulted in a verdict more favorable to defendant. (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1317.) In this case, it is not reasonably probable that admission of evidence of K.I.’s claimed molestation by Jesse would have resulted in a verdict more favorable to appellant. The mere fact that K.I. claimed an earlier molestation would have done little or nothing to directly refute the multiple charges of sexual abuse against appellant. While the defense might have used evidence of the earlier claim to attack K.I.’s credibility, the trial court’s

exclusion of such evidence on Evidence Code section 352 grounds did not exceed the bounds of reason, all of the circumstances being considered. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658.) Exclusion of evidence of the earlier claim of molestation did not amount to a miscarriage of justice.

VI. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY ADMITTING THE PROSECUTION’S EXPERT EVIDENCE OF CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME.

Appellant contends the trial court committed reversible evidentiary error by admitting irrelevant evidence of “child sexual abuse accommodation syndrome” (CSAAS).

A. Challenged Testimony

On August 24, 2010, appellant filed a motion in limine to exclude evidence relating to CSAAS as “not relevant and overly prejudicial under [Evidence Code section] 352.” On that same day, respondent filed points and authorities requesting the admission of CSAAS evidence during the prosecution’s case-in-chief. On August 31, 2010, the court conducted an Evidence Code section 402 hearing on the motion in limine. Michael Musacco, Ph.D., a psychologist, testified as to his credentials, his work with criminal offenders, and the theory known as CSAAS. Dr. Musacco provided the history of the syndrome, described its parameters and phases, said it was “more of a theory” based on observations rather than research, and acknowledged that the syndrome was accepted in the psychological community as a valid explanation. On cross-examination, Dr. Musacco acknowledged that CSAAS is a theory and “[i]t’s not diagnostic of any particular mental disorder.” He further acknowledged that scientists cannot predict any particular response by a victim of sexual abuse.

After Dr. Musacco testified, the court heard the arguments of counsel. Defense counsel questioned the qualifications of Dr. Musacco with respect to child victims of sexual abuse. Counsel further questioned the prosecution’s basis for calling Dr. Musacco

as an expert witness and speculated that his potential testimony related to the fact that the sexual crimes were reported late. Counsel further speculated that CSAAS might be inapplicable to the victim's personal history. The prosecutor maintained the evidence was relevant and probative and designed to dispel common myths about child sexual abuse. The court then granted the prosecution's motion to allow the evidence and denied the defense motion to exclude the evidence of CSAAS. The court found the witness qualified as an expert to render an opinion on CSAAS and found the syndrome relevant to the issues in the case. The court noted the evidence was not going to be offered with regard to an opinion as to the specific facts of the case. Rather, the evidence would be offered to "explain how different children react or what common reactions are of children without specifically asking the witness hypotheticals related to this particular case." The court also found under Evidence Code section 352 that the evidence was probative and not substantially outweighed by its prejudicial effect.

Dr. Musacco subsequently testified at length before the jury. He initially set forth this education and experience as a psychologist and described his work as a private practitioner. After Musacco set forth his credentials and experiences, the court gave the jury the following admonition:

"With regard to this witness, evidence may be presented to you concerning Child Sexual Abuse Accommodation Syndrome. This evidence is not received and must not be considered by you as proof that the alleged victim's molestation claim in this case is true. Child Sexual Abuse Accommodation Syndrome research is based upon an approach that is completely different from that which you must take to this case. The syndrome research begins with the assumption that a molestation has occurred and seeks to describe and explain common reactions of children to that experience. As distinguished from that research approach, you are to presume the defendant innocent. The People have the burden of proving guilt beyond a reasonable doubt. You should consider any evidence concerning the syndrome and its effect only for the limited purpose of showing, if it does, that the alleged victim's reactions, as demonstrated by the evidence, are not inconsistent with her having been molested."

After the court gave the admonition, Dr. Musacco testified about his understanding of CSAAS, studies of CSAAS, the anecdotal basis of CSAAS, and the five phases of CSAAS. In offering this testimony, Dr. Musacco acknowledged that he had not met with the victim or appellant in this case. On cross-examination, Dr. Musacco confirmed that he had not reviewed any police reports or facts of appellant's case and had not spoken with appellant or the alleged victim of the charged offenses. Dr. Musacco admitted that his testimony entailed theoretical applications of CSAAS based upon his reading of professional literature. At the conclusion of all the evidence, the court further instructed the jury in former CALJIC No. 10.64 [cautionary instruction – child abuse syndrome (§§ 261, 288)].

B. Appellant's Contention

Appellant contends CSAAS testimony should be deemed to be inadmissible as improper, irrelevant expert opinion which usurps the jury's function to determine credibility. He further contends CSAAS does not meet the requirement of Evidence Code section 801, subdivision (a) that it be beyond the common knowledge of the jury to be admissible as expert testimony. He acknowledges that “[f]or years, California courts have sanctioned the admissibility of CSAAS evidence on the narrow basis that it dispels widely held misconceptions about how sexually abused children behave or react in the wake of such alleged abuse.” He maintains the time has come to reexamine this premise for admissibility and asserts that the trial court committed prejudicial error in admitting Dr. Musacco's CSAAS testimony in his case.

C. Applicable Law

CSAAS evidence is a term social scientists and the courts use to describe a list of behaviors commonly observed in child sexual abuse victims. These behaviors were first noted in the work of Dr. Roland J. Summit, who identified and defined the child sexual abuse accommodation syndrome in 1983. He identified “five characteristics commonly

observed in sexually abused children: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, conflicted, and unconvincing disclosure, and (5) retraction.” (Steele, Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Abuse Prosecutions (1998-1999) 48 Duke L.J. 933, 943-944.) Summit claimed the characteristics were “behavioral coping mechanisms that emerge because the child is ‘fearful, tentative and confused about the nature of the continuing sexual experience and the outcome of disclosure.’ CSAAS does not prove abuse because it assumes that the abuse occurred. Nonetheless, CSAAS is helpful in identifying common responses to child sexual abuse and in establishing reasons for the behavior of child sexual abuse victims.” (*Id.* at p. 944, fns. omitted.) A host of behaviors, such as bed wetting and a delay in reporting the abuse, are now included within the syndrome. (*Id.* at pp. 943-944; see also *People v. Bowker* (1988) 203 Cal.App.3d 385, 392, fn. 8 (*Bowker*).)

CSAAS “is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness’s credibility when the defendant suggests that the child’s conduct after the incident--e.g., a delay in reporting--is inconsistent with his or her testimony claiming molestation. [Citations.]” (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301, fn. omitted (*McAlpin*).) “CSAAS assumes a molestation has occurred and seeks to describe and explain common reactions of children to the experience. [Citation.] The evidence is admissible *solely* for the purpose of showing that the victim’s reactions as demonstrated by the evidence are not inconsistent with having been molested.” (*Bowker, supra*, 203 Cal.App.3d at p. 394, italics in original; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1383.) “Although inadmissible to prove that a molestation occurred, CSAAS testimony has been held admissible for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation. [Citations.]” (*People v. Patino* (1994) 26 Cal.App.4th 1737,

1744 (*Patino*.) “ ‘Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children’s seemingly self-impeaching behavior....’ [Citation.]” (*McAlpin, supra*, 53 Cal.3d at p. 1301.)

“[T]he evidence must be tailored to the purpose for which it is being received. [A]t a minimum the evidence must be targeted to a specific ‘myth’ or ‘misconception’ suggested by the evidence. [Citation.] For instance, where a child delays a significant period of time before reporting an incident or pattern of abuse, an expert could testify that such delayed reporting is not inconsistent with the secretive environment often created by an abuser who occupies a position of trust. Where an alleged victim recants his story in whole or in part, a psychologist could testify on the basis of past research that such behavior is not an uncommon response for an abused child who is seeking to remove himself or herself from the pressure created by police investigations and subsequent court proceedings.” (*Bowker, supra*, 203 Cal.App.3d at pp. 393-394, fn. omitted.) “Identifying a ‘myth’ or ‘misconception’ has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim’s credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation. [Citations.]” (*Patino, supra*, 26 Cal.App.4th at pp. 1744-1745.)

Although the California Supreme Court has not addressed the general issue of admissibility of CSAAS evidence, it has noted with apparent approval that most appellate districts have approved the use of such testimony. (*McAlpin, supra*, 53 Cal.3d at pp. 1300-1301.) Since even general testimony on CSAAS “has the potential of being used by an untrained jury as a construct within which to pigeonhole the facts of the case and draw the conclusion that the child must have been molested[,]” the jury must be instructed that the expert’s testimony cannot be used as evidence that the victim’s claim

of molestation is true. (*People v. Bothuel* (1988) 205 Cal.App.3d 581, 587, disapproved on another point in *People v. Scott* (1994) 9 Cal.4th 331, 347-348.) The jury must be instructed “simply and directly that the expert’s testimony is not intended and should not be used to determine whether the victim’s molestation claim is true. The jurors must understand that CSAAS research approaches the issue from a perspective opposite to that CSAAS *assumes* a molestation has occurred and seeks to describe and explain common reactions of children to the experience. [Citation.]” (*Bowker, supra*, 203 Cal.App.3d at p. 394, italics in original; *People v. Housley* (1992) 6 Cal.App.4th 947, 958-959; see also CALCRIM No. 1193, former CALJIC No. 10.64.) Thus, CSAAS evidence has been found constitutionally admissible with the proper admonishments to the jury regarding the limits of such evidence that the expert’s testimony is not intended and should not be used to determine whether the victim’s molestation claim is true, but admissible solely to show the victim’s reactions are not inconsistent with having been molested. (*Patino, supra*, 26 Cal.App.4th at p. 1744; *Housley, supra*, 6 Cal.App.4th at pp. 958-959.)

D. Analysis

The decision of a trial court to admit expert testimony on CSAAS will not be disturbed on appeal unless a manifest abuse of discretion is demonstrated. (*McAlpin, supra*, 53 Cal.3d at p. 1299.) “ ‘An abuse of discretion occurs when, after calm and careful reflection upon the entire matter, it can fairly be said that no judge would reasonably make the same order under the same circumstances. [Citation.]’ [Citation.]” (*In re Marriage of Reynolds* (1998) 63 Cal.App.4th 1373, 1377.) Appellant’s challenge to the admission of Dr. Musacco’s testimony falls short of that standard. Musacco never testified that a molestation occurred in this case. He simply testified that he had not reviewed the facts of the case or the police reports and indicated that his testimony entailed theoretical applications of CSAAS from his reading of literature. During cross-examination, Dr. Musacco acknowledged “a small percentage of false accusations.”

Musacco's testimony was relevant to K.I.'s admitted failure to report the alleged sexual abuse to anyone for a period of several years. Musacco testified about the reasons for delayed reporting by child sexual abuse victims, an attribute cited by the prosecutor during argument at the Evidence Code section 402 hearing. He also addressed other aspects of CSAAS, including secrecy, helplessness, and accommodation. The court minimized any possibility that the jury would interpret Dr. Musacco's testimony to mean appellant was guilty of sexual abuse or that K.I. was a victim of sexual abuse by giving CALJIC No. 10.64 on two occasions, once during Musacco's testimony and again at the conclusion of all the evidence. We presume the jury properly followed the admonition of CALJIC No. 10.64. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.)

Under all of the facts and circumstances, the trial court did not abuse its discretion by allowing Dr. Musacco to testify about CSAAS.

DISPOSITION

The judgment is affirmed.

Poochigian, J.

WE CONCUR:

Wiseman, Acting P.J.

Detjen, J.