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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LYLE ROPER,

Defendant and Appellant.

F070396

(Super. Ct. No. 13CM3955)

**OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Barton Bowers, Deputy Attorneys General, for Plaintiff and Respondent.

In October 2013, defendant Robert Lyle Roper was arrested. He was charged in a subsequent amended information with committing the following 16 offenses against minor victims M.O, K.K. and B.K.: four counts of violating Penal Code section 269, subdivision (a)(4)<sup>1</sup> (counts 1, 3, 5 & 7); four counts of violating section 288a, subdivision (c)(1) (counts 2, 4, 6 & 8); five counts of violating section 288, subdivision (a) (counts 9, 12, 13, 14 & 15); one count of violating section 288, subdivision (b)(1) (count 10); one count of violating section 288.5, subdivision (a) (count 11); and one count of violating section 647.6, subdivision (a)(1) (count 16). The offenses charged in counts 1 through 10 were allegedly committed against M.O. between June 15, 2004, and October 30, 2004. The offenses charged in counts 11 through 16 were allegedly committed against sisters K.K. and B.K. between June 1, 2013, and September 1, 2013.

The case was tried by jury. After the close of evidence, the prosecutor dismissed counts 11 and 16, and the jury subsequently convicted defendant of count 1 against M.O. (aggravated sexual assault of a child (§ 269, subd. (a)(4)), and acquitted him of counts 7 and 8 against M.O. The jury was deadlocked on the remaining 11 counts against M.O., K.K. and B.K., and the court declared a mistrial. Defendant was thereafter sentenced to an indeterminate prison term of 15 years to life on count 1. (§ 269, subd. (b).)

Defendant raises the following claims on appeal. He invites us to categorically bar the admission of Child Sexual Abuse Accommodation Syndrome (CSAAS) evidence because it is irrelevant and prejudicial. He also contends CALCRIM No. 1193, pertaining to CSAAS, violates the law and the error caused him prejudice because it lessened the People's burden of proof. Finally, he contends the prosecutor committed misconduct by arguing facts not in evidence during closing argument; the existence of

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

cumulative errors require reversal; and the state court construction penalty imposed under Government Code section 70372, subdivision (a)(1), must be reduced from \$155 to \$150.

We remand this matter to the trial court to reduce the penalty assessed to \$150, but otherwise affirm the judgment.

### **FACTUAL SUMMARY<sup>2</sup>**

Defendant and his wife had six children. In June 2004, their daughter, Michelle O., returned home from out of state to live with them following the dissolution of her marriage. She had two daughters, M.O., age 6, and C.O., age 14. M.O. referred to her grandfather (Michelle O.'s father) as "Papa."

On the night of September 15, 2004, defendant, then age 65, took M.O. from the bedroom she shared with her sister for some "quality time." He went into the garage with M.O., placed her on the clothes dryer, removed her underwear and orally copulated her. Meanwhile, Michelle O. noticed her daughter missing from the bedroom and went looking for her. She entered the garage and saw defendant bent over M.O., who was lying across the washer and dryer, with his head down. He appeared startled and she noticed he had an erection. M.O. sat up and pulled her nightgown down. Michelle pushed past defendant and grabbed her daughter off the dryer she was sitting on.

M.O. was afraid to tell her mother what happened, but she eventually told her mother "Papa had licked her butt." She then clarified it was her "pee-pee" he licked.

Michelle O. returned to the house and woke her mother up before confronting defendant, who denied doing anything wrong. Defendant said he caught M.O. in the garage playing with herself and was talking to her about it. He thereafter packed a suitcase and left the house. Michelle O. put her daughters to bed and went to a friend's

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<sup>2</sup> Defendant is not challenging the sufficiency of the evidence supporting his conviction on count 1 and, therefore, we only briefly summarize the facts underlying that single conviction, construing them "in the light most favorable to the judgment." (*People v. Curl* (2009) 46 Cal.4th 339, 343, fn. 3.)

house to call the police once the girls were asleep.<sup>3</sup> Michelle O. subsequently moved out and her father returned home.

## **DISCUSSION**

### **I. Admissibility of CSAAS Evidence**

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

At trial, M.O. testified to multiple sexual molestations, as did K.K. and B.K. M.O. testified defendant would say, “It’s our secret.” K.K. told her grandmother that defendant told her if she said anything about being touched, she would not be allowed to come over and see defendant’s grandson, who was K.K.’s friend, or defendant’s wife; and K.K. was afraid she would not be allowed to come over to see them anymore. B.K. testified that defendant told her not to tell and she did not tell anyone because she was afraid defendant might hurt someone she loved.

The prosecution called Dr. Urquiza, a clinical psychologist, to testify about CSAAS, which he described as a tool designed to educate therapists on characteristics common to sexually abused children so they could better treat the children and in turn educate the children’s parents.<sup>4</sup> Defendant’s counsel objected to the testimony as cumulative and time consuming. The trial court admitted the evidence based on the testimony about secrecy, but limited the duration of Dr. Urquiza’s testimony.

Defendant concedes that CSAAS evidence is admissible in California for limited purposes and under limited circumstances but, relying on authorities from other states, he argues we should hold it categorically inadmissible for all purposes because it is irrelevant and highly prejudicial. Defendant also argues that the admission of the

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<sup>3</sup> Defendant was not charged in this case until almost a decade later, after grandmother of K.K. and B.K. contacted police in 2013 and reported their allegations that defendant touched them inappropriately.

<sup>4</sup> Dr. Urquiza identified five components of a sexually abusive relationship: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed and unconvincing disclosure, and (5) retract[ion]s and recantation.

evidence in this case “resulted in a miscarriage of justice.” (Evid. Code, § 353, subd. (b).) In response, the People state that the claim CSAAS evidence is a per se violation of Evidence Code section 352 fails in light of established California law and should be rejected. They also contend that defendant fails to show prejudice, as the jury’s verdict—conviction on only one of 14 counts—demonstrates “jurors evaluated the evidence critically and with discernment”; and the single conviction was also supported by the eyewitness testimony of Michelle O. In reply, defendant reasserts that California case law should be reexamined and the CSAAS testimony prejudiced him by bolstering M.O.’s testimony, which led to the verdict against him.

## **B. Analysis**

### **1. No Abuse of Discretion in Admitting CSAAS Testimony**

The admission of “expert testimony ‘will not be disturbed on appeal unless a manifest abuse of discretion is shown.’” (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299; *People v. Sandoval* (2008) 164 Cal.App.4th 994, 1001.) As defendant acknowledges, California courts have long recognized that CSAAS evidence is admissible in child sexual abuse cases “for the limited purpose of disabusing the fact finder of common misconceptions it might have about how child victims react to sexual abuse.” (*In re S.C.* (2006) 138 Cal.App.4th 396, 418; *People v. Wells* (2004) 118 Cal.App.4th 179, 188; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744; see *People v. Brown* (2004) 33 Cal.4th 892, 905–907; *People v. McAlpin, supra*, at pp. 1300–1302.) As we previously observed, “[i]dentifying a ‘myth’ or ‘misconception’ has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim’s credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation.” (*People v. Patino, supra*, at pp. 1744–1745.) However, “CSAAS testimony is inadmissible to prove that a molestation actually occurred.” (*Id.* at p. 1744.)

There is no claim in this case that Dr. Urquiza’s testimony exceeded the limitations placed on CSAAS testimony, and the trial court specifically limited the duration of the testimony. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1069; *People v. Patino, supra*, 26 Cal.App.4th at pp. 1744–1746.) Rather, defendant seeks to categorically preclude the introduction of CSAAS evidence. We decline his invitation to disregard settled authority in this state, including our own precedent. The evidence was well within the recognized boundaries of admissible CSAAS evidence (*People v. Mateo, supra*, at p. 1069; *People v. Perez* (2010) 182 Cal.App.4th 231, 244–245; *People v. Patino, supra*, at pp. 1744–1745), and we find no abuse of discretion by the trial court in admitting the evidence over defendant’s objection.

## **2. No Prejudice**

Although we find no error in admitting the evidence, we also note the absence of any prejudice to defendant. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 395.) “[A] ‘miscarriage of justice’ should be declared only when the court, ‘after an examination of the entire cause, including the evidence,’ is of the ‘opinion’ that 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. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *People v. Bowker, supra*, at p. 395 [applying *Watson* harmless error test to admission expert testimony on CSAAS].)

As the People argue, the jury convicted defendant of only one of 14 counts, which evidences an engagement in reasoned deliberation. The single count on which defendant was convicted was also the only count supported by corroborating evidence, in the form of Michelle O.’s testimony that she walked in on defendant and M.O. during the incident, defendant was bent over M.O. and defendant had an erection. Although M.O. testified that defendant would tell her it was their secret when he molested her, and Michelle O. testified M.O. “shut down” and “wouldn’t talk” when officers later tried to question her, M.O. told her mother what happened after they left the garage and Michelle O. reported

the molestation to the police that night. Thus, not only was there strong evidence supporting defendant's conviction on count 1, the CSAAS evidence would have had limited relevance to that count.

Accordingly, we reject defendant's argument that the CSAAS evidence "bolstered [M.O.'s] testimony and led to the verdict[] in this case," and find no error under the *Watson* standard of review. (*People v. Bowker, supra*, 203 Cal.App.3d at p. 395.)

## **II. Instructional Error**

Defendant challenges the portion of CALCRIM No. 1193 instructing the jury it may consider the CSAAS evidence "in evaluating the believability of [the victims'] testimony." He argues that jurors should not be instructed to consider the CSAAS evidence in evaluating the witnesses' credibility and it was error to do so. The People contend defendant forfeited this claim by failing to object below and he fails to show error or prejudice.

### **A. Standard of Review**

We review allegations of instructional error de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) "[I]nstructions are not considered in isolation. Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury." (*People v. Holt* (1997) 15 Cal.4th 619, 677; *People v. Thomas* (2011) 52 Cal.4th 336, 356.) "If the charge as a whole is ambiguous, the question is whether there is a "reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution." (*Middleton v. McNeil* (2004) 541 U.S. 433, 437 (*per curiam*).) Jurors are presumed to have understood and followed the trial court's jury instructions. (*People v. Sandoval* (2015) 62 Cal.4th 394, 422.)

## **B. Analysis**

### **1. No Error**

Defendant did not object to the instructional language he now challenges on appeal. However, because we find neither error nor prejudice assuming error, we need not determine whether, as the People argue, defendant forfeited his claim by failing to object or whether, as he argues, his substantial rights were affected, thereby preserving the issue for appeal. (§ 1259; *People v. Johnson* (2016) 62 Cal.4th 600, 638–639; *People v. Lucas* (2014) 60 Cal.4th 153, 281, fn. 47, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

CALCRIM No. 1193 provides:

“You have heard testimony from \_\_\_\_\_ <insert name of expert> regarding child sexual abuse accommodation syndrome.

“\_\_\_\_\_’s <insert name of expert> testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against (him/her).

“You may consider this evidence only in deciding whether or not \_\_\_\_\_’s <insert name of alleged victim of abuse> conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of (his/her) testimony.”

The trial court instructed the jury:

“You have heard the testimony from Anthony Urquiza regarding [CSAAS]. Dr. Urquiza’s testimony about [CSAAS] 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 [M.O.]—okay. [M.O.]—strike that. We did hear the names of the children, but it’s M.O., K.K., and B.K., whether or not their conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of their testimony. Okay?”

The defense presented evidence that M.O. was both untruthful about what happened that night and untruthful in general, through the testimony of defendant, his

oldest daughter, and his brother-in-law. M.O.'s credibility was, therefore, placed at issue and we have recognized that CSAAS evidence "is pertinent and admissible if an issue has been raised as to the victim's credibility." (*People v. Patino, supra*, 26 Cal.App.4th at p. 1745.) As such, although the instruction broadens the scope of CSAAS evidence to allow the jury to consider it in evaluating the victim's credibility, we are unpersuaded by defendant's claim of error.

Notably, CALCRIM No. 1193 expressly states that CSAAS testimony is not evidence the crimes were committed, and the jury was separately instructed on the prosecution's burden, assessing the credibility of witnesses, and expert testimony, as well as to disregard any instructions that do not apply. (CALCRIM Nos. 220, 226, 303 & 332.) Moreover, Dr. Urquiza's testimony was limited, as previously noted, and he did not testify about the victims in this case or the circumstances of the offenses defendant allegedly committed against them. (*People v. Housley* (1992) 6 Cal.App.4th 947, 959.) In considering the entire charge to the jury, we are unpersuaded that CALCRIM No. 1193 created any ambiguity or misstated the law.

## **2. No Prejudice**

Even assuming prejudice, any argument that defendant was prejudiced by the instruction rings hollow in light of the evidence supporting count 1. As previously stated, the sole conviction arose from the molestation corroborated by Michelle O.'s eyewitness testimony. In addition, M.O.'s older sister, C.O., testified that defendant took M.O. from the bedroom that night for some "quality time," further contradicting defendant's testimony that he found M.O. alone in the garage playing with herself.

We conclude that defendant cannot establish, under the *Watson* standard, a reasonable probability of a more favorable verdict in the absence of the language instructing the jury to consider the CSAAS testimony "in evaluating the believability of

[M.O.’s] testimony.”<sup>5</sup> (See *People v. Mateo*, *supra*, 243 Cal.App.4th 1063, 1074 [applying *Watson* standard to failure to instruct on CSAAS evidence].)

### **III. Alleged Prosecutorial Misconduct**

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

At trial, defendant denied he molested M.O. and, with respect to the garage incident, he testified when he entered the garage to check on the laundry, he found M.O. in there playing with herself. Following defendant’s closing argument, the prosecutor argued in rebuttal, “[T]he key point here is so [M.O.] goes in the garage—this is the defendant’s story, right—[M.O.] goes into the garage, okay, to play with herself with the garage door open. And then he went into this big explanation about, ‘Oh, you can’t see that part from the street.’ [¶] Are you kidding me? She’s going to go in the garage to play with herself when the garage door is open? Why wouldn’t she just stay in her bedroom and what 6-year-old is, you know, doing that unless she’s been molested?”

Defendant’s trial counsel did not object.

On appeal, defendant contends the prosecutor committed error when he misstated the evidence and the error “effectively undercut his defense” that M.O. was in the garage playing with herself that night. The People argue defendant forfeited this claim by failing to object, but, in any event, the prosecutor’s rhetorical question was a proper comment on the evidence and was harmless.

#### **B. Standard of Review**

“When a prosecutor’s intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls

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<sup>5</sup> Nor was it error under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, which defendant contends applies because the instructional error violated his federal constitutional right to due process by lessening the prosecutor’s burden. Any error was harmless beyond a reasonable doubt, given the strength of the evidence supporting defendant’s conviction for molesting M.O. in the garage. (*Ibid.*)

short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.” (*People v. Jablonski* (2006) 37 Cal.4th 774, 835.) “When attacking the prosecutor’s remarks to the jury, the defendant must show that, ‘[i]n the context of the whole argument and the instructions’ [citation], there was ‘a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.’” (*People v. Centeno* (2014) 60 Cal.4th 659, 667.)

### **C. No Prejudice**

“As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.” (*People v. Maciel* (2013) 57 Cal.4th 482, 541.) “[O]nly if an admonition would not have cured the harm is the misconduct claim preserved for review.” (*People v. Cook* (2006) 39 Cal.4th 566, 606.) However, “[a] defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel’s inaction violated the defendant’s constitutional right to the effective assistance of counsel.” (*People v. Centeno, supra*, 60 Cal.4th at p. 674.)

In this instance, defendant did not object to the prosecutor’s statement, but we need not reach defendant’s ineffective assistance of counsel argument because, assuming error, we find no prejudice.

“In order to be entitled to relief under state law, [the] defendant must show that the challenged conduct raised a reasonable likelihood of a more favorable verdict. In order to be entitled to relief under federal law, [the] defendant must show that the challenged conduct was not harmless beyond a reasonable doubt.” (*People v. Blacksher* (2011) 52 Cal.4th 769, 828, fn. 35; *People v. Linton* (2013) 56 Cal.4th 1146, 1205.) Defendant

cannot do so. As discussed *ante*, while defendant testified he found M.O. playing with herself in the garage, M.O. testified about the molestation that night in the garage; her mother, who walked in on the two of them, corroborated M.O.'s account and contradicted defendant's version of events; and M.O.'s sister testified that defendant removed M.O. from their room that night, also contradicting defendant's account. Given this evidence, any error arising from the prosecutor's rhetorical question was harmless beyond any reasonable doubt and defendant's claim fails under either standard. (*People v. Blacksher*, *supra*, at p. 828, fn. 35; *People v. Linton*, *supra*, at p. 1205.)

#### **IV. Cumulative Error**

Defendant also argues he is entitled to reversal based on the cumulative effect of errors. "In examining a claim of cumulative error, the critical question is whether [the] defendant received due process and a fair trial. [Citation.] A predicate to a claim of cumulative error is a finding of error." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068.) Having found no errors, and no prejudice if we assume the existence of errors, we reject this claim. (*People v. Williams* (2013) 56 Cal.4th 165, 201; *People v. Sedillo*, *supra*, at p. 1068.)

#### **V. Error in State Court Construction Penalty Assessment**

Finally, the parties agree the trial court erred in imposing a \$155 penalty against defendant under Government Code section 70372, subdivision (a)(1), which provides, "Except as otherwise provided in this article, there shall be levied a state court construction penalty, in the amount of five dollars (\$5) for every ten dollars (\$10), or part of ten dollars (\$10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses . . . ." The trial court imposed a \$300 fine under Penal Code section 290.3 and, therefore, the penalty assessed under Government Code section 70372 should have been \$150 rather than \$155. The judgment shall be modified accordingly.

**DISPOSITION**

The judgment is modified to reduce the state court construction penalty from \$155 to \$150. (Gov. Code, § 70372.) The case is remanded to the trial court to amend the abstract of judgment and the clerk’s minute order of the sentencing proceeding to reflect this change and to forward the amended document to the appropriate authorities. As modified, the judgment is affirmed.

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KANE, J.

WE CONCUR:

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LEVY, Acting P.J.

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POOCHIGIAN, J.