

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,

Plaintiff and Respondent,

v.

PABLO BEDOLLA-MATIAS,

Defendant and Appellant.

H035711

(Santa Clara County

Super. Ct. No. CC939831)

**I. STATEMENT OF THE CASE**

A jury convicted defendant Pablo Bedolla-Matias of four counts of aggravated lewd conduct with a minor under the age of 14 and also found that he committed those offenses against two victims: A. and L. (Pen. Code, §§ 288, subd. (b)(1), 667.61, subds. (b) & (e).)<sup>1</sup> The court sentenced defendant to an indeterminate prison term of 60 years to life.

On appeal from the judgment, defendant claims there was insufficient evidence to support two convictions for aggravated lewd conduct against A. He claims the court erred in admitting (1) the victims' preliminary hearing testimony, (2) evidence of A.'s demeanor at the preliminary hearing, (3) evidence that the magistrate found both A. and L. competent to testify at that hearing, and (4) expert testimony concerning child sexual

---

<sup>1</sup> All unspecified statutory references are to the Penal Code.

abuse accommodation syndrome (CSAAS). He further claims the court erred in instructing jurors that (1) they could consider the victims' testimony as propensity evidence, (2) they could convict him for aggravated lewd conduct based on findings of duress, and (3) they could consider the CSAAS testimony in determining whether he committed the charged offenses.

We affirm the judgment.

## **II. THE EVIDENCE**

### **A. The Prosecution's Case**

A. and her cousin L., the victims, were seven years old when they testified.<sup>2</sup> They lived in the same house with several relatives, including J., who is A.'s sister and L.'s cousin. At the time the offenses occurred, defendant also lived at the house.

A. testified that defendant touched her private parts on more than one occasion and told her not to tell her mother. She was scared. One time when she was in the kitchen, he touched her crotch over her shorts. On another occasion, she was eating soup in the kitchen, and defendant "cupp[ed]" her crotch with his hand. She was afraid and told him to stop, but he did not. She screamed for L. to come in so that he would stop. She said he would stop touching her whenever someone else entered the room.

A. testified that defendant never touched her skin, penetrated her with his finger, or kissed her on the mouth or breasts. Although she initially said that she never told anyone that he had kissed her, she corrected herself and said that she told J., who then reported it to A.'s mother. She said she once tried to tell her aunt, but she was watching TV and did not pay any attention to her.

At the preliminary hearing, A. testified that defendant touched her private parts around five times directly on her skin. He also kissed her on the neck. She said he touched her when she was in the kitchen. She said that he did not penetrate her with his

---

<sup>2</sup> In addition to their live testimony, A.'s and L.'s preliminary hearing testimony and evidence of their interviews with police officers were also admitted at trial.

finger. She asked him to stop, but he would not and told her not to tell her mother. She also said she was afraid of him. She said that there were times when defendant was molesting her that she wanted to scream, but she denied that he ever put his hand over her mouth and denied telling anyone that he had. She said she told her sister J. and her cousin L. about what defendant was doing.

L. testified that defendant touched her private parts directly on her skin under her underwear more than once, and she did not like it. She told him to stop, but he would not do so and told her not to tell anyone. She further testified that on one occasion, defendant was outside her bedroom window at night and asked her to touch his private part. She did not do so and could not remember if she saw it. On another occasion, she went into the living room, and defendant offered her two dollars, but she refused. She could not recall if he tried to touch her.

At the preliminary hearing, L. testified that defendant touched her crotch area at least five and maybe nine times. She said she was scared and told him to stop but he would not. She said he also touched her neck with his hand. She said she told her aunt and uncle.

J. was 14 when she testified. She said that on April 7, 2009, a male cousin told her that defendant had tried to grab A. When J. asked A., A. was upset and afraid to talk about it because defendant had told her not to tell anyone. She said that defendant once gave her a dollar not to tell anyone. Nevertheless, A. disclosed that defendant had touched her and L. in places she did not like. He touched her private part and put his finger inside which hurt and made her private part "rosada," which, J. explained, meant red and raw. He also kissed her neck. A. told J. not to tell their mother, but J. did, and the police were called.

On April 7, 2009, Officers Yvonne Dela Cruz and Jose Uribe of the San Jose Police Department visited the victims' home. Officers De La Cruz interviewed A.; Officer Uribe interviewed L.<sup>3</sup>

At that time, A. said that defendant had touched her private part outside her clothing four times and sometimes kissed her on the neck and mouth.<sup>4</sup> Defendant told her not to tell her mother. L. said that one time, defendant was outside her window urinating, opened the window, called her, touched her breasts and crotch, and pulled her head to make her look at his penis. On another occasion, he kissed her neck and gave her a dollar not to tell anyone.

Officer Patricia Jaime with the Sexual Assault Unit of the San Jose Police Department conducted follow-up, recorded interviews with A. and L. on April 9, 2009, which were played for the jury.

A. said that defendant touched her private parts on four different occasions and also kissed her on the mouth and neck. The last time it happened, she asked him to stop but he kept on kissing her, and when she tried to call out to her aunt, he covered her mouth with his hand. When A.'s aunt came into the room, defendant hid in the closet.<sup>5</sup>

A. said that on another occasion, his touching caused her to bleed from her "pee-pee" because he "squished" her. She explained that defendant pulled her underwear aside, put his hand there, and also touched her there with his fingernails, which hurt. This caused her to bleed and made her sad and worried. She said he penetrated her three

---

<sup>3</sup> Both officers recorded their interviews. Officer De La Cruz's recording was played for the jury. Officer Uribe could not find the recording of his interview.

<sup>4</sup> At the preliminary hearing, A. said that defendant never kissed her mouth.

<sup>5</sup> At the preliminary hearing, A. said the defendant never covered her mouth with his hand, and she denied telling Officer Jaime that he had.

times. She also said he tried to kiss her vagina under clothing about five times.<sup>6</sup> She recounted how once he touched her in the kitchen when she was eating soup. Another time, he took off her shirt and tried to kiss her breasts, but she pushed him away.

L. said that defendant was always grabbing her and would kiss her. She said he touched her under her underwear five to 10 times and penetrated her vagina with his finger, which felt bad and hurt. He told her he would continue to do this if she told anyone about it. He once grabbed her hand and forced her to touch his penis under his underwear. He also kissed her on the neck.

Mary Ritter, a physician's assistant at the Center for Child Protection at the Santa Clara Valley Medical Center, examined A. and L. A. told her that there had been hand and oral vaginal contact but no bleeding. A. also said that defendant had kissed her mouth, and she had seen his penis.<sup>7</sup> Ms. Ritter found no evidence of penetrating trauma and a normal looking hymen, but she noticed some redness in A.'s genital area, which, however, could have had a variety of causes.

L. told Ms. Ritter that defendant had touched her vagina with his hand, but she denied any pain. She also said she had seen defendant's penis and touched it.<sup>8</sup> Ms. Ritter found no evidence of penetrating trauma. She observed a mound on L.'s hymen that could be a benign, normal finding or the remnant of a prior sexual assault. However, Ms. Ritter could not determine the actual cause or whether there had been an assault.

Dr. David Kerns, an expert in the area of child sexual abuse, reviewed Ms. Ritter's findings and agreed with them. He said that the majority of prepubescent girls who have been sexually abused have "normal" examination results.

---

<sup>6</sup> At the preliminary hearing, A. denied that defendant kissed her vagina.

<sup>7</sup> At the preliminary hearing, A. said she never saw defendant's penis and denied saying that she had.

<sup>8</sup> At the preliminary hearing, L. denied telling Ms. Ritter about seeing defendant's penis.

Carl Lewis testified as an expert on CSAAS. He explained that the way in which a child discloses abuse or behaves when being abused can conflict with common, preconceived notions of how a child might or should react. CSAAS describes a variety of factors that may exist when a disclosure is made. It can provide background information and explains that there is no single thing to look for in determining whether a child is being or has been abused. However, CSAAS is not a science or a measure of whether a child is telling the truth about being abused.

That said, Mr. Lewis described five categories of CSAAS, that may or may not be present in a case. The first category is secrecy. An abuser often takes advantage of the fact that abusive conduct usually occurs in a private setting and enforces this secrecy by telling the child not to say anything and perhaps threatening consequences. The second category is helplessness that arises from the child's dependence on adults. As a result, disclosure tends to involve a process rather than a one-time report. Helplessness can be reinforced when there is an inadequate response to an attempt to disclose. The third category is entrapment and accommodation. A child may feel trapped by circumstances and accommodate the abuse by dissociating or acting as if nothing were wrong. The fourth category is delayed, conflicted, or unconvincing disclosure. A child often delays reporting abuse, and most times it is not disclosed until some time after it has occurred. Conflicted disclosure describes the process a child goes through in deciding whether to report abuse and also the fact that during that process, the child may say different things at different times about what happened. Unconvincing disclosure describes the way in which a child may disclose the abuse in a way that makes it seem unbelievable. The fifth category is retraction. Once a child reports abuse, he or she receives a lot of attention that can disrupt normal life; and often, the child will minimize or retract what he or she had disclosed so that life can return to normal.

## **B. Defense Case**

Defendant presented no evidence of his own but relied on cross-examination to undermine the credibility and reliability of A.'s and L.'s testimony and statements to others and argue that the prosecution had not met its burden to prove the charges beyond a reasonable doubt.

## **III. SUFFICIENCY OF THE EVIDENCE**

Defendant contends there is insufficient evidence to support two convictions for aggravated lewd conduct against A.

Section 288, subdivision (a) proscribes the willful and lewd commission “any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.” Section 288, subdivision (b)(1) proscribed aggravated lewd conduct, that is, the commission of any such act “by use of *force*, violence, *duress*, menace, or fear of immediate and unlawful bodily injury on the victim or another person.” (Italics added.)

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

“To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Kipp* (200) 26 Cal.4th 1100, 1128; *People v. Wallace* (2008) 44 Cal.4th 1032, 1077.) “In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination

depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.] [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” ’ the jury’s verdict. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

### **B. Force<sup>9</sup>**

To establish aggravated lewd conduct by force, the prosecution must prove that the defendant used force “ ‘substantially different from or substantially greater than that necessary to accomplish the lewd act itself.’ ” (*People v. Soto* (2011) 51 Cal.4th 229, 242 (*Soto*); *People v. Griffin* (2004) 33 Cal.4th 1015, 1027; see CALJIC No. 10.42; CALCRIM No. 1111.)

In *People v. Alvarez* (2009) 178 Cal.App.4th 999, the court explained that “a ‘defendant may fondle a child’s genitals without having to grab the child by the arm and hold the crying victim in order to accomplish the act. Likewise, an assailant may achieve oral copulation without having to grab the victim’s head to prevent the victim from resisting.’ [Citation.] Lewd conduct of this sort is punishable in and of itself. [Citation.] Therefore, it stands to reason that the force requirement will be deemed satisfied when the defendant uses any force that is ‘different from and in excess of the type of force which is used in accomplishing similar lewd acts . . . .’ [Citation.] [¶] According to the majority of courts, this includes acts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves. [Citations.]” (*Id.* at p. 1005; see, e.g., *People v. Bolander* (1994) 23 Cal.App.4th 155, 160-161 [pulling victim’s pants down, bending him over, and pulling him toward defendant constituted forcible lewd conduct]; *People v. Neel* (1993) 19 Cal.App.4th 1784, 1790 [pushing the victim’s head down on defendant’s penis, grabbing her wrist, and placing her hand on his penis to masturbate him constituted

---

<sup>9</sup> Defendant implicitly concedes that there was sufficient evidence to support the convictions by use of force against L.

forcible lewd conduct]; *People v. Babcock* (1993) 14 Cal.App.4th 383, [grabbing victim's hand and making him touch defendant's genitals constituted sufficient force].)

For example, in *People v. Gilbert* (1992) 5 Cal.App.4th 1372, the victim testified that the perpetrator's forearm was over her mouth rendering her unable to cry out during the sexual conduct, and when she attempted to move, the perpetrator pushed her back. In finding sufficient evidence of force, the court explained, "It was not necessary to accomplishment of the described sexual acts that [the victim] be prevented from moving or from crying out. [The perpetrator's] described acts therefore exceeded any force necessary to the acts." (*Id.* at p. 1381; *People v. Cardenas* (1994) 21 Cal.App.4th 927, 940 [force found where victim held and pillow used to stifle her screams].)

During the recorded interview with Officer Jaime, A. described how once, when she was alone with defendant, he started kissing her. She told him to stop and said she did not want to do it anymore. But he kept doing it, and when she tried to call out to her aunt, he put his hand over her to mouth stifle her attempt.

Defendant argues that putting his hand over A.'s mouth to prevent her from calling out cannot satisfy the force requirement because that act of force took place after he stopped kissing her and thus was used not to accomplish the lewd conduct but to facilitate his escape.

In the interview with Officer Jaime, A. said, "Then I said—then I said, I don't want to do it anymore. And then . . . then I told him . . . mm, *then he said, I don't want to stop but then he keep doing it, and then, and I call—and I was going to call my auntie but then he, then he . . . went like that to me.*" (Italics added.) Officer Jaime responded, "He went like that to you, and so right now you're putting your, your hand over your mouth?" A. said, "He, he, he put his hand in my mouth."

A.'s statement does not conclusively or necessarily establish that defendant applied force that was separate and/or different from his lewd conduct only *after* that conduct—i.e., the kissing. Rather, it reasonably reveals that A. asked defendant to stop

kissing her, he refused and kept kissing her, and while doing so, he covered her mouth to prevent her from calling out to her aunt. Moreover, at the preliminary hearing, A. testified that defendant kissed her on the neck and that she told J.; and J. testified at trial that A. told her that defendant had kissed her on the neck.<sup>10</sup> Thus, defendant did not have to stop kissing A. when he covered her mouth and prevent her from calling out.

Given the evidence, a jury reasonably could find that in physically stifling A. with his hand to prevent her from calling out, defendant used force substantially different from and in excess of that required to kiss her. This is especially so given the age and, we assume, size disparity between them, which would have made it extremely difficult, if not impossible, A. to escape his grasp had she tried to do so.

The record also reveals that A. told Officer Jaime that once defendant pulled her underwear aside and then penetrated and squished her “pee-pee,” which caused bleeding.

Pulling A.’s underwear aside involved the use of force. Although it probably did not require much force, aggravated lewd conduct need only involve force that is substantially *different* from that needed to accomplish the lewd act. Here, a jury could find that the act of pulling A.’s underwear aside was substantially different from the act of penetrating and squishing her “pee-pee.” Moreover, it was unnecessary for defendant to pull A.’s underwear aside to commit the lewd act. Defendant could have simply slid his hand beneath her underwear or penetrated and squished her through her underwear. Alternatively, he could have had A. move or remove her underwear. Thus, that defendant pulled A.’s underwear aside instead of ripping her clothing off does not preclude a finding of force. Nor does the fact that A. apparently did not resist when he pulled her underwear aside. Although such resistance would further support a finding of force beyond that necessary to commit the lewd act (see, e.g., *People v. Bolander, supra*, 23 Cal.App.4th 155 [defendant overcame the victim’s resistance to having his pants pulled

---

<sup>10</sup> L. also said that defendant kissed L. on the neck.

down and being bent over and pulled toward defendant]), the California Supreme Court in *Soto* made it clear that aggravated lewd conduct does not require a finding of force against the victim's will or resistance. (*Soto, supra*, 51 Cal.4th at p. 248.)

### **B. Duress**

For purposes of aggravated lewd conduct, “ ‘duress’ ” means “ ‘a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.’ ” (*People v. Leal* (2004) 33 Cal.4th 999, 1004, italics omitted; accord, *Soto, supra*, 51 Cal.4th at p. 246; see CALJIC No. 10.42; CALCRIM No. 1111.) Simply put, “duress involves psychological coercion.” (*People v. Schulz* (1992) 2 Cal.App.4th 999, 1005; *People v. Senior* (1992) 3 Cal.App.4th 765, 775.)

This court has recognized that “ ‘[d]uress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. . . . “Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim” [are] relevant to the existence of duress.’ [Citation.]” (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1319-1320; *People v. Schulz, supra*, 2 Cal.App.4th 999, 1005.) “Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family.” (*People v. Cochran* (2002) 103 Cal.App.4th 8, 14.) “A threat to a child of adverse consequences, such as suggesting the child will be breaking up the family or marriage if she reports or fails to acquiesce in the molestation, may constitute a threat of retribution and may be sufficient to establish duress, particularly if the child is young and the defendant is her parent. . . . [S]uch a threat also represents a defendant's attempt to isolate the victim and increase or maintain her vulnerability to his assaults.” (*Id.* at p. 15.)

We conclude that the totality of the circumstances surrounding defendant's ongoing molestation of A. and L. supports findings that defendant secured the girls' compliance against their will through duress.

First, although defendant was not a parent or relative, he would naturally enjoy the inherent respect and authority that six-year-old children would commonly, if not instinctively, afford adults, especially one who lived with them. (See *People v. Pitmon* (1985) 170 Cal.App.3d 38, 51.) Moreover, for six-years-old girls, an unrelated, adult man who approached them and physically imposed himself would naturally be intimidating and foster a sense of physical vulnerability and defenselessness. (See *People v. Cochran, supra*, 103 Cal.App.4th 13-14 [age and size disparity].)

Next, we note that both girls said that after defendant started molesting them, they were afraid or scared of him. They would tell him to stop touching them, but he refused, and he continued to exploit them over a period of time. Moreover, there was evidence that in some instances, he physically grabbed L.; his conduct inflamed A. vagina and caused her to bleed. (See *People v. Schulz, supra*, (1992) 2 Cal.App.4th at p. 1005 [continuous exploitation]; *People v. Senior, supra*, 3 Cal.App.4th at p. 775 [use of physical control].) Defendant's ongoing molestation and occasional use of force despite the girls' protests could only have accentuated the girls' sense of powerlessness and enhanced the psychologically coercive nature of defendant status, authority, size and age.

Finally, we note that from the beginning, defendant warned A. not to tell her mother, and L. not to tell anyone. A "simple warning to a child not to report a molestation reasonably implies the child should not otherwise protest or resist the sexual imposition." (*People v. Senior, supra* 3 Cal.App.4th at p. 775.) It is true that defendant did not couple his warnings with an *express* threat that they would suffer some bad consequence—i.e., bodily harm, jeopardy to someone else, family disruption. (See *People v. Espinoza, supra*, 95 Cal.App.4th at pp. 1318-1321 [no evidence that lewd acts were accompanied by threat that impelled compliance].) Nevertheless, we believe that

given the disparity in age and size, the girls' generalized fear of defendant, his ongoing molestation and occasional use of force, and his refusal to heed their protest, a jury reasonably could find that defendant's express warnings implicitly conveyed a "don't tell *or else*" type threat of retribution or negative consequences, and that these circumstances combined to overcome the girls' resistance, coerce their acquiescence, and thereby enable defendant to continue molesting them. In our view, when an adult male molests a child despite her protests and repeatedly warns her not to tell anyone, the naturally intimidating circumstances and the warnings can be enough to trigger a child's fearful imagination of some negative consequence and coerce acquiescence.

In sum, we conclude that there is substantial evidence to support defendant's convictions on theories that he used force and/or duress to commit the lewd acts.

Defendant notes that in the cases relied on by the Attorney General, there was more evidence of duress than there is here. (*People v. Veale* (2008) 160 Cal.App.4th 40 [victim's testimony that she feared defendant would kill her]; *People v. Cochran, supra*, 103 Cal.App.4th 8 [father perpetrator and threat that family would be disrupted].) However, every case is unique, and we do not read those cases to set a minimum evidentiary basis to support a finding of duress based on an implicit threat of negative consequences. Accordingly, they do not convince us that there was insufficient evidence in this case.

#### **IV. EVIDENTIARY ISSUES**

Defendant contends the court erred in admitting A.'s and L.'s preliminary hearing testimony, evidence of A.'s demeanor at the preliminary hearing, and evidence of the magistrate's competency determination. He also claims the court erred in admitting expert testimony concerning CSAAS.

### A. The Preliminary Hearing Testimony

Before trial and after a hearing, the court granted the prosecution's motion to admit the preliminary hearing testimony under Evidence Code section 1360.<sup>11</sup>

Defendant claims the court erred in finding that A.'s and L.'s former testimony was sufficiently reliable to be admitted.

Although generally, we review a determination under section 1360 for abuse of discretion (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367; *People v. Brodit* (1998) 61 Cal.App.4th 1312, 1329; cf. *In re Cindy L.* (1997) 17 Cal.4th 15, 29), we independently review the court's finding of reliability. (*People v. Eccleston* (2001) 89 Cal.App.4th 436, 445; see § 1360, subd. (a)(2).)

In determining reliability, we consider all relevant factors including (1) spontaneity and consistent repetition; (2) mental state of the declarant; (3) use of terminology unexpected of a child of similar age; and (4) lack of motive to fabricate. (*People v. Eccleston, supra*, 89 Cal.App.4th at p. 445; *People v. Brodit, supra*, 61 Cal.App.4th at pp. 1329-1330, citing *In re Cindy L., supra*, 17 Cal.4th at pp. 29-30.) Moreover, "the child's ability to understand the duty to tell the truth and to distinguish between truth and falsity is also a factor in determining the reliability of his or her extrajudicial statements." (*In re Cindy L., supra*, 17 Cal.4th at p. 30.)

---

<sup>11</sup> Evidence Code section 1360 provides, in relevant part as follows. "(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply: [¶] (1) The statement is not otherwise admissible by statute or court rule. [¶] (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability. [¶] (3) The child either: [¶] (A) Testifies at the proceedings. [¶] (B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child."

In this section, we refer to Evidence Code section 1360 simply as "section 1360."

A.'s and L.'s preliminary hearing testimony was not spontaneous. However, their testimony that defendant touched their private parts numerous times, they were scared of him, they told him to stop, and he would not stop was consistently repeated either to the officers who interviewed them or at trial or both. Concerning A.'s and L.'s mental state at the preliminary hearing, the record does not suggest that they were in a state that might undermine the reliability of their testimony. Although the transcript strongly suggests that they were at times hesitant or reluctant to talk about the particulars of the abuse, such hesitance or reluctance does not reasonably imply that the testimony they gave was unreliable. Next, we do not find that A. nor L. used words that a child would not be expected to know in describing defendant's conduct. On the contrary, they used their own age-appropriate words to describe their body parts. Concerning motive, the record does not reveal that at the preliminary hearing, the girls had a motive to fabricate the molestation. Rather, both girls said that defendant's touching scared them, and A. said that defendant was mean to her in that he touched her. Finally, at the preliminary hearing, both girls were asked whether they understood the difference between what is true and what is false, and the court was satisfied that they did and found them competent to testify.

Given the record, we do not find that as a matter of law, the preliminary hearing testimony was too unreliable to be admissible. Instead, we agree with the trial court that on balance, the girls' basic testimony that defendant touched their private parts on a number of occasions, that they told him not to, that he warned them not to tell their mother, and that he would not stop was sufficiently reliable to render their preliminary hearing testimony admissible under section 1360.

We acknowledge, as defendant points out, that there were inconsistencies and contradictions between what A. and L. said at the preliminary hearing and what they told the officers who interviewed them, what they later told Ms. Ritter, and what they said at trial concerning the number of times defendant touched them, whether he directly

touched their skin, whether he penetrated them, whether he touched their breasts, whether and where he kissed them, and whether they saw his penis.

On those particular issues, the preliminary hearing testimony provided the defense with evidence that could be used to impeach A.'s and L.'s other statements. However, given A.'s and L.'s ages and the fact that they were confronted with the formality of testifying in court with adults questioning them, we do not find that the inconsistencies and contradictions on those details undermined the reliability of their preliminary hearing testimony that defendant touched their private parts more than once, allegations that they consistently repeated.

### **B. A.'s Demeanor at the Preliminary Hearing**

At one point when A. was testifying, she apparently became emotional. The prosecutor and court asked if she was okay or wanted to take a break. After a break, the prosecutor asked if she was feeling sad. She said she was but could not say why. At another point, the prosecutor asked whether defendant had touched her private parts on her skin and whether her underwear was on or off. A. did not respond. The prosecutor noted that she had started to cry. After a pause in the proceedings, the court asked A. if she wanted her mother to sit next to her while she testified. A. said she did. The court then explained that her mother could only sit there; she could not talk to A. or answer questions. Only A. could answer the questions.

Defendant argues that the statements describing A.'s demeanor were not admissible under section 1360 because A.'s demeanor was not nonverbal conduct that A. intended as a substitute for an oral or written expression *about defendant's abuse*. (See Evid. Code, § 225 [defining "[s]tatement" ].)

We agree that the statements by the prosecutor and court were not admissible under section 1360. However, we find that their admission was harmless. The comments about A.'s demeanor were brief. And although the evidence may have evoked sympathy for A. and the difficulty she apparently had testifying at the preliminary hearing, her

demeanor did not have a tendency to make her preliminary hearing testimony or statements to the officers or Ms. Ritter more credible or convincing; nor did evidence of her demeanor tend to make her a more credible witness at trial. The testimony at the preliminary hearing did not corroborate the statements A. provided at other times about defendant's use of force that support the convictions for *forcible* lewd conduct. Moreover, the jury was able to see A. testify at trial and assess her credibility at that time. Last we consider defendant's argument that the jury would have wanted to punish defendant for putting the girls through the trauma of testifying to be at best speculation.

Under the circumstances, we do not find it reasonably probable defendant would have obtained a more favorable outcome had the jury not heard the brief comments about A.'s demeanor at the preliminary hearing. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

### **C. A.'s and L.'s Competence**

At the preliminary hearing before the prosecutor asked A. and L. any questions related to the charges against defendant, the prosecutor and court questioned them about whether they knew the difference between the truth and a lie and whether they promised to tell the truth. Given their answers, the court found them both competent to testify.

Defendant notes that these colloquies also did not involve former statements by A. and L. about defendant's abuse. Accordingly, he again claims that they were not admissible under section 1360. Moreover, he argues that the jurors would understand the court's comments as a judicial determination that A. and L. told the truth at the preliminary hearing.

We conclude that any error in admitting these exchanges was harmless. They were extremely brief. And because they only involved whether A. and L. understood the difference between the truth and a lie and reflected their promise to tell the truth, we considerate it inconceivable that any juror understood them as a finding by the court that everything the girls said was the truth. We further note that the girls' preliminary hearing testimony did not corroborate the statements they made concerning defendant's forcible

conduct. Moreover, the jurors had ample evidence and direct observation of A. and L. to determine the credibility of all of their incriminating statements and testimony; and, despite the magistrate's determination of competence to testify, the inconsistencies and contradictions in what the two girls said at various times provided the defense with fodder to impeach both girls' credibility. Again, it is not reasonably probable defendant would have obtained a more favorable outcome had the jurors not heard the competency exchanges. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)<sup>12</sup>

#### **D. CSAAS Testimony**

Defendant acknowledges that when a defendant suggests that an alleged child abuse victim's conduct is inconsistent with his or her accusations of abuse, CSAAS expert testimony has been held admissible to disabuse jurors of commonly held stereotypical misconceptions about how child sexual abuse victims behave. California courts have repeatedly acknowledged the admissibility of CSAAS evidence.<sup>13</sup> (See, e.g.,

---

<sup>12</sup> We reject defendant's claim that error in admitting evidence of A.'s demeanor and A.'s and L.'s competency implicated his federal constitutional rights. "We do not reverse a judgment for erroneous admission of evidence unless 'the admitted evidence should have been excluded on the ground stated and . . . the error or errors complained of resulted in a miscarriage of justice.'" (Evid.Code, § 353, subd. (b); see also [citation]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [error is harmless under our state constitutional standard unless 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. Earp* (1999) 20 Cal.4th 826, 878.)

Given our discussion concerning evidence of the girls' competency, we need not address the Attorney General's argument that defendant forfeited this claim by failing to raise a specific objection to that portion of the preliminary hearing transcript. Nor need we address defendant's argument that if he forfeited his claim, then defense counsel rendered ineffective assistance in failing to object.

<sup>13</sup> Although defendant presented no case in chief, his cross-examination of the girls implied and his closing argument made explicit his suggestion that the differences, inconsistencies, and contradictions in what the girls' said at various times, including trial, undermined their claims of molestation. Thus, defendant does not claim that there was no basis for admitting expert testimony concerning CSAAS.

*People v. Yovanov* (1999) 69 Cal.App.4th 392, 406-407; *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1216; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745; *People v. Housley* (1992) 6 Cal.App.4th 947, 957; *People v. Bowker* (1988) 203 Cal.App.3d 385, 391.) However, noting that other states—Iowa, Pennsylvania, Kentucky, and Tennessee—limit or exclude CSAAS evidence (see, e.g., *Lantrip v. Commonwealth* (Ky.1986) 713 S.W.2d 816, 817 [CSAAS evidence not proven to be a generally accepted medical concept or a syndrome that has attained scientific acceptance]; *Commonwealth v. Dunkle* (Pa.1992) 602 A.2d 830, 834 [same]; *State v. Ballard* (Tenn.1993) 855 S.W.2d 557, 561-562 [CSAAS symptoms too generic to be probative and only relevance is to credit the victim’s testimony]), defendant urges us to join them and hold that such evidence is inadmissible for all purposes. We decline the invitation.

In *People v. Perez* (2010) 182 Cal.App.4th 231, this court rejected a similar challenge to the admissibility of CSAAS evidence. We found “no reason to depart from recent precedent, to wit: ‘CSAAS cases involve expert testimony regarding the responses of a child molestation victim. Expert testimony on the common reactions of a child molestation victim is not admissible to prove the sex crime charged actually occurred. However, CSAAS testimony “is admissible to rehabilitate [the molestation victim’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.]” ’ [Citations.] Moreover, it appears that our Supreme Court reached the same conclusion in *People v. Brown* (2004) 33 Cal.4th 892, 906, in which case we are bound by its reasoning (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). Here, we reiterate, the victim’s testimony on direct examination was inconsistent with her prior statements in a way that tended to exculpate defendant. ‘ “ ‘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.]” ’ [Citation.]” (*People v. Perez, supra*, 182 Cal.App.4th at p. 245.)

## V. INSTRUCTIONAL ISSUES

### A. Propensity Instruction<sup>14</sup>

Based on this court’s decision in *People v. Wilson* (2008) 166 Cal.App.4th 1034 (*Wilson*), the trial court gave the following modified version of CALCRIM No. 1191, which we shall refer to as the *Wilson* instruction. “The People presented evidence that the defendant committed the crimes of lewd or lascivious act on a child by force or fear against [A.] and [L.]. These crimes are defined for you in these instructions. [¶] If you decide the defendant committed a charged offense, you may but are not required to conclude from that evidence that the defendant was disposed or inclined to have the requisite specific intent for other charged crimes, and based on that decision also conclude that the defendant was likely to and did have the requisite specific intent for other charged offenses. If you conclude that the defendant committed the charged offense, that conclusion is only one factor to consider, along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of other charged offenses. The People must still prove each element of every charge beyond a reasonable doubt. Do not consider this evidence for any other purpose except for the limited purpose of determining the specific intent of the defendant in certain charged offenses.” (See § 1108.)<sup>15</sup>

---

<sup>14</sup> In this particular section, all unspecified statutory references are to the Evidence Code.

<sup>15</sup> Section 1108 provides, in relevant part, “(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352. [¶] (b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section

Relying on *People v. Quintanilla* (2005) 132 Cal.App.4th 572 (*Quintanilla*), defendant contends the court erred by giving the *Wilson* instruction.<sup>16</sup>

In *Quintanilla, supra*, 132 Cal.App.4th 572, the trial court gave an instruction that permitted jurors to draw an inference of propensity from the *charged* offenses of domestic violence if they found by a preponderance of the evidence that he committed those offenses. (*Id.* at p. 581; see § 1009.) On appeal, the court disapproved of the instruction. It explained that section 1109 “was clearly intended to make evidence of uncharged domestic violence admissible in cases where it was not previously permitted. [Citation.] The Legislature was careful to provide that evidence of other domestic violence offenses may be excluded when it is unduly prejudicial. Our Supreme Court relied heavily on a parallel provision in section 1108 when it upheld the constitutionality of that statute, which was the first to authorize the admission of propensity evidence. [Citation.] Evidence of other *charged* offenses cannot be excluded, however, no matter how prejudicial it may be. Without that safeguard, it is fundamentally unfair to allow the jury to infer the defendant’s propensity to commit crimes of domestic violence from his

---

1054.7 of the Penal Code. [¶] (c) This section shall not be construed to limit the admission or consideration of evidence under any other section of this code.”

<sup>16</sup> The propriety of a *Wilson* instruction is before the California Supreme Court, which granted review in *People v. Villatoro* (2011) 194 Cal.App.4th 241 (review granted July 20, 2011, S0192531) to consider whether the modifying the standard section 1108 instruction so that it permitted jurors to consider evidence of a *charged* offense in determining defendant’s propensity to commit the other charged offenses was reversible error when the court told jurors that all charged offenses must be proved beyond a reasonable doubt.

We reject the Attorney General’s claim that defendant forfeited his claim of instructional error by failing to object below. The record reveals that defense counsel did object. Moreover, even in the absence of an objection, we may consider the merits of defendant’s claim because it implicates substantial rights. (Pen. Code, § 1259; *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [no forfeiture when “trial court gives an instruction that is an incorrect statement of the law”]; *People v. Prieto* (2003) 30 Cal.4th 226, 247 [instructional errors reviewable on appeal to extent they affect defendant’s substantial rights even absent objection].)

commission of other charged offenses.” (*Id.* at pp. 579-580, italics added.) For this reason, the court was reluctant to stretch the application of section 1109 beyond evidence of uncharged offenses, which could be excluded, to evidence of charged offenses which could not. (*Id.* at p. 582.) The court also expressed concern over the “mental gymnastics” involved in evaluating the “charged offenses under the preponderance standard for purposes of drawing a propensity inference, while also weighing the same evidence under the reasonable doubt standard for purposes of deciding [the defendant’s] guilt on each charge.” (*Id.* at p. 583.)<sup>17</sup>

Because the *Wilson* instruction permits jurors to consider the charged offenses as propensity evidence, defendant claims that it rendered his trial fundamentally unfair and violated his right to due process.

In *Wilson*, *supra*, 166 Cal.App.4th 1034, this court rejected a similar challenge to the *Wilson* instruction. We found three reasons for permitting the use of charged offenses to show propensity. “First, the plain wording of Evidence Code section 1108 does not limit its application to cases involving uncharged sex offenses. The statute provides that when a ‘defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.’ The statute does not distinguish between charged and uncharged offenses. Second, in cases such as this, involving multiple sexual offenses against multiple victims, permitting the jury to use propensity evidence in this way serves the legislative purpose behind section 1108. Third, the policy concerns or factors . . . ‘supporting the general rule against the

---

<sup>17</sup> The United States Supreme Court granted certiorari for *People v. Quintanilla*, *sub nom. Quintanilla v. California* (2007) 549 U.S. 1191, on a sentencing issue unrelated to the propriety of the propensity instruction. Judgment was vacated and the case remanded to the Court of Appeal for further consideration in light of *Cunningham v. California* (2007) 549 U.S. 270. On remand, the Court of Appeal filed an unpublished opinion on July 31, 2007.

admission of propensity evidence’ are not implicated where multiple offenses are charged in the same case. [Citation.] The defendant does not face an ‘unfair burden of defending against both the charged offense and the other uncharged offenses’ or ‘protracted “mini-trials” to determine the truth or falsity of the prior charge’ or ‘undue prejudice arising from the admission of the . . . other offenses’ in cases such as this, since he is already required to defend against all of the charges. [Citation.] Thus, the reasons for excluding propensity evidence . . . do not apply to cases involving propensity evidence based on charged offenses.” Given these reasons, we questioned *Quintanilla*’s conclusion that section 1108 did not permit the jury to consider evidence of charged offenses as propensity evidence. (*Wilson, supra*, 166 Cal.App.4th at p. 1052.)

Moreover, we distinguished *Quintanilla* on the ground that the instruction in *Wilson* was much narrower than that given in *Quintanilla*. In particular, the instruction in *Wilson*, like that given here, “eliminated the language permitting proof of the propensity evidence by a preponderance of the evidence. The court instructed the jury that the prosecution needed to prove ‘each element of every charge beyond a reasonable doubt.’ There were no other instructions that permitted proof by any standard other than beyond a reasonable doubt. Thus, there was no risk that the jury would be confused regarding the standard of proof or apply the wrong standard of proof. Second . . . the court instructed the jury that it may, but was not required to make the inference authorized by Evidence Code section 1108. Third, it told the jurors that the inference ‘is not sufficient by itself to prove that the defendant is guilty of the other charged offenses.’ Fourth, it limited use of the inference to proof that defendant had the specific intent to commit a charged offense. Finally, prior to giving the modified instruction in this case, the court engaged in the weighing process that our Supreme Court found crucial for the admission of propensity evidence . . . and weighed the propriety of using evidence of one offense as circumstantial evidence to prove one of the other offenses under Evidence Code section 352. [Citation.]” (*Wilson, supra*, 166 Cal.App.4th at pp. 1052-1053.)

We affirmed our analysis in *Wilson*. Accordingly, we do not find that giving the *Wilson* instruction rendered defendant's trial fundamentally unfair.

Defendant argues that *Wilson* is distinguishable and should not be followed for two reasons. First, he notes that here, evidence of numerous alleged incidents was admitted, and the prosecutor never identified which acts constituted the offenses charged against him. However, this point of distinction does not suggest that it was error to give the *Wilson* instruction. The trial court gave a unanimity instruction, which required that jurors agree on the act forming the basis for each conviction unless they all agreed that he committed all of the acts he was alleged to have committed. (See CALCRIM No. 3501.) The *Wilson* instruction reiterated the general reasonable doubt instruction (CALCRIM No. 220) and told jurors that the prosecution had the burden to prove every element of the charged offenses beyond a reasonable doubt. Under the *Wilson* instruction, if, and only if, the jury found that defendant committed a charged offense could it consider that evidence as evidence of a propensity to harbor the requisite intent for other charged offenses. Thus, in effect, the instruction permitted the jury to consider only the evidence of acts which it unanimously agreed defendant committed as evidence of propensity to harbor the requisite specific intent.

Defendant also notes that in *Wilson*, the trial court exercised its discretion under section 352 before giving the propensity instruction; but here the court did not do so. (*Wilson, supra*, 166 Cal.App.4th at p. 1053.)

In *Wilson*, we noted that the trial court's exercise of discretion distinguished the case from *Quintanilla*. However, we did not discuss whether the trial court must exercise its discretion under section 352 before giving a *Wilson* instruction. As a practical matter, it is not clear whether doing so would ever be necessary, that is, whether the potential prejudice from permitting a jury to consider charged offenses as propensity evidence could ever so outweigh the probative value of the evidence as to militate against giving the *Wilson* instruction.

In *People v. Falsetta* (1999) 21 Cal.4th 903, the Supreme Court found that the discretion to *exclude* propensity evidence altogether under section 352 protected section 1108 against a due process challenge. (*Id.* at p. 917.) “By reason of section 1108, trial courts may no longer deem ‘propensity’ evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352. Rather than *admit or exclude* every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant’s other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.” (*Id.* at pp. 916-917, italics added.)

When evidence of *uncharged* sex offenses is offered as propensity evidence, the primary issue is whether to admit it. Under section 352, the focus is on whether its potential prejudice “substantially outweighs” its probative value. (§ 352 [court may exclude evidence if “its probative value is substantially outweighed” by the probability of prejudice].) The greatest potential prejudice comes from simply letting the jury learn about uncharged similar acts. That prejudice can, of course, be compounded by the burden of defending against it, the amount of time that presenting and countering the evidence might consume, and the risk that a mini-trial on uncharged offenses might distract jurors from the primary task of deciding whether the defendant committed the charged offenses. However, as we opined in *Wilson*, none of these sources of prejudice exist when the defendant is charged with multiple lewd acts because the evidence of those acts is coming in no matter how prejudicial it is, the defendant must address and defend against that evidence, and there is no risk of a distracting, mini-trial on unrelated misconduct. For these reason and because the *Wilson* instruction requires the jury to

determine that the defendant committed a charged offense in order to consider it as evidence of a propensity, we find it difficult to imagine what other sort of undue or unfair prejudice would, or could, arise from permitting a jury to consider a charged offense as propensity evidence. It is even more difficult to imagine how some sort of additional prejudice could or would “substantially outweigh” the probative value of the propensity evidence.

In any event, for these very reasons, even if a “352” analysis concerning evidence of charged offenses were a prerequisite for a *Wilson* instruction, we would find the court’s failure exercise its discretion in this case to be harmless.

As noted, the *Wilson* instruction limited the use of the propensity evidence to the issue of whether defendant committed the lewd acts with the requisite criminal intent.<sup>18</sup> Given the ages and residence of A. and L., and the circumstances surrounding the alleged conduct toward A. and L., the evidence of defendant’s conduct toward both girls was sufficiently similar to be highly probative on the issue of lewd intent and thus equally probative of a propensity to harbor that intent. (See *People v. Branch* (2001) 91 Cal.App.4th 274, 282-283, 285 [evidence of a sexual offense is “indisputably relevant in a prosecution for another sexual offense”].) Indeed, the evidence of intent was, in our view, overwhelming, and defendant concedes that if the jury found that he committed the acts described by A. and L., his intent was not reasonably subject to dispute. On the other hand, the record does not suggest any source of undue or unfair prejudice that might

---

<sup>18</sup> Defendant complains that during closing argument, the prosecutor did not confine his propensity argument to the issue of criminal intent. However, defendant did not object to that argument. In any event, the instruction unequivocally limits the jury’s consideration of the propensity evidence to the issue of defendant’s criminal intent in committing the lewd acts. We presume the jury understood and followed the court’s instructions, and, as the court directed it to do, disregarded statements by the prosecutor that conflicted with the court’s instructions. (*People v. Osband* (1996) 13 Cal.4th 622, 717; see *People v. Guerra* (2006) 37 Cal.4th 1067, 1115; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17; *People v. Anderson* (1987) 43 Cal.3d 1104, 1120.)

have “substantially outweighed” the highly probative value of the charged offenses to show propensity to harbor the requisite intent. Accordingly, it is inconceivable that a proper exercise of discretion under section 352 would militate against giving the *Wilson* instruction. Furthermore, given the overwhelming evidence that if defendant committed a lewd act, he did so with the requisite intent, it is inconceivable the jury would not have found the requisite intent had the court not given the *Wilson* instruction.

In short, we do not find it reasonably probable defendant would have obtained a more favorable verdict had the court exercised its discretion under section 352 before giving the *Wilson* instruction. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) Furthermore, because we do not find that giving the *Wilson* instruction rendered defendant’s trial fundamentally unfair, we would find any alleged error in failing to exercise discretion under section 352 before giving it to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Defendant argues that giving the *Wilson* instruction was prejudicial because here the prosecutor did not offer it until the conference on instructions, which was after the evidence had been taken. He complains that because of that timing, he “had no ability to call witnesses to defend against the propensity evidence.” He asserts that he could have called one or more of the many people living at the residence “as character witnesses and/or to testify about specific incidents of conduct inconsistent with having a propensity to molest.”

Because the evidence from which the jurors could have inferred propensity was admitted to show that he actually committed the offenses, any evidence that defendant could have marshaled to counter the propensity evidence also would have supported his defense that A. and L. were unbelievable and unreliable and, therefore, that he was innocent. Thus, at trial, even before the instruction conference, defendant had compelling incentive to present any and all evidence in defense, including testimony from residents that defendant never exhibited any sexual interest in children or expert testimony that he

is not a sexual deviate and thus did not commit the charged offenses. (§ 1102, subd. (a) [permitting character evidence]; *People v. Stoll* (1989) 49 Cal.3d 1136, 1152 [expert testimony].)

Furthermore, even if it did not occur to defendant to present such evidence to defend against the charges, after the instruction conference, defendant could have asked the court to reopen the case so he could rebut any inference of propensity that jurors could now draw under the *Wilson* instruction. (*People v. Jones* (2003) 30 Cal.4th 1084, 1110 [trial court has discretion to reopen the case to permit a party to present additional evidence]; *People v. Riley* (2010) 185 Cal.App.4th 754, 764; *People v. Goss* (1992) 7 Cal.App.4th 702, 706; e.g., *People v. Ardoin* (2011) 196 Cal.App.4th 102, 129 [case reopened for further argument because additional instruction raised new issues]; see Pen. Code, §§ 1093, 1094.) Defendant did not do so or seek a continuance to investigate and obtain such evidence.

Under the circumstances, defendant's alleged inability to present evidence to rebut the propensity evidence fails to establish prejudice from either the timing of the prosecutor's request for a *Wilson* instruction or the giving of that instruction.

In a related claim, defendant argues that it was error to give the *Wilson* instruction because the prosecutor failed to comply with the notice provision of section 1108, which requires that the people disclose the propensity evidence at least 30 days before trial. (§ 1108, subd. (b), incorporating by reference the notice requirements in Pen. Code, § 1054.7.)

Defendant failed to raise a section 1108 "notice" objection below and therefore forfeited this claim on appeal. (§ 353; see *People v. Mayfield* (1997) 14 Cal.4th 668, 798 [failure to object forfeits claim based on lack of timely notice].)

Defendant alternatively claims defense counsel rendered ineffective assistance in failing to raise a notice objection.

To obtain reversal due to ineffective assistance, a defendant must first show “that defense counsel’s performance fell below an objective standard of reasonableness, i.e., that counsel’s performance did not meet the standard to be expected of a reasonably competent attorney[.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; *Strickland v. Washington* (1984) 466 U.S. 668, 688.) Second, the defendant must show that there is “a reasonable probability that defendant would have obtained a more favorable result absent counsel’s shortcomings.” (*People v. Cunningham, supra*, 25 Cal.4th at p. 1003.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland v. Washington, supra*, 466 U.S. at p. 694; *People v. Staten* (2000) 24 Cal.4th 434, 450-451.) Where the record on direct appeal “does not show the reason for counsel’s challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation.” (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) Under such circumstances, claims of ineffective assistance are generally rejected on direct appeal and more properly raised in a petition for habeas corpus, which can include declarations and other information outside the appellate record that reveal the reasons for the challenged conduct. (*People v. Mayfield* (1993) 5 Cal.4th 142, 188 [“tactical choices presented . . . on a silent record” are “better evaluated by way of a petition for writ of habeas corpus” and will be rejected on direct appeal].)

Here, the record does not reveal counsel’s reasons, and we do not find that counsel’s omission was unreasonable as a matter of law. “Counsel does not render ineffective assistance by failing to make motion or objections that counsel reasonably determines would be futile.” (*People v. Price* (1991) 1 Cal.4th 324, 387.) Here, counsel could have considered an objection unnecessary or pointless because he had notice before trial of the evidence from which jurors would be allowed to draw an inference of propensity under the *Wilson* instruction. Counsel could have reasoned that he had no more evidence to rebut that inference than he had to offer in defense of the charges and thus concluded that the basic defense—i.e., that A. and L. were unreliable and thus the

prosecution could not prove any act beyond a reasonable doubt—would also allow him to urge jurors not to draw a propensity inference.

Moreover, on the record before us, defendant cannot establish prejudice. Again, defendant had notice of the evidence from which the jury might infer a propensity. When the *Wilson* instruction was first mentioned, counsel did not seek to reopen the case to present evidence to rebut any potential inference. And the record does not suggest that defendant had or could have had any evidence. As noted, if he had such evidence, he could have offered it instead of introducing no evidence to support his defense. Accordingly, we do not find a reasonable probability that the court would have declined to give a *Wilson* instruction had counsel raised the notice objection. More fundamentally, because the *Wilson* instruction permitted jurors to draw only an inference that defendant had a propensity to harbor the specific intent necessary to establish unlawful lewd conduct and because, as defendant concedes, his intent was not subject to reasonable dispute if the jury found that he committed an alleged lewd act, we do not find a reasonable probability that defendant would have obtained a more favorable result had the *Wilson* instruction not been given.

In short, we reject defendant's claim of ineffective assistance.

### **B. Duress**

Defendant contends that court erred in instructing jurors on the theory of aggravated lewd conduct by duress. He claims there was insufficient evidence to support a finding of duress. (See *People v. Risenhoover* (1968) 70 Cal.2d 39, 51 [error to instruct theory not supported by the evidence].)

Obviously, having found sufficient evidence to support convictions based on duress, we reject defendant's instructional claim.<sup>19</sup>

---

<sup>19</sup> For this reason, we need not address the Attorney General's argument that defendant forfeited his instructional claim by failing to object to the duress part of the court's aggravated lewd conduct instruction.

However, even if we assume that it was error to instruct on duress, the error would not compel reversal.

Where the prosecution presents its case on alternative theories, one of which is legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) However, this standard of review does not apply here because duress did not represent a legally incorrect theory of aggravated lewd conduct. Rather, where, as here, the court permits a jury to consider a factual theory for which there is insufficient evidence, that is, where the jury is presented with two alternative theories, one supported by the evidence but the other not supported, reversal is required *only* if the record affirmatively shows a reasonable probability that the jury relied on the factually unsupported theory. (*People v. Guiton, supra*, 4 Cal.4th 1116, 1129; *People v. Vargas* (2001) 91 Cal.App.4th 506, 564; see *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Here, the court defined “duress” as “a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do or submit to something the he or she would not otherwise do or submit to.” The court repeatedly instructed the jury that the prosecution had the burden to prove every element of the charged offenses beyond a reasonable doubt. The court also instructed the jury that some of its instructions may not apply, depending on its findings, and therefore, jurors should not assume that because a particular instruction was given, the court was suggesting anything about the facts. Finally, there was sufficient evidence to support convictions based on defendant’s use of force.

We presume that jurors can understand the court’s instruction and thus are “fully equipped to detect” a factually inadequate theory. (*People v. Guiton, supra*, 4 Cal.4th at p. 1129.) Thus, even assuming the duress instruction had no application here, it is not reasonably probable the jury would have relied on a factually unsupported theory or that

defendant would have obtained a more favorable result absent the “duress” instruction; rather, we may assume that the jury would have based (and did base) its verdict on a factually supported theory. (*People v. Lucas* (1997) 55 Cal.App.4th 721, 733-734.)<sup>20</sup>

### C. CSAAS Testimony

Defendant contends the court’s standard instruction on CSAAS testimony—CALCRIM No. 1193—is flawed, and therefore the court erred in giving it.

In accordance with CALCRIM No. 1193, the court instructed the jury as follows: “You have heard testimony from Carl Lewis regarding [CSAAS]. Carl Lewis’ 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 [A.’s or L.’s] conduct was not inconsistent with the conduct of someone who has been molested [and] in evaluating the believability of her testimony.” (See CALCRIM No. 1193.)<sup>21</sup>

Defendant cites *People v. Bowker, supra*, 203 Cal.App.3d 385 for the proposition that when CSAAS testimony is admitted, the court must instruct the jury that it “is not intended and should not be used to determine whether the victim’s molestation claim is

---

<sup>20</sup> We reject defendant’s claim that the alleged error implicated defendant’s federal constitutional rights. (See *People v. Guiton, supra*, 4 Cal.4th at p. 1129 [*Watson* applies].)

<sup>21</sup> CALJIC No. 10.64 is also a standard instruction on CSAAS. It differs from CALCRIM No. 1193, and states: “Evidence has been 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 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 an 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 the evidence concerning this 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 . . . .” (Internal brackets omitted.)

true.” (*Id.* at p. 394; see *People v. Brown*, *supra*, 33 Cal.4th at pp. 905-906 [recognizing admissibility of expert testimony to dispel common misconceptions about how victims behave but not to prove alleged victim had actually been molested].) Defendant argues that CALCRIM No. 1193 is internally inconsistent because it informs the jury that the testimony may only be used to decide whether the victim’s testimony is consistent with that of someone who has been molested; and it then informs the jury that the testimony may be used to evaluate the victim’s “believability.” According to defendant, however, permitting use of the evidence to evaluate “believability” is the same as using the evidence to determine whether the victim’s claim of molestation is true, in violation of *Bowker*.<sup>22</sup>

The court’s instruction expressly told the jury *not* to use the expert’s testimony as evidence that defendant molested A. or L. (“testimony . . . is not evidence that the defendant committed any of the crimes charged”); and it advised the jury that it could consider the CSAAS evidence *only* for the limited purpose of evaluating whether A.’s and L.’s behavior was inconsistent with having been molested (“You may consider this evidence only in deciding whether or not [A.’s or L.’s] conduct was not inconsistent with the conduct of someone who has been molested”). However, the instruction also permitted the jury to consider the evidence in evaluating their credibility.

As noted, CSAAS evidence is offered to disabuse a jury of misconceptions it might hold about how a child reacts to a molestation. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301.) However, when the victim’s credibility is attacked, “[t]he [CSAAS] testimony is pertinent and admissible.” (*People v. Patino*, *supra*, 26

---

<sup>22</sup> We reject the Attorney General’s argument that defendant forfeited this claim by failing to object to the court’s instruction below. (See *People v. Guerra*, *supra*, 37 Cal.4th 1067, 1138 [forfeiture upon failure to request that otherwise correct instruction be clarified], overruled on another ground in *People v. Randle* (2008) 43 Cal.4th 76, 151, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also discussion, fn. 16, *ante*.) Defendant claims the instruction does not correctly state the law. Thus, we may address his claim on appeal. (See fn. 16, *ante*.)

Cal.App.4th at p. 1745; cf. *People v. Brown, supra*, 33 Cal.4th at p. 906 [expert testimony on battered woman's syndrome admissible to rehabilitate credibility of victim].)

Here, the girls' credibility was clearly in dispute and an important question for the jury to determine. Simply put, the CSAAS testimony was relevant and could help the jurors understand the inconsistencies and contradictions in the girls' various versions of defendant conduct and determine whether they undermined the girls' credibility and rendered all of their allegations unbelievable. Although evaluating their credibility is a step in determining what happened to the girls, we disagree with defendant's view that the instruction effectively, albeit implicitly, told jurors the testimony could be used to determine whether defendant molested them.

In analyzing a claim of inadequate instructions, we review the instruction in light of the evidence and the arguments of counsel to determine whether there is a "reasonable likelihood" that the jury understood the instructions in the manner proposed by the defendant. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Boyde v. California* (1990) 494 U.S. 370, 378-381; *People v. Holt* (1997) 15 Cal.4th 619, 677; *People v. Clair* (1992) 2 Cal.4th 629, 663; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

Here, we do not find a reasonable likelihood that jurors would (or did) think they could use the CSAAS testimony to determine whether defendant molested A. or L. Not only did the instruction explicitly limit the purposes of the testimony and inform jurors that it was not evidence that he committed any of the charged crimes, but also the prosecutor did not suggest that the testimony could be used to determine whether defendant committed any offense. On the contrary, the prosecutor stated that Carl Lewis was "not [t]here to tell you who to believe and who not to believe" and his testimony was offered because it "dispels myths and preconceived ideas about child sexual assault. If

it's helpful to you, great. If it's not helpful to you, ignore it." Moreover, defense counsel emphasized Carl Lewis's testimony that CSAAS was not "diagnostic."<sup>23</sup>

## VI. DISPOSITION

The judgment is affirmed.

---

RUSHING, P.J.

WE CONCUR:

---

PREMO, J.

---

ELIA, J.

---

<sup>23</sup> Defendant also claims that even if individually the numerous errors he asserts on appeal would not compel reversal, their cumulative effect does. Because we reject most of defendant's claims of error, it suffices to say that we reject his further claim of cumulative reversible prejudice.