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

THE PEOPLE,

Plaintiff and Respondent,

v.

BRETT ANTHONY PASSINEAU,

Defendant and Appellant.

H036276

(Monterey County

Super. Ct. No. SS052209A)

1. INTRODUCTION

A first amended information filed at the outset of trial in July 2010 charged defendant Brett Anthony Passineau with eight counts of lewd touching of two minors between January and July 2005. (Pen. Code, § 288, subd. (a).) The minors are half-brothers (“brothers”) whom defendant and his wife had adopted.¹ During the charged molests, the older brother was six and the younger brother was four. Three counts involved the older brother and five involved the younger brother. The information also charged under the One Strike statute that the offenses had been committed against more than one victim. (Pen. Code, § 667.61, subd. (e)(5).)

¹ To preserve the privacy of the minor victims, we will refer to them as “younger brother” and “older brother” and will not use the names of their aunt or natural parents.

After five days of testimony, the court instructed the jury pursuant to CALCRIM No. 3500 that the prosecution had presented evidence of 11 different types of acts, namely, defendant rubbed his penis on the butt² of each brother, defendant inserted his penis in the younger brother's butt, defendant inserted his finger in the butt of each brother, and each brother tickled defendant's penis and tickled and sniffed defendant's butt. To find defendant guilty of any count, the jurors had to unanimously agree on the lewd act. The verdict forms required the jury to identify the act or acts they found true.

After deliberating for four days and replacing a juror, the jury convicted defendant on three of the eight charged counts, specifically finding that both brothers had tickled defendant's penis (the younger brother in count 1; the older brother in count 6), that defendant had rubbed his penis on the younger brother's butt or between his butt cheeks (count 2), and that there was more than one victim of the offense involving tickling. The jury acquitted defendant of having the younger brother sniff his butt (count 3). As the jury was deadlocked on the remaining four charges, the court declared a mistrial and implicitly dismissed them at sentencing.³ Pursuant to the One Strike statute, defendant was sentenced to 36 years to life, including consecutive terms of 15 years to life on counts 1 and 6 and six consecutive years on count 2.

On appeal, defendant contends that the trial court erred by overly restricting evidence in support of defense theories that the younger brother was inclined to make

² The jury's instructions and findings were based on the words used by the young victims and this opinion will likewise use "butt" and "butt cheeks" for buttocks.

³ Upon receipt of the verdicts, the prosecutor announced an intent to move to dismiss the remaining counts. The trial court announced the motion would be considered at sentencing. The reporter's transcript of sentencing on November 12, 2010 does not reflect any such motion, but the amended minutes signed by the court on December 8, 2010 state that on November 12, 2010, defendant was sentenced and, "On motion of the District Attorney, all remaining charges, enhancements and/or special allegations are hereby ordered dismissed/stricken pursuant to PC 1385."

false accusations of molestation, that the brothers were able to describe sexual encounters because they had each been molested before, that they were sexually precocious, and that their aunt was motivated to induce them to falsely accuse defendant so that they would not move out of the state and away from her. Defendant also complains about the improper admission of rebuttal testimony regarding his parenting skills and his character for lewd conduct with children. For the reasons stated below, we will affirm the judgment.

2. TRIAL EVIDENCE

A. THE ADOPTION OF THE BROTHERS BY DEFENDANT AND HIS WIFE

The two brothers were born to the same mother and different fathers in July 1998 and June 2000. The brothers were removed from their natural mother and placed in May 2002 with their aunt, a woman who had been briefly married to their mother's brother. She had not met the brothers before.

The first of two stipulations read to the jury stated: "Both [brothers] were sexually molested prior to their placement with Mr. and Mrs. Passineau on or about May 15, 2003. Those prior molests were initially disclosed to their aunt, []. Those prior molests involved acts of sodomy and oral copulation."⁴

⁴ The stipulation did not identify who had molested the brothers. As will appear below, more than one individual was allegedly involved.

The jury was not given the statutory definition of sodomy as "sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy." (Pen. Code, § 286, subd. (a).) The jury was not given the statutory definition of oral copulation as "the act of copulating the mouth of one person with the sexual organ or anus of another person." (Pen. Code, § 288a, subd. (a).)

The brothers were already in counseling when placed with the aunt. She took them to a counselor named Jean Wedekind.⁵

Their aunt wanted to be their foster mother, but it was difficult for her, as she is a double amputee with a legal prescription for marijuana to ease her pain and her glaucoma. Carrying around the younger brother was wearing down her amputated leg stump and it was difficult for her teenage boys. She decided the brothers would be better off in a two-parent family. According to the aunt, the brothers were placed with the Fikes for a week or two but it did not work out, so she took them back.⁶

The Passineaus were a couple who wanted to start their own family after having almost grown children with other spouses. They began by taking in a seven-year-old female relative whose mother was having drug problems. Next, Fred Barnes, the director of a private adoption agency, placed a newborn female child with the Passineaus in 2002.

Barnes told the Passineaus about the brothers and their history of molestation. The Passineaus met the brothers with their aunt in Santa Rosa two times before taking them home on the third visit in May 2003. Their aunt testified that she was relieved when they left. The Passineaus told the aunt that she was welcome to visit and she was like extended family. Her first visit was at a birthday party for the brothers in July 2003.

By all accounts, the brothers thrived living with the Passineaus and no observer suspected that defendant was molesting either brother prior to the brothers' disclosures.

⁵ One of defendant's issues on appeal is that the quoted stipulation was almost all the evidence that the trial court allowed of preplacement molestation. Defense counsel had proposed a much more detailed set of stipulations based on his summary of notes by therapist Wedekind, but Wedekind was not called as a witness and her notes were not in evidence at trial.

⁶ According to defense counsel's summary of Wedekind's notes, which was not in evidence, Charles and Christina Fike were involved with the brothers from March 19 through May 6, 2003.

The brothers enjoyed having a four-bedroom house with a big yard in Salinas. Also on the property was a garage that served as a shop for defendant's plumbing business. Also on the property was a recreational vehicle which was the residence of defendant's mother, Virginia Ray, and his younger sister, Tiffany Ray. Tiffany was 21 years old in 2010. They had moved from Oregon to provide a support system for the new family.

Barnes monitored this placement by visiting every two weeks and talking to the brothers and their teachers until their adoption was finalized in the fall of 2004. Barnes never filed a negative report. At his request, the Passineaus arranged for regular family therapy, seeing Wendy McCraney-Matz, a marriage family therapist, as well as other therapists, according to defendant.

The second stipulation read to the jury stated: "During their tenure with the Passineaus, from on or about May 13, 2003, to on or about July 4, 2005, [the brothers] were regularly treated and counseled by mental health professionals. The Passineaus arranged for and transported [the brothers] to and from their counseling sessions.

"The mental health professionals who treated the children were mandated by law to report any allegations of child abuse to the authorities. Neither [brother] ever reported to those mental health professionals that they were being molested by [defendant] or had been molested by [defendant]."

Beginning in May 2003, McCraney-Matz sometimes saw the entire family, sometimes the brothers together, sometimes individually. She testified that, in counseling, defendant asked about behavioral issues by the brothers and she advised him how to deal with some of them. According to her notes, she did not see the younger brother after January 2005. She had monthly sessions with the older brother into April 2005.

Two teachers at their day care center described how, over time, the brothers went from being withdrawn, difficult, and aggressive, to happy, outgoing, and friendly. They

were happy to see their father and he seemed very involved with them. They saw no signs of sexual abuse, which they were trained to look for and required to report.

The brothers' aunt visited and occasionally brought both brothers, though mostly the older brother, to her house in Santa Rosa to visit. She did most of the driving to pick up and return the brothers.

According to defendant's mother, the brothers grew to call her "Grandma," defendant "Daddy," and his wife "Mommy."

Defendant regularly camped and fished at Santa Margarita Lake ("the lake"). He had a boat and a trailer. Defendant testified that he went there every month, often joined by family members, friends, and coworkers. It was a three hour trip when pulling a trailer. Defendant and Jeff Kennedy rented adjoining spaces and parked their trailers facing each other. The brothers remembered "Uncle Jeff's" trailer.

The brothers enjoyed these camping trips. They stayed in defendant's trailer. They fished and swam and went out on the boat.

As to how often defendant took the brothers camping alone, the older brother testified it happened more than five times, more like 20 times. The younger brother testified it happened about four times. Defendant testified that he and the brothers went to the lake with Kennedy about five times. He doubted he had gone twice with the brothers without Kennedy.

Defendant's mother testified that it happened only twice. After one of these trips, the younger brother told her it was "a boys' secret" from Mommy that, at the lake, they got to stay up late, watch movies with Daddy, eat candy, and they did not have to take showers.

Defendant testified that he relaxed the camping rules when his wife was not along. He did not require the brothers to bathe, brush their teeth, or change their clothes every day. According to defendant, this was the "boys' secret," although he did not keep it a

secret from his wife. He either told her about it or confirmed it when she learned it from someone else.

The younger brother testified that Daddy told him that it was a secret from Mommy that they could wear the same clothes and not bathe all weekend. The older brother testified that this occurred, but it was not the “boys’ secret.”

In 2005, the Passineaus made plans to move to Oregon and bought a house there. According to defendant, the move would allow his wife to leave her job as a secretary at a high school and to stay home with the brothers. It was a large lot with room for defendant’s mother and sister. They were planning to move in mid-August. They were waiting on the adoption of two girls placed by the adoption agency in 2004. Defendant and his wife talked with their children about the move. The brothers were excited about moving and being able to do more camping and fishing and outdoor activities. They were concerned about missing their aunt.

According to defendant’s mother, the brothers wondered if their aunt was going to Oregon with them. They were told their aunt would visit them.

The older brother testified at trial in July 2010 that he was excited about moving and was not worried about seeing his aunt after moving. He told his aunt about it and she did not want it to happen. The younger brother testified that he did not want to go to Oregon because he wanted to stay where he could see his aunt.

The aunt testified that she was excited to hear about the planned move. It meant less babysitting for her, and a prettier, though longer, drive to visit the boys. She did not tell defendant’s mother that she was worried she would not see the brothers again if they moved to Oregon.

According to defendant’s mother, the aunt was sad about the idea of them moving and was afraid she would not see the brothers. She told the aunt that they would fly her up to visit.

B. THE LAST CAMPING TRIP

Defendant testified as follows about his last camping trip with the brothers.⁷ He went to the lake near the end of June 2005 for a longer than usual camping trip, maybe five days. People came and went during that visit. At some point defendant was alone with the brothers. They were overdue for a shower, so they used the showers by the public restrooms.

He had learned from Barnes to never touch the brothers while bathing them and to just give them instructions without using his own naked body as an example. In the public showers, defendant kept his underwear on, while the brothers were naked. It was the first time that he had washed their hair.

Early one morning during that trip, the younger brother woke defendant up because he was scared. He wanted to get into bed with defendant. Defendant let him. The younger brother snuggled in with his buttocks against defendant's groin. They were both wearing pajamas. Defendant moved him away and let him sleep there till morning.

The younger brother was small and liked being close. One evening during that camping trip, when he was sitting on defendant's lap, he asked, " 'Daddy, am I sitting on your penis?' " In fact, the younger brother was sitting on his lap, not his penis. Defendant wondered where the question came from, but he was taught not to overreact, so he took a breath and said that he was, " 'But more appropriately, you're sitting on my lap.' " When they returned home, defendant told his wife about these incidents.

When he drove home with the brothers, he had them separated in car seats in the back seat of a four-door pickup truck. During the trip he told them to settle down when they were arguing and disobeying him. They got quiet for about 15 minutes, when he

⁷ This testimony was primarily offered to clarify what defendant later told the aunt about this camping trip in a July 2005 telephone call that she recorded. The recording is summarized below in part 2E, as it covered topics other than the camping trip.

heard giggling. He looked around to see that both brothers had pulled their pants down and were playing with their erect penises. On cross-examination, defendant admitted that their car seat harnesses were in place and their pants were not down, just open.

Defendant had dealt with that kind of behavior by the older brother “[a] lot,” but not by the younger brother. According to instructions from Barnes, he did not want to overreact and scare them, so he told them to pull up their pants and take a nap. He told them it was inappropriate. They complied.

The younger brother asked if he was going to “ ‘tell Mommy.’ ” Defendant told him that he could. “ ‘It’s not a big deal if you want to tell Mommy you’re playing with your erection.’ ” After they got home that night, the younger brother did tell Mommy about it.

Defendant tried to handle situations like that by sharing them with his support group, his wife, mother, and the therapist. He and his wife decided that it was time for the younger brother to have another checkup. He did not call McCraney-Matz about this camping trip. They were seeing other therapists as well.

C. THE FIRST DISCLOSURES

After this last camping trip, the aunt picked the older brother up for a visit in June 2005 while defendant’s wife was in Hawaii. She picked up the younger brother almost a week later on Thursday, June 30. Because her two teenage sons were living with her, the brothers slept in her room. She did not believe it was going to be their last visit before they moved. She expected they would be saying their goodbyes at a different time.

According to the aunt, on Saturday, July 2, 2005, she did not smoke marijuana, as she did not smoke in the house and did not want to leave the brothers alone. She used some prescription pain medication. That night she had a conversation with the younger brother as she put him to bed. He had just turned five years old. She told him he was lucky to have a father to do things with. He told her about a camping trip. She asked him

what kind of games they played. “And then he just said [‘]tickle the penis[’] and [‘]hide the penis in the butt.[’]” He told her that “yellow slime” would shoot out after he tickled for a while. She did not ask for more details because she is not a professional. She “freaked out” and “ran downstairs” and asked the older brother if there was anything going on hurting them at defendant’s house because she had just heard something from his brother.

According to the aunt, the older brother told her that he and defendant tickled each other’s backs and sometimes hugged with no clothes on and they played the tickle game. He said that he touched defendant’s penis and sniffed his butt. Slime came out of defendant’s penis. She did not ask him for specific details. He told her that sometimes he would get jealous because it was happening to his younger brother and he was out of the trailer. He was embarrassed that he wanted to be loved the way his brother was.

At trial in July 2010, the younger brother remembered telling his aunt about the tickle game when he stayed at her house for the Fourth of July in 2005. He remembered that she asked him what kind of games they played. He told her about the tickle game. He gave her the details. At the time he thought it was a fun game. As he remembered it, he first told her about it when they were driving somewhere, and then they talked about it again the same night. When he first told her about it, she stopped somewhere and talked to some people and then turned around. On direct examination, he could not remember what he told her. She was upset and cried a lot.

On cross-examination, the younger brother testified that, when they talked at night, he answered yes when she asked if defendant had made him touch his penis and had put his penis in the younger brother’s butt. He did not remember if she asked him if slimy stuff came out.

The older brother testified that his aunt was the first person he told about what he did with defendant. He told her his “half of the story” after she talked to his younger brother. His aunt called him upstairs and asked him about what his younger brother had

said. She asked if defendant had put his penis in his butt or rubbed it on his butt. He said that defendant had rubbed his penis on his butt. He thought he said that defendant did not put his penis in his butt. He answered yes when she asked if defendant had touched his penis.⁸ She did not ask if he had kissed or touched defendant's penis.

Both brothers testified that they did not talk to each other about it before talking to their aunt.

According to the aunt, she called defendant's wife twice that night of July 2, 2005. She put the younger brother on the telephone and he repeated his statement three times on the telephone. He mentioned tickling and hiding the penis. She did not recall if he mentioned the slime. The aunt was hoping defendant's wife would take care of the situation. In one call she told defendant's wife that the younger brother was hysterical, as he was told not to tell. She did not recall talking about the older brother. Defendant's wife told her not to do anything right away and she would get back to her. Until these disclosures, the aunt had no concerns about the brothers being sexually abused by defendant. Her only concern was that the Passineaus were taking in too many foster children.

According to defendant's mother, there were three phone calls that night, one initiated by the aunt, one by defendant's wife, and one by her. Defendant's wife was shocked and asked his mother to listen in. The aunt said that the brothers had alleged sexual abuse by defendant. On the phone the younger brother said, "Daddy made me sit on his penis and rub until green slime came out." When the aunt prompted him about the minutes, he said, "Daddy said I had to do this for 15 minutes." Defendant's mother was "flabbergasted" and listened without talking.

⁸ The jury was not instructed that this was among the acts of lewd conduct.

According to defendant's mother, she and his wife decided not to tell him about the phone calls that night, as he had been working long hours. When they told him the next day, he was in shock. He went pale and could not get his breath. He could not speak for 15 to 20 minutes. They tried to call the aunt back and did not reach her.

According to defendant, they talked about how to deal with the situation. Their practice was to bring that kind of issue to the next counseling session.

Defendant and his mother each left telephone messages for the aunt in the next couple of days, but they did not speak before the aunt took the brothers to child protective services on July 5, 2005. She also talked to a police officer that day or the next.

According to defendant, on July 5, 2005, the police came and removed all his children from his house.

D. THE INTERVIEWS

On July 7, 2005, the aunt brought the brothers to a child interview center in Santa Rosa. An interview with the younger brother was video-recorded and a 28-minute recording of excerpts was played for the jury. He talked to a woman in a colorful room with toys. He told her he was going to go to kindergarten. He knew he was supposed to tell the truth and would not get in trouble for anything he said. He was there to tell her the truth about "what we did at the lake."

The younger brother said the following. "Daddy wanted me to sit on his penis and then, uhm, then rub back and forth then that . . . [¶] . . . [¶] . . . yellow slime came out." "Daddy" told him to sit on his butt and rub back and forth on "[h]is penis and then yellow slime came out and then, and then Daddy don't want me to tell Mommy 'cause it was a boys['] secret." He rubbed back and forth with his butt. "Dad's" hands were on his hips and pushed him back and forth. "Dad's" penis was on his butt cheeks. The yellow slime went on his butt and defendant's skin. Defendant said, "'[T]hat felt good.'" The younger brother said both that it happened one time and that it happened five times on different days. It only happened when they went camping.

Defendant wanted him to tickle defendant's penis with his hand. Yellow slime came out. His brother was with them when defendant rubbed him.

Nothing else happened. Defendant did not touch his penis. "[H]e wanted me to tickle his butt and then I smelled his balls."⁹ This was everything that was a secret.

After their interviews, the brothers never went back to live with defendant. A police officer told the younger brother that day he would never have to go back.

At trial in July 2010, the younger brother could not remember what he said in that interview. He remembered a nice lady asking him things about defendant. He remembered showing her how he rubbed defendant's penis with his hand and telling her that yellow slime came out.

No recording of the older brother's interview was played for the jury.¹⁰ At trial the older brother remembered being interviewed by a nice lady about sexual things that happened. He initially testified that he did not remember what he told her. He believed that he did not tell her that slime came out when he tickled defendant's penis, because he had not remembered it, but he did tell her that slime came out when defendant rubbed his penis on his younger brother's butt. He recalled telling her that things happened only at the lake. That was not true. He did not tell her that defendant never put his finger in his butt. He did not lie to her. He thought his memory was better at trial than in 2005.

He recalled telling the lady that he only took his clothes off once at the lake. That was not true. He told her he got a surprise when he took off his clothes. It was a toy gun. He told the lady and showed her with dolls how defendant lay face down and his younger

⁹ The jury was later instructed that there was evidence of the lewd acts of sniffing and tickling defendant's butt, but not of smelling his balls.

¹⁰ In the jury's absence, defense counsel explained that the older brother's testimony adequately explained the discrepancies between his trial testimony and his interview.

brother was face down on top of him. He remembered showing the lady how he moved his hand when he tickled defendant's penis.

The brothers were removed from the aunt's care the day of their interviews and were not returned to her until late September 2005.

E. THE TELEPHONE CALL BETWEEN THE AUNT AND DEFENDANT

A Santa Rosa detective suggested to the aunt that she should talk to defendant by telephone and secretly record their conversation. The aunt recalled that conversation occurring on July 8, 2005, or shortly after that date.¹¹ She denied that the police asked her to get defendant to incriminate himself. The recorded call was redacted and admitted into evidence, along with a transcript.

The call began with the aunt denying that she wanted such a thing to happen. She said the brothers sounded like they were telling the truth. Defendant said that the younger brother "said that to me too."¹² The aunt explained that she had not taken the brothers to talk to anyone till Tuesday. She wanted to know what was going on. Defendant said, "Well I can tell you that there's a good chance I'm gonna go to prison for something I didn't do, but to take care of those kids."

The aunt said that she did what she had to do. On Tuesday she took the brothers to social services. Then she explained how the conversation had occurred. The younger brother had asked if he was safe where she lived and she answered that he was because

¹¹ In the jury's absence, the prosecutor stated that the call was recorded on July 15, 2005.

¹² At trial when asked about this statement during cross-examination, defendant explained that the younger brother did not say anything to him about it directly. Two family members had described the disclosure call to him. Then he said the prosecutor had helped him remember, he was in the room and heard the younger brother talking on the phone. On recross-examination, he testified that he was not in the room. He heard about it from his wife and mother.

he has a new dad. He said that the new dad took them camping. She asked him what kind of games they played. Then he said that “you had them tickle your penis.”

Defendant replied that the whole thing was blown out of proportion. He had never ever done anything.

The aunt interrupted him and said that the brothers said it happened more than once and she did not know how they could have made it up. Defendant said that the closest thing was that, at the lake, defendant kept his underwear on while they all showered together and he washed their hair. The aunt said there was nothing wrong with that. Defendant said he had not touched their penises. She said that they had not said otherwise, but that he had asked them to touch his penis.

Defendant said his life was being ripped apart. The aunt said that she was sure that defendant blamed her, but the brothers kept talking about it, so what was she supposed to do? The brothers kept talking about the “tickle game.” Defendant said there was no tickle game. Defendant said he had never been naked with the brothers. She said she had to report it.

Defendant mentioned that the younger brother had been getting erections and that both brothers were playing with their erections on the way back from the lake. The younger brother asked if he was going to tell Mommy and he replied, “ ‘We can. It’s not a big deal if you wanna tell Mommy you’re playing with your erection.’ ” Later that day after they got home, the younger brother told her.

The younger brother also told “mommy” that “ ‘I touched my butt on Daddy’s cheeks [*sic*].’ ” She “flipped.” The younger brother had not told her that he had crawled into bed with defendant one morning because he was scared. They were both wearing pajamas. The younger brother “pushed his butt right up against my penis.”

Another time while camping, the younger brother was sitting on his lap and asked, “ ‘Daddy, am I sitting on your penis?’ ” He answered, “ ‘Well as a matter of fact you are, but you know that’s not a big deal.’ ” The aunt asked if he thought they got this whole

thing from that. Defendant said he did not think so and he did not know where they got it.¹³

The aunt said that they had never told her anything like that during prior visits. The younger brother had told her as she was putting him to bed two days after she had picked him up. The younger brother did not say it with viciousness.

Defendant said that “he did that the same way at the house. He said it like it was funny.” “We definitely overreacted, and now my life is over.” “Here is where it’s gone. A little sweet little innocent boy said something in total innocent passing even to us, okay? And to you, and you overreacted.” He said they had taken all his children.

At trial defendant explained that he blamed the aunt for not working with him and his wife. He wished she had not called the police. By the time of the phone call, his kids were gone and he had already talked to an attorney.

F. THE FALSE ACCUSATION BY THE YOUNGER BROTHER OF GABRIEL ZENDEJAS

When the brothers were returned to the aunt in September 2005, they resumed therapy with Jean Wedekind. On October 25, 2005, they came to the aunt’s house as foster children. She adopted them on August 29, 2007.

Over time the brothers revealed more information to the aunt. Once after the younger brother had visited defendant’s wife, as his aunt drove him home, he told her that defendant’s employee and best friend Gabriel Zendejas had molested him during a visit while his mother was in Hawaii. He said that when Zendejas was babysitting him, he had lain on him.

The aunt told the younger brother that if it was true, then he should tell a counselor. She had been told not to dig for information. The younger brother told a

¹³ Defendant testified that the aunt interrupted him before he could explain that he had told the younger brother that it was more appropriate to say “lap” than “penis.”

counselor that defendant had allowed Zendejas to put his penis in the younger brother's butt.

The police in Monterey County followed up on this accusation and interviewed the younger brother. A detective let the aunt know about the progress of the investigation. The aunt told the younger brother she needed to know if what he said about Zendejas was true. He then told her that he had lied because he was afraid they would not believe what he said about defendant, defendant would be let go, and would hurt him. He did not tell her that he wanted to speed up the trial.

At trial the younger brother acknowledged lying to his aunt about Zendejas molesting him. He testified that he did so to make the case go faster. He was afraid that he would have to live with defendant again unless the case kept going. He said that Zendejas had jumped over the couch, pinned him face down on the couch, removed his pants and underwear, and put his penis in the younger brother's butt. It was at least a month before he admitted to his aunt that it was a lie. He told the police he had lied about Zendejas.

G. ADDITIONAL TRIAL TESTIMONY

At trial defendant denied being naked with the brothers, molesting them, and committing any of the sexual acts they had described.

The older brother was the first witness. He testified that he knew defendant “ ‘[c]ause he was the – he was the person who put his penis in my butt. Well, he put his – he rubbed his penis on my butt.’”¹⁴ They went camping and fishing and swimming at the

¹⁴ In later testimony, the older brother said that defendant did not rub his penis on his butt. The jury was not instructed that among the lewd acts in evidence was defendant putting his penis in the older brother's butt.

Defendant argued to the jury that this was obviously “prepared testimony.” “He was coming to say something and he said it.” Then the older brother immediately contradicted himself. The prosecutor replied that he was taken aback by the older (continued)

lake. Sometimes he and his brother played “the tickle game” with defendant. “He would, uh, make us tickle his penis and butt.” They would tickle defendant’s “penis until it came. [¶] . . . [¶] . . . Till it had come, like slime coming out of it.” The older brother tickled defendant’s penis “[a] very lot,” more than three times. Yellow slime did not come out when he was tickling defendant’s penis.

At trial the younger brother also described playing “the tickle game” when the brothers and defendant went camping. It involved him tickling defendant’s penis until “[y]ellow slimy stuff would come out.” It happened more than once, but he could not say how many times. His older brother did the same thing. They were all naked when it happened.

The older brother testified that sometimes they all played together, but mostly defendant did it with his younger brother. It made him feel jealous, “ ‘cause I like doing it too, but I don’t like it now.” The younger brother testified that defendant spent more time with him than he did with his older brother.

The older brother testified that he also tickled defendant’s butt and sniffed it.

The older brother saw defendant rub his penis on his younger brother. The younger brother would be lying face down and defendant would be rubbing his penis between his butt cheeks. “He would do it really hard too.” Sometimes “yellow gross slime” would come out of his penis and he would wipe it off with his younger brother’s shirt.¹⁵

brother’s statement and, before he asked another question, the older brother “clarified what he meant on his own.” The prosecutor pointed out that the charges did not involve sodomy as to the older brother.

¹⁵ On cross-examination, the older brother said that no slime came out when defendant rubbed his penis on his younger brother’s butt. On redirect, he said it did and not when his younger brother was tickling his penis.

The younger brother testified that defendant put his penis in his butt hole three or four times. More than once defendant called him into the trailer and told him to remove his clothes. Defendant rubbed his penis between his butt cheeks for five minutes and, at the end, “[w]eird slimy stuff would come out of his penis.” Both brothers recalled that defendant said it was love.

The older brother testified that defendant put his finger in the younger brother’s butt. In the garage of their house in Salinas, defendant put his fingers in the older brother’s butt. He could not say how many times. His memory was better at trial.

The older brother did not tell defendant’s wife because defendant told them “to keep a boys’ secret” and “ ‘a three-boy secret.’ ” The younger brother testified that defendant told them to keep a secret.

Defense witnesses who had seen defendant interacting with the brothers at daycare, defendant’s house, and camping were unanimous in the opinions that there was no sign of molestation by defendant and that he was not capable of molesting children. These witnesses included his mother, Virginia Ray, his sister Tiffany, his first wife, Kristi Taylor, their daughter Tamara, friends and former employees Noel Ramirez and Michael Zendejas (Gabriel Zendejas’s brother), friend and former coworker Tony Tuscan, and day care teachers Paula Stoddard and Ann Aaroe. On cross-examination, his sister said that defendant was not controlling with the brothers.

In rebuttal, the trial court elicited the opinion of Kelsey Davis, the daughter of defendant’s second wife, that “defendant is a person given to lewd conduct with children.”¹⁶ Davis did not live with the brothers, but she visited on a monthly basis for three- and four-day weekends. Though she was 20 years old in 2003, defendant did not

¹⁶ As explained more fully below in part 5A, the court elicited this opinion only after the court twice struck Davis’s testimony that defendant could possibly have committed the charged crimes.

let her drive the brothers to or from day care or school. Davis acknowledged that defendant had never done or said anything suggestive or sexually inappropriate with her. While the brothers lived with defendant, she had not seen or heard anything about him doing something inappropriate. However, she considered him very controlling with the brothers. He punished the brothers for lying, urinating in bed, and rocking in their chairs at the dining table.

She lived at the house after the other children left until defendant kicked her out. At the time of trial defendant and her mother were going through a difficult divorce.

A defense investigator testified that Davis did not offer the opinion that defendant was capable of molestation in a telephone interview on October 6, 2005.

3. RESTRICTIONS ON DEFENSE EVIDENCE

On appeal, defendant challenges the following trial court rulings as unduly restricting defense evidence. The trial court admitted evidence that the younger brother had falsely accused Gabriel Zendejas of molestation, but excluded evidence that he had accused a former foster-father, Charles “Chuck” Fike, of the same conduct. The trial court originally excluded all evidence that the brothers had been molested prior to their placement with defendant and his wife, and eventually restricted the evidence to the stipulation that there was preplacement molestation that was first disclosed to the aunt. Consistent with that ruling, in admitting much of the recorded telephone call between the aunt and defendant, the trial court excluded her naming of an alleged prior molester. The trial court also excluded evidence that the brothers engaged in sexualized behavior both preplacement and postplacement, other than defendant’s description of it in the recorded telephone call. To the extent possible, we will attempt to segregate the facts relating to each appellate issue, even though the arguments and rulings were intertwined and repeated in the trial court.

A. THE FALSE ACCUSATION OF OTHERS

On appeal defendant claims that the trial court erred in excluding evidence that the younger brother had falsely accused Fike, a potential foster parent, of molesting him.

(1). The trial court's rulings

On January 25, 2007, the case was set for jury trial on July 16, 2007. After a number of continuances, on March 4, 2010, jury trial was scheduled to commence on July 12, 2010.

On Monday, July 12, 2010, the court postponed calling in a jury panel because counsel for both sides represented they were working on stipulations that would save trial time. Defense counsel said he was in the process of distilling proposed stipulations, particularly as to the anticipated testimony of therapist Jean Wedekind. Around 2:30 p.m., defense counsel presented six typed pages of proposed stipulations based on statements made by the brothers and the aunt to Wedekind in therapy from October 1, 2002 through May 14, 2003, and from September 14, 2006 through December 12, 2007.¹⁷

¹⁷ We do not intend to repeat the entire six pages of proposed stipulations, a number of which defense counsel conceded that he did not intend to explore at trial. It is important to note the following. They included no statement by the younger brother, who was not yet three when he was removed from his natural mother. Defense counsel's list of proposed stipulations was based primarily on the aunt's reports to Wedekind of statements by the older brother, though it also included some statements by others to the aunt, her own observations, and a few statements by the older brother and other witnesses to Wedekind.

Defense counsel's list included molestation of the brothers by adults, including reports by the older brother that "'dad'" had put his penis in his butt, "Manny" had put a "shaker" and a "sticker" in the older brother's butt, and the younger brother had "licked his mommy's privates." The summary did not clarify who "dad" was.

Defense counsel's list also included sexual behavior by the brothers, such as the aunt observing the younger brother pinching his penis with Legos, masturbating, and the older brother attempting to get the younger brother to perform oral sex, Christina Fike observing the older brother orally copulating himself, the natural mother telling the aunt (continued)

As recalled by the trial court and defense counsel at later hearings, in chambers on July 12, 2010 the court questioned the relevance of much of the information included in defense counsel's proposed stipulations.

Because the parties had not agreed on any stipulations on July 12, 2010 the prosecutor drafted proposed stipulations and presented them to the court and defense counsel on July 13, 2010.¹⁸ Defense counsel stated that he had not yet had time to digest the prosecutor's proposal. "It might be close. I might have a couple additions." The court announced that "today on the record" it would decide what evidence was admissible.

that the older brother "stuck things up his own butt," and the older brother reporting that the brothers had put their penises in each other's butts. All this conduct preceded the brothers' placement with defendant and his wife. Two calls from defendant's wife in June and July 2003 reported the older brother's "sexual acting out with baby" and "his playing with penis."

Defense counsel's list also included other events purportedly witnessed by the brothers involving no sexual molestation of them, such as their natural mother being raped and at other times cutting herself. It also included adult behavior the older brother told the aunt he had witnessed, such as his mother and father putting crayons, paper, and a maraca in their butts.

¹⁸ The prosecutor proposed the following stipulations. "[The brothers] are brothers born of the same mother but different fathers. [¶] [The older brother] was molested by [the younger brother's] biological father when he was approximately 4 years of age. This molestation included sexual penetration of his rectum. [¶] [The younger brother] was molested by his mother with the apparent knowledge/presence of his biological father. The nature of this molest was that he was instructed to orally copulate his mother when he was a toddler. [¶] The boys had been removed from the home of their biological mother for various reasons including general neglect, drug addi[c]tion on the part of their mother and her partner, suspected sexual abuse. [¶] The boys have exhibited various behavior issues and have as a result presented a very difficult foster care placement issue. [¶] During the course of their foster care situations they have been periodically placed with [] an Aunt [b]y marriage. The boys currently reside with [this aunt] and have so resided since reporting the alleged sexual abuse by [defendant] to [the aunt] during a visit in July of 2005."

The first topic addressed was subpoenas by defense counsel for the younger brother's biological father¹⁹ and Charles Fike, a foster father. Defense counsel stated on information and belief that each man would deny an accusation of having molested either brother. That was defendant's counsel's interpretation of notes in the therapist's file.²⁰ The prosecutor responded with surprise, saying that the prior premise of the defense was

¹⁹ The actual relationship of this alleged molester is in some doubt in the record. He has been characterized as the biological father of the younger brother in defendant's trial brief filed on July 12, 2010, in the prosecutor's proposed stipulations on July 13, 2010, in defense counsel's argument to the court on that date, in later statements on July 19, 2010 by both counsel in the jury's absence, and in the parties' briefs on appeal.

However, in a declaration dated October 25, 2010 supporting his unsuccessful motion for new trial, defense counsel identified the same person previously assumed to be the biological father of the younger brother as the biological father of the older brother. The declaration did not attempt to explain counsel's prior mistake in characterization.

As the molester's actual identity is not important to the issues on appeal, we will simply call him the biological father.

²⁰ While the subpoenas and accompanying declarations were discussed on the record, the documents themselves are not part of the record on appeal.

Defense counsel's declaration dated October 25, 2010 in support of his new trial motion asserted that the biological father stated in a telephone conversation with defense counsel "[o]n or about July 12, 2010" that he had not sexually molested either brother and had not previously heard such an allegation.

In the same declaration, defense counsel stated that he had spoken to Charles Fike by telephone "[o]n or about July 12, 2010," and Fike had told him that he and his wife had been foster parents for a number of children over the years and had not sexually molested any of them, though he could not specifically remember the brothers.

It appears from defense counsel's oral statements on July 13, 2010, that his declarations in support of the subpoenas did not contain all the information he later claimed to have at the time.

that the older brother was aware of the male anatomy and sexual behavior because he had been molested by the biological father.

This led into a discussion of whether defense counsel intended to argue that either brother's sexual knowledge had resulted from a prior molestation.²¹ In the course of this discussion, the court asked defense counsel to explain the relevance of evidence of prior molestation. Defense counsel gave three reasons for admitting prior molestation evidence. First was "knowledge of sexual matters." It is one thing to know the words "butt" and "penis" and another to know that ejaculation may result from rubbing a penis against a butt long enough. "[T]he circumstances of the prior molests are very similar. Every one of them." Counsel asserted that, in therapy after the younger brother had disclosed defendant's conduct, the younger brother had said of defendant, defendant's employee Zendejas, the biological father, and Fike that "each of them did the same thing to him."²² Their knowledge of sexual matters would help the jury "judge whether his claim in this instance is indeed genuine."

The second reason was to establish the dynamic that disclosures were again made first to their aunt. The aunt told Wedekind what the older brother told her. The defense position was that the aunt prompted, suggested, or manipulated the accusations against defendant, as every accusation made against anyone has come through her, including the older brother's initial statements about his own mother, the biological father, the foster father Fike, and a person named Manny. The aunt manipulated the information so the brothers would not be moved to Oregon.

²¹ That issue is the topic of the next part of our opinion.

²² This alleged accusation by the younger brother did not appear in defense counsel's July 12, 2010 summary of Wedekind's notes described above (*ante* in fn. 17). It is mentioned in a sealed declaration by defense counsel filed on July 14, 2010, a day after this argument and is quoted in the Attorney General's brief.

The third reason for introducing the evidence would be to show that there were false accusations against the biological father, Fike, and Zendejas. The younger brother had recanted his statements about Zendejas.

The prosecutor responded that, as to the brothers' sophisticated knowledge, the court had already ruled.²³ As to the disclosures to the aunt, it made sense as she was the one stable influence in their lives. As to Fike, the prosecutor was looking into his background, and there was some indication that he had been convicted of child molestation and no evidence that the accusation was false. Zendejas was a different question.

The court ruled, "The Court is going to exclude any mention of any molestation by the biological mother, by the person identified as Manny, by [the biological father] or by Charles Fike." The reason was that it is unknown whether the accusations are true or false. The day before defense counsel had almost agreed that the brothers were molested by the biological father and their natural mother. "This Court is not during this trial going to have three to four separate mini-trials on prior molests." The probative value was outweighed by the undue consumption of time. It would also be confusing to the jurors. As to the issue of manipulation by the aunt, the defense would have leeway to cross-examine her about her motivations. Each attorney was responsible for informing each and every witness not to mention prior molests of either brother. That included their knowledge of penises, buttocks, and ejaculation. The court ruled that the evidence of the younger brother making a false allegation against Zendejas was admissible. In other words, the trial court found irrelevant any claim of molestation prior to placement with defendant, whether the claim was true or false. The false allegation against Zendejas was a claim of post-placement molestation.

²³ This preliminary ruling is described below in part 3B(1).

In the jury's absence, defense counsel read the prosecutor's proposed stipulation (quoted above in fn. 18) into the record and argued that the prosecution had never made a motion to exclude the evidence included in its proposal.

The court responded that it was unwilling to accept the stipulation if defense counsel felt free to challenge the veracity of the stipulations, as he did regarding the accusation against the biological father. The court elicited from the prosecutor that his proposed stipulation was based on defense counsel agreeing that the older brother had been molested before. The court asked, "Are you moving to exclude these events?" The prosecutor answered, "Yes," and the court granted the motion.

After this ruling on the morning of July 13, 2010, defense counsel did not renew his request to produce evidence of false accusations. (We will explain below in part 3B(1) that the trial court ultimately admitted a stipulation regarding preplacement molestation.)

Defense counsel relied on the recanted accusation regarding Zendejas in argument to the jury. He argued that the younger brother had told one story in his July 2005 interview and another story on the witness stand. In July 2005 it was rubbing between the buttocks, "[a]nd by the time we get here now, it's a sodomy, full-fledge[d] sodomy." He had also given a detailed account of what Zendejas had done to him, and it was "[p]ure and total fabrications." "[T]hese aren't lies in [the younger brother's] mind. This is survival. He related to you the reason he did that was because the things weren't moving along fast enough in [defendant's] case."

(2). Validity of the restriction of evidence of false accusations

On appeal defendant contends that there is no justification for excluding evidence of the younger brother's false accusation of Charles Fike under Evidence Code section 352²⁴ while allowing evidence of his false accusation of Gabriel Zendejas.

People v. Tidwell (2008) 163 Cal.App.4th 1447 (*Tidwell*) explained on page 1457: “Section 352 provides: ‘The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’ [A] trial court’s exercise of discretion under Evidence Code section 352 will not be reversed on appeal absent a clear showing of abuse. [Citations.] It is also established that “ ‘Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense.’ ” [Citations.] This does not mean that an unlimited inquiry may be made into collateral matters; the proffered evidence must have more than “slight-relevancy” to the issues presented. [Citation.] . . . [Citation.] The proffered evidence must be of some competent, substantial and significant value. [Citations.]’ [Citations.] A trial court’s exercise of discretion under section 352 ‘will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]’ (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)”

This court has previously recognized that it is relevant to the credibility of a person who has accused another of child molestation that the accuser has falsely accused a third person of child molestation. (*People v. Franklin* (1994) 25 Cal.App.4th 328, 335;

²⁴ Unspecified section references are to the Evidence Code.

cf. *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273²⁵; see *Tidwell, supra*, 163 Cal.App.4th at p. 1457 [prior rape complaint].) On the other hand, when there is no credible proffer of the falsity of an accusation against another person, a trial court does not abuse its discretion in excluding evidence that would require the jury to determine the credibility of the accuser and the uncharged accused. (*Tidwell, supra*, 163 Cal.App.4th at pp. 1457-1458; *People v. Waldie* (2009) 173 Cal.App.4th 358, 363-364 [no credible evidence of unspecified allegations of sexual molestation]; *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1425-1426 [sexual assault on a minor]; see Annot., Impeachment or Cross-examination of Prosecuting Witness in Sexual Offense Trial by Showing That Similar Charges Were Made Against Other Persons (1989) 71 A.L.R.4th 469, § 8[d].) Obviously, an accuser's credibility is undermined in direct proportion to the strength of the showing that the accuser made another false accusation. It is hard to imagine stronger evidence regarding an accuser's credibility than the accuser admitting to lying.

The trial court in this case recognized that it was helpful to the defense to admit evidence that a witness against defendant had made a demonstrably false accusation against a third party. Defendant proffered evidence on this point of two different kinds. The younger brother would admit on the witness stand that he recanted his accusation of Zendejas after some police investigation. As to accusations of other third parties including Fike, defense counsel offered no assurance that they were in fact false or that the younger brother would recant them. Defense counsel did not assert that he was sure the third parties would deny them, only that he believed they would if called to testify.

On appeal defendant asserts that he has "every reason to believe that [the younger brother] would have recanted the baseless Fike allegation if confronted with Fike's denial

²⁵ *Franklin v. Henry, supra*, 122 F.3d 1270 was overruled on another ground by *Payton v. Woodford* (9th Cir. 2002) 299 F.3d 815, 829, fn. 11. In turn, the judgment in *Payton v. Woodford* was vacated by *Woodford v. Payton* (2003) 538 U.S. 975.

before the jury.” On appeal defendant speculates that there was no investigation because “no one took the allegation seriously enough to investigate it.”

As to the uninvestigated accusations, unless the younger brother recanted them, to determine his credibility the jury might need to hear the details of when the accusation was made, what activity was described, when it supposedly occurred, whether there were any witnesses at the time, what was the relationship between the younger brother and the accused, and whether the accused had an alibi. Contrary to defendant’s argument, it is not necessarily the case that Fike and the younger brother were the only witnesses required to determine what happened and who was telling the truth. In other words, as the trial court stated, it could involve a mini-trial on uncharged accusations of third parties simply to determine the younger brother’s credibility. The jury might need to determine the truth of the charges against defendant involving the younger brother to evaluate whether the other uncharged accusations were credible. We see no abuse of discretion or arbitrariness in the trial court excluding under section 352 the more speculative and time-consuming evidence in favor of the previously recanted accusation.

We further conclude that defendant here was not deprived of any due process right to present a defense, unlike that implicitly found by the Ninth Circuit in *Franklin v. Henry, supra*, 122 F.3d 1270 on which defendant relies. The defendant in that case was accused of continuous molestation based on a five-year-old’s statement that he “had licked her ‘private’ and made her lick his ‘private.’” The trial court precluded the defendant from testifying that he had overheard her accuse her mother of licking her “private.” (*Id.* at pp. 1271-1272.) The federal court accepted this court’s determination that the ruling was error and held that it was constitutional error. (*Id.* at p. 1273.) In that case, the federal appellate court did not mention that there was any other evidence, other than what was excluded, of a false accusation by the alleged molest victim.

In this case defendant was able to present evidence of another demonstrably false accusation by the younger brother, namely his accusation of Zendejas, and, as

summarized above, defense counsel relied on it in argument to the jury. Defendant questioned the younger brother's credibility at trial based on evidence of a recanted accusation of a third party and the jury convicted defendant of only two of five charges involving the younger brother. Defendant was not deprived of this defense for constitutional purposes merely because he was not allowed to introduce all possible evidence on the topic, which could have involved mini-trials and additional witnesses as to other prior acts. We conclude that the trial court did not abuse its discretion or violate due process in excluding the evidence concerning Fike. (*Tidwell, supra*, 163 Cal.App.4th at pp. 1457-1458.)

B. EXCLUDED EVIDENCE OF PRIOR SEXUAL ENCOUNTERS

On appeal defendant contends that the trial court erred in excluding defense evidence that the brothers "had knowledge of sexual acts prior to their placement with the Passineaus." (Emphasis omitted.) He argues that the evidence of preplacement molestation was generally relevant to the brothers' credibility under section 782²⁶ and

²⁶ Section 782 provides in pertinent part: "(a) In any of the circumstances described in subdivision (c), if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780, the following procedure shall be followed:

"(1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.

"(2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing pursuant to paragraph (3). After that determination, the affidavit shall be resealed by the court.

"(3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.

(continued)

that it was specifically relevant to dispel a natural inference that the only reason a young victim would know of adult sexuality was because he or she had engaged in the alleged sexual encounter with the defendant.²⁷ He further argues that the name of a prior molester should not have been redacted from a recording of a telephone call between

“(4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court. [¶] . . . [¶]

“(b) As used in this section, ‘complaining witness’ means:

“(1) The alleged victim of the crime charged, the prosecution of which is subject to this section, pursuant to paragraph (1) of subdivision (c).

“(2) An alleged victim offering testimony pursuant to paragraph (2) or (3) of subdivision (c).

“(c) The procedure provided by subdivision (a) shall apply in any of the following circumstances:

“(1) In a prosecution under Section 261, 262, 264.1, 286, 288, 288a, 288.5, or 289 of the Penal Code

“(2) When an alleged victim testifies pursuant to subdivision (b) of Section 1101 as a victim of a crime listed in Section 243.4, 261, 261.5, 269, 285, 286, 288, 288a, 288.5, 289, 314, or 647.6 of the Penal Code”

²⁷ Defendant calls this theory “ ‘the sexual innocence inference’ ” based on its description in a law review article. (Reid, Note: *The Sexual Innocence Inference Theory as a Basis for the Admissibility of a Child Molestation Victim’s Prior Sexual Conduct* (1993) 91 Mich. L. Rev. 827.) The article actually describes two inferences by a jury. First, a young child is likely to be ignorant and innocent of sexual matters. Second, a child’s lost sexual innocence is only explicable by the charged molest having occurred. (*Id.* at p. 829.)

defendant and the aunt and that admission of that telephone call opened the door to evidence of sexualized behavior by the brothers and how defendant reacted to it. As we will discuss, these rulings took place on five different days, both before and during trial.

(1). The trial court's rulings

(A). General limitation on evidence of preplacement molestations

Because of the overlapping nature of the issues, we have already summarized in part 3A(1) above the first part of defendant's argument on July 13, 2010 regarding the admissibility of preplacement molestation of the brothers and the trial court's first rulings excluding such evidence. Here we focus on the remaining arguments and rulings as they pertain to admitting evidence of preplacement molestation.

In the morning of July 13, 2010, the court questioned the relevance of actual prior molestations. The court asked the prosecutor if he was going to argue that the brothers must have been molested by defendant because there was no other explanation for how they could give sophisticated explanations of sexual conduct. The prosecutor said he would not. Defense counsel stated that in off-the-record discussions the prior day the court indicated an intent to limit his "cross-examination as to other acts. [¶] I haven't heard an objection about that yet from the People. They didn't raise it. The Court did it in our in limine discussions in chambers and not on the record."

The court explained that the day before was the first time it had seen the lengthy stipulations proposed by defense counsel. At the time, defense counsel conceded that the older brother had been molested by the biological father. The court was concerned about "diverting into a mini-trial on whether or not that molest occurred," as well as possibly another molest by another individual.

The court observed that nothing about the brother's descriptions of defendant's conduct required reference to a prior molestation. "[T]he Court is not convinced that allowing evidence of prior molests or sexual abuse is relevant for the purpose of any kind of sophisticated terminology." The court asked defense counsel for another reason for

allowing that evidence. As summarized above in part 3A(1), defense counsel made his argument and the court ruled all evidence of prior molestations inadmissible.

The court next obtained assurances that the attorneys did not intend to bring up a number of topics related to the brothers' natural mother and the court asked whether either side wanted to introduce evidence of sexualized behavior by the brothers. Defense counsel noted that the brothers claimed to have sodomized and orally copulated each other and orally copulated themselves. He argued that the jury needed to know that the brothers "have a relative obsession with sexual matters." The court excluded this evidence because it could lead back to the preplacement molests and it also posed a substantial danger of confusing the issues, misleading the jury, and consuming undue time.

After discussing the aunt's use of medical marijuana, defense counsel asserted that the record should be clear that the court excluded all evidence of prior molestation because counsel had requested subpoenas for the biological father and Fike. The court replied that the facts were otherwise. The day before, Monday, the court had indicated that the prior molests did not seem relevant. The parties represented they were working on a stipulation. It was obvious to the court by the midafternoon that defense counsel was not going to concede the accuracy of the prior molests, so the court undertook a section 352 analysis and excluded them.

After the court called for the jury panel, defense counsel offered to agree to the stipulation. The court stated that it had already ruled.

Later the same day, July 13, 2010, defense counsel filed a motion for reconsideration wherein he again offered to agree to the prosecution's proposed stipulation. In the absence of the jury panel, the court gave defense counsel another opportunity to explain the relevance of the prior molests. Defense counsel began by reciting that, prior to that morning, the prosecution had never requested exclusion of the prior sexual acts. He was unprepared to respond to such a motion. The prior acts were

relevant because each brother had claimed that another male before defendant had put his penis in his butt. The victims had prior knowledge of this kind of sexual activity.

Second, it was clearly relevant to the credibility of the disclosure to the aunt that they had made a previous disclosure to the aunt. Also, everyone involved with them knew about this history. It explained how people acted, why the brothers were in therapy, and why defendant would never have done the same thing to them. It would mislead the jury to hear the brothers describe what defendant did “without knowing that this has happened to them before.” Defense counsel was willing to accept the prosecution’s proposal or even a two-line stipulation that someone else had put his penis in the older brother’s buttocks and the younger brother had been molested before.

The prosecutor responded that the older brother’s report of anal penetration by the biological father was different from the current accusation. There was no claim that the younger brother was sodomized before. The prosecutor had proposed a stipulation because he was under the impression that the court was disappointed with their progress the day before.

The court explained that the court had taken off the previous day based on the representation that counsel were going to arrive at time-saving stipulations. Around 2:30 p.m. that day, defense counsel presented his summary of Wedekind’s notes. At that time, both counsel conceded that the boys had been molested. The court observed that, “if the Court allowed all of this information to come in, this trial truly would take several months. And the Court cannot for the life of it see the relevance of the vast majority of these things that happened to these complaining witnesses.” Tuesday morning, as no stipulation had been arrived at, and with defense counsel rejecting the prosecution’s proposal, the court decided to take charge. “There is nothing sophisticated about the language they use. There is nothing that would require a prior knowledge of sexual behavior, sexual acts.” The court found before hearing testimony “a complete distinction

between completed acts of sodomy and what the allegations are in this particular case.” The court decided to exclude any and all mention of prior molests to avoid mini-trials.

The court proposed that the parties could stipulate that the boys were in therapy so that defendant was unlikely to molest them. Defense counsel asserted that the importance of the therapy would be lost if there was no reference to it being based on prior molests of the brothers. The prosecutor was willing to stipulate that the brothers were in therapy.

The court explained that the evidence of the prior molests was excluded because the jury would not have enough information to evaluate the accuracy of the prior molests, it would consume an undue amount of time, and would confuse the issues.

Defense counsel said he had a 12-word stipulation that he would accept and not question. He offered not to cross-examine the brothers about the stipulation. The court stated that it already made its rulings.

The following morning, July 14, 2010, defense counsel announced he was going to file a written motion under Evidence Code section 782 that afternoon, and he did so. The motion asked to explore the prior sexual conduct of the victims as relevant to their credibility.²⁸ In afternoon proceedings in the absence of the jury panel, the court announced that there were two options on how to proceed. The court indicated that it was familiar with section 782, as well as the cases of *People v. Daggett* (1990) 225 Cal.App.3d 751 (*Daggett*), *Tidwell, supra*, 163 Cal.App.4th 1447, and *People v. Franklin, supra*, 25 Cal.App.4th 328. The court asked defense counsel if he was now conceding the prior molests occurred. He replied that he did not think a concession was

²⁸ The sealed affidavit by defense counsel, described in defendant’s opening brief, asserted that evidence at a section 782 hearing “could very well reveal that the boys were also previously aware of ejaculation” and “that the previous acts of placing a penis in their buttocks occurred in the same or similar positions as alleged against [defendant].” The affidavit also explained that defense counsel was in possession of 661 pages of Wedekind’s notes. The affidavit did not cite any prior description by either brother of ejaculation.

necessary, but he was requesting the information based on the assumption that the prior acts occurred. After jury selection, the court met with counsel in chambers regarding the section 782 motion.

The following morning, on July 15, 2010, the jury received preinstructions. During the prosecutor's opening statement, the court read two stipulations to the jury, first: "Both [brothers] were sexually molested prior to their placement with Mr. and Mrs. Passineau on or about May 15, 2003. Those prior molests were initially disclosed to their aunt []. Those prior molests involved acts of sodomy and oral copulation."

Second was: "During their tenure with the Passineaus, from on or about May 13, 2003, to on or about July 4, 2005, [the brothers] were regularly treated and counseled by mental health professionals. The Passineaus arranged for and transported [the brothers] to and from their counseling sessions.

"The mental health professionals who treated the children were mandated by law to report any allegations of child abuse to the authorities. Neither [brother] ever reported to those mental health professionals that they were being molested by [defendant] or had been molested by [defendant]."

The opening statement by defense counsel on July 15, 2010 asserted, among other things, that there would be evidence that the night the brothers supposedly disclosed defendant's molests, the aunt "initiated that conversation and she initiated it regarding a prior person who may have been involved in prior molests. She told the boys, [']you know, that person lives only a couple blocks away from here. How do you feel about that?['] It was in that context that this disclosure was or was not made to [the aunt]."²⁹

After the opening statements, in the jury's absence the court asked if anyone wanted to put something on the record regarding the stipulations. Defense counsel asked

²⁹ As will appear below, defense counsel's paraphrase of that conversation was inconsistent with the aunt's description of the conversation in the recorded telephone call.

if either side would be allowed to question the brothers “regarding the prior molestations; that is to say details of them to determine what degree they are similar or dissimilar. It would be my request to be allowed to do so.”

The court asked: “[Defense counsel], you’re withdrawing the 782 motion; is that correct?” He answered, “In view of the stipulations, I am, Your Honor.” The court stated: “The Court will allow that motion to be withdrawn and will not rule on the merits of that motion.” Defendant did not thereafter ask for a ruling on this motion.

The prosecutor argued that the purpose of the stipulations was to prevent questioning about the details of the prior molests. The court said that its ruling under section 352 was the same. “The Court accepts the stipulation on the condition that the prior molests will not be discussed in any detail with any of the witnesses, including the complaining witnesses, including [the aunt] and any other witness that takes the stand during this trial.” The court ordered both attorneys to inform each witness of its rulings.

After the close of evidence, defense counsel argued to the jury that it was no coincidence that the accusations by the brothers were the same as before, sodomy. The prosecutor responded that the accusations were not the same because the older brother had modified his claim of defendant putting his penis in his butt to rubbing it on his butt. As noted above, the jury was not instructed that there was evidence of defendant putting his penis in the older brother’s butt.

Defendant did claim later in his unsuccessful new trial motion that he was coerced into withdrawing his section 782 motion. He contended that, after he made the motion, “the Court suddenly and drastically shifted its position of the previous day and announced that it was considering allowing limited evidence to be admitted regarding the prior molests if defense counsel would agree to withdraw the defendant’s § 782 motion.”

In denying his motion, the trial court disagreed with this characterization of the off-the-record events and called it “somewhat disingenuous.” “Clearly, clearly upon the filing of the 782 motion, the Court indicated to both attorneys that it felt that the prior

molests could be admissible for the purpose for which they were admitted, and that then prompted the discussions regarding the agreed-upon stipulation.”

(B). Admitting and redacting the recorded telephone call

After defense counsel withdrew his section 782 motion on July 15, 2010 and the trial court precluded questioning the brothers about the preplacement molestation described in the stipulation, in the jury’s absence the court asked the prosecutor for a response to a written motion filed that morning by defense counsel to exclude evidence of a recorded telephone call between defendant and the aunt on July 15, 2005. The prosecutor announced that he would not be offering the pretext call in the People’s case-in-chief, but only as impeachment if defendant testified inconsistently. Defendant said that one issue with the call was that the parties discussed some sexualized behavior by the brothers. The court stated it had already ruled that “any evidence of the sexualization of the children” was inadmissible. The court also noted that, “having just read the transcript, that there are what could be arguably admissions or confessions by the defendant irrespective of the sexualization.” The court asked the parties to research whether the transcript was usable to impeach defendant if there were Fifth or Sixth Amendment violations.

The older brother testified on July 15 and 16, 2010. The younger brother testified on July 16, 2010. In the jury’s absence at the conclusion of his testimony, the court and the parties returned to the issue of the admissibility of the telephone call as impeachment. The court ruled that there was no Sixth Amendment violation warranting exclusion of the telephone call. The court did not “need to get to the impeachment issue.” “[T]he Court is not going to agree to what the Court feels is an erroneous analysis of the law and then make another legal decision based on that erroneous analysis of the law.” The court also stated, “I’m not saying there’s some legal basis for bringing it up in impeachment because I feel that it would be admissible in the People’s case in chief.”

In light of that indication by the court, the prosecutor asked to introduce the telephone call in its case-in-chief. The prosecutor suggested that some portions should be redacted that referred to the biological father and molestation by defendant of another victim. Defense counsel objected to the prosecutor's change of approach. The parties and court agreed to give defense counsel until the next day of trial on Monday, July 19, 2010, to brief the admissibility of the call.

On July 19, 2010, defense counsel filed a supplemental motion to exclude several parts of the telephone call, including defendant's statements about prison and his life being over and observing sexualized behavior by the brothers and the aunt's reference to defendant taking a polygraph examination. The motion stated in part: "Evidence Code [section] 356 compels that if one portion of the conversation was admitted the entirety of the transcript would have to be admitted in order to fairly and competently understand any given portion. Such cannot occur given the numerous legally objectionable portions explained above."

The trial court rejected claims that the telephone call infringed on defendant's right to counsel or his attorney-client privilege. After some discussion of the mechanics of redacting the recording, cross-examination of the aunt resumed.

At a morning recess in the jury's absence, the court and counsel returned to the pretext call. The court overruled defendant's objection to admitting his statement that he would be going to prison for something he did not do.

As to defendant's description of sexual behavior by the brothers during and returning from a camping trip, the court ruled it admissible as "admissions of sorts."

The court agreed with a redaction requested by defendant in which the younger brother mentioned that he had seen defendant naked with two of his girls, which was the topic of dismissed counts. Over the prosecutor's objection, the court granted defendant's request to exclude reference to a polygraph.

Defendant asked why there needed to be a redaction of a reference to the biological father. According to a transcript provided by defense counsel, when the aunt explained her conversation with the younger brother on the evening of July 2, 2005, it started with him asking if he was safe at her house, because the biological father lived near her house.³⁰ She told him he was safe because he had a new dad. Defense counsel characterized that statement as inconsistent with the aunt's trial testimony because she "indicates that it was in the context of [the name of the biological father], who was the former guardian or father, that motivated [the younger brother] apparently to make a disclosure against [defendant]." Defense counsel had indicated in his opening statement to the jury that the evidence would show that the disclosure by the younger brother began with a mention of a prior molester. The prosecutor agreed with defense counsel that there

³⁰ The unredacted transcript offered by defense counsel quoted the aunt as saying: "This was [the younger brother] when I was putting him to bed, he asked if he was safe here and then he just said that, um, and I said, you know, because of [the biological father], he said, [the biological father] lives here by your house, does he, [aunt] and I said, but you're really safe 'cause you got your new dad, you know, and everything and then, and he's like, yeah, and he takes us camping, I'm like, yeah, what kinda games do you guys play there and then, boom, this is what I get from him. And he was very descriptive."

The transcript later provided to the jury put this quotation in a different form. "This was [the younger brother] when I was putting him to bed. He asked if he was safe here, [¶] [Portion Redacted] [¶] And I said, 'Yeah, but you're really safe cuz you got your new dad, you know and everything.' And then . . . And he's like, 'Yeah, and he takes us camping.' And I'm like, 'Yeah, what kind of games do you guys play there?' And then 'boom.' This is what I get from him, and he was very descriptive."

The transcript offered by defense counsel continued with defendant saying that it was blown out of proportion and he had not done anything. The aunt said they talked about it more than once and she had not suspected that of him, but "I don't know how those guys could've made that up. That's not the same stories they were telling me when they were telling me about [the biological father] and them and [the younger brother] was never telling me anything." The transcript later provided to the jury had "[Portion Redacted]" in lieu of this final sentence.

was evidence that the biological father had molested both brothers and had once lived near the aunt. The court ruled that the stipulation accepted by the court was based on the lack of relevance of what happened or did not happen with the biological father.

The court also mentioned that to the extent the statement was inconsistent, it was admissible. The prosecutor responded that it was inconsistent only because he had instructed the aunt not to refer to the biological father in describing the initial disclosures. This was confirmed by the aunt's testimony at a section 402 hearing. After this hearing, defense counsel acknowledged that the aunt had intentionally avoided the topic of the biological father, but he still asked to leave it in evidence because it was something the jury should understand. He repeated that it was inconsistent with her trial testimony. The court ruled that statements regarding the biological father were inadmissible pursuant to its previous rulings that the prior molests would not be mentioned. After these rulings, the excerpted recorded call was played for the jury on July 19, 2010.

(C). Subsequent proffers regarding brothers' sexualized behavior

The recorded telephone call included defendant's description to the aunt of sexualized behavior by the brothers during and after a camping trip. Before defense counsel called therapist Wendy McCraney-Matz, he announced at a sidebar conference the intent to ask her how she told defendant to deal with sexual behavior by the brothers, in light of the topic being broached in the recorded call. He argued that the prosecutor was attempting to characterize defendant's described reaction to their conduct as "obviously bizarre[,] . . . therefore he must be a child molester and more likely to be touching them, downplaying this type of activity." The court stated that both parties had agreed "to a stipulation not to bring the counselors in, not to mention any of the acting out." The court allowed defendant to ask her generally if she gave him advice regarding how to deal with issues that he brought up when he attended counseling with the boys, without getting into what the actual advice was. "[T]he specifics have been ruled not admissible."

On July 20, 2010, the court sustained the prosecutor's objection when defense counsel asked defendant's mother during direct examination whether Barnes and McCraney-Matz had ever provided guidance "in terms of how to react to [*sic*] when the children acted out, as it were?"

In the morning of the same day, in the absence of the jury, defense counsel proposed to explore with defendant's daughter Tamara her observations of the brothers playing with their own and each other's penises. He asserted it was relevant in view of the topic being broached in the telephone call. "[G]iven the fact that that sexualized behavior was permitted by this Court to come in in apparent violation of the Court's order not to mention sexualized behavior apart from the accusations of this case, I think it is important and not just important but critical that we meet on the defense side that evidence with evidence that this sexualized behavior was not uncommon," and that defendant's reaction as described on the tape was consistent with how he was dealing with other sexualized behavior and was not an effort to keep it quiet or minimize it.

The prosecutor reminded the court of its prior rulings excluding all references to prior molests, sexualized behavior, and therapy. After stating that the court had already ruled on the topic, the court denied defendant's request.

(2). Forfeiture

The Attorney General asserts that defendant has forfeited any argument regarding preplacement sexual knowledge "because defense counsel effectively withdrew that theory of admissibility when he agreed to the stipulation" regarding the prior molestation.

Usually, a party cannot attack on appeal the effect of a stipulation he voluntarily entered. (See *People v. Gurule* (2002) 28 Cal.4th 557, 623.) The rule is different when the stipulation was not truly voluntary. (*Ibid.*) " "An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and

endeavoring to make the best of a bad situation for which he was not responsible.’ ”
(*People v. Calio* (1986) 42 Cal.3d 639, 643.)

“The general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state’s case of its persuasiveness and forcefulness. [Citations.]” (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007.) By the same token, the defense should not be compelled to accept a stipulation that would deprive the defense of its ability to present persuasive and forceful defense evidence.

In this case, it appears that defense counsel may have felt compelled to enter into a general stipulation regarding prior molestation of the brothers in order to have that evidence before the jury in any form. As summarized above, on July 13, 2010, defense counsel objected to any restriction on the evidence of prior molestation, pointing out that the prosecution had been willing to stipulate to some part of that evidence and had not sought to exclude the evidence. Only after the court ruled the evidence inadmissible did the prosecution make a motion to exclude at the court’s express invitation. In the middle of jury selection on the same day, defense counsel filed an unsuccessful written motion for reconsideration. At the end of the day on July 13, 2010, the trial court adhered to its earlier rulings that the prior molests were irrelevant and the evidence was more prejudicial than probative. Finally, by making a section 782 motion, defense counsel succeeded in obtaining admission of evidence of some preplacement molestation in the form of a stipulation. In withdrawing the section 782 motion, defense counsel asked if either side would be allowed to question the brothers about the details of the prior molestations. The court stated that its ruling under section 352 remained the same.

Under these circumstances, we conclude that defense counsel preserved his objection to the repeated rulings limiting the evidence of preplacement molestations. We cannot conclude that defense counsel voluntarily entered the stipulation regarding the prior molestation and thereby forfeited an appellate challenge to the exclusion of other

evidence regarding the prior molests. (Cf. *People v. Cuccia* (2002) 97 Cal.App.4th 785, 791 [trial court coerced waiver of privilege against self-incrimination].)

We reach a different conclusion regarding defendant's withdrawn section 782 motion. On appeal defendant asserts that, "after preparing to deny the motion, the court accepted the narrowest of stipulations on the condition that defense counsel withdraw the section 782 motion and make no mention of the prior molestations with any witness, not only the boys themselves."

As described above, the record does not reflect that the trial court either was prepared to deny the motion or that admission of the prior molestations was conditioned on withdrawal of the motion. Instead, by belatedly accepting a stipulation regarding the prior molestations, the trial court effectively took a shortcut past the in limine hearing required by section 782 as a prelude to admitting such evidence.³¹ The record suggests no coercion to withdraw the motion. Instead, it appears that defense counsel was willing

³¹ *People v. Fontana* (2010) 49 Cal.4th 351, 362, has explained: "Evidence of the sexual conduct of a complaining witness is admissible in a prosecution for a sex-related offense only under very strict conditions. A defendant may not introduce evidence of specific instances of the complaining witness's sexual conduct, for example, in order to prove consent by the complaining witness. (Evid. Code, § 1103, subd. (c)(1).) Such evidence may be admissible, though, when offered to attack the credibility of the complaining witness and when presented in accordance with the following procedures under section 782: (1) the defendant submits a written motion 'stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness' (*id.*, § 782, subd. (a)(1)); (2) the motion is accompanied by an affidavit, filed under seal, that contains the offer of proof (*id.*, subd. (a)(2)); (3) '[i]f the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant' (*id.*, subd. (a)(3)); and (4) if the court, following the hearing, finds that the evidence is relevant under Evidence Code section 780 and is not inadmissible under section 352, then it may make an order stating what evidence may be introduced by the defendant and the nature of the questions to be permitted. (*Id.*, § 782, subd. (a)(4).)"

to withdraw the motion because the motion had accomplished his goal of obtaining admission of evidence of prior molestations, though he was still precluded from questioning the brothers about them.

“[A] party may not challenge on appeal a procedural error or omission if the party acquiesced by failing to object or protest under circumstances indicating that the error or omission probably was inadvertent.” (*People v. Braxton* (2004) 34 Cal.4th 798, 813.) A party who fails to ask for a hearing and press for a ruling may be deemed to have forfeited an appellate challenge. (*Ibid.*)

“A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself. [Citations.] ‘ “ ‘Where the court rejects evidence temporarily or withholds a decision as to its admissibility, the party desiring to introduce the evidence should renew his offer, or call the court’s attention to the fact that a definite decision is desired.’ ” ’ ” (*People v. Holloway* (2004) 33 Cal.4th 96, 133.)

A party will not be heard to criticize a trial court for failing to rule on a motion withdrawn by that party. (*People v. Lewis* (2001) 26 Cal.4th 334, 375-376.)

Under these circumstances, since defendant apparently withdrew his section 782 motion willingly, the trial court did not rule on it, and defendant did not press for a ruling, we will not attempt to review an unmade ruling.

(3). Validity of restriction on evidence of preplacement molestation

Above we have discussed how it is relevant to an accuser’s credibility to admit evidence of a prior false accusation. *Daggett, supra*, 225 Cal.App.3d 751 explained how it is relevant to the accuser’s credibility that the accuser has been previously molested by a third party. “A child’s testimony in a molestation case involving oral copulation and sodomy can be given an aura of veracity by his accurate description of the acts. This is because knowledge of such acts may be unexpected in a child who had not been

subjected to them. In such a case it is relevant for the defendant to show that the complaining witness had been subjected to similar acts by others in order to cast doubt upon the conclusion that the child must have learned of these acts through the defendant. Thus, if the acts involved in the prior molestation are similar to the acts of which the defendant stands accused, evidence of the prior molestation is relevant to the credibility of the complaining witness and should be admitted.” (*Id.* at p. 757; see Annot., Admissibility of Evidence That Juvenile Prosecuting Witness in Sex Offense Case Had Prior Sexual Experience for Purposes of Showing Alternative Source of Child’s Ability to Describe Sex Acts (1991) 83 A.L.R.4th 685, § 2.)

The Attorney General contends that defendant is actually asserting two theories of relevance on appeal, the “ ‘prior ability to describe’ ” and the “ ‘false transference of similar experience.’ ” The first theory is essentially the inference of molest to be drawn from a child’s lost sexual innocence. The second theory is that it is easier for a child who has been molested by one person to accuse another person of similar conduct. In reply, defendant asserts that his “single theory of relevance” “encompassed all of the following elements: the boys could falsely accuse based on their prior knowledge of similar sexual acts; they had a ‘relatively easy way to do so’; and an increased likelihood to do so. Defense counsel never advanced an independent argument that the boys had transferred their experiences to [defendant].”

We detect three related, but different, arguments regarding the evidence of preplacement molestation in defendant’s briefs. His reply brief claims that the ruling he is challenging is the one on July 13, 2010 excluding any mention of preplacement molestations. Whether the court’s initial rulings were erroneous is academic, however, as the trial court ultimately admitted a stipulation regarding preplacement molestation on July 15, 2010. An error in excluding evidence may be cured if the trial court changes its mind and admits the evidence. (*People v. Davis* (1965) 63 Cal.2d 648, 658.) His reply

brief also “agrees that the pertinent question is what the excluded evidence showed that was significantly different from what the admitted evidence showed.”

His next two arguments focus on the adequacy of the stipulation for defense purposes. In his opening brief, defendant asserts: “Allowing additional information regarding the nature of the acts would have enlightened rather than confused the jury. [¶] Indeed, by not fully informing the jury of the varied nature of the prior molests, the stipulation was itself misleading in fostering the erroneous inference that the prior molests *only* involved sodomy and oral copulation. The jury was free to assume any additional sexual behavior the boys described in their allegations against [defendant] was newly acquired from their molestation by him.” This passage advocates full information to the jury.

His reply brief attacks the stipulation as not presenting evidence of prior molestation similar to that of which defendant was ultimately convicted. “Neither of the two acts encompassed in the three charges of which [defendant] was convicted – masturbation (tickling the penis) and penile stimulation with the buttocks (rubbed penis on or between butt cheeks) – [is] similar to the acts of sodomy or oral copulation[] contained in the stipulation.” He also asserts that “defense counsel was not permitted to show that the boys’ allegations of prior molestation were similar to their allegations against [defendant].” These passages advocate simultaneously for exclusion of evidence of dissimilar preplacement molestation and admission of evidence of more similar preplacement molestation.

Defendant’s advocating full information to the jury does not take into account the principle that “it is relevant for the defendant to show that the complaining witness *had been subjected to similar acts by others* in order to cast doubt upon the conclusion that the child must have learned of these acts through the defendant.” (*Daggett, supra*, 225 Cal.App.3d at p. 757; our emphasis.) Evidence of dissimilar sexual acts may be excluded as more time-consuming and confusing than probative. (*People v. Woodward* (2004) 116

Cal.App.4th 821, 832.) As only prior acts similar to the pending charges are relevant to dispel the inference from lost sexual innocence, defendant's full information argument fails.

As to defendant's attack on the stipulation for mentioning dissimilar acts, we do not understand how it would have advanced defendant's position had evidence of oral copulation, for example, been completely excluded because neither brother ever mentioned oral copulation involving defendant.

Defendant also argues on appeal, citing the statutory definition of sodomy, that "[t]he act of rubbing the penis on the butt or between the butt cheeks is not necessarily sodomy." As noted above, however, the jury was not given this definition. Defendant does not argue on appeal that it should have been. Defense counsel argued to the jury that the accusation of sodomy was the same as before, though the prosecutor disputed this point as to the older brother. After hearing the brothers testify, the jury must have understood that the stipulation was not written in the language used by the brothers to describe what happened to them. Given these circumstances, it is impossible to know exactly what the jury thought had occurred to the brothers when told that their prior molestation had involved sodomy, but surely it must have involved an erect penis and buttocks.

However dissimilar the evidence admitted by stipulation, defendant's true complaint appears to be that the trial court erroneously excluded evidence of preplacement molestations that were more similar to the pending charges than what was admitted. Citing defense counsel's summary of Wedekind's notes (described *ante* in fn. 17), defendant's reply brief claims that "the boys had prior knowledge of sodomy and/or anal stimulation by the penis, anal penetration with foreign objects, oral copulation and masturbation." We note that sodomy and oral copulation were included in the stipulation. We are unsure what distinction defendant is implying, if any, between "sodomy" and "anal stimulation by the penis."

By general assertions of “masturbation” and “anal stimulation by the penis,” defendant is suggesting that there was excluded evidence of preplacement molestation identical to the acts of which he was convicted. He argues on appeal that “it is likely that the boys’ prior knowledge encompassed similar acts” and that the summary of Wedekind’s notes “suggests the boys did have knowledge of such acts.”

A review of the defense’s summary of Wedekind’s notes reveals that the only “masturbation” described was the aunt’s report of the younger brother pinching his penis with Legos, and no report that either brother had masturbated any adult male before defendant. As to “anal stimulation by the penis,” the summary describes reports by the older brother of an adult male putting his penis in the older brother’s butt and the brothers putting their own penises in each other’s butts, but no report that an adult male had rubbed his penis on or between either brother’s butt cheeks and ejaculated. Defense counsel’s pretrial hope that he could elicit similarities between the charged acts and some part of the prior molests was not evidence, and it was not supported by his own written summary of Wedekind’s notes. The trial court cannot be faulted for excluding nonexistent evidence of similar molests.

Under other circumstances, we might find it overly restrictive to limit defense evidence of prior molestation to a stipulation including undefined legal characterizations of the acts involved without giving the defendant an opportunity to question his or her accuser about the details of the prior molestation. If there is evidence that a pending accusation describes conduct by a third party other than the defendant, the defendant must be allowed to introduce such evidence.

In the circumstances of this case, however, we find no abuse of discretion under section 352 for three reasons. First, the court ultimately admitted a stipulation that the brothers had been molested preplacement. Defendant cannot point to evidence of a molestation that was more similar to the charges than what was included in the stipulation.

Second, because defendant eventually succeeded in introducing evidence that the brothers had been molested before they came to live with him, he was equipped to dispel any inference that their precocious sexual knowledge must be attributable to defendant molesting the brothers. He argued to the jury that the brothers had repeated accusations against him that they had made before against others.

Third, defense counsel did not need to dispel such an inference in this case because the prosecutor was true to his word and did not argue this inference to the jury. He asked the jury to believe both brothers because they sounded credible, despite their inconsistent statements, and not because molestation by defendant was the only explanation of their sexual knowledge. Defendant acknowledges that the prosecutor did not assert this inference in his opening argument, but contends that he did so in his closing response that there was no current charge of sodomy involving the older brother. We do not understand the prosecutor's correction of defense counsel's statement of the pending charges as encouraging the jury to draw an improper inference from the descriptive details of the brothers' testimony.

The fact that defendant was ultimately allowed to produce evidence via a stipulation to preplacement molestation involving sodomy supports our conclusion that defendant was not deprived of his due process right to present this defense.

We further conclude that defendant has failed to demonstrate any prejudice resulting from the trial court confining the evidence of preplacement molestations to a general stipulation, rather than a potentially lengthy and confusing exploration about the details underlying this stipulation. The only testimony that could have benefited defendant more than the stipulation was if either brother were to describe a prior molestation that was more similar to the charges than the stipulation, but we see no such evidence in the record. That defendant would have obtained a more favorable verdict had he been allowed to question the brothers about their initial molestations is speculation and not a reasonable probability.

(4). Redaction of references to the biological father

Defendant argues that “the court committed reversible error by redacting [the aunt’s] references to [the biological father] creating a version of the pretext call that was misleading under Evidence Code section 356 and resulted in a trial that was fundamentally unfair.” (Emphasis and footnote omitted.) As we will explain, this argument is newly minted on appeal.

Section 356 states: “Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.”

“The purpose of this section is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party’s oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which ‘have some bearing upon, or connection with, the admission . . . in evidence.’” (*People v. Arias* (1996) 13 Cal.4th 92, 156; cf. *People v. Douglas* (1991) 234 Cal.App.3d 273, 285.) “In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry.” (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1174.) It is no objection to the other statements that they would otherwise be excludable hearsay. (*People v. Williams* (1975) 13 Cal.3d 559, 565.) Statements that are irrelevant to those being admitted may be excluded (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192-193 (*Gambos*); *People v. Von Villas* (1992) 10 Cal.App.4th 201, 272; see *People v. Williams, supra*, 13 Cal.3d at p. 565), as may statements that are subject to exclusion under section 352. (Cf. *People v. Samuels* (2005) 36 Cal.4th 96, 130; see *People v. Von Villas, supra*, 10 Cal.App.4th at p. 272.)

Defendant asserts: “Trial counsel did not specifically reference [] section 356 in making his objection to the redaction of [the aunt’s] statement regarding [the biological father]. Nevertheless, counsel’s arguments that the jury should hear the entire conversation regarding [the younger brother’s] disclosure fairly informed the court and the prosecutor that he was invoking the rule of completeness under section 356.”

We disagree that trial counsel implicitly invoked section 356. As summarized above, he strenuously resisted admission of any part of the recorded telephone call and argued in writing that it was objectionable in too many parts for section 356 to apply. His fallback argument that references to the biological father should not be redacted if the remainder of the call was being admitted was not based on the rule of completeness. He argued that it was a prior inconsistent statement by the aunt and it was something that the jury should know. At no point did defense counsel argue that the jury should hear the entire recorded conversation. Under these circumstances, defendant cannot assert an error under section 356 on appeal.

“In general, a judgment may not be reversed for the erroneous exclusion of evidence unless ‘the substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means.’ (Evid. Code, § 354, subd. (a).)” (*People v. Anderson* (2001) 25 Cal.4th 543, 580.)

Defendant can assert an error under section 352, as the reference to the biological father was excluded for the same reasons that most of the evidence of preplacement molestation was excluded.

Defendant asserts that “[t]he court failed to explain how admitting the statement – comprising merely the remainder of a sentence uttered by [the aunt] – would have been unduly prejudicial, consumed excessive time or confused the issue and misle[d] the jury.” However, including the name of the biological father would have necessarily been confusing to the jury in the absence of any other explanation as to why the younger

brother might have been concerned about an individual with that name. The recorded call itself did not provide such an explanation nor did the stipulation specify who had molested the brothers. Thus, to make the connection sought by defendant would have necessitated additional testimony explaining who the biological father was, what his relationship was with the younger brother, how long it lasted, and what he was accused of doing to the younger brother. We conclude that there was no abuse of discretion in excluding the biological father's name as being more confusing and time-consuming than probative, particularly considering the limited probative value asserted in the trial court.

While defense counsel did oppose redaction of the biological father's name, he did not make the argument defendant now makes on appeal, that the redacted version of the aunt's account of the disclosure "left a completely different and misleading impression that [the younger brother] was fearful of [defendant] and that his fear triggered the allegations of molestation," while the unredacted version shows that his "allegations against [defendant] arose in connection with his fear of [the biological father]."

This argument fails on procedural grounds, as it was not made in the trial court. It also fails on the merits. In the next paragraph we will underline the redaction of which defendant primarily complains. It involved the aunt's explanation to defendant of the circumstances under which the younger brother told her that defendant "had them tickle your penis."

"This was [the younger brother] when I was putting him to bed. He asked if he was safe here and then he just said that, um, and I said, you know, because of [the biological father], he said, [the biological father] lives here by your house, does he, [aunt.] And I said, 'Yeah, but you're really safe cuz you got your new dad, you know and everything.' And then . . . And he's like, 'Yeah, and he takes us camping.' And I'm like, 'Yeah, what kind of games do you guys play there?' And then 'boom.' This is what I get from him, and he was very descriptive."

Without going into a detailed side-by-side comparison of the redacted and unredacted versions of this quotation, we disagree with defendant's interpretation that the redacted version conveyed any impression that the younger brother was fearful of his adoptive father. Instead, he apparently assented to the aunt's statement that he was really safe because he had a "new dad." Even with the unredacted version, if anything prompted the disclosure, it was the aunt's question about the games they played while camping, and not the earlier reference to the biological father.

Defendant asserts that this redaction deprived him of the ability "to argue that the boys' past molest at the hands of [the biological father] and the reminder of that molest were the catalysts for the false accusations against [defendant]."

We note that defendant urged the jury to conclude regarding the disclosure on July 2, 2005 "that she extracted something from them under fear. That was a fearful night for those boys, fearful night. [¶] And she – the routine was not unknown. It happened before. She was always the medium for sexual molestation disclosures and it wouldn't be the last time. And she caused them to relive certain experiences."

Defense counsel was precluded from arguing that the aunt caused the brothers to relive certain experiences with the biological father, but we do not see how this would materially add to this argument. It was mere argument without evidentiary support that the aunt had caused the brothers to relive any experiences. Adding the name of the biological father would not have provided evidentiary support for this speculation, as there was no expert description of any psychological mechanism explaining how the mere mention of a molester's name would or could prompt a child to falsely accuse someone unrelated to that molester of lewd touching. The trial court cannot be faulted for overlooking a theory of relevance that was not asserted. We conclude that, had this theory been asserted, it would have been no abuse of discretion to exclude the biological father's name in view of the marginal probative value compared to the likely confusion and time consumption.

Defendant has forfeited any constitutional objection to this redaction apart from the argument that the section 352 ruling “had the additional legal consequence of violating due process.” (*People v. Partida* (2005) 37 Cal.4th 428, 435.) For the same reasons that the redaction was justified under section 352, we conclude that it did not render the trial fundamentally unfair.

(5). Exclusion of evidence of sexualized behavior by the brothers

One heading in defendant’s briefs is: “Exclusion of defense evidence that [the brothers] exhibited sexualized behavior prior to their placement with the Passineaus following the prosecution opening the door to this evidence with the pretext telephone call was prejudicial error under state law and violated [defendant’s] federal due process right to present a complete defense.” (Emphasis omitted.)

A review of the arguments under this heading reveals that defendant is not complaining only about the continued exclusion of evidence of preplacement sexualized behavior. Almost all the challenged rulings that he cites pertain to exclusions of evidence of postplacement sexualized behavior and his reaction to it. Thus, the brief describes how, following admission of the recorded call, on July 19 and 20, 2010, defendant unsuccessfully “sought to present evidence to explain and give context to his statements from three witnesses: Wendy McCraney-Matz,[a therapist,] Virginia Ray,[defendant’s mother,] and Tamara Passineau[, defendant’s daughter].” The brief accurately describes that the offer of proof as to Tamara was that she had seen the brothers playing with their penises while living with defendant. This was postplacement behavior. The brief accurately describes the offer of proof as to McCraney-Metz that she provided guidance regarding how to deal with the brothers’ sexualized behavior. Presumably this also referred to their behavior while living with defendant and not preplacement behavior. There was no offer of proof as to defendant’s mother, but the question asked of her related to guidance provided by both McCraney-Matz and Barnes. Presumably this

advice also covered postplacement acting out behavior witnessed by defendant and his family.

In response, the People's brief argues that "the trial court properly restricted defense counsel's examination of three witnesses," namely defendant's mother, daughter, and McCraney-Matz. (Emphasis omitted.) In reply, defendant complains that the Attorney General is attempting to narrow the scope of defendant's argument, which also asserted error in excluding preplacement behavior before the telephone call was admitted. We will address all of defendant's arguments regarding the exclusion of both preplacement and postplacement sexualized behavior.

As to reports of sexualized behavior by the brothers, defense counsel's summary of therapist Wedekind's notes (described above in fn. 17) primarily described reports of preplacement behavior. On appeal defendant contends that this evidence should have been admitted for the same reasons he has already given for admitting more evidence of preplacement molests.

To the extent defendant makes the same arguments, our analysis is the same as stated above in part 3B(3). Defendant offered the evidence of preplacement sexualized behavior to prove the brothers' "relative obsession with sexual matters." The trial court excluded it as simply more evidence of prior molestation. Defense counsel did not assert it had a different relevance. We concluded above that there was no evidence of sexual conduct more similar to the charged lewd touching than what was admitted by stipulation. In reaching that conclusion, we took into account the reports of sexualized behavior. One notable dissimilarity is that none of the brothers' sexualized behavior involved an adult male penis.

As to excluded evidence of postplacement sexual behavior, defendant argues that "here, the prosecutor opened the door to defense evidence that was previously excluded under section 352 by introducing the pretext telephone call containing descriptions of the boys' habitual sexualized behavior. But here, rather than exclude or appropriately redact

the tape, the court permitted the prosecutor to use the excluded evidence against [defendant] but prevented [defendant] from using the same type of evidence in his defense.” (Fn. omitted.)

This argument fails for four reasons. First, we reject defendant’s premise that any evidentiary door was opened by the admission of the recorded phone call. The “open the door” theory of admissibility is “a popular fallacy.” (*Gambos, supra*, 5 Cal.App.3d at p. 192.) “By allowing objectionable evidence to go in without objection, the non-objecting party gains no right to the admission of related or additional otherwise inadmissible testimony.” (*Ibid.*) Similarly, a trial court’s error in admitting some objectionable evidence does not commit the trial court to admitting other or all objectionable evidence. Each objection to potential evidence must be scrutinized separately.

Second, the telephone call did not include any description of “habitual sexualized behavior.” Neither speaker in the 2005 telephone call characterized the sexual behavior as habitual, though defendant testified at trial in 2010 that he had seen masturbation by the older brother before, though not the younger brother.

Third, the court did not permit the prosecutor “to use the excluded evidence.” What had been previously offered and excluded was primarily preplacement sexualized behavior, not postplacement behavior.

Fourth and most important, the evidence of sexualized conduct was not used “against” defendant. Defendant perceives that the recorded call passage in which he described observing sexualized behavior by the brothers created a new issue in this case. In his words, his “evidence would have established that the boys habitually acted out sexually and talked about sex frequently and when they did so the family would discuss the issue with a therapist and receive guidance for handling the behavior without conveying negative judgments. This evidence would have rebutted the inference that [defendant], and his family members, were minimizing the boys’ behavior or failing to

report it to the police for nefarious reasons. Rather, to them the behavior was similar to other incidents of the boys' sexually acting out, claiming to have participated in a large variety of sexual activity and talking incessantly about sexual acts.”

The preplacement molestation and sexualized behavior evidence was offered at the outset of trial to dispel a natural inference from lost innocence. This resulted in entry of the stipulation regarding preplacement molestation. Defendant offered additional evidence of postplacement sexualized behavior not to further dispel this inference, but to dispel two other inferences, one that his reaction to this behavior was inappropriate and the other that it reflected a consciousness of guilt.

We note that defendant himself testified regarding the significance of his reactions. In elaborating on the reactions he described in the recorded telephone call, defendant testified that he had seen a lot of sexualized behavior by the older brother, though not the younger brother, and that defendant reacted to the camping trip behavior the way he had been taught by the adoption agency director. Further, he discussed the incidents with his wife and they planned to take the younger brother to therapy, though events prevented him from executing that plan.

That was not the only evidence of how defendant dealt with misbehavior by the boys. Therapist McCraney-Matz was allowed to testify in general that she gave defendant advice during therapy about behavioral issues with the brothers, though she was precluded from testifying that she gave advice about sexualized behavior. There was also a stipulation that defendant and his wife regularly took the brothers for mental health counseling.

The trial court rulings precluding certain testimony by McCraney-Matz and defendant's mother and sister did leave uncorroborated defendant's later testimony that (a) he had previously observed sexualized behavior by the older brother and (b) he had been instructed by the adoption agency director about how to deal with such behavior by either brother.

We recognize that “[t]he existence or nonexistence of *any* fact testified to by” a witness is relevant to the witness’s credibility. (§ 780, subd. (i), our emphasis.) However, we are aware of no rule authorizing a criminal defendant to produce corroboration for *every* fact to which he or she testifies, no matter its relevance.

People v. Cunningham (2001) 25 Cal.4th 926, 998-999 (*Cunningham*) teaches: “In general, the “ ‘[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant’s right to present a defense.” [Citations.]’ [Citations.] We have recognized, however, that Evidence Code section 352 must yield to a defendant’s due process right to a fair trial and to the right to present all relevant evidence of *significant* probative value to his or her defense. [Citation.]

“Although the complete exclusion of evidence intended to establish an accused’s defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right. [Citation.] Accordingly such a ruling, if erroneous, is ‘an error of law merely,’ which is governed by the standard of review announced in *People v. Watson* (1956) 46 Cal.2d 818, 836.”

If there was any issue in this case regarding what inferences the jurors could draw from defendant’s self-described reaction to the brothers’ sexualized behavior on a camping trip, we regard it as a minor, subsidiary, and collateral issue for three reasons. First, there was no expert testimony that child molesters typically minimize sexualized behavior by their victims.

Second, assuming that this inference could still be drawn by the jury without expert testimony, the prosecutor did not make this argument to the jury. The prosecutor did not argue to the jury that defendant minimized their sexualized behavior and that such minimization reflected a consciousness of guilt of molesting the brothers. No part of the prosecutor’s argument mentioned either the brothers manifesting any sexualized behavior or defendant’s response to it. Indeed, the prosecutor did not mention the recorded

telephone call at all in his opening argument to the jury. The closing argument did refer to the call twice. The prosecutor attempted to cast doubt on defendant's credibility by mentioning how he had contradicted himself in seeking to explain some of his recorded statements.³² Later the prosecutor stated, "clearly [defendant] did make denials in the pretext call. He did say ['I'm going to go to prison for a long time for something I didn't do.']" Neither assertion invited the jury to infer a consciousness of guilt from defendant's reaction to the brothers' sexualized behavior.

Third, assuming the jury might still be inclined to infer that molesters minimize sexualized behavior without expert support or prosecutorial argument, the inference was counterbalanced by the stipulated evidence that defendant and his wife regularly took the brothers for mental health counseling and the testimony by McCraney-Matz that she gave defendant advice on how to deal with the brothers' unspecified behavioral issues. For a

³² The opening brief asserts, "The prosecutor urged the jury to use the phone call to show that [defendant], 'might have had some inkling of what was going on before [the aunt] had [the boys] and got the disclosure on July 2.'" As the Attorney General responds, defendant has misconstrued this part of the closing argument.

As noted above in footnote 12, defendant had difficulty explaining one part of the call. In the cited passage of argument, the prosecutor argued that defendant had changed his testimony during cross-examination. When the prosecutor posited that defendant made a statement during the call indicating a prior disclosure to him personally, defendant "didn't like this concept. This concept doesn't work with the theory that [the aunt] put these boys up to it, the idea that he might have had some inkling of what was going on before [the aunt] had them and got the disclosure on July 2nd. He wasn't having that." The prosecutor proceeded to note that defendant said his wife and mother described the call to him, then he said he overheard it, then he remembered that it was described to him.

In this context, it is clear that the prosecutor's point was not that the call actually revealed a prior disclosure, but that defendant's statements about the call were contradictory. In any event, this passage was unrelated to the later description in the call of sexualized behavior.

juror to infer, first, that defendant minimized the brothers' sexual behavior, and, second, that this minimization reflected a consciousness of guilt would require the juror to disregard that defendant regularly obtained therapeutic help for the brothers.

In the circumstances of this case, we conclude that defendant's reaction to the brother's sexualized behavior was at most a minor issue. While the stipulation regarding regular mental health treatment was not introduced to counteract admission of the recorded telephone call statements, it effectively established something about defendant's parental character. Defendant was also allowed to elicit from a therapist that she answered his questions about the previously-molested brothers' behavioral issues. We conclude that defendant suffered no constitutional deprivation of the opportunity to respond to this evidence on a collateral issue.

Defendant does not convince us that the trial court abused its discretion under section 352 in excluding either that his sister had also observed sexualized behavior or that therapists had told the family, including defendant's mother, not to overreact to sexualized behavior.

“[T]he balancing process mandated by section 352 requires ‘consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in section 352 for exclusion.’ [Citation.]” (*People v. Wright* (1985) 39 Cal.3d 576, 585 (*Wright*).

As to each item of evidence, the question under section 352 is whether the probative value is substantially outweighed by the undue consumption of time. Evidence of other postplacement sexualized behavior by itself would not be probative of either defendant's guilt or innocence. It was readily attributable to the stipulated preplacement molestation and the prosecutor did not argue otherwise.

Corroboration of how the adoption director told defendant to react to sexualized behavior had only slight probative value considering the stipulations to preplacement

molestation and defendant obtaining regular mental health counseling for the brothers. There could be no doubt that, through this counseling, defendant had received therapeutic advice about how to deal with the behavior of molested boys. Corroboration of what advice defendant said he received would be slightly probative of his credibility, but the slight probative value may not have outweighed the potential time consumption in corroborating defendant on a collateral point.

Even if we were to conclude that asking the questions proposed by defendant did not pose a real danger of undue consumption of trial time, “we cannot say it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the error[s].” (*Wright, supra*, 39 Cal.3d at p. 586.) The issue in this case was whether the younger brother, the older brother, or defendant was telling the truth about defendant molesting either brother. We conclude that it is not reasonably probable that defendant would have obtained a more favorable result had the jury heard corroboration of the details of the professional advice he received about how to react to sexualized behavior.

4. RESTRICTIONS ON CROSS-EXAMINATION OF THE AUNT

On appeal defendant complains that the trial court unduly restricted his cross-examination of the aunt in support of his theory that she manipulated the brothers into alleging molestation in order to prevent their move to Oregon and away from her.

“ ‘[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, “to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.” ’ (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 (*Van Arsdall*), quoting *Davis v. Alaska* (1974) 415 U.S. 308, 318.) However, not every restriction on a defendant’s desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court

retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, unless the defendant can show that the prohibited cross-examination would have produced ‘a significantly different impression of [the witnesses’] credibility’ (*Van Arsdall, supra*, 475 U.S. at p. 680), the trial court’s exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]” (*People v. Frye* (1998) 18 Cal.4th 894, 946, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 (*Doolin*).)

A. THE YOUNGER BROTHER’S VERACITY

Defendant contends that the trial court erred in sustaining the prosecutor’s relevance objection to this question posed to the aunt: “Is it true that you are unable to trust [the younger brother] around your son [] because you’re afraid that he’ll make accusations against [your son]?”

Defendant asserts that the aunt’s opinion of the younger brother’s honesty was admissible. Defendant, however, cites no cases allowing lay opinion of veracity, and for good reason. In *People v. Sergill* (1982) 138 Cal.App.3d 34, cited by defendant, the appellate court found that the trial court had prejudicially erred by allowing two police officers to testify to their opinions that a minor molest victim was telling the truth.

People v. Melton (1988) 44 Cal.3d 713, not cited by either side, explained the general rule at page 744. “With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. Qualified experts may express opinions on issues beyond common understanding (Evid. Code, §§ 702, 801, 805), but lay views on veracity do not meet the standards for admission of expert testimony. A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where ‘helpful to a clear understanding of his testimony’ (*id.*, § 800, subd. (b)), i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. [Citations.] Finally, a lay opinion about the veracity of particular statements

does not constitute properly founded character or reputation evidence (Evid. Code, § 780, subd. (e)), nor does it bear on any of the other matters listed by statute as most commonly affecting credibility (*id.*, § 780, subds. (a)-(k)). Thus, such an opinion has no ‘tendency in reason’ to disprove the veracity of the statements. (*Id.*, §§ 210, 350.)”

Defendant has established no error in the trial court enforcing this general rule.

B. THE AUNT’S ATTACHMENT TO THE BROTHERS

Defendant categorizes several other questions during the aunt’s cross-examination as important to establishing the aunt’s attachment to the brothers and her motive. One colloquy follows.

There was a side-bar conference after defense counsel asked the aunt if she was aware of the brothers’ prior molestations when they were first placed with her. The aunt did not answer this initial question. The court precluded questions based on the stipulation that the molests were first disclosed to her.

Defense counsel then asked several questions about the brothers’ initial placement with the aunt. In answer to a question about the boys being hard to handle, the aunt stated, “I don’t know if this answers your question, but when they were placed with me I was never told they were molested or hurt or anything.” The court called another sidebar conference. The court questioned the relevance of defense counsel’s line of questioning. Defense counsel explained that the “whole case” for the defense was that, “despite her protestations to the contrary, [the aunt] was extremely upset about the move to Oregon. It is that motive that I believe created the accusations in this case.” “[I]t’s important for the jury to understand, not in the abstract, not isolated, but the entire history of how she got attached to these children and how guilty she felt every time she had to give them up. And that guilt built over time”

The court observed that the witness was not testifying consistently with the defense theory. “So far there is no evidence that she was overwhelmed with guilt and was dying to keep them close to her.” The court ruled that what was relevant was her

interaction with the brothers when they were placed with the Passineaus. Back on the record, the court granted the prosecutor's motion to strike the last question and answer from the record.

On appeal, defendant criticizes the initial ruling precluding questioning the aunt about how she first learned about the brothers being molested. He does not cite the second ruling as error.

As the stipulation already established that the brothers initially disclosed their earlier molests to the aunt, we find no abuse of discretion in the trial court precluding a question apparently designed to either confirm or undermine the stipulation.

Defendant also challenges the following ruling during his cross-examination of the aunt.

“Q Did you have difficulty separating from these children because of attachment issues that you had as a child after being abandoned?”

“A Abandoned?”

“Q Yes. Did you have issues of abandonment and attachment issues as a child that made it difficult for you to separate from the children?”

After the prosecutor objected to this question, the court held a conference at side bar. Defense counsel said that this question was based on a note by Wedekind about a statement made by the aunt. The prosecutor objected that the purpose of one stipulation was to avoid getting into the therapy records. The court agreed that “the exact reason why the Court accepted the stipulation” was “because we were not going to do mini-trials on people's personal lives dating back many years.” In the jury's hearing, the court granted a motion to strike the question and instructed the jury to disregard it.

At trial, defendant was given ample leeway to cross-examine the aunt, the brothers, and persons who talked to the aunt about her feelings for and attachment to the brothers based on their history together. We find no abuse of discretion in the trial court

precluding defendant under section 352 from attempting to ascertain to what extent these feelings were rooted in the aunt's own childhood.

This is akin to the evidence found to have been properly excluded in *People v. Adames* (1997) 54 Cal.App.4th 198. In that case the defense sought to elicit evidence from the mother of a minor female who claimed to have been sexually molested that the mother herself had been molested as a child. (*Id.* at p. 208.) The appellate court upheld the trial court's exclusion of this evidence as marginally relevant and potentially confusing to the jury and found that there was no violation of the right of confrontation. (*Id.* at pp. 208-209.)

While defendant was not allowed to explore the aunt's complete psychohistory, we conclude that the restrictions on his cross-examination of her did not infringe on his constitutional rights of confrontation, cross-examination, and presentation of a defense. They did not prevent defense counsel from making the following argument to the jury. The brothers felt abandoned by the aunt when she gave them up to the Fikes. They were returned to her and she gave them up again. "Abandonment there again. Now, it's not just I think abandonment feelings on the part of the boys. It's abandonment feelings on the part of [the aunt]. You can conclude that she doesn't feel good about giving these kids up. She's bonded with them the year she was with them. She feels guilty about giving them up in the first place. She feels guilty about not being able to care for them. She feels guilty about giving them up a second time."

Defense counsel's argument illustrates that defendant was able to present the defense that he now claims to have been deprived of.

5. ADMISSION OF REBUTTAL CHARACTER EVIDENCE

On appeal defendant argues that the trial court improperly admitted rebuttal testimony by Kelsey Davis to the effect that in her opinion, defendant was a strict parent and was capable of lewd conduct with children.

A. THE COURT’S RULINGS AND THE WITNESS’S TESTIMONY

After the defense presented a number of witnesses who offered the opinions that defendant was not capable of molesting the brothers and they had seen no signs that he had, the prosecutor proposed as a rebuttal witness Davis, who was originally on the defense witness list. In the jury’s absence, the prosecutor explained that Davis, defendant’s stepdaughter, would contradict other character witnesses for the defendant and testify “that he is, in fact, controlling, that he was subject to fits of upset towards the children, that sometimes his punitive measures were more related to his being frustrated.” “In addition to which, she will testify that she, in fact, has formed the opinion that he does have the character which is consistent with someone who would molest a child.” Defendant objected to the testimony as a surprise, and much of it as irrelevant to the character trait in issue. Defendant argued that Davis should not be allowed to describe a disclosure by the younger brother to her about the tickle game.

The prosecutor responded that the disclosure had actually been by the older brother, but he agreed that it was inadmissible. He intended to elicit Davis’s opinion as to defendant’s “character for the appropriate treatment of children.”

The court indicated a familiarity with case law allowing lay witness opinion that a defendant is not a person given to lewd conduct with children. The prosecutor explained that his current intent was to ask Davis about her direct observations of defendant’s parenting and not ask for her opinion of his character. Defense counsel argued that specific instances of conduct could not be employed as evidence of character. The court stated that a rebuttal opinion of character was admissible.

Defendant asked the prosecutor to name one witness he had asked about good parenting skills. The prosecutor cited defendant, his mother, the preschool teacher Stoddard, and the adoption agency director Barnes. The court also named Stoddard and Barnes as testifying about defendant’s parenting skills.

The court cited *People v. McAlpin* (1991) 53 Cal.3d 1289 (*McAlpin*) as guiding what is admissible. The court explained: “It’s impeachment evidence as to the defendant’s stated parenting style as to not overreact, to remain calm and whatever else he testified to throughout all the questions of how he would contact counselors and then parent in consistence [*sic*] and conforming ways as to their advice. I think he described those. I can go back to my notes to the various ways he described his parenting style.

“I think specific acts would be – this is not a trait. It is impeachment of the defendant. The character traits the Court allowed are to rebut the character traits that were testified to in the defense case in chief, which would be either that he is a person given to lewd conduct with children, which would rebut the character trait you brought out through your witnesses, or another character trait that was established through your character witnesses.”

Ultimately, Davis testified as described above that defendant was a controlling parent and strict disciplinarian. When the prosecutor first asked her what her opinion was of defendant’s character, she answered, “That it could be possible he could have committed these acts.”

Defense counsel objected to this opinion at sidebar as a violation of the court’s ruling. The court indicated that it would strike the response, and suggested how the question of character to molest should be asked.³³ There was further discussion of how to elicit a proper opinion and the prosecutor was given an opportunity to speak with the witness about how to testify. The court stated that the prosecutor could elicit her opinion, but could not ask her the basis of her opinion. The court did not want the witness to

³³ The court stated, “character evidence should go something like this, Have you had an opportunity to observe the defendant or the person around children? Based on those observations, do you believe he is a person given or not given to lewd conduct with children?”

mention any personal revelation by a brother of molest. The court stated, “I do not want her to have an opinion on the guilt or innocence of this defendant.” The prosecutor represented that the witness understood.

Back on the record, the court struck the last question and answer and instructed the jury to disregard them. The prosecutor asked if Davis had an opinion as to whether defendant was given to lewd conduct with children based on her observations of his interactions with the brothers. When the witness answered, “Yes,” the prosecutor announced no further questions. The court prompted the prosecutor to ask for her opinion. She answered, “He could have possibly done this, yes.” The court immediately struck that answer and asked the witness, “[I]s your opinion that the defendant is a person given to lewd conduct with children, yes or no?” The witness answered, “Yes.”

After Davis testified, in the jury’s absence defendant moved for a mistrial as the testimony violated the prosecutor’s original proffer and the court’s ruling. The prosecutor admitted that he had changed his mind based on the court’s ruling. The court ruled that it was proper to have a rebuttal opinion regarding defendant’s character and that the improper opinions by the witness were stricken, so the mistrial motion was denied.

The jury was instructed about how to evaluate lay opinion testimony in terms of CALCRIM No. 333, including to consider “the reason the witness gave for any opinion and the facts or information on which the witness relied in forming that opinion.” The jury was also instructed on the relevance of character evidence in terms of CALCRIM No. 350.

B. ADMISSIBILITY OF REBUTTAL OPINION TESTIMONY

Witnesses must have personal knowledge of a subject for their testimony about it to be admissible unless they are experts. (§ 702, subd. (a).) A witness qualifies as an expert on a subject by having “special knowledge, skill, experience, training, or education.” (§ 720, subd. (a).) “ “The competency of an expert is relative to the topic

and fields of knowledge about which the person is asked to make a statement. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited.” ’ ’ (*People v. Williams* (1989) 48 Cal.3d 1112, 1136.) An expert’s opinion should be limited “to a subject that is sufficiently beyond common experience” to be helpful to the trier of fact. (§ 801, subd. (a); cf. *People v. Cole* (1956) 47 Cal.2d 99, 103-104.)

McAlpin stated: “Evidence Code section 800 limits lay opinion testimony to an opinion that is ‘(a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony.’ Our focus is on the requirement of subdivision (a) of this statute. The meaning of subdivision (a) is clear: ‘A witness who is not testifying as an expert may testify in the form of an opinion *only if the opinion is based on his own perception.*’ (Cal. Law Revision Com. com., 29B West’s Ann. Evid. Code (1966 ed.) § 800, p. 376, italics added.) As the drafters acknowledge (*ibid.*), this was also the common law rule. [Citations.] In this context, moreover, the drafters define ‘perception’ as the process of acquiring knowledge ‘through one’s senses’ (Evid. Code, § 170), i.e., by personal observation.” (*McAlpin, supra*, 53 Cal.3d at p. 1306, fns. omitted, emphasis in original.) “[W]hen a lay witness offers an opinion that goes beyond the facts the witness personally observed, it is held inadmissible.” (*Id.* at p. 1308.) “Matters beyond common experience are not proper subjects of lay opinion testimony.” (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1333.)

Evidence Code section 1102 states: “In a criminal action, evidence of the defendant’s character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:

“(a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.

“(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).”

Section 1102 has codified the general rule that specific acts are inadmissible to prove a defendant's character. (*People v. Wagner* (1975) 13 Cal.3d 612, 618-619 (*Wagner*); see *McAlpin, supra*, 53 Cal.3d at p. 1309.) This limitation on character evidence has survived the enactment of the "Truth-in-Evidence" provision (Cal. Const., art. I, § 28, subd. (d)). (*People v. Felix* (1999) 70 Cal.App.4th 426, 432.)

The California Supreme Court has "firmly rejected the notion that 'any evidence introduced by defendant of his "good character" will open the door to *any and all* "bad character" evidence the prosecution can dredge up. As in other cases, the scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf.' [Citation.]" (*People v. Loker* (2008) 44 Cal.4th 691, 709.)

On appeal we review evidentiary rulings under sections 352 and 1102 for abuse of discretion. (*Doolin, supra*, 45 Cal.4th at p. 437.)

(1). Rebuttal as to defendant's parenting skills

As to Davis's testimony regarding defendant's general parenting skills, defendant contends that it was not responsive to testimony by defendant's mother, the preschool teacher, or the adoption agency director Barnes. He argues that their testimony was more limited than that.

As summarized above, one theme of the testimony by a number of defense witnesses, including defendant, was that defendant was engaged, caring, and nonconfrontational with the brothers. Unlike defendant, we do not regard that testimony as so limited as to preclude a description of how he was at least occasionally strict with the brothers. "A defendant cannot bar the prosecution from rebutting favorable character evidence merely by characterizing the direct examination as being narrower in scope than in fact it was." (*Wagner, supra*, 13 Cal.3d at p. 617.) In any event, as we noted above, this was not a dependency case in which defendant's parenting style was particularly relevant.

(2). Rebuttal as to defendant's capacity for lewd conduct

McAlpin, supra, 53 Cal.3d 1289 upheld the admission of expert testimony “that there is no profile of a ‘typical’ child molester, and that such persons are found instead in all walks of life.” (*Id.* at p. 1302.) The court noted the conclusion of a then-recent study that “ ‘under the current state of scientific knowledge, there is no profile of a “typical” child molester.’ ” (*Id.* at p. 1303.) The court found the expert testimony sufficiently beyond common experience as to be helpful to a jury. (*Id.* at pp. 1303-1304.)

On the other hand, the court also found error in a trial court's exclusion of lay opinion that a defendant charged with lewd conduct in violation of Penal Code section 288 was not a sexual deviant. “Because the latter conclusion of the witnesses was based on their direct observation of defendant's behavior with their daughters, it was both a proper subject of lay opinion testimony and relevant to the charge of child molestation.” (*McAlpin, supra*, 53 Cal.3d at p. 1309.) As the witnesses' proffered opinions were based on their entire relationships with the defendant and not specific acts of nonmolestation, they should have been admitted. (*Ibid.*)

On appeal, defendant does not dispute the general admissibility of a lay opinion that a certain person is given to lewd conduct when it is based on adequate personal experience. Instead, defendant challenges Davis's opinion as not based on adequate personal experience.

We are bound by *McAlpin*, which allows such an opinion to be expressed by a person who has observed the defendant's interactions with children. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Under this standard, Davis was qualified to offer an opinion. We conclude there was no abuse of discretion in allowing her to offer her opinion on defendant's character for lewd conduct.

Moreover, we do not see how defendant was prejudiced by this testimony. The prosecutor made no mention of Davis's testimony in argument to the jury. Defense

counsel argued to the jury that her testimony “was an act of desperation on the part of the prosecution to build a case where there was none. You bring a girl like that to say what she said, an obvious lie, you’re desperate and you know it.” The jury was instructed on how to evaluate opinion testimony and was well aware that Davis admitted having never observed sexual misconduct by defendant. Her opinion was based on defendant’s nonsexual means of discipline. She further acknowledged that defendant had kicked her out of his house and was involved in a difficult divorce with her mother. As the Attorney General points out, her bias was obvious and the jury did not convict defendant of five of eight charges.

6. CUMULATIVE PREJUDICE

Defendant argues that even if no error alone was prejudicial, the cumulative impact of the errors was prejudicial. Above we have acknowledged arguable error only in the rulings excluding corroboration of how defendant was advised to react to sexualized behavior. We have also concluded that this error was neither constitutional nor prejudicial under the state standard. We conclude that “[e]ven considered cumulatively, there is no reasonable probability [citation] that absent the errors the jury would have reached a different result.” (*People v. Jones* (2003) 30 Cal.4th 1084, 1117.)

The jury was aware from stipulations that the brothers had previously been molested and that defendant had thereafter arranged for regular mental health counseling for them. No evidence of more similar molests was excluded. Defendant was ultimately convicted on only three of the eight charges. We conclude that, while the trial may not have been perfect, it was fair. (*Cunningham, supra*, 25 Cal.4th at p. 1009.)

7. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

MIHARA, J.

DUFFY, J.*

*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.