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

In re STEVEN R., a Person Coming Under  
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN R. ,

Defendant and Appellant.

H036784  
(Santa Clara County  
Super. Ct. No. JV36945)

In re JEREMY R., a Person Coming Under  
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMY R.,

Defendant and Appellant.

H036862  
(Santa Clara County  
Super. Ct. No. JV37243)

After a contested jurisdictional hearing, the juvenile court found that appellant Steven R. had committed six counts and appellant Jeremy R. had committed one count of forcible lewd conduct on a child under 14 (Pen. Code, § 288, subd. (b)(1)). Steven and

Jeremy were both placed on probation. On appeal, both Steven and Jeremy contend that (1) the evidence was insufficient to support the court's jurisdictional findings, (2) their trial counsel were prejudicially deficient in failing to object to the admission of the victim's notes about their offenses, (3) the trial court erred in excluding some defense evidence, (4) the prosecutor engaged in prejudicial misconduct in his examination of defense witnesses and a rebuttal witness, (5) the court utilized the wrong standard to determine their knowledge of the wrongfulness of their conduct, (6) the court improperly relied on extrajudicial information in making its jurisdictional findings, (7) the court erred in denying their request for a jury trial, (8) some of the probation conditions are invalid or require modification, (9) the court erred in its imposition of general fund fines and penalty assessments, and (10) the court erred in ordering payment of attorney's fees in the absence of substantial evidence of ability to pay. Steven individually asserts that his trial counsel was prejudicially deficient in failing to object to the admission of recordings of a pretext call and a police interview with him. Jeremy separately contends that the court erred in ordering a copy of the transcript of the pretext call between the victim and Steven to be provided to Jeremy's counselor. We reject their challenges to the court's jurisdictional findings. However, we remand these matters with directions for the court to modify the probation conditions, clarify the amount of Steven's general fund fine, and state the statutory bases for the general fund fines and penalty assessments imposed on both Steven and Jeremy.

### **I. Factual Background**

Jeremy and Steven are brothers, and L.C. is their first cousin. Steven is about 16 months older than L., and Jeremy is about five months older than her. Steven, Jeremy, and L. all lived together in their grandmother's home with their siblings and parents from the time L. was two until she was nine years old. Four families lived in the home, and

each family had one bedroom. As children, the cousins “played together, played sports together.”

When L. was four years old, Steven “started to dry hump me.” “He would pin me down on the floor and get on top of me.” Steven was “a little bit bigger” than L. at that time. Steven would hold her hands and feet down and thrust his hips into her. She was not able to escape. This occurred twice when she was four years old, on both occasions in a “clubhouse” in the backyard of their home.

Steven “started doing other stuff” when L. was six years old. He touched her chest over her clothing and kissed her. She told him to stop, but he did not. After that, “[i]t got worse.” When she was seven or eight years old, Steven began touching both her chest and her genitals under her clothing. These touchings occurred “[a] few times a week,” and each touching would last “[a] couple of minutes.” L. told him to stop and tried unsuccessfully to remove his hands from her body.

When L. was eight years old, Steven anally penetrated L. with his penis after forcing her pants down over her resistance. He held her chest against him so that she could not escape.

Steven also started to digitally penetrate her. L. recalled eight to 10 incidents of digital penetration. One digital penetration incident occurred after they no longer lived in the same home. L. was at a party at Steven’s home, and she had been playing video games with a group of cousins. The other cousins left the room, and L. tried to follow the last one other than Steven to leave. Steven pulled her back into the room and locked the door. L. tried to fight him off and tried to pull his hands away from her, but he opened her pants and put his hands inside her underwear.

There were also occasions when Steven would expose his penis and “force” L.’s “hand to grab his penis,” or “force [L.’s] hand inside his pants.” His penis was erect on these occasions. There were also two to five occasions when Steven put his mouth on her vagina. She was “fighting him off and stuff,” but he “held my hand with one of his hands

and his other hand took down my pants and he put his tongue on my vagina.” On one occasion, they were swimming in a public pool, and Steven swam under her, pulled her bathing suit to the side, and put his mouth on her vagina. She was able to kick him away from her. On another occasion, when L. was 8 years old, Steven pulled her onto a bed, sat on her chest with his knees pinning down her arms, grabbed her jaw, pulled out his penis, and put it in her mouth. She bit down, and he hit her in the head. She bit down again, and he hit her harder.

When L. was approximately nine years old, Steven started putting his penis in her vagina. One time, he entered the bathroom while she was on the toilet, pulled her to the floor, held her down as she was “fighting him telling him to stop” and trying to push him off of her, and put his penis in her vagina. Steven “began moving his hips back and forth.” She told him “to stop and that it hurt.” He told her “to shut up, that it felt good.” He was on top of her for 10 to 15 minutes. Steven stopped only when he heard someone calling him. L. had vaginal pain for the rest of the day after this event. There was one other time when Steven penetrated her vagina with his penis.

When L. was 11 to 13 years old, Steven continued to fondle her chest, digitally penetrate her vagina, and orally copulate her. On one occasion, when Steven was 12 or 13, Steven again forced his penis into her mouth, and ejaculated into her mouth. Steven stopped molesting L. when she was 13. L. “was staying after school and he had a girlfriend at that time.”

L. testified that Steven molested her 50 to 100 times between the time he was 11 and 14.<sup>1</sup> “He always forced himself on me.” She was always “resisting.” L. suffered bruises to her arms and ribs from Steven’s hands. Most of these incidents happened after school when the only adult in the home was their grandmother, and Steven and L. were

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<sup>1</sup> This was the charged time period.

alone. The remainder of the incidents happened at Steven's home when Steven's mother was babysitting L. or during family gatherings.

Jeremy also molested L. when she was 11 and he was 11 and 12 years old. Twice, when Jeremy was spending the night at L.'s home, he got on top of her, pinned her down, and thrust his hips into her. About five times, Jeremy forced her hand into his pants, put his hand over her hand, and made her hand "go up and down" on his penis for a few minutes. One of these occasions occurred in the garage. Jeremy forced L. onto a couch as she fought back before forcing her to touch his penis. Another of these incidents occurred at Jeremy's house in his room. On that occasion, Jeremy forced her onto the bed, held her down with one hand, and used his other hand to stick L.'s hand down his pants. On the final occasion, after forcing her hand down his pants, Jeremy asked L. "did I want this or did it feel good, did I want to try." She said no, and there were no more incidents.

L. did not tell anyone about these incidents because she was "scared" that Steven "would hurt me." L. was not "scared" of Jeremy, but she did not report his molestations because she feared Steven. Steven and his brothers frequently punched, hit, and bullied L. Steven had punched her in the arms and legs leaving bruises, and he had hit her in the head during one of these incidents. "Most of the time [the bullying and punching by Steven and his brothers] was playful, but sometimes it was mean." L. also did not think she would be believed, as Steven and his brother were not punished for hitting and bullying her. L. did tell her mother that her bruises came from Steven and Jeremy hitting her, but she did not disclose the molestations.

A couple of years after the molestations ended, L. first disclosed that she had been molested when she told a doctor in August 2009. The doctor had asked L. whether she had ever been sexually assaulted, and L. hesitated. The doctor "pursued me on that and that's when I said that Steven had raped me." She did not tell the doctor more about the molestations. L. thought that her disclosures to the doctor would be confidential, and she

did not realize that her doctor was a mandated reporter. She told her doctor that she did not want to report that she had been molested.

L. was contacted by San Jose Police Detective Stella Cruz-Foy soon after her disclosure to her doctor. After an initial telephone contact during which L. refused to identify her molester and said only that she had been raped once by her cousin, Cruz-Foy met with L. a few weeks later at her school. At this September 2009 interview, L. disclosed that both Steven and Jeremy had molested her. L. told Cruz-Foy everything she could remember at that time. After this interview, Cruz-Foy arranged for L. to make a “pretext phone call” to Steven. The pretext call, during which Steven admitted molesting L., occurred in October 2009. Cruz-Foy subsequently interviewed Steven, and Steven made some admissions during this interview.

## **II. Procedural Background**

Petitions were filed alleging that both Jeremy and Steven came within the provisions of Welfare and Institutions Code section 602. At the contested jurisdictional hearing, L.’s grandmother and grandfather testified that they had never seen L. try to avoid Steven or Jeremy. The grandmother acknowledged that she was babysitting up to nine grandchildren much of the time and could not be watching all of them at all times. The grandfather was not at home during the day as he worked until 6:00 p.m. Jeremy testified that he had never molested L. in any way.

Steven testified that he had touched L. over her clothing and once under her clothing. He also admitted having moved her bathing suit aside, but he insisted that he “just moved it aside” and “didn’t do nothing to it.” Steven denied all of L.’s other allegations and denied that he had ever “forced” L. to do anything to him. He claimed that L. had repeatedly put her hand on his pants over his penis. Steven testified that he “stopped” when “I realized it was wrong what we were doing.” However, he admitted that he had been punished by his parents for kissing L. when he was five years old. He

claimed that he understood as a result that the kissing was wrong but did not realize that touching her vagina was wrong. Steven asserted that he was unable to recall when the touchings had ended.

The court found the allegations in both petitions true and found them to be felonies. The probation department recommended that both Jeremy and Steven be placed on probation on numerous conditions, and the court adopted this recommendation with a few modifications. Steven and Jeremy both timely filed notices of appeal.

### **III. Discussion**

#### **A. Sufficiency of the Evidence**

In our review of the sufficiency of the evidence, we view the evidence in the light most favorable to the court's findings. (*In re Roderick P.* (1972) 7 Cal.3d 801, 808-809.)

##### **1. Steven**

Steven claims that there was not substantial evidence of *six* acts of *forcible* lewd conduct *during the charged period*. We disagree.

“[I]n determining the sufficiency of generic testimony, we must focus on factors other than the youth of the victim/witness. Does the victim's failure to specify precise date, time, place or circumstance render generic testimony insufficient? Clearly not. As many of the cases make clear, the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction. [Citations.] [¶] The victim, of course, must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe *the number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., ‘twice a month’ or ‘every time we went camping’). Finally, the victim must be able to describe *the general time period* in which these acts

occurred (e.g., ‘the summer before my fourth grade,’ or ‘during each Sunday morning after he came to live with us’), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim’s testimony, but are not essential to sustain a conviction.” (*People v. Jones* (1990) 51 Cal.3d 294, 315-316.)

L.’s testimony was sufficient to support the court’s findings that Steven committed six forcible lewd acts during the charged period. First, L.’s testimony sufficiently described the general time period during which the acts occurred and the number of acts. Steven’s amended petition alleged that all of his offenses had occurred between April 9, 2004 (when Steven was 11 years old and L. was nine years old) and August 10, 2008 (when Steven was 15 years old and L. was 13 years old).<sup>2</sup> L. testified at trial that she was sexually assaulted by Steven 50 to 100 times when Steven was between 11 and 14 years old, which was within the charged time period. This testimony adequately identified the number of acts. Second, L. testified that Steven committed three types of acts against her during this time period. She described two specific incidents of rape when she was nine years old and also testified that, when she was 11 to 13 years old, Steven repeatedly digitally penetrated her vagina and repeatedly orally copulated her and forced her to orally copulate him. Finally, L. testified that all of Steven’s acts were forcible and perpetrated against her physical resistance. “He *always* forced himself on me.” (Italics added.) She was always “resisting.”

Steven argues that L.’s testimony was inadequate because she did not “specifically describe” the force involved in six specific incidents during the relevant time period. He concedes that her testimony was sufficient to support three counts of forcible lewd

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<sup>2</sup> The petition was amended after the close of the prosecution’s case to conform to proof.

conduct during that period, but he claims that it was not sufficient to support the other three counts of forcible lewd conduct and asks that those counts be reduced to nonforcible lewd conduct. Steven's argument is inconsistent with *Jones*. As long as the victim's generic testimony is sufficient to support each element of the offense, the victim need not describe specific events in any greater detail. Moreover, we "'presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment.'" (*In re Arcenio V.* (2006) 141 Cal.App.4th 613, 615.) The evidence in this case included quite detailed descriptions of the force that Steven used to perpetrate his various sex acts against L. While L. did not provide specific descriptions of the force used during six specific acts during the relevant time period, L's testimony that Steven "always forced himself" on her, coupled with her detailed descriptions of the type of force he used to perpetrate the types of acts he committed against her during this time period, was sufficient to permit the juvenile court to "reasonably deduce" that he used the same type of force on all of the occasions within the relevant time period as he had used on the occasions she described in detail.

"A defendant uses 'force' if the prohibited act is facilitated by the defendant's use of physical violence, compulsion or constraint against the victim other than, or in addition to, the physical contact which is inherent in the prohibited act." (*People v. Bolander* (1994) 23 Cal.App.4th 155, 163 (Mihara, J. concurring) (*Bolander*)). "The evidentiary key to whether an act was forcible is not whether the distinction between the 'force' used to accomplish the prohibited act and the physical contact inherent in that act can be termed 'substantial.' Instead, an act is forcible if force facilitated the act rather than being merely incidental to the act." (*Id.* at pp. 163-164.) "[A]cts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves" are sufficient to support a finding that the lewd act was committed by means of force. (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005 (*Alvarez*)).

Steven's focus on the force used to perpetrate fondlings of L.'s chest is misplaced, as L. clearly identified more than six acts of rape, digital penetration, and oral copulation during the charged period, and her descriptions of the force used to perpetrate those acts were plainly sufficient to demonstrate the use of "force." He pinned her down to accomplish the rapes and held her hands to overcome her resistance to the digital penetrations and oral copulations. His "grabbing, holding and restraining" (*Alvarez, supra*, 178 Cal.App.4th at p. 1005) was sufficient to support findings of force.

The evidence supports the juvenile court's findings that Steven committed six acts of forcible lewd conduct within the charged period.

## **2. Jeremy**

Jeremy makes three challenges to the sufficiency of the evidence. First, he challenges the court's finding that he knew of the wrongfulness of his conduct. Second, he contends that there was insufficient evidence of force to support the juvenile court's finding. Finally, he claims that there was inadequate evidence that he acted with the requisite specific intent.

"In determining whether the minor knows of the wrongfulness of his conduct, the court must often rely on circumstantial evidence such as the minor's age, experience, and understanding, as well as the circumstances of the offense, including its method of commission and concealment." (*In re James B.* (2003) 109 Cal.App.4th 862, 872.) Jeremy's lewd acts against L. were always preceded by his efforts to isolate L. where they could not be seen by others. During the incidents, he ignored her pleas to stop and used force to overcome her resistance. He always discontinued his conduct when he heard someone coming. Jeremy's use of concealment and force along with his obvious fear of discovery provided the requisite proof that he was aware of the wrongfulness of his conduct. Had he thought that his conduct was not wrongful, there would have been no need to conceal it, to fear discovery, or to use force to perpetrate it. While Jeremy was just 11 or 12 years old when he engaged in this conduct, the circumstances of the

offenses rebutted the inference that his youth precluded him from knowing that his conduct was wrongful.

As we have already noted, force may be established by evidence of “compulsion or constraint against the victim other than, or in addition to, the physical contact which is inherent in the prohibited act.” (*Bolander, supra*, 23 Cal.App.4th at p. 163 (Mihara, J. concurring).) Evidence that the act was facilitated by “grabbing, holding and restraining” the victim satisfies the force requirement. (*Alvarez, supra*, 178 Cal.App.4th at p. 1005; *Bolander*, at pp. 163-164.)

L. testified that, on one occasion, Jeremy forced her onto a couch as she fought back before forcing her to touch his penis and, on another occasion, he forced her onto a bed, held her down with one hand, and used his other hand to stick L.’s hand down his pants. His acts of grabbing, holding, and restraining L. facilitated his acts and were not merely incidental to them. Therefore, there was sufficient evidence of force to support the court’s finding.

The specific intent element of lewd conduct requires that the perpetrator act with “the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.” (Pen. Code, § 288, subd. (a).) “Because intent can seldom be proved by direct evidence, it may be inferred from the circumstances.” (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 299.) The fact that Jeremy ensured that his acts took place in seclusion suggests that he wanted to obtain sexual gratification. More importantly, the fact that he compelled L. to stroke his penis in a masturbatory fashion and that his penis was erect at the time was highly suggestive of an intent to gratify his own sexual desires. While his youthfulness might weigh against such a finding in other circumstances, these circumstances were so clearly calculated to appeal to Jeremy’s sexual desires that they cannot be outweighed. The evidence supports the juvenile court’s specific intent finding.

## **B. Ineffective Assistance**

Steven and Jeremy contend that their trial counsel were deficient in failing to renew their hearsay objections to the admission of L.'s "notes." Steven contends that his trial counsel was prejudicially deficient in failing to object to the admission of "involuntary statements" made by Steven during the pretext call and to his statements during a subsequent police interview (on the ground that they were tainted by the pretext call statements).

### **1. Notes**

#### **a. Background**

Cruz-Foy interviewed L. in September 2009 and again in April 2010. In August 2010, L. prepared two sets of notes. One set of notes was two and one-half pages of single-spaced handwritten narrative recounting in detail Jeremy's molestations of her. The second set of notes was 11 and one-half pages of single-spaced handwritten narrative recounting in great detail Steven's molestations of her. In September 2010, L. was interviewed by an investigator for the district attorney's office.<sup>3</sup> She told him everything she could remember at that time.

During the prosecutor's direct examination of L. at the jurisdictional hearing, he asked her about the notes. L. testified that she had written down in these notes "everything [she] could remember" about the molestations. When the prosecutor sought admission of the notes, the defense objected on hearsay grounds.<sup>4</sup> The prosecutor asked

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<sup>3</sup> L. testified on cross-examination by Steven's trial counsel that she had prepared the notes a week or two in advance of her interview by the district attorney's investigator, but she had forgotten to bring all of the notes to that interview. Jeremy's trial counsel had L. confirm during his cross-examination of her that she had written her notes before meeting with the district attorney's investigator.

<sup>4</sup> Steven's trial counsel made the objection, but the trial court had earlier obtained a stipulation from the attorneys that "if one [defense] attorney makes an objection that the other is joining in the objection."

to reserve the issue until after cross-examination because he expected “that there will be prior consistent or inconsistent statements provided in these documents based on counsel’s cross-examination.” The court reserved the issue.

Steven’s trial counsel cross-examined L. extensively about the notes, asking her about much of the content in the notes about Steven.<sup>5</sup> He also questioned L. about inconsistencies between her testimony on direct and her statements to the district attorney’s investigator. Jeremy’s trial counsel suggested in his cross-examination of L. that there were certain details that L. had never mentioned prior to her trial testimony.<sup>6</sup> He asked her about her interview with the district attorney’s investigator and about her notes. Jeremy’s trial counsel proceeded to rely heavily on the content of the notes in examining L. about inconsistencies between the notes and her testimony. He also cross-examined her about inconsistencies between her testimony and statements she had made to the district attorney’s investigator, and about inconsistencies within her statements to the district attorney’s investigator.

After cross-examination, the prosecutor renewed his request for admission of the notes. “The People believe there’s been sufficient impeachment of consistent and inconsistent statements provided by both counsel during cross-examination for the documents to overcome the hearsay objection made earlier.” Both defense attorneys

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<sup>5</sup> In addition, Steven’s trial counsel elicited L.’s testimony that she had told her doctor that her cousin had “raped [her] one time.” He also elicited her testimony that, when she spoke five days later to Cruz-Foy, she again reported only a single incident. He also cross examined L. about various inconsistencies between her trial testimony and her statements to Cruz-Foy.

<sup>6</sup> Jeremy’s trial counsel also asked L. about inconsistencies between her testimony on direct and her statements to Cruz-Foy. Jeremy’s trial counsel’s examination of Cruz-Foy addressed inconsistencies between L.’s statements during the April 2010 interview and L.’s testimony. That interview preceded the creation of the notes, which were prepared in August 2010.

stated that they had no objections, and the court admitted the notes into evidence. On redirect, the prosecutor questioned L. about the notes.

The defense subsequently sought and obtained admission of the entirety of L.'s interview with the district attorney's investigator on the grounds that she had made inconsistent statements during that interview. This interview was played in court.

### **b. Analysis**

Steven and Jeremy contend that their trial counsel were prejudicially deficient in failing to renew their hearsay objection to the admission of the notes. They claim that the notes were not admissible under Evidence Code section 791.

“Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.” (Evid. Code, § 791.)

Jeremy and Steven contend that Evidence Code section 791, subdivision (a) is inapplicable here because they did not attack L.'s credibility with any inconsistent statements made after the preparation of the notes. Steven concedes that his trial counsel “ask[ed] [L.] several questions” about her interview with the district attorney's investigator (which occurred after preparation of the notes), but he claims that these questions “did not focus on” inconsistencies between her testimony and her statements in the interview. We disagree. Steven's trial counsel asked L.: “Now, when you were talking to the D.A.'s investigator you said that the rape in the bathroom *happened when you were 10, not when you were 7*. And that he pulled you off of the toilet while you

were using it, is that correct?" (Italics added.) L. had testified on direct that this incident occurred when she was *eight or nine* years old. This question by Steven's trial counsel therefore clearly focused on the inconsistency between L.'s testimony and her statement to the district attorney's investigator about the age when this incident occurred. Jeremy's trial counsel also focused on an inconsistency between L.'s direct testimony and her statement to the district attorney's investigator. He asked L.: "[Y]ou told them, both the D.A. and the investigator that Steven actually pulled you over the bed, pulled the sheets over you and that's when he sodomized you. Your testimony today is Steven walks into the room and goes and lies down next to you, and gets behind you, and holds you, and then sodomized you." L. explained that her statement to the district attorney's investigator was accurate. Jeremy's trial counsel then asked: "But that wasn't your testimony just about an hour ago. Do you have an explanation?" This too was an attempt to focus the trier of fact's attention on an inconsistency between L.'s testimony and a prior statement made after preparation of the notes.

Both Steven and Jeremy contend that, even if their trial counsel did impeach L. with her inconsistent statements to the district attorney's investigator, that would not justify the admission of the "entirety of the notes" but only of "certain aspects" of the notes. Neither of them elaborate on this contention. Evidence Code section 791, subdivision (a) contains no such limitation. It requires only that the prior consistent statement be "offered after" evidence of a later statement "inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility . . . ." (Evid. Code, § 791, subd. (a).) The statute does not require that the prior consistent statement concern the same fact as the prior inconsistent statement. The credibility focus of the statute and its broad reference to a statement that is inconsistent "with any part" of the witness's testimony suggests that the statute was intended to permit prior consistent statements to be admitted to support a witness's credibility generally

when it is attacked with a prior inconsistent statement rather than merely to rebut such an attack as to a particular factual issue.

In any case, it is inconceivable that trial counsel would have been successful in obtaining such a limitation in this case because they had both introduced a large amount of the content of the notes through their own questioning of L. (See Evid. Code, § 356.) In fact, the record strongly indicates that trial counsel made a strategic decision to utilize the notes and L.'s inconsistencies during the interview with the district attorney's investigator to attack L.'s credibility rather than attempt to obtain the exclusion of all or parts of the notes. "Judicial scrutiny of counsel's performance must be highly deferential[;] . . . a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland v. Washington* (1984) 466 U.S. 668, 689.) Thus, whenever counsel's conduct can be reasonably attributed to sound strategy, a reviewing court will presume that the conduct was the result of a competent tactical decision, and the defendant must overcome that presumption to establish ineffective assistance. (*Ibid.*) The main thrust of the defense at trial was that L.'s inconsistencies demonstrated that she was not a credible witness. Their trial counsel's strategy to utilize the notes and the interview with the district attorney's investigator to support this defense theory was not unreasonable. Jeremy and Steven make no attempt on appeal to overcome the presumption that their counsel made a competent tactical decision to allow the notes to come into evidence.<sup>7</sup> They have failed to establish that their trial counsel were deficient in this regard.

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<sup>7</sup> Steven argues in his reply brief that the fact that his attorney originally objected on hearsay grounds "refutes any inference of tactical advantage . . ." We disagree. The course of the cross-examination may well have led both trial counsel to pursue a different course, particularly if, as seems likely, they thought it unlikely that their objection would be sustained.

## 2. Pretext Call

Steven contends that his trial counsel was prejudicially deficient in failing to object to the admission of a recording and a transcript of the pretext call.

### a. Background

The pretext call occurred after Cruz-Foy interviewed L. in September 2009. Cruz-Foy “asked [L.] if she could make a pretext phone call” to Steven. Cruz-Foy gave L. “the recorder” and told her that she could “do it on her own without me present.” L. tried to call Steven on her own, but she was unable to reach him. When L. actually reached Steven, she did so in Cruz-Foy’s presence at the YMCA. Cruz-Foy testified that she “conducted” the pretext call, listened to the conversation between L. and Steven during the pretext call, and recorded it. She also testified that it was her practice to “guid[e] the victim as to what kind of questions to ask.”

During the pretext call, L. asked Steven if he remembered “what you did to me?” He said “No.” This colloquy followed: “[L.]: You know when you touched my vagina? [¶] STEVEN: When we were little? [¶] [L.]: Yeah. [¶] STEVEN: (\*) long time ago? [¶] [L.]: Yes. [¶] STEVEN: Uh-huh. [¶] [L.]: Well, I just want to ask you, you know why did you do that? Why do you touch my vagina? [¶] STEVEN: I don’t know that was a long time ago. I mean when we were little, little.” After Steven claimed a lack of memory, L. said: “You just told me we did that stuff when we were kids.” Steven responded: “Yeah, that’s all I know, but I don’t know, remember anything like about it.” “[L.]: I’m just asking why you did it. [¶] STEVEN: Well, I don’t know, but (\*) because you were kids.” L. sought an apology and insisted that she needed to know “[w]hy you did it.” Steven responded: “Well, I don’t have a reason.” Then, this colloquy occurred: “[L.]: I never said anything to anybody if that’s on your mind right now. I don’t want to tell anybody this I just want an apology of why me. [¶] STEVEN: Uh, great, really I don’t know why you know I was young and stupid now that you think about it you know? [¶] [L.]: But you forced me to touch your penis. And you put your

fingers in my vagina Steven. [¶] STEVEN: Well, I know I was young and stupid and now alright I'm sorry. [¶] [L.]: You're sorry? [¶] STEVEN: Yeah." L. asked: "Can you tell me what you're sorry what are you sorry for?" Steven responded: "For what I did." L. said that he had "just stopped two years ago," and asked "Why did you stop Steven?" He responded: "Hmm, because I finally knew that, knew that it was bad." When L. asked "why did you start" and "why didn't you stop when I said no," Steven responded "I don't know." L. mentioned numerous incidents of molestation by Steven, and he did not deny her assertions. At the end of the conversation, Steven asked if he could call her back later. She said: "No, it's okay I just wanted an apology." Steven said: "Okay, well, sorry." Just before she hung up, L. told Steven: "I'm not gonna tell anybody about this by the way." Steven said "Okay," and they said "bye" to each other.

Cruz-Foy interviewed Steven nine days after the pretext call. During this interview, he admitted that he had "kissed" L. on the lips when they were in the first or second grade and he was six years old. "I didn't know it was bad you know I was little." He initially denied putting his hands in L.'s pants, and denied any recollection of the other sexual acts that L. had reported. Steven also denied that L. had "ever confronted [him] on this or anything." After this denial, Cruz-Foy told Steven that she knew he was lying because she had been present during the pretext call. Steven claimed: "I gave her an apology for, for it, but I don't remember none of that." Cruz-Foy asked him "why you did it," and Steven said "Cause I was young." He claimed that "she didn't tell me to stop you know." "But I didn't know it was bad you know, cause I was young, I didn't know it was bad. I was like probably, I wasn't even like ten years old yet you know?" He asked: "Am I gonna get in trouble for any of this, cause?"

He told Cruz-Foy that he now remembered putting his hands down L.'s pants but not putting his fingers in her vagina. He thought this had occurred "[p]robably like two or three" times. He claimed that L. would place his hand on her and "try to make me rub it then I'll just put my hand inside her pants that's it." He insisted that only "one time"

was “under her underwear.” He also insisted that L. never said stop and that she “would pull me on top of her on the bed.” “And then she’ll like start trying to like move like uh, humping me.” He said this “humping” happened twice. Steven denied having vaginal or anal sex with L. or ever putting his finger in her vagina.

He also denied ever having gone to the public swimming pool. However, he admitted that, in the pool at his home, he had pulling her swimming suit to the side. Yet he denied ever putting his mouth on her vagina or ever having L. put her mouth or her hand on his penis. Steven claimed that L. “would grab” his penis over his clothing when they were sitting next to each other watching television. He denied that L. had ever touched his penis under his clothing. He also denied ever using force and denied that L. had ever said no. Steven said that these incidents stopped when “I finally realized it was bad like.” He claimed that he stopped “a long time ago,” which was more than two years ago, maybe when he was 11 or 12 years old.

Steven’s trial counsel was the first to mention the pretext call at the jurisdictional hearing when he asked L. about it during his cross-examination of her. His questioning of L. appeared to be intended to demonstrate that Steven had not made significant admissions during the pretext call. Steven’s trial counsel expressly stipulated to “the foundation” for admission of the pretext call. A recording of the pretext call was played at the end of the prosecution’s case without objection, and it was received into evidence without objection. A recording of Cruz-Foy’s interview with Steven was also played in court without objection and received into evidence without objection.

#### **b. Analysis**

Steven contends that his trial counsel was prejudicially deficient in failing to challenge the admissibility of the recording of the pretext call on the ground that it contained “involuntary statements” by Steven.

He concedes that an analysis of the voluntariness of Steven’s statements is required only if those statements were obtained by “state action.” “A finding of coercive

*police* activity is a prerequisite for a finding that a confession was involuntary under the due process clauses of the federal or the state Constitution.” (*People v. Mayfield* (1997) 14 Cal.4th 668, 759.) “‘Absent evidence of complicity on the part of law enforcement officials, the admissions or statements of a defendant to a private citizen infringe no constitutional guarantees.’” (*In re Eric J.* (1979) 25 Cal.3d 522, 527.) Since the pretext call was solely between Steven and L., the key question is whether L. was acting as a “police agent” when she spoke with Steven during the pretext call. Steven predicates his claim that L. was acting as an agent of the state on three cases.

*People v. Walker* (1972) 29 Cal.App.3d 448 (*Walker*) was a case in which a doctor hired by the prosecution interviewed the defendant while he was in jail. At the outset of the interview, the doctor advised the defendant of his constitutional rights and the defendant invoked his right to an attorney, which the doctor disregarded. (*Walker*, at pp. 451-452.) The Court of Appeal concluded that the doctor’s failure to heed the defendant’s invocation was a violation of the defendant’s constitutional rights. It concluded that the doctor was clearly acting as an agent of the state because he was hired by the prosecutor to perform the interview. (*Walker*, at pp. 453-454.) *Walker* is clearly inapposite. L. was not hired by the prosecutor to interview Steven. Steven had a conversation with his cousin, not with an employee of the prosecution. *Walker* does nothing to show that this conversation involved *state action*.

*People v. Cribas* (1991) 231 Cal.App.3d 596 (*Cribas*) involved a telephone conversation between a rape victim and a jailed defendant who had been appointed counsel. The rape victim was provided housing by the state making her, in the court’s view, a “paid informant,” and she was instructed to extract incriminating statements from the defendant. (*Cribas*, at p. 604.) The issue was whether the state had violated the defendant’s Sixth Amendment rights by having the rape victim question him in the absence of counsel; the voluntariness of his statements was not at issue. (*Cribas*, at p. 605.) The court found that the police had violated the defendant’s rights by

engineering an interrogation by the rape victim in the absence of counsel. “In every sense, the police deliberately created the setting and led Cribas into it. Surreptitious questioning was conducted at their request about a matter on which counsel had been appointed.” (*Cribas*, at p. 605.)

While *Cribas* has a few factual similarities to the situation before us, it is distinguishable. *Cribas* did not involve the Fifth Amendment, but the Sixth Amendment. The court in *Cribas* viewed the rape victim as a “paid informant,” which easily established that she was an agent of the state, and focused on whether the police had engineered a violation of Cribas’s Sixth Amendment rights. Here, our concern is the Fifth Amendment and voluntariness, neither of which were at issue in *Cribas*. L. was not compensated by the police or the prosecution. There is no evidence here that L. was acting as an agent of the state rather than simply as a crime victim assisting the police in their investigation of that crime.

Steven’s reliance on *Arizona v. Fulminante* (1991) 499 U.S. 279 (*Fulminante*) is also misplaced. The United States Supreme Court did not consider in *Fulminante* whether there was state action because the parties agreed that there was state action.<sup>8</sup> (*Id.* at p. 287, fn. 4.)

In our view, where a crime victim simply participates in a recorded pretext call to the unincarcerated perpetrator of the crime, who is the victim’s family member, the victim is not acting as an agent of the state for Fifth Amendment voluntariness purposes.<sup>9</sup>

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<sup>8</sup> The same is true of *Hopkins v. Cockrell* (5th Circ. 2003) 325 F.3d 579, which Steven cites in his reply brief. In *Hopkins*, a police officer who was a friend of the defendant interrogated the defendant in jail and told the defendant that their conversation would be confidential. The presence of state action was not at issue.

<sup>9</sup> Steven asserts that the Attorney General does not challenge his claim that L. was “acting as a police agent in the pretext call.” Not so. While the Attorney General’s argument is less than clear, she does cite cases for the proposition that conversations between defendants and family members do not involve coercive pressures. It is only

Cruz-Foy recorded the call, but she did not participate in it. Indeed, she originally suggested that L. make the call on her own, and there was no evidence that Cruz-Foy manipulated L.’s conversation with Steven beyond providing advice to L. None of the coercive pressures associated with state action are present in this situation.

Consequently, as there was no state action, Steven’s trial counsel was not deficient in failing to move to suppress the recording of the pretext call on Fifth Amendment grounds.<sup>10</sup>

Furthermore, Steven’s trial counsel was not deficient in failing to seek suppression of the pretext call on voluntariness grounds because such a motion had no prospect for success. “A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. [Citations.] A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it ‘does not itself compel a finding that a resulting confession is involuntary.’ [Citation.] The statement and the inducement must be causally linked.” (*People v. Maury* (2003) 30 Cal.4th 342, 404-405.)

What is lacking here is any inducement for Steven to make incriminating statements. Steven contends that L. impliedly promised to conceal the molestations if he apologized, thereby inducing his admissions. However, the transcript of the pretext call rebuts this interpretation. By the time L. told Steven that she “never said anything to anybody” and “I don’t want to tell anybody this I just want an apology,” Steven had already made substantial admissions. Steven’s trial counsel could not have believed that

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after citing these cases that the Attorney General goes on to “[a]ssum[e] for the sake of argument that [L.] was a police agent . . . .”

<sup>10</sup> This resolution also disposes of Steven’s claim that the recording of Cruz-Foy’s interview with him was tainted by the pretext call’s unconstitutionality.

she would be able to credibly rebut the prosecution's showing that the alleged inducement, which occurred in the midst of a string of admissions by Steven, had not *caused* Steven's admissions. Consequently, she was not deficient in failing to seek suppression on this ground.

### **C. Evidentiary Issues**

Steven and Jeremy contend that the juvenile court violated their confrontation rights by restricting questioning of L. regarding her relationship with a former teacher and also erred in excluding evidence of L's "physical aggressiveness."

#### **1. Relationship With Former Teacher**

##### **a. Background**

During Jeremy's trial counsel's recross of L., he asked her if she had had a middle school teacher named John Servanda. She confirmed as much. When he asked her what grade this was in, the prosecutor objected on relevance and "outside the scope of direct" grounds. Jeremy's trial counsel claimed that this was relevant because "[i]t's our argument that the minor is in a current . . . inappropriate relationship with that teacher" and "that all of these allegations are as a result of that particular relationship . . . . And the minor is using the allegations against both these minors to cover up that particular relationship." He insisted that he was *not* asserting that there was "any kind of sexual relationship," but only that "[t]hey hung out together. They went camping together. At this point, they may be residing together." The trial court was skeptical. "And when you say 'inappropriate,' don't be trying to get something past this Court. You're talking about a sexual relationship. If you weren't, why would you bring it up?"

When the court sought the factual basis for his questions, Jeremy's trial counsel vaguely referred to a letter to Servanda that had apparently been forwarded to L.'s residence and to a report that Servanda had been seen dropping L. off at her grandmother's home. He again denied that he was trying to show that L. had a sexual

relationship with Servanda. “I have no evidence of there being anything sexual going on between [L.] and [Servanda].” He premised the relevance of his proffered evidence on reports that L. had hugged, kissed, and held hands with Servanda in public, that Servanda had “purchased presents” for L., and that Servanda had gone “trick or treating” with L. He claimed that *any* kind of “relationship” between a teacher and a student was “inappropriate.” The prosecutor asked the court to exclude this evidence under Evidence Code sections 352 and 782. He represented that, in fact, Servanda was a friend of L.’s family.

The court reasoned that the implication of an “inappropriate relationship” was tantamount to a claim of a sexual relationship, for which there was no factual basis. The court concluded that all of the proffered evidence, other than the holding hands and kissing, would establish nothing more than that L. and Servanda had a “friend relationship.” The evidence of holding hands and kissing amounted to allegations of sexual conduct, which were barred because the defense had not complied with Evidence Code section 782. The court found the proffered evidence to be “irrelevant” and to have, at best, minimal probative value. “[I]t would be an undue consumption of court trial to have a mini trial within the trial to have this court get to the bottom of whether or not this actually happened or not.” “So the court has considered all of this under 352. The court engaged in a balancing process to determine if the probative value of the evidence in the prior act is substantially outweighed by the possibility that its admission will create a substantial danger of undue prejudice.”

Nevertheless, the court decided that “the defense has a critical point to make in this case, which is that the minor is lying to hide a friend relationship with [Servanda] and I will allow that. [¶] But the question has to be phrased in this way: quote, is it true that you were saying that you were sexually assaulted by Steven or Jeremy to hide a friend relationship with John Servanda, close quotes.” “No other questions can be asked of this area. If the witness says yes then you can explore it going into the friend contacts

which I've identified. If she says no there is no more questions that can be asked by any of the three attorneys in the courtroom." Jeremy's trial counsel asked that precise question. L. responded: "No, that's not true."

At the commencement of the defense case, the prosecutor sought to exclude testimony about Servanda. The court noted that "[m]y ruling on the 782 content doesn't extend to the friend relationship with the teacher . . . ." When the prosecutor sought the exclusion of evidence that Servanda had been seen at "their home," the court told the defense that "you are permitted to go into it if you want." During his cross-examination of the mother of Jeremy and Steven, Jeremy's trial counsel elicited her testimony that L. had "brought" Servanda "to the house" on Halloween of 2009. Jeremy testified that he was aware of the "friend relationship" between L. and Servanda, and that he knew that Servanda "would take her shopping and buy her stuff. They would go see movies together."

#### **b. Analysis**

“ “[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.” ” (*People v. Jennings* (1991) 53 Cal.3d 334, 372.) “ “[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” ” (*People v. Cooper* (1991) 53 Cal.3d 771, 817 (*Cooper*)). “[R]eliance on Evidence Code section 352 to exclude evidence of marginal impeachment value that would entail the undue consumption of time generally does not contravene a defendant's constitutional rights to confrontation and cross-examination.” (*People v. Brown* (2003) 31 Cal.4th 518, 545.) “ There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably

have produced “a significantly different impression of [the witness’s] credibility . . . .””  
(*Cooper*, at p. 817.)

Steven and Jeremy ignore the fact that their trial counsel disclaimed any intent to introduce evidence of a sexual relationship between L. and Servanda and that the trial court found that they were precluded from doing so because they had failed to comply with Evidence Code section 782. They repeatedly argue that evidence of L.’s “inappropriate” relationship with Servanda would have been “relevant to her precocious knowledge of sexual matters” and to her “possible motivations” for reporting that she had been raped by Steven.

The juvenile court very carefully bifurcated the proffered evidence into two categories. One category was evidence of sexual conduct—kissing and holding hands—that was inadmissible due to a lack of compliance with Evidence Code section 782. Steven and Jeremy do not address Evidence Code section 782, so they obviously do not purport to challenge the court’s ruling regarding this category of evidence. The other category was, as the court put it, evidence of a “friend relationship” between Servanda and L. This category of evidence consisted of evidence that L. had spent time with Servanda, including going trick-or-treating with him, he had bought her presents, and he had dropped her off at her grandmother’s home. The relevance of this category of evidence is difficult to identify. Steven and Jeremy argued below and argue on appeal that any relationship between a teacher and a student is by definition “inappropriate.” However, they fail to explain how the existence of an innocent friendship between L. and her former teacher would have impacted L.’s credibility. Their suggestion that L. might have made up her claim that Steven and Jeremy sexually molested her to cover up her “inappropriate” friendship with Servanda is not supported by the proffered evidence and is nothing more than unsupported speculation. The juvenile court’s balancing of the practically nonexistent probative value of the proffered evidence against the consumption of time involved in its presentation was clearly within the court’s discretion under

Evidence Code section 352. Furthermore, the court did permit them to ask L. about this speculative theory, albeit limiting them to one very carefully constructed question. We can find no abuse of discretion in the juvenile court's ruling in this regard. Moreover, presentation of further evidence of L.'s friendship with Servanda, which the trial court did not preclude the defense from presenting through its own witnesses, would not have created "'a significantly different impression of [the witness's] credibility'" (*Cooper, supra*, 53 Cal.3d at p. 817), so it was not a violation of the Confrontation Clause.

## **2. L's Alleged Aggressiveness**

### **a. Background**

L. testified that she was unsuccessful in her attempts to physically resist Steven's molestations of her. On cross, Steven's trial counsel elicited L.'s testimony that she had "wrestled" with boys. During Jeremy's trial counsel's cross-examination of L., he elicited her testimony that she "used to roughhouse with the bigger boys" and "played football" and "wrestled" with them.

Before the defense witnesses testified, the prosecutor moved to exclude "irrelevant" and "inadmissible character evidence" concerning L.'s alleged "punchant for violence." He sought exclusion of testimony that L. "beat up her brother a lot" and "is always the aggressive person," "violent and always kicking or punching somebody." The defense claimed that this evidence was relevant because L. had testified that she was "unable to fight back" during the molestations. They argued that the evidence they sought to introduce would show that she was "quite able to fight back" and that she was "a very physical person," which would be "inconsistent with" her testimony. The defense wanted to show that L. had "the physical prowess to defend herself . . . ."

The court excluded evidence that L. was a "violent" "aggressor," but it ruled admissible testimony that L. "would win" when "wrestling" with Steven or Jeremy. The court did not exclude evidence "that she could thwart" Jeremy or Steven. The court also told the defense that there were "many ways" it could show that L. had the "physical

proWess to defend herself,” but the court would not permit the defense “to do it with impermissible acts and prior violence.” The court’s ruling suggested that it was based, at least in part, on Evidence Code section 352: “[I]f I allow this . . . this trial will never end.” “[T]he fact that some child struck another child some time in their life time is not really that relevant because almost all children strike other children at some point.”

### **b. Analysis**

Steven and Jeremy argue on appeal that the excluded evidence was “impeachment testimony” about L.’s “trait of physical aggressiveness and violence, based on reputation and specific incidences of conduct” that would have undermined L.’s credibility by casting doubt both on her testimony that she did not report the molestations due to her fear of Steven and on her testimony that she resisted but no one ever heard or saw what was happening.

We can find no abuse of discretion in the court’s ruling. The juvenile court’s ruling did not preclude the defense from introducing evidence of L.’s physical interactions with Jeremy and Steven. Its ruling was limited to her acts of violence and aggression against *others*. Jeremy and Steven had already established that L. wrestled, played football, and “roughhouse[d]” with her larger male cousins, which established her “physical prowess.” Evidence that she had “beat up” her little brother and had been physically violent toward some other children not including Jeremy and Steven would have had little probative value on L.’s credibility. She did not claim that she was *incapable* of resisting but only that her resistance had been unsuccessful. The court did not preclude the defense from adducing evidence that L. was able to successfully overcome Jeremy or Steven if it had such evidence, but the defense produced no such evidence. L.’s testimony that she resisted but no one heard or saw any of the molestations had nothing to do with her ability to hit or punch her attackers. Nearly all of the molestations occurred when L. and her molester were alone, and she did not claim that she called out for help. Hence, the failure of others to discover the molestations

while they were occurring had nothing to do with L.'s ability to *physically resist*. Given the very minimal probative value of this evidence, the court was well within its discretion in deciding that its limited relevance was substantially outweighed by the risk of undue time consumption and confusing the issues. The issue here, after all, was not whether L. was a violent person but whether she was telling the truth when she testified that Jeremy and Steven had forcibly molested her. We find no abuse of discretion or violation of Steven's or Jeremy's constitutional rights in the court's ruling excluding this nearly irrelevant evidence.

#### **D. Prosecutorial Misconduct**

Steven and Jeremy contend that the court's orders must be reversed because the prosecutor engaged in prejudicial misconduct by improperly questioning defense witnesses and eliciting improper opinion testimony from Cruz-Foy that Steven had lied on the witness stand.

##### **1. Background**

After L.'s grandmother testified that she had no knowledge of the allegations against Steven and Jeremy, the prosecutor asked her if she was aware of the pretext call. She said no. Steven's trial counsel's relevance objection was overruled. The prosecutor proceeded to read a portion of the pretext call transcript to L.'s grandmother. He then asked her "How do you feel about that?" She said "I feel bad." The prosecutor asked her "what did you think you were coming to court to talk about today?" Steven's trial counsel's relevance objection was overruled. She said "I don't know really." The prosecutor also asked her whether she was aware that Steven had "admitted to doing all of these things to [L.]" when he was interviewed by the police. Steven's trial counsel's "misstates the evidence" objection was sustained.

At the beginning of the grandfather's testimony on cross, this colloquy occurred:  
"Q Can you hear me okay? [¶] A I can't hear that good. [¶] Q I am going to try to

speak up.” The grandfather acknowledged that he was aware that they were in court due to L.’s allegations of sexual assault against Steven and Jeremy. He said that “[t]he victim was Jeremy and Steven,” and he stated that he did not believe L.’s allegations. The prosecutor asked him if the fact that Steven had admitted “these things” during a “recorded phone call” would “change your opinion.” He said: “No.” The prosecutor proceeded to read portions of the pretext call transcript to the grandfather. No objection was interposed. After reading this section, the prosecutor asked the grandfather if he knew “that Steven had admitted to [L.] he had sexually assaulted her during this time?” The grandfather answered “No.” Steven’s trial counsel’s “misstating the evidence” objection was overruled. The prosecutor also asked the grandfather whether he knew about Steven’s admissions to the police. He said no. When the prosecutor started to read portions of the police interview, Jeremy’s trial counsel objected on relevance grounds. The objection was overruled. The prosecutor read a portion of the interview and asked the grandfather if it changed his mind. He said no.

This colloquy followed: “Q And even though Steven admitted to the police officer about touching [L.] you refused to believe it happened, right? [¶] A Right. [¶] Q So basically it doesn’t matter what Steven says or admits doing to [L.] you would refuse to believe that? [¶] A Right. [¶] . . . [¶] Q . . . [Y]ou would rather believe Steven and Jeremy when they tell you they didn’t do it, meaning rape [L.], instead of believing [L.] when she says Steven and Jeremy sexually assaulted me, is that correct? [¶] A. Correct. [¶] Q . . . I’m sorry I am talking a little loud. [¶] A That’s all right.”

After a little more questioning, Steven’s counsel objected that the prosecutor was “harassing the witness.” This colloquy followed: “[Prosecutor]: I am just talking loudly. [¶] THE COURT: I know. So you are speaking loud so we can hear you, I understand, just slow down a little bit. [¶] Thank you.” The prosecutor went on to ask the grandfather: “it’s not in your opinion not okay for guys to sexually assault girls, correct?” He responded “That’s correct.” Jeremy’s trial counsel’s relevance objection

was sustained, but the court denied his motion to strike. The court sustained relevance and speculation objections to two more questions. A short time later, the court made this statement: “Just a minute. [¶] I don’t know how to put this, but I am having a hard time listening because you are yelling so loud, [prosecutor]. So I know you are trying to speak up loudly so the witness can hear you, but maybe you can reposition yourself closer to the witness stand, because when you are yelling this loud I am having a hard time listening. Okay?” The prosecutor proceeded. “Q Is that better? [¶] A Yes, that’s better, because I have a hard time hearing. [¶] Q I was trying to use the microphone. I guess I was doing a poor job.”

Nicholas, an older brother of Jeremy and Steven, testified that they “were always together,” and he had never seen Jeremy or Steven touch L. inappropriately. The prosecutor asked Nicholas if he was aware that Steven had admitted touching L.’s vagina many times and if he was “there for that.” Steven’s trial counsel’s “misstates the evidence” objection was overruled. Nicholas said no, but he continued to insist that he was “always with” Jeremy and Steven. Nicholas testified that he was not aware that Steven had admitted inappropriately touching L. Another “misstates the evidence” objection was made, and the prosecutor then read from the transcript of the pretext call without objection. Upon additional questioning by the prosecutor, Nicholas conceded that he had not always been with Steven and Jeremy. When Nicholas continued to insist that there was never an occasion when the cousins did not all go down to eat together, the prosecutor asked him: “[C]an you recall what each and every single person was wearing during each and every one of those instances?” Nicholas answered no, and Jeremy’s trial counsel objected that the question was “argumentative.” The objection was overruled. When the prosecutor repeated the question, Steven’s trial counsel’s “asked and answered” objection was sustained.

Nicholas's older brother Christopher also testified, but the prosecutor did not cross-examine him. The prosecutor's cross-examination of the younger sister of Jeremy and Steven was uneventful.

The mother of Jeremy and Steven testified on direct that her family moved out of the grandmother's home when Steven was seven and Jeremy was six. She stated that after they moved out the boys did not go to their grandmother's house anymore either after school or for parties.<sup>11</sup> She also testified that she was a stay-at-home mom when they lived at the grandmother's home. On cross by the prosecutor, she testified that she believed that her sons had not committed these offenses. The prosecutor asked her if she had talked to Cruz-Foy about the information on the "time line" that she had offered in her direct testimony in support of her sons. She said no. The prosecutor then asked if she had prepared a written statement or tried to reach another police officer to provide this information. Jeremy's trial counsel's "asked and answered" objection was overruled. The mother said no.

The prosecutor asked the mother about her awareness of Steven's admissions. She said she was aware that Steven had admitted touching L. "over the clothes." She was not aware that he had admitted touching her under the clothes. Steven had told his mother that this occurred when he was "little, 6." The prosecutor asked if she had heard the recording of the interview in court "and he admitted that he was touching her from 9, 10, 11 and 12 - -" Steven's trial counsel's "misstates the evidence" objection was sustained. The prosecutor then read from the transcript, which supported his question. There was no objection. The mother insisted that Steven had not given "a definite age" in the transcript, even though he had mentioned nine, 10, 11 and 12. The prosecutor asked her: "[I]n your mind is there a difference between a child's development when they are 5 or 6

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<sup>11</sup> On cross she admitted that "a couple" of parties "might have been" at the grandmother's house.

versus when they are 11 or 12?” The relevance objections of both defense counsel were sustained. The prosecutor asked the mother if she was “surprised” that Steven had been “untruthful” and “had basically lied to you” about the molestations. Defense relevance objections were overruled. She said yes. When the prosecutor again asked about the difference between five and six-year-old kids and 11 and 12-year-old kids, Jeremy’s trial counsel’s relevance objection was sustained. Although Steven’s trial counsel objected on relevance grounds, the prosecutor was permitted to elicit the mother’s testimony that Steven had not immediately told her about the pretext call. Steven never told her that he had apologized to L. for putting his penis in her vagina. A “misstates the evidence” objection to the prosecutor’s characterization of Steven’s admissions was overruled. The mother testified that she had learned about Steven’s apology to L. when she read a transcript of the pretext call. When the prosecutor asked the mother if she had “punished him for what he did,” defense relevance objections were sustained. A subsequent question about whether it was “better or worse” for an older boy to touch a “little girl’s private parts” was also the subject of sustained relevance objections. The mother insisted, contrary to the grandmother’s testimony, that there was never a time when the grandmother was babysitting the kids without another adult present.

During the prosecutor’s recross-examination of Jeremy, there were a few “asked and answered” objections that were overruled. Near the end of recross, the court said to the prosecutor: “I’m having the same problem as I had yesterday, which is when you yell it’s hard for me to listen. I know you’re being a zealous advocate but you have to keep it within the bounds of something the court can hear.” The prosecutor asked three more questions without objection, and then ended his examination of Jeremy.

During the prosecutor’s cross-examination of Steven, Steven testified that he did not know, when he was interviewed by Cruz-Foy, that she was a police officer. He said that he thought she was “[j]ust some regular lady asking questions.” “She never showed

me a badge. She never said I am a detective, I am going to ask you some questions.” He admitted that she had told him she was “conducting an investigation.”

The prosecutor recalled Cruz-Foy as a rebuttal witness. She testified that, at the beginning of her interview with Steven, she “just said I am Detective Cruz-Foy with San Jose Police.” She was wearing her badge on her belt during the interview. This colloquy occurred: “Q So if Steven said you never identified yourself that would be untrue, correct? [¶] A Correct. [¶] Q And for him to say that he didn’t know who you were, just some lady from the school that would be untrue, wouldn’t it? [¶] A Yes.” Steven’s trial counsel then objected, but withdrew her objection.

## 2. Analysis

Jeremy and Steven argue that the prosecutor committed misconduct by asking questions of defense witnesses “assuming or insinuating” that Jeremy and Steven were “guilty” and seeking “impermissible lay opinion” testimony about their “guilt” or “veracity” from these witnesses.

“Under California law, a prosecutor commits reversible misconduct if he or she makes use of ‘deceptive or reprehensible methods’ when attempting to persuade either the trial court or the jury, and when it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant’s specific constitutional rights—such as a comment upon the defendant’s invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action “‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’”” (*People v. Rundle* (2008) 43 Cal.4th 76, 157, disapproved on another point in *People v. Doolin* (2008) 45 Cal.4th 390, 421, fn. 22.) It is only where the trial is fundamentally unfair that we evaluate any error under the federal standard; otherwise, we apply the state law harmless error standard of review. (*People v. Adanandus* (2007) 157 Cal.App.4th

496, 514-515.) Under the state law standard, reversal is required “only if, ‘after an examination of the entire cause, including the evidence’ (Cal. Const., art. VI, § 13), it appears ‘reasonably probable’ the defendant would have obtained a more favorable outcome had the error not occurred (*Watson, supra*, 46 Cal.2d 818, 836).” (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

Although it is misconduct for a prosecutor to intentionally elicit inadmissible testimony (*People v. Smithey* (1999) 20 Cal.4th 936, 960), the prosecutor’s questions that Steven and Jeremy target as misconduct were generally directed at admissible impeachment evidence and had no tendency to infect the jurisdictional hearing with unfairness. Steven and Jeremy complain that the prosecutor asked the defense witnesses questions that assumed the guilt of Jeremy and Steven. In fact, the prosecutor properly based his questions of the defense witnesses on the *evidence presented at the hearing*, which, because it supported the allegations, also implied the truth of the allegations. Most of the questioning to which Steven and Jeremy now object concerned Steven’s admissions. Because the testimony of the grandmother, the grandfather, Nicholas, and the mother was offered by the defense in an effort to demonstrate that the molestations described by L. could not have occurred, the prosecutor could legitimately seek to challenge this testimony by asking these witnesses how their testimony could be squared with Steven’s admissions that at least some of the molestations had occurred.

Steven and Jeremy claim that the prosecutor “treated the percipient defense witnesses as character or reputation witnesses.” This is not true. The prosecutor did not seek to elicit character evidence from any of the defense witnesses. He repeatedly sought to impeach their testimony by eliciting evidence of their bias. The fact that it was necessary to challenge their testimony with questions about their awareness of Steven’s admissions, which conflicted with their testimony, did not transform those questions into ones seeking character evidence.

Steven and Jeremy also suggest that the prosecutor could not properly seek to establish the bias of the defense witnesses because their bias as family members was evident. The *extent* of a witness's bias is highly relevant to his or her credibility. (Evid. Code, § 780, subd. (f).) "Questions which have a tendency to show bias of a witness are not only competent, but great latitude in cross-examination should be allowed in developing its existence." (*People v. Evans* (1952) 113 Cal.App.2d 124, 127; accord *People v. Winston* (1956) 46 Cal.2d 151, 157 ["[C]onsiderable latitude should be allowed to show the witness' state of mind and possible bias."].)

We also reject their claim that it was misconduct for the prosecutor to use the words "sexual assault" and "admitted" in posing questions to the defense witnesses. These words were not utilized by the prosecutor to "carry specific legal meanings" but only in their ordinary sense, which none of the witnesses had any difficulty understanding.

Overall, our consideration of the prosecutor's questioning of the defense witnesses does not reveal any significant misconduct and certainly no misconduct that infected the hearing with fundamental unfairness. To the extent that the prosecutor engaged in any questioning that was not directed toward properly admissible evidence, these lapses were either forestalled by the juvenile court's rulings or had no prejudicial impact.

The grandmother testified that she never saw anything to suggest a problem between L. and Steven or between L. and Jeremy. On cross-examination by the prosecutor, she denied that there were times when she did not know what the children were doing. Eventually, the prosecutor was able to get her to concede that she could not see everything that was going on in her house. It was then that he sought to test her bias by asking why she believed she was testifying. When she denied any knowledge of the subject matter of the allegations, the prosecutor sought to explore that further by inquiring whether she was aware of Steven's admissions. The examination proceeded from there. Because the grandmother asserted that she never saw anything amiss

throughout a time period during which L. had testified there were at least 50 molestations, the prosecutor could properly seek to challenge the grandmother's testimony by pointing out its inconsistency with Steven's admissions. While the prosecutor's question about how Steven's admissions during the pretext call made her "feel" sought a response that was of little or no relevance, there was no objection, and the question and answer (that she felt "bad") had no prejudicial impact.

The main point of the grandfather's testimony on direct was his testimony that, contrary to the grandmother's testimony, that there had never been a "clubhouse" or playhouse in the backyard of their home. Since L. had testified that the clubhouse was one of the locations where she had been molested, this was an attack on L.'s credibility. Therefore, the prosecutor could properly seek to challenge the grandfather's testimony on this point. When he began to probe the grandfather's bias and the grandfather volunteered that he believed that Steven and Jeremy were "[t]he victim[s]" in this case, the prosecutor did not act improperly in seeking to delve deeper into the grandfather's bias. This further examination revealed that the grandfather would not believe that Steven had molested L. even if he had admitted doing so. The prosecutor did ask the grandfather a few questions that sought evidence of little relevance, but the court sustained relevance objections so there could not have been any prejudice from these inquiries. While the prosecutor did speak very loudly while examining the grandfather, the record establishes that he did so due to the grandfather's difficulty hearing rather than as a means of harassing the grandfather.

Nicholas testified on direct that his family had moved out of the grandmother's home when he was eight or nine years old. He also testified that all of the cousins would go down to eat together, and no one ever lagged behind. This testimony was obviously intended to challenge the credibility of L's testimony that she had lived in the grandmother's home with her cousins until she was nine years old, which was long after

Nicholas was nine years old.<sup>12</sup> It also challenged L.'s testimony that Steven and Jeremy had committed molestations after isolating her from the other cousins when the other cousins went down to eat. The prosecutor could properly challenge the credibility and reliability of Nicholas's testimony by impeaching Nicholas's testimony and establishing the strength of Nicholas's bias. The prosecutor asked Nicholas about his statement to an investigator that his family had not moved out of the grandmother's home until he was 11 years old. When the prosecutor sought to establish that Nicholas was not present with Steven, Jeremy, and L. "every moment of the day," Nicholas insisted that they "were always together . . . as a group." It was at this point that the prosecutor began asking Nicholas about his awareness of Steven's admissions, which were inconsistent with Nicholas's testimony that the cousins were "always together." Steven's trial counsel objected that the prosecutor was "misstat[ing] the evidence," so the prosecutor chose to read from the transcript instead. This was not improper. After doing so, he was able to get Nicholas to admit that the cousins were not "always together." The prosecutor also sought to test Nicholas's recollection regarding his claim that everyone always went to get food together. He asked Nicholas if he remembered what each person was wearing on each occasion. Jeremy's trial counsel's objection that this was "argumentative" was overruled, and the question does not necessarily appear to be argumentative. The question could be seen as a legitimate attempt to test the precision of Nicholas's recollections. In any case, even if it is seen as argumentative, we see no significant misconduct in it.

The mother of Jeremy and Steven testified that she was nearly always present in the grandmother's home and that her family moved out when Steven was seven and Jeremy was six. Since her testimony conflicted with L.'s testimony and the

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<sup>12</sup> Nicholas was more than a year older than Steven, who was more than a year older than L.

grandmother's testimony, the prosecutor sought to establish her bias by eliciting her testimony that she did not believe the allegations, testing her knowledge of Steven's admissions, and establishing that she had never provided to the police any of the timeline information to which she had testified. Questions about her failure to provide this information to the police were not an improper attempt to shift the burden of proof, as Steven contends, but a proper attempt to show that her testimony was recently fabricated to combat L.'s allegations. All of this was proper impeachment. The prosecutor did ask the mother a few questions that sought evidence of little or no relevance, but relevance objections were sustained to most of them, and the remainder did not elicit any prejudicial evidence. There was no misconduct.

Nor was there any misconduct in the prosecutor's cross-examination of Jeremy. Although the prosecutor raised his voice, the court admonished him, and no possibility of prejudice is apparent under these circumstances. Finally, the prosecutor did not commit significant misconduct in eliciting Cruz-Foy's testimony that Steven's contrary testimony regarding her identification of herself was not true. This brief snippet of testimony merely stated the obvious, and there is no chance that the court's jurisdictional findings were improperly influenced by it.

We find no prejudicial prosecutorial misconduct.

### **E. Standard of Proof of Knowledge of Wrongfulness**

Steven and Jeremy claim that the trial court erred in using a clear and convincing evidence standard rather than a beyond a reasonable doubt standard to find that they knew of the wrongfulness of their conduct.<sup>13</sup> While they acknowledge that the California Supreme Court held in *In re Manuel L.* (1994) 7 Cal.4th 229 (*Manuel L.*) that the clear

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<sup>13</sup> The juvenile court explicitly found "by clear and convincing evidence each of the minors knew the wrongfulness of the acts at the times of the commission."

and convincing evidence standard is the appropriate standard of proof, they maintain that the reasoning of *Manuel L.* is no longer valid.

“All persons are capable of committing crimes except those belonging to the following classes: [¶] One—Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.” (Pen. Code, § 26.) In *Manuel L.*, the California Supreme Court distinguished the nature of this requirement from the elements of a criminal offense. “The issue of the juvenile’s capacity remains, as historically it has been, subject to a distinct standard of proof. Penal Code section 26, subdivision One, continues to define the prosecution’s burden of proving the juvenile’s capacity in section 602 proceedings. Section 701 establishes its burden with respect to all elements of the offense necessary to a finding that the minor violated any law defining a crime.” (*Manuel L., supra*, 7 Cal.4th at p. 236.) The court reasoned that “criminal capacity is not an element of the offense and thus is not the type of fact [that] requires proof beyond a reasonable doubt. Rather, it is akin to the question of sanity, which due process does not require the prosecution to prove beyond a reasonable doubt.” (*Manuel L.*, at p. 238.)

Steven and Jeremy concede that we would ordinarily be bound to follow the holding in *Manuel L. (Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), but they contend that *Manuel L.* is no longer valid in light of the United States Supreme Court’s decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). In *Apprendi*, the United States Supreme Court held that a fact (other than a prior conviction) that increases the maximum penalty for an offense must be proved to a jury beyond a reasonable doubt, but the court explicitly did not consider “the State’s power to manipulate the prosecutor’s burden of proof by, for example, relying on a presumption rather than evidence to establish an element of an offense, [citations], or by placing the affirmative defense label on ‘at least some elements’ of traditional crimes, [citation].” (*Apprendi*, at p. 475.)

A juvenile's capacity to commit a criminal offense is not an element of a criminal offense, nor is it a sentencing factor that increases the maximum penalty for an offense. As the California Supreme Court explained in *Manuel L.*, a juvenile's capacity to commit a criminal offense (Pen. Code, § 26, subd. One) is akin to an adult's sanity (Pen. Code, § 26, subd. Two). In *People v. Ferris* (2005) 130 Cal.App.4th 773 (*Ferris*), the defendant claimed that *Apprendi* applied to the issue of sanity and required the prosecution to prove sanity beyond a reasonable doubt. In *Ferris*, the jury had been instructed that the defendant had the burden of proving by a preponderance that he was insane. (*Ferris*, at p. 777.) The Fifth District Court of Appeal rejected the defendant's attempt to characterize sanity as an element of the offense for *Apprendi* purposes. (*Ferris*, at p. 780.)

Sanity, like a juvenile's capacity to commit a criminal offense, concerns the individual's ability to understand the wrongfulness of the criminal act at the time of its commission. (*Ferris, supra*, 130 Cal.App.4th at p. 780; Pen. Code, § 26.) Since the issue of sanity is not an element of the offense for *Apprendi* purposes, it follows that a juvenile's capacity is not an element of the offense for *Apprendi* purposes. Therefore, *Apprendi* does not require that capacity be proved beyond a reasonable doubt.

Steven and Jeremy also insist that we need not follow *Manuel L.* because its reasoning has been undermined by the United States Supreme Court's decisions in *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*), *Graham v. Florida* (2010) \_\_ U.S. \_\_ [130 S.Ct. 2011] (*Graham*), and *J.D.B. v. North Carolina* (2011) \_\_ U.S. \_\_ [131 S.Ct. 2394] (*J.D.B.*). *Roper* and *Graham* were both Eighth Amendment cases involving the propriety of punishment imposed on juveniles who had been tried as adults. Eighth Amendment analysis requires a consideration of the nature of the offense and the characteristics of the offender, which necessarily entails an analysis of the offender's *level of culpability*. (*Graham*, at pp. \_\_ [130 S.Ct. 2011 at pp. 2022, 2026].) *Roper* held that it violated the Eighth Amendment to impose the death penalty on a person who had committed his

offenses when he was a juvenile. (*Roper*, at pp. 571-572, 578-579.) In *Roper*, the United States Supreme Court noted that juveniles as a class have diminished culpability and are categorically different from other offenders in terms of the possibility of reform. (*Roper*, at pp. 570-571.) *Graham* held that a sentence of life without possibility of parole for a juvenile convicted of a nonhomicide offense violates the Eighth Amendment for the same reasons. (*Graham*, at pp. \_\_\_ [130 S.Ct. 2011 at pp. 2026-2027]; see *People v. Caballero* (2012) 55 Cal.4th 262, 265.)

Steven and Jeremy make the mistake of equating *capacity* and *culpability*. The two are not the same. A person either has or lacks the capacity to commit a criminal offense. If capacity is lacking, no criminal offense may be committed. The level of a criminal actor's culpability, on the other hand, may be measured only when capacity is present and a criminal offense actually has been committed. The level or degree of culpability depends on the nature of the offense and the characteristics of the offender. A determination of the level of culpability is relevant to the propriety of the punishment, which is why it plays a role in Eighth Amendment analysis. A determination of a person's capacity to commit a criminal offense has nothing to do with punishment, as a lack of capacity precludes the commission of a criminal offense. For these reasons, statements about a juvenile's level of culpability in these Eighth Amendment cases has nothing to do with the *Manuel L.* court's determination of the appropriate standard of proof for a juvenile's capacity.

*J.D.B.* concerned whether a juvenile's age should play a role in determining if the juvenile would have understood that he was free to leave when he was interrogated by the police. (*J.D.B.*, *supra*, \_\_\_ U.S. \_\_\_ [131 S.Ct. at pp. 2402-2403].) In the course of its discussion, the court stated: "The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." (*J.D.B.*, at p. \_\_\_ [131 S.Ct. at p. 2403].) This reference to a child's lack of the "capacity to exercise mature

judgment” used the word “capacity” in its general sense and clearly was not intended to refer to a juvenile’s capacity to commit a criminal offense. As the subject matter of *J.D.B.* had nothing to do with *criminal capacity* or the appropriate standard of proof, nothing in *J.D.B.* overruled *Manuel L.* Thus, we remain bound by *Manuel L.* (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455)

The juvenile court did not err in utilizing the clear and convincing evidence standard of proof in deciding that Steven and Jeremy knew of the wrongfulness of their conduct.

#### **F. Reliance on Extrajudicial Information**

Steven and Jeremy contend that the trial court improperly relied on information outside the record.

After the close of evidence at the jurisdictional hearing, the court announced its decision. The court stated that it was “basing its decision in part upon the demeanor, quality of the testimony, and the comparison of the testimony to the other facts in the case.” The court explicitly found L. to be “credible.” L.’s testimony, in the court’s view, “rings true of someone who is retelling an episode of being sexually abused as opposed to someone just making it up.” The court found that L. “was very articulate, very intelligent, very thorough, had good eye contact, her demeanor was forthright. She had excellent recall. She did not appear to this court to be lying. She knew specific details with almost photographic memory, including details preceding the sexual assaults, during the sexual assaults, and after the sexual assaults. [¶] [L.] demonstrated a good memory of details of what she said to whom and when. Much of her testimony was corroborated by the evidence in this case. [L.] was consistent throughout eight separate reports which the court went over carefully, not only during the trial but after the trial.

“ . . . All of those documents had very consistent stories throughout given the totality of the conduct in this case against her. [¶] *It is not unusual in sexual assault*

*cases for there to be inconsistencies. It is not unusual for the victim to minimize at first, to test the waters, to learn what effect her disclosure creates upon herself and her family. It's not unusual for sexual assault victims to downplay the frequency and level of the sexual assault at first. It's not unusual as time goes by or as different interviews unfold more information is revealed. It's not unusual for victims to recant when the victims learn of the negative consequences to themselves and their family's lives. ¶¶ Oftentimes, victims do not say more than the one thing and then they say it never happened at all. It is also not unusual for there to be innocent misrecollection and even glaring inconsistencies when a victim is exposed to years of abuse. And then years later she is asked to recall those years of sexual abuse. ¶¶ In general, if an offender touches a victim 20 or 50 or 100 times it's unlikely the victim can separate out the repeated acts. Even when a person engages in consensual adult sex, years later they may remember the first time or the last time and they may have some recollection of some acts in between or images or some specifics, but it is unlikely that a person who is an adult, who engaged in consensual adult sex, would be likely to remember the specifics of when it happened or where it happened. ¶¶ The court finds even under those stressful and dire pressures upon [L.], she had incredible recall and had great detail. Again, understanding the long gravity of the incidents that she was asked to recall. ¶¶ The court finds that no motive to lie has been established." "I do not find that she would lie knowing that this was going to screw up her family. ¶¶ She well knew the ramifications, the fact that this information coming out would destroy her family, which, in fact, it did." (Italics added.)*

The court found Steven's "testimony to be incredible and the court believes he committed perjury and his testimony was implausible. . . . I believe that none of those things are true that Steven said in his testimony." After the court had given this explanation for its decision, it said: "Is there anything else by the attorneys before we go on to the scheduling for disposition?" All of the attorneys said no.

Steven and Jeremy contend that the court's statements reflected that it "improperly injected CSAAS [child sexual abuse accommodation syndrome] information from outside the record, after the presentation of evidence had closed, so that it was not subject to testing by cross-examination, rebuttal, or argument." We derive no implication of impropriety from the judge's comments.

A factfinder does not leave his or her personal experience at the courtroom door. "[W]e must allow [factfinders] to use their experience in *evaluating and interpreting* that evidence. . . . [I]t is virtually impossible to divorce completely one's background from one's *analysis* of the evidence.'" (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 77.) Here, the judge was permitted to use his personal experience with sexual assault cases in evaluating and interpreting the evidence. His generalized comments about sexual assault cases did not amount to the injection of extrajudicial information. Indeed, most of his generalized comments about what was "not unusual" related to circumstances that he found absent in this case. He mentioned inconsistent victims, victims who recant, and the recollections of those who engage in adult consensual sex. Yet he found L. to be consistent, and she did not recant and was not an adult. The only portion of the judge's comments that could relate to this case was his comment that it was "not unusual for the victim to minimize at first, to test the waters . . . ." The judge's reliance on his experience with sexual assault cases in this regard was not improper, as he could not be expected to "divorce" his "background" from his "analysis of the evidence." The fact that expert testimony could have been received in a case tried to a jury to rebut common misperceptions about sexual assaults did not mean that an experienced judge, who did not suffer from any such misperceptions, was not permitted to utilize his personal experience in evaluating the evidence.

## **G. Request for Jury Trial**

Jeremy and Steven claim that the juvenile court erred in denying their motion for a jury trial based on the possibility that, if they were committed to the Department of Juvenile Justice (DJJ), they could be ordered to register as sex offenders and thereby become subject to associated strict residency restrictions.<sup>14</sup>

### **1. Background**

In advance of the jurisdictional hearing, Steven's trial counsel filed a motion based on *In re J.L.* (2010) 190 Cal.App.4th 1394, review granted March 3, 2011, S189721, seeking a jury trial due to the possibility that Steven would be ordered to register as a sex offender thereby triggering certain residency restrictions. Alternatively, the motion sought to bar the imposition of these residency restrictions. The juvenile court considered the motion, which was joined by Jeremy's trial counsel, at the commencement of the jurisdictional hearing. The court essentially considered this issue to be premature since the residency restrictions would apply only if sex offender registration was required, and registration would be required only if there was a commitment to the DJJ. The court denied the motion. "I am not going to make any decision or order as it relates

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<sup>14</sup> "Any person who . . . is discharged or paroled from the Department of Corrections and Rehabilitation [which includes the DJJ] to the custody of which he or she was committed after having been adjudicated a ward of the juvenile court pursuant to Section 602 of the Welfare and Institutions Code because of the commission or attempted commission of any offense described in subdivision (c) [which includes a violation of Penal Code section 288] shall register [as a sex offender] in accordance with the [Penal Code section 290 Sex Offender Registration] Act." (Pen. Code, § 290.008, subd. (a).) "[I]t is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather." (Pen. Code, § 3003.5, subd. (b).) The California Supreme Court recently granted review of the Fourth District Court of Appeal's decision in *In re Taylor* (2012) 209 Cal.App.4th 210, review granted January 3, 2013, S206143, holding that the "blanket" imposition of these residency restrictions on all parolees subject to Penal Code section 290 registration (Pen. Code, § 3003.5, subds. (a) & (b)) is unconstitutional. (*In re Taylor*, at p. 213.)

to registration.” If a DJJ commitment occurred, “then you can come back to this court and we can address the issue.”

In the midst of the jurisdictional hearing, the juvenile court noted that the California Supreme Court had granted review in *In re J.L.* and therefore it was “not binding.” “But even if it was the law, I believe that my ruling is a prudent one, because I don’t expect these two young men to go to DJJ even if there was a sustaining of the petition in this case. And I believe that the law will change between now and then. And again, I offer you if they ever do get sentenced to DJJ that you come back to court and I will make sure that their rights are taken care of.”

## 2. Analysis

Although they were not committed to the DJJ, Steven and Jeremy contend that the juvenile court erred in denying their motion because they remain at risk of a DJJ commitment if they violate their probation. They claim that they had a due process right to a jury trial because the potential residency restrictions are so “overwhelmingly punitive” that “criminal procedural protections must apply.”

Steven and Jeremy are in no position to mount a due process or equal protection challenge to the validity of the residency restrictions themselves because neither of them has been subjected to these restrictions. The challenge that they do make is far more limited. They contend that due process requires that a jury trial be afforded to juveniles who may potentially be subjected to these allegedly punitive residency restrictions. We find guidance in addressing this challenge in *People v. Nguyen* (2009) 46 Cal.4th 1007 (*Nguyen*).

*Nguyen* contended that his prior juvenile adjudication could not be utilized to increase the penalty for his adult crime because he had not been afforded a jury trial on the juvenile offense. The California Supreme Court rejected his contention using reasoning that is relevant here. “[I]t makes little sense to conclude, under *Apprendi*, that a judgment of juvenile criminality which the Constitution deemed fair and reliable

enough, when rendered, to justify confinement of the minor in a correctional institution is nonetheless constitutionally inadequate for later use to establish the same individual's recidivism as the basis for an enhanced adult sentence. Such a determination would preclude a rational and probative basis for increasing an adult offender's sentence—that he or she was not deterred from criminal behavior by a youthful brush with the law—unless juveniles were afforded a right to jury trial, *which the Constitution does not require.*" (*Nguyen, supra*, 47 Cal.4th at pp. 1021-1022.)

We find similar reasoning applicable here. It makes little sense to conclude that the juvenile court's jurisdictional findings, which the Constitution deems fair and reliable enough to justify a disposition as punitive as a commitment to the DJJ, are nevertheless constitutionally inadequate to support the imposition of residency restrictions associated with sex offender registration requirements. Such a conclusion would preclude the imposition of residency restrictions, which are not more punitive than a DJJ commitment, unless juveniles were afforded a right to jury trial, which the Constitution does not require.

Since the juvenile court's jurisdictional findings were constitutionally adequate to support a DJJ commitment, they were not constitutionally inadequate to support the potential imposition of residency restrictions associated with sex offender registration.

#### **H. Cumulative Error**

Steven and Jeremy argue that the cumulative prejudice from the court's errors requires reversal. Since we have rejected all of their claims of error, there is no prejudice to cumulate.

#### **I. Probation Conditions**

Steven and Jeremy challenge four of the probation conditions imposed by the juvenile court.

## 1. Background

Steven's probation conditions included: (1) "That said minor not change his place of residence without prior approval of the Probation Officer;" (2) "That said minor not be on or adjacent to any school campus unless enrolled or with prior administrative approval;" (3) "That said minor not knowingly associate with any person whom he knows to be, or that the Probation Officer informs him to be, a probationer, parolee, or gang member;" (4) "That said minor not be within his arm's reach of any minor twelve years of age or under in any non-public place unless he is under competent adult supervision and is within the sight or hearing range of that adult. No exceptions for siblings of Steven or Jeremy's children; does not apply to Steven's children." The court imposed the same four probation conditions on Jeremy except that the last two sentences of the fourth one were slightly modified as to Jeremy: "No exception for siblings of Jeremy or Steven's children. Does not apply to Jeremy's children."

At the dispositional hearing, Steven's trial counsel asked the court to modify the probation condition "to allow contact with his siblings and his brother's infant children." The court refused to do so.

## 2. Analysis

"The juvenile court has wide discretion to select appropriate conditions and may impose "any reasonable condition that is 'fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.'"" (In re Sheena K. (2007) 40 Cal.4th 875, 889 (Sheena K.).) "[A] condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court. [Citations.] "Even conditions which infringe on constitutional rights may not be invalid if tailored specifically to meet the needs of the juvenile [citation]."" (In re Tyrell J. (1994) 8 Cal.4th 68, 81-82, overruled on other grounds by In re Jaime P. (2006) 40 Cal.4th 128, 139.)

“[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ [Citation.] The rule of fair warning consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders’ [citation], protections that are ‘embodied in the due process clauses of the federal and California Constitutions.’” (*Sheena K., supra*, 40 Cal.4th at p. 890.) “In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that ‘abstract legal commands must be applied in a specific *context*,’ and that, although not admitting of ‘mathematical certainty,’ the language used must have “‘reasonable specificity.’” (*Ibid.*) “A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. [Citation.]” (*Ibid.*)

The overbreadth doctrine focuses on other, though related, concerns. “A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Sheena K., supra*, 40 Cal.4th at p. 890.) Under this doctrine, ““a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”’ [Citations.]” (*In re Englebrecht* (1998) 67 Cal.App.4th 486, 497.) “‘A law’s overbreadth represents the failure of draftsmen to focus narrowly on tangible harms sought to be avoided, with the result that in some applications the law burdens activity which does not raise a sufficiently high probability of harm to governmental interests to justify the interference.’ [Citation.]” (*Ibid.*)

#### **a. Residence Condition**

Steven and Jeremy claim that the condition prohibiting them from changing their residence without approval of the probation officer is unconstitutionally overbroad.

They rely on *People v. Bauer* (1989) 211 Cal.App.3d 937 (*Bauer*), which struck an adult's probation condition requiring that his "residence be subject to his probation officer's approval." (*Bauer*, at pp. 943-944.) The *Bauer* court expressed concern that the condition gave the probation officer the right to banish the adult defendant from his parents' home, where he had lived for his entire life. (*Bauer*, at p. 944.)

Steven and Jeremy contend that *Bauer* applies here, despite the fact that it involved an adult, because this court cited *Bauer* in its decision in *In re Babak S.* (1993) 18 Cal.App.4th 1077 (*Babak S.*). *Babak S.* concerned a juvenile probation condition requiring Babak to live in Iran. He was found in violation of his probation after he returned to the United States. This court held that the condition was unconstitutional and lacked any reasonable basis. *Bauer* was cited as an example of a less egregious case in which a probation condition that might be seen as a banishment had been found constitutionally invalid. (*Babak S.*, at pp. 1084-1085.) The decision in *Babak S.* did not abandon the distinction between adult and juvenile probation conditions.

In any case, the conditions in *Bauer* and *Babak S.* are readily distinguishable from the one before us here. Unlike the *Bauer* condition, the condition here does not potentially require Steven or Jeremy to leave their parents' home, as it merely requires approval of a *change of residence*. There is no risk of banishment. The condition here, unlike the condition in *Babak S.*, does not *require* Jeremy or Steven to change residences. It requires approval only if *they* wish to change residences.

This condition was closely tailored to its purpose. The court placed Steven and Jeremy on probation *in their parents' home*. It also required both of them to be subject to electronic monitoring, which required special efforts to be made to accommodate two probationers in the same home. The court recognized that this placement might not work out if Steven and Jeremy did not make progress in therapy. Since Steven was soon to become an adult, and Jeremy already had a child, the court had legitimate concerns about where they might choose to live if their choices of residence were not restricted.

Steven and Jeremy contend that this probation condition was improper because it delegated to the probation officer approval of any change of residence without providing a meaningful standard. They rely on *People v. O'Neil* (2008) 165 Cal.App.4th 1351 (*O'Neil*). In *O'Neil*, the probation condition ordered the defendant not to associate “with any person, as designated by your probation officer.” (*O'Neil*, at p. 1354.) The First District Court of Appeal held that this condition was flawed because “there are no limits on those persons whom the probation officer may prohibit defendant from associating with.” (*O'Neil*, at p. 1357.) “The court’s order does not identify the class of persons with whom defendant may not associate nor does it provide any guideline as to those with whom the probation department may forbid association. Without a meaningful standard, the order is too broad and it is not saved by permitting the probation department to provide the necessary specificity.” (*O'Neil*, at pp. 1357-1358.) “Here, although the court authorized the probation officer to designate those with whom defendant could not associate, it did not in any way define the class of persons who could be so designated.” (*O'Neil*, at p. 1358; see also *In re Victor L.* (2010) 182 Cal.App.4th 902, 918-919.)

It is true that the residence condition did not provide the probation officer with any type of standard for determining whether a change of residence should be approved. Therefore, the condition requires modification. It should provide that *court* approval is necessary for any change of residence, as it was the *court* that placed Steven and Jeremy in *their parents’ home*. We will order the condition modified accordingly.

#### **b. School Campus Condition**

Steven and Jeremy challenge the “school campus” condition on the grounds that it is vague and overbroad. First, they claim that the word “adjacent” is vague, as this court concluded in *People v. Barajas* (2011) 198 Cal.App.4th 748 (*Barajas*). Second, they argue that the condition is overbroad in encompassing a “zone” around the campus where the probationer might have a legitimate need for access. Third, Steven and Jeremy maintain that the condition is overbroad in failing to permit the probation officer to

authorize presence on a school campus for legitimate reasons. Finally, they point out that the condition needs and lacks a knowledge requirement.

In *Barajas*, this court addressed a similar condition and concluded that it needed to be modified. “To avoid inviting arbitrary enforcement and to provide fair warning of what locations should be avoided,” this court ordered the condition modified to replace “‘adjacent’” with “‘within 50 feet’” and to add a knowledge requirement. (*Barajas, supra*, 198 Cal.App.4th at pp. 761-763.) These modifications, which the Attorney General agrees are appropriate, resolve the first and fourth contentions made by Steven and Jeremy.

Their second and third contentions both arise from their argument that the condition does not permit them to be present on a school campus or within a specific zone around one when they have a legitimate reason for being there. We do not agree with Steven and Jeremy that there is no need for a “zone” of protection around a school campus. The risk that such a condition is aimed at is that a sex offender will lurk near a school campus and make contact with children who leave the campus itself. Since children often congregate near a school campus before or after school, a limited zone of protection around the campus appropriately balances the probationer’s constitutional rights against the public safety risks. The Attorney General does not oppose adding to the condition that the probation officer may authorize presence on campus or within a zone around it. In our view, this modification adequately addresses the concern raised regarding legitimate reasons. If the probation officer determines that there is a legitimate need for a specific exception to this condition, such an accommodation can be provided.

We will order the condition modified to replace “adjacent to” with “within 50 feet of,” to add a knowledge requirement, and to permit the probation officer to grant an exception to the condition’s restrictions. It shall be modified to read: “That said minor shall not knowingly be on or within 50 feet of any school campus unless enrolled or with prior administrative approval or prior approval of the probation officer.”

### c. Association Condition

Jeremy and Steven contend that this condition was overbroad because it prohibited Jeremy and Steven from associating with *each other* even though they were placed together in their parents' home. They ask that the condition be modified to provide that it is not applicable to immediate family members.

“Conditions of probation prohibiting an individual from associating with other persons including spouses and close relatives, who have been involved in criminal activity have generally been upheld when reasonably related to rehabilitation or reducing future criminality.” (*People v. Wardlow* (1991) 227 Cal.App.3d 360, 367.) The Attorney General relies on *Wardlow* to support the validity of this probation condition.

In their reply brief, Steven and Jeremy respond that the *facts* of this case are distinguishable from *Wardlow*. Steven and Jeremy did not object to this condition on this basis below. The forfeiture rule applies to a challenge to a probation condition unless it is a *facial* constitutional challenge. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 881-882, 886-887.) Only a facial challenge “that is ‘correctable without referring to factual findings in the record or remanding for further findings’ is not subject to forfeiture.” (*Sheena K.*, at p. 887.) The challenge that Steven and Jeremy make in their reply brief, in their attempt to distinguish *Wardlow*, fails because it is not a *facial* challenge, but depends on the juvenile court’s factual findings.<sup>15</sup> (*Sheena K.*, at p. 886-887.) It follows that they forfeited this challenge.

Nevertheless, the illogic of forbidding association between Jeremy and Steven when they are placed in the same home demands a remedy. We will order that the condition be modified to permit Jeremy and Steven to associate with each other.

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<sup>15</sup> At the dispositional hearing, the court explicitly found that Steven “and his family are still in denial, and because of their denial, Steven is still a risk to the community.” The fact that the family was in denial was a circumstance that might well justify restricting association with family members who are involved in criminal activity.

#### **d. Minors Condition**

Jeremy and Steven seek a modification of this condition to add a knowledge requirement. A probation condition prohibiting association with minors must include a knowledge requirement. (*People v. Turner* (2007) 155 Cal.App.4th 1432, 1436.) The Attorney General concedes as much. We will order this modification.

#### **J. Transcript of Pretext Call**

Jeremy challenges the court's order that a transcript of the pretext call be provided to his counselor. At the dispositional hearing, the court said: "[F]or the counseling I would like a redacted copy of the pretext call transcripts to be given to [Jeremy's] counselor. Even though it is not Jeremy's statements, it shows that there was sexual molestation going on. I would even suggest you cross out Steven's name because the counselor doesn't need to know anything about Steven other than it's the brother of Jeremy."

The juvenile court's order was obviously based on legitimate concerns. Jeremy and his father had made statements to the psychologist who prepared Jeremy's psychological evaluation that led the psychologist to question whether L. had fabricated all of her allegations. The pretext call, while it related solely to Steven, rebutted the claim that all of L.'s allegations were fabricated. The theory behind their claims of fabrication applied equally to the allegations against both Steven and Jeremy. Hence, the court was simply attempting to forestall continued claims of fabrication and denial that might interfere with Jeremy's therapeutic success. We reject Jeremy's claim that the court's order somehow implicated Jeremy in Steven's offenses. The transcript of the pretext call did not suggest that Jeremy was involved in his brother's offenses. We find no error in the court's order.

### **K. General Fund Fine**

Steven points out a discrepancy regarding the amount of his general fund fine, and Steven and Jeremy contend that a remand is required for the court to specify the statutory basis for the fine. Both contentions have merit.

The probation reports recommended that Steven and Jeremy each be ordered “to pay to the General Fund a fine and penalty assessment totaling \$146.” At the dispositional hearing, the court ordered Steven to pay a general fund fine of “*four* hundred forty six dollar[s],” which the court said “is the minimum.” (Italics added.) It ordered Jeremy to pay a general fund fine of “*one* hundred forty six dollars which is the minimal [*sic*].” (Italics added.) The juvenile court’s written and signed order of probation for Steven stated that the general fund fine and penalty assessment was “\$146.”

We agree with Steven that the court’s oral statement was obviously a mistake, as it claimed that both fines were the “minimum” but Steven’s fine was not equal to Jeremy’s fine. Clearly the court misspoke, and it meant to impose a \$146 general fund fine on Steven. Since the clerk’s transcript correctly states that Steven was ordered to pay a \$146 fine, rather than a \$446 fine, we need not order correction of the record in this regard.

Nowhere in the probation reports, the court’s statements at disposition, or the clerk’s transcript is there any specification of the statutory basis for this fine or its associated penalty assessments. Trial courts are required to identify the statutory bases for all fees, fines, and penalties imposed. (*People v. Eddards* (2008) 162 Cal.App.4th 712, 718.) We will direct the juvenile court to do so on remand.

### **L. Attorney’s Fees**

Steven and Jeremy challenge the sufficiency of the evidence to support attorney’s fees orders.

The parents of a minor and the minor’s estate “shall be liable for the cost to the county or the court, whichever entity incurred the expenses, of legal services rendered to

the minor by an attorney pursuant to an order of the juvenile court.” (Welf. & Inst. Code, § 903.1, subd. (a).) “[T]he cost of delinquency-related legal services referred to by Section 903.1 . . . shall be determined by the board of supervisors.” (Welf. & Inst. Code, § 904.) “[T]he juvenile court shall, at the close of the disposition hearing, order any person liable for . . . the cost of legal services as provided for in Section 903.1 . . . to appear before the county financial evaluation officer for a financial evaluation of his or her ability to pay those costs.” (Welf. & Inst. Code, § 903.45, subd. (b).) “If the county financial evaluation officer determines that a person so responsible has the ability to pay all or part of the costs, the county financial evaluation officer shall petition the court for an order requiring the person to pay that sum to the county or court.” (Welf. & Inst. Code, § 903.45, subd. (b).) “In evaluating a person’s ability to pay under this section, the county financial evaluation officer and the court shall take into consideration the family’s income, the necessary obligations of the family, and the number of persons dependent upon this income.” (Welf. & Inst. Code, § 903.45, subd. (b).)

At the dispositional hearing, the court stated, with regard to Steven: “I am *imposing* attorney fees of two thousand, three hundred fifty dollars for fifteen regular appearances and fifty dollars per appearance which equals seven hundred fifty dollars because [*sic*] one thousand, six hundred dollars for the trial appearances.” (Italics added.) The court made no finding that Steven and his parents had the ability to pay these fees.<sup>16</sup> As to Jeremy, the court stated: “Attorney’s fees of two thousand, one hundred fifty dollars for eleven regular appearances at fifty dollars per appearance which equals five hundred fifty dollars plus one thousand six hundred dollars for trial appearances.” The court made no finding that Jeremy or his parents had the ability to pay the attorney’s

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<sup>16</sup> Steven’s probation report did not mention attorney’s fees. At the dispositional hearing, the court made an ability to pay finding with regard to the general fund fine and noted that “Steven is working” and “[h]is parents are working.” “I make a finding they have the ability to pay that [general fund fine].”

fees.<sup>17</sup> The court orally directed that “[t]he family’s referred to the department of revenue within thirty days to set up a payment of the amounts owed.” The court’s written dispositional orders tracked its oral statements with regard to attorney’s fees. They identified the amount of attorney’s fees for Steven and for Jeremy. They also provided: “The minor and his parents be ordered . . . to appear before a financial officer of the Department of Revenue for an evaluation of the ability to pay all other [than the general fund and restitution fund fine] reimbursable costs.”

Steven and Jeremy claim that the court erred in ordering them and their parents to pay attorney’s fees in the absence of evidence that they and their parents had the ability to pay those fees. This claim is premature. Perhaps because the juvenile court erroneously used the word “imposing” when it orally identified the amount of Steven’s attorney’s fees, Steven and Jeremy are under the mistaken impression that the court did not merely identify the amount of fees but also ordered payment of those fees. The statutory scheme does not work that way. A proper interpretation of the events in the juvenile court is that the court identified the cost of the legal services provided and ordered the minors and the parents to appear before the financial officer for an ability to pay evaluation. No order for payment of attorney’s fees had yet been entered at the time of these appeals, so we reject the challenge to the nonexistent orders.

#### **IV. Disposition**

The juvenile court’s orders are reversed and remanded with the following directions: (1) the court shall modify the probation conditions in the following respects: (a) the residence conditions shall be modified to read: “That said minor not change his

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<sup>17</sup> The court explicitly found that Jeremy and his parents had the ability to pay the general fund fine. This finding was based on Jeremy’s admission that he had no disabilities that would prevent him from getting a job and the fact that his parents “are working and have good-paying jobs.”

place of residence without prior approval of the Court;” (b) the school campus conditions shall be modified to read: “That said minor shall not knowingly be on or within 50 feet of any school campus unless enrolled or with prior administrative approval or prior approval of the probation officer;” (c) the association conditions shall be modified to read: “That said minor not knowingly associate with any person whom he knows to be, or that the Probation Officer informs him to be, a probationer, parolee, or gang member except that Jeremy and Steven may associate with each other;” (d) the first sentence of the minors conditions shall be modified to read: “That said minor not knowingly be within his arm’s reach of any minor twelve years of age or under in any non-public place unless he is under competent adult supervision and is within the sight or hearing range of that adult;” and (2) the court shall specify the statutory bases for both Jeremy’s and Steven’s general fund fines and penalty assessments.

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Mihara, J.

WE CONCUR:

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Premo, Acting P. J.

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Duffy, J.\*

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\* 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.