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

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEXIS JOEL AMAYA,

Defendant and Appellant.

H040451

(Santa Clara County

Super. Ct. No. C1225642)

A jury found defendant Alexis Joel Amaya guilty on two counts of sexual penetration of a child aged 10 or younger. (Pen. Code, § 288.7, subd. (b).)¹ The trial court sentenced defendant to two concurrent terms of 15 years to life.

Defendant raises three claims on appeal. First, he contends the trial court erred by admitting expert testimony on Child Sexual Abuse Accommodation Syndrome. Second, he contends the trial court erred by reopening closing arguments when the jury could not reach a verdict. Finally, he contends the trial court abused its discretion by denying him a grant of probation.

We conclude defendant's claims are without merit, and we will affirm the judgment.

¹ Subsequent undesignated statutory references are to the Penal Code.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts of the Offenses*

1. *Overview*

At the time of the offenses, defendant was a 25- or 26-year-old musician in San José. The victim, J.J., was his nine-year-old niece. E.A.,² defendant's brother and J.J.'s father, was married to the victim's mother, M.J.

In December 2011, when J.J. was 13, her parents took her to a therapist. J.J. revealed to the therapist that defendant had molested her when she was nine. The therapist told her parents and alerted CPS, who in turn informed law enforcement. The police contacted J.J. and her parents in January 2012. By that time, E.A. had told defendant about J.J.'s accusations.

The police arranged a pretext phone call between J.J. and defendant. When J.J. confronted defendant with her claims, he denied touching her and suggested she might have misinterpreted something that had happened while they were playing a game. Subsequently, defendant voluntarily went to the police station for an interview. He told the police that J.J. may have misunderstood something that had occurred during a game. At trial, defendant repeatedly and consistently denied J.J.'s accusations.

2. *Testimony of J.J.*

J.J. was 14 years old when she testified at trial in 2013. (She was nine years old when defendant first touched her.) At the time of the offense, J.J. was living in San José with her parents, her aunt and uncle, and a younger sister. The touching occurred in defendant's bedroom, where there were two beds—defendant's bed and his wife's bed.

J.J. testified that she and her sister were watching a movie on defendant's bed in his bedroom. J.J. was wearing a nightgown with underwear underneath. Defendant was on the bed with them. J.J. was lying with her back against the front of defendant's body,

² We refer to the victim's father as E.A. to avoid confusion.

and J.J.'s sister was lying in front of J.J., who had her arms around her sister. Defendant had his arms around J.J.

At some point, J.J.'s sister left the room, leaving defendant and J.J. alone. Defendant had his hands on J.J.'s legs, and he started moving them up towards her stomach under her nightgown. This made J.J. feel uncomfortable but she did not say anything because she was scared. When defendant's hands reached J.J.'s stomach, he moved them lower and put them under her underwear. Defendant touched J.J.'s vagina and put his finger inside. His fingers were moving in and out, hurting J.J. When J.J. started crying, defendant told her to be quiet. The incident lasted about five minutes. Defendant stopped touching J.J. when her sister came back into the room. J.J. was scared and upset, but did not say anything to defendant or her parents at the time because she was not sure they would believe her.

Defendant touched J.J. again the next day. J.J. and her sister were on defendant's wife's bed watching a movie. Defendant told them to get on his bed with him. J.J. did not want to get into defendant's bed, but she did so because her sister wanted to. J.J. arranged for her sister to lie between defendant and herself because she did not want him to touch her again. When her sister left the room, defendant took J.J.'s wrist and pulled her toward him. He did the same thing to J.J. that he had done the day before. He put his finger inside her vagina and moved it. This caused J.J. more pain than it did the day before, but she did not say anything to him. He did not say anything either. This lasted about five minutes. Defendant stopped when J.J.'s sister came back. J.J. did not tell her parents about this second incident at the time because she thought they might not believe her and she was afraid she might get in trouble.

J.J. did not tell an adult about the molestation until she was 13, when she told her therapist. In the course of getting to know J.J., the therapist asked if anyone had ever touched her inappropriately. J.J. paused for a while and thought about whether to tell the therapist. J.J. did not want the therapist to tell her parents about the incident or report it

to anyone, but she ultimately told the therapist because she thought it might make her feel better. J.J. was mad when the therapist told her the incident would have to be reported. She did not want to talk to the police, but eventually spoke with them.

The police arranged for a pretext call between J.J. and defendant. J.J. got mad during the call because defendant repeatedly denied the molestation and suggested J.J. must have been confused about a game they were playing.

3. Testimony of J.J.'s Parents

M.J. and E.A. did not learn of the molestation until they took J.J. to the therapist in December 2011. At that time, M.J. and E.A. were separated. E.A. was living with defendant and defendant's wife.

After the therapist spoke with J.J. alone, the therapist told E.A. and M.J. about J.J.'s claims. The therapist told them she would have to report the claims to law enforcement. After the appointment, E.A. told defendant what the therapist had told them J.J. had said.

The police subsequently left a phone message for J.J.'s parents asking them to call back. The next month (January 2012), the police called the parents again, whereupon E.A. called them back. At that point, E.A. took J.J. to the police to be interviewed.

E.A. testified that he never observed anything improper between defendant and J.J. He also testified that he had never seen defendant engage in any conduct to indicate he would be involved in such an offense.

4. Testimony of Jeffrey Nichols and the Pretext Phone Call

Jeffrey Nichols was a criminal investigator for the District Attorney's office. He testified the case was first reported to the police on December 20, 2011. He called J.J.'s parents on December 27 and left a message for them. They did not call him back at that point. He called them again on January 10, 2012. He also notified them by letter that they had 14 days to respond. M.J. contacted him on January 10, 2012, and he met with J.J. two days later.

On January 13, 2012, Nichols arranged for a pretext phone call between J.J. and defendant. The call was undertaken mostly in Spanish. Nichols testified that J.J. was nervous and cried during the call.

The prosecution played an audio recording of the call for the jury and provided the jury with a transcript in both Spanish and English. When defendant answered the phone, J.J. told him she was home from school because she was sick. She asked him if he remembered touching her when she was nine, and she expressed concern that she could get pregnant. Defendant, while expressing surprise and confusion, said he did not understand what she was talking about. J.J. told defendant, “You touched me down there like inappropriately.”³ Defendant denied doing so. J.J. responded, “Yes, you put your fingers there on my va—on my vagina.” Defendant asked J.J. if she was referring to some game they might have been playing. J.J. stated they were not playing a game at the time. She said it happened when they were on defendant’s bed, after her sister had left the room. Defendant recalled playing with J.J. and the other children, and he suggested again that she must be misinterpreting what had happened during a game. J.J. continued to insist that it had not happened during the course of a game. Defendant continued to suggest that she was misinterpreting or misunderstanding what had happened during some game—e.g. when he had hugged her or picked her up. At no point did defendant admit touching J.J.’s vagina.

Defendant voluntarily went to the police station to be interviewed by Nichols. A third officer acted as a translator. Defendant told police that J.J. may have misunderstood something that occurred during a game. He also stated that he could have touched her accidentally. Part way through the interview, the police conduct “a DNA ruse.” They falsely told defendant they had performed DNA testing on J.J.’s vagina. They then presented defendant with a phony test report purporting to show that his DNA had been

³ Quotations in English are taken from the translation.

found on her vagina. When they asked defendant to explain the result, he responded that “perhaps I touched her part in some moment I did not realize.” At no point did defendant confess to performing any sexual act on J.J.

5. *Expert Testimony on Child Sexual Abuse Accommodation Syndrome*

Miriam Wolf, a licensed clinical social worker, testified for the prosecution as an expert on Child Sexual Abuse Accommodation Syndrome (CSAAS). She was unaware of the facts of the case. She did not interview any witnesses, read any reports or transcripts, or participate in the investigation in any way.

Wolf testified that CSAAS is a term that first appeared in an article by Dr. Ronald Summit in the *Journal of Child Abuse and Neglect* in 1983. Dr. Summit wrote the article to document some of the behavior he saw in treating child victims of sexual abuse. He wrote the article because the child victims he was familiar with displayed patterns of behavior that were unexpected by adults. Wolf testified that the article was not a research article; it was based on anecdotal evidence. And she testified that CSAAS is not an actual syndrome or a diagnosis indicating whether a child has been sexually abused.

Wolf also testified that CSAAS consists of five categories of behavior: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and (5) retraction. Secrecy refers to the fact that abuse generally occurs in secret. The abuser is often in a position of power, and communicates the need for secrecy to the child. Helplessness refers to the child’s cognitive inability to understand and appreciate the consequences of a sexual encounter with an older person. The child may experience emotional helplessness because the abuser sends the message that the child cannot disclose the abuse to trusted persons such as teachers and parents, or the child believes that such people will not be available to help them. Entrapment and accommodation mean that children have to figure out how to cope with the situation and continue with their daily lives. Some children appear outwardly healthy, while others may develop psychosocial symptoms as a way of coping. Delayed, conflicting, or

unconvincing disclosure means the child may not disclose the abuse for a long period of time, and the disclosure does not “come out in a nice, neat package the way an adult might expect it to” The disclosure may be conflicted or unconvincing, and parts of it may not make sense to an adult. And finally, retraction or recantation refers to the fact that a child may take back claims of abuse due to the consequences of disclosure, such as the loss of parental support or criminal prosecution.

Wolf noted that Dr. Summit published a subsequent paper in 1992 expressing concern about how CSAAS was being used in court. He wrote that he had never intended for CSAAS to be used as a diagnostic tool or checklist. He had only intended to dispel myths held by many adults about how children would behave when molested. Dr. Summit expressed concern that prosecutors were using CSAAS to prove criminal cases, whereas CSAAS is not intended to be used to determine the truth or falsity of allegations. Instead, CSAAS starts with the premise that allegations made by a child victim are true.

Wolf testified that she had seen many of these patterns of conduct in children she had worked with. She also noted that Dr. Summit’s research has not been universally accepted by other researchers, but there is a “growing consensus” on many aspects of CSAAS. As to delayed disclosure, Wolf testified that there is “a lot of consensus among different researchers that children don’t disclose sexual abuse for lengthy periods of time, sometimes into adulthood. When they do disclose, it is often after lengthy delays.” On cross-examination, Wolf testified that recantation or retraction is not as common as Dr. Summit believed it to be at the time of his original article.

6. Testimony of Defendant

Defendant testified in his defense. He was born in El Salvador in 1982 and had 15 siblings. He had a sixth grade education. He worked as a musician in a band with two of his brothers, and he did yard work. He was married but had no children.

Defendant repeatedly denied touching J.J.’s vagina or “private parts.” E.A. told him about J.J.’s allegations on December 20, 2011. E.A. only told him that J.J. had

claimed he had touched her; defendant did not know what form or manner of touching she had alleged. Defendant called all his siblings and told them what was happening. He did not talk to J.J. about it until she called him several weeks later. He thought the call was a joke or “like a game.” At the time, he did not know she had accused him of putting his finger in her vagina.

7. Other Defense Witnesses

Numerous relatives and friends testified as character witnesses on defendant’s behalf, including four brothers, three sisters, one sister-in-law, two friends, and his wife. They generally testified that it was not within defendant’s character to commit a sexual act on a minor, and that they had never seen him do so. On cross-examination, several relatives also testified that they believed J.J. was an honest person.

B. Procedural Background

In May 2012, the prosecution charged defendant by information with two counts of sexual penetration of a child aged 10 years or younger. (§ 288.7, subd. (b).) The case proceeded to trial in June 2013. The jury found defendant guilty on both counts. The trial court sentenced defendant to two concurrent terms of 15 years to life.

II. DISCUSSION

A. Admission of Expert Testimony on CSAAS

Defendant contends the trial court violated his due process rights by admitting testimony from the prosecution’s expert witness on CSAAS. Alternatively, he contends his trial counsel provided ineffective assistance by failing to object to the expert’s testimony on due process grounds. The Attorney General argues that defendant has forfeited his due process claim and that the admission of the expert’s CSAAS testimony was not an abuse of discretion.

We conclude the trial court did not abuse its discretion by admitting the expert testimony, and trial counsel did not provide ineffective assistance.

1. *Procedural Background*

Defendant moved in limine to exclude any expert testimony on CSAAS. He argued that such expert testimony failed to meet the standard of admissibility set forth in *People v. Kelly* (1976) 17 Cal.3d 24, and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 (*Kelly/Frye*). He also argued that admission of CSAAS testimony was erroneous under *People v. Bowker* (1988) 203 Cal.App.3d 385 (*Bowker*), because the underlying premise—that adults have misperceptions about how abused children behave—was no longer true. On that basis, defendant argued that CSAAS testimony was irrelevant, lacked probative value, and presented an undue risk of prejudice. Alternatively, defendant argued that CSAAS testimony, if admitted, must be limited to a general description of CSAAS and not applied to the facts of this case.

In a pretrial hearing, the trial court tentatively ruled that CSAAS testimony would be conditionally admitted, pending the details of J.J.’s testimony. After J.J. testified, the parties offered further argument. Given the facts of J.J.’s testimony, the court found the proffered CSAAS testimony would be relevant and helpful to the jury. The court then ruled the testimony admissible.

After the close of evidence, the trial court instructed the jury based on CALCRIM No. 1193 as follows: “You have heard testimony from Miriam Wolf regarding child sexual abuse accommodation syndrome. Miriam Wolf’s testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. You may consider this evidence only in deciding whether or not [J.J.’s] conduct was not inconsistent with the conduct of someone [who] would [have] been molested and in evaluating the believability of her testimony.”

2. *Legal Principles*

Evidence Code section 801 limits expert opinion testimony to that which is “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (Evid. Code, § 801, subd. (a).) “When expert

opinion is offered, much must be left to the trial court's discretion.” (*People v. Carpenter* (1997) 15 Cal.4th 312, 403 [superseded by statute on other grounds].) The trial court has broad discretion in deciding whether to admit or exclude expert testimony. (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1196.) The decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion. (*People v. Alcala* (1992) 4 Cal.4th 742, 788-789.)

In *People v. Patino* (1994) 26 Cal.App.4th 1737, the court noted: “It is beyond dispute that CSAAS testimony is inadmissible to prove that a molestation actually occurred. It can be highly prejudicial if not properly handled by the trial court. It is unusual evidence in that it is expert testimony designed to explain the state of mind of a complaining witness. The particular aspects of CSAAS are as consistent with false testimony as with true testimony. For these reasons, the admissibility of such testimony must be handled carefully by the trial court. [Citation.] Although inadmissible to prove that a molestation occurred, CSAAS testimony has been held admissible for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation. [Citations.] Identifying a ‘myth’ or ‘misconception’ has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim’s credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation.” (*Id.* at pp. 1744-1745.)

3. *Admission of CSAAS Testimony Was Not an Abuse of Discretion*

Defendant challenges the admission of CSAAS testimony on three grounds. First, defendant asserts that the underlying premise justifying the evidence—that jurors hold certain myths and misperceptions about how abused children behave—is no longer a valid premise. Second, defendant contends CSAAS does not have general acceptance in the scientific community. And third, defendant asserts that CSAAS does not meet the

requirement that it be beyond the common knowledge of the jury to be admissible as expert testimony.

As to the first contention, the prosecution's expert gave testimony sufficient to support the premise that adults hold the myths and misperceptions CSAAS is intended to dispel. While defendant's trial counsel put forth the argument that adults no longer hold these misperceptions, counsel put no evidence in the record to support this argument. It is well established that the unsworn statements of counsel are not evidence. (*In re Silver's Estate* (1949) 92 Cal.App.2d 173, 176.) Absent some evidence disproving the premises put forth by the expert, it was not an abuse of discretion for the trial court to admit the expert testimony on this ground.

As to the acceptance of CSAAS in the scientific community, defendant points to two sources. First, he cites a number of academic journal articles refuting the efficacy of CSAAS as a diagnostic tool. Second, he relies on *Commonwealth v. Dunkle* (1992 Pa.) 602 A.2d 830, which concludes CSAAS is not a "generally accepted diagnostic tool." But the expert admitted that CSAAS was never designed for diagnostic purposes. And the prosecution never put forth the testimony for this purpose. In other words, the expert's testimony was never offered as evidence that J.J. had been molested. Indeed, the trial court specifically instructed the jury not to consider the expert's testimony for that purpose. Absent a showing to the contrary, we assume the jury followed this instruction.

Finally, as to the argument that the expert's testimony was not "[r]elated to a subject that is sufficiently beyond common experience," (Evidence Code section 801, subdivision (b)), the trial court's ruling to the contrary was within its discretion. We decline to reverse the longstanding admissibility of CSAAS evidence in California courts on these grounds. We conclude that admission of the expert's CSAAS testimony did not constitute an abuse of discretion. For the same reasons, trial counsel did not provide ineffective assistance for failing to object on due process grounds; such an objection would have been futile. (*People v. Anderson* (2001) 25 Cal.4th 543, 587 [defense

counsel does not provide ineffective assistance of counsel by declining to lodge a futile objection].) We thus conclude defendant's claims relating to the CSAAS testimony are without merit.

B. Reopening of Closing Argument

Defendant contends the trial court erred by allowing the parties to present supplemental closing argument after the jury informed the court it was having difficulty reaching a verdict. Defendant argues this error violated his rights to due process and an impartial jury under the Sixth and Fourteenth Amendments. Alternatively, he contends trial counsel provided ineffective assistance by failing to object on constitutional grounds. The Attorney General contends the trial court properly exercised its discretion by allowing supplemental argument, and that defendant has waived any constitutional objections. We conclude the trial court did not abuse its discretion by reopening closing argument, and we find no constitutional violation.

1. Procedural Background

After approximately nine hours of deliberation over the course of three days, the jury sent the following note to the court: "We are at a stand still! Please give us guidance + direction. HELP." The trial court brought the parties and jurors into court and asked the foreperson for a breakdown of the votes. The foreperson stated the jury was split seven to five. The court asked if it would help to provide clarification of any particular instruction, or to read back any testimony. The foreperson answered in the negative. The court then asked jurors to raise their hand if they felt otherwise, but no juror did so. The court then asked the jury to return to the jury room and added, "if you feel comfortable doing this, if you are able to generally identify or share with the Court just generally what might be the disagreement." The jury subsequently sent a note to the court stating: "define: reasonable +/- define possible doubt." In response, the court reread to the jury CALCRIM No. 220, defining reasonable doubt.

The trial court then posed the following question to the jury: “Would it be helpful for the jury to hear further arguments from the lawyers on this area? What I will do, you will hear from each of them for 10 minutes. I will consider 15, but it’s a very limited period of time. And I would ask you to just send a note back that says, yes, further argument will be helpful. Or, no, it would not be helpful.” The foreperson answered affirmatively and the jury asked for 15 minutes of argument from each side.

Defendant objected to further argument. He argued as follows: “One of my concerns in this is it’s—by allowing the additional argument, especially under these circumstances, is in a sense having the Court and counsel almost participating in the deliberative process and express their concerns, more or less the root of their discussions, at least according to what they told us, and then argument was re-opened and counsel essentially re-argued that. And it seems that we kind of crossed the line there and are actually interfering with the process. The jurors have been given the case. The case has already been argued and now we’re communicating with them once again.” The prosecution responded that the trial court was authorized to reopen closing arguments under *People v. Young* (2007) 156 Cal.App.4th 1165 (*Young*). The prosecution further noted that the trial court was proposing to do so in response to the prosecution’s off-the-record request for supplemental argument.

The trial court arranged for defendant to argue first and the prosecution to argue second on the basis that the latter had the burden of proof. Defendant argued to the jury that its inability to reach a verdict demonstrated that the jury had reasonable doubt. The prosecution focused on the relative credibility of the victim’s testimony compared to the defendant’s testimony, arguing the victim had no motive to lie while the defendant had a strong motive to do so.

The jury reached its guilty verdicts the next morning.

2. *Legal Principles*

Penal Code section 1093 provides, in part: “When the evidence is concluded, unless the case is submitted on either side, or on both sides, without argument, the district attorney, or other counsel for the people, and counsel for the defendant, may argue the case to the court and jury; the district attorney, or other counsel for the people, opening the argument and having the right to close.” (§ 1093, subd. (e).) Furthermore, “[w]hen the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order prescribed in Section 1093 may be departed from.” (§ 1094.) Thus, “[s]ection 1094 grants the trial court broad discretion to depart from the order specified in section 1093.” (*Young, supra*, 156 Cal.App.4th at p. 1171 [holding that the trial court was authorized to reopen closing argument].)

Under California Rules of Court, rule 2.1036(a): “After a jury reports that it has reached an impasse in its deliberations, the trial judge may, in the presence of counsel, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. The judge should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict.” The rule specifies “[p]ossible further action” as follows: “If the trial judge determines that further action might assist the jury in reaching a verdict, the judge may: [¶] (3) Permit attorneys to make additional closing arguments.” (Cal. Rules of Court, rule 2.1036(b)(3).) “The authority for rule 2.1036 is [Penal Code] sections 1093 and 1094. Section 1094 provides the trial court with discretion to deviate from the standard trial procedure set forth in section 1093 when required by the pleadings or for good reasons. Accordingly, [. . .] the trial court has discretion to utilize the tools provided in rule 2.1036. We review the trial court’s exercise of discretion for an abuse of discretion.” (*People v. Salazar* (2014) 227 Cal.App.4th 1078, 1088.)

3. *The Trial Court Did Not Abuse Its Discretion by Reopening Closing Argument*

Defendant acknowledges the above authority, but contends the trial court erred under *United States v. Evanston* (9th Cir. 2011) 651 F.3d 1080, and *United States v. Ayeni* (D.C. Cir. 2004) 374 F.3d 1313. In both cases, a federal court of appeals held that the trial court (one in Arizona and one in the District of Columbia) abused its discretion by allowing supplemental argument. But “we are not bound by decisions of the lower federal courts.” (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) Because settled California law expressly authorizes supplemental closing argument, we find these nonbinding authorities unpersuasive.

Furthermore, the record shows the trial court adhered to the procedures required under California law. The jury informed the court it had reached an impasse. The trial court asked the jury whether it had specific concerns the court or the parties could address. The jury responded that it sought guidance regarding the meaning of reasonable doubt. After rereading the appropriate instruction on reasonable doubt, the court asked the jury whether further argument would be helpful; the jury responded affirmatively. And “there were no remarks by the court that could have been viewed as coercive.” (*Young, supra*, 156 Cal.App.4th at p. 1172.) We thus conclude the trial court acted within its discretion by allowing supplemental argument. Moreover, trial counsel did not provide ineffective assistance by failing to object to the additional argument on constitutional grounds because such an objection would have been futile. (*People v. Anderson* (2001) 25 Cal.4th 543, 587.)

C. *Denial of Probation*

Defendant contends the trial court erred by failing to grant him probation. We conclude the trial court did not abuse its discretion by sentencing defendant to prison instead of placing defendant on probation.

1. *Procedural Background*

The probation report recommended that defendant be sentenced to two concurrent terms of 15 years to life. The report cited several aggravating factors under California Rules of Court, rule 4.414. Defendant requested that the court grant him probation. Defendant emphasized his lack of any criminal record and the probation report's finding that he was a low risk for recidivism. The victim testified at the sentencing hearing and expressed in detail the ways in which the offense had harmed her. The trial court found defendant eligible for probation, but sentenced him instead to two concurrent terms of 15 years to life. The court found that defendant violated a position of trust and caused enormous emotional injury to the victim.

2. *Legal Principles*

“The trial court enjoys broad discretion in determining whether a defendant is suitable for probation.” (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1256.) “To establish abuse, the defendant must show that, under the circumstances, the denial of probation was arbitrary or capricious. [Citations.] A decision denying probation will be reversed only on a showing of abuse of discretion. [Citation.]” (*Id.* at p. 1257.) California Rules of Court, rule 4.414 provides criteria a court must consider when deciding whether to grant or deny probation. (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1530.) These criteria include, among others, “[w]hether the defendant took advantage of a position of trust or confidence to commit the crime,” (rule 4.414(a)(9)) and “[w]hether the defendant inflicted physical or emotional injury” (rule 4.414(a)(4)).

3. *Denial of Probation Was Not an Abuse of Discretion*

Defendant contends the court erred by basing the denial of probation on findings that he took advantage of a position of trust and caused emotional harm to the victim. He contends that a violation of a position of trust is a factor present in virtually every child molestation case. We disagree. An offender can molest a complete stranger under

largely random circumstances. Here, by contrast, defendant molested his own niece while babysitting her and her sister, taking advantage of a position of trust.

Defendant also contends the victim described herself as recovering, and that the emotional harm she suffered may have been due to other factors, such as her parents' separation. But the record belies this contention. J.J.'s testimony made abundantly and vividly clear the myriad ways in which defendant's actions caused her serious emotional and psychological damage.

We conclude the trial court did not abuse its discretion by denying a grant of probation.

III. DISPOSITION

The judgment is affirmed.

MÁRQUEZ, J.

We concur:

RUSHING, P.J.

GROVER, J.

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