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

THE PEOPLE,

Plaintiff and Respondent,

v.

LONNIE LEE POSLOF, JR.,

Defendant and Appellant.

F076258

(Super. Ct. No. CRM028634)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Mark V. Bacciarini, Judge.

Laura Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Lance E. Winters, Chief Assistant Attorneys General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, Eric L. Christoffersen and Dina Petrushenko, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Lonnie Lee Poslof, Jr. was arrested approximately one year after his then-girlfriend reported to police that he molested her four-year-old daughter, A.J. He was subsequently convicted by jury of one count of engaging in oral copulation or sexual penetration with a child 10 years old or younger (Pen. Code, § 288.7, subd. (b); count 1),¹ two counts of committing a lewd or lascivious act on a child under the age of 14 (§ 288, subd. (a); counts 2 & 3), and one count of engaging in oral copulation with a child under the age of 14 (former § 288a, subd. (c)(1); count 4).² Defendant was sentenced to the upper term of eight years on count 2, a consecutive two-year term on count 3 and a consecutive two-year term on count 4, for a total determinate term of 12 years. On count 1, defendant was sentenced to a consecutive indeterminate term of 15 years to life.

On appeal, defendant claims that during A.J.'s trial testimony, which was conducted by two-way, closed-circuit television pursuant to section 1347, A.J. failed to answer questions, she responded nonverbally to questions, she was not visible in the camera, and she was coached by her designated support person, in violation of his Sixth Amendment right to confrontation and cross-examination. Further, the coaching by A.J.'s support person deprived defendant of his right to due process and a fair trial. Relatedly, defendant claims that because he was deprived of his right to cross-examine A.J. and her prior statements to her mother and a detective were unreliable, the trial court erred in admitting the statements under Evidence Code section 1360. He also claims the trial court erred under Evidence Code section 352 when it admitted consciousness-of-guilt evidence that he planned to have A.J. and her family killed prior to trial, but if we find no error, he contends that the trial court erred by failing to give a limiting instruction

¹ All further statutory references are to the Penal Code unless otherwise specified.

² Section 288a was renumbered to section 287 effective January 1, 2019. (Stats. 2018, ch. 423, § 49, pp. 88–91.) Former section 288a, subdivision (c)(1), is now section 287, subdivision (c)(1).

under CALCRIM No. 375 or, alternatively, that trial counsel was ineffective for failing to ask for the instruction. Finally, in supplemental briefing, defendant seeks relief from the restitution fine and court assessment fees imposed by the trial court, pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

The People dispute defendant's entitlement to any relief on his claims.

We reject defendant's claim that he was deprived of his Sixth Amendment right to confront and cross-examine A.J., and his claim that she was coached by her support person, in violation of his right to due process and a fair trial. We find no error in the admission of A.J.'s prior statements or the consciousness-of-guilt evidence, we reject defendant's claims of instructional error and ineffective assistance of counsel, and we conclude that defendant forfeited his *Dueñas* claim in its entirety by failing to exercise his statutory right to object to imposition of the \$10,000 maximum restitution fine. (§ 1202.4, subd. (d).)³ Accordingly, we affirm the judgment.

FACTUAL SUMMARY

I. Prosecution Case

A. Facts Leading to Police Report

Shortly after A.J. turned four years old, the friendship between defendant and her mother, B.L., became romantic. About four months later, in April 2013, defendant moved into the house B.L. shared with her four children, A.J., A.J.'s two older brothers, and A.J.'s younger brother. A.J. had a very close relationship with her paternal grandmother, R.J., who lived several blocks away, and A.J. usually spent the night at R.J.'s house. R.J. was also close with B.L., her former daughter-in-law.

On June 3, 2013, B.L. received a private message through Facebook from defendant's ex-wife, S., warning her "as a mother" that defendant had abused S.'s son and had also abused another ex-wife's three children. B.L. did not believe the

³ Because we find no errors, we do not reach the parties' arguments regarding prejudice.

accusations and felt the message was threatening because S. said that if B.L. was in a relationship with defendant and something happened to her children, they would be taken away from her. B.L. responded that she did not believe S. and would have to call somebody if S. continued to threaten her. B.L. asked defendant about the message and he said S. was just trying to start trouble.

Although B.L. believed defendant and did not think anything of the message, she mentioned it to R.J. and she called Child Protective Services (CPS) to ask if she could lose her children. CPS did not provide her with any information, but shortly thereafter, someone from CPS came to her house and spoke with her four children.

On June 11, 2013, R.J. was bathing A.J. and her younger brother, L.J., in the tub when L.J. reached for A.J.'s "business," which is the term the family used for private parts. R.J. told him, "Hey, that's Sister's business, not yours[.]" A.J. responded, "But Grandma, Lee's business is my business."⁴ R.J. testified that A.J.'s statement did not really register with her initially and she said, "No." A.J. then stated, "Yeah, but we can't tell anybody because I'll get in big trouble[.]" and "We can't because I'll get in big, big trouble." A.J. then told R.J. that defendant put candy on his "business" and she licked it off.

R.J. testified that A.J. was afraid and she kept saying she would get in big trouble, defendant would tear down the clubhouse he built, and her parents would not like her anymore. A.J. told R.J. that the candy came from defendant's pocket and that he would take her to the basement of their house. R.J. reassured A.J. she would not get in trouble, but A.J. said, "Make sure you don't tell." At A.J.'s request, R.J. "pinky promise[d]" that she would not tell.

R.J. "was in a fog" and texted B.L. to tell her that L.J. wanted to spend the night, although he did not. It was too late, however, and defendant was already in the driveway

⁴ The family referred to defendant by his middle name, Lee.

to pick up L.J. A.J. hid behind the door and kept shaking her head and saying, “Don’t tell, Grandma. Don’t tell[.]” After L.J. left with defendant, R.J. texted B.L. to ensure that defendant took L.J. straight home. She described everything as a blur and after A.J. went to sleep that night, she called CPS for guidance.

In the morning, R.J. called in sick to work and took A.J. home after defendant left for work. R.J. told B.L. that A.J. said defendant was doing things to her. B.L. then spoke with A.J., who did not want to repeat what she told R.J. because she did not want to get in trouble. After B.L. reassured A.J. that she was not in trouble and “pinky promised” her that B.L. would not tell, A.J. said that defendant was putting candy on her “business[.]” and on his “business,” and they were licking it off each other.

After that, R.J. left with the children and B.L. called the police. While the police were at the house, defendant drove up and parked. He asked B.L. why the police were there and after she told him she was making a report, the nature of which she did not disclose, he became angry and drove away. B.L. did not see defendant after that, although he texted her that day. At Detective Rios’s direction, she responded and told him about A.J.’s allegations. Law enforcement subsequently attempted to locate defendant, but he was not arrested until approximately one year later based on a tip.

B. A.J.’s Interviews

After B.L. contacted police, A.J. had three MDIC (Multi-Disciplinary Interview Center) interviews within an approximately two-week period in June 2013. The first two interviews were conducted by a CPS social worker. Detective Rios described A.J.’s demeanor during the first interview as that of a happy, normal little girl until the questions shifted to defendant, at which point A.J. shut down, hid her face in her hands and repeated that she did not want to talk about it. During the second interview, A.J. was not enthusiastic, but “[s]he was okay” until asked what she told her grandmother, at which point she again covered her face, shook her head and said, “I can’t do it[.]” Both interviews were terminated when A.J. shut down. Detective Rios recommended that A.J.

begin counseling, told B.L. and R.J. not to ask A.J. any questions, and told them to contact her whenever A.J. was ready to talk.

Approximately one week after the second interview, the family contacted Detective Rios and she set up a third interview, which she conducted. During this interview, A.J. asked if Rios was going to take defendant to jail because “he did it to down here” and she pointed downward. She also said Lee touched her there. She pointed to their private parts on diagrams provided by Rios and said “[h]e did it inside it,” and under her shorts and “chonies.” She stated that he “hid” candy on his “business” and later that he put candy from a bottle “[o]n his business” and had her lick it off. She described the candy as red and said it came from a “little tiny bottle” kept “behind” her mother’s dresser where she could not see it.

C. Dress

Shortly after A.J.’s third interview, B.L. was cleaning defendant’s things out of a cabinet in the basement when she found a dress of A.J.’s behind a box of items belonging to defendant. The dress was covered in dried liquid. Detective Rios collected the dress and also collected some bottles of flavored lubricant B.L. kept on her dresser in a picture box, one of which was red and had obviously been used. Three spots on the dress were analyzed and determined to be semen that matched defendant’s DNA profile.⁵

D. A.J.’s Trial Testimony

A.J. was eight years old when she testified at trial and she did not recall very many details. She testified that she did not like defendant when he lived with them and that she spent time with him in the basement. After three breaks in her testimony, the latter two at her request, A.J. testified that defendant took her into the basement and was “bad” to her,

⁵ The prosecution’s DNA expert testified that the DNA profile obtained from the dress “is estimated to occur at random among other unrelated individuals in approximately 1 in 88 quintillion Caucasians, 1 in 980 quintillion Hispanics, . . . , and 1 in 56 quintillion African-Americans.”

and he touched her “business” with his “business.” She said it was a long time ago and she “might not remember most of the questions[,]” but she talked to her mother and grandmother about it and she told them the truth. She did not recall talking to Detective Rios about it, but said her memory was better at age four than at trial. She also did not recall any candy or red liquid, and said defendant did not make her lick his “business.” However, she testified he touched her with his business “a lot.”

E. Letter and Recorded Jail Calls

On July 3, 2014, approximately one year after B.L. reported A.J.’s allegations of abuse, defendant was arrested and detained at the Merced County Jail. On May 27, 2016, defendant spoke with his brother, J.P., from the jail. During the recorded call, defendant asked his brother if he remembered the house defendant used to live in by the cigarette store.⁶ His brother said yes and defendant asked him to find out if “those people still live there[.]” Defendant said he needed to know if “they’re physically there. There’s a reason for it, trust me. Ok? I—I found another alt- avenue on this issue.” As the call ended, defendant said, “Um, we got until—we got until, uh, next month to do this, in time, ok but— [¶] Let—please, I’m begging you because I got people[.]” After his brother said he would, defendant said, “OK, because there’s going to be some people doing—doing some stuff for me, ok? [¶] ... [¶] I need to get out.”

On June 6, 2016, an inmate being processed for release from the jail handed Officer Lacey a sealed letter, which caught Lacey’s attention because outgoing letters must be scanned by staff and therefore are usually unsealed. Lacey was busy at the time so he left the letter in the control room. Defendant later contacted the control room through an intercom and asked for the letter back. Defendant subsequently asked for the letter back a second time.

⁶ Defendant’s mother testified that the house defendant and B.L. lived in together was down the street from a cigarette store.

The letter, dated May 28, 2016, read:

“‘Urgent. Read and burn. J[P.]’ ... ‘this letter has been secured and mailed from the house. Now I can speak freely. I’m not going to ask you to get involved in anything that would get you into trouble with the law. Issue at hand. I need to know if B[L.] and her kids still live at the house on East 18th, 146 East 18th. Please understand that I’m having some dangerous people handle it’ ‘... and I need to know for 100 percent that they are there. If so, please say in my voicemail the following code, “The snake has made its nest.”’ ... [¶] ‘Furthermore, once the place has been burned and article in Sun-Star online’ ... ‘it says “no survivors. Please, J[P.], understand that this was my last resort and only possible way for me to end this malicious prosecution. I will not tell you who’s doing this for me, but understand that it’s for real. Once you notify me telling me that they are still there, you’ll know for a fact once the job has been done.... ‘[I]t will be big news probably on the news. J[P.], once I get out of here, you and I will get more’—‘we’ll move away from this crazy [town] After you read this letter, please burn. Destroy any remains to protect you and me. With all my respect and love, your brother Lee.’”⁷

On June 28, 2016, defendant again spoke with his brother, J.P., from the jail.

During the recorded call, they discussed J.P.’s impending homelessness, that defendant’s calls were being blocked inside the jail, and how defendant would be able to reach him. J.P. indicated he would “get an Obama phone,” but it would take some time. Defendant said, “I’m trying to get out there quicker, I got somebody taking care of things, I just gotta, you know what I mean? I gotta keep my communication open otherwise I can’t work things the way it’s supposed to go down.” He also said, “This person’s- the person I’m talking about is going to be coming to you. I got a letter for you. It’s very important.” J.P. said he planned to leave Merced after taking care of some things and defendant asked if J.P could wait for him, stating he would be out no later than September 2016 because his trial date was September 13, 2016. He then said, “I need to get this phone thing up because I don’t have a way to talk to people that are important[,]”

⁷ The jury saw the letter, but it was read into the record by Officer Lacey. B.L. testified that the address where she lived with defendant and her children in 2013 was 146 West 18th Street.

and “I’ll try to call this number again on Friday- or Thursday or Friday, and hopefully you’ll have it in my voicemail, and if you can get another one[.]”

Two other recorded telephone calls from the jail were introduced into evidence. On November 29, 2016, defendant had a conversation with an unidentified woman and told her “they” were trying to get him for “[c]onspiracy to commit murder[.]” of “[t]he whole family” over “a letter [he] wrote, that never got out.”⁸ Approximately 30 minutes later, he had a conversation with an unidentified man who stated, “And I hear, I hear this conspiracy thing. I mean, I talked to high end[.]” Defendant replied, “I’ll tell you. I’ll tell you what it’s about. Okay. Listen. I’m not denying I wrote a letter. It was intercepted. Okay. It had a threat in it.”

II. Defense Case

Dr. Jessen, a forensic nurse practitioner and Ph.D., examined A.J. on July 3, 2013. She did not find any forensic evidence during the physical examination. On cross-examination, she explained that she did not find any lacerations, bruises, or healed injuries, a finding which was consistent with the reported history. On redirect examination, she stated that her findings were consistent with both an assault and the absence of an assault, and she could neither confirm nor deny that sexual abuse occurred.

Defendant’s mother testified that she visited defendant and B.L. numerous times at their house. The interactions she saw between the two were positive and the children seemed happy around defendant. During one visit, B.L. stated she did not like defendant’s exes because they lied and told stories about him. However, she also stated that she treated defendant too well and “she wanted to have a better bad story about him.” B.L. was not laughing at the time and defendant’s mother thought it was “a sick joke[.]” and said, ““You’re not serious[.]”” B.L. replied, ““Well, you’ll see.”” Defendant’s

⁸ The September trial date was continued to November 9, 2016, but opening statements and the presentation of evidence did not begin until December 1, 2016.

mother said defendant was present for the conversation and heard everything B.L. said. When his mother asked him what was going on, he said he did not know.

III. Rebuttal

On rebuttal, Detective Rios testified that when she interrogated defendant on July 3, 2014, following his arrest, he did not mention any conversation like that described by his mother during her testimony. In addition, the prosecutor played a recorded conversation from June 12, 2013, in which Officer Garcia asked defendant over the phone what B.L. would gain from calling the police and making something like this up. Defendant replied, "I'm not saying B[L.]'s making this up."

DISCUSSION

I. Constitutional Challenge to A.J.'s Testimony

A. Background

Following hearing testimony by A.J.'s mother and Shaula Brent, a licensed clinical social worker and A.J.'s counselor, the trial court found, over defendant's objection, that A.J. would suffer severe emotional distress if required to testify in the courtroom in defendant's presence, and the court granted the prosecutor's section 1347 motion to allow A.J. to testify from another room via two-way, closed-circuit television. After A.J. testified at trial, the prosecutor moved to admit A.J.'s statement to Detective Rios pursuant to Evidence Code section 1360. Defense counsel objected and argued that A.J. was not a competent witness, citing the breaks in her testimony and her inability to answer questions or elaborate in her answers. (Evid. Code, § 1360, subd. (a)(3)(A).)

Defendant does not challenge the trial court's decision to permit A.J. to testify via closed-circuit television or renew his argument that A.J. was not competent to testify at trial, but he claims that his Sixth Amendment right to confront and meaningfully cross-examine A.J. was violated because she failed to provide verbal responses to some questions; she failed to respond to other questions; at times her face was not visible in the camera; and unbeknownst to trial counsel, she was coached by Brent. (§§ 868.5,

subd. (a), 1347, subd. (f).) Defendant also claims that Brent’s coaching violated his right to due process and a fair trial. The People argue that “because A.J. was present to give testimony, she was under oath, she was cross-examined, and the jury observed her demeanor as she gave testimony[,]” the confrontation clause was satisfied, and that defendant received a fair trial. We agree with the People that there was no constitutional error.

B. Confrontation Clause Claim

1. Legal Standard

“The Confrontation Clause of the Sixth Amendment gives the accused the right ‘to be confronted with the witnesses against him.’” (*United States v. Owens* (1988) 484 U.S. 554, 557 (*Owens*); accord, *Maryland v. Craig* (1990) 497 U.S. 836, 844.) “The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” (*Maryland v. Craig, supra*, at p. 845.)

“[T]he right guaranteed by the Confrontation Clause includes not only a ‘personal examination,’ [citation], but also ‘(1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the “greatest legal engine ever invented for the discovery of truth”; [and] (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.’” (*Maryland v. Craig, supra*, 497 U.S. at pp. 845–846, quoting *California v. Green* (1970) 399 U.S. 149, 158, fn. omitted.) “The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial

testing that is the norm of Anglo-American criminal proceedings.” (*Maryland v. Craig*, *supra*, at p. 846; accord, *People v. Gonzales* (2012) 54 Cal.4th 1234, 1268.)

We review defendant’s confrontation clause claim de novo. (*People v. Hopson* (2017) 3 Cal.5th 424, 431; *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 964 (*Giron-Chamul*.)

2. Analysis

a. A.J.’s Responses and Visibility on Camera

“‘[T]he Confrontation Clause guarantees only “an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’”” (*Owens, supra*, 484 U.S. p. 559; *People v. Gonzales, supra*, 54 Cal.4th at p. 1265.) We have reviewed A.J.’s videotaped testimony and we are unpersuaded by defendant’s characterization of that testimony.

A.J. was clearly uncomfortable when the prosecutor and defense counsel broached the subject of her molestation; her demeanor became somber and at times she visibly shrank down in her seat. Several of her responses were nonverbal in that she shook her head or shrugged her shoulders, but even adult witnesses at times forget to answer audibly and it is clear from the record that the attorneys were able to interpret A.J.’s occasional nonverbal responses to their questions. A.J. was cooperative with both attorneys and she did not refuse to answer questions, although she no longer remembered very many details of the events. (*Owens, supra*, 484 U.S. at pp. 559–560 [opportunity for effective cross-examination not denied by witness’s memory loss].) Neither her inability to remember events or details nor her emotional difficulty with the subject matter may be conflated with a refusal to answer questions, although we note that even when a witness narrows the practical scope of cross-examination by refusing to answer questions, the Sixth Amendment is not necessarily violated. (*People v. Homick* (2012) 55 Cal.4th 816, 861, citing *People v. Perez* (2000) 82 Cal.App.4th 760, 766; *Giron-Chamul, supra*, 245

Cal.App.4th at pp. 965–966; *People Foa Lima* (2015) 239 Cal.App.4th 1376, 1392; *People v. Murillo* (2014) 231 Cal.App.4th 448, 455–456.)

Regarding A.J.’s visibility in the camera, she was seated in an office chair looking at a computer monitor with a camera mounted to its top. Defense counsel told A.J. twice he could only see the top of her head. As evidenced by the video, this occurred once when she leaned forward toward the computer monitor and once when she leaned on her hand. She immediately sat up straight and raised her head when defense counsel brought it to her attention and we find these were isolated incidents of no consequence.

Defendant’s reliance on *Giron-Chamul* for the proposition that A.J.’s conduct deprived him of his ability to meaningfully cross-examine her is misplaced. In *Giron-Chamul*, the five-year-old victim testified via closed-circuit television for approximately four hours over three days. (*Giron-Chamul, supra*, 245 Cal.App.4th at p. 941.) She spent a significant amount of time out of her chair, either under the conference table or wandering around, and she refused to answer hundreds of questions. (*Id.* at pp. 943–953, 968.)

The Court of Appeal noted “[t]here is a dearth of California authority addressing the circumstances under which a defendant might be denied an adequate opportunity to effectively cross-examine a very young child[.]” but after reviewing several federal and out-of-state decisions, the court concluded that “these decisions suggest a continuum on which the right to an opportunity for effective cross-examination is more likely violated as the number of relevant questions that go unanswered increases. [Citation.] Here, [the victim] refused to answer hundreds of questions, of which approximately 150 were substantive. And nothing about her lack of cooperation can be attributed to the trial court, prosecutor, or defense counsel, all of whom took laudable measures to try to make it easier for her to testify.” (*Giron-Chamul, supra*, 245 Cal.App.4th at pp. 967–968.)

The victim “refused to respond to many questions that were crucial to testing her claims, particularly those involving her drawing and her report to the day care provider,

the forensic interview, and other possible explanations for her apparent sexual knowledge. Nor would she respond to many questions bearing on her credibility more generally, such as follow-up questions about her assertion that [the defendant] had defecated in her hair. We need not determine the exact line on the continuum when a child witness's refusal to answer questions impedes cross-examination enough to violate the confrontation clause because the line was clearly crossed here. [The victim's] failure to respond to questions on critical topics deprived [the defendant] of "a full and fair opportunity to probe and expose ... infirmities" in her testimony and out-of-court statements [citation], and her testimony should have been stricken." (*Giron-Chamul, supra*, 245 Cal.App.4th at pp. 968–969.)

A.J.'s testimony in this case bears no resemblance to that described in *Giron-Chamul*. "The right of confrontation secures to an accused an adequate opportunity to cross-examine adverse witnesses; it does not guarantee testimony free from forgetfulness, confusion, or even evasion." (*People v. Dennis* (1998) 17 Cal.4th 468, 526; accord, *Owens, supra*, 484 U.S. at pp. 559–560.) We reiterate that although it was difficult for A.J. to talk about what happened in the basement, she cooperated with both attorneys and her inability to recall events or details does not appear to be attributable to anything other than her age at the time of the crimes and the passage of time.

b. Support Person's Conduct

Next, defendant claims that A.J.'s support person, Brent, coached and encouraged A.J., and that during the third break in testimony and unbeknownst to defense counsel, A.J. returned to her seat with a drawing on a piece of paper. Defendant contends that Brent's conduct violated his Sixth Amendment rights. Again, we disagree with defendant's characterization of the record.

At the beginning of A.J.'s direct examination, Brent could be heard whispering, "You're doing great[.]" The comment occurred during a pause in the examination when the prosecutor inquired about making an adjustment to the camera view and told

A.J. to hold on; there was neither a question nor an answer pending. The prosecutor then requested a break in the proceedings to adjust the camera and, during that break, he stated on the record that he heard Brent's comment. Defense counsel agreed and stated that while he understood, Brent could not do that. The trial court thereafter admonished Brent not to communicate with the witness. With defense counsel's agreement, the prosecutor went to the room where A.J. was testifying and told her she could not look at Brent, who was seated behind her and to the side. Brent commented to the prosecutor that she was unaware she had said anything and the issue did not reoccur.

The next two breaks were requested by A.J. when the prosecutor's questions turned to what occurred in the basement. During the final break, A.J. and Brent left the room for water and, when they returned, Brent put a piece of paper down in front of A.J. and told her that if she became scared, all she had to do was look at the paper. A.J. described defendant as a "bad, bad chicken," and appears to read sentences from the paper, such as, "I am not scared of you anymore," "you are super dumb," "you are like a big ball of lava," and "you cannot hurt me." A.J. commented that she wrote the important parts in red and that she would read the paper if she became scared.

Based on our review of the video evidence, it appears that A.J. wrote down her thoughts and feelings on the paper, and it is clear that the paper was intended to be a support tool should she become scared during her testimony. A.J. appears to glance down at the paper at one point during testimony, but she did not read from the paper, hold it up or otherwise appear to rely on it to guide her, and there is no indication the jury saw the paper. A.J. was scared of defendant and it is evident from the video that the purpose of the paper was to give A.J. the strength to testify. Under these circumstances, defendant fails to persuade us that the paper differed materially from the two stuffed animals near her and the pink ball she held, which were also present to provide comfort. Critically, the record fails to support defendant's position that the paper was a "script"

created or employed by Brent to somehow coerce or coach A.J., or that it had any impact on the substance of A.J.'s testimony or her demeanor.

Finally, defendant argues that Brent, through her body language, affected the reliability of A.J.'s testimony, but he fails to explain how this was so. After being admonished during the first break in testimony, Brent made no further comments. She occasionally nodded slightly during A.J.'s testimony, but neither the jury nor A.J. could see Brent. After the prosecutor told A.J. during the first break that she could not look at Brent, she did not do so and she kept her eyes on the computer monitor with the camera.

Defendant asserts that Brent was "very visibly pleased" when A.J. incriminated defendant and she "gave an enthusiastic thumbs up" during another part of A.J.'s testimony. As previously discussed, A.J. became visibly withdrawn when the questioning turned to what happened to her in the basement and she requested two breaks before being able to answer the prosecutor's questions about what happened. When A.J. testified to the effect that defendant touched her "'business'" with his "'business'" in the basement, Brent lifted her head up and looked toward the ceiling; and when A.J. testified that she only talked to Brent about what happened in the basement, but "not a lot[.]" Brent moved her right thumb upward. Whether the gestures were conscious or not, Brent's minor movement of her right thumb and her act of lifting her head upward were not visible to A.J. or the jury, and the record simply does not support defendant's claim that Brent coached or otherwise influenced A.J.'s testimony.

Defendant cites *People v. Adams* (1993) 19 Cal.App.4th 412, 438 (*Adams*) for the principle that "[t]he presence of a second person at the stand affects the presentation of demeanor evidence by changing the dynamics of the testimonial experience for the witness." However, neither A.J. nor the jury saw Brent and, as we have explained, there is nothing in the record supporting the claim that Brent conducted herself in a manner that impacted the substance of A.J.'s testimony or her demeanor. While it may be argued that even Brent's mere presence had some effect on the proceedings (*ibid.*), her presence

as a support person was authorized by law and cannot, without more, demonstrate a constitutional violation (§§ 868.5, subd. (a), 1347, subd. (f); *Adams, supra*, at pp. 441–442; *People v. Chenault* (2014) 227 Cal.App.4th 1503, 1515–1516 [presence of service dog not inherently prejudicial]). Based on the foregoing, we conclude that defendant was not deprived of his right to confront and cross-examine A.J., either by A.J. or by Brent.

C. Due Process Claim

Defendant also claims that Brent’s coaching of A.J. during breaks violated his right to due process and a fair trial. Defendant cites *Adams* and *People v. Patten*, stating the cases “mainly speak to the influence the presence of a support person may have on a jury, but both decisions recognize that there is a danger the support person could also influence the witness’s testimony.” (*Adams, supra*, 19 Cal.App.4th at p. 442 [concluding § 868.5, providing for support persons, is constitutional]; *People v. Patten* (1992) 9 Cal.App.4th 1718, 1732–1733 [finding no due process violation resulting from support person’s presence at trial].) In his reply brief, he also additionally cites to the out-of-state decisions in *Sharp v. Commonwealth* (1993) 849 S.W.2d 542 and *State v. Smith* (2009) 383 S.C. 159 for support.

In *Sharp v. Commonwealth*, a family friend “gestured to the child witness during her testimony and communicated the substance of some testimony from the courtroom to one or more separated witnesses.” (*Sharp v. Commonwealth, supra*, 849 S.W.2d at p. 547.) The Supreme Court of Kentucky concluded that common sense dictated that the family friend’s conduct deprived the defendant of a fair trial. (*Ibid.*) The court explained, “Even taking [the friend’s] version of what she did at face value, the witness received encouragement, approval and comfort at the time her credibility was being assessed by the jury. It would be impossible to say that the witness did not derive confidence and assurance from this positive reinforcement which influenced the jury to believe her. Whether [the friend’s] contact with the separated witnesses affected the trial

can never be known. After learning that these witnesses had been apprised as to testimony from the courtroom, defense counsel did not recall them to the stand.” (*Ibid.*)

In *State v. Smith*, the Supreme Court of South Carolina concluded that the trial court properly exercised its authority to grant a new trial after finding that conduct by the victim’s relative while the victim was testifying deprived the defendant of a fair trial. (*State v. Smith, supra*, 383 S.C. at pp. 168–169.) In that case, the trial judge found that the victim’s relative communicated with him while he was testifying, using body language and other nonverbal signals, her conduct ““may have overridden [his] free will””; and her ““behavior and the potential for corruption of [his] testimony clearly denied [the defendant] a fair trial.”” (*Id.* at p. 164.)

However, as we have stated, the jury did not see Brent; A.J. did not look at Brent while she testified; and the record does not support defendant’s contention that Brent coached A.J.’s testimony, verbally or nonverbally. As such, defendant fails to show a due process violation. (*People v. Myles* (2012) 53 Cal.4th 1181, 1214 [absent improper interference, a support person’s mere presence does not infringe on due process and confrontation clause rights]; *People v. Spence* (2012) 212 Cal.App.4th 478, 514 [“It is established that a support person’s mere presence with a witness on the stand, pursuant to section 868.5, does not infringe upon a defendant’s due process and confrontation clause rights, unless the support person improperly interferes with the witness’s testimony, so as to adversely influence the jury’s ability to assess the testimony.”]; accord, *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1171; see *People v. Lopez* (2018) 5 Cal.5th 339, 354 [rejecting due process claim based on argument that ““children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement””]; *People v. Chenault, supra*, 227 Cal. App.4th at pp. 1515–1516 [rejecting claim that presence of support dog violated the defendant’s right to a fair trial].)

II. Admissibility of A.J.'s Prior Statements

A. Background

Pursuant to Evidence Code section 1360 and over defense counsel's objection that A.J. was not a competent trial witness and that her statements were not reliable, the trial court admitted A.J.'s statements to B.L. and Detective Rios, and her videotaped interview with Rios. Evidence Code "[s]ection 1360 creates a limited exception to the hearsay rule in criminal prosecutions for a child's statements describing acts of child abuse or neglect, including statements describing sexual abuse." (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367 (*Roberto V.*)) The statute requires "that: (1) the court find, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances surrounding the statement(s) provide sufficient indicia of reliability; (2) the child either testifies at the proceedings, or, if the child is unavailable to testify, other evidence corroborates the out-of-court statements; and (3) the proponent of the statement gives notice to the adverse party sufficiently in advance of the proceeding to provide him or her with a fair opportunity to defend against the statement." (*Ibid.*, fn. omitted; accord, *People v. Brodit* (1998) 61 Cal.App.4th 1312, 1329 (*Brodit.*))

On appeal, defendant claims the trial court erred in admitting the statements and video because A.J. was not subject to cross-examination, in violation of his Sixth Amendment rights, and her statements were unreliable. The People disagree. As discussed in the preceding section, defendant was not deprived of his Sixth Amendment right to cross-examine A.J. at trial and, therefore, that portion of his argument has been resolved against him. As we shall explain, we also resolve his argument that the statements were unreliable against him.

B. Standard of Review

We review a trial court's ruling on the admission or exclusion of evidence for abuse of discretion. (*People v. Kopatz* (2015) 61 Cal.4th 62, 85; accord, *People v. DeHoyos* (2013) 57 Cal.4th 79, 131; *People v. Mitchell* (2020) 46 Cal.App.5th 919, 927

[Evid. Code, § 1360]; *Roberto V.*, *supra*, 93 Cal.App.4th at p. 1367 [same].) “Under this standard, a trial court’s ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151, disapproved in part on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 390.)

C. Analysis

In sexual abuse cases, factors relevant in determining whether a child’s statements are reliable include: “(1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected of a child of a similar age; and (4) lack of motive to fabricate.” (*In re Cindy L.* (1997) 17 Cal.4th 15, 30 (*Cindy L.*), citing *Idaho v. Wright* (1990) 497 U.S. 805, 821–822 (*Wright*); accord, *Roberto V.*, *supra*, 93 Cal.App.4th at p. 1374; *People v. Eccleston* (2001) 89 Cal.App.4th 436, 445 (*Eccleston*); *Brodit*, *supra*, 61 Cal.App.4th at p. 1330.) Although not dispositive of the matter, “ability to understand the duty to tell the truth and to distinguish between truth and falsity is also a factor in determining the reliability of [a child’s] extrajudicial statements.” (*Cindy L.*, *supra*, at p. 30; accord, *Brodit*, *supra*, at p. 1330.)

1. A.J.’s Statements to B.L.

On the evening of June 11, 2013, A.J. disclosed to her grandmother, R.J., that defendant had her lick candy off his “business.” A.J. was fearful and asked R.J. to promise she would not tell. The next morning, R.J. informed B.L. that A.J. said defendant had done some things to A.J. B.L. questioned A.J., who expressed fear she would get in trouble and her playhouse would be torn down. After B.L. “pinky promised” she would not tell and A.J. would not get in trouble, A.J. disclosed that

defendant was licking candy from her “business” and having her lick candy from his “business” and that it hurt.

Defendant argues that A.J.’s statements to her mother were not reliable given her age and the fact that her grandmother had questioned her the night before. We disagree. Defendant cites no authority for his position, which is contrary to established law. If mere age and the fact that a disclosure was repeated to more than one person were sufficient to preclude the admission of statements under Evidence Code section 1360, the hurdle would be virtually insurmountable in sexual abuse cases involving young children. Instead, the determination requires consideration of “the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.” (*Wright, supra*, 497 U.S. at p. 820; accord, *Cindy L., supra*, 17 Cal.4th at pp. 29–30.)

A.J.’s disclosure to her grandmother that defendant had her lick candy off his “business” was spontaneous, and R.J. testified that she was “flabbergasted” and did not question A.J. A.J.’s disclosure to her mother the next morning was consistent with this prior, spontaneous disclosure to her grandmother. (*Cindy L., supra*, 17 Cal.4th at p. 35; *Eccleston, supra*, 89 Cal.App.4th at p. 446; *Brodit, supra*, 61 Cal.App.4th at p. 1330.) Nothing in the record suggests A.J.’s mental state rendered the statements unreliable (*Brodit, supra*, at p. 1330), and there is no evidence suggesting A.J. had any motive to lie (*Cindy L., supra*, at p. 35; *In re Daniel W.* (2003) 106 Cal.App.4th 159, 165 (*Daniel W.*); *Roberto V., supra*, 93 Cal.App.4th at pp. 1374–1375; *Eccleston, supra*, at p. 448; *Brodit, supra*, at p. 1330). Although at trial more than three years later, A.J. testified she did not like defendant, neither R.J. nor B.L. observed anything amiss with respect to defendant and his relationship with B.L.’s children prior to the disclosure of abuse. B.L. testified that they took trips together as a family, defendant had a “[r]eally good” relationship with the children, A.J. was “very happy” with him, he played with A.J. and her younger brother, and he had a parental-like role in the household.

With respect to age-appropriate terminology or knowledge, the evidence established that in A.J.'s family, the term "business" meant private parts, or genitalia. While that term was not age inappropriate, the act of licking candy off of genitalia certainly evidences knowledge of a sexual act beyond the expected awareness of a normal four-year-old child. (*Daniel W.*, *supra*, 106 Cal.App.4th at pp. 165–166; *Roberto V.*, *supra*, 93 Cal.App.4th at p. 1375; *Eccleston*, *supra*, 89 Cal.App.4th at p. 447; *Brodit*, *supra*, 61 Cal.App.4th at p. 1330.) Finally, the social worker established A.J.'s ability to distinguish between the truth and a lie during her first and her second MDIC interview, the first of which occurred less than a week after her disclosure of abuse to B.L. Accordingly, in view of the totality of the circumstances, we find no error in the determination that A.J.'s statements to B.L. were reliable and therefore admissible under Evidence Code section 1360. (*Wright*, *supra*, 497 U.S. at p. 820; accord, *Cindy L.*, *supra*, 17 Cal.4th at pp. 29–30.)

2. A.J.'s Statements to Rios

After B.L. contacted the police on June 12, 2013, A.J. was interviewed by a social worker on June 17, 2013. She appeared happy until questioned about defendant, at which time she hid her face and said, "I don't want to talk about it. I don't want to tell you." On June 20, 2013, she was again interviewed by the social worker and when the subject turned to defendant, she hid her face and said, "I can't do it[.]" Detective Rios, who had years of experience investigating sexual assault cases and had specialized training in the subject, testified that she told the family to contact her when A.J. was ready to talk and she did so because she believed, based on her background, that A.J. was afraid to talk about what happened as opposed to having nothing to disclose. A.J. was subsequently interviewed for a third time on June 28, 2013.

During the third interview, which was conducted by Detective Rios, A.J. again disclosed that defendant put candy on his "business" and had her lick it, consistent with her spontaneous disclosure to R.J. and her subsequent disclosure to B.L. As with A.J.'s

statements to B.L., nothing in the record suggests the statements were unreliable due to an issue with her mental state, she had no motive to lie and describing the act of licking candy from genitalia is unexpected from a four year old child. Further, the interview with Detective Rios was mere weeks after A.J.'s initial disclosure to R.J. Under these circumstances, we also conclude that the trial court did not err in finding A.J.'s statements to Rios reliable and admissible under Evidence Code section 1360.

Defendant's contrary arguments are unpersuasive. Defendant faults Rios for not establishing that A.J. knew the difference between the truth and a lie or that "she understood terms such as over or under or inside or outside[.]" He also asserts that A.J. had trouble with numbers. These contentions are untenable.

Notwithstanding that Evidence Code section 1360 does not mandate an affirmative showing on either point, the social worker who conducted A.J.'s first two MDIC interviews established that A.J. knew the difference between the truth and a lie and established that she grasped certain terms and concepts. Defendant offers no explanation why the failure to cover this territory during a third interview that occurred only a week later is of any significance. As for the concept of numbers, A.J. demonstrated she was able to count crayons, which we believe is all that may be reasonably expected from a four-year-old in preschool.

We decline defendant's invitation to sift through A.J.'s third interview and identify every statement that might, in isolation, suggest oddness or fancy, and Rios was not required to delve deeper into every statement made by A.J. It does not strike us as unusual, for example, that a four-year-old might not know Rios's name and while we cannot discern from the record what A.J. meant when she was talking about broken bones, her reference to being in college when asked about her teacher is understandable given that she attended preschool at Merced College while her mother attended classes there.

Defendant also contends that A.J. did not disclose any abuse in her first two MDIC interviews or in the CPS interview that preceded the initial disclosure to R.J. As discussed, A.J. refused to discuss defendant or what she told her grandmother in her first two MDIC interviews, but Rios believed this was fear-driven rather than a function of having no information to disclose. As for the CPS interview, that occurred pre-disclosure and the exact date the abuse began is unclear. That interview may or may not have preceded the initiation of the molestations but, regardless, A.J.'s nondisclosure at that time to a stranger is entirely consistent with her postdisclosure conduct: the fear she displayed when discussing the issue even with her grandmother and mother, whom she loved and trusted, and her refusal to discuss the issue in her first two MDIC interviews.

Finally, defendant relies on *State v. Michaels* (1994) 136 N.J. 299 for the proposition that Rios's interview of A.J. was "so suggestive that it created a substantial risk that the statements elicited lacked sufficient reliability to justify their admission at trial." We find *State v. Michaels* inapt.

In that case, the Appellate Division reversed, on several grounds, the convictions of "a nursery school teacher ... convicted of bizarre acts of sexual abuse against many of the children who had been entrusted to her care." (*State v. Michaels, supra*, 136 N.J. at p. 303.) The state sought review (*ibid.*), and the New Jersey Supreme Court addressed the issue concerning the propriety of assessing reliability as a predicate to the admission of in-court testimony (*id.* at p. 316). The court concluded that a pretrial taint hearing was required should the prosecutor elect to retry the case and affirmed the Appellate Division's judgment, observing, "The interrogations undertaken in the course of this case utilized most, if not all, of the practices that are disfavored or condemned by experts, law enforcement authorities and government agencies[]" (*id.* at p. 313), including "the absence of spontaneous recall, interviewer bias, repeated leading questions, multiple interviews, incessant questioning, vilification of [the] defendant, ongoing contact with peers and references to their statements, and the use of threats, bribes and cajoling, as

well as the failure to videotape or otherwise document the initial interview sessions” (*id.* at p. 321).

We have reviewed the videotaped interview in its entirety and no such circumstances even arguably occurred in this case. Detective Rios interviewed A.J. on the substance of her molestation only once and the interview lasted only 32 minutes, approximately. A.J. clearly had spontaneous recall of the relevant events, including the use of red candy that her mother kept hidden on the dresser and that defendant had her lick the candy off “his business.” A.J. stated she told her grandmother and mother about what happened; Rios’s demeanor was relaxed and friendly; and Rios did not threaten, bribe or cajole A.J. into making any allegations of molestation.

Additionally, we note that in *Wright*, discussed in the preceding subsection, the complaining witness, who was only two years old at the time of the alleged crimes, was interviewed by a pediatrician who asked blatantly leading questions such as, ““Does daddy touch you with his pee-pee[?]”” (*Wright, supra*, 497 U.S. at p. 811.) The United States Supreme Court agreed with the Idaho Supreme Court that the doctor’s questioning of the child was troubling. (*Id.* at pp. 826–827.) Here, in contrast, Detective Rios did not engage in this type of questioning. A.J., for example, spontaneously asked at the outset if Rios was going to take defendant to jail because “he did it to down here,” and Rios had her point out what she meant on a diagram. Rios also asked A.J. questions such as, “Did someone touch you there? Yeah. Who touched you there?” Accordingly, we find defendant’s reliance on *State v. Michaels* misplaced given the facts of this case and we find no error in the admission of A.J.’s statement to Detective Rios.

III. Consciousness of Guilt Evidence

A. Background

Prior to trial, the court held a hearing to determine the admissibility of the jailhouse letter written by defendant and, during trial, it held a hearing to determine the admissibility of the four jailhouse calls. The prosecutor sought to introduce the letter and

the calls on the ground that they were relevant to defendant's consciousness of guilt. Defense counsel objected on grounds of foundation, relevance and undue prejudice under Evidence Code section 352. The trial court overruled the objections and admitted the evidence.

On appeal, defendant claims that the probative value of the evidence was substantially outweighed by the danger of undue prejudice and the trial court erred in concluding otherwise. (Evid. Code, § 352.) We agree with the People that the trial court did not abuse its discretion in admitting the evidence.

B. Admission of Evidence Under Evidence Code Section 352

1. Legal Standard

“‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action[,]” (Evid. Code, § 210), and, under California law, all relevant evidence is admissible except as otherwise provided by statute (Evid. Code, § 351). Of pertinence here, Evidence Code section 352 limits the admission of relevant evidence as follows: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

However, “‘[p]rejudice’ as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. Unless the dangers of undue prejudice, confusion, or time consumption “‘substantially outweigh’” the probative value of relevant evidence, a section 352 objection should fail. [Citation.] “‘The “prejudice” referred to in Evidence Code section 352 applies to evidence which

uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, “prejudicial” is not synonymous with “damaging.” [Citation.]” [Citation.] [¶] The prejudice that section 352 “is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.’ [Citations.] ‘Rather, the statute uses the word in its etymological sense of “prejudging” a person or cause on the basis of extraneous factors. [Citation.]’ [Citation.]” [Citation.] In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.” (*People v. Doolin, supra*, 45 Cal.4th at pp. 438–439; accord, *People v. Bell* (2019) 7 Cal.5th 70, 105; accord, *People v. Tran* (2011) 51 Cal.4th 1040, 1048.)

2. Standard of Review

On appeal, we presume the trial court’s evidentiary ruling is correct and defendant bears the burden of demonstrating error. (*People v. Giordano* (2007) 42 Cal.4th 644, 666; *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1139–1140.) “The trial court enjoys broad discretion in determining the relevance of evidence and in assessing whether concerns of undue prejudice, confusion, or consumption of time substantially outweigh the probative value of particular evidence.” (*People v. Clark* (2016) 63 Cal.4th 522, 572; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 320.) We review the court’s ruling for abuse of discretion. (*People v. Clark, supra*, at p. 572; accord, *People v. Johnson* (2019) 8 Cal.5th 475, 521; *People v. Jackson, supra*, at p. 321.)

3. Analysis

Defendant acknowledges that efforts to suppress testimony may indicate consciousness of guilt, but contends it may also merely indicate anger at being falsely

accused of a crime carrying a sentence of life in prison, thereby diminishing the probative value of the evidence. As defendant correctly concedes, evidence that he planned to have A.J. and her family killed prior to trial was relevant to consciousness of guilt, which “is generally admissible within the trial court’s discretion.” (*People v. Anderson* (2018) 5 Cal.5th 372, 391; accord, *People v. Jones* (2017) 3 Cal.5th 583, 609–610; *People v. Valdez* (2012) 55 Cal.4th 82, 135, fn. 32; *People v. Johnson* (1992) 3 Cal.4th 1183, 1235; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1246; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007.) In this case, the prosecutor argued that the evidence demonstrated defendant’s consciousness of guilt while defense counsel argued that the letter, written more than two years after defendant’s arrest, had nothing to do with the alleged crimes and instead detailed “a completely farcical and outrageous plan” that was the act of a frustrated, hopeless man, but not a guilty man. However, the existence of these competing inferences did not undermine the probative value of the evidence; it was for the jury to decide what inferences to draw. (*People v. Anderson, supra*, at pp. 391–392; *People v. Jones, supra*, at p. 610.)

With respect to prejudice, while the evidence was certainly damaging to defendant, that is not the test. “The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.” (*People v. Jones, supra*, 3 Cal.5th at p. 610.) The evidence here, however repugnant, was nonetheless confined to an unexecuted plan, and we are not persuaded that it was misleading, confusing or so inflammatory that it should have been excluded under Evidence Code section 352. We find no error. (*People v. Jones, supra*, at p. 610.)

C. Instructional Error

1. Background

Alternatively, defendant claims that the trial court erred in failing to instruct the jury sua sponte with CALCRIM No. 375, which is the pattern instruction for the

admission of evidence under Evidence Code section 1101, subdivision (b), pertaining to an uncharged offense offered to prove identity, intent, motive, knowledge or other purpose. The People respond that the evidence was not admitted under that statute and the court did not have a duty to give the corresponding limiting instruction. (*People v. Collie* (1981) 30 Cal.3d 43, 64 (*Collie*).

The trial court here instructed the jury on consciousness of guilt pursuant to CALCRIM No. 371 as follows: “If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.”

After the verdicts were rendered, defendant moved for a new trial on the grounds that the letter and jail calls should not have been admitted, it was error not to instruct the jury pursuant to CALCRIM No. 375, and trial counsel rendered ineffective assistance of counsel when he failed to request the instruction.⁹ Counsel acknowledged her disadvantage by virtue of the California Supreme Court’s decision in *Collie*, discussed *post*, but argued that this case presented the “occasional extraordinary case” exception contemplated in *Collie* and necessitated instruction with CALCRIM No. 375. (*Collie, supra*, 30 Cal.3d at p. 64.) The trial court denied the motion and defendant renews his arguments on appeal regarding the limiting instruction.

2. Standard of Review

We review allegations of instructional error de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) “[I]nstructions

⁹ Trial counsel was relieved from representing defendant several months after the verdict and a different attorney filed the new trial motion and represented defendant for sentencing. As well, the matter was assigned to a different judge prior to the filing of defendant’s new trial motion.

are not considered in isolation. Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury.” (*People v. Holt* (1997) 15 Cal.4th 619, 677; accord, *People v. Thomas* (2011) 52 Cal.4th 336, 356.) “If the charge as a whole is ambiguous, the question is whether there is a “reasonable likelihood that the jury has applied the challenged instruction in a way” that violates the Constitution.” (*Middleton v. McNeil* (2004) 541 U.S. 433, 437 (per curiam).) Jurors are presumed to have understood and followed the trial court’s jury instructions. (*People v. Sandoval* (2015) 62 Cal.4th 394, 422.)

3. Analysis

In this case, the issue was not the identity of whomever sexually molested A.J., but whether defendant committed any crime at all against A.J. As such, the prosecutor did not move to admit the letter and jailhouse calls under Evidence Code section 1101, subdivision (b), to show identity, intent, motive or other purpose, and he confined his argument to consciousness of guilt.¹⁰ As previously stated, the trial court instructed the jury with the pattern instruction regarding consciousness of guilt, including the admonition that such evidence “cannot prove guilt by itself.” (CALCRIM No. 371.) Defendant bears the burden of demonstrating error on appeal and he fails to persuade us that here, the court should have additionally instructed the jury sua sponte with the

¹⁰ Evidence Code section 1101 provides: “(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

“(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

“(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.”

pattern instruction applicable to Evidence Code section 1101, subdivision (b), evidence. (See *People v. Robinson* (2000) 85 Cal.App.4th 434, 445 [statement admissible as admission does not *also* have to meet standard for admissibility of evidence under Evid. Code, § 1101, subd. (b)].)

Defendant acknowledges that in *Collie*, the California Supreme Court concluded there is no *sua sponte* duty to instruct on the limited admissibility of past criminal conduct. The court stated, “Evidence of past offenses may not improperly affect the jury’s deliberations if the facts are equivocal, the charged offense is dissimilar, or the evidence is obviously used to effect one or more of the many legitimate purposes for which it can be introduced. [Citations.] Neither precedent nor policy favors a rule that would saddle the trial court with the duty either to interrupt the testimony *sua sponte* to admonish the jury whenever a witness implicates the defendant in another offense, or to review the entire record at trial’s end in search of such testimony. There may be an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. In such a setting, the evidence might be so obviously important to the case that *sua sponte* instruction would be needed to protect the defendant from his counsel’s inadvertence. But we hold that in this case, and in general, the trial court is under no duty to instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct.” (*Collie, supra*, 30 Cal.3d at p. 64, fn. omitted.)

Defendant argues this case falls within the exception to the rule mentioned in *Collie*, but we disagree. The evidence at issue here “was more than minimally relevant to a legitimate purpose—[demonstrating consciousness of guilt]—and was not ‘a dominant part of the evidence against’ [the] defendant.” (*People v. Valdez, supra*, 55 Cal.4th at p. 139; accord, *People v. Cowan* (2010) 50 Cal.4th 401, 479–480.) Furthermore, it was not unduly prejudicial within the meaning of Evidence Code section 352, as discussed. (*People v. Cowan, supra*, at p. 480.) Accordingly, we find no error under *Collie*.

E. Ineffective Assistance of Counsel

Relatedly, defendant claims that trial counsel was ineffective in failing to request a limiting instruction pursuant to CALCRIM No. 375. “[A] defendant claiming a violation of the federal constitutional right to effective assistance of counsel must satisfy a two-pronged showing: that counsel’s performance was deficient, and that the defendant was prejudiced, that is, there is a reasonable probability the outcome would have been different were it not for the deficient performance.” (*People v. Woodruff* (2018) 5 Cal.5th 697, 736, quoting *People v. Alexander* (2010) 49 Cal.4th 846, 888; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Mickel* (2016) 2 Cal.5th 181, 198.) To establish deficient performance, defendant must show that counsel’s performance “fell below an objective standard of reasonableness under prevailing professional norms.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009; accord, *Strickland v. Washington, supra*, at pp. 687–688; *People v. Mickel, supra*, at p. 198.)

“On appeal, we do not second-guess trial counsel’s reasonable tactical decisions.” (*People v. Lucas* (2014) 60 Cal.4th 153, 278, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.) “[A] defendant’s burden [is] ‘difficult to carry on direct appeal,’ as a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had “‘no rational tactical purpose’” for an action or omission.” (*People v. Mickel, supra*, 2 Cal.5th at p. 198, quoting *People v. Lucas* (1995) 12 Cal.4th 415, 437.)

We disagree with defendant’s contention that there was no satisfactory tactical reason for counsel’s failure to request an instruction pursuant to CALCRIM No. 375. As we have explained, the evidence at issue was introduced solely as circumstantial evidence of defendant’s consciousness of guilt and the court instructed the jury on such evidence pursuant to CALCRIM No. 371.

Given that the prosecutor did not seek to use the evidence for any other purpose and the parties made no arguments that might have misled the jury to the contrary,

defendant fails to meet his burden of demonstrating the absence of any rational tactical purpose for failing to request the instruction. Counsel could have reasonably concluded that under these circumstances, a further limiting instruction was inapplicable, was of no added benefit or may have called further unwanted attention to the evidence. (*People v. Hinton* (2006) 37 Cal.4th 839, 878 [failure to request limiting instruction on the defendant's prior murder conviction not ineffective where jury adequately instructed on use of prior conviction and counsel may have decided it unwise to draw further attention to conviction]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1053 [no showing that counsel was ineffective for failing to request a limiting instruction regarding gang evidence].) Indeed, in denying the new trial motion, the court observed in relevant part that defense counsel "could very well have made a tactical decision not to shine more light on this evidence by asking for that limiting instruction, and I find that well within the professional norm for conduct." Therefore, we conclude that trial counsel's failure to request an additional limiting instruction under CALCRIM No. 375 did not constitute deficient performance.

IV. *Dueñas* Claim

Finally, in supplemental briefing, defendant challenges the imposition of fines, fees and assessments without a determination on his ability to pay, in accordance with the postsentencing decision in *Dueñas*. (Pen. Code, §§ 1202.4, subd. (b)(1), 1465.8; Gov. Code, § 70373.) The People dispute defendant's entitlement to any relief under *Dueñas*.

In this case, the trial court imposed a maximum restitution fine of \$10,000 under Penal Code section 1202.4, subdivision (b)(1); a total court operations assessment of \$160 under section 1465.8; and a total court facilities assessment of \$120 under Government Code section 70373. Because the court imposed a restitution fine in excess of the minimum \$300 fine, defendant had a statutory right to object to the fine based on his inability to pay. (§ 1202.4, subs. (c), (d).) He did not do so and, therefore, he forfeited appellate review of his claim that the trial court erred in imposing the fines, fees

and assessments without determining his ability to pay. (*People v. Taylor* (2019) 43 Cal.App.5th 390, 399–400; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1154.) The imposition of court operations and facilities assessments under Penal Code section 1465.8 and Government Code section 70373 is mandatory irrespective of ability to pay, but we agree with the Court of Appeal in *People v. Gutierrez* that “[a]s a practical matter, if [defendant] chose not to object to a \$10,000 restitution fine based on an inability to pay, he surely would not complain on similar grounds regarding an additional \$[280] in fees.” (*People v. Gutierrez, supra*, at p. 1033.)

We recognize that in *People v. Taylor*, the Court of Appeal applied the forfeiture doctrine where the defendant failed to object to the imposition of the maximum restitution fine, but declined to do so with respect to the court operations and facilities fees, reasoning that the defendant’s failure to object to the restitution fine despite a statutory right to do so may have been based on reasons unrelated to his ability to pay. (*People v. Taylor, supra*, 43 Cal.5th at pp. 400–401.) We are unpersuaded on that point, however, and conclude that in this case, defendant forfeited his ability-to-pay claim under *Dueñas* in its entirety by failing to object to the \$10,000 restitution fine.

DISPOSITION

The judgment is affirmed.

MEEHAN, J.

WE CONCUR:

POOCHIGIAN, Acting P.J.

SNAUFFER, J.