APPENDIX

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APPENDIX A

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUAN CARLOS MENDEZ, Defendant and Appellant.	H042638 (Santa Clara County Super. Ct. No. C1351407)

A jury found defendant Juan Carlos Mendez guilty on four counts of aggravated sexual assault of a child who was under 14 and at least 10 years younger than defendant (former Pen. Code, § 269, added by Stats. 1994, 1st Ex. Sess. 1993, ch. 48, § 1).[1] The trial court imposed four consecutive terms of 15 years to life.

Defendant raises numerous claims on appeal. First, he contends the prosecution improperly cross-examined him about the facts underlying his prior felony conviction for domestic violence. He argues the testimony was inadmissible and the prosecutor committed misconduct. We conclude the trial court erred by allowing such questioning but defendant suffered no prejudice.

[1] Subsequent undesignated statutory references are to the Penal Code.

Second, defendant contends the prosecution improperly cross-examined him about whether the prosecution's witnesses were lying. We conclude the prosecution's questions were not improper and the elicited testimony was admissible.

Third, defendant contends the prosecution's expert witness gave inadmissible testimony about child sexual abuse accommodation syndrome. He argues that the prosecution improperly asked hypothetical questions closely tracking the facts of this case, such that the expert's testimony profiled both the victim and defendant. He further contends the prosecutor committed misconduct by improperly relying on the expert's testimony in closing argument. We conclude none of the prosecutor's conduct was improper and none of the challenged testimony was inadmissible.

Fourth, defendant contends his trial counsel rendered ineffective assistance by failing to object when the trial court imposed consecutive terms on each of the four counts. He argues that the trial court improperly believed it lacked discretion to impose concurrent terms and defense counsel should have objected. We find no sentencing error.

We will affirm the judgment.

I. Factual and Procedural Background

A. Facts of the Offenses

Around 2003 to 2009, defendant maintained an intermittent sexual relationship with Cynthia N. Cynthia was the mother of the victim, Maria N.[2] The prosecution alleged defendant repeatedly raped and orally copulated Maria during this period.

1. Prosecution Evidence

a. Testimony of Maria N.

Maria was 18 years old when she testified. Two years prior, she had revealed to a high school counselor that defendant had raped her. She testified as follows.

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[2] We use the family members' first names to avoid confusion.

Maria first met defendant when she was eight years old. Her mother and father had broken up. Defendant was Cynthia's boyfriend. The first time defendant touched Maria, she was eight or nine years old. He rubbed the side of her right leg while she was standing up. The next time he touched her, she and her siblings were sleeping when he woke her up in the middle of the night. Cynthia was taking a shower. Defendant took Maria's pants off and touched her inside her vagina. She tried to keep her pants on, but defendant was larger and stronger than she was. When Cynthia got out of the shower, defendant stopped molesting Maria and told her to go away.

Maria described two incidents when defendant tried to molest her but was interrupted. On one occasion, Cynthia had left the house, and Maria was sleeping on a couch with her sister. Defendant picked up Maria, took her to another room, and told her to remove her clothes. Maria fought to keep her clothes on, and defendant eventually stopped after hearing noises from the other room. On a later occasion, they were staying at a hotel in San Jose when defendant told Cynthia to go shopping for food. Defendant tried to undress Maria, but she struggled against him until Cynthia returned.

Maria testified that, over the years, defendant raped her more times than she could remember. There were multiple occasions when he would take her clothes off, hold her down, and put his penis in her vagina. It would happen in the middle of the night when everyone was sleeping or when nobody was around. It happened when she was in the third grade and it continued through the sixth grade. Defendant would tell her to take her clothes off and warned her she would get in trouble if she did not obey, or that she would never see her mother and siblings again. It was physically painful. Defendant would ejaculate inside her or on her. Maria always told him "no" and tried to push him away, but she understood that she was basically helpless. She was afraid for Cynthia's safety. Maria knew defendant and Cynthia would argue, and Cynthia had once lost a job because she had suffered bruises.

Maria also testified that defendant orally copulated her on multiple occasions. He would tell her to copulate him orally, sometimes while grabbing her head and pushing her onto him. He used an aggressive tone, warning her she would get in trouble, or threatening to tell Cynthia about something Maria had done. There were also times when defendant would put his mouth on Maria's vagina.

Maria never told Cynthia about these incidents because defendant told Maria not to and she was not sure what would happen. Maria once told Cynthia she needed to go to the doctor to get checked because she was experiencing pain, but she did not tell Cynthia she was having sexual intercourse with anyone. Maria told the doctor she was experiencing pain in her vagina and said she had been having intercourse with someone (not defendant).

b. Testimony of Cynthia N.

Cynthia, Maria's mother, testified that she separated from her husband around 2003. She started seeing defendant around that time and continued to see him intermittently until she went back to her husband around 2008 or 2009. Cynthia and defendant did not live together. She did not consider defendant to be a boyfriend or partner; they only had a sexual relationship.

Cynthia testified that defendant would punch, kick, and verbally abuse her. He often threatened to kill her if he did not get what he wanted. She did not think the children ever witnessed the violence, but they saw her with bruises.

Cynthia described two incidents in which she saw defendant engaged in sexual conduct with Maria. The first incident occurred at an apartment Cynthia was renting when Maria was around seven or eight years old. Cynthia, defendant, and some cousins were drinking outside the apartment when defendant went inside to use the bathroom. Cynthia noticed that defendant was taking a long time, so she went inside and saw him kneeling over Maria on the floor while unbuttoning and pulling off her pants. Her pants were not completely off, but they were open and defendant had his hand down them.

Cynthia asked defendant what he was doing, but he pretended nothing had happened and went back outside. When Cynthia asked him about it later, he slapped her and told her that if she ever told anyone about it, he could kill or hurt her or her family.

The second incident happened at a motel in San Jose. Cynthia had gone to the store and returned home to find her son and another daughter sitting outside on the cement. The children said defendant had sent them outside. When Cynthia entered the motel room, she saw defendant about to have intercourse with Maria. Maria was lying on her back on the edge of the bed with her legs up in the air and her pants around her ankles. Defendant's pants were open, but Cynthia did not see his penis. Defendant "played stupid," closed his pants, and left "like it was nothing." Cynthia did not confront him about it because she believed he would threaten to kill her.

Cynthia testified that she often returned home from work to find defendant there with her children. Defendant once told Cynthia he wanted to have sex with her together with her daughters. He wanted to have sex with her daughters because they were virgins and "they would always be his."

Cynthia tried to talk to Maria about what had happened, but Maria said nothing and claimed everything was fine; she never told Cynthia about defendant's molestations. Cynthia's relationship with defendant ended in 2009 when she reunited with her husband.

c. Testimony of Monique N.

Monique, Maria's younger sister, was 15 years old when she testified at trial. She was three years younger than Maria. Monique identified defendant as her mother's boyfriend. She testified that there were times when she saw defendant and Maria go into a room by themselves when Cynthia was not home. Monique could not say how many times it happened, but it happened a lot. Sometimes she heard noises coming from the room. She could hear Maria crying, and she heard what she assumed was Maria moaning. When Maria came out, she would look sad and scared. Defendant told Monique that what had happened in the room was making Maria happy.

d. Testimony of Miriam Wolf

Social worker Miriam Wolf testified as an expert in child sexual abuse accommodation syndrome (CSAAS). Wolf had not been given any information about the facts of the case and she never interviewed any of the witnesses. She knew nothing about the victim or defendant.

Wolf testified that CSAAS is a compilation of the most common patterns of behavior observed in patients who had been treated for sexual abuse. The first common behavior is secrecy. Often there are no witnesses to the abuse, and the adult responsible for the abuse takes steps to keep it a secret, for example, through overt threats that the victim's mother will be taken away or the victim will never see her again. If the adult is perpetrating both domestic violence and sexual abuse, the child may have even more reason to be fearful.

Wolf testified that most abusers are known to the child—a person such as a member or friend of the family, a coach, clergy, a teacher, or someone else in a position of trust. The majority of people who experience child sexual abuse—about two-thirds of all victims—do not disclose it until they become adults. Victims may refuse to disclose abuse even when asked about it point blank. Disclosure may be delayed by weeks, months, or years out of fear or shame.

Because the abuser is often older or in a position of power, another common category of victim behavior is physical and emotional helplessness. The child's inability to disclose the abuse causes them to feel they are stuck—a state of mind dubbed "entrapment." The child's attempts to cope with the situation are referred to as "accommodation," for example, by compartmentalizing the effects of the abuse through intense engagement in other activities. Children who are unable to compartmentalize the abuse may engage in dissociation, letting their minds go elsewhere during the experience.

2. Defense Evidence

a. Defendant's Testimony

Defendant was 36 years old at the time of trial. Defendant admitted he had been convicted of a domestic violence offense in 2004, but he had never been charged with or accused of child molestation before.

Defendant first met Cynthia around 2004. Two weeks after they met, defendant went to jail for six months for the domestic violence conviction. He was in a work furlough program that allowed him to work during the day. Cynthia drove him to and from work during this period. After about a month and a half, they began having sex with each other. They kept in contact after defendant was released. Although defendant moved in with another woman, he continued an intermittent sexual relationship with Cynthia. He never lived with Cynthia, and he only spent the night with Cynthia once. His relationship with Cynthia was just sexual; when he visited her, he would have sex and leave. He was never with Cynthia's children when she was not there.

Defendant denied ever touching Maria sexually or doing anything sexually inappropriate with her. He testified that he never hugged her; never played around or wrestled with her; never touched her legs or vagina; never took her clothes off; never exposed his penis to her; never had sex with her; never put his penis in her mouth; never put his mouth on Maria's body; never tried to kiss her; and never had anal sex with her. Defendant also denied that he was ever physically violent with Cynthia. He testified that he would walk away whenever she tried to start a fight with him.

b. Testimony of Marcella Gamboa

Marcella Gamboa was defendant's wife. She had known him since 2010. She had four children ranging from three years to 10 years old at the time of trial. Two were girls. Defendant saw them every day and spent time alone with them. Gamboa testified that defendant was always good around her daughters; she never saw him do anything bad or inappropriate to them. Gamboa has talked about sexual molestation with her children.

They have never told Gamboa that defendant did anything inappropriate to them. Gamboa testified that defendant has never shown a bad character towards children; she felt he was a good father figure to her children.

B. Procedural Background

The prosecution charged defendant with four counts of aggravated sexual assault of a child under 14 and 10 or more years younger than the defendant (former § 269, added by Stats. 1994, 1st Ex. Sess. 1993, ch. 48, § 1).[3] Counts 1 and 2 were predicated on rape (§ 261, subd. (a)(2)). Counts 3 and 4 were predicated on oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury (§ 288a).

The jury found defendant guilty on all counts. The trial court imposed a total term of 60 years to life, consisting of four consecutive counts of 15 years to life for each count.

II. Discussion

A. Admission of Testimony on the Facts of Defendant's Prior Conviction

Defendant contends the trial court erred by admitting testimony about the facts underlying his prior felony conviction for domestic violence. In conjunction with this claim, defendant asserts prosecutorial misconduct and ineffective assistance of counsel. The Attorney General argues that the evidence was properly admitted; that the prosecutor committed no misconduct; and that even assuming error, defendant suffered no prejudice.

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[3] The prosecution amended the information to add a fifth count at the close of evidence, but the trial court granted the prosecution's motion to dismiss this count before sentencing.

1. Background

Among other offenses, defendant suffered a prior felony conviction in 2004 for domestic violence against his prior girlfriend, Ilene S. (§ 273.5, subd. (a).) Defendant moved pretrial to exclude evidence of this and other convictions under Evidence Code section 352. He argued that the domestic violence conviction was too remote in time to be probative. He also moved to exclude evidence of the facts underlying the conviction and any testimony by Cynthia regarding her belief that he had been convicted of and incarcerated for it.

The trial court ruled that if defendant testified at trial the domestic violence conviction would be relevant and admissible for impeachment. The court noted that the date of the conviction (2004) fell within the relevant time frame as alleged in the instant offenses. As to testimony by Cynthia regarding her knowledge of the conviction, the court excluded it as irrelevant and prejudicial.

In the prosecution's case-in-chief, Cynthia testified that defendant had punched, kicked, and threatened to kill her.

In his testimony, defendant admitted on direct examination that he had been convicted of domestic violence in 2004 and that he had been sentenced to six months in county jail. He further testified that Cynthia had bailed him out from jail after the offense and drove him to and from a work furlough program while he served his sentence. He denied ever hitting Cynthia or doing anything violent to her.

On cross-examination, the prosecutor asked defendant if he had told Cynthia about the specific facts of his prior domestic violence offense. Defense counsel objected on relevance grounds. The prosecutor responded that defendant had "opened it up," and the trial court overruled the objection. Defense counsel then asked to approach the bench, but the court refused the request. When the prosecutor asked defendant again if he had told Cynthia about the specific facts of the offense, defendant responded that he did not recall whether he did. The prosecutor then began asking defendant in detail about certain

aspects of the offense and whether he had told Cynthia about them. Defense counsel again objected, but the trial court overruled it. Following a sidebar on the matter, the following exchange occurred: "[Prosecutor:] Did you tell [Cynthia] that you punched Ilene? [¶] [Defendant:] That I punched Ilene? [¶] [Prosecutor:] Did you tell her that you punched Ilene? [¶] [Defendant:] I don't remember. [¶] [Prosecutor:] Did you tell her that you told Ilene you were going to kill her? [¶] [Defendant:] No. [¶] [Prosecutor:] Did you tell her that you ever kicked [Ilene]? [¶] [Defendant:] No. [¶] [Prosecutor:] Did you tell her that when the officers arrived and spoke to you, you denied having assaulted Ilene at all? [¶] [Defendant:] No." Soon afterward, the following exchange occurred: "[Prosecutor:] Now, Cynthia described you kicking her. Right? [¶] [Defendant:] That's what she said. [¶] [Prosecutor:] That's also what Ilene told the deputies in that other case. Right? That you kicked her in the past? [¶] [Defendant:] I don't know. I wasn't there. [¶] [Prosecutor:] I'm sorry? [¶] [Defendant:] I wasn't there. I don't know what she told the deputy. [¶] [Prosecutor:] Did you ever read that police report? [¶] [Defendant:] No." Defense counsel then objected under Evidence Code section 352, and the trial court instructed the prosecutor to "move on." Defendant then denied that he had ever kicked, struck, or threatened to stab or kill Cynthia. As to the prosecutor's question whether defendant had kicked Ilene, defense counsel lodged no objection asserting prosecutorial misconduct or any misstatement of the facts in evidence.

The parties later memorialized the relevant sidebar discussions as follows. Defense counsel restated his objection to the admission of specific facts about the domestic violence offense against Ilene. The prosecutor pointed out that defendant had taken the position that Cynthia was lying about the violence against her as well as the instant child molestation. Based on the similarity between defendant's conduct in the attack on Ilene and his conduct in the attack on Cynthia, the prosecutor argued that the details of the former offense were probative to bolster Cynthia's credibility. The court

then stated, "My ruling was that I would let [the prosecutor] ask a couple questions about what happened specifically, whether he slapped her or kicked her, and that was it that you wanted to go into the entire details of and he said no, but for purposes of impeachment, you could go into a couple of these areas."

2. Legal Principles

a. Admission of a Prior Conviction for Impeachment

"For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony . . . ."[4] (Evid. Code, § 788.) We apply the abuse of discretion standard of review to a trial court's ruling to admit such evidence. (*People v. Clair* (1992) 2 Cal.4th 629, 655.) "A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]" (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70, and *Spencer v. Texas* (1967) 385 U.S. 554, 562-564.)

b. Prosecutorial Misconduct

"The standards governing review of misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. [Citation.]'"

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[4] The rule sets forth several exceptions inapplicable here.

(*People v. Parson* (2008) 44 Cal.4th 332, 359.) "'"As a general rule, a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety."'" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 894.)

c. Ineffective Assistance of Counsel

To demonstrate ineffective assistance of counsel, a defendant must first show trial counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Second, the defendant must show prejudice flowing from counsel's performance or lack thereof. (*Id.* at pp. 691-692.) "Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." (*People v. Benavides* (2005) 35 Cal.4th 69, 93, citing *Strickland v. Washington*, at pp. 687-688, 693-694.) "On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) "'Tactical errors are generally not deemed reversible; and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, [the appellate court] will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ."'" (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.) The defendant has the burden on appeal to show by a preponderance of the evidence that he or she was denied effective assistance of counsel and is entitled to relief. (*People v. Dowdell* (2014) 227 Cal.App.4th 1388.)

3. Defendant Suffered No Prejudice

Defendant contends evidence of the specific facts underlying his prior domestic violence conviction was inadmissible. For this proposition, he relies on *People v. Heckathorne* (1988) 202 Cal.App.3d 458 (*Heckathorne*). "The scope of inquiry when a criminal defendant is impeached with evidence of a prior felony conviction does not extend to the facts of the underlying offense." (*Id.* at p. 462, citing *People v. McClellan* (1969) 71 Cal.2d 793, 809.) The Attorney General contends this rule was abrogated by the so-called "Truth-in-Evidence" amendment to the California Constitution. (Cal. Const., art. I, § 28, subd. (f)(2) ["relevant evidence shall not be excluded in any criminal proceeding."].) (Cf. *People v. Wheeler* (1992) 4 Cal.4th 284, 288 [although the amendment to the California Constitution, article I, section 28 abrogated the felony-convictions-only rule, the fact of a misdemeanor conviction remains inadmissible under traditional hearsay rules when offered for impeachment].) However, the California Supreme Court recently reaffirmed the continued validity of *Heckathorne*: "Under California law, the right to cross-examine or impeach the credibility of a witness concerning a felony conviction does not extend to the facts underlying the offense." (*People v. Casares* (2016) 62 Cal.4th 808, 830, citing *Heckathorne*, at p. 462; see also *People v. Ardoin* (2011) 196 Cal.App.4th 102, 120.)

The Attorney General contends defendant "opened the door" to such questions. When asked on direct examination how he was punished for his conviction, defendant testified that he was sentenced to six months in county jail, which he served in a work furlough program. He was also required to take 52 weeks of domestic violence classes. The Attorney General argues that this testimony minimized the seriousness of the offense. "[I]f in 'admitting' the prior felony conviction 'the defendant first seeks to mislead a jury or minimize the facts of the earlier conviction' [citation] he may properly be questioned further. [Citation.]" (*People v. Shea* (1995) 39 Cal.App.4th 1257, 1267.) But defendant did not minimize the *facts* of his earlier conviction, and nothing he said

was misleading. He testified to the punishment he received, but nothing about this testimony misled the jury and none of it concerned the facts of the offense. Thus, when the prosecutor began questioning defendant on the facts of his prior conviction, the trial court should have sustained the objection.

The error, however, was harmless. "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) It is not reasonably probable the verdict would have been more favorable if the trial court had sustained the objection. First, the prosecution never actually elicted any affirmative evidence of the facts underlying the offense. The prosecutor asked defendant *whether he had ever told Cynthia* he had punched Ilene, kicked Ilene, or threatened to kill Ilene. Defendant responded in the negative. In a follow-up question, the prosecutor then asked whether Ilene had told the police in that case that defendant had kicked her. Defendant responded that he did not know because he was not there. He denied having read a police report of the incident. As the trial court instructed the jury, an attorney's questions are not evidence; only the witness's answers are evidence. Defendant makes no showing that the jury failed to follow this instruction.

Regardless, the questioning was not central to the prosecution's case. In addition to the victim, the prosecution presented two witnesses—the mother and the sister—who partly corroborated much of the victim's direct testimony describing defendant's molestations. Defendant presented no evidence contradicting their testimony apart from his own self-serving denials. While this put defendant's credibility at issue, it is not reasonably probable the challenged line of questioning was a deciding factor in the jury's evaluation of his testimony. We conclude any error was harmless; defendant suffered no prejudice under the *Watson* standard. Nor was the questioning "so prejudicial as to

render the defendant's trial fundamentally unfair." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 913.) We conclude defendant suffered no due process violation.

Defendant further contends the prosecutor committed misconduct by misrepresenting the nature of the prior offense. Specifically, defendant points to the prosecutor's questions that assumed defendant had kicked Ilene. Defendant contends a police report of that incident shows defendant had not kicked her, and that the prosecutor thereby misstated the evidence. But defense counsel lodged no objections on that basis. "It is misconduct for a prosecutor to ask a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means. [Citation.] But if the defense does not object, and the prosecutor is not asked to justify the question, a reviewing court is rarely able to determine whether this form of misconduct has occurred. [Citation.] Therefore, a claim of misconduct on this basis is waived absent a timely and specific objection during the trial. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 481.) By this rule, defendant's failure to object forfeited this claim.

Defendant contends we should consider his claim notwithstanding the failure to object because any objection would have been futile. The record does not support this claim. After defense counsel objected on relevance grounds that the prosecution should not be allowed to elicit the underlying facts of the offense, the trial court overruled the objection on the ground that the evidence was relevant for impeachment. The record does not show how the trial court would have ruled on an objection to a misstatement of the facts in evidence. We conclude the claim was forfeited.

Even on the merits, however, defendant has not shown misconduct. Defendant claims the prosecutor had "no factual predicate" to ask defendant about kicking Ilene in the past. His claim hinges on the substance of a police report made after the offense. In the report, the police documented statements from two witnesses to the assault, one of whom was Ilene, and one of whom was a third party not identified in the record. Both

witnesses also made statements about another past assault. According to the unidentified third party witness, Ilene said defendant had "punched her, kicked her, and slapped her in the past." Ilene herself made conflicting statements about the past assault. When the police asked her if defendant had physically assaulted her in the past, she "mumbled few words and shook her head up and down implying that Mendez did assault her previously." In a subsequent statement, however, the victim denied that defendant had assaulted her in the past.

Defendant requested we take judicial notice of this police report. We granted the request for judicial notice, but defendant misconstrues the scope of that grant. "'Although the *existence* of a document may be judicially noticeable, the truth of statements contained in the document and its *proper interpretation are not subject to judicial notice* if those matters are reasonably disputable. [Citations.]'" (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364, quoting *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113.) The truth of the assertion that defendant never kicked Ilene is reasonably disputable given the conflicting statements in the report. By the same token, as the Attorney General points out, the conflicting statements gave the prosecutor "reasonable grounds" to ask defendant about the alleged kicking. (*People v. Price*, *supra*, 1 Cal.4th at p. 481.) We perceive no misconduct in that line of questioning. Even assuming the questioning was improper, for the reasons set forth above it is not reasonably probable the questions "affected the jury's evaluation of the evidence or the rendering of its verdict." (*People v. Espinoza* (1992) 3 Cal.4th 806, 821.) Nor did they "infect[] the trial with such unfairness as to make the conviction a denial of due process." (*People v. Harris* (1989) 47 Cal.3d 1047, 1084.) We conclude defendant suffered no prejudice or due process violation as a result of this questioning.

Defendant contends his trial counsel provided ineffective assistance of counsel by failing to object. Nothing in the record shows why counsel objected on relevance

grounds but not on grounds of misstated facts. Counsel may have made a tactical choice not to litigate the facts of the prior offense, either because those facts were unfavorable or because he wished not to highlight them for the jury. A conviction is not reversible for ineffective assistance unless the record shows counsel had no rational tactical purpose, counsel failed to provide an explanation upon request, or there is no satisfactory explanation. (*People v. Mai*, *supra*, 57 Cal.4th at p. 1009.) Even assuming counsel's performance was deficient and not tactically motivated, defendant has not shown a reasonable probability of a more favorable outcome for the reasons set forth above. We conclude this claim is without merit.

B. Cross-examination of Defendant With "Were They Lying" Questions

Defendant contends the prosecution committed misconduct and elicited inadmissible testimony in its cross-examination of defendant regarding the veracity of Cynthia and Maria's allegations. He argues that the prosecution's questions—which defendant characterizes as impermissible "were they lying" questions—were argumentative and called for speculation. The Attorney General contends the questions were proper and the testimony in response was admissible.

1. Background

In his testimony, defendant denied the allegations by Maria and Cynthia that he had sexually abused Maria and physically assaulted Cynthia. On cross-examination, the prosecutor questioned defendant about why he believed Maria and Cynthia had made false accusations. Defendant testified that he believed Cynthia had arranged for Maria to make the allegations. Defendant believed Cynthia was upset at him for being absent and failing to respond to her attempts to contact him: "[Prosecutor:] So from about 2008 to about beginning of 2013, you had no contact with them. Right? [¶] [Defendant:] No. [¶] [Prosecutor:] In your mind, Cynthia just made this up. Is that right? [¶] [Defendant:] Yes. [¶] [Prosecutor:] And in your mind, she put Maria up to coming in

and saying this. Right? [¶] [Defendant:] Yes. [¶] [Prosecutor:] And you said that to the officer repeatedly that mom was putting the charges on you. Right? [¶] [Defendant:] Yes. [¶] [Prosecutor:] Why do you think that? [¶] [Defendant:] Because when she tried to contact me, I did not respond to her. [¶] [Prosecutor:] From many years before, you think she was still mad that you didn't contact her. [¶] [Defendant:] Yes."

When the prosecutor asked defendant to explain this, defendant responded that "people will do stuff to you to make you comply with them," and "they could make false charges on you." The prosecutor pointed out that Cynthia had not had contact with defendant for five years by the time she made the allegations. Defendant responded that Cynthia was fighting with her husband and he claimed she would seek money from defendant when she had none. The prosecutor pressed defendant on that point, drawing an objection from defense counsel: "[Prosecutor:] Okay. Clarify that for me, Mr. Mendez, because I'm not following. You're telling me that she would put her two daughters up to allege that you sexually molested them, or, Maria, and she would come testify about that because if she broke up with her husband, she'd come back to you. [¶] [Defense counsel:] Your Honor, this is calling for speculation in what Maria's thinking or Cynthia."

The trial court overruled the objection on the ground that defendant had testified to the matter. The prosecutor then restated the question and asked defendant, "Does that make sense?" When defendant responded affirmatively, the prosecutor pressed him to "[e]xplain to me how that works." Defendant responded that it was part of a pattern of behavior exhibited by Cynthia. The prosecutor asked several questions about the purported pattern and pressed defendant to explain how it fit any pattern: "[Prosecutor:] . . . So, again, explain to me how it fits that five years after she's seen you, she's going to organize a vast conspiracy amongst family members to get you in serious trouble. [¶] [Defendant:] 'Conspiracy'? [¶] [Prosecutor:] Yeah, having three people get together to make up a story and come in and testify twice under oath and accuse you of sexual

molest? [¶] [Defendant:] Yeah. Well, I mean, it would be accurate if they got all the details exactly from three people that saw me, there would be accurate details of the situation that did happen and all the situations were wrong. And they have pretty different stories. How would that match? The stories? If the three people saw me, how can there be so many different stories? How much time changed? How much different things they saw if three people saw the exact same thing? [¶] [Prosecutor:] That was what I asked you. I asked you how much sense it makes to make this up after five years of not seeing you. [¶] [Defendant:] I don't know what they're thinking. I don't know what sense it makes."

The prosecutor asked defendant if a simpler explanation was that the witnesses were telling the truth, and defense counsel objected to the question as argumentative. The trial court sustained the objection. When the prosecutor reinitiated similar lines of questioning, the trial court again sustained several objections by defense counsel on the grounds the questions were argumentative and called for speculation.

The prosecutor questioned defendant several more times about various allegations Maria and Cynthia made against him, and defendant again denied them. The prosecutor then returned to the question of why they would have lied and defendant's assertion that Cynthia was "putting the kids up to this." Defendant again asserted that was the case. The prosecutor asked defendant about a statement he apparently made to police to the effect that Maria was making an excuse for having been "devirginized" by someone else: "[Prosecutor:] Now, then, in your testimony, in your estimation, that somehow, because it was a little bit different when you talked to the officers, it was that somehow Maria had been 'devirginized.' Do you remember having that conversation? [¶] [Defendant:] Yes. [¶] [Prosecutor:] That was why they were making all this up? [¶] [Defendant:] Yes. [¶] [Prosecutor:] Can you explain that to me? [¶] [Defendant:] There's no explanation. That's what I read in the report. [¶] [Prosecutor:] You said that that was somehow what they were trying to get out from under. [¶] [Defendant:] That's what I felt at the time.

[¶] [Prosecutor:] Has your feeling changed? [¶] [Defendant:] Yes. [¶] [Prosecutor:] How has it changed? [¶] [Defendant:] Because I recognize the pattern of what was happening."

Defendant again asserted that Cynthia's allegations were part of a pattern of behavior in which she got angry with him for being absent and failing to respond to her attempts to contact him. When the prosecutor followed up on this point, the trial court overruled defense counsel's objection: "[Prosecutor:] So then what's the pattern where you didn't respond to her that would have led us here today? [¶] [Defendant:] The pattern is that she, the mom and the daughter, messaged my brother on Facebook looking for me. And I didn't respond when they were looking for me. [¶] [Prosecutor:] The mom and daughter messaged your brother? [¶] [Defendant:] Yes. [¶] [Prosecutor:] When was that? [¶] [Defendant:] It was probably before the charges. [¶] [Prosecutor:] Right before you got charged, you mentioned them on Facebook. You didn't respond. That's why we're here. [¶] [Defense counsel:] Calls for speculation. [¶] [Court:] Overruled. [¶] [Defendant:] I don't know."

Defendant admitted that he had never told the police or testified before about the purported Facebook messages.

In closing argument, the prosecutor argued that Cynthia and Maria had no motive to lie and he described defendant as "an individual who has no explanation at all for anything in this case[.]" Defense counsel objected to this statement as burden-shifting, but the trial court overruled. The prosecutor later repeated this line of argument: "The question's why? If what Maria was saying on the witness stand is not true, then why? Why did she lie? What did she have to gain? What does she get out of it? What does her mother get out of it? What does her sister get out of it? Why? Why five years later does she come and say that?" Defense counsel again objected to this argument as burden-shifting, and the trial court again overruled.

2. Legal Principles

"No witness may give testimony based on conjecture or speculation. (See Evid. Code, § 702.) Such evidence is irrelevant because it has no tendency in reason to resolve questions in dispute. (Evid. Code, § 210.)" (*People v. Chatman* (2006) 38 Cal.4th 344, 382 (*Chatman*).) "An argumentative question that essentially talks past the witness, and makes an argument to the jury, is improper because it does not seek to elicit relevant, competent testimony, or often any testimony at all." (*Id.* at p. 384.) We review a trial court's ruling on the admissibility of such testimony under the deferential abuse of discretion standard. (*People v. Thornton* (2007) 41 Cal.4th 391, 428.)

When a defendant testifies to facts that contradict testimony by the prosecution's witnesses, a prosecutor may ask the defendant "were they lying" questions within certain limits. "[C]ourts should carefully scrutinize 'were they lying' questions in context. They should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions." (*Chatman*, *supra*, 38 Cal.4th at p. 384.)

3. The Prosecution's Questions Were Proper and the Testimony Admissible

Defendant relies on authority from other jurisdictions to support his claim that the prosecution's questions were improper. In *Chatman*, however, the California Supreme Court permitted such questions. (*Chatman*, *supra*, 38 Cal.4th at p. 384.) The court noted that the defendant had testified and put his own veracity at issue. (*Id.* at p. 383.) The defendant testified that the prosecution's witnesses should not be believed and asserted his own version of the facts over theirs. Accordingly, "[t]he jury had to determine whose testimony to credit. It is one thing for a witness to assert that he had a better vantage point from which to observe an event, or that his memory is superior to one who was

inattentive or has given inconsistent accounts. It is another thing entirely for a witness to claim that witness after opposing witness has lied. Defendant was not asked to opine on whether other witnesses should be believed. He was asked to clarify his own position and whether he had any information about whether other witnesses had a bias, interest, or motive to be untruthful." (*Ibid.*) Because the defendant in *Chatman* had personal knowledge of the relevant facts about which he was questioned, he could provide relevant, nonspeculative testimony pertaining to the prosecution witnesses' credibility as compared with his own.

Defendant here is in the same position as the defendant in *Chatman*. Defendant testified to facts squarely contradicting those put forth by Cynthia and Maria. The prosecution's questions essentially asked defendant for whatever facts or personal knowledge he could put forth to assist the jury in assessing his credibility versus the prosecution's witnesses. And defendant answered accordingly: He claimed Cynthia's allegations were part of a pattern of conduct in which she sought retribution against him for failing to visit her or respond to her attempts to contact him. This testimony was not speculative; these were facts about which defendant claimed personal knowledge—e.g., the purported attempts by Cynthia and Maria to message him via Facebook. Moreover, if the jury had believed this testimony, it could have credited defendant's version of events over the prosecution's evidence. In sum, this evidence could assist the trier of fact.

For these reasons, the questions asked by the prosecution were proper, and the elicted testimony was relevant and admissible. We conclude the trial court did not abuse its discretion by overruling defense counsel's objections and allowing the prosecution to question defendant in this fashion.

C. Testimony by the Prosecution's CSAAS Expert Witness

Defendant contends the prosecution's CSAAS expert witness gave inadmissible testimony by improperly profiling both defendant and the victim. Defendant also brings

claims of prosecutorial misconduct and ineffective assistance of counsel in conjunction with this claim. He further contends the errors violated his due process rights. The Attorney General disputes the claim of prosecutorial misconduct and contends the expert's testimony was properly admitted.[5]

1. Background

Defendant moved pretrial to exclude or restrict expert testimony on CSAAS. Defendant argued that the expert's testimony, if admitted, should be limited by the holdings set forth in *People v. Bowker* (1988) 203 Cal.App.3d 385. Specifically, defendant argued that the expert should be precluded from: (1) testifying that a report of abuse is credible because the victim manifests certain characteristics exhibited by abused children; (2) commenting on the facts of the case or a hypothetical closely tracking the facts; and (3) rendering any opinion about what percentage of abuse allegations have been proven false.

At oral argument on the matter, the trial court ruled that the expert would be allowed to testify without specifically referring to the facts of this case. The prosecutor agreed that the expert's testimony would not exceed the three limits set forth in defendant's motion. The trial court also granted defendant's motion that all objections in his pretrial motions would constitute continuing objections.

Wolf, the prosecution's CSAAS expert, testified as set forth above in section I.A.1.d. Defendant lodged no objections during her testimony. Nor did defendant object to the prosecutor's use of Wolf's testimony in closing arguments.

The trial court instructed the jury with CALCRIM No. 1193: "Miriam Wolf's testimony about Child Sexual Abuse Accommodation Syndrome is not evidence that the

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[5] The Attorney General does not claim defendant forfeited this claim by failing to object. Accordingly, we will consider the claim on its merits. In any event, as set forth below, trial counsel did not render ineffective assistance of counsel.

defendant committed any of the crimes charged against him. You may consider this evidence only in deciding whether or not Maria's conduct was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of her testimony."

2. Legal Principles

"Expert opinion testimony must be '[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).) We review the trial court's ruling in this regard for abuse of discretion. [Citation.]" (*People v. Smith* (2003) 30 Cal.4th 581, 627.)

CSAAS evidence may not be used to prove the alleged sexual abuse actually occurred. Rather, "CSAAS is admissible evidence for the limited purpose of disabusing the fact finder of common misconceptions it might have about how child victims react to sexual abuse. [Citations.]" (*In re S.C.* (2006) 138 Cal.App.4th 396, 418.) The prosecution may explicitly identify misconceptions about victims' behavior that CSAAS testimony is intended to rebut. (*People v. Harlan* (1990) 222 Cal.App.3d 439, 449-450.) Furthermore, the prosecution may elicit testimony about a victim's conduct that relates directly to those misconceptions. (*Id.* at p. 450.) "For instance, where a child delays a significant period of time before reporting an incident or pattern of abuse, an expert could testify that such delayed reporting is not inconsistent with the secretive environment often created by an abuser who occupies a position of trust." (*People v. Bowker*, *supra*, 203 Cal.App.3d at p. 394.)

"Profile evidence is generally inadmissible to prove guilt." (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084 (*Robbie*).) "A profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime." (*Ibid.*) "'"Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officials in investigating criminal activity."'" (*Ibid.*, quoting *U.S. v. Beltran–Rios* (9th Cir. 1989) 878 F.2d 1208, 1210.)

3. Admission of the Expert's Testimony Was Not an Abuse of Discretion

Defendant contends Wolf's testimony profiled him and the victim because the prosecution asked Wolf hypothetical questions with facts closely tracking their conduct. Defendant cites the following examples. First, the prosecution asked Wolf if she had seen children who did not disclose abuse who had also witnessed domestic violence during the same time frame. Wolf testified that she had seen situations "where there is co-occurring domestic violence that children have either heard or witnessed." She added that if the same perpetrator was committing both the sexual abuse and the domestic violence, the children "have even more magnified reason to be fearful." Defendant argues that this testimony closely tracked the allegations by Cynthia that defendant beat and threatened her and the allegations by Maria that she had seen bruises on Cynthia.

Second, defendant points to Wolf's testimony that children may delay disclosure because they can intuit that reporting the abuse will disrupt the family. Wolf explained that "if this involves, say, a mom's boyfriend or a stepparent, they appreciate that their disclosure of sexual abuse is going to change that status quo and have an impact on people beyond them." Defendant contends this tracked Maria's testimony that defendant was Cynthia's boyfriend. Both defendant and Cynthia, however, denied that he was her boyfriend. They both described the relationship as a sexual relationship only.

Third, Wolf testified that abused children's disclosures "are often incremental and in parts" due to "a hesitancy to get somebody in trouble that they care about." Such children may make partial disclosures, "testing the waters" to gauge an adult's response. Following up, the prosecutor asked whether the duration of the period of abuse affected disclosure. Wolf responded that "[i]f the relationship goes on for a long time and has some positive aspects, whether it's something as overt as gift giving or, you know, being involved in this family and helping support the family, there are some conflicts for kids then disclosing. [¶] So if it didn't happen early on, I think children feel that the longer it goes on, the harder it is to disclose." Defendant contends this testimony tracked the

allegations that he had abused Maria over a long period of time. There was no evidence, however, that Maria cared about defendant or that he gave her gifts.

Fourth, Wolf testified that children may recall the "core details" of the abuse more accurately than other specific facts: "[I]n general, those core details, the who, what, where, are remembered best. And the peripheral details that an investigator might be asking about, What were you wearing, What color were the sheets in the bed, those kind of things may or may not have been paid attention to by the child or may not have really been encoded very deeply in memory. And then a lot of time passes because of delayed disclosure so those peripheral details may not be remembered as well as the core details." Wolf further explained that when a child victim suffers abuse repeatedly, the victim may end up describing events from "script memory"—i.e., "a script with general details." She testified, "They know who was there, generally what happened, how it would generally happen, and generally where it would happen, but because it happened so often and often in a similar way, they have a difficult time pulling out the discrete episodes so they can't tell you the date that it happened or how many times it happened. It kind of gets remembered as a lump." Defendant contends this tracked Maria's allegations because she testified generally to the rape and oral copulation offenses without providing specific details of such events.

Fifth, Wolf testified that children may refuse to disclose abuse even when asked about it "point blank." Defendant contends this tracked Cynthia's testimony that she asked Maria what was going on, and Maria told her everything was fine.

Defendant also contends Wolf gave testimony improperly profiling his own conduct. Wolf testified, "Most sexual abuse is perpetrated by somebody who is known to the child and family so, oftentimes, that person is either a family member a family friend, a coach, a clergy person, a teacher, somebody who both the child and the family have trust in." Defendant points out that he was "known to the child and family." Wolf further testified that "generally speaking, child sexual abuse is a crime that occurs in

secret. It doesn't often have other witnesses. And the adult who is responsible for the sexual encounter takes steps to assure that the encounter remains a secret, that it generally happens in private and that they provide a context and an understanding for the child that the kind of conduct that they're engaging in should be kept a secret." Wolf explained that children "will describe sometimes overt kinds of threats about what would happen if people found out about this and how their lives would change and be different. [¶] And the threats can be quite menacing, things like hurting people or hurting animals to somewhat milder, People won't really understand, I will go to jail, People will be upset with you so things that are sort of overtly threatening to children." Wolf added that abusers may engage in "messaging," in which the abuser implies others won't understand, that life will be different, that the family may not be able to get together for holidays, or that the child and the perpetrator may not be able to spend time together. She added that messaging is even more common than overt threats. Defendant contends this testimony tracked Maria's allegations that he told her she and her mother would get in trouble if she told anyone about the abuse, and that Maria would never see her mother or siblings again.

Defendant contends these portions of Wolf's testimony constituted improper "profiling" under *Robbie, supra*, 92 Cal.App.4th 1075. We are not persuaded. First, as a doctrinal matter, defendant conflates cases concerning impermissible uses of CSAAS as it relates to *victims'* behavior with cases that prohibit profiling of a *defendant.* (See, e.g., *U.S. v. Beltran-Rios, supra,* 878 F.2d 1208, 1209 [discussing so-called "drug courier" profiles].) The latter line of cases is distinct from the former. In *Robbie*, the prosecution questioned its expert witness with hypothetical questions incorporating the defendant's alleged sex offender conduct. The expert testified that such behavior was "typical of a particular kind of criminal." (*Robbie,* at p. 1084.) The expert described defendant's conduct as the "most prevalent type of behavior that I've seen with sex offenders." (*Id*. at p. 1083.)

Wolf never testified to anything resembling a profile of child molesters or a typical pattern of behavior for child sex abusers. Nor did the portions of her testimony quoted above closely resemble defendant's conduct. To the contrary, much of her testimony described divergent characteristics. Wolf testified that the abuser is often a family member, a family friend, a coach, a clergy person, a teacher, or somebody trusted by both the child and the family. Defendant played none of those roles, and nobody testified that Maria ever trusted him. Wolf testified that "messaging" by the offender is more common than overt threats. No witness testified to any conduct by defendant that could be described as messaging. Defendant never threatened to "hurt any animals" and he never implied that he would have to go to jail if Maria disclosed the abuse. We conclude Wolf's testimony did not improperly profile defendant, and none of the challenged testimony was inadmissible on that basis.

Similarly, Wolf's CSAAS testimony about victim conduct did not closely track Maria's behavior. While some of her testimony about victims' conduct resembled some of the evidence about Maria's conduct, much of Wolf's testimony was *not* consistent with Maria's behavior. For example, Wolf testified that the majority of child victims do not disclose the abuse until they become adults. Maria, by contrast, was a junior in high school when she told a school counselor that defendant had raped her. Wolf testified that abused children may delay disclosure out of shame because they question whether something is wrong with themselves. They may ask "why would a person who's supposed to be important to them or be taking care of them be doing this unless it was their own fault as a child." There was no evidence Maria believed defendant was important to her or took care of her, or that she felt the abuse was her own fault. Wolf testified that abused children may compartmentalize the abuse, coping with it by putting a lot of energy into other areas—e.g. they might "get really good grades and be popular in school and be a cheerleader or a football player or be really active in a church group." There was no evidence that Maria behaved in such a fashion. Wolf also testified that

child may engage in psychological dissociation during episodes of abuse. Maria never testified to experiencing any such phenomenon. As to delayed reporting, Wolf testified that victims' disclosures are of "incremental and in parts"—i.e. "testing the waters" to see how adults will respond. There is no evidence Maria engaged in such behavior.

As to those facts of Maria's behavior resembling conduct identified with CSAAS, nothing about this evidence was inadmissible or prejudicial per se. Expert testimony about CSAAS-related conduct is admissible even if it resembles conduct exhibited by the victim, provided the testimony "relate[s] directly to the popular misconception about delayed disclosure." (*People v. Harlan*, *supra*, 222 Cal.App.3d at p. 450; see also *People v. Bowker*, *supra*, 203 Cal.App.3d at p. 394.)

Defendant contends the prosecution improperly asked hypothetical questions with facts closely tracking Maria's conduct. For this proposition, he relies on *People v. Jeff* (1988) 204 Cal.App.3d 309. But in that case, the prosecution's questions incorporated "the exact same facts and details" as those in the allegations against the defendant. (*Id*. at p. 338.) As a consequence, the court concluded, the expert's testimony "told the jury that they should accept" the victim's version of events. (*Ibid.*) Here, neither the prosecution's questions nor the expert's responses tracked Maria's testimony so closely that they "told the jury" it should believe her allegations. To the contrary, Wolf testified that CSAAS was *not* intended to be used as a diagnostic tool. She expressly testified that the fact that a person exhibits some of the behaviors identified in CSAAS does *not* mean the person was abused.

Defendant contends the prosecutor improperly relied upon Wolf's CSAAS testimony in closing argument. The prosecutor argued defendant had two motives in committing the offenses—first, to have sex with the victim, and second, to avoid getting caught. The prosecutor argued that avoiding detection requires a perpetrator to either earn the trust of the parent or intimidate the parent to the point where the parent would refuse to see the crime. The prosecutor then pivoted to Wolf's testimony that a

perpetrator may threaten a victim, tell the victim she would never see her parents again, or "whatever method he can use to keep that child quiet." The prosecutor then added that "you heard those things from young Maria." However, the prosecutor did not specifically argue that this showed defendant had committed the offenses. To the contrary, shortly thereafter the prosecutor argued that "there's no surprise that [Maria] doesn't report anything" and he identified the similarity between this conduct and Wolf's testimony about the nature of delayed reporting. As set forth above, this is a permissible use of CSAAS testimony.

Defendant also points to a portion of the prosecution's rebuttal in which the prosecutor drew a connection between Maria's conduct and defendant's guilt. The prosecutor discussed Maria's demeanor on the stand during her testimony and the events leading up to her reporting the abuse. The prosecutor pointed out that Maria had initially kept the abuse secret—something the prosecutor argued was a result of defendant's threats. The prosecutor also argued that Maria suffered from a mindset of helplessness and perceived inability to fight back. He then stated: "And what she believed was that when she did say something, she'd never have her family again. That may be unreasonable. That may be reasonable, but that's what she felt. That's what she felt. *And that makes him guilty*." (Italics added.) Defendant contends that this last statement urged the jury to use Wolf's testimony to find him guilty. But this portion of the prosecutor's rebuttal relied on Maria's own testimony about how she felt helpless, not Wolf's testimony on CSAAS.

Furthermore, the trial court instructed the jury not to use Wolf's testimony as evidence that defendant committed the offenses. The court instructed the jury to use the testimony only in deciding whether Maria's conduct was not inconsistent with that of someone who had been molested and in evaluating the believability of her testimony. Defendant contends the latter part of this instruction concerning the victim's credibility effectively allowed the jury to conclude defendant committed the offenses. But

defendant makes no showing that the jury misapplied the instruction in this manner. Absent a showing to the contrary, we assume the jury adhered to the trial court's instructions. (*People v. Pettie* (2017) 16 Cal.App.5th 23, 45.)

We conclude nothing about the prosecutor's questioning or argument was improper and none of the challenged testimony was inadmissible. For the same reasons, counsel did not render ineffective assistance of counsel by failing to object. (*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].) Moreover, the asserted errors were not "so prejudicial as to render the defendant's trial fundamentally unfair" in violation of due process. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 913.)

Defendant further contends reversal is required by the cumulative prejudice from this and the asserted errors set forth above. We identified only one error above. Absent a finding of multiple errors, there is no other prejudice to cumulate.

D. Ineffective Assistance for Failure to Object at Sentencing

Defendant contends his trial counsel rendered ineffective assistance by failing to object at sentencing when the court imposed consecutive terms on all four counts.[6] The court stated it was imposing the terms "pursuant to Penal Code 667.6(d) which requires consecutive sentencing in this matter." Defense counsel did not object. Defendant contends counsel should have objected because the prosecution failed to show each count occurred on a separate occasion. Defendant contends the trial court thereby erred in believing it lacked discretion to impose concurrent terms. The Attorney General contends the trial court properly based its decision on a finding that the offenses occurred on separate occasions.

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[6] The legal principles governing ineffective assistance of counsel are set forth above in section II.A.2.c.

Section 667.6 provides in relvant part: "A full, separate, and consecutive term shall be imposed for each violation . . . if the crimes involve separate victims or involve the same victim on separate occasions. [¶] In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (§ 667.6, subd. (d).) "Once a trial judge has found under section 667.6, subdivision (d), that a defendant committed offenses on separate occasions, we may reverse only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior." (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.)

The trial court's ruling that consecutive terms were required "in this matter" shows the trial court implicitly found each offense occurred on a separate occasion based on the facts of those offenses. The probation report expressly recommended consecutive terms on this basis: "Given the defendant raped the very young victim on numerous and separate occasions, consecutive sentencing is recommended." A handwritten note on the report next to the recommended total term states "per PC 667.6(d)." The record shows the trial court understood its discretion was circumscribed by that subsection.

Furthermore, the record holds abundant evidence on which a reasonable trier of fact could have found defendant had a reasonable opportunity for reflection after completing each offense. Maria testified that defendant committed numerous rapes perpetuated over a period of several years, starting in the third grade and continuing through the sixth grade. She also testified that he committed multiple instances of oral copulation "plenty of times," which occurred "more [often] than I can remember."

Defendant relies on *People v. Coelho* (2001) 89 Cal.App.4th 861. In *Coelho*, the defendant committed 10 offenses. But he committed some of the offenses on the same occasion, and he committed other offenses on separate occasions. The Court of Appeal observed that "because more acts were shown than were charged and the charges all related to the same time period, it is much more difficult to determine the bases for the jury's verdicts." (*Id.* at p. 874.) The court held that when imposing consecutive terms in such a case, "a trial court *must* accept and rely upon the same factual basis which the jury unanimously selected and relied upon to convict the defendant on a particular count." (*Id.* at p. 876.) Here, however, there was nothing in the record showing that any of the counts occurred on the same occasion. As explained above, a reasonable trier of fact could have found defendant committed all four offenses on separate occasions; the trial court implicitly made such a finding. Accordingly, the trial court faced no ambiguity in determining which of the counts required consecutive terms. We conclude this claim is without merit.

III. Disposition

The judgment is affirmed.

_____
Mihara J.

WE CONCUR:

_____
Premo, Acting P. J.

_____
Grover, J.

People v. Mendez
H042638

APPENDIX B

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

THE PEOPLE,
Plaintiff and Respondent,
v.
JUAN CARLOS MENDEZ,
Defendant and Appellant.

H042638
Santa Clara County No. C1351407

BY THE COURT*:

Appellant's petition for rehearing is denied.

Date: 05/10/2018 PREMO, J. ACTING P.J.

*Before Premo, Acting P.J., Mihara, J., and Grover, J.

APPENDIX C

Court of Appeal, Sixth Appellate District - No. H042638

S248918

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JUAN CARLOS MENDEZ, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice