APPENDIX

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APPENDIX A

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CELSO YANEZ, Defendant and Appellant.	H044868 (Santa Clara County Super. Ct. No. B1476089)

Defendant Celso Yanez was convicted by jury trial of three counts of committing a lewd act on a child under 14 (Penal Code, § 288, subd. (a)),[1] and the jury found true multiple-victim one-strike allegations for each count (§ 667.61, subds. (b), (e)). The trial court sentenced defendant to 45 years to life, consisting of three consecutive indeterminate terms of 15 years to life.

On appeal, defendant argues: (1) the trial court prejudicially erred in instructing the jury pursuant to CALCRIM No. 361 (Failure to Explain or Deny Adverse Testimony); (2) the trial court's instruction pursuant to CALCRIM No. 1191B (Evidence of Charged Sex Offense) impermissibly reduced the prosecution's burden of proof and violated defendant's constitutional rights; (3) even if individually harmless, the interplay between CALCRIM Nos. 301, 361, 1190, and 1191B shifted the burden of proof and violated defendant's constitutional rights; (4) the use of the term "victims" during trial was prejudicial error; (5) defense counsel was prejudicially deficient in failing to object

[1] Subsequent statutory references are to the Penal Code unless otherwise noted.

to expert testimony about the rate of false reports of child abuse; (6) the cumulative effect of these alleged errors mandates reversal; and (7) his 45-years-to-life sentence is unconstitutionally cruel and/or unusual. We reject these contentions and affirm the judgment.

I. Background

The victims in this case, Jessica Doe and Monica Doe, were sisters. Jessica was a year older than Monica. Defendant was a family friend. Jessica and Monica met defendant and his family because defendant's daughter, Evelyn, was in the same first grade class as Jessica. The two families were close and spent a lot of time together over the course of several years, including going to "each other's house after church on Sundays" and celebrating birthdays, Thanksgiving, and Christmas together.

A. Prosecution's Case

1. Jessica Doe's Testimony

Jessica was 19 years old at the time of trial. She first met defendant when she was seven or eight years old. Jessica testified that defendant touched her a number of times "in a way that he shouldn't have."

The first incident occurred when Jessica was 12 years old. Jessica and Monica were at defendant's apartment for a sleepover with Evelyn. During the sleepover, Jessica and Monica were "play fighting" with Evelyn, meaning they were "wrestling each other, like, piling on top of one another." Defendant's wife, Isabel Perez-Borer, "was home at the time," but was in a "[d]ifferent room." At some point, Jessica was "on top of both Evelyn and [her] sister Monica," when defendant came from behind and "wrapped his arms around [Jessica] below the waist." Jessica first felt him feel her stomach. She then felt him reach "inside her underwear shorts" and then move "[d]own to [her] vagina"

with his "whole hand." The incident was so brief, just "[a] second or two seconds," that Jessica thought the touching might have been accidental.[2]

On another occasion, also when Jessica was 12 years old, defendant, Evelyn, Jessica, and Monica were at defendant's apartment. At one point, defendant asked Evelyn to go outside to get the mail. When she left, he asked Jessica and Monica if they wanted a snack. Monica went first with him to get a snack. Jessica then went to get a snack, but "as soon as [she] was walking away, [defendant] pulled [her] back towards him, and . . . he tried to kiss" her. As he was hugging her, Jessica recalled that his "face was really like to [her] ear, and he was trying to give [her] a kiss." She resisted by "trying to turn [her] head" away from him. She had no recollection as to whether he "actually kissed [her]." He "let [Jessica] go" at around the same time as Evelyn came back to the apartment.[3]

Later that day, defendant drove Jessica and Monica back to their home in his truck. Monica was sitting in the back of his truck with Evelyn, and Jessica was in front with defendant. The truck was a "three-seater" truck, with room for three people in the front. Monica and Evelyn were in the back and had no seats. Throughout the two-to-three-minute drive, defendant repeatedly "touch[ed] [Jessica's] legs." She was wearing shorts that day, and his hands were "really high up on [her] thigh . . . at the very top of the thigh." When they arrived at the home, defendant said to her that "nobody should know about this, and he tried to kiss [Jessica] again."[4]

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[2] The incident at the sleepover was charged as count four, and defendant was not convicted of that count.

[3] Defendant's "pull" of Jessica and attempted kiss were charged as count five, and defendant was convicted of that count.

[4] This incident in the car was charged as count six, and defendant was not convicted on that count.

On another occasion, also when Jessica was about 12 years old, there was a baby shower for Jessica's mother at the mobilehome of a family friend. About 30 people attended. At some point, everyone went inside, and Jessica was standing alone on the porch. Defendant came outside and gave Jessica a hug. She turned around while he was still hugging her. He then "reached beneath [her] sweater, under [her] shirt, and . . . under [her] bra" and he "squeezed" one of her breasts "skin to skin." She pushed him away and went inside. The incident made Jessica feel "[g]ross" and "uncomfortable."[5]

Near the end of Jessica's mother's pregnancy, when Jessica was "12 to 13," defendant often drove Jessica and Monica to school. When he drove them to school, it was not in defendant's truck but rather in "a different car." Evelyn would usually sit in the front seat, and Jessica and Monica would sit in the back seat. During those drives, defendant "would always reach" toward the back seat "with his right hand and try to touch [Jessica] and [her] sister." "[Jessica] and [her] sister would always scoot closer to the passenger doors so he wouldn't touch [them] at all." Jessica recalled this happening "three times" in total. Each time this happened, Evelyn "was always looking outside her window."[6]

Jessica first told her two friends, Ana and Janet, about defendant's conduct when she was in seventh grade. She told them "[j]ust what happened," but "didn't go into details exactly." Jessica told her parents about what happened during her freshman year of high school, just before she turned 15 years old. After she told her parents, she no longer went to defendant's apartment or allowed him to drive her to school. The family did not involve law enforcement.

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[5] The baby shower incident was charged as count seven, and defendant was convicted of that count.

[6] These car incidents were charged as count eight, and defendant was not convicted of that count.

During her junior year of high school, Jessica was contacted by law enforcement because of a theft incident at her school. At around that time, she had also run away from home and had been truant from school. As a result, she attended counseling sessions with a therapist. During one therapy session, she told her therapist about defendant's conduct, and the therapist notified the police. Jessica did not want her therapist to contact the police. She subsequently spoke to a police officer about what had happened.

2. Monica Doe's Testimony

Monica was 18 years old at the time of trial. She was about five years old when she first met defendant. She described three incidents where defendant touched her inappropriately.

On one occasion, when she was around 11 years old, she went swimming with Evelyn and defendant. There was no one else around. Monica was wearing a tank top, shorts, and underwear. The pool was shallow enough that they could stand in the pool. After playing in the pool, Evelyn decided to get out. She swam to the wall and pulled herself out. At the same time, defendant approached Monica from behind and grabbed her around the waist with his left hand. With his right hand, he began to "touch" her body, starting at the ankle. He moved his hand up her leg, "brush[ing] through [her] private area up to [her] chest." This touch lasted "a couple seconds" and occurred over her clothes. He then moved his hand up and touched her "in between [her] two breasts," making contact with her breasts "[a] little bit." After touching her chest, he "stopped below [her] neck" area.[7]

Monica then got out of the pool, and she and Evelyn went inside defendant's apartment to take a shower. Monica showered first. She then waited alone in the living room while Evelyn showered. At some point, defendant came in and put his arm around her shoulder. He then ran his finger across "the outline of [her] T-shirt," tracing the

[7] The swimming pool incident involving Monica was charged as count one, and defendant was convicted of that count.

outline of her shirt around her neck and shoulder area. He did not try to open Monica's shirt. It all happened "pretty quickly," like the swimming pool incident. Defendant's wife called defendant from the kitchen and he left the room.[8]

Monica described another occasion that occurred during a period of two weeks before her mother gave birth when defendant drove her and Jessica to school. Monica and Jessica sat in the back seat of defendant's car, and Evelyn sat in the front passenger seat. During nearly every one of the five-to-ten-minute drives, defendant would reach back with his right hand over the center console to touch Monica's and Jessica's legs, rubbing their legs and knees for what "felt" like a "pretty long" time. Defendant did not say anything when he did this. Monica was left "uncomfortable," "[c]onfused," and "disgusted."[9]

Monica testified that she told two of her friends from school, Jennifer and Jessica H., about defendant's inappropriate conduct. She "felt sad" telling them about what had happened. She also told her sister, Jessica, about the pool incident on the same day that it happened.

3. Prior Disclosures

Ana R. testified that sometime in the "eighth grade or maybe freshman year," Jessica disclosed to her that she had been sexually abused. Jessica was emotional when she did so; "her voice [was] kind of shaky and [she looked] like she wanted to cry."

Jessica H. testified that she and Monica were "best friends" in the sixth grade. At some point around the "end of sixth grade, . . . going into seventh grade," Monica disclosed "some kind of sexual assault that had occurred to her." She appeared "frazzled" and "seemed scared . . . and concerned" when she told Jessica H. Monica was

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[8] The living room incident involving Monica was charged as count two, and defendant was not convicted of that count.

[9] The car incident involving Monica was charged as count three, and defendant was not convicted of that count.

usually quite "talkative and laughing," but Jessica H. noted that "something [was] definitely bothering her."

Francisco H., one of Jessica's and Monica's uncles, testified that both Jessica and Monica told him in 2011 about what defendant had done to them. When Jessica told him "what had happened," she was "crying" and Francisco could "see in her face that . . . it got [to] her." Monica "was the same," but "more fragile." The conversation lasted about 20 minutes. Francisco told the girls' mother about what they had said. At trial, Jessica did not recall making a disclosure to her uncle.

In 2014, Valentina Helo, who at the time was a family therapist intern, participated in 10 counseling sessions with Jessica. Toward the "end of that time," at around the "sixth or seventh session," Jessica reported "some sort of sexual assault" to Helo. Prior to making the disclosure, Jessica asked her parents to leave the therapy room. She was "very nervous" and she "was shaking." "She started crying and was not able to talk to [Helo] for a while until she was able to self-regulate." Based on what was said, Helo reported the disclosure to law enforcement within 24 hours.

4. Expert Testimony

Miriam Wolf, a licensed clinical social worker, testified as an expert on Child Sexual Abuse Accommodation Syndrome (CSAAS). Wolf stated that she was not familiar with the facts of this case. Wolf explained that CSAAS is not a diagnostic tool to prove that sexual abuse occurred, but is an educational tool used to dispel common myths about sexual abuse and the way children react to sexual abuse.

There are five categories of CSAAS: secrecy; helplessness; entrapment and accommodation; delayed and unconvincing disclosure; and retraction. Wolf testified that it was common for child sexual abuse victims to remain silent about abuse. The abuse is often committed in private and the abuser tells the child to keep it secret. While some child victims of sexual abuse show signs of emotional trauma, including "psychosocial distress, depression, anxiety, withdrawing," other children look "completely normal to

people" who know them. It is also common to delay reporting the abuse, and disclosures are often partial, delayed, conflicting, or unconvincing.

B. Defense Case

Defendant's wife, Isabel Perez-Borer, married defendant in 1998. They had two children together, Evelyn and a son. Perez-Borer had known Jessica and Monica since 2002, when Jessica was six years old and Monica was five.

Perez-Borer recalled that the girls had come over to go swimming once, but did not see defendant alone with Monica at any time. When the girls returned to the apartment, they appeared to be having fun and were behaving normally. Perez-Borer was in the apartment the entire afternoon and did not see defendant alone with Monica at any time.

She also recalled that defendant had driven Monica and Jessica to school on a regular basis when the girls' mother was pregnant. Perez-Borer was usually in the car, and sometimes the girls would kick the back of defendant's seat. Defendant "would reach back and ask 'Who's kicking my back?' " Jessica "would sit back in the seat laughing and laughing." It was "a game" for the children. Defendant never touched the girls' legs.

Perez-Borer testified that Jessica had once come to their apartment for a sleepover. Perez-Borer was present the entire time, defendant was never alone with the girls, and she never saw him grab Jessica or do anything inappropriate. Perez-Borer had also been at the baby shower, and she did not see defendant alone with Jessica at any time.

Defendant's daughter, Evelyn, who was 19 years old at the time of trial, testified that her father was not the type of person who would sexually abuse a child. Evelyn, Monica, and Jessica would sometimes ride in defendant's truck, but Jessica and Monica never sat next to defendant. While in the car, defendant would sometimes reach back to touch Jessica's and Monica's legs, but "it was like a playful thing. He'd always be like,

'Oh, who's ticklish?' And then he'd reach over and tickle people." Jessica and Monica were "[c]omfortable" with the conduct and "giggled about it."

Evelyn recalled the night of the sleepover. She was always with Jessica and Monica and did not observe defendant "do anything inappropriate" during the sleepover.

Evelyn also recalled attending a baby shower when she was in eighth grade. Jessica and Monica were there. Evelyn spent "[a]lmost all of [the] seven hours" of the baby shower with Jessica and Monica, and defendant spent the entire time in the living room with the other men.

Monica once came over to Evelyn's apartment complex to go swimming. The two girls sometimes "splashed water at [defendant] but [did] nothing serious." Neither of the girls had physical contact with defendant in the pool. Defendant climbed out of the pool first, and Monica and Evelyn got out a few minutes later. Defendant was never within reach of Monica. In the apartment, Evelyn never saw anything inappropriate happen between defendant and Monica.

Defendant, who was 55 years old at the time of trial, testified that he had enjoyed a close friendship with Jessica's and Monica's family. He had been "very happy" to have been asked to sponsor Monica's Quinceañera. When he found out about the accusations from Jessica and Monica, it was "a very heavy blow" because he had "never done anything." He was "sad because of everything that [he had] lost because of this problem." He specifically denied each of Jessica's and Monica's allegations, and he provided accounts of his time during each of the alleged incidents that generally agreed with Evelyn's and Perez-Borer's accounts.

II. Discussion

A. CALCRIM No. 361

Defendant contends that the trial court reversibly erred by instructing the jury pursuant to CALCRIM No. 361. He argues there was no factual basis for the instruction,

and that the instruction had the effect of "improperly singl[ing] out [his] testimony for special scrutiny" by "effectively shift[ing] the burden to [defendant] 'to explain' the complainants' accusations against him." The Attorney General concedes that the instruction "should not have been given in this case," but maintains that "any error was harmless."

1. Background

The trial court instructed the jury pursuant to CALCRIM No. 361 as follows: "If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure." Defense counsel did not object to the instruction.

In addition, the trial court instructed the jury pursuant to CALCRIM No. 200, as follows: "Some of the instructions may not apply depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I'm suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

2. Analysis

Defendant did not object to the instruction in the trial court, and thus defendant's challenge to the instruction is forfeited on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.) Nevertheless, "[a] reviewing court may review an instruction even absent an objection 'if the substantial rights of the defendant were affected thereby.' [Citation.]" (*People v. Hardy* (2018) 5 Cal.5th 56, 91.) " 'Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error

would result in prejudice if error it was.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087.) Because defendant argues the claimed instructional error affected his substantial rights, we reach the merits of his claim.

CALCRIM No. 361 "applies only when a defendant completely fails to explain or deny incriminating evidence, or claims to lack knowledge and it appears from the evidence that the defendant could reasonably be expected to have that knowledge." (*People v. Cortez* (2016) 63 Cal.4th 101, 117.) "Where a defendant's testimony contradicts or stands in conflict with the state's evidence, such 'contradiction is not a failure to explain or deny.' [Citations.] Nor is the instruction appropriate even when a defendant's testimony may seem 'improbable, incredible, unbelievable, or bizarre.' [Citation.] As our high court has explained, '[t]he instruction acknowledges to the jury the "reasonable inferences that may flow from silence" when the defendant "fail[s] to explain or deny evidence against him" and "the facts are peculiarly within his knowledge." ' [Citation.]" (*People v. Grandberry* (2019) 35 Cal.App.5th 599, 606.)

We agree with the parties that the instruction was inappropriate in this case. In his trial testimony, defendant generally admitted to having been with Jessica and Monica on the occasions that they described at trial, but broadly denied the specific allegations against him. He admitted to occasionally hugging or tickling the girls but insisted he had never done so sexually. His testimony was *not* " 'the functional equivalen[t] of no explanation at all.' " (*Cortez*, *supra*, 63 Cal.4th at p. 117.) Thus, it was error to give the instruction.

Defendant argues that any error involved his "constitutional rights to basic fairness," and thus we should evaluate the error under the constitutional standard. (See *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).) We disagree. Notwithstanding defendant's argument, California courts have routinely applied the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), when reviewing claims of instructional error pertaining to CALCRIM No. 361 and the equivalent CALJIC

instruction. (*People v. Saddler* (1979) 24 Cal.3d 671, 683 (*Saddler*); *People v. Vega* (2015) 236 Cal.App.4th 485, 501; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1471; *People v. Roehler* (1985) 167 Cal.App.3d 353, 393 [courts have "rather uniformly" applied *Watson*].)

In applying the *Watson* standard, the relevant inquiry is whether it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, *supra*, 46 Cal.2d at p. 836.) Under *Watson*, the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130.) "[T]he *Watson* test for harmless error 'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' " (*People v. Beltran* (2013) 56 Cal.4th 935, 956.)

We first look to the instructions given to the jury. Here, the challenged instruction, CALCRIM No. 361, is conditional and explicitly invites jurors to determine whether it applies. It instructed the jury that the instruction applies only "[i]f the defendant failed in his testimony to explain or deny evidence against him," and defendant "could reasonably be expected to have done so based on what he knew . . . ." The instruction makes clear that it applies *only if* defendant failed to explain or deny evidence. Further, the jury was instructed with CALCRIM No. 200, which told the jury that "[s]ome of these instructions may not apply," and that the jury must decide "what the facts are" and then "follow the instructions that *do* apply to the facts as you find them." (*Saddler*, *supra*, 24 Cal.3d at p. 684 [instruction to "disregard" inapplicable instructions

mitigated prejudicial effect related to improper giving of CALJIC No. 2.62 (predecessor to CALCRIM No. 361)].) "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Construed with CALCRIM No. 200, we presume that that the jury disregarded CALCRIM No. 361, because by its own terms it did not apply in this case.

In addition, the evidence in this case was strong. *Saddler* is instructive. In *Saddler*, there was a "clear conflict" between the testimony of the one eyewitness to the crime and the defendant's alibi, and "little corroborating evidence" of the defendant's guilt. (*Saddler*, *supra*, 24 Cal.3d at p. 683.) Although "mindful that the challenged instruction was not given in the previous trial which resulted in a hung jury," the court nevertheless concluded that the instructional error was harmless based in part on the "strength" of the witness testimony. (*Id.* at pp. 683-684; see also *People v. Haynes* (1983) 148 Cal.App.3d 1117, 1122 [concluding error in giving CALJIC No. 2.62 was harmless, even though the defendant claimed intercourse was consensual; "[t]he victim's version of the incident, both in her testimony and her report to the police . . . was unequivocal and not inherently improbable."].)

Here, as in *Saddler*, there was a "clear conflict" in the testimony. Nevertheless, the prosecution's case was relatively strong. With respect to the allegations that resulted in convictions, defendant "squeezed" one of Jessica's breasts "skin-to-skin" and also held her and tried to kiss her when she was 12 years old. He also ran his hand across Monica's body, when she was about 11 years old, "brush[ing] through [her] private area up to [her] chest," where he then touched the area between her breasts. Jessica and Monica had no apparent motive to fabricate the claims, the incidents were not reported to police until Jessica revealed what had happened to a therapist, and the sisters disclosed the incidents to friends and family before police became involved. Although there was no physical corroborating evidence, the prior disclosures generally corroborated the fact

that the abuse had taken place. Under these circumstances, it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the instructional error. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

In arguing that the instruction was prejudicial, defendant notes that the jury "requested hearing the testimony of all three witnesses to the pool incident," and also requested readbacks of other testimony, including for counts that resulted in acquittal. Defendant reads too much into these requests. "[T]he fact that the jury requested readback of testimony" does not establish "that his case was close," or "that he was prejudiced by" the instruction. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1075.) That the jury "request[ed] a rereading of very specific testimony" instead reflects that "[t]he jury approached its task with care" and carefully evaluated the evidence. (*Ibid.*) It does not show that the challenged instruction was prejudicial under the *Watson* standard.

Defendant also argues that his trial counsel was prejudicially deficient for failing to object to CALCRIM No. 361. To prevail on this claim, he must show both deficient performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 684 (*Strickland*).) Defendant's claim of ineffective assistance fails because, for the reasons discussed, he cannot establish that he was prejudiced by the instruction.

B. CALCRIM No. 1191B[10]

Defendant argues that the "giving of CALCRIM No. 1191[B] by the trial court improperly reduced the [prosecution's] burden of proof and violated [his] right to an impartial jury and due process."

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[10] At the time of trial, the relevant jury instruction was CALCRIM No. 1191. In March 2017, CALCRIM No. 1191 was divided into CALCRIM No. 1191A and CALCRIM No. 1191B. Although the record refers to CALCRIM No. 1191, for clarity we refer to the newly designated versions of the instructions.

1. Procedural Background

At the instruction conference, the trial court stated that it intended to instruct the jury with CALCRIM No. 1191B. Defense counsel objected, arguing that the instruction "changes the standard of proof and allows the jury to, in essence, use the charged crimes in an impermissible way when evaluating counts 1 through 8." The court overruled the objection.

The trial court instructed the jury as follows: "The People presented evidence that the defendant committed the crimes of lewd or lascivious acts on a child under 14. These crimes are charged crimes in this case that are alleged in Counts 1 through 8. The crimes are defined for you in these instructions. [¶] If you decide beyond a reasonable doubt that the defendant committed one of these charged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit the other charged crimes of lewd and lascivious act on a child under 14, and, based on that decision, also conclude that the defendant was likely to and did commit the other offenses of lewd or lascivious acts on a child under 18 -- under 14. [¶] If you conclude beyond a reasonable doubt that the defendant committed a charged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant's guilty of other charged offenses alleged in the other counts. The People must still prove each element of every charge beyond a reasonable doubt."

2. Analysis

Defendant argues that the instruction, as given, reduced the prosecution's burden of proof. He points to these two sentences: "The People presented evidence that the defendant committed the crimes of lewd or lascivious acts on a child under 14. These crimes are charged crimes in this case that are alleged in Counts 1 through 8." He argues that, in effect, "the trial court told the jury that the prosecution had presented evidence

sufficient to satisfy each and every element of all of the charged offenses under" section 288, subdivision (a).

Defendant acknowledges that the prior version of this instruction was approved in *People v. Villatoro* (2012) 54 Cal.4th 1152 (*Villatoro*), but contends that "[b]ecause *Villatoro* did not address the propriety of the first two sentences of CALCRIM No. 1191[B], it is not precedent on the issue." He points instead to *People v. Owens* (1994) 27 Cal.App.4th 1155 (*Owens*), and argues that as in *Owens*, the instruction in this case "impermissibly carried the inference that the [prosecution] had, in fact, established guilt." *Owens* does not support defendant's instant claim.

In *Owens*, the court examined an instruction which stated: "The People have introduced evidence tending to prove that there are more than three acts of substantial sexual conduct or lewd and lascivious conduct upon which a conviction in Count I may be based." (*Owens*, *supra*, 27 Cal.App.4th at p. 1158.) The court concluded that "[i]nstructing the jury that the People have introduced evidence 'tending to prove' [the defendant's] guilt carries the inference that the People have, in fact, established guilt." (*Ibid.*) The court opined that this impermissible "inference would be eliminated if the phrase 'for the purpose of showing' was substituted for 'tending to prove' " in the challenged instruction. (*Id.* at pp. 1158-1159.)

In this case, in contrast to *Owens*, the instruction did *not* include the impermissible phrase "tending to prove." Instead, the instruction stated that the prosecution had "presented evidence" as to crimes alleged in counts one through eight. As a matter of logic and language, the phrase "presented evidence" merely states the obvious—that the prosecution, as in all criminal cases, presented evidence that defendant committed a crime. It did not carry an "inference that [the prosecution] ha[d], in fact, established guilt." (*Owens*, *supra*, 27 Cal.App.4th at p. 1158.) Indeed, the instruction concluded by reminding the jury that "[t]he [prosecution] must still prove each charge and allegation beyond a reasonable doubt." Unlike the instruction in *Owens*, the instruction in this case

was a correct statement of the law. Thus, CALCRIM No. 1191B did not improperly shift the burden of proof in violation of defendant's constitutional rights.[11]

C. CALCRIM Nos. 301, 361, 1190, and 1191B

Even if none of the individual instructions violated defendant's constitutional rights, he contends that "the unusual interplay between CALCRIM Nos. 301, 361, 1190, and 1191[B] violated [his] rights to testify in his defense, to an impartial and fair jury, and to fundamental due process." He asserts that "taken together," these instructions "violated the trial court's sua sponte duty to instruct correctly on the allocation and weight of the burden of proof, and given that the error was prejudicial, [this] court must reverse."

1. Procedural Background

The trial court instructed the jury pursuant to CALCRIM No. 301: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all of the evidence." Right before giving CALCRIM No. 1191B, the court instructed the jury pursuant to CALCRIM No. 1190: "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone." Defendant did not object to CALCRIM Nos. 301 or 1190.

2. Analysis

In *People v. Gammage* (1992) 2 Cal.4th 693 (*Gammage*), the defendant contended that the predecessors of CALCRIM Nos. 301 and 1190 "in combination . . . unconstitutionally 'create[ ] a preferential credibility standard for the complaining witness.' " (*Gammage*, at p. 700.) The California Supreme Court rejected this

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[11] Because we find no error in the instruction, we do not address defendant's argument that his trial counsel rendered ineffective assistance by failing to challenge the first part of the instruction. Counsel was not deficient, and defendant was not prejudiced by the failure to challenge the instruction on those grounds. (*Strickland*, *supra*, 466 U.S. at p. 687.)

contention. "Although the two instructions overlap to some extent, each has a different focus. [CALCRIM No. 301's predecessor] CALJIC No. 2.27 focuses on how the jury should evaluate a fact (or at least a fact required to be established by the prosecution) proved solely by the testimony of a single witness. It is given with other instructions advising the jury how to engage in the *fact-finding* process. [CALCRIM No. 1190's predecessor] CALJIC No. 10.60, on the other hand, declares a substantive rule of law, that the testimony of the complaining witness need not be corroborated. It is given with other instructions on the legal elements of the charged crimes. [¶] Because of this difference in focus of the instructions, we disagree with [the] defendant . . . that, in combination, the instructions create a preferential credibility standard for the complaining witness, or somehow suggest that that witness is entitled to a special deference. The one instruction merely suggests careful review when a fact depends on the testimony of one witness. The other tells the jury there is no legal corroboration requirement. Neither eviscerates or modifies the other . . . . The instructions in combination are no less correct, and no less fair to both sides, than either is individually." (*Id.* at pp. 700-701.)

Defendant concedes that *Gammage* precludes him from arguing that the trial court prejudicially erred in giving both CALCRIM No. 301 and CALCRIM No. 1190, but he claims that it does not preclude him from contending that the trial court prejudicially erred in giving CALCRIM No. 1190 immediately before CALCRIM No. 1191B *and* in combination with CALCRIM Nos. 301 and 361.

"It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Burgener* (1986) 41 Cal.3d 505, 538, disapproved on a different point in *People v. Reyes* (1998) 19 Cal.4th 743, 756.) We evaluate the challenged instruction in the context of all the instructions given by the trial court. (*Boyde v. California* (1990) 494 U.S. 370, 378.) "[An] instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as

a whole and the trial record. [Citation.] In addition, in reviewing [a potentially] ambiguous instruction such as the one at issue here, we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

" '[T]he general rule is that the order in which instructions are given is immaterial.' " (*People v. Sanders* (1990) 51 Cal.3d 471, 519.) This is particularly true where, as here, the jury is instructed to consider all of the instructions together. (*Ibid.*) "Also, ' " 'we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]" ' [Citation.]" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 475.)

Here, we can see no reasonable likelihood that the jury was misled by the court's ordering or combination of the instructions. That the complained-of instructions were given in the same case did not suggest that a complaining witness was to be given more deferential treatment than any other witnesses, nor did it suggest that the prosecution's burden was anything less than beyond a reasonable doubt. Instead, a reasonable jury would have understood the instructions as being completely consistent: (1) the complaining witness, like any other single witness, may provide the sole testimony supporting a fact; (2) the complaining witness, even in cases of sexual assault, may provide the sole testimony supporting a conviction; and (3) if the jury concluded that defendant committed one of the crimes in counts one through eight, it may, but was not required to, conclude that defendant was disposed to committed other lewd acts. Although erroneously given, giving CALCRIM No. 361 was harmless error. When combined with CALCRIM Nos. 1191B, 1190, and 301—all correct statements of the law and none erroneously given—there is no reasonable likelihood that jurors would have understood the combination of instructions to suggest that the complaining witnesses were entitled to special deference or that the prosecution's burden was anything less than beyond a reasonable doubt. "The instructions in combination are no less correct, and no

less fair to both sides, than either is individually." (*Gammage*, *supra*, 2 Cal.4th at p. 701.) Because we reject defendant's claim on the merits, we do not address his argument that his trial counsel was ineffective for failing to object to the instructions on these grounds.

D. Use of Term "Victims"

Defendant contends that the "repeated use of the term 'victim' by the prosecutor, prosecution witnesses, and the trial court was error in violation of [his] right to due process."

1. Background

Defendant moved in limine to prevent the trial court, the prosecutor, and all witnesses from referring to Monica and Jessica as "victims." The trial court granted the motion in part, stating that it intended to refer to the complaining witnesses "by their first names probably in this case or Jessica Doe [and Monica Doe] so that it's not coming from the Court." As to the prosecution, the court declined to impose such a restriction, explaining: "I'm not going to restrict the People. It is their theory of the case that [defendant] is the defendant and that the victims are victims. Otherwise, they would not be prosecuting the case. I also have some difficulties in completely restricting that because, quite frankly, the jury instructions refer to them as victims and defendant, and so it's not improper to do so."

During voir dire, the trial court sometimes referred to Monica and Jessica as "victims." While speaking with one potential juror, the court stated that it understood that "some people feel like under no circumstances am I comfortable. I know it's a big decision. It's a big decision. It affects the defendant in this case. It affects the victims in this case. It affects the community. You have an important role." The prospective juror replied, "Yeah." The court continued: "You have to be able [to] do that because it's beyond -- it's a very high standard, but it's not beyond all possible doubt because

everything in life is open to some possible or imaginary doubt." The prospective juror replied that "there's a gray area in there . . . . Everybody may believe a witness. They still -- none of those 12 jurors really know if the witness is telling the truth if there's no corroborating evidence. That's all I'm trying to say." The same prospective juror later reiterated that it would be difficult to "reach a judgment . . . beyond a reasonable . . . without any supporting evidence at all, that's a very hard thing to do."

Another prospective juror voiced some hesitation about the case, explaining: "Because the victims are young. And looking at the defendant, he's much older than that." The court replied: "Okay. And again you're basing it on the allegations and what not, but you haven't heard what the victims will say yet." The prospective juror replied: "Yeah, I understand that." The court asked the prospective juror, "If you listened to the victims and you felt sympathy for them, but you didn't believe that what they said proved the crime, . . . would you be able to return a verdict of not guilty against the defendant?" The prospective juror replied, "If I didn't believe the witness, but if I felt on the fence, I feel like I would be more inclined to believe the witnesses."

At the end of jury selection, the trial court told the jurors that "because of the nature of the charges the, two named victims, I'm not reading their actual last names. They will have the last names Doe."

The prosecutor used the term "victim" or "victims" during voir dire, throughout trial, and in her closing arguments.

Two police officers who testified also referred to the complaining witnesses as "victims." The references occurred during three separate exchanges. At all other times, the two officers referred to the complaining witnesses as "Jessica" and "Monica," "the children," or using pronouns ("she" or "her").

2. Analysis

Defendant relies on *People v. Williams* (1860) 17 Cal. 142 (*Williams*). In *Williams*, the defendant was charged with murder, claimed self-defense, and was

convicted of manslaughter. On appeal, the defendant argued that the trial court committed error when it referred to the decedent as a " 'victim' " when instructing the jury. (*Id.* at p. 146.) The *Williams* court cautioned against use of that word: "The word *victim*, in the connection in which it appears, is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the accused." (*Id.* at p. 147.) In the court's view, it was improper for the trial court to have used the word "victim" when instructing the jury because "[i]t seems to assume that the deceased was wrongfully killed, when the very issue was as to the character of the killing." (*Id.* at pp. 147-148.) The California Supreme Court reversed the defendant's conviction, but on another ground. (*Id.* at p. 148.)

In *People v. Wolfe* (1954) 42 Cal.2d 663 (*Wolfe*), the defendants were convicted of stabbing and murdering a fellow inmate while in prison. Relying on *Williams*, the defendants argued the prosecutor committed misconduct when the prosecutor said that a defendant's knife had been left in the " 'victim's back.' " (*Wolfe*, at p. 666.) On appeal, the defendants claimed that the prosecutor's language "assume[d] the guilt of the defendant." (*Id.* at pp. 665-667.) The California Supreme Court disagreed, and distinguished *Williams* because the prosecutor's expression "did not come from the judge, but from the prosecuting attorney without objection by defense counsel or motion to strike being made, and the jury was instructed that it was the sole judge of the value and effect of the evidence; that it could not convict a defendant upon mere suspicion; that the prosecution was 'bound to establish the guilt of a defendant beyond a reasonable doubt, and unless the prosecution does so, then it is your duty to find the defendant not guilty.' " (*Wolf*, at pp. 666-667.)

Under the facts of this case, there was no reversible error. *Wolfe*'s distinction between a prosecutor's use of the term "victim" and a trial court's use of the term is instructive. As in *Wolfe*, the prosecutor was an advocate whose purpose was to prove that Jessica and Monica were "victims" of a crime. Defendant was charged with

committing multiple lewd acts on a child under 14, and the prosecutor's theory of the case was that defendant in fact committed a lewd act as alleged in each of the counts. As the trial court observed, the prosecution's "theory of the case" was that "[defendant] is the defendant and that the victims are victims." Although defense counsel objected in this case, the salient distinction between *Wolfe* and *Williams* was that the use of the term "victim" is different when it comes from the court as opposed to an advocate. Under *Wolfe* and *Williams*, it was not error for the prosecutor to refer to Jessica and Monica as the victims.

As to the use of the term "victim" or "victims" by witnesses and the trial court, even assuming it was error, the error was harmless under any standard. (*Chapman*, *supra*, 386 U.S. at p. 24; *Watson*, *supra*, 46 Cal.2d at p. 836.) In this case, the trial court's references to "victim" or "victims" occurred only briefly during the voir dire. By contrast, in *Williams*, the trial court's use of the term occurred when giving the jury instructions. Defendant identifies no instances after voir dire where the court referred to Jessica and Monica as "victims." Rather, the court strictly adhered to its own guidelines and avoided referring to Jessica and Monica as "victims" in front of the jury. We conclude that the court's brief deviation from its guidelines during voir dire was harmless beyond a reasonable doubt. It is also impossible to imagine that the use of the term by the two police officer witnesses was prejudicial. The two witnesses used the term "victim" or "victims" briefly during three parts of their testimony, and otherwise referred to the complaining witnesses by using their first names or pronouns.

In addition, the jury was fully instructed on reasonable doubt and the prosecution's burden of proof: that it "must decide what the facts are" and it "alone" decides "what happened[,] based only on the evidence that was presented . . . in this trial"; not to let "bias, sympathy, prejudice, or public opinion influence your decision" and bias included being "for or against" the "alleged victims"; that "[y]ou must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial";

that "[n]othing that the attorneys say is evidence" and the attorneys' remarks during "opening statements and closing arguments" were not evidence; and that the jury "alone must judge the credibility or the believability of the witnesses." We presume the jury followed the court's instructions. (*People v. Prince* (2007) 40 Cal.4th 1179, 1295.) Under no standard of prejudicial error is it conceivable that the jury ignored all of these instructions and failed to consider whether the prosecution had proved defendant committed the charged acts beyond a reasonable doubt simply because Jessica and Monica were occasionally referred to as "victims."

Finally, at times defendant seems to suggest that the prosecutor's use of the term "victim" or "victims" was "prosecutorial misconduct." To the extent defendant raises a separate misconduct claim, we reject it. " 'A prosecutor is not guilty of misconduct when [s]he questions a witness in accordance with the court's ruling.' [Citation.]" (*People v. Earp* (1999) 20 Cal.4th 826, 861.) Here, the trial court specifically ruled the prosecutor could refer to Jessica and Monica as victims. There was thus no misconduct on the part of the prosecutor.

E. Statistical Evidence

Defendant argues that this court should reverse because the CSAAS expert improperly commented on the credibility of the accusations by testifying that "only 4-5% of child abuse victims make a false accusation," which made the trial fundamentally unfair. In the event that his general objection to the admission of CSAAS testimony is deemed inadequate, he contends that his trial counsel was ineffective for failing to object to the testimony about the rate of false accusations.

1. Background

During cross-examination, defense counsel repeatedly asked the CSAAS expert, Wolf, about the incidence of false reporting of sexual abuse. Defense counsel asked whether someone who made a false report could still exhibit any of the five CSAAS

factors. Wolf replied, "Yes, it's possible." Defense counsel then asked whether there had "been any research" "[o]n false accusers?" Wolf said, "There is a body of literature about false allegations, yes." Defense counsel twice returned to the issue of false accusations later in cross-examination. Defense counsel also asked Wolf about whether her opinions were based more on anecdotal evidence rather than on scientific studies. Defense counsel finished by asking, "During your clinical observations, have you ever had the opportunity to interview individuals who you later found out that the report was false?" Wolf answered, "Yes."

On redirect, the prosecutor returned to the topic of false reporting, asking, "And are you able to give us any kind of percentage range with regard to false reporting?" Wolf said, "Yes." The prosecutor asked, "What do you base that on?" Wolf replied, "Research literature." The prosecutor continued, "And can you tell me what types of research literature you've reviewed to get to that point?" Wolf answered, "So there are individual studies and then there are what are called meta studies or meta articles that analyze -- that the article itself -- the authors analyze multiple studies and come up with a conclusion. And so there are meta studies about both types of -- I'm putting this in quotes -- false reports." The prosecutor asked, "Have you reviewed any literature that studies over kind of a span of years?" Wolf replied, "Yes. The false reporting articles -- here were about a dozen [articles concerning] . . . false reports, meaning somebody making something up. There were about a dozen published between the late 1980s and the mid 2000s. That was the focus of false reporting allegations during that period of time. More recent articles look at the phenomenon of failure to report true abuse."

The prosecutor continued, "What can you tell us about the percentage of false reports?" Wolf replied, "So across the studies of false reports, the kind where somebody believes a child made up something or an adult made up a report of abuse, all of those go into the false reporting studies. Of those dozen or so studies, there are some studies that say as low as one percent in false reports, and there are a couple of studies out of that

dozen with much higher percentages, 38 percent, 50ish percent, something like that. [¶] The majority of studies on false reports cluster around 2 to 8 percent, with even the majority of those being in the 4 to 6 percent range. So I think across researcher groups there's quite good consensus that as difficult as it is to do this kind of research and a recognition that they are -- this is an estimate area because of the challenges in doing the research, that those kind of false reports are in -- conservatively in the 5 to 6 percent range, 4 to 6 percent."

Wolf then elaborated on the other type of false reports: "The other type of false reports, kinds where kids do not report true abuse -- again a difficult thing to study but a little bit easier to study -- those reports have kids not reporting true abuse, including in cases where there is other corroborating evidence that the abuse happened. Those studies cluster between 40 and 50 percent." The prosecutor asked, "And so that 40 and 50 percent is not reporting true abuse?" Wolf responded, "Yes. That -- of the studies that look specifically at that issue. There are other studies that look at do people delay reporting or delay reporting until into adulthood. But the ones that are specifically looking at if we know abuse happened because there is some kind of external corroborating evidence, when directly asked do children tell about it and do they tell completely, the studies -- there are fewer of those, but those studies that there are cluster in a 40 to 50 percent range." Wolf's testimony then ended without objection.

During closing arguments, defense counsel addressed the CSAAS testimony: "[T]his is another sort of example of my concern about these types of cases. When you have no additional physical evidence . . . . You have nothing. You have words. But you bring in an expert to give us pseudoscience. Okay? To give us kind of junk science, a theory, by her own admission, a theory based -- or a theory based on an article that has been repudiated by the actual author who said you guys are using this incorrectly." Defense counsel later emphasized that the expert testimony was based "in pseudoscience or junk science to help [the jury] come to a conclusion." He later added: "So for those of

you with a background in knowing what real science is and what real research is, the CSAA[S] -- and I shouldn't say it -- but BS is just that. It's not real. It's nothing that you should be basing your opinions on. It's nothing that you should be relying on in order to determine guilt or innocence of my client. CSAAS has no part in a criminal trial, and I'm hoping that you realized that when Miriam Wolf got up there and tells you anecdotal evidence is the same as science. That's not what -- it's not true. Discount that."

2. Analysis

Defendant maintains that his general objection to admission of the CSAAS evidence, which the trial court "deemed to be a continuing objection," was sufficient as to all of the CSAAS testimony, including the statistical testimony elicited on redirect. We disagree. In the trial court, defendant objected to the admission of the CSAAS evidence, arguing that it would unduly bolster the credibility of the complaining witnesses. The objection was made in general terms. The failure to raise a timely and *specific* objection forfeits a claim on appeal that evidence was erroneously admitted. (Evid. Code, § 353, subd. (a).) The requirement of a timely and specific objection serves to prevent error and allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps to minimize the prospect of reversal. (*People v. Partida* (2005) 37 Cal.4th 428, 434.) Because defendant failed to specifically object to the testimony, he cannot challenge its admission on appeal.

Defendant asserts that if he failed to preserve this claim for review, his trial counsel was ineffective for not objecting to Wolf's testimony about the rate of false reports.

To succeed on an appellate claim of ineffective assistance, a defendant must establish that his trial counsel's performance was deficient and that his defense was prejudiced by the deficiency. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218; *Strickland*, *supra*, 466 U.S. at p. 687.) "The defendant must show that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, at p. 694.) Whenever counsel's conduct can be reasonably attributed to sound strategy, a reviewing court will presume that the conduct was the result of a competent tactical decision, and the defendant must overcome that presumption to establish ineffective assistance. (*Id.* at p. 689.)

"It is particularly difficult to prevail on an appellate claim of ineffective assistance [on direct appeal]." (*People v. Mai* (2013) 57 Cal.4th 986, 1009, italics omitted (*Mai*).) We will reverse "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. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding. [Citations.]" (*Ibid.*) "The failure to object only rarely constitutes ineffective representation." (*People v. Caro* (2019) 7 Cal.5th 463, 514 (*Caro*).)

Here, we cannot say that the record affirmatively discloses *no* rational tactical purpose for the failure to object to the statistical testimony. Indeed, the record reflects two possible tactical reasons for why defense counsel did not object. First, defense counsel's theory with respect to the CSAAS evidence was that it was "pseudoscience" or "junk science." In her testimony, Wolf reported that there were a range of studies on false reporting, with some reporting rates as high as "50ish percent" and some as low as "2 percent." Such a wide range supported defense counsel's argument that CSAAS evidence was "junk science" and that it should not be trusted. Second, the challenged testimony also told the jury that false reports *do* exist, and that some studies have reported the rate to be as high as 50 percent. This testimony supported defense counsel's theory that the alleged lewd acts did not happen.

"This is not the rare case where there 'could be no satisfactory explanation' for the failure to object," rather it may have arisen from a desire not to object to testimony that arguably supported defense counsel's theory of the case. (*Caro*, *supra*, 7 Cal.5th at

p. 514.) " '[D]eciding whether to object is inherently tactical,' " and the record suggests that counsel's failure to object here was tactical. (*People v. Lopez* (2008) 42 Cal.4th 960, 972.) We therefore reject defendant's claim of ineffective assistance.

There is an additional basis for rejecting defendant's contention. Even assuming defense counsel had no tactical reason not to object, defense counsel's questioning on cross-examination opened the door to the admission of this testimony. " 'The extent of the redirect examination of a witness is largely within the discretion of the trial court . . . . It is well settled that when a witness is questioned on cross-examination as to matters relevant to the subject of the direct examination but not elicited on that examination, he may be examined on redirect as to such new matter.' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1247-1248.) Here, defense counsel's questions on cross-examination repeatedly focused on the incidence of false reporting, and whether Wolf's opinions were supported by scientific evidence. On redirect, "[t]he prosecution was . . . entitled to inquire into the facts that might influence this opinion." (*Id.* at p. 1248.) Thus, defense counsel's line of questioning opened the door for the admission, on redirect examination, of testimony regarding false allegations of child sexual abuse, including the frequency of such false allegations and the scientific basis for the testimony. There "was no error in permitting this very limited redirect examination in response to the cross-examination." (*Ibid.*) Had counsel objected, it is unlikely that the trial court would have stricken the challenged testimony. Accordingly, there was no prejudice, and defendant's ineffective assistance claim fails. (*Strickland*, *supra*, 466 U.S. at p. 694.)

F. Cumulative Error

Defendant contends that "[e]ven if each constitutional, instructional and evidentiary error identified above could be considered harmless individually, the combined errors violated [his] right to due process."

"[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046.) " 'The "litmus test" for cumulative error "is whether defendant received due process and a fair trial." ' [Citation.]" (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436.) " '[A] defendant is entitled to a fair trial, but not a perfect one,' for there are no perfect trials. [Citations.]" (*Brown v. United States* (1973) 411 U.S. 223, 231-232; accord, *People v. Cunningham* (2001) 25 Cal. 4th 926, 1009.)

In this case, we have found that the trial court erred when it instructed the jury pursuant to CALCRIM No. 361. We also assumed without deciding that the trial court's brief use of the term "victim" or "victims" was error. Each of these errors was individually harmless. We found no ineffective assistance in the redirect examination of the CSAAS expert, and no error in connection with the other instructional error claims. Based on our review of the record, we conclude that defendant received a fair trial. Thus, reversal is not required even considering the cumulative effect of the one identified error and the one assumed error.

G. Cruel and Unusual Punishment

Defendant contends that his sentence violates the state and federal prohibitions on cruel and/or unusual punishments. He notes that he was 56 years old at the time of sentencing, and thus his sentence is effectively a life sentence. He further contends, if the issue is deemed forfeited, that his trial counsel was ineffective for failing to object to the sentence on these grounds.

1. Background

Prior to sentencing, Jessica made a victim impact statement: "So I'm speaking for my sister and I both. What happened to me and my sister has affected us for our entire lives. I'm afraid of it all happening again. [¶] I'm afraid of being touched by the other

sex. I'm always tense and aware. It sucks not being comfortable with the other sex. I have tried so many times to forget about what happened, but it's too hard. The memories coming -- I hate having to remember those times no matter how many times (unintelligible)."

She continued: "All I want to know from you is why. Why did you do this? What made you think that what you did was okay and that it was just playful? [¶] I trusted you and thought of you as family. The pain you have put not only me but my sister [through] is -- the feeling of your hands on me makes me cringe, and it makes me feel nasty. My whole family trusted you. [¶] There were times when I had trouble sleeping because these memories would come back to me. I had to be strong for not only myself but for my family too. Do you know how hard it was to tell my parents about it? The thought of them not believing us . . . [.] [¶] The first time I had to go to court was painful. That night I couldn't sleep. It sucked. I cried every night because I couldn't forget. You had the guts to say this was all a joke. Who jokes around like that? [¶] There are times when I feel that I should forgive to be in peace, but it's not something that you can easily forgive and forget."

The probation report stated that defendant was 56 years old at the time of sentencing. He was born in Guatemala and had been in the United States for 29 years. He had no known criminal history. Defendant spoke no English and had received an education through the sixth grade in Guatemala. He worked as a handyman. Defendant was married with three children, one of whom resided in Guatemala.

Defendant stated the following at sentencing: "What my attorney has told me, that I don't accept what he has told me or what he has [*sic*] telling me. I have never done anything so why am I to accept all of this. [¶] If I would have been guilty, I could have run. I went back to my country. I returned. [¶] I was -- I had also bailed out for a while. If I were guilty, I would have run, I would have disappeared from this country. So I have no reason to accept what is being imposed on me because it's too much for having done

nothing. [¶] I'm going to prison for a long time and I don't think that it's fair for someone who has done nothing because how does the jury know that I am guilty. And that's all I have for the moment." He continued: "What I can tell you is that I'm not guilty or whatever sentence is to be imposed you will impose. That's all."

Defendant's wife and daughter also made statements in his support. Evelyn stated that her dad "always was kind" and that he was a "good man." Perez-Borer spoke about her husband's good character -- that he was "a good man" and "a hard worker." She believed that Jessica became "upset" with them and that their "mistake" was in trying to help Jessica and her family. She asked the court to "show compassion for [her] husband."

In pronouncing its sentence, the court stated that it took the comments made by defendant's family members into consideration. The court also addressed Jessica's victim impact statement: "The victim did fight through tears in making her statement. I did take some notes from it. And, you know, her sentence is a lifelong one as well, based on what happened to her. She talked about the fact that her [*sic*] and her sister have been affected for the rest of her life." In recounting the trial, the court noted that the jury assessed the victims' credibility and convicted defendant on three different counts, which were "convictions that reflect different occurrences" as well as "two . . . separate victims." The court also observed that there was "a position of trust and confidence between [the victims] and the defendant." Because the "assaults did occur . . . over the period of a year" and "defendant did have time to reflect on his actions," the court concluded that consecutive terms were appropriate.

The trial court sentenced defendant to terms of 15 years to life on counts one, five, and seven. Because the offenses involved more than one victim, the term of 15 years to life on each count was mandatory. (§ 667.61, subds. (b), (e).) Based on the aggravating circumstances, the court imposed consecutive terms resulting in a sentence of 45 years to life.

2. Analysis

Defendant contends that his sentence of 45 years to life violates state and federal constitutional bans against cruel and/or unusual punishment. The Attorney General argues defendant forfeited this claim because he failed to raise it in the trial court. Nevertheless, we address the merits of his claim for the sake of judicial economy. (*People v. Chaney* (2007) 148 Cal.App.4th 772, 780.) Because the federal Constitution "affords no greater protection than the state Constitution" (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510), we address whether defendant's sentence violates the California Constitution.[12]

Article I, section 17 of the California Constitution states that "[c]ruel or unusual punishment may not be inflicted or excessive fines imposed." This constitutional proscription is violated when a penalty is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*), superseded by statute on another ground as stated in *People v. West* (1999) 70 Cal.App.4th 248, 256.) "Whether a particular punishment is disproportionate to the offense is, of course, a question of degree. The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible. The judiciary, accordingly, should not interfere in this process unless a statute prescribes a penalty 'out of all proportion to the offense' [citations], i.e., so severe in relation to the crime as to violate the prohibition against cruel or unusual punishment." (*Lynch*, at pp. 423-424.) "Whether a punishment is cruel or unusual is a question of law for the

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[12] We do not address defendant's reliance on *People v. Cadena* (2019) 39 Cal.App.5th 176, which, after briefing was complete, was ordered depublished on December 11, 2019. (See Cal. Rules of Court, rule 8.1115, subd. (a).)

appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496.)

The California Supreme Court has devised a three-prong test for assessing whether punishment is cruel or unusual. (*Lynch*, *supra*, 8 Cal.3d at pp. 425-427.) Courts should consider "the nature of the offense and/or the offender" (*id.* at p. 425), compare the punishment to other punishments imposed by the same jurisdiction for more serious offenses (*id.* at p. 426), and compare the punishment to other punishments imposed by other jurisdictions for the same offense. (*Id.* at p. 427.) The defendant need not establish the requisite disproportionality in all three respects. (*People v. Dillon* (1983) 34 Cal.3d 441, 487, fn. 38 (*Dillon*), abrogated by statute on a different point as explained in *People v. Chun* (2009) 45 Cal.4th 1172, 1186.) A defendant bears the burden of establishing that the punishment prescribed for his offense is unconstitutional. (*People v. King* (1993) 16 Cal.App.4th 567, 572.)

We first consider the nature of the offense and the offender. Regarding the offense, we evaluate "the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*Dillon*, *supra*, 34 Cal.3d at p. 479.)

Here, defendant committed a number of lewd acts against Jessica and Monica, who were 11 and 12 years old. In addition to touching Monica's and Jessica's breasts skin-to-skin on separate occasions, he also tried to kiss Jessica when she was in his care. Defendant did not use physical violence against Jessica and Monica beyond the violence inherent in the offenses. However, as described by Jessica, the incidents had a lasting effect on the girls. Defendant also took advantage of his position as an authority figure by committing the offenses when he was supposed to be watching after the girls. The consequences of defendant's acts were devastating to the girls. In a statement to the court, Jessica said that she is "afraid of being touched by the other sex," she is "always

tense and aware," she "had trouble sleeping because [of] these memories," she "cried every night" during trial, and she "couldn't forget" what defendant had done.

We next focus on defendant's "individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Dillon*, *supra*, 34 Cal.3d at p. 479.) Here, defendant's record revealed no prior criminality, though his wife's statements at sentencing indicated a prior DUI offense. When defendant committed the charged offenses, he was in his late 40's. He had been married for many years and was the father of three children. He had been working regularly as a handyman. Thus, defendant was old enough to know and understand that he was committing very serious offenses and that he was inflicting severe emotional damage on Jessica and Monica. He also did so over an extended period of time, and had time to reflect on his conduct.

Based on the number of times defendant committed lewd acts, the extremely damaging effect of his sexual misconduct on Jessica and her sister, and his culpability, defendant's sentence is not "so disproportionate to the crime[s] for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Lynch*, *supra*, 8 Cal.3d at p. 424.)[13]

III. Disposition

The judgment is affirmed.

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[13] Having rejected defendant's argument that his sentence constituted cruel or unusual punishment, we need not consider defendant's alternative argument that trial counsel's failure to raise this issue constituted ineffective assistance of counsel.

_____
Mihara, J.

WE CONCUR:

_____
Elia, Acting P. J.

_____
Grover, J.

People v. Yanez
H044868

APPENDIX B

Filed 5/7/2020

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Appellant, v. CELSO YANEZ, Defendant and Respondent.	H044868 (Santa Clara County Super. Ct. No. B1476089) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on April 17, 2020, be modified as follows:

1. On page 4, replace the first sentence of the first paragraph, which begins with the words "On another occasion," with the following sentence. "On another occasion, when Jessica was about 12 or 13 years old, there was a baby shower for Jessica's mother at the mobilehome of a family friend."

2. On page 34, replace the first sentence of the last paragraph, which begins with the word "Here," with the following sentence. "Here, defendant committed a number of lewd acts against Monica and Jessica, who were both children under the age of 14."

This modification does not affect the judgment.

The petition for rehearing is denied.

Date: _____

_____
Mihara, J.

_____
Elia, Acting P. J.

_____
Grover, J.

People v. Yanez
H044868

APPENDIX C

Court of Appeal, Sixth Appellate District - No. H044868

S262394

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

CELSO YANEZ, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice