NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID ALLEN KUNTZ, Defendant and Appellant.	F074975 (Super. Ct. No. BF161652A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Diane Nichols, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jeffrey D. Firestone, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant David Allen Kuntz was convicted of several sex crimes occurring over a period of approximately nine months against four of his cousin's minor children with whom he lived. Appellant appeals the judgment of his convictions, raising the following arguments: (1) the trial court erred by admitting appellant's confession because the confession was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and his constitutional rights to due process; (2) the evidence was constitutionally insufficient to support one of the convictions; (3) defense counsel violated appellant's Sixth Amendment right to the assistance of counsel by conceding guilt in closing argument; or in the alternative, that defense counsel provided ineffective assistance of counsel with the comments made in his closing argument; and (4) the trial court erred by instructing the jury that it could use Child Sexual Abuse Accommodation Syndrome (CSAAS) evidence to evaluate the believability of witnesses' testimony and by instructing the jury it could apply CSAAS evidence to the testimony of a victim not named in the information. Appellant also claims the cumulative prejudicial effect of the alleged errors requires reversal. Finally, appellant asserts there is a clerical error in the abstract of judgment regarding fines that must be corrected. We direct the trial court to correct the abstract of judgment to reflect the oral pronouncement of the trial court. In all other respects, we affirm.

FACTUAL BACKGROUND

Prosecution Evidence

In 2015, appellant lived with his maternal cousin, V.J.[1] At that time, V.J. had seven children: E.R.; B.R., born in 2011; A.S.; I.S., born in 2009; G.S., born in 2007; D.S., born in 2005; and J.S., born in 2004. Appellant looked after V.J.'s children while

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1 Pursuant to California Rules of Court, rule 8.90, we refer to certain persons by their initials. No disrespect is intended.

she was in school from March 2015 through July 2015, five days a week from 8:00 a.m. to 5:00 p.m. Appellant slept in the living room or in the boys' bedroom.

On September 21, 2015, V.J. was alerted by B.R. that I.S. had told him that appellant and G.S. had been " 'being gay.' " V.J. asked B.R. what he meant by "being gay," and B.R. said it meant touching each other. V.J. questioned I.S. and G.S. about the comment. I.S. told V.J. that appellant would "suck on [G.S.]'s pecker." G.S. denied it happened at first but then admitted that " '[appellant] does' "; appellant " 'bes [*sic*] gay to [him].' " V.J. called the police. Appellant was present during this conversation, and while V.J. called the police, appellant went into J.S.'s room. Officers Anthony Manriquez and Ian Jones responded to V.J.'s house. When they arrived, they could not find appellant. When V.J. went into J.S.'s room, the window was open. V.J. had not seen appellant leave through the front door.

Manriquez interviewed G.S. G.S. told Manriquez that appellant forced G.S. to let appellant suck G.S.'s penis. G.S. said he tried not to let appellant do it, but appellant "strapped [G.S.] down" in order to accomplish the act. This happened in J.S.'s bedroom approximately eight times. Appellant continued the act after G.S. told appellant to stop. The last time was approximately three weeks ago. G.S. said appellant also told G.S. to suck on appellant's penis, but G.S. said no. At the time of this interview, G.S. said appellant never did anything else. Later that night, G.S. confirmed with detective Lance O'Nesky, the lead investigator on the case, that appellant strapped G.S. down with appellant's hands and feet in order to suck G.S.'s penis in J.S.'s bedroom approximately eight times. G.S. told O'Nesky that appellant told G.S. not to tell anyone, and G.S. did not because he thought he would get in trouble. G.S. also told O'Nesky that when appellant asked G.S. to touch his penis, and G.S. said no, appellant would then scoot next to G.S. and touch G.S.'s penis with appellant's hand. This happened when G.S.'s mom was out at Walmart approximately 14 days before. G.S. never saw anything happen with appellant and any of the other children.

Jones interviewed I.S. I.S. told Jones he saw appellant sucking on G.S.'s penis a few days ago while his mom was at Walmart. I.S. said appellant and G.S. often would go into a room together and lock the door. I.S. also said that B.R. sometimes sucked on appellant's nipple and "it gets all red." This exchange followed:

"[JONES]: ... Does [appellant] tell [B.R.] to [suck on his nipple]?

"[I.S.]: Nope.

"[JONES]: No? [B.R.] just does it on his own?

"[I.S.]: No, um, [appellant], um, just lays down and lets him.

"[JONES]: Okay. Um. Has [B.R.] — so [appellant] and [B.R.] have they ever done nasty stuff together other than, uh, putting his mouth on his nipple?

"[I.S.]: Mm no.

"[JONES]: No?

"[I.S.]: He just, um, just kept sucking on his nipple."

I.S. said appellant has not done anything "nasty" with him (I.S.)

Jones attempted to obtain a statement from B.R. but determined B.R. had difficulty understanding the difference between a truth and a lie.

The next day on September 22, 2015, O'Nesky interviewed I.S., D.S., and J.S. separately. D.S. and J.S. each told O'Nesky that appellant and G.S. would go into a room together and lock the door. I.S. told O'Nesky that he has seen appellant suck on G.S.'s "middle part," referring to the penis, and that B.R. "does the same thing" and sucks appellant's nipple. I.S. told O'Nesky that one time he saw appellant suck on G.S.'s penis while B.R. sucked on appellant's nipple. I.S. had seen B.R. suck on appellant's nipple approximately 15 times. During the interviews conducted on September 22, 2015, none of the boys admitted they had been touched by appellant though D.S. said appellant tried to have D.S. touch him one time by asking and D.S. said, "no." This happened twice. Appellant told D.S. if anyone "snitches," appellant would get rid of his phone so no one

could find him and would go to Michigan. I.S. also said that appellant tried to touch I.S.'s penis, but I.S. kicked him and he stopped.

Appellant was arrested at his grandmother's house on September 23, 2015. O'Nesky interviewed appellant. Appellant initially denied having sexual contact with G.S. or any of the boys. Appellant then admitted to engaging in multiple sexual acts with the boys including performing oral copulation on I.S., G.S., D.S., and J.S.; inserting his finger into the butts of G.S., D.S. and I.S.; and inserting his penis into the butts of G.S. and I.S. Appellant admitted he had "[p]layed with [G.S.]'s penis" and asked G.S. to put his mouth on appellant's penis. Appellant said the acts made him horny and that he did it for sexual gratification.

Appellant told O'Nesky that B.R. sucked on appellant's nipple. Appellant said B.R. put B.R.'s hands down appellant's pants. In appellant's statement to O'Nesky on September 23, 2015, appellant told O'Nesky that B.R. sucked on his nipple "quite a bit." Appellant said this happened every other night for approximately five months. Appellant also said he would wake up in the middle of the night with B.R.'s hand down appellant's pants. Appellant said that when B.R. tried to do this when appellant was awake, appellant told him not to. On one occasion, appellant woke to find he had an erection from the touching.

Appellant also told O'Nesky he once lived with a cousin named Tyler, who was 13 or 14 years old, in Colorado. He slept next to Tyler every night and touched Tyler's penis on 15 to 16 occasions.

After interviewing appellant, O'Nesky asked V.J. to bring the children back for more interviews. O'Nesky testified he did not tell V.J. anything about what appellant told him. During their interviews, O'Nesky told each boy that he had talked to appellant and that appellant had told him what happened. He did not tell them specifically what appellant said occurred. Each boy with the exception of I.S. then volunteered that appellant had engaged in sexual acts with them.

G.S. told O'Nesky appellant put his penis in G.S.'s butt once and it hurt. G.S. said appellant played with G.S.'s penis three times with his hand skin to skin.

D.S. told O'Nesky that appellant "always tries to put his wiener in my butthole." Appellant had tried approximately eight times. D.S. told appellant no, but appellant did it anyway. Appellant would pull down D.S.'s and his own pants, but D.S. would "sock" appellant before appellant's penis would touch him. Appellant "got to" D.S. one time, and put his penis into D.S.'s butthole. Appellant tried to suck D.S.'s penis.

J.S. told O'Nesky that appellant had tried touching him. J.S. said appellant tried "touching all of us" but that J.S. did not let him. J.S. said that appellant would hold him down and make him let appellant touch his penis. J.S. said appellant touched J.S.'s privates with appellant's hands. J.S. said appellant had tried four times to put his penis in J.S.'s butt. Appellant tried sucking J.S.'s penis as well. J.S. saw appellant and G.S. "doing something" under the blankets approximately six times.

I.S. said no one had touched him inappropriately.

At trial, B.R. did not testify because it was determined he had trouble determining the difference between a truth and a lie. I.S. testified he had never seen appellant before. I.S. said no one had touched him in a way he did not want to be touched, that he had never seen B.R. touched in a way he would not like, and that he had never talked to a police officer. I.S. said he had never heard the word "nipple" before and denied knowing what counsel was pointing to when counsel pointed to his own nipple. G.S., D.S., and J.S. testified to substantially the same acts they told O'Nesky about after he had interviewed appellant.

Psychologist Michael Musacco testified as an expert in CSAAS. CSAAS was identified by researchers who noticed behaviors of child sexual abuse victims seemed to be inconsistent with what would be expected of a victim. CSAAS explains misconceptions about how a victim of child sexual abuse would behave, but does not

prove abuse occurred. There are five stages of CSAAS: secrecy, helplessness, accommodation, delayed/unconvincing disclosure, and retraction.

Musacco expounded upon the five stages of CSAAS. He testified that for ongoing abuse to continue, there has to be secrecy. A sexually abused child feels helplessness because he or she typically experiences emotional confusion and is overwhelmed. Child victims of sexual abuse accommodate or adapt to the abuse. When a child is sexually abused, they do not tell right away for a variety of psychological pressures. Disclosure may be delayed or inconsistent. Victims tell part of the story to "test the waters," or see how the person will respond and then will share more later. Retraction is a less common stage, but a child may recant an accusation because a child may be removed from the home as a result of the abuse and there may be pressure for them to get the family back together or get a family member out of a legal difficulty. Musacco testified that the application of CSAAS starts with the premise that there has been abuse. Musacco testified he had no knowledge of the case.

Defense Evidence

Appellant testified in his own defense. Appellant testified that he never touched any of the boys. He also denied touching his cousin Tyler. Appellant confessed to O'Nesky because he was scared and because O'Nesky said he had DNA evidence and that there was "no point in delaying the inevitable." Appellant thought if he confessed, he could get counseling instead of going to prison.

PROCEDURAL BACKGROUND

Appellant was convicted by jury of four counts of lewd and lascivious acts—one each against B.R. (count 1), G.S. (count 5), D.S. (count 8), and J.S. (count 11) (Pen. Code,[2] § 288, subd. (a)); two counts of sodomy against a child less than 10 years of age—one each against G.S. (count 2) and D.S. (count 6) (§ 288.7, subd. (a)); one count of

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[2] All further undesignated statutory references are to the Penal Code.

sodomy against a child less than 10 years of age against G.S. (count 3; § 288.7, subd. (b)); one count of attempted lewd and lascivious acts against D.S. (count 7; §§ 664/288, subd. (a)); one count of attempted lewd and lascivious act by force against J.S. (count 9; §§ 664/288, subd. (b)); and one count of attempted sodomy against a child younger than 14 years of age and 10 years younger than the defendant against J.S. (count 10; §§ 664/286, subd. (c)). In addition, the jury found true appellant committed an enumerated sexual offense against more than one victim (§ 667.5, subd. (e)(4)) as to counts 1, 5, 8, and 11.

As to counts 1, 3, and 11, appellant was sentenced to a term of 15 years to life for each count. As to counts 2 and 6, appellant was sentenced to a term of 25 years to life for each count. As to count 9, appellant was sentenced to the midterm of four years. As to count 7, appellant was sentenced to one year (one-third the midterm). Sentences for counts 5, 8, and 10 were imposed but stayed pursuant to section 654. Appellant's total prison term was 95 years to life plus five years.

DISCUSSION

I. Admission of Appellant's September 23, 2015 Statement to O'Nesky

A. Circumstances of Appellant's Statement

Before O'Nesky began questioning appellant, he advised appellant with the following:

> "[J]ust because we're at the police station, ah, the circumstances, okay, I'm gonna let you know, you have the right to remain silent. Anything you say may be used against you in court. You have the right to the presence of an attorney before and during any questioning. If you cannot afford an attorney, one will be appointed for you free of charge before any questioning if you want."

O'Nesky then asked appellant, "Do you understand that?" Appellant responded, "Yeah." O'Nesky proceeded to ask appellant his name, his birthday, and his contact information. O'Nesky then asked appellant where he lived and asked him to name V.J.'s children. Appellant told O'Nesky he babysits the children for work. O'Nesky asked appellant how

he got along with the children. O'Nesky then asked appellant if appellant knew why they were talking, and appellant said he thought it was because of accusations made on September 21, 2015.

Appellant then repeatedly denied sexual contact with G.S. or any of the children. O'Nesky asked appellant if there was any reason appellant's DNA would be on G.S.'s penis. Appellant replied, "No," but explained that he sleeps in the same bed with the children. O'Nesky continued to ask if appellant's DNA would match any found on G.S. Appellant said he was nervous about his DNA being on G.S. because appellant had been living with the family for nine months and his saliva is all over the bed, and the children wear boxers to bed. O'Nesky commented that appellant's DNA would not get on G.S. by accident. O'Nesky told appellant they had taken swabs of G.S.'s penis and that the DNA evidence would "tell the truth." O'Nesky told appellant DNA would stay on G.S. for "quite a while" even if G.S. had taken a shower or a bath. O'Nesky said the DNA evidence would "tell us. And I — I think it's pretty obvious under the circumstances what that's gonna tell us." O'Nesky told appellant, "Nothing is gonna change the truth." O'Nesky told appellant that his DNA is not going to "fly across the room onto [the children]." O'Nesky said he thought it was "pretty clear what the DNA is gonna show."

O'Nesky then likened concealing the truth to carrying bricks on one's shoulders. O'Nesky told appellant the way to start putting the bricks down is by telling the truth. O'Nesky said appellant would not be able to apologize until he told the truth and admitted what he did. O'Nesky told appellant when they walked out of the interrogation room, appellant should leave all his "bricks" in the room. O'Nesky told appellant they know he touched G.S. and that the DNA is not going to lie. Throughout the interview, O'Nesky repeatedly told appellant he did not think appellant was a "bad guy" or that he wanted to hurt children and that appellant should tell the truth.

Appellant eventually told O'Nesky, "I don't want to be in trouble. But if I need help I need help. I mean and I thought about it before. I'm—I mean I've been bisexual

since I was 8 years old. I mean I'm not—I'm not, you know, and ... I've tried to fight it and it's—this shit's difficult." Appellant then described a situation where he walked in on J.S., D.S., and G.S. lying side by side on the bed with their pants down, and they asked appellant to "suck their dicks." Appellant said he turned around and walked out. O'Nesky then asked appellant if he put his mouth on G.S.'s penis, and appellant said he did. Appellant then admitted to several sexual acts he committed with G.S. O'Nesky asked if anything happened with the other children, and appellant admitted he committed sexual acts with J.S., D.S., I.S., and B.R.

O'Nesky asked appellant if he would like to write an apology letter to V.J., and appellant said he would. O'Nesky then left appellant alone, and appellant became visibly emotional and appeared to be crying for over an hour while he worked on his letter. In the letter, appellant wrote that he knows he made every fear and nightmare V.J. could ever imagine come true. He wrote, "What I did to you hurts most cause [it is] not just one but to 5 of [your] babies. Except [A.S.] and [E.R.] I swear I've never put my hands on [yo]ur daughter or [E.R.]"

While appellant was writing his letter, O'Nesky came in twice to ask clarifying questions about the sexual conduct, and appellant answered.

B. Relevant Procedural History

The People moved in limine to admit appellant's statements from his September 23, 2015 interview with O'Nesky. Defense counsel moved in limine to exclude the statements, but informed the court he was not asking for an Evidence Code section 402 hearing on the admission of the interview. Defense counsel requested the court to review the video recording of the interview and "make a determination as to *Miranda* or any sort of involuntariness or threats or promises for leniency." The court informed counsel it had reviewed the video up to page 73 of the transcript and had reviewed the remainder by reading the transcript only because the court encountered computer problems.

The court noted appellant did not expressly waive his *Miranda* rights but held appellant had given an implied waiver because he said he understood his rights and proceeded to answer O'Nesky's questions. The court noted it felt there was an issue of whether appellant was under the influence of drugs because he had mentioned using methamphetamine or marijuana in the morning or the night before. The court noted, however, that appellant was aware of and answered the questions asked of him. The court noted that though appellant was evasive early on, the court felt appellant was in control of his faculties, understood where he was, what the situation was, and what questions were being asked of him. The court found appellant's statement admissible.

C. Analysis

1. Standard of Review

When reviewing a ruling admitting a confession, we accept the trial court's resolution of any factual dispute to the extent the record supports it, but otherwise we determine independently whether the confession was taken in violation of the rules of *Miranda*. (*People v. Duff* (2014) 58 Cal.4th 527, 551.)

2. Waiver

Pursuant to *Miranda*, a suspect in custody "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Miranda, supra*, 384 U.S. at p. 479.) In order for a defendant's statements to be admissible against him, he must have knowingly and intelligently waived his *Miranda* rights. (*People v. Cruz* (2008) 44 Cal.4th 636, 667 (*Cruz*).) A defendant who waives his *Miranda* rights need not do so with any particular words or phrases, and a waiver may be either express or implied. (*Cruz, supra,* at p. 667.)

Appellant contends the court should not have found an implied waiver because his individual characteristics and the police methods rendered any such waiver unknowing and/or involuntary. We reject this claim.

The question is whether the waiver is knowing and intelligent under the totality of the circumstances surrounding the interrogation. (*Cruz*, *supra*, 44 Cal.4th at p. 668.) This means relinquishment of the right must have been voluntary—it was the product of a free and deliberate choice rather than intimidation, coercion, and deception—and it must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. (*People v. Whitson* (1998) 17 Cal.4th 229, 247; see *Cruz*, at p. 669 ["The test for determining whether a confession is voluntary is whether the questioned suspect's 'will was overborne at the time he confessed.' "].) " 'Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.' " (*People v. Whitson*, at p. 247.)

The California Supreme Court has stated, "[a] suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights." (*Cruz*, *supra*, 44 Cal.4th at pp. 667–668; accord, *People v. Medina* (1995) 11 Cal.4th 694, 752; *People v. Sully* (1991) 53 Cal.3d 1195, 1233.) This principle has been upheld by the United States Supreme Court, which explained: "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 384 [finding implied waiver of *Miranda* rights].)

Appellant first argues any waiver was not knowing, intelligent, or voluntary because he was "inexperienced with custodial interrogation." To support this claim, appellant cites *People v. Nelson* (2012) 53 Cal.4th 367, 375, where a 15-year-old

defendant willingly answered questions after acknowledging he understood his rights, and *People v. Debouver* (2016) 1 Cal.App.5th 972, 977–978, where the defendant expressly waived his rights but was intoxicated. In those cases, the defendants had conditions, young age and intoxication, that put at issue whether the defendants voluntarily and knowingly waived their rights. The courts in those cases found the defendants' waivers valid based partly on those defendants' experiences with the criminal justice system. (*People v. Nelson*, at p. 375; *People v. Debouver*, at p. 978.) These cases do not stand for the inverse proposition that inexperience with the criminal justice system by itself renders a waiver invalid. Appellant's argument is undermined by the fact that he *had been* arrested before and testified he had been read *Miranda* rights before.

Here, there was no indication on the record that appellant had any characteristics that would hinder his understanding of the rights as explained to him or compel us to find his waiver not knowing, intelligent, and voluntary. Appellant was a 28-year-old man at the time of questioning who had a high school degree and some college education. There was no evidence he had any mental or developmental issues.

We recognize the trial court noted appellant had admitted to drug use the day of the interview and defer to its factual finding that appellant was not impaired so as to inhibit his understanding of his rights or the questioning. The court's finding is supported by the record. Appellant's answers were responsive to the questions asked. In addition, O'Nesky testified he had been a detective for 10 years and had classroom and field training as well as extensive on-the-job experience in determining whether suspects were intoxicated. He testified he has encountered individuals who were under the influence of either methamphetamine or marijuana over 200 times, and nothing indicated to him that appellant was under the influence of narcotics. Appellant himself testified he understood the questions O'Nesky was asking him and was able to give him intelligent answers.

willfully touched B.R.'s body or willfully caused B.R. to touch appellant's body and (2) that the touching was done with lewd intent. We disagree.

On a challenge to the sufficiency of the evidence, our role is limited. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We presume the existence of every fact the trier of fact could reasonably deduce from the evidence that supports the judgment. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) We do not reweigh the evidence or revisit credibility issues. (*People v. Icke* (2017) 9 Cal.App.5th 138, 147.)

Section 288, subdivision (a) reads, in pertinent part: "[A] person who willfully and lewdly commits any lewd or lascivious act ... upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony." The statute is violated if there is " 'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." (*People v. Martinez* (1995) 11 Cal.4th 434, 452.) Thus, the offense described by section 288, subdivision (a) has two elements: " '(a) the touching of an underage child's body (b) with a sexual intent.' " (*United States v. Farmer* (9th Cir. 2010) 627 F.3d 416, 419.)

Appellant argues the act of B.R. sucking on appellant's nipple was not "willful[]" because B.R. instigated the touching. We disagree. " '[W]illfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to." (§ 7.) The terms "willful" or "willfully," as used in penal statutes, imply that the person knows what he is doing, intends to do what he is doing, and is a free agent. (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438.)

Here, I.S. told the police that appellant "lays down and lets" B.R. suck his nipple until it "gets all red." In appellant's statement, he did not express that he made any effort to stop the behavior. The jury could have reasonably concluded that because appellant was conscious of the touching and allowed it to happen, the touching was willful. Thus, there is substantial evidence of a willful touching.

We also reject appellant's claim the evidence was insufficient to support lewd intent. In addition to an actual or constructive touching, section 288, subdivision (a) "requires 'the *specific intent* of arousing, appealing to, or gratifying the lust of the child or the accused.' " (*People v. Warner* (2006) 39 Cal.4th 548, 557.) "Because intent for purposes of ... section 288 can seldom be proven by direct evidence, it may be inferred from the circumstances." (*In re Mariah T.* (2008) 159 Cal.App.4th 428, 440.) In determining whether the defendant acted with the required specific intent, the jury therefore looks to all the circumstances, including the charged act. (*People v. Martinez*, *supra*, 11 Cal.4th at p. 445.) "Other relevant factors can include the defendant's extrajudicial statements [citation], other acts of lewd conduct admitted or charged in the case [citations], the relationship of the parties [citation], and any coercion, bribery, or deceit used to obtain the victim's cooperation or to avoid detection [citation]." (*Ibid.*)

Here, the circumstances of the touching are the sucking of the nipple of an adult man. Though appellant points out there is evidence on the record that B.R. had some fixation with nipples, as a male cannot lactate, there is no appropriate or proper explanation for the behavior. Further, I.S. told police he once witnessed appellant sucking on G.S.'s penis while B.R. was sucking on appellant's nipple, which could indicate the act was done for a sexual purpose. Lewd intent can be inferred from the circumstances of the act. Appellant's extrajudicial statements and the context of his disclosure of this act further reveals his intent. After admitting to several sexual acts, which he expressly admitted were done for the purpose of sexual gratification with the other children, appellant disclosed the acts with B.R. after O'Nesky asked if appellant

had anything else to add. Further, appellant disclosed that B.R. would attempt to touch appellant's penis, and that he woke up once with an erection. Appellant, in his apology letter, included B.R. as one of V.J.'s children he had harmed. There is substantial evidence from which the jury could infer the touching was done with a lewd intent.

Count 1 is supported by sufficient evidence.

III. Defense Counsel's Closing Argument

A. Sixth Amendment Violation

Appellant contends his Sixth Amendment rights to the assistance of counsel, to maintain his innocence, and to defend against the charges were violated when defense counsel made statements regarding appellant's confession with regard to count 1.

During his closing argument, defense counsel pointed out at length that most of appellant's confessions were obtained by leading questions. He points out O'Nesky is "the first person to talk about ... the majority [of the] counts in this case. Defense counsel argued O'Nesky, through these leading questions, suggested to appellant what to confess and this was part of what coerced appellant to confess. Defense counsel then stated the following:

> "Now, I will say this, Count 1, Count 1, does truthfully—I'd like to think my job isn't to pull the wool over your eyes.
>
> "Count 1 is the only confession. It's the only statement that is not led. It is the only statement where it's ... not open-ended.
>
> "It's the one that my client actually cops to. Everything else he's led down the direction. With [B.R.], it wasn't. You want to see how to do it and not how to do it. You want to see how to get people to say what you want them to say?
>
> "Do you want to see, arguably, a righteous confession? There. You let them say the words because it's much more powerful, because then it prevents his crafty government-appointed public defender from getting up there and just—and—and making mincemeat out of it. It prevents his public defender from getting up here and saying that that's coerced.

"That's how to do it. These whole pages are. That's not how to interrogate. That's not how to do it at all."

Appellant contends the comments about "count 1" constituted error like that found in the recent United States Supreme Court case, *McCoy v. Louisiana* (2018) ___U.S___ [138 S.Ct. 1500] (*McCoy*). In *McCoy*, the trial court permitted defense counsel at the guilt phase of a capital trial, despite the defendant's vociferous insistence he did not engage in the charged acts and adamant objection to any admission of guilt, to tell the jury the defendant " 'committed three murders.... [H]e's guilty.' " (*Id.* at p. 1505.) The United States Supreme Court held "that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." (*Ibid.*) The court went on: "Guaranteeing a defendant the right 'to have the *Assistance* of Counsel for *his* [defense],' the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." (*Ibid.*) The *McCoy* court noted that some decisions are grounded in a defendant's autonomy, and "are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." (*Id.* at p. 1508.) The court held the error was structural and remanded the matter for a new trial. Appellant contends *McCoy's* holding should be extended to noncapital cases. We need not decide this here because appellant's claim would fail even if we assume *McCoy* is not limited to capital cases.

Defense counsel's comments are distinguishable from those made in *McCoy* because defense counsel did not concede guilt. Rather, defense counsel stated appellant had confessed to count 1. Appellant conceded in his testimony that he confessed and did so because he thought he would receive counseling in lieu of prison time. Defense counsel's comments did not contradict appellant's testimony in that the jury could still

believe appellant volunteered the confession because he thought he would be rewarded with leniency. Defense counsel pointed out that in addition to the reasons appellant referred to in his testimony for confessing, O'Nesky led the majority of appellant's confessions. Defense counsel's comment that count 1 was the only confession in the context of the argument as a whole was that it was an unled confession in contrast to all the others. Defense counsel did not imply the jury did not have a duty to find appellant committed the offense in count 1 beyond a reasonable doubt. To the contrary, at the close of his argument, he asked the jury to "hold [the prosecution] to their burden and find [appellant] not guilty." There is no evidence that defense counsel's strategy was not in line with appellant's objective of maintaining innocence.

Moreover, the comments are not tantamount to a concession of guilt because they could not alone cause the jury to convict him. The jury was instructed they could only rely on appellant's out-of-court statements to convict him if they concluded that other evidence showed the crime was committed. (CALCRIM No. 359.) The jury was also instructed they must find the People proved beyond a reasonable doubt appellant was guilty of each charge and must not convict appellant unless they do so. (CALCRIM Nos. 220, 359.) They were instructed that (1) facts may be proved by direct or circumstantial *evidence* (CALCRIM No. 223), (2) nothing the attorneys say is evidence (CALCRIM No. 222), and (3) they alone were to judge the credibility of witnesses (CALCRIM No. 226).

Appellant points out that in two separate parts of his rebuttal argument, the prosecutor characterized defense counsel's comments as "conced[ing]" count 1.[3] That the prosecutor made these remarks does not alter our conclusion. The jury was instructed their duty was to decide what the facts are based only on the evidence presented at trial

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[3] At oral argument, appellant remarked that trial counsel should have objected to the prosecutor's comments that he "conced[ed]" count 1. To the extent appellant argues this constituted ineffective assistance of counsel, we reject this claim for similar reasons. Objection would have likely prompted the trial court to remind the jury nothing the attorneys say is evidence and would not likely have resulted in a different outcome.

(CALCRIM No. 200) and that nothing that the attorneys say is evidence, including remarks made in closing arguments (CALCRIM No. 222).

At oral argument, appellant requested we consider an additional authority, *People v. Eddy* (2019) 33 Cal.App.5th 472 (*Eddy*). In *Eddy*, defense counsel stated in his closing argument that the defendant " 'committed the crime [of voluntary manslaughter]' " but maintained the defendant was not guilty of first or second degree murder. (*Eddy*, at p. 477.) The jury convicted the defendant of first degree murder. (*Ibid.*) At a post-conviction hearing requested by the defendant pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, the defendant complained that he disagreed with defense counsel's decision to argue for voluntary manslaughter and instead wanted to maintain a defense of factual innocence. (*Eddy*, *supra*, at p. 478.) Defense counsel admitted he knew the defendant's position but went with what he thought was best for the defendant in his professional opinion. (*Ibid.*) The appellate court reversed, finding error under *McCoy*. (*Eddy, supra,* at p. 481.) Appellant cites *Eddy* to support his proposition that contrary to other recent California cases, e.g. *People v. Lopez* (2019) 31 Cal.App.5th 55, [refusing to extend *McCoy* to a case where the defendant did not expressly raise an objection to conceding guilt] that appellant's failure to object before his conviction does not preclude protection under *McCoy*. Because we find that defense counsel did not concede guilt, *Eddy* is not applicable to the present case. We find no error under *McCoy*.

B. Ineffective Assistance of Counsel

In the alternative, appellant claims defense counsel's comments constituted ineffective assistance of counsel. To prevail on such a claim, appellant must establish that (1) the performance of his trial counsel fell below an objective standard of reasonableness and (2) prejudice occurred as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Anderson* (2001) 25 Cal.4th 543, 569.) "When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable

professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. 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. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Appellant has not met his burden of establishing the first prong under *Strickland.* There is a conceivable reasonable explanation for defense counsel's choice to highlight the fact that appellant's confession to the acts with B.R. was unled. Defense counsel wanted to highlight the majority of appellant's confession was obtained by leading questions. Defense counsel's concession that O'Nesky did not "lead" appellant's confession as to count 1 was likely made in an attempt to retain credibility with the jury. As we discuss, we do not find defense counsel's comments were at odds with appellant's testimony. To the extent defense counsel in any way contradicted appellant's testimony, however, he may have done so because he intuited the jury was not accepting appellant's testimony and made a strategic decision to focus on defeating the counts where evidence of leading confession was stronger. On this record, there is no showing that defense counsel's conduct fell below an objective standard of reasonableness.[4] Accordingly, appellant cannot show ineffective assistance of counsel.

IV. CSAAS Instructional Error

Before Musacco's testimony, the court instructed the jury with CALCRIM No. 1193: "You will hear testimony from Dr. Musacco regarding child sexual abuse accommodation syndrome. Dr. Musacco's testimony about child sexual abuse

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[4] Because appellant has not shown the first prong has been met, we need not address his argument that no prejudice need be shown pursuant to *United States v. Cronic* (1984) 466 U.S. 648.

accommodation syndrome is not evidence that the defendant committed any crimes of the charges against him. You may consider this evidence only in deciding whether or not the alleged victims of abused conduct was not inconsistent, but the conduct of someone who has been molested and in evaluating the believability of their testimony." The same instruction was given at the close of evidence, but instead of "alleged victims," the court named G.S., D.S., J.S., and I.S.

A. Standard of Review

In addressing a claim of jury misinstruction, we assess the instructions as a whole and view the challenged instruction in context with other instructions to determine whether there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. (*People v. Jennings* (2010) 50 Cal.4th 616, 677.) We also presume the jury followed the court's instructions. (*People v. Edwards* (2013) 57 Cal.4th 658, 746.)

B. CALCRIM No. 1193: "Evaluating the believability of [witnesses'] testimony"

Appellant argues the portion of CALCRIM No. 1193 that instructs jurors to use CSAAS evidence to evaluate the believability of the boys' testimony is improper because it permits the jurors to determine whether the victims' molestation claims are true. Such a use of CSAAS evidence is impermissible. (See *People v. Bowker* (1988) 203 Cal.App.3d 385, 391–394.) Appellant claims the "jury could only have taken the instruction to mean it could use the CSAAS evidence to determine whether the named victims were telling the truth about the molestation claim, not merely to determine whether the witness's testimony was not inconsistent with CSAAS." Appellant's argument is not well taken.

It is not reasonably likely the jury understood CALCRIM No. 1193 as allowing it to use the CSAAS evidence in determining that the molestation occurred or that the victims' molestation claims were true because CALCRIM No. 1193 expressly prohibits

the jury from using the CSAAS evidence to determine the molestation occurred. The only reasonable interpretation of the instruction as a whole is that jurors may use the evidence to evaluate the believability of the witnesses' claims in light of the evidence that they engaged in conduct seemingly inconsistent with the conduct of a child who had been molested after the molestations allegedly occurred. Contrary to appellant's claim, it is not a misstatement of the law to say CSAAS evidence may be used to evaluate the believability of a child's testimony. Per the California Supreme Court, CSAAS evidence "is admissible to rehabilitate [the child] witness's credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300.) Though jurors are prohibited from determining that a defendant is guilty because a child exhibits the stages of CSAAS, they are not prohibited from determining that a child is not a credible witness and therefore their claims are not true just because they exhibit stages of CSAAS. The instruction tells jurors they should not allow behaviors that may normally cause them to disbelieve a child victim's testimony to necessarily do so if those behaviors coincide with stages of CSAAS. CALCRIM No. 1193 does not mislead the jury into using CSAAS evidence for the impermissible purpose of determining that because a witness exhibits the stages of CSAAS evidence, the defendant is guilty. Thus, it is not reasonably likely the jury applied the instruction in the impermissible manner appellant claims.

C. <u>CSAAS as Applied to I.S.</u>

Appellant argues the court erred by including I.S.'s name with G.S., D.S., and J.S. in reference to the children whom the jury was permitted to apply CSAAS evidence. We find any error clearly harmless. The jurors were properly instructed they may consider, among other factors, a witness's behavior while testifying, whether he or she made a statement in the past that is consistent or inconsistent with his or her testimony, and how reasonable the testimony is when considered in conjunction with the rest of the evidence.

(CALCRIM No. 226.) The jurors were also instructed if they thought a witness lied about some things but told the truth about other things, they could accept the part they think is true and ignore the rest. (CALCRIM No. 226.) By these instructions, the jurors were permitted to believe I.S.'s statement to the police and discount his testimony without regard to any application of CSAAS evidence. Based on the record, it is not reasonably probable the jury found I.S.'s statements to the police credible based on any improper application of CSAAS evidence to his statements. It is patently more likely the jury found I.S.'s statement to the police credible because his account of the unusual behavior that took place between appellant and B.R. was independently corroborated by appellant's statement. In contrast, I.S.'s claims during his testimony that he did not know what a nipple was and had never spoken to a police officer were clearly not credible in light of his audio recorded interview with Jones and video recorded interview with O'Nesky.

The jurors certainly did not need, and likely did not apply, CSAAS evidence to come to the conclusion that I.S.'s statement to police was credible and his testimony was not.

For the foregoing reasons, we find any error in including I.S.'s name in the instruction was harmless.

V. Cumulative Error

Appellant also contends the cumulative effect of the errors he has identified requires reversal of his convictions. Because we find no errors, we reject this claim.

VI. Correction of Abstract of Judgment

The trial court imposed a fine of $300 pursuant to section 290.3, plus a penalty assessment, for each of counts 1, 3, 5, 6, 7, 8, 9, 10, and 11. The trial court stayed the fines for counts 5, 8, and 10 pursuant to section 654. Thus, the total fines imposed pursuant to section 290.3, and not stayed, total $1,800, plus penalty assessments of $5,580. Under section "12. Other orders," the abstract of judgment states: "FINE

ORDERED OF $3000.00 PLUS PENALTY ASSESSMENT OF $9300.00 PURSUANT TO SECTION 290.3 OF THE PENAL CODE." No mention is made of the fines ordered stayed.

Appellant asserts the abstract of judgment must be modified to reflect the correct sentence imposed orally by the trial court. Respondent agrees. We accept respondent's concession. Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185–186.) "If the judgment entered in the minutes fails to reflect the judgment pronounced by the court, the error is clerical, and the record can be corrected at any time to make it reflect the true facts." (*People v. Hartsell* (1973) 34 Cal.App.3d 8, 13.)

DISPOSITION

We remand with directions that the abstract of judgment be corrected in section "12. Other orders" to read as follows: "FINES ORDERED OF $2,700 PLUS PENALTY ASSESSMENTS OF $8,370 PURSUANT TO SECTION 290.3 OF THE PENAL CODE, OF WHICH FINES OF $900.00 PLUS PENALTY ASSESSMENTS OF $2,790 ARE STAYED PURSUANT TO SECTION 654 OF THE PENAL CODE." The court shall prepare an amended abstract of judgment and forward it to the appropriate authorities.

In all other respects, the judgment is affirmed.

SMITH, J.

WE CONCUR:

PEÑA, Acting P.J.

MEEHAN, J.

Court of Appeal, Fifth Appellate District - No. F074975

S262484

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DAVID ALLEN KUNTZ, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

"Appendix B"