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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GREGORY SCOTT HINTON, Defendant and Appellant.	A124024 (Solano County Super. Ct. No. FCR224183)

A jury convicted appellant Gregory Scott Hinton of continuous sexual abuse committed against a minor victim over a three-year period. (Former Pen. Code,[1] § 288.5, subd. (a) [as added by Stats. 1989, ch. 1402, § 4, p. 6140].) Sentenced to 12 years in state prison, he appeals. He contends that his trial counsel failed (1) to seek a jury instruction limiting the jury's consideration of hearsay evidence and (2) to impeach the complaining witness with an inconsistency between her preliminary hearing and trial testimony. Hinton also asks this court (3) to review sealed records to determine if the trial court should have ordered disclosure of them. Finally, he contends that the trial court committed (4) instructional and (5) sentencing error. We affirm the conviction, but remand the matter for resentencing.[2]

[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] In addition to this appeal, Hinton filed a related petition for writ of habeas corpus, which we determine by separate order. (*In re Hinton*, A128569.)

I. FACTS

A. *Pretrial Matters*

In June 2004, 14-year-old Laura M.'s mother Susan was reported to Child Protective Services (CPS). When Laura was interviewed by CPS officials, she offered no report that she was being molested. Soon afterward, Susan found poems written by her daughter. One described an 11-year-old girl's molestation by a 40-year-old man.[3] In another poem, a child accuses her mother of failing to protect her from molestation. At the time that Laura was 11, appellant Gregory Hinton had lived with her family. The mother reported to Concord police that her daughter had been molested.

The following week, Laura was interviewed by a representative of the Martinez Children's Interview Center. She offered her molestation poem to the interviewer, who questioned her about it. Laura reported that three years earlier, when she was 11, Hinton touched her buttocks and stuck his fingers in her vagina one night when she had been sleeping.

In September 2004, Fairfield police were investigating the molestation allegations. In October 2004, the police interviewed Hinton about the matter. He told police that Laura's allegations were false. He stated that he had expressed a concern to Susan shortly after he came to live with the family that someone might accuse him of behaving in an inappropriate manner with Laura. Hinton reported that Susan said that she appreciated his concern and tried to allay his fears. Not long after this conversation, according to Hinton, Laura began acting in a flirtatious manner. Several times, she straddled his leg and ground her hips into him. Hinton told police that everyone in the household had given each other backrubs, but he denied doing this alone with Laura. The police forwarded a report on this matter to the prosecutor in December 2004.

In September 2006, Laura was interviewed again in Vacaville. By this time, police learned that she had undergone extensive therapy since her 2004 interview. They believed that she had information that she was prepared to disclose that she had not

[3] Hinton was born in May 1961. He was almost 40 years old in the spring of 2001 when the first instance of molestation allegedly occurred.

earlier been willing to report. In the 2006 interview, Laura stated that when she was in the fifth grade, Hinton first molested her by placing his fingers in her vagina.

In October 2007, Hinton was charged by information with continuous sexual abuse of Laura occurring between February 2000 and February 2003. (Former § 288.5, subd. (a).)[4] He pled not guilty to this charge.

B. *Laura's Trial Testimony*

1. *Molestation*

At the time of trial in October 2008, Laura was 18 years old. She testified that when she was almost 11 years old in late 2000 or early 2001, she moved to Fairfield with her mother Susan, her stepfather Brian M. and her stepfather's friend Hinton.

Laura told the jury that she had had a difficult relationship with Susan and Brian. Susan was physically, emotionally and psychologically abusive to her. When Susan and Brian were not working, they spent time together apart from her. In Laura's view, neither of them was "there" for her. Hinton did not work, so he was home much of the time. A year earlier, CPS had investigated the family after Laura was missing and Susan was found to be intoxicated. Initially, Laura—fearful that she would be removed from her home—lied to CPS officials about her situation.

When they first moved to Fairfield, Laura's relationship with Hinton was good. Then, Laura testified, Hinton began touching her in inappropriate ways. The first time he did so was in the spring of 2001, when she was 11 and in the fifth grade. Laura was in her bedroom, lying on her stomach, trying to sleep. Hinton came in and started rubbing her back, shoulders and legs. It seemed weird and scary to Laura, who pretended to be asleep because she did not know what to do. Hinton pulled aside her pajamas and underpants, then inserted his fingers in her vagina before leaving the room. Laura saw

[4] We apply the version of section 288.5 in effect during 2000-2003, when the crime was committed. Although this statute was amended in 2006, for our purposes, the current provision is substantially the same as it was at the time of the continuous sexual abuse charged in this matter. (Compare Stats. 1989, ch. 1402, § 4, p. 6140 with Stats. 2006, ch. 337, § 8.)

Hinton leave the room. She told the jury that she was certain that Hinton was the perpetrator.

Laura did not feel that she could tell Susan about this. The next day, Laura saw Hinton waiting outside of her school. She ran home alone and he came home later. Hinton was taken by ambulance to the hospital later that night. Later, her parents told her that Hinton had tried to kill himself.[5]

The household moved to Concord in August 2001, just before Laura entered the sixth grade. At trial, she testified that, every week or so after the move, Hinton would grab her butt or her breast through her clothing when no one else was watching. Once when she was in the living room studying for a test, she lay on her stomach on the floor. Through her clothes, Hinton began massaging Laura's back and her buttocks. He rubbed her vagina through her clothes.

Hinton once admired a tight shirt that Laura wore, telling her that it made her breasts look bigger. On another occasion, he gave her a note saying that he had a crush on her. Hinton had shown her a book with photographs of naked women in it, commenting that he would take her photograph some day. She saw him with a camera at the house afterward. One day, she came home to find that Hinton had set up a photography shoot at the house. Anxious, she left the house soon afterward.

During this time, Susan and Brian stayed in their room. Hinton told Laura that he thought they were using drugs and when she checked their room, she thought she saw evidence of that. In 2002, Hinton, Susan, Brian and Laura attended a group therapy session. In a separate therapy session when she was alone with the therapist, Laura denied that Hinton spent time in her room or that she had any problems with him. Five months later, near the end of her sixth grade year, Hinton moved out of the house. A few weeks after that, Susan obtained a restraining order against Hinton for reasons unrelated to the molestation. Laura did not see him again for several years.

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[5] A Fairfield police officer reported that he had arranged for Hinton to be sent to a hospital by ambulance in March 2001, after the man tried to commit suicide.

2. *Initial Disclosure*

In March 2004, Laura wrote a poem for an eighth grade class assignment. In the poem, an 11-year-old girl woke from sleeping to discover that her pants were down. The perpetrator massaged her butt, back, legs and arms before placing a hand between her legs and sticking fingers in her vagina. Laura told the jury that the poem was about Hinton's first molestation of her three years earlier in 2001.[6] She did not show the poem to Susan—she was uncomfortable with her mother and did not really talk with her about anything.

Laura's teacher asked her about the poem the day after it was turned in. Laura stated that the incident described in the poem had actually happened, but she played it down, saying that she had already talked with the school counselor about it. In the fall of 2003, Laura had spoken vaguely about the same incident with the counselor. She told the counselor that the matter had already been in court and that her mother had obtained a restraining order against Hinton. Based on Laura's suggestion that authorities were already aware of the molestation allegations, the counselor apparently concluded that she was not required to report the incident.[7]

About this time, Laura developed anorexia and bulimia. She also began cutting and burning herself. In June 2004, Laura's school counselor reported Susan to CPS. In July 2004, Susan confronted Laura about several poems she had found about molestation, a relationship between mother and daughter, and a girl's struggles with cutting. Susan was unhappy about the things Laura said about her in the poems. For her part, the girl was upset that her mother had read her private writings. Laura played down the matter when her parents asked if the poem about molestation was true. That was a lie, she later admitted, explaining that she did not like talking to her parents.

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[6] She admitted that some events that actually occurred later in Concord were reflected in her poem about the earlier Fairfield incident.

[7] Later, it came out that the restraining order was not based on any allegations of molestation.

Susan arranged for Laura to go to therapy and to be interviewed by authorities in Martinez. Reluctant to speak about the molestation, she did so in order to be allowed to go to camp that summer. She brought her molestation poem with her to the interview—she was not ready to speak about what happened. At this interview, she said that Hinton had molested her the first time when she was 11 at the Fairfield house. Laura reported that she did not actually see his face during any part of the incident. She sensed that Hinton was the perpetrator, because he differed in size from her stepfather Brian.[8] She stated that this was the only time that Hinton touched her vagina. Laura reported that when they lived in Concord, Hinton massaged her buttocks and touched her through her clothes.

3. *Effects*

Laura suffered from depression and continued to have eating disorders in high school.[9] When she was in high school, she attempted suicide several times. She was hospitalized in the spring of 2006. During her hospitalization, Laura obtained treatment for her emotional issues and began to acknowledge, rather than suppress, her underlying concerns.

In June 2006, another CPS report had been made, alleging abuse within Laura's family. This was a challenging time for Laura, who suffered from Susan's physical and verbal abuse. The girl did not mention any sexual abuse to CPS officials at that time, because the molestation report had already been made to authorities.

By the fall of 2006, Laura felt strong enough—with the support and encouragement of the hospital staff and peers—to submit to another interview. In a recorded interview for Fairfield police, she again identified Hinton as the one who molested her by inserting his fingers in her vagina. She told the interviewer that this digital penetration happened more than once—perhaps five times. She reported that

[8] At trial, Laura testified that she opened her eyes and saw Hinton as he was leaving.

[9] The initial felony complaint in this matter was filed against Hinton in May 2005, toward the end of Laura's first year of high school.

sometimes, Hinton entered their shared bathroom while she was using it. Laura sometimes woke at night to find him sitting by her bed, staring at her. She acknowledged that it took her a long time to come to terms with the molestation. Initially, she had been unwilling to tell the whole truth about it because she was not ready to talk. By 2006, she was not willing to lie anymore, she told the interviewer.

Sometime in 2006-2007, during Laura's junior year in high school, Susan and Brian saw Hinton while they were in Berkeley. Laura and some of her friends were inside a store at the time. Susan came in and warned her daughter that Hinton was there. Laura hid from him. She testified at Hinton's preliminary hearing in October 2007. At trial, Laura told the jury that once she entered college in the fall of 2008, she chose not to have much contact with Susan or Brian.

C. *Other Trial Evidence and Verdict*

Laura's poems were admitted into evidence, including the one she wrote about the initial 2001 molestation.[10] Recordings of her July 2004 and September 2006 statements were also played for the jury.

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[10] In 2004, Laura wrote a poem entitled "That Night." It read: "What do I remember of that hideous unspeakable night? [¶] I remember you openly saying that you had a sizeable crush on me; [¶] I was scandalized, [¶] And had no idea of what to say; [¶] You were forty, [¶] And I was but eleven. [¶] What do I remember of that hideous unspeakable night? [¶] I remember it being a school night; [¶] So I went to bed at nine o'clock, [¶] But I could not get to sleep, [¶] Not until it got closer to ten [¶] Did I drift to dream land. [¶] What do I remember of that hideous unspeakable night? [¶] I remember waking up lying on my stomach, [¶] After only being asleep for a few fleeting minutes; [¶] Everything that then happened [¶] Seemed to go in exceptionally slow motion; [¶] My pants were down; [¶] And you were massaging my butt; [¶] You then lifted up my shirt and, [¶] Began to massage my back, legs, and arms. [¶] Finally you put your icy hand between my legs and, [¶] Stuck your fingers in my vagina. [¶] What do I remember of that hideous unspeakable night? [¶] I remember being awfully young; [¶] I remember being petrified; [¶] And most of all I remember being helpless; [¶] I felt as limp as a rag doll, [¶] Not knowing how to react. [¶] What do I remember of that hideous unspeakable night? [¶] I remember when you finally stopped, [¶] I felt ecstasy, [¶] But I would not show that I was awake; [¶] You silently snuck out of my room, [¶] And that was the end. [¶] What do I remember of that hideous unspeakable night? [¶] I remember being

Hinton offered no affirmative evidence at trial. Defense counsel argued that Laura's uncorroborated testimony was not credible. He emphasized that the jury had three different versions of the underlying events from Laura—one in 2004, one in 2006 and one at trial in 2008. The prosecution urged the jury to conclude that Laura's various statements were consistent on key issues. The jury found Hinton guilty of continuous sexual abuse. After some consideration, the trial court rejected his request for probation, sentencing him to 12 years in state prison.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. *Limiting Jury Instruction*

1. *Facts*

First, Hinton reasons that Laura's statements that he threw knives at her mother's door were not based on personal knowledge, constituted hearsay evidence and could have been used improperly as character evidence against him. He contends that his trial counsel was ineffective because counsel failed to seek a limiting jury instruction precluding the jury from considering this evidence for the truth of the matter asserted or as evidence of Hinton's character.

In her July 2004 statement, Laura stated that her family had obtained a restraining order against Hinton. Explaining that the reason for this action was unrelated to any molestation, she reported that the restraining order had been sought after Hinton threw five butcher knives at a door. Her statement contained three brief references to this incident. In her September 2006 statement, Laura reported that Hinton had thrown five butcher knives at Susan's bedroom door as a way to punish Susan for undefined actions she took against him. Referring to the restraining order obtained against Hinton, Laura mentioned the knives twice. Both of these recorded statements were played for the jury.

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appallingly violated; [¶] But I also remember being incredibly thankful, [¶] That you did not go any further than you did."

In her 2004 statement and at trial in 2008, Laura admitted that one aspect of this poem—that the perpetrator spoke of having a crush on her—had not actually occurred until after the initial molestation. She told the jury that she used the later event to begin her poem, in a bit of artistic license.

Although Susan was identified as a potential witness for the prosecution, she was not called to testify at trial.

In this matter, both the prosecution and defense counsel requested that the jury be given a general instruction limiting the scope of certain evidence. The jury was instructed that certain evidence was admitted at trial for a limited purpose, and was admonished to consider that evidence for that purpose and no other. (See Evid. Code, § 355; CALCRIM No. 303.) However, Hinton's counsel did not link that instruction to evidence of the knife-throwing incident during his argument to the jury, nor did he seek to have the jury admonished that Laura's statements about the incident was evidence that could only be considered for a limited purpose.

2. *Legal Standard*

A criminal defendant has a right to the effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) To prevail on this claim of error, Hinton must establish ineffective assistance of counsel by a preponderance of evidence. (See *People v. Ledesma* (1987) 43 Cal.3d 171, 218.) He must establish both that Russo's representation fell below an objective standard of reasonableness and that it is reasonably probable that, but for Russo's error, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-688, 694-695; *People v. Ledesma, supra,* 43 Cal.3d at pp. 215-218; see *People v. Benavides* (2005) 35 Cal.4th 69, 92-93.)

On the first prong of the ineffective assistance of counsel test, our scrutiny of defense counsel's performance must be highly deferential. We presume that defense counsel's conduct falls within a wide range of reasonable representation. (*Strickland v. Washington, supra,* 466 U.S. at p. 689.) Hinton must overcome the presumption that under the circumstances, the challenged action might be considered a sound tactical decision. (*Ibid.*; see *In re Lucas* (2004) 33 Cal.4th 682, 722.) We make the determination whether counsel's conduct was within the range of professional conduct or outside of it based on the attorney's perspective at the time of the acts or omissions cited in the ineffective assistance of counsel claim. (*People v. Davenport* (1995) 11 Cal.4th

1171, 1235-1236, disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

The second prong—prejudice—is established if counsel's failings render the jury's verdict unreliable or the trial fundamentally unfair. Counsel's failings must have undermined the proper functioning of the adversarial process that we cannot rely on the trial as having produced a just result. (*Strickland v. Washington, supra,* 466 U.S. at p. 686; *In re Cudjo* (1999) 20 Cal.4th 673, 687.) The failure must be such that it undermines our confidence in the outcome of the trial. (See *People v. Majors* (1998) 18 Cal.4th 385, 403; *In re Ross* (1995) 10 Cal.4th 184, 201.) The deficiency must be egregious. (See *People v. Hart* (1999) 20 Cal.4th 546, 633.) As an ineffective assistance of counsel claim fails on an insufficient showing of either element, we need not decide the issue of counsel's alleged deficiencies before deciding if prejudice occurred. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

3. *Analysis*

Hinton contends on appeal that evidence of the knife-throwing incident should not have been offered to the jury without a limiting instruction admonishing the jury of the proper limits of its use of this evidence. He reasons that the evidence demonstrates that Laura was not present during this incident, such that she lacked the requisite personal knowledge of it. He argues that this lack of personal knowledge renders her testimony to be hearsay, but that the jury was not admonished not to consider it for the truth of the matter asserted. Hinton also urges us to conclude that the jurors could have used this evidence improperly to show his bad character, to his detriment.

A witness's testimony must be based on his or her personal knowledge to be admissible. (See Evid. Code, § 702, subd. (a); *People v. Valencia* (2006) 146 Cal.App.4th 92, 103.) When a witness lacks personal knowledge, that witness's testimony constitutes hearsay. (*People v. Valencia, supra,* at p. 103.) Unless an exception to the hearsay rule applies, the evidence is inadmissible. (Evid. Code, § 1200, subds. (a)-(b); *People v. Duarte* (2000) 24 Cal.4th 603, 610.) Subject to limited exceptions, character evidence is also inadmissible to prove conduct on a specific

occasion. (See Evid. Code, § 1101, subd. (a); *People v. Davis* (2009) 46 Cal.4th 539, 602.)

When evidence is admissible for one purpose but inadmissible for another, a trial court asked to do so must instruct the jury not to make inappropriate use of the evidence. (Evid. Code, § 355; *People v. Dennis* (1998) 17 Cal.4th 468, 533-534.) Although such an instruction was given in this matter at the request of Hinton's counsel, he did not ask the trial court to admonish the jurors about the limited use of Laura's evidence of the knife-throwing incident at the time that the evidence was presented to them. The instruction was not linked to this incident evidence in any way. It seems clear that defense counsel could have obtained such an admonishment on request. (See Evid. Code, § 355.)

The parties disagree about whether defense counsel might reasonably have made a tactical choice not to seek a limiting jury instruction, to avoid calling attention to this evidence. (See, e.g., *People v. Johnson* (1993) 6 Cal.4th 1, 50, overruled on another ground in *People v. Rogers* (2006) 39 Cal.4th 826, 879.) We need not resolve this question, because even if we assume that trial counsel should reasonably have sought a limiting instruction, Hinton cannot establish that there is a reasonable probability of a different verdict if that instruction had been given.

When we consider prejudice stemming from failure to request a jury instruction on an ineffective assistance of counsel claim, we must conduct a de novo review of the record for the other evidence of guilt. (*Berghuis v. Thompkins* (2010) ___ U.S. ___, ___, 130 S.Ct. 2250, 2265.) Prejudice is established if counsel's failings were egregious, so undermining the adversarial process that our confidence in the outcome of the trial is shaken. (*Strickland v. Washington, supra,* 466 U.S. at p. 686; *In re Cudjo, supra,* 20 Cal.4th at p. 687; *People v. Hart, supra,* 20 Cal.4th at p. 633; *People v. Majors, supra,* 18 Cal.4th at p. 403; *In re Ross, supra,* 10 Cal.4th at p. 201.)

Our review of that record persuades us that trial counsel's failure to link the knife incident to the limited use of evidence jury instruction that was given was not so great that it undermines our confidence in the jury's verdict. The knife incident was tangential to the key issue facing the jury—whether Laura's reports of molestation were credible

enough to warrant convicting Hinton of continuous sexual abuse. The trial properly focused on evidence of sexually inappropriate acts. None of those acts were alleged to have been accomplished by means of a weapon, nor did any of the evidence about the continuous sexual abuse involve any suggestion of weapon use. The evidence of Hinton's knife use came out in Laura's 2004 and 2006 interviews that the jury viewed. The incident was not the subject of any direct or cross-examination. It was not emphasized by either side. Neither the prosecution nor the defense mentioned the knife incident during argument. The prosecution did not paint Hinton as a violent person. In these circumstances, we are satisfied that it is not reasonably probable that counsel's failure to link an instruction limiting the jury's use of certain evidence to this evidence affected the outcome of the trial.

B. *Impeachment*

Hinton also contends that he received ineffective assistance of counsel because his trial counsel failed to impeach Laura with her preliminary hearing testimony identifying a different person than she did in her 2004 report as the person she first told about the alleged molestation.

In July 2004, Martinez authorities questioned 14-year old Laura about her report of several instances of molestation. After discussing these incidents and the poem that she wrote for school about the first incident, she was asked who she had told about "this one." Laura stated that she first told her friend Elizabeth in 2002, as she was about to enter the seventh grade. Three years later, at the October 2007 preliminary hearing, 17-year-old Laura testified that the first person she told about any of the incidents of molestation was her friend April.

Even if we assume arguendo that a reasonably competent attorney would have seen these statements as inconsistent,[11] Hinton must prove that it is reasonably probable

[11] The Attorney General argues that this claim of error is somewhat tenuous, reasoning that it is not clear whether Laura was referring to a specific act of molestation or a continuous course of conduct when she made the statements that she did. It suggests that if the first person she told about one incident differed from the first person she told

that, but for his counsel's failure to impeach her on this inconsistency, the result of the proceeding would have been different. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-696.) He reasons that if Laura had been impeached about this inconsistency, the jury would have seen her as a vacillating, insufficiently credible witness to support a conviction beyond a reasonable doubt.

Hinton's counsel impeached Laura about inconsistencies arising out of her 2004 poem and statement, her 2006 statement, her 2007 preliminary hearing testimony and her trial testimony in 2008. These attacks related *directly* to the charges made against Hinton, but they did not shake the jury's opinion that Laura's testimony was credible. As such, we are satisfied that it is not reasonably probable that further impeachment of her on a tangential, collateral issue would have persuaded the jury that she was an unreliable witness. As Hinton cannot establish prejudice, his claim of ineffective assistance of counsel necessarily fails.

III. SEALED RECORDS

Hinton asks that we review educational and other confidential, sealed records that the trial court reviewed in camera. He seeks a determination whether the trial court erred by failing to disclose any of those records, thus violating his federal constitutional rights to due process, confrontation, compulsory process and the right to present a defense. (See U.S. Const., 6th & 14th Amends.)

Before trial, defense counsel sought Laura's medical and school records. Some of these records were released to Hinton's counsel in September 2008. The case was tried before a different judge than the one that released these records. After Laura testified about her hospitalization, defense counsel asked the trial judge to review her records again to see if they contained any relevant evidence or impeachment evidence.

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about a different event or even about the entire molestation, her statements are not necessarily inconsistent. In light of our conclusion that Hinton cannot establish any prejudice resulting from his claim that trial counsel failed to raise this issue at trial, we need not determine this issue.

When the trial court did so, it found nothing useful. It recounted references to treatment for depression and eating disorders; an instance of voicing suicidal thoughts; and a referral to a psychiatric facility. School records referenced self-destructive behavior, as well as emotional and psychological issues. Some of these records had already been disclosed to the defense. None of the medical or school records referred to Hinton or the allegations underlying his case. There was no evidence inconsistent with Laura's testimony. From the trial court's description, defense counsel conceded that none of these records seemed to contain evidence relevant to the defense.

On appeal, these sealed documents are part of the record. The parties disagree about whether we should conduct an independent review or determine whether the two judges that have already reviewed these records abused their discretion in doing so. We need not resolve this underlying dispute. Even after conducting an independent review of the records, we find nothing worthy of disclosure that has not already been disclosed. Thus, this claim of error is meritless.

IV. UNANIMITY INSTRUCTION

Next, Hinton contends that the trial court violated his federal constitutional rights when it instructed the jurors that they were not to come to a unanimous agreement on the three lewd and lascivious acts required for a finding of continuous sexual abuse. He reasons that this jury instruction deprived him of his federal constitutional rights to due process, a jury trial and jury unanimity.[12] (See U.S. Const., 6th & 14th Amends.) The trial court instructed the jurors that they had to agree that Hinton committed three or more lewd acts in order to convict Hinton of continuous sexual abuse, but that they were not required to agree on which three acts were committed. (CALCRIM No. 1120; see *People v. Johnson* (2002) 28 Cal.4th 240, 243, 247.) This instruction—requested by the

[12] Hinton raises this issue to preserve it for federal review.

prosecution—mirrored the language of the charging statute.[13] (See former § 288.5, subd. (b).)

Hinton's claim of error is meritless. The United States Supreme Court has ruled that federal due process does not require jury unanimity. (*Johnson v. Louisiana* (1972) 406 U.S. 356, 359.) In California, our courts have repeatedly rejected similar due process and jury trial challenges to this jury instruction, reasoning that the underlying offense is one for a continuous course of conduct, not specific criminalized acts. (See, e.g., *People v. Cissna* (2010) 182 Cal.App.4th 1105, 1123-1126; *People v. Adames* (1997) 54 Cal.App.4th 198, 207-208 [CALJIC instruction].) At least one appellate court has rejected Hinton's related claim that this practice violates the *Apprendi*[14] rule requiring that each element of an offense be found by the jury beyond a reasonable doubt. (See *People v. Cissna, supra,* 182 Cal.App.4th at p. 1126.) Similarly, we conclude that section 288.5 properly defines the element of the prohibited offense as a continuous course of conduct requiring at least three acts, while defining the three specific acts as the means of committing of that offense. No violation of *Apprendi* occurred. As the instruction passes constitutional muster, it was properly given.[15] Finding no reversible error, we affirm Hinton's conviction.

V. SENTENCING

A. *Contention on Appeal*

Hinton also attacks the trial court's decision to sentence him to state prison. He argues that the trial court erroneously believed that he was ineligible for probation unless unusual or exceptional circumstances existed. (See § 1203.066.) As such, he reasons

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[13] Defense counsel did not object to the giving of this instruction in the trial court. This does not bar Hinton's contention on appeal, as we may review any instruction given, even if no objection was made in the trial court. (§ 1259.)

[14] *Apprendi v. New Jersey* (2000) 530 U.S. 466, 477, 491-497.

[15] Hinton also argues that the policy reasons motivating the enactment of subdivision (b) of section 288.5—to allow for the use of generic testimony in child molestation cases—is no longer an issue, as current case law allows use of such testimony to prove lewd and lascivious conduct pursuant to section 288. We deem this argument as one for the Legislature, not the courts.

that a remand for resentencing is required to allow the trial court to exercise its informed discretion, consistent with his right to due process and the prohibition against the ex post facto application of laws. (See U.S. Const., art. I, § 10, 14th Amend.; Cal. Const., art. I, §§ 9, 15.)

B. *Sentencing After Trial*

After the jury's verdict convicting Hinton, the trial court obtained several reports and recommendations about what sentence to impose. It ordered an evaluation of Hinton's mental condition, seeking to determine his amenability to treatment. In that evaluation, the psychologist portrayed Hinton as a depressed, anxious, sometimes suicidal individual who blamed Laura for what happened. She stated that he had engaged in embezzlement, but had no history of sex offenses. She concluded that Hinton was not a pedophile or a sociopath. In her view, the molestation of Laura was the result of "very poor judgment exercised by a man who was ill-equipped to function in an environment that was emotionally and sexually over stimulating." She noted that he was having difficulty taking responsibility for his behavior. He required psychotropic medication and psychotherapy. The psychologist concluded that if probation—with sex offender treatment and medication management—was an option, Hinton was unlikely to pose a danger to minor girls or society in general. She also noted that he was at risk of self-harm and abuse from others if incarcerated. (§ 288.1.)

The prosecution was critical of the psychologist's conclusion that Hinton has not committed any sex offenses. The prosecutor argued that this psychologist had failed to consider evidence of his conviction for false imprisonment. This conviction was the result of a 2004 incident during which Hinton allegedly assaulted a woman who was convinced that he intended to rape her. He was accused of entering a women's bathroom at a San Jose club, forcing a bikini dancer who worked there to the floor, and holding her prisoner until she escaped. The woman believed that Hinton intended to rape her. He was convicted of false imprisonment as a result of this incident, jailed for 30 days and placed on probation.

The probation report recommended a midterm 12-year prison term as an appropriate sentence for Hinton. It stated that Hinton was ineligible for probation unless unusual circumstances existed, citing section 1203.066. It listed various reasons that might support a grant of probation and some factors that weighed against this outcome. In the probation officer's view, no unusual circumstances existed, such that the probation officer opined that Hinton was ineligible for probation. He was also characterized as a marginal candidate for probation, having scored as having a medium high risk of recidivism for sex offenders.

The probation report was marred by factual errors that defense counsel brought to the trial court's attention. The sentencing judge corrected some of these errors, noting that it was familiar with the underlying facts of the case, having presided over the trial. The trial court also considered the devastating impact of Hinton's conduct on Laura.

For his part, Hinton sought a grant of probation, submitting many letters from friends supporting this request. Uncertain whether to sentence Hinton to prison or grant him probation, the trial court referred Hinton to the Department of Corrections and Rehabilitation for a diagnostic study. The trial court asked whether probation should be granted and whether unusual circumstances existed in this matter. (§ 1203.03.)

The diagnostic study was composed of three parts. In the first, a prison warden recommended incarceration, based on the seriousness of the offense and the risk to society posed by Hinton. In the second part, a correctional counselor also recommended a prison sentence. The correctional counselor found it difficult to believe that Hinton was eligible for probation and concluded that he was a poor candidate for probation. This recommendation was based on the seriousness of the offense, the impact of the offense on the victim, Hinton's lack of remorse and the sexual nature of the 2004 incident that led to his false imprisonment conviction.

In the third aspect of the diagnostic report, a prison psychologist recounted Hinton's long history of psychiatric treatment for depression and anxiety, noting that it likely played a role in the offense against Laura. The psychologist noted his criminal history of embezzlement and false imprisonment. The recitation of the offense against

Laura included that the victim was 14 years old and that she reported multiple instances of digital penetration. In interviews, Hinton described Laura as a sexually provocative girl who made advances toward him and as one who had been sexually abused by a family member before the time of the allegations made against him. The psychologist opined that Hinton did not take responsibility for the two sexual charges that had been made against him.

The psychologist opined that Hinton's conduct was becoming increasingly predatory—first, against an adult, then against a child victim. She noted that Hinton had scored in the medium high range for sexual recidivism, but found that it was not clear whether Hinton was a sexual predator, although this conclusion could not be ruled out. The psychologist opined that Hinton was not a sociopath, but a person who had poor boundaries and impaired judgment. These factors increased his level of risk and his criminal convictions suggested an escalating pattern of behavior. The psychologist concluded that if Hinton were granted probation, he would be more likely to remain safe if he took psychotropic medication, underwent counseling for sexually predatory behavior and received assistance managing his depression and anxiety.[16]

The trial court characterized this diagnostic study as a "split decision." Defense counsel argued against damaging assumptions that he reasoned should be excised from the reports. For her part, the prosecutor argued that there were no unusual circumstances warranting a grant of probation.

The trial court, the prosecutor, defense counsel and the probation officer all assumed that Hinton was ineligible for probation unless unusual circumstances existed. (See § 1203.066.) Ultimately, the trial court rejected Hinton's request for probation, concluding that the presumption that he was ineligible for probation had not been overcome. The trial court concluded that he posed a risk to the community. Hinton was sentenced to the midterm of 12 years in state prison.

[16] The trial court expressed concern that the prison psychologist appeared not to understand the difference between parole and probation.

C. *Ex Post Facto and Presumptive Eligibility for Probation*

Hinton was sentenced in 2009. In 2009, if one was convicted of continuous sexual abuse of a child and the accusatory pleading did not allege specific facts rendering the defendant ineligible for probation, probation could be granted only if certain statutory terms and conditions were met. (§ 1203.066, subds. (a), (d)(1) [as amended by Stats. 2006, ch. 538, § 506]; see § 288.5.) Thus, the law in effect at the time of sentencing would have rendered presumptively Hinton ineligible for probation, in the absence of unusual circumstances.

The Hinton information alleged that the underlying offense was committed during 2000-2003. During the years between 2000 and 2003, any criteria rendering one ineligible for probation at sentencing for continuous sexual abuse of a child had to be pled and proven. (Former § 1203.066, subds. (a), (d) [Stats. 1997, ch. 817, § 13, pp. 5584-5587].) The Hinton information included no such allegations. Thus, at the time of the commission of the underlying offenses, Hinton was *not* presumptively ineligible for probation absent unusual circumstances.

The removal of a sentencing court's discretion can implicate the prohibition on ex post facto laws. (*People v. Delgado* (2006) 140 Cal.App.4th 1157, 1167.) Section 1203.066 renders some offenders statutorily ineligible for probation and strongly limits the possibility that probation may be granted to others. Its application to offenders disadvantaged by it and who committed crimes before the effective date of the statue violates the prohibition on ex post facto laws. (*People v. Martinez* (1988) 197 Cal.App.3d 767, 777-778; see *People v. Delgado, supra,* 140 Cal.App.4th at pp. 1168-1169 [when presumptive sentencing scheme creates high hurdle to exercise of judicial discretion, provision enacted after commission of crime substantially disadvantaged defendant].)

In the trial court, everyone assumed that Hinton was presumptively ineligible for probation absent a showing of unusual circumstances. The trial court made specific reference to that presumption when finding that Hinton had not overcome it. The application of the 2009 version of section 1203.066 to Hinton disadvantaged him in a

manner prohibited by the ex post facto clauses of the federal and state Constitutions. (See U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) Thus, the trial court erred when sentencing Hinton as if he was presumptively ineligible for probation unless unusual circumstances existed.

An erroneous legal assumption precludes a trial court from truly exercising its discretion. A criminal defendant is entitled to the informed discretion of a sentencing court. A court that is unaware of the scope of its discretion cannot be said to have exercised an informed discretion. (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1247-1248.) In the matter before us, the trial court failed to exercise its sentencing discretion in an informed manner.[17]

D. *Remand Required*

When a trial court imposes sentence without an accurate understanding of its discretion, a remand for resentencing is an appropriate remedy. (*People v. Bruce G., supra,* 97 Cal.App.4th at p. 1248.) However, the People urge us to conclude that a remand for resentencing would be an idle act in this instance, because it would have been an abuse of discretion for the trial court *not* to sentence Hinton to prison. (See *ibid.*)

We express no opinion about the propriety of granting probation in this matter. However, the record on appeal does not support the claim that a decision to grant probation would be outside of the trial court's discretion. (See, e.g., *People v. Bruce G., supra,* 97 Cal.App.4th at p. 1248.) The trial court obtained advice from several sources including the probation department, mental health professionals and correctional officers before rendering its sentence. Defense counsel made a vigorous attack on those aspects of these recommendations that tended to favor a prison term. Hinton's counsel argued strongly in favor of a grant of probation and offered evidence of much community support for that outcome.

The evidence before that court was divided about what sentence was appropriate. The exercise of sentencing discretion is part of the trial court's function, not ours. In

[17] The Attorney General appears to concede that the trial court erred by acting under the mistaken assumption that Hinton was ineligible for probation.

these circumstances, we conclude that it would be more appropriate to remand this matter for resentencing to allow the trial court to exercise its sentencing discretion applying its understanding of the correct legal standards. (See, e.g., *People v. Bruce G.*, *supra*, 97 Cal.App.4th at p. 1248.)[18]

The conviction is affirmed. The sentence is vacated and the matter is remanded for resentencing in accordance with this opinion.

_____
Reardon, J.

We concur:

_____
Ruvolo, P.J.

_____
Sepulveda, J.

[18] In light of this conclusion, we need not address Hinton's claim that he received the ineffective assistance of counsel at sentencing.