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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JASON JACOB CARDONA, Defendant and Appellant.	F054344 (Super. Ct. No. F04907112-7) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Bruce M. Smith, Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans, Supervising Deputy Attorney General, David Andrew Eldridge and Heather S. Gimle, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of the Facts and parts I, II, and III of the Discussion.

Appellant Jason Jacob Cardona stands convicted, following a jury trial, of forcible rape (Pen. Code, § 261, subd. (a)(2); counts 1 & 5), forcible lewd act on a child under age 14 (*id*., § 288, subd. (b)(1); counts 2 & 6), forcible oral copulation (*id*., § 288a, subd. (c)(2); counts 3 & 7), and sexual penetration by force (*id*., § 289, subd. (a)(1); count 4). Counts 1 through 4 involved crimes against S., while counts 5 through 7 involved crimes against A., and the jury further found, as to all but count 4, that the offenses were committed against multiple victims. (*Id*., § 667.61, subd. (e)(5).) Appellant was between 16 and 18 years of age during much of the period of time in which the crimes were alleged to have occurred.[1] Concluding that appellant was not a fit and proper subject to be dealt with under juvenile court law, the trial court sentenced appellant to a total unstayed term of 30 years to life in prison, and this appeal ensured. For the reasons that follow, we will affirm.

FACTS[*]

S. was 19 years old at the time of trial. From the time she was five until she was 12, appellant, her uncle, constantly molested her. Sometimes, he lived with her and her family. The molestations occurred even when he did not live with them.

On one occasion, S., A. (S.'s younger cousin), appellant, and some others went to a ditch. S. and A. were left alone with appellant. Appellant took off his pants and looked at A. She looked at S., then got on her knees and orally copulated appellant. He did not need to tell her what to do. After, appellant told S. to give him a kiss. She complied; it was like a French kiss. Appellant stopped when someone came up the road.

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[1] The facts are not pertinent to the published portion of this opinion, which addresses the application of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) to the determination of fitness to be sentenced as an adult.

[*] See footnote, *ante*, page 1.

On another occasion, S. was at her grandparents' house when appellant told her to go to the bedroom. She complied. She was on the bed and appellant put in a movie, and the next thing S. knew, she was on the floor. Appellant took off his pants, put his penis in her vagina, and ejaculated on her chest. Although her grandparents were elsewhere in the house, S. did not scream for help. She saw no point in it; appellant had done it for so long, S. felt it would be over sooner if she kept quiet.

Once, when S. was seven or eight, she was asleep at her house. She woke to find appellant on top of her. It was dark and she could not see who it was, but she knew it was him because of the way he smelled. He put her pillow over her face so she would not make any noise, then put his penis in her vagina. It hurt. He again withdrew and ejaculated all over her chest. On the occasions when he had intercourse with her, appellant told S. to tell him that she loved him and to call him "'daddy.'" S. felt awful, like the worst person in the world.

Sometimes, appellant made S. rub his penis with her hands or orally copulate him. Other times, he would touch her breasts (sometimes with his hands; sometimes with his mouth) or put his fingers in her vagina. S. never told anyone about any of these occasions, because she did not want to make anybody – especially her grandmother or A. – feel bad. Also, appellant said he would show pictures of S. to everybody and make her seem like she was a bad person. He also said he could make it hurt worse. S. was afraid that if she told, he would hurt somebody.

The abuse finally stopped when S. was 12. She was in the living room, watching television, when appellant came in and asked if she wanted to have some fun. When she told him no, he came toward her. She went into her parents' room and locked the door. He knocked, but she did not open the door. Finally, he gave up and walked away.

S. finally reported the abuse to the police in August of 2004, after appellant had moved out of state. She overdosed and ended up in the hospital. Her friend Robby wanted to know why she hurt herself all the time, and she confided in him.[2] He then reported the abuse. S. did not tell her family at the time.[3] She did not want them to know, they would feel bad because they could not prevent it. D.G., S.'s mother, did not find out about the abuse until the police asked her to bring S. to the police station because they had received a report she had been molested and raped.

S. spoke to Officer Fuentes and Sergeant Drum of the Kingsburg Police Department on August 30, 2004. At first, she said she did not know why she was there. When Drum asked about her uncle, she replied that she had many uncles. Drum asked again if she knew why she was there, and this time, she nodded affirmatively and said she had been molested. She said it was one of her uncles. She would not name him, but said he now lived in Texas. She said she believed the abuse began before she started school, and she described acts of rape, oral copulation, and fondling and kissing. She said she just decided to stop fighting and let him do everything he wanted to, because he told her it was something she was supposed to do and that it was just a part of life. She knew this was not true, but when she would try to run away, he would grab her and force her down and molest her. She said the molestations stopped when she was 12.

S. told Fuentes that no one was ever present while she was being molested. She did not want to bring A. into it, and so did not tell about the incident at the ditch. She did not tell anyone about the incident with the pillow until the day she testified at trial. She told Fuentes that one of the reasons she did not report the abuse was because she felt bad,

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2 S. would cut her wrist with razors and try to overdose on pills because she felt like a bad person due to what happened to her.

3 In addition to S.'s parents, her grandparents and appellant and his girlfriend were with her at the hospital. When she had previously told appellant that she liked Robby, he got mad and said she was not allowed to do anything with anybody but him.

as appellant had a girlfriend and a baby and she did not want to get them in trouble. She also said that her uncle had threatened to kill her if she told anybody, but that she was not sure how serious he was. She related that he also said he would take pictures of her doing things and would show everyone. S. told Fuentes and Drum that it made her feel horrible, and that she had attempted suicide because she did not want to live anymore.

S. subsequently told her mother, D.G., that A. had been involved. D.G. in turn told Fuentes that she had seen some e-mail messages between S. and A., saying they had been molested. Fuentes had another officer dispatched to Orange Cove to contact A.'s mother.

S. testified that since appellant's arrest, S.'s grandmother no longer came around much and A. did not talk to S. as much as she used to. S. never talked to A. about this case or the details of the molestations, although she did tell A. she was sorry for getting A. into it. S. felt bad because she wanted to protect A. and did not want her to be sad. S.'s grandparents, who were appellant's parents, asked her not to testify at trial. They also told her to write a letter saying that she had dropped all the charges. They said she should do it, since A. had. She wrote the letter, as they would not stop pressuring her.

A. was 16 years old at the time of trial. She was very close to her grandmother, who, along with appellant, had been around a lot when A. was approximately seven through 11 years old. Appellant sometimes took A. and her sisters to the river to play, but she did not remember any ditches around the fields near her grandmother's house, and appellant never took her and S. anywhere. At no time did appellant ever molest her.

A. spoke to Fresno County Sheriff's Deputy Davenport on November 19, 2004. When he first arrived at the house, he had contact with A.'s mother. When he explained that he had been dispatched there to find out if A. had been the victim of some type of sexual offense, the mother said yes, that she had found out about it six months earlier, and that her mother had taken appellant to live in Texas. When Davenport asked A. if she had been the victim of any type of sex offense, she said yes, that her uncle, appellant,

had assaulted her on numerous occasions between the ages of seven and 11, approximately 1997 to 2001. A. said it had happened so many times that she was unable to give a number. She said her mother would drop her off at her grandmother's house for babysitting, and that, when she was asleep at night, appellant would come into the room. He would grab her, twist her arm, and tell her not to say anything or he would hurt her or her grandmother. A. described appellant forcing her to orally copulate him, and putting his penis in her vagina. She also said she would masturbate him with her hands. A. said that, despite the threats, she would fight back on occasion, but he was stronger than she was and he would overpower her. A. also described one incident as occurring in the bathroom at night. She said appellant took her into the bathroom and sat down. He made her sit on him, and his penis entered her vagina. A. told Davenport that during some of the attacks, her cousin was in the same room and would be assaulted in the same fashion. On occasion, appellant put one of them into the closet until he finished with the other, then switched. Appellant told the girls that nobody was going to believe them if they told, and that he would hurt their grandmother. A. gave Davenport S.'s name. During the interview, A. told Davenport that she had come to feel that her grandmother was actually protecting her uncle, and not her.

A. testified at trial that she did not remember the details of what she told Davenport. He told her what S. had said and then asked if it had happened to A. She just agreed.[4] She lied to Davenport. She had no motivation to lie; she just thought S. wanted

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[4] A.'s mother, who told A. to tell the truth to Davenport, was present during the interview. According to her, it was Davenport who said that A. had been abused by appellant and named the various sex acts, and A. just nodded her head. A.'s mother, who was appellant's sister, denied telling Davenport that she had found out what happened to A. six months earlier, and that that was when appellant moved to Texas. She admitted knowing about the molestation before Davenport interviewed A., however, and she did not call the police. A. said she lied almost immediately after the police left. [Fn. contd.]

her to because S. needed some way to get out of what she had gotten into. S. would send text messages to A., asking if she remembered certain things. Those things never happened, but A. did not want to make S. feel as if anything was her fault. A. felt like S. was manipulating her to lie to the police. However, S. never told her to lie, nor did she tell A. anything about what happened to S. At one point, S. told A. that she had tried to commit suicide because her boyfriend had broken up with her.

After appellant was arrested, A. wrote him a letter, saying that she had recently dropped the charges against him mainly because she lied, and apologizing. She wrote in the letter that she hoped "this" would never happen again and would feel grateful if he felt the same way, and that she would appreciate it if they did not see each other. She did not write that because she was afraid of appellant, but because she thought he would hate her for getting him into trouble for something he did not do. She gave the letter to her grandparents, but her grandmother did not ask her to write it.

Psychologist Randall Robinson testified as an expert in Child Sexual Abuse Accommodation Syndrome (CSAAS), which, she explained, was a term coined by UCLA Psychiatrist Dr. Roland Summit in an article he wrote in 1983. The term was meant to be used descriptively, and Summit himself objected to attorneys and clinicians using it diagnostically, i.e., as an indicator that abuse occurred.

Robinson described CSAAS as meaning that "when children are sexually abused, they don't resist for the most part and they don't report for the most part." Moreover, if there is reporting, it is often delayed and sometimes retracted. This is what clinicians have always experienced in their work with children who have been sexually abused.

Davenport testified that he sometimes used more clinical terms for the acts A. described. At the time of the interview, however, he had not read Fuentes's report of his contact with S. or spoken to him about his investigation.

According to Robinson, it is a myth that if a child is abused, he or she will try to get away and tell someone. If the abuse is not a one-time event and continues until the child is 12, he or she may still not resist for various reasons. One is fear of reprisal from the perpetrator, especially if he or she is a family member. Because family members are supposed to protect children, the child has nowhere to go. There is anticipation that if the child says something, he or she will not be believed, the perpetrator might have to go to jail, a parent might have an emotional breakdown, or the child may get sent to a foster home. Children feel responsible for what happened. As they grow older, they may feel shame. Some may develop psychological defense mechanisms, while others may engage in self-abusive behavior because they feel they were responsible for the abuse.

If a child tells a trusted figure, such as a mother, about the abuse and the mother does nothing, it is "abuse upon abuse." For the child to take the risk to tell and then not be believed is an emotional assault. If a teenager reports abuse by a close family member, someone gets arrested, and another family member such as a grandmother gets upset, in Robinson's experience the victim may change the story and say he or she made some of it up or dreamt it. This is a common symptom of CSAAS.

DISCUSSION

I*

REOPENING JURY SELECTION

A. Background

After the parties had exercised several peremptory challenges apiece, each passed the challenge consecutively. The trial court then asked the prospective jurors if they could think of any reason they could not try the case fairly and impartially as to both sides. The prosecutor apologized and asked whether she could reopen. Following an unreported sidebar discussion, the court stated that the People had revoked their pass, and

* See footnote, *ante*, page 1.

allowed the prosecutor to exercise another peremptory challenge. Both sides then passed, and the jurors were sworn.

After the jury was excused for the noon recess, the trial court observed that neither side had exercised all of its peremptory challenges. Defense counsel then noted his objection to the manner in which the People had exercised their last challenge. Counsel took the position that, since both parties had passed sequentially, the People should not have been permitted to exercise the additional challenge. The prosecutor explained that after both sides had passed, she had realized there was one more juror she needed to challenge, and so had asked to reopen. The court stood by its ruling granting the request.

Appellant now contends the trial court violated his rights under the federal Constitution by erroneously permitting the prosecutor to reopen jury selection in order to exercise another peremptory challenge. Appellant says the court had no discretion to permit the prosecutor to reopen, or, if it did, it abused that discretion because the prosecution failed to establish good cause for doing so. We find no error.

B. Analysis

"A challenge to an individual juror may only be made before the jury is sworn." (Code Civ. Proc., § 226, subd. (a).) The "jury," under this provision, does not include the alternates. (*People v. Cottle* (2006) 39 Cal.4th 246, 257.) "Peremptory challenges shall be taken or passed by the sides alternately …. When each side passes consecutively, the jury shall then be sworn, *unless the court, for good cause, shall otherwise order*." (Code Civ. Proc., § 231, subd. (d), italics added.) Accordingly, although the law no longer permits a trial court to reopen jury selection proceedings once a jury has been sworn (*People v. Cottle, supra,* 39 Cal.4th at p. 258), the emphasized portion of subdivision (d) of Code of Civil Procedure section 231 affords the court the discretion to reopen proceedings when, as in appellant's case, the jury has not yet been sworn (see *People v. DeFrance* (2008) 167 Cal.App.4th 486, 504). "[D]iscretion is abused whenever the court

exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

The question is whether the trial court erred by implicitly finding the fact the prosecutor made a mistake constituted good cause to reopen. Relying on *People v. Niles* (1991) 233 Cal.App.3d 315, 321 (*Niles*), appellant argues that a party's reconsideration and change of mind do not warrant reopening jury selection in order to exercise peremptory challenges; hence, the prosecutor's neglect here did not constitute good cause.

Appellant reads too much into *Niles*. That case construed former Penal Code sections 1068 and 1088, the latter of which contained language very similar to the above-quoted portion of Code of Civil Procedure section 231, subdivision (d). (*Niles, supra*, 233 Cal.App.3d at p. 319-320 & fn. 3.) The Court of Appeal determined that, once both sides have consecutively passed on peremptory challenges, any remaining such challenges may be exercised only at the discretion of the trial court, upon a showing of good cause, even though the jury has not yet been sworn. (*Id*. at p. 320.) To show good cause, the party "must make a sufficient showing to persuade the court to allow the belated exercise of [the] challenge." (*Id*. at p. 320, fn. 4.) The court concluded that the trial court did not clearly abuse its discretion by denying a defense request to reopen where "defendant showed nothing more than that he had reconsidered his decision of the day before [to accept the jury] and had changed his mind." (*Id*. at p. 321.) *Niles* manifestly did not hold that permitting the defense to reopen would have constituted an abuse of discretion.

"'[G]ood cause,' liberally construed, requires taking account of ""'real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate excuses that will bear the test of reason, just grounds for action, and always the element of good faith.…'" [Citation.]' [Citation.]" (*People v. DeFrance, supra*, 167 Cal.App.4th at p. 504.) Here, the trial court acted

reasonably in finding good cause. "[A] 'mistake' is, at the very least, a 'reason,' that is, a coherent explanation for the peremptory challenge." (*People v. Williams* (1997) 16 Cal.4th 153, 188.) Although a trial court is not necessarily required to conclude that a party's mistake or neglect constitutes good cause to reopen, where, as here, there is no suggestion counsel is acting other than in good faith, permitting the exercise of further peremptory challenges neither encourages gamesmanship (see *People v. Cottle*, *supra*, 39 Cal.4th at p. 257) nor exceeds the bounds of reason, all of the circumstances being considered (*People v. Giminez*, *supra*, 14 Cal.3d at p. 72).

Justice Werdegar's concurring opinion in *People v. Hernandez* (2003) 30 Cal.4th 1 does not alter our conclusion. Although Justice Werdegar noted that reopening voir dire and permitting a party to exercise additional peremptory challenges violates Code of Civil Procedure section 226, subdivision (a) and may also compromise a defendant's constitutionally protected right to a chosen jury (*Hernandez*, *supra*, at p. 12 [conc. opn. of Werdegar, J.]), she did so in the context of a case involving the dismissal of a juror *after* the jury was sworn. The issue before the court in *Hernandez* was whether the improper discharge of one juror during trial, and replacement of that juror with a sworn alternate, both warranted reversal of the ensuing conviction and barred retrial on double jeopardy principles. (*Hernandez*, at p. 3.) Such was not the situation here.

II*

ADMISSION OF EXPERT TESTIMONY AND HYPOTHETICAL QUESTIONS

A. Background

At the outset of trial, the prosecutor sought to present expert testimony on CSAAS in order to disabuse the jury of widely held misconceptions about child molestation victims, and to show that the alleged victims' reactions and behavior were not

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* See footnote, *ante*, page 1.

inconsistent with their having been molested. The defense did not object, and, as described in the statement of facts, *ante*, Dr. Robinson testified on the subject at trial.

During the course of the prosecutor's direct examination, the following took place:

> "Q So when a teenager – let's take this example – a teenager reports something, reports an abuse by a close family member, bad fall-out happens, somebody gets arrested, another family member, respected family member, grandmother gets upset, doesn't like it and asks that person to do something, to drop charges or something, how would that effect [*sic*] the victim who just reported something terrible that happened to them?
>
> "A In my experience when there's been resistance in the family, the child has changed the story, has recanted has said well, maybe I'm – maybe I made some of this up or maybe I dreamt it. A child needs to have a family, wants to be loved and accepted and doesn't want to feel like a trader [*sic*].
>
> "Q These are all common symptoms of adult sexual assault accommodation syndrome? [*Sic*.]
>
> "A Yes."

The prosecutor then questioned Robinson about whether her clients tended to tell her every single event that happened, or whether their stories changed as they recalled the events.[5] Robinson responded that it depended on the age of the person talking to her, and discussed children's difficulties remembering chronology and reporting details. This ensued:

> "Q And in your experience, Dr. Robinson, do children lie about being molested or being abused by a family member?
>
> "A In my experience, no they don't.
>
> "MR. DULCE [defense counsel]: Objection. That's an ultimate conclusion.

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[5] In her private practice, Robinson's patients were victims of child molestation or child abuse, and ranged in age from four to their 80's.

"THE COURT: Overruled.

"THE WITNESS: In my experience, children do not lie – in my experience, children lie about things that make them look good like getting better grades or having better batting average or their parents earning more money, they do not lie about things about which they feel ashamed about which things that will make them look bad to people."

Later, during the prosecutor's redirect examination, the following occurred:

"Q … You said that the victim will often feel out the situation as they're telling the person who's listening so if they feel safe they will reveal more, correct?

"A Correct.

"Q So if you hypothetically had a child molest victim who told their mother about what happened, mother doesn't do anything, nothing happens and then a trusted police officer or police officer that the victim told the truth to and it's a safe environment and they're talking to that officer, it would make sense then they would talk to a stranger versus their own mother?

"MR. DULCE: Objection. Improper hypothetical.

"THE COURT: Overruled.

"A Am I understanding you correctly a child tells a mother and the mother does not believe the child and then that same child tells a police officer?

"MS. HOWO [prosecutor]: Right.

"A And what is your question?

"Q And tells – is forthcoming with details about the abuse, does it make a difference – well, strike that. Why would a child or a teenager tell a police officer more details than a family member?

"A Teenagers will tell anybody who will listen and help them. Teenagers at that time are extremely angry that this has happened to them. They understand it's exploitive, it's illegal, it's wrong and a lot of self abuse is about anger turned inward so it's a very healthy thing for a child to be able to get that anger out and tell somebody what happened. If a child feels that a parent won't help her, then it's very risky to tell law

> enforcement because the story has to be consistent and you're not going to be popular in your family. But it sounds like a child that would tell law enforcement would be angry at the perpetrator and would be trying to get somebody to believe her."

Appellant says admission of the improper expert opinion that children do not lie about being molested or abused by a family member and the quoted hypothetical questions and answers, constituted reversible error that violated his right to a fair trial. He says Robinson's opinion exceeded the testimonial limits of rebutting a specific myth or misconception and was an improper predictor of child abuse, in addition to which it improperly "painted a picture" of what happened to S. and A. in this case; was improper and inherently prejudicial profile evidence, which was fortified by the improper hypotheticals tied to the facts of this case; and invaded the jury's sole province on credibility while allowing the prosecution to bolster S.'s credibility and A.'s prior inconsistent statements and to undermine A.'s in-court testimony that was favorable to the defense. We conclude any error was harmless.[6]

B. Analysis

At the outset, we reject appellant's claim that the challenged testimony constituted improper profile evidence as such. "A profile is a collection of conduct and characteristics commonly displayed *by those who commit a certain crime*." (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084, italics added.) "Profile evidence is unfairly relied upon to affirmatively prove *a defendant's guilt* based on *his match* with the profile. The jury is improperly invited to conclude that, because *the defendant* manifested some characteristics, *he committed a crime*." (*Id*. at p. 1086-1087, italics added.) We know of no authority extending this premise, as appellant would have us do, to the typical *victim*.

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[6] For the most part, appellant did not object at trial on the grounds he now asserts, thus forfeiting the bulk of his claim on appeal. (E.g., *People v. Davis* (2008) 168 Cal.App.4th 617, 627; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1434.) We nevertheless have examined the issue on the merits.

To the extent appellant analogizes the syllogism underlying profile evidence (criminals act a certain way; the defendant acted that way; therefore, the defendant is a criminal (*id.* at p. 1085)) to what he asserts was the syllogism underlying Robinson's testimony about children not lying (children do not lie about being molested by a family member; S. and A. recounted being molested by appellant, a family member; therefore, they were molested by appellant), it is more appropriately addressed in terms of the purpose of, and limitations on, CSAAS evidence.

This court has stated the law applicable to the admission of CSAAS evidence as follows: "It is beyond dispute that CSAAS testimony is inadmissible to prove that a molestation actually occurred. It can be highly prejudicial if not properly handled by the trial court. It is unusual evidence in that it is expert testimony designed to explain the state of mind of the complaining witness. The particular aspects of CSAAS are as consistent with false testimony as with true testimony. For these reasons, the admissibility of such testimony must be handled carefully by the trial court. [Citations.] [¶] Although inadmissible to prove that a molestation occurred, CSAAS testimony has been held admissible for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation. [Citations.] [¶] Identifying a 'myth' or 'misconception' has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation. [Citations.] [¶] Admission of evidence such as CSAAS is not error merely because it was introduced as part of the prosecution's case-in-chief rather than in rebuttal. The testimony is pertinent and admissible if an issue has been raised as to the victim's credibility. [Citations.]" (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745; accord, *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301; *People v. Bowker* (1988) 203 Cal.App.3d 385, 391, 393; see *People v. Bledsoe* (1984) 36 Cal.3d 236, 251.)

In our view, portions of Robinson's testimony arguably went beyond the limits of CSAAS evidence. "The general rule is that an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful. [Citations.] Thus, … a psychological expert may not testify about rape trauma syndrome … in order to prove that a rape actually occurred, although such testimony is admissible to rehabilitate the credibility of the complaining witness against a suggestion that her behavior after the assault – such as a delay in reporting it – was inconsistent with her claim of having been raped. [Citations.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82.)

Here, Robinson did not expressly testify that S. and A. were telling the truth when they reported having been molested by appellant. Instead, her testimony ostensibly was limited to a proper discussion of victims as a class, supported by references to literature and experience. (See *People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1100.) Rather than testifying, however, that delayed reporting or recantation is not inconsistent with abuse or is not an uncommon response for an abused child, for example (see *People v. Bowker, supra,* 203 Cal.App.3d at p. 394), Robinson stated that in her experience, children do not lie about being molested. Given the evidence in this case, this amounted, as appellant contends, to an opinion on the credibility of S. and A. and, it necessarily follows, as to appellant's guilt.

Although Evidence Code section 805 provides that "'[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact,'" "an expert opinion is inadmissible 'if it invades the province of the jury to decide a case.' [Citation.]" (*People v. Frederick* (2006) 142 Cal.App.4th 400, 412.) Moreover, while a hypothetical question must be based on the facts shown by the evidence (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; *People v.*

Denman (1918) 179 Cal. 497, 500), "the line between impermissible use of expert testimony to prove the child was abused, and permissible use of such testimony to '"explain the emotional antecedents of abused children's seemingly self-impeaching behavior"' [citation]" can be a fine one (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1383-1384). Thus, "the better practice is to limit the expert's testimony to observations concerning the behavior of abused children as a class and to avoid testimony which recites either the facts of the case at trial or obviously similar facts. [Citations.]" (*Id*. at p. 1384.) Here, the prosecutor led Robinson to "construct[] a 'scientific' framework into which the jury could pigeonhole the facts of the case. Thus, even though [she] was precluded from using CSAAS as a predictor of child abuse, the jury was free to superimpose these children on the same theory and conclude abuse had occurred." (*People v. Bowker, supra*, 203 Cal.App.3d at p. 395.)

"The erroneous admission of expert testimony only warrants reversal if 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 247, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); accord, *People v. Bledsoe, supra*, 36 Cal.3d at p. 252 [applying *Watson* standard to erroneous admission of testimony on rape trauma syndrome]; *People v. Derello* (1989) 211 Cal.App.3d 414, 426 [same re: erroneous admission of drug courier profile evidence]; *People v. Bowker, supra*, 203 Cal.App.3d at p. 395 [same re: erroneous admission of CSAAS testimony that was not properly limited]; *People v. Roscoe, supra*, 168 Cal.App.3d at pp. 1100-1101 [same re: erroneous admission of psychologist's testimony diagnosing complainant as molestation victim]; see *People v. Benavides* (2005) 35 Cal.4th 69, 91 ["generally, violations of state evidentiary rules do not rise to the level of federal constitutional error"].) At trial, appellant implicitly recognized the propriety of CSAAS evidence in this case, and even now only objects to limited portions of Robinson's testimony. S.'s mother and brother both testified to S.'s truthfulness, and no evidence contradicted their

assessment. Significantly, defense counsel brought out, in his examination of Robinson, that someone might try to hurt him- or herself for reasons not related to child molest or abuse; that children are capable of lying about a claim of sexual attack and that Robinson did not preclude the possibility that someone – including a child – could make a false claim of sexual attack; that Robinson had not spoken either to S. or to A.; that someone making a false accusation might feel guilty and ashamed and might recant; that Robinson was not saying anything about which side should be believed in a particular family because she did not know this family; and that it was possible, depending on the circumstances, that delayed disclosure could be indicative of a false accusation. On redirect examination by the prosecutor, Robinson again made clear that she had never met S. or A., and that she did not know the details of the case. (Compare *Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, 737-739 [denial of fundamental fairness found where expert's testimony, that 99.5 percent of children tell the truth and that expert had not personally encountered an instance in which a child lied about abuse, was linked to expert's interviews with a specific child who testified at the trial; that child, who was six years old at time of trial some two years after alleged abuse, was the only alleged victim to testify].) In addition, jurors were instructed that hypothetical questions asked a witness to assume certain facts were true and to give an opinion based on those assumed facts, and that it was up to jurors to decide whether an assumed fact had been proved. Jurors were also instructed that Robinson's testimony about CSAAS was not evidence that appellant committed any of the crimes charged against him. Under the circumstances, we conclude there is no reasonable probability the jury would have reached a different result had the challenged testimony been excluded or limited. Accordingly, any error does not warrant reversal. (See *People v. Whitson* (1998) 17 Cal.4th 229, 251.)

III*

PROSECUTORIAL MISCONDUCT

A. Background

At the outset of her opening argument, the prosecutor told jurors:

> "When we were talking in the voir dire process, we talked about child molestation, that being a family secret a crime that happens in the dark, no other witnesses, a crime that can tear apart families. That's what we have here today. We have a case where it was a crime of darkness, a crime of violence and a crime that caused two victims to feel shamefull [*sic*] and guilty because they were victims. We talked about children being afraid of the monster under the bed, the monster in the closet and in this case, *the monster was real and the monster was their uncle, the defendant Jason Cardona* and they had to live through that." (Italics added.)

Subsequently, in discussing A.'s inconsistent statements and recantation, the prosecutor stated:

> "Molest victims often wait to disclose out of shame, fear and not wanting to – textbook example in this case, remember Dr. Robinson told you she doesn't know about the details of this case, she didn't read a police report, she's never met these girls. But this is what happens. They're so worried about the shame and the fear and not wanting to disrupt that family peace. And they'll recant because of concern over hurting other people and protecting others. [A.] is saying I lied. When did that happen? After the defendant was arrested, right? That was a long time after she first disclosed. It was after defendant's arrested, grandmother is upset, mom's, you know, Dr. Robinson talked about, you know, sometimes parents get mad, they have emotional breakdowns. You saw her mother up there. She's barely holding it together. It's just awful, it is tearing this family apart and [A.] is feeling it. When you find – when you listen to all of this evidence, I want you to do the right thing and *hold that monster accountable, that monster* that was in these poor girls' lives for years. Hold him accountable. Hold him responsible." (Italics added.)

In closing, the prosecutor told jurors:

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* See footnote, *ante*, page 1.

> "[S.] and [A.] both used the word bad. They were bad. [S.] especially kept talking about that, I was bad. I tried to kill myself because I was bad. I was all bad. No one protected these girls. *It's your job to do that*. That was one of the exhibits. That's [S.] at 12. That's not the bad person. She's not the bad person. *That's the bad person*. That's the person who did that to her and her cousin for years. *You have to hold the monster responsible for what he did*. Tell these girls it's not right and it's not your fault. Find him guilty beyond a reasonable doubt." (Italics added.)

Pointing to the emphasized portions of argument, appellant says "[t]he prosecutor's repeated foul blows and abhorrent misconduct with scurrilous, degrading, vilifying references to appellant as a 'monster' were improper personal expressions of defendant's culpability and created inflammatory prejudice." He further contends the statement that it was the jurors' job to protect the girls was improper. Appellant recognizes that he did not object to any of the instances at trial, but says (1) we have discretion to address the issue anyway, (2) an objection and admonition would not have cured the harm, and (3) defense counsel's failure to object constituted ineffective assistance of counsel. We find no reason to overlook the lack of objection, little or no impropriety, and no prejudice in any event.

B. <u>Analysis</u>

"The standards governing review of misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. [Citation.] In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review. [Citation.]' [Citation.]" (*People v. Parson* (2008) 44 Cal.4th 332, 359.) Forfeiture also will not apply if the objection and/or request for admonition would have been futile. (*People v. Panah* (2005) 35 Cal.4th 395, 462.) "A

defendant claiming that one of these exceptions applies must find support for his or her claim in the record. [Citation.] The ritual incantation that an exception applies is not enough." (*Ibid*.)

Because nothing in the record suggests an objection or request for admonition would have been futile, and because an admonition would have cured any possible harm from the claimed misconduct, appellant has not preserved his claims for review. (*People v. Tafoya* (2007) 42 Cal.4th 147, 176.) The cases upon which appellant relies to assert the contrary are factually distinguishable, and, to the extent appellant suggests the purported misconduct was pervasive, we have no reason to assume the prosecutor would have continued to make the complained-of remarks had an objection been made and sustained at the outset. (See *People v. Hughes* (2002) 27 Cal.4th 287, 372.) Furthermore, we decline to exercise our discretion to review appellant's claims directly (see *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6), and so relegate appellant to his assertion that trial counsel was ineffective for failing to object (*People v. Lopez* (2008) 42 Cal.4th 960, 966).

The burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

"If the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 367.) In other words, "in assessing a Sixth Amendment attack on trial counsel's adequacy mounted on *direct appeal*, competency is *presumed* unless the record *affirmatively* excludes a rational basis for the trial attorney's choice. [Citations.]" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260.) "The appellate record … rarely shows that the failure to object [to purported misconduct] was the result of counsel's incompetence …. [Citation.]" (*People v. Lopez, supra*, 42 Cal.4th at p. 966.)

With respect to the prosecutor's use of epithets, we conclude that defense counsel's decision not to object fell within the range of reasonable competence, since a failure to make unmeritorious objections does not constitute deficient performance. (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1092; see *People v. Jones* (1997) 15 Cal.4th 119, 182, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) A prosecutor is not required to discuss his or her view of the case in a clinical or detached manner. (*People v. Panah, supra,* 35 Cal.4th at p. 463.) Instead, he or she "'is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury.' [Citation.]" (*People v. Sanders* (1995) 11 Cal.4th 475, 527.) Considering the complained-of statements in the context of the argument as a whole (*People v. San Nicolas* (2004) 34 Cal.4th 614, 665), we do not find the reference to appellant as a "bad person" to be inflammatory or principally aimed at arousing jurors' passion or prejudice. Instead, it was linked to suggestions in the evidence that A. and especially S. felt they were bad because of what appellant did. The "monster" appellations were simply a colorful way of conveying how appellant may have seemed to two young girls, without improperly urging jurors to

consider the victims' suffering or to view the crimes through their eyes. (See *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, revd. on other grounds *sub nom. Stansbury v. California* (1994) 511 U.S. 318.) They were reasonably related to the evidence[7] and we conclude they constituted permissible and fair comment thereon. (Compare *People v. Farnam* (2002) 28 Cal.4th 107, 199-200 [prosecutor's references to defendant as "'monster'" and "'beast who walks upright'" constituted, for most part, fair comment on evidence presented] & *People v. Sully* (1991) 53 Cal.3d 1195, 1249-1250 [prosecutor's references to defendant as "'human monster'" and "mutation'" constituted permissible comment] with *Kellogg v. Skon* (8th Cir. 1999) 176 F.3d 447, 451-452 [prosecutor's references to defendant as "'monster,'" "'sexual deviant'" and "'liar'" constituted improper personal expression of defendant's culpability and created inflammatory prejudice by compelling jurors to focus on grossness of alleged conduct rather than on whether defendant engaged in said conduct; nevertheless, trial was not rendered fundamentally unfair].)

In *People v. Pitts* (1990) 223 Cal.App.3d 606, 702, we held it was improper for the prosecutor to place upon jurors the responsibility for the lives of the children who were the alleged victims. Assuming the prosecutor here exceeded the bounds of "vigorous yet fair argument" (*People v. Sandoval* (1992) 4 Cal.4th 155, 180, affd. *sub nom. Victor v. Nebraska* (1994) 511 U.S. 1) by telling jurors it was their job to protect the girls, this single reference was not prejudicial in light of the record as a whole. (See *People v. Sanders, supra,* 11 Cal.4th at p. 527; *People v. Stansbury, supra,* 4 Cal.4th at p. 1057; *People v. Sully, supra,* 53 Cal.3d at p. 1250.)

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[7] S. testified that she could not sleep if the door to her room was open and that she could not sleep in the dark, because everything happened in the dark. She also testified that she had to have a teddy bear next to her so that she could feel like she was protecting herself.

IV

FINDING OF JUVENILE COURT UNFITNESS

A. Background

The parties stipulated that appellant's date of birth was September 6, 1982. The original information alleged some counts occurring as early as November 1, 1997, while the first amended information alleged some counts occurring as early as May 30, 1992. As set out in the second amended information (upon which the jury returned its verdicts), the offenses charged with respect to S. were alleged to have occurred between September 6, 1998, and May 29, 2001, while the offenses charged concerning A. were alleged to have occurred between September 6, 1998, and November 1, 2002. Thus, appellant was between 16 and 18 years old (hence, a juvenile) during a portion of the periods in which the crimes were committed, having turned 18 on September 6, 2000. In filing the second amended information in the midst of trial, the prosecutor stated her belief that, given the amendment of dates so that appellant was 16 or older at the time of the alleged offenses, the People could "direct file" the charges under Welfare and Institutions Code section 707 and Proposition 21.[8] Appellant did not object to the amendment of the information or to its being filed directly in adult court.

Prior to sentencing, the People filed a written motion for an adult sentencing. Although contending that provisions enacted in 2000 pursuant to Proposition 21 permitted the direct filing of appellant's offenses in adult court, they observed that the court might, out of an abundance of caution and because some of the offenses antedated enactment of the Proposition 21 statutory amendments, conduct a fitness hearing. The People argued that appellant's failure to object to the direct filing waived any objection to his status, and that he was unfit to be dealt with under the juvenile court law in any event.

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[8] Further statutory references are to the Welfare and Institutions Code unless otherwise stated.

The court opted to hold a fitness hearing prior to sentencing. Appellant did not object to this procedure, and did not present any evidence. Following argument concerning the probation officer's fitness report, the trial court found appellant was alleged to be a person described in section 602, and that he was 16 years of age or older at the time of the alleged offenses. Although finding appellant to be a fit and proper subject to be dealt with under the juvenile court law with regard to his prior delinquent history and the success of previous attempts by the juvenile court to rehabilitate him, inasmuch as he had no prior juvenile history or record, the court found him unfit with respect to the degree of criminal sophistication of the offense, whether he could be rehabilitated prior to expiration of the juvenile court's jurisdiction, and the circumstances and gravity of the offenses. Accordingly, the trial court ruled that appellant was not a fit and proper subject to be dealt with under the juvenile court law, and instead was to be sentenced under the general law of California.

Appellant now contends that under *Apprendi*, *supra*, 530 U.S. 466 and its progeny, "the facts of juvenile unfitness that increased the penalty for the crimes beyond a juvenile court disposition to a prescribed adult maximum sentence had to [be] submitted to a jury and proven beyond a reasonable doubt," instead of determined by the sentencing judge. To permit an increase in his authorized punishment contingent upon the finding of unfitness facts, he says, violated his Sixth Amendment right to jury trial. Appellant further contends, based on *Kent v. United States* (1966) 383 U.S. 541 and its progeny, that he was entitled to a hearing *before* juvenile court jurisdiction was rejected and his case was transferred to the superior court criminal process, and that the procedures employed in this case violated his rights under the due process clause of the Fourteenth Amendment.

Respondent disagrees with both arguments, claiming California law does not make any facts "legally essential" to appellant's prosecution as an adult, and that the United States Supreme Court has made clear that the Sixth Amendment's jury trial rights are to

be expanded only to those issues that historically have been the subject of a jury trial. Respondent further says appellant forfeited his due process claim by failing to raise it in the trial court; moreover, because the charges against appellant spanned a time period after the passage of Proposition 21, the prosecutor was required to file them in a court of criminal jurisdiction, and appellant received a fitness hearing in any event.

We conclude *Apprendi* and its progeny do not apply. We further conclude appellant forfeited any due process claim by failing either to raise it or to object to the procedures used, in the trial court.

B. Analysis

1. The statutory framework

The prosecutor's apparent uncertainty over what procedure to follow is understandable: The relevant statutes underwent significant revisions over the course of the timeframe alleged in the second amended information.

In 1998, section 602 placed every juvenile alleged to have committed a crime under the jurisdiction of the juvenile court.[9] Section 707 allowed the district attorney to move to have a minor 16 years of age or older found unfit to be dealt with under the juvenile court law. If the minor was not alleged to have committed an offense listed in subdivision (b) of the statute, the juvenile court could find him or her unfit following investigation, consideration of the probation officer's report, and hearing (former § 707, subd. (a)); if the minor was one who, like appellant, was alleged to have committed an offense listed in subdivision (b) of the statute, the minor was presumed to be unfit

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[9] As it read in 1998, section 602 provided in its entirety: "Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

(former § 707, subd. (c)).[10] Effective March 8, 2000, the electorate enacted the initiative measure known as Proposition 21. As amended thereby, section 602 mandated the

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[10] Section 707 was amended several times in 1998, in ways not applicable to appellant. In pertinent portion, it read:

"(a) In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any criminal statute or ordinance except those listed in subdivision (b), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit, the juvenile court may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law if it concludes that the minor would not be amenable to the care, treatment, and training program available through the facilities of the juvenile court, based upon an evaluation of the following criteria: [¶] (1) The degree of criminal sophistication exhibited by the minor. [¶] (2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction. [¶] (3) The minor's previous delinquent history. [¶] (4) Success of previous attempts by the juvenile court to rehabilitate the minor. [¶] (5) The circumstances and gravity of the offense alleged in the petition to have been committed by the minor.

"A determination that the minor is not a fit and proper subject to be dealt with under the juvenile court law may be based on any one or a combination of the factors set forth above ….

"(b) Subdivision (c) shall be applicable in any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of one of the following offenses: [¶] … [¶] (4) Rape with force or violence or threat of great bodily harm. [¶] … [¶] (6) Lewd or lascivious act as provided in subdivision (b) of Section 288 of the Penal Code. [¶] (7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm. [¶] (8) Any offense specified in subdivision (a) of Section 289 of the Penal Code. [¶] … [¶]

"(c) With regard to a minor alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any of the offenses listed in subdivision (b), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit the minor shall be presumed to be not a fit and proper subject to be dealt with

prosecution of specified minors in adult court.[11] Section 707 permitted the district attorney to directly file charges in adult court against other specified minors.[12]

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under the juvenile court law unless the juvenile court concludes, based upon evidence, which evidence may be of extenuating or mitigating circumstances, that the minor would be amenable to the care, treatment, and training program available through the facilities of the juvenile court based upon an evaluation of each of the following criteria: [¶] (1) The degree of criminal sophistication exhibited by the minor. [¶] (2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction. [¶] (3) The minor's previous delinquent history. [¶] (4) Success of previous attempts by the juvenile court to rehabilitate the minor. [¶] (5) The circumstances and gravity of the offenses alleged in the petition to have been committed by the minor.

"A determination that the minor is a fit and proper subject to be dealt with under the juvenile court law shall be based on a finding of amenability after consideration of the criteria set forth above, and findings therefor recited in the order as to each of the above criteria that the minor is fit and proper under each and every one of the above criteria. In making a finding of fitness, the court may consider extenuating or mitigating circumstances in evaluating each of the above criteria.…"

11 Section 602 underwent further, nonsubstantive changes in 2001. As amended effective March 8, 2000, it provided, in pertinent part:

"(a) Except as provided in subdivision (b), any person who is under the age of 18 years when he or she violates any law of this state … is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

"(b) Any person who is alleged, when he or she was 14 years of age or older, to have committed one of the following offenses shall be prosecuted under the general law in a court of criminal jurisdiction: [¶] … [¶] (2) The following sex offenses, if the prosecutor alleges that the minor personally committed the offense, and if the prosecutor alleges one of the circumstances enumerated in the One Strike law, subdivisions (d) or (e) of Section 667.61 of the Penal Code, applies: [¶] (A) Rape, as described in paragraph (2) of subdivision (a) of Section 261 of the Penal Code. [¶] … [¶] (D) Forcible lewd and lascivious acts on a child under the age of 14 years, as described in subdivision (b) of Section 288 of the Penal Code. [¶] (E) Forcible penetration by foreign object, as described in subdivision (a) of Section 289 of the Penal Code. [¶] (F) Sodomy or oral copulation in violation of Section 286 or 288a of the Penal Code, by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person."

12 As is pertinent to appellant's case, former section 707 provided:

"(a)(1) In any case in which a minor is alleged to be a person described in Section 602(a) by reason of the violation, when he or she was 16 years of age or older, of any criminal statute … except those listed in subdivision (b), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit, the juvenile court may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law …. [¶] … [¶]

"(b) Subdivision (c) shall be applicable in any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of one of the following offenses: [¶] … [¶] (4) Rape with force or violence or threat of great bodily harm. [¶] … [¶] (6) Lewd or lascivious act as provided in subdivision (b) of Section 288 of the Penal Code. [¶] (7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm. [¶] (8) Any offense specified in subdivision (a) of Section 289 of the Penal Code. [¶] … [¶]

"(c) With regard to a minor alleged to be a person described in Section 602 by reason of the violation, when he or she was 14 years of age or older, of any of the offenses listed in subdivision (b), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit the minor shall be presumed to be not a fit and proper subject to be dealt with under the juvenile court law unless the juvenile court concludes, based upon evidence, which evidence may be of extenuating or mitigating circumstances, that the minor would be amenable to the care, treatment, and training program available through the facilities of the juvenile court based upon an evaluation of each of the following criteria: [¶] (1) The degree of criminal sophistication exhibited by the minor. [¶] (2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction. [¶] (3) The minor's previous delinquent history. [¶] (4) Success of previous attempts by the juvenile court to rehabilitate the minor. [¶] (5) The circumstances and gravity of the offenses alleged in the petition to have been committed by the minor.

"A determination that the minor is a fit and proper subject to be dealt with under the juvenile court law shall be based on a finding of amenability after consideration of the criteria set forth above, and findings therefor recited in the order as to each of the above criteria that the minor is fit and proper under each and every one of the above criteria. In making a finding of fitness, the court may consider extenuating or mitigating circumstances in evaluating each of the above criteria.…

In light of the foregoing, appellant was, at all times alleged in the second amended information that were prior to his 18th birthday, presumptively unfit to be dealt with under the juvenile court law. What is not clear is whether, because Proposition 21 went into effect partway through the timeframe in which the crimes were alleged to have been committed, appellant was *per se* unfit. (See *In re Veronique P.* (2004) 119 Cal.App.4th 195, 198.) If appellant was per se unfit to be dealt with under the juvenile court law, then any errors with respect to his posttrial, presentence fitness hearing are immaterial, since the trial court could not have found him fit under any circumstances.

We need not decide whether Proposition 21's amendment to section 602 was intended to apply retroactively, contrary to the general rule that a new or amended statute applies prospectively only unless the Legislature or electorate expresses an intent otherwise (see *In re N.D.* (2008) 167 Cal.App.4th 885, 892), or whether applying it to appellant would run afoul of ex post facto principles (see *Thompson v. Missouri* (1898) 171 U.S. 380, 383).[13] We conclude that, even assuming appellant was not per se unfit to be dealt with under the juvenile court law, he has not shown grounds for reversal.

2. Due process

"(d)(1) Except as provided in subdivision (b) of Section 602, the district attorney or other appropriate prosecuting officer may file an accusatory pleading in a court of criminal jurisdiction against any minor 16 years of age or older who is accused of committing an offense enumerated in subdivision (b)."

[13] Unlike the authority cited by respondent (*People v. Williams* (2004) 118 Cal.App.4th 735, 747-749; see also *People v. Quiroz* (2007) 155 Cal.App.4th 1420, 1428-1430), this is not a case involving a course of conduct that constitutes an offense and continues both before and after enactment or amendment of a statute. Indeed, the second amended information dropped the charges of continuous sexual abuse of a child (Pen. Code, § 288.5) that were contained in the original and first amended informations. Each count in the second amended information charged a discrete criminal act that took place somewhere within a broad timeframe and, for all the record tells us, jurors could have found that every offense was committed before the effective date of Proposition 21. (See *People v. Riskin* (2006) 143 Cal.App.4th 234, 244-245.) We decline to decide whether respondent's cited authority applies in such circumstances.

"The possibility of transfer from juvenile court to a court of general criminal jurisdiction is a matter of great significance to the juvenile. [Citation.]" (*Breed v. Jones* (1975) 421 U.S. 519, 535; *Kent v. United States, supra,* 383 U.S. at p. 556.) In order to afford a juvenile the constitutional protection against multiple trials, a transfer decision generally must be made prior to an adjudicatory hearing. (*Breed*, *supra*, at pp. 535-536.) Transfer hearings "must measure up to the essentials of due process and fair treatment. [Citation.]" (*Kent*, *supra*, at p. 562.)

At his fitness hearing, appellant was afforded such hallmarks of due process as the assistance of counsel, the right to review the probation officer's report, and the right to present evidence. (Contrast *Kent v. United States, supra*, 383 U.S. at p. 546.) Although the hearing was not held prior to the waiver of juvenile court jurisdiction, at no time, as we have noted, did appellant object either to the direct filing of charges in adult court, or to the holding of a post-trial fitness hearing. "Whether a case should proceed in juvenile or adult court 'does not involve an issue of subject matter jurisdiction.' [Citation.] There is but one superior court in a county, though it is divided into different departments. [Citation.] Because [appellant] was charged with a felony, the superior court had subject matter jurisdiction." (*In re Harris* (1993) 5 Cal.4th 813, 837.) "[T]he right to trial in the proper department of the superior court may be waived. '[I]t is well settled that a person who is eligible to have his or her case proceed in juvenile court may waive this right either knowingly, or by failing to timely and properly raise the matter.' [Citation.]" (*Id.* at pp. 837-838; see, e.g., *In re Rodney F.* (1988) 203 Cal.App.3d 177, 186; *Rucker v. Superior Court* (1977) 75 Cal.App.3d 197, 200-201.)

Appellant's failure timely to object, either to the adult court's assumption of jurisdiction or to the holding of a fitness hearing after trial, forfeited his claim on appeal. (See *In re Harris, supra,* 5 Cal.4th at p. 838.) Moreover, we see nothing that undermined the fairness of the hearing appellant was afforded (see *id.* at p. 835) or that suggested the

result might have been different had the hearing been held before trial. Accordingly, appellant's due process claim fails.

3. *Apprendi*[14]

In *Apprendi, supra*, 530 U.S. 466, a New Jersey hate-crime statute authorized a 20-year sentence, despite the usual 10-year maximum, if the sentencing judge found the crime was committed for a specified purpose. In invalidating the statutory scheme, the United States Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490.)

In *Ring v. Arizona* (2002) 536 U.S. 584, the Supreme Court followed *Apprendi* to invalidate a scheme whereby, after the jury found guilt, the judge determined the presence or absence of aggravating factors required by state law for imposition of the death penalty. The high court explained: "We held that Apprendi's sentence violated his right to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' [Citations.] That right attached not only to Apprendi's weapons offense but also to the 'hate crime' aggravating circumstance.… [¶] The dispositive question … 'is one not of form, but of effect.' [Citation.] If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. [Citation.] A defendant may not be 'expose[d] … to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.' [Citations.]" (*Ring*, at p. 602.) The court concluded: "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an

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14 We are aware of no California case that, at the time of appellant's fitness hearing, supported the proposition *Apprendi* required jury findings with respect to juvenile court fitness. Accordingly, we assume, pursuant to *People v. Black* (2007) 41 Cal.4th 799, 811-812, that appellant did not forfeit this issue by failing to raise it in the trial court.

element of a greater offense,' [citation], the Sixth Amendment requires that they be found by a jury." (*Ring*, at p. 609.)

In *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), the standard sentencing range provided for a maximum prison term for the defendant's crime of 53 months. Because the judge found he acted with "'deliberate cruelty,'" however, he was sentenced to more than three years above that maximum, although the facts supporting the finding were neither found by the jury nor admitted by the defendant. In rejecting the state's argument that there was no *Apprendi* violation because the relevant "'statutory maximum'" was the 10-year maximum sentence permissible for the class of felonies in which the crime was categorized under Washington's sentencing scheme, the high court stated: "Our precedents make clear … that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Blakely*, at pp. 303-304.)

In *United States v. Booker* (2005) 543 U.S. 220, the high court found mandatory federal sentencing guidelines indistinguishable from the statute at issue in *Blakely* and so subject to the same holding. (*Booker*, at pp. 233, 243.) *Apprendi* was reaffirmed: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*Booker*, at p. 244.)

In *Cunningham v. California* (2007) 549 U.S. 270, the court applied *Apprendi* and its progeny to California's sentencing scheme. The court stated: "California's

determinate sentencing law (DSL) assigns to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence. The facts so found are neither inherent in the jury's verdict nor embraced by the defendant's plea, and they need only be established by a preponderance of the evidence, not beyond a reasonable doubt. The question presented is whether the DSL, by placing sentence-elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. We hold that it does. [¶] As this Court's decisions instruct, the Federal Constitution's jury-trial right guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. [Citations.] … In petitioner's case, the jury's verdict alone limited the permissible sentence to 12 years. Additional factfinding by the trial judge, however, yielded an upper term sentence of 16 years.… [T]he four-year elevation based on judicial fact-finding denied petitioner his right to a jury trial." (*Cunningham*, at pp. 274-275.)

In *People v. Black*, *supra*, 41 Cal.4th at page 812, the California Supreme Court found it "important to recognize that, under the [foregoing] line of high court decisions …, the constitutional requirement of a jury trial and proof beyond a reasonable doubt applies only to a fact that is 'legally essential to the punishment' [citation], that is, to 'any fact that exposes a defendant to a greater potential sentence' than is authorized by the jury's verdict alone [citation]. 'The Sixth Amendment question, the Court has said, is whether the law *forbids* a judge to increase defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede). [Citation.]"

We have quoted each of the *Apprendi* line of cases to show why, in our view, their holdings are not violated by a juvenile court fitness finding. "The maximum penalty in defendant's case was established when the jury convicted him of the predicate offenses and sustained the [section 667.61] allegations." (*People v. Retanan* (2007) 154

Cal.App.4th 1219, 1229-1230.) No additional fact-finding by the judge was engaged in or required: The *jury's verdict alone* authorized the sentence imposed.

We recognize that, had appellant been tried as a juvenile, his maximum period of actual physical confinement would have been limited by the jurisdiction of the juvenile court to his attainment of age 25. We also recognize that the findings required under the criteria listed in section 707 with respect to fitness are factual ones. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 680 & fn. 1.) This simply does not mean, however, that the Sixth Amendment is violated because a judge makes them.

In *People v. Black, supra*, 41 Cal.4th at page 821, the California Supreme Court explained that *Apprendi* and *Blakely* treated the crime, together with the fact that is the prerequisite to eligibility for an increased sentence, as the functional equivalent of a greater crime. Thus, these decisions are intended to protect the historic right to a trial by jury on all elements of an offense, which would be jeopardized if a legislature could label facts affecting the length of the authorized sentence for an offense as something other than elements, thereby eliminating the right to a jury trial thereon.

This interpretation was confirmed by the United States Supreme Court in *Oregon v. Ice* (2009) 555 U.S. ___ [129 S.Ct. 711], which held that *Apprendi* and its progeny do not apply to a sentencing judge's decision whether to impose consecutive sentences. The court observed that "[o]ur application of *Apprendi*'s rule must honor the 'longstanding common-law practice' in which the rule is rooted. [Citation.] The rule's animating principle is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense. [Citation.] Guided by that principle, our opinions make clear that the Sixth Amendment does not countenance legislative encroachment on the jury's traditional domain. [Citation.] We accordingly considered whether the finding of a particular fact was understood as within 'the domain of the jury … by those who framed the Bill of Rights.' [Citation.] In undertaking this inquiry, we remain cognizant that administration of a discrete criminal justice system is among the

basic sovereign prerogatives States retain. [Citation.]" (*Ice*, at p. ___ [129 S.Ct. at p. 717]. After reviewing "[t]he historical record" (*ibid*.), the court went on to state:

> "In light of this history, legislative reforms regarding the imposition of multiple sentences do not implicate the core concerns that prompted our decision in *Apprendi*. There is no encroachment here by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused.…
>
> "It is no answer that, as Ice argues, 'he was "*entitled*" to' concurrent sentences absent the fact findings Oregon law requires. [Citation.] In Ice's view, because 'the Oregon Legislature deviated from tradition' and enacted a statute that hinges consecutive sentences on fact findings, *Apprendi*'s rule must be imported. [Citation.] As we have described, the scope of the constitutional jury right must be informed by the historical role of the jury at common law. [Citation.] It is therefore not the case that, as Ice suggests, the federal constitutional right attaches to every contemporary state-law 'entitlement' to predicate findings.
>
> "For similar reasons, *Cunningham*, upon which Ice heavily relies, does not control his case. As stated earlier, we held in *Cunningham* that the facts permitting imposition of an elevated 'upper term' sentence for a particular crime fell within the jury's province. [Citation.] The assignment of such a finding to the sentencing judge implicates *Apprendi*'s core concern: a legislative attempt to 'remove from the [province of the] jury' the determination of facts that warrant punishment for a specific statutory offense. [Citation.] We had no occasion to consider the appropriate inquiry when no erosion of the jury's traditional role was at stake. *Cunningham* thus does not impede our conclusion that, as *Apprendi*'s core concern is inapplicable to the issue at hand, so too is the Sixth Amendment's restriction on judge-found facts." (*Ice*, at p. ___ [129 S.Ct. at p. 718].)

"Members of [the United States Supreme] Court have warned against 'wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries.' [Citation.] The jury-trial right is best honored through a 'principled rationale' that applies the rule of the *Apprendi* cases 'within the central sphere of their concern' [Citation.]" (*Oregon v. Ice, supra,* 555 U.S. at p. ___ [129 S.Ct. at p. 719].) Nothing in the *Apprendi* line of cases "'suggests that they apply to factual determinations

that do not serve as the "functional equivalent" of an element of a crime.' [Citation.]" (*People v. Black, supra,* 41 Cal.4th at p. 821.)

The factual findings involved in a fitness determination are not the functional equivalent of an element of a crime. "The sole purpose of the fitness hearing is to determine whether the best interest of the minor and of society will be served by retention in the juvenile court or whether the minor should be tried as an adult. [Citation.]" (*People v. Superior Court (Ronald H.)* (1990) 219 Cal.App.3d 1475, 1479.) A transfer hearing "does not directly result in an adjudication of guilt or delinquency" (*People v. Superior Court (Steven S.)* (1981) 119 Cal.App.3d 162, 173), and the question of a minor's amenability to treatment within the juvenile court system is concerned with the child's prospects for rehabilitation, not the degree of his or her criminal culpability (see *People v. Macias* (1997) 16 Cal.4th 739, 746-747). A finding that a minor is not amenable to treatment in the juvenile system "does not increase the maximum penalty one can receive if punished according to the facts as reflected in the jury verdict alone." (*People v. Ferris* (2005) 130 Cal.App.4th 773, 780 [rejecting claim that, under *Apprendi,* insanity must be treated as element of offense charged].) Moreover, even assuming juveniles have indeed historically been afforded the right to trial by jury on allegations they committed a crime (see *In re Javier A.* (1984) 159 Cal.App.3d 913, 928-949), we are aware of no historical practice extending that right to a fitness determination.

The constitutional concerns expressed in *Apprendi* and its progeny were satisfied in the present case by the jury's finding, beyond a reasonable doubt, of those facts legally essential to the punishment imposed, viz., that appellant committed the offenses. Appellant's sentence was fully authorized by the jury verdict; the statutory provision for judicial factfinding with respect to amenability to treatment in the juvenile court system is not "a legislative attempt to 'remove from the [province of the] jury' the determination of facts that warrant punishment for a specific statutory offense.… [A]s *Apprendi*'s core

concern is inapplicable to the issue at hand, so too is the Sixth Amendment's restriction on judge-found facts." (*Oregon v. Ice, supra,* 555 U.S. at p. ___ [129 S.Ct. at p. 718].)

DISPOSITION

The judgment is affirmed.

_____
Ardaiz, P.J.

WE CONCUR:

_____
Vartabedian, J.

_____
Cornell, J.