7/28/05 CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR DANIEL RUILOBA, Defendant and Appellant.	C046096 Sup.Ct.No. P02CRF0363

APPEAL from a judgment of the Superior Court of El Dorado County, Eddie T. Keller, Judge. Affirmed as modified.

John F. Schuck, Under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, John G. McLean, and George M. Hendrickson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Arthur Daniel Ruiloba of three counts of lewd conduct with a child under 16 while he was at least 10 years older than the child. (Pen. Code, § 288, subd. (c)(1); further unspecified section references are to this code.) The

* Pursuant to California Rules of Court, rule 976.1, only the Factual and Procedural Background, parts III and IV of the Discussion, and the Disposition of this opinion are certified for publication.

trial court sent him to prison for four years four months, and defendant timely appealed.

Defendant contends: (1) A statute improperly revived time-barred charges; (2) no substantial evidence supports count III; (3) no substantial corroboration supports extending the statute of limitation; (4) the court should have bifurcated the trial on the statute of limitation; (5) the court misinstructed about uncharged conduct; 6) the court misinstructed on corroboration; (7) the court should have excluded evidence about child sexual abuse accommodation syndrome (CSAAS); (8) the sentence is based on facts not found true by the jury; and (9) certain fines were improper, a claim conceded by the Attorney General.

In the published portions of this opinion, we reject defendant's claim that he was entitled to a bifurcated trial on the statute of limitations, but we offer an instructional suggestion for future cases, and we reject his claim that there is insufficient corroboration of the victim's allegations. In the unpublished portion, we will correct the concededly improper fines and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A complaint filed July 18, 2002, charged numerous sexual offenses. The charges were amended over time, and at trial the operative pleading alleged lewd conduct with a child under 14 (§ 288, subd. (a)) (count I), continuous sexual abuse (§ 288.5) (count II), and lewd conduct with a child 14 or 15 (§ 288, subd. (c)(1)) (counts III-VI). The jury convicted defendant on counts

III, IV and V (alleging defendant rubbed his penis against the victim's vagina or had her rub his penis), acquitted on count VI (intercourse) and deadlocked on counts I and II, which were dismissed.

The victim, J., was 26 at trial and had been "raised by" defendant, who married J.'s mother, Karen. J. knew defendant (Karen's stepbrother) all her life; he began dating Karen when J. was about seven or eight. He worked as a Santa Clara County deputy sheriff. The family moved to Placerville when J. was 10. Defendant had not married Karen yet, but was part of the family.

When J. was about 10, during the summer when it was hot, she was on the bed watching television with defendant when he turned on some pornography and asked J. if she liked it. She became aroused and rubbed her crotch on his leg, through their clothing; defendant "was kind of surprised, and I was embarrassed." She retracted a claim that defendant put his hand down her pants at this time.

J. did not often think about sexual acts with defendant "Because I didn't want to remember them." She had trouble pinning down specific dates, but she recalled several times when he would pay her to put sunscreen on his genitals. She also recalled times when "He wanted me to give him a squeeze, which meant that he would take my hand and squeeze his penis and testicles or whatever."

Once, J. performed oral sex on defendant in the car, and once (after her brother had moved out of the house in 1990) in a "loft area of the upstairs," in an incident where defendant

“ejaculated all over my face.” Many times during junior high and high school, about every other day, he would wrestle with her, “and spread open my legs and rub his penis on me,” sometimes while she was dressed, but sometimes when he took her clothes off; he would pull down his pants and touch her with his bare skin on these occasions.

Defendant had J. sleep with him in junior high and high school and sometimes would put his finger in her vagina, which woke her up. “Usually he would have me rub his penis until he ejaculated because I wouldn’t have sex with him.” He had been asking her to have intercourse since she was 13: “He kept telling me to try it because it is so wonderful.” Finally, when she was 15 or 16, she relented and he put his penis in her vagina, but it hurt her and he stopped.

J. did not report the abuse because she feared the impact her revelation would have on the family and she wanted to forget what had happened. However, when she learned that a female cousin who had been living with the family had left the house abruptly, she became concerned and made a report. At trial the cousin testified as a defense witness that defendant never touched her improperly and she left the house for other reasons.

At the behest of law enforcement, J. made a recorded telephone call to defendant, from which a reasonable person could infer that defendant had had an intimate relationship with J. when she was a child. We give more details about this telephone call later in this opinion.

B., a friend of J.'s from junior high and high school, testified that when she was 17, she visited J.'s family after J. had left home to go to college. She and defendant began massaging each other's feet while watching a movie and defendant "pulled my shirt up and messed with my bra." "[I]t was in the way of the massage. And I felt as if he was trying to go down the sides of my rib cage, and I pressed my arms very tightly against my sides." Defendant asked if B. wanted to have an affair, stating that his wife wanted him to be happy. The import of this was arguably lessened by (1) B.'s testimony, corroborated by Karen and a female child, that massages were common at the household and often B. and J. would give defendant mutual foot massages while watching television; (2) B.'s testimony that defendant often massaged her *under her clothing*, "mostly lower back area, hips"; and (3) her employment in a topless bar.

The defense theory was that defendant and J. became lovers after J. turned 18, and she became vindictive when they broke up. In addition to pointing out inconsistencies in J.'s story over time, the defense pressed the fact that she denied using a certain endearment towards defendant after she became an adult, a denial refuted when defense counsel, in violation of discovery rules, produced a Valentine's Day card J. had sent defendant. The trial court instructed the jury to consider the discovery violation when it evaluated this evidence. (CALJIC No. 2.28.)

The jury deadlocked on counts alleging lewd conduct and continuous abuse when J. was under 14, convicted defendant of

three counts of lewd conduct when she was 14 to 15 years of age, and acquitted of the lewd conduct count based on intercourse when she was 15. The mixed verdicts do not mean the jury disbelieved the victim. The acquittal was likely due to uncertainty about J.'s age at the time of intercourse; a reasonable doubt about whether she was 15 or 16 meant defendant was entitled to an acquittal, because at trial he was no longer charged with unlawful sexual intercourse (§ 261.5) but with lewd conduct with a child aged 14 or 15, (§ 288, subd. (c)) based on intercourse. The deadlock on the counts alleging conduct before J. was 14 may well have resulted because some jurors were not satisfied, under the statute-of-limitation instructions given, that the evidence clearly and convincingly corroborated sexual activity with J. before the age of 14. Therefore, contrary to an implication in defendant's brief, the mixed verdicts do not show that the jury viewed J.'s testimony with suspicion.

DISCUSSION

I. Timely Prosecution

Defendant contends his prosecution was untimely. Shortly before trial, the United States Supreme Court issued *Stogner v. California* (2003) 539 U.S. 607 [156 L.Ed.2d 544] (*Stogner*), holding that a statute that extends an *expired* statute of limitation violates ex post facto principles. Defendant argued in the trial court, and reiterates on appeal, his view that this decision barred the instant prosecution.

Defendant concedes that the statute at issue, section 803, subdivision (g) (§ 803(g)), became effective before the normal

period of limitations for his offenses expired. Pre-*Stogner* California decisions hold an extension of an *unexpired* period raises no ex post facto violation. (E.g., *People v. Masry* (1986) 179 Cal.App.3d 1149, 1152; *People v. Swinney* (1975) 46 Cal.App.3d 332, 340, disapproved on other grounds in *People v. Zamora* (9176) 18 Cal.3d 538, 564-565, fn. 26.) Judge Learned Hand's colorful passage in *Falter v. United States* (2d Cir. 1928) 23 F.2d 420 explains the rationale (at pp. 425-426): "The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the stake forgives it."

Falter v. United States, supra, 23 F.2d 420 was partly rejected by the California Supreme Court in *People v. Frazer* (1999) 21 Cal.4th 737, at pages 761 to 765. But *Falter* was later approved-and *Frazer* was disapproved-by the United States Supreme Court. (*Stogner v. California* (2003) 539 U.S. 607, 611, 619-621, 629 [156 L.Ed.2d 544, 551, 556-558, 563].) Thus, *Falter* remains good law. Post-*Stogner* cases hold where section 803(g) extends an unexpired period, prosecution is timely. (*People v. Renderos* (2003) 114 Cal.App.4th 961, 964-966; *People v. Robertson* (2003) 113 Cal.App.4th 389, 392-394.) We agree.

Defendant points out that by its terms section 803(g) is triggered when the normal limitation period "has expired."

(§ 803, subd. (g)(2)(A).) Although the statute could have been drafted differently, as applied to the facts of this case it does not revive an expired statute of limitations, for the reasons just explained. (See *People v. Vasquez* (2004) 118 Cal.App.4th 501, 505-506; *People v. Superior Court (German)* (2004) 116 Cal.App.4th 1192, 1196-1197.)

II. Substantial Evidence on Count III

Defendant contends no substantial evidence supports the conviction on count III, which alleged that between August 21, 1991 and August 20, 1993, "defendant had victim rub his penis while they were in his car." He claims the victim "testified that she did not remember this alleged conduct occurring during this time period."

We view the evidence in the light most favorable to the People and presume the existence of every fact the trier could reasonably deduce from the evidence. Although we must ensure the evidence is reasonable in nature, credible, and of solid value, it is the province of the trier of fact to determine the credibility of a witness and the truth or falsity of facts. If the verdict is supported by substantial evidence, we defer to the trier of fact. (*People v. Barnes* (1986) 42 Cal.3d 284, 303-304 (*Barnes*).) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor

evidentiary conflicts; we look for substantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

The victim was born on August 21, 1977. She prepared a time line which is in the record on appeal. Her testimony, coupled with the exhibit, shows she was in middle school from 1989 to 1991 (ages 11-13) and high school from 1991 to 1995 (ages 14-17). Based on her birthdate and her testimony that the Placerville schools had a "traditional" school year, that would establish her middle (or junior) school ended about June of 1991, *before* she turned 14. The operative pleading alleged, in count III, conduct when she was 14 and 15 (just before her 16th birthday), which for J. meant essentially 9th or 10th grade. The People in its argument made a clarifying election, limiting this count "to the time when [J.] was 14, 15 years old. She is in 9th and 10th grade, high school. [J.] testified that Mr. Ruiloba had . . . put . . . her hand on his penis, multiple times, countless times, in her words, during junior high and high school. [¶] This particular charge relates to the act of having her hand on his penis when she was in high school in 9th and 10th grade during this time period of 1991 to 1993." Defendant argues the record does not show the charged conduct took place during that time.

J. recalled times when "we would be riding in the car and he would have me reach over and put my hand between his legs." "He wanted me to give him a squeeze, which meant that he would take my hand and squeeze his penis and testicles or whatever." "It was over an amount of time, and it was countless times.

Although I can't pinpoint specifically, I remember specific incidents. But it happened so often that . . . I don't remember specifically ages. Q. Well, do you recall it ever happening when you were in high school [9th-12th grade]? A. Yes. Q. Do you recall it happening when you were in junior high school [6th-8th grade]? A. Yes. Q. Do you recall it happening when you were in the 5th grade at [elementary school]? A. No. I don't think he had the car then. Q. Do you recall it happening in 6th grade or 7th grade? A. Approximately, yes. Q. Do you recall it definitely happened when you were in middle school? A. Yes." "I would reach over and squeeze him between his legs on the outside of his pants. *And then **sometimes** he would unzip his pants and put my hand inside*." (Emphasis added.) Later she was asked about when her hand was inside his pants in the car and J. testified "It was more often than once a month. It was at least once a week. Q. *And **that** would be where he would put your hand . . . in his unzipped pants onto his penis*? A. Yes. Q. *And **that** happened through junior high and high school*? A. I don't remember. Q. *Do you remember **it** happening in high school*? A. No, I can't say that I do." (Emphasis added.) Similar conduct took place in other places, as well, not just in the car.

J. later testified as follows: "Q. Now, you also testified that approximately once a week [defendant] would put your hand in his pants on his penis. Do you recall that testimony? A. Yes. Q. And did that occur during the entire time of your growing up, or was that limited to one particular

time frame in terms of was it in high school or junior high or -- A. That was during the whole time." "[Q.]: . . . [W]hat I want to do is try to establish the number of times that the activity occurred that we are talking about in this time frame of you had indicated junior high and high school. And a few moments ago . . . you had stated that it was . . . more than once a month and something about once a week. What is your recollection? A. My recollection is that it was often, but I cannot tell you if it was once or twice or every other week, but it was often. And I can't tell you a specific number because I just -- I don't remember."

There was no basis for the jury to pick and choose among the "countless" times, which "happened so often" that J. could not remember particular incidents that defendant made her "squeeze" his penis in the car, either through his clothing or "sometimes" inside his pants. (See *People v. Smith* (2002) 98 Cal.App.4th 1182, 1190.) The apparent inconsistencies in this testimony do not undermine the verdict. J. remembered "squeezing" defendant's penis many times, but defendant did not put her hand inside his pants each time, and J. could not recall her age on particular occasions. When J. testified she could not remember if "that" or "it" happened in junior high *and* high school, in the passages emphasized above, a fair inference is that she could not recall exact incidents when she had her hand inside his pants, that is, when she touched his bare penis, as distinct from incidents when she "squeezed" him through his pants. A bare-skin touch was not required, and the jury was so

instructed. (CALJIC No. 10.42.5; see *People v. Martinez* (1995) 11 Cal.4th 434, 444.) Further, the tenor of her later testimony was that such conduct took place the "whole time" she was growing up, which would include the charged time period, although she could not distinguish particular incidents and link them to particular dates.

We reject defendant's claim of no substantial evidence.

III. Corroboration to Satisfy Statute of Limitation

The People had the burden to prove the charges were timely brought. (See *People v. Lopez* (1997) 52 Cal.App.4th 233, 244-245.) Generally, the burden to show this is by a preponderance of the evidence. (*Id*. at p. 248.) However, section 803(g) partly sets out a different burden. In order to extend the statute of limitations for certain sexual offenses, section 803(g) requires, in part, "independent evidence that clearly and convincingly corroborates the victim's allegation." (§ 803, subd. (g)(2)(B).) Defendant argues no substantial clear and convincing corroboration was shown. We disagree.

Tracking section 803(g) and the pleadings, the trial court instructed that the jury had to make five findings to extend the statute of limitations. Four had to be proven by a preponderance of the evidence, *viz*.: (1) On April 2, 2002, J. reported to the authorities while under age 18; 2) a complaint was filed on July 18, 2002; 3) the crimes involved substantial sexual conduct (as defined); and 4) the normal statute of limitations had expired. Facts (2) and (4) were stipulated, defendant effectively conceded fact (1) in argument, and fact

(3) was disputed only in the sense that the defense was that no unlawful conduct took place.

For the fifth fact, the trial court instructed the jury that it had to find "independent evidence that clearly and convincingly corroborates the victim's allegation, not including the opinion of any mental health professional. [¶] Clear and convincing evidence of the corroboration means evidence of such convincing force that it demonstrates in contrast to the opposing evidence a high probability of the truth of the fact for which it is offered as proof. [¶] Such evidence requires a higher standard of proof than proof by a preponderance of the evidence. [¶] You should consider all of the evidence bearing upon every issue regardless of who produced it."

To answer a written jury question, the trial court later instructed, "The independent evidence must clearly and convincingly corroborate [J.'s] allegations of sexual abuse. The corroborating evidence must connect the defendant to the commission of the crimes charged in such a way to convince you that [J.] is telling the truth. It is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crimes charged, or that it corroborate every fact to which [J.] testified."

In determining whether the record shows substantial evidence, defendant concedes we apply the normal substantial evidence standard of review, regardless of the burden of proof in the trial court. (See *Crail v. Blakely* (1973) 8 Cal.3d 744, 750; *In re Maria S.* (2000) 82 Cal.App.4th 1032, 1039.) Thus, we

view the evidence in the light most favorable to the jury's findings. (*Barnes*, *supra*, 42 Cal.3d at pp. 303-304.)

Evidence of uncharged sexual misconduct that is admissible under Evidence Code section 1108 may be used to corroborate a victim's allegation and thereby satisfy section 803(g). "Given the significant probative value of uncharged sexual misconduct in sex crimes cases, we find evidence of such can be used to corroborate a victim's allegation of sexual abuse under section 803(g). Of course, the precise probative value to be accorded this evidence will depend on various considerations, such as the frequency of the uncharged acts and their similarity and temporal proximity to the charged acts." (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 404 (*Yovanov*); see *People v. Mabini* (2001) 92 Cal.App.4th 654, 659 (*Mabini*) [similar molestations against another child of similar age as the victim].) This impliedly rejects defendant's suggestion that each specific act alleged against a defendant must be corroborated. Section 803(g) partly requires "evidence that clearly and convincingly corroborates the victim's allegation." (§ 803, subd. (g)(2)(B).) The "victim's allegation" can, and often does, consist of a description of multiple instances of abuse, often spread over years of time in the case of resident child molesters, such as in this case. To the extent an uncharged act shows a defendant's *propensity* to commit sexual offenses against a child, that can corroborate *all of the charged offenses* even if it does not *particularly* corroborate any specific offense. (*Mabini*, *supra*, 92 Cal.App.4th at pp. 657-659; *Yovanov*, *supra*,

69 Cal.App.4th at pp. 404-405.) In some cases, particular corroboration may be shown, such as where the offenses reflect a distinctive method. (See Evid. Code, § 1101, subd. (b).) But the corroboration does not have to corroborate each allegation in the criminal pleading, only the "victim's allegation." (§ 803, subd. (g)(2)(B).) Evidence of a person's propensity to do what the victim has alleged corroborates the victim's allegation. (*Mabini*, *supra*, 92 Cal.App.4th at p. 659 ["such evidence, if credited by the trier of fact, may standing alone constitute independent evidence that clearly and convincingly corroborates the victim's allegation"].) Further, the corroboration does not have to be sufficient to support a *conviction*. (*People v. Zandrino* (2002) 100 Cal.App.4th 74, 85.)

The People produced two types of corroborating evidence. First, B. testified that once when she was 17, defendant possibly tried to grope her during a massage, told B. his wife did not mind if he had sex with other people, and invited an affair. Second, J. made a recorded telephone call to defendant.

Only a small part of B.'s evidence was of substantial value. The sexual invitation was not necessarily criminal, or at least it is not clear a jury would have found it to be criminal within the narrow definitions provided by Evidence Code section 1108, given that the trial court failed to instruct the jury properly on that statute. That error is discussed further in part V, *infra*, in the nonpublished portion of this opinion. In any event, in the context of a consensual massage between persons who regularly and openly engaged in such conduct, the

vague description of a possible grope and the request for sex were not the sort of uncharged acts from which a reasonable jury could conclude defendant had a propensity towards sexual relations with *young* girls generally. (See *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1131 (*Maurer*) [because Maurer and minor "were confidants and freely discussed sexual and nonsexual matters," his sexual comments did not clearly show child molestation under § 647.6, for purposes of determining instructional error prejudice].) Nor was the B. incident similar to the J. incidents. (See *Yovanov*, *supra*, 69 Cal.App.4th at p. 404 [value of uncharged act corroboration turns partly on its similarity to charges].) However, B. also testified that defendant admitted his wife allowed him to have sexual affairs. That corroborates part of the pretext call, as we describe in a moment.

In a motion to dismiss (§ 995) defendant argued the pretext call did not corroborate the charges by clear and convincing evidence because the conversation was not explicit enough to support any single act, far less "the number of counts charged in this case." He conceded the tape referred to "some sort of intimacy [which] occurred between these two," "some kind of certainly immoral relationship," but that it did not clearly indicate "that the occurrence was after [J.] was over age 14, or even over age 18." Defendant generally presses the same claims on appeal. But defendant fails in his duty, as the appellant, to provide an accurate description of the content of the call.

We have explained why the corroborating evidence did not need to support each claimed sexual offense. By means of quotations from the transcript of the telephone call used as a guide at trial we will show why a rational jury could conclude the call corroborated J.'s allegations. Although the transcript was not introduced as evidence, the parties assume it is accurate. So do we. (See *County of El Dorado v. Misura* (1995) 33 Cal.App.4th 73, 77.)

Before setting out the quotations, we explain that "Bob," a person mentioned by J. during the pretext call, was identified by J. and by a peace officer at trial as a convicted child molester. Detective Strasser testified this person "was a family friend of theirs that had been previously convicted of child molestation" and Strasser and J. agreed that she would use "Bob" "to introduce this subject . . . because the crimes that [Bob] was convicted of were specifically child molestation and it was specifically what was going on with her." Detective Strasser's testimony defining the relevance of "Bob" was, of course, independent of J.'s allegations.

J. called defendant while he was at work and at one point he had to hang up and call her back. We will use "J" and "D" for convenience. Some of the ellipses are in the original and some we have added for clarity, but we have preserved the tenor of the transcript excerpts.

> "[J]: . . . [R]emember we were talking about Bob [S.] the other night?
>
> "[D]: Right.

"[J]: And . . . about like how people are going to jail for that kind of stuff and all that and . . . .

"[D]: Yeah.

"[J]: . . . and I'm having a really hard time with, with what happened between me and you and . . .

"[D]: Well that doesn't have anything to do with that.

"[J]: Well why not though?

"[D]: Because it was, it was me and you and a whole lot of ah, love involved.

"[J]: Yeah.

"[D]: And that wasn't to do with me, you know, being a predator and taking advantage of you and holding you and scaring you . . .

"[J]: Yeah.

"[D]: . . . and, you know, abusing you, you know what I mean."

If defendant had had an adult sexual relationship with J., the obvious distinction between him and "Bob" would be that J. had not been a minor. But instead, defendant explains the difference is that he loved J. and he is not a "predator."

"[J]: Well but what about, I mean . . . I was always under the impression though that, that any type of sexual relationship between an adult and a child would be inappropriate. But then you know, you always told me that, you know, me and you were different. That, that it was different then most situations because of that, but I, I don't . . . I'm just having . . .

"[D]: Well there's a lot of confusion for me and you, I know that.

"[J]: Yeah.

"[D]: I mean I'd never ever picked . . . I, I mean I'd be perfectly blunt and blatant. You know, what I tell you is a profile on a predator is, they can't stop.

"[J]: Yeah.

"[D]: And I have had nothing before and nothing since.

"[J]: Yeah.

"[D]: And it's totally different in that regard, you know what I mean?

"[J]: Yeah.

"[D]: I mean obviously if I was, you know, looming over the next child or, or whatever something to that effect. You'd say hey, that's not good."

Defendant says he is not a predator because he can stop and "had nothing before and nothing since," which a rational jury could infer meant no sex with a child before or since, particularly given his claim that he was not "looming over the next child . . . ." Defendant posits that "child" can refer to an adult child or stepchild, and argues this passage referred to an adult sexual relationship, but that is not the only rational interpretation, nor even the most likely.

Later in the call, defendant explains that he discouraged his wife from having other "young ladies around" because "the last thing I want to ever [be] accused of is, is being a predator" but he again distinguished his relationship with J. because "it developed over time and, and over love."

When J. explained the relationship made her feel like she was hiding something from her mother, defendant said "Well I

don’t think . . . you can be closer to her by, by discussing that with her.” He then explained that his wife allowed him to have relations with other women. After more discussion, the following took place:

> “[J]: . . . I mean do you remember when I was trying to stop it and I said, you know, I said that that kind of sexual relationship was just not right because of what the Bible says. And you said that, that you thought that it was okay because of these scriptures and stuff like that. And, you know, I’ve always felt like I’ve done something wrong.
>
> “[D]: Well that’s . . .
>
> “[J]: . . . And I felt like you did something wrong too, because . . . I mean I didn’t understand that my mom was consensual with things like that.
>
> “[D]: Right, right.
>
> “[J]: And, and you know I always thought that you were an ass, because I thought that you shouldn’t have been cheating on my mom.
>
> “[D]: Yes, and that’s because I couldn’t and I don’t want to share with you the intricacies of what your mom’s about.
>
> “[J]: Um-hum.
>
> “[D]: Because why would I . . . see if I was a predator I would use that. I’d say, well did you know your mom did this? And did you know your mom did that?
>
> “[J]: Yeah.
>
> “[D]: You know what I’m saying?
>
> “[J]: Um-hum.
>
> “[D]: But there was no reason for that, because I wasn’t approaching you with a predator mode. I was approaching you with . . . well actually we were

> approaching each other with, the love. We, you know, you didn't put me there. I didn't put you there. And when we were there I think, I need to be honest with you, I don't know what would have happened if you weren't. Because there was no love there with your mom at the time.
>
> "[J]: Um-hum.
>
> "[D]: She wasn't giving it and I wasn't getting it. And I, and I was feeling very lonely. . . ."

From this passage, a rational jury could infer defendant turned to J. for sexual and emotional companionship when his relationship with his wife was empty. When J. then indicated she was having difficulties because of the relationship and spoke of seeing a counselor, defendant warned against it, stating that would "expose" the issue, and "the ramifications are life long." He also said it would hurt J.'s mother: "[T]he only thing that would cause terror in her heart and terror in her life is for you to expose that, because then she'd be thinking, you know, I failed my daughter." Defendant suggests on appeal that disclosure of an adult sexual relationship also would be damaging, but the jury did not have to construe the call that way. Defendant spoke of not being a "predator" because he could stop himself and had not "had any" before or since J., and was not "looming over the next child[.]" In sum, a reasonable trier of fact could conclude that defendant and J. were discussing a sexual relationship between themselves during J.'s minority. Although they did not discuss particular acts or dates, the tenor is clear. The fact it corroborates *any* sexual acts corroborates all of J.'s allegations, because the call

tended to prove his lewd disposition toward her in particular. (See *People v. Moon* (1985) 165 Cal.App.3d 1074, 1079.)

We find substantial evidence in the record to corroborate J.'s allegations within the meaning of section 803(g).

IV. Adjudicating the Statute of Limitation

The period to file an action in some sex cases may be extended by section 803(g), which partly provides:

> "(1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in [various sections].
>
> "(2) This subdivision applies only if both of the following occur:
>
> "(A) The limitation period specified in Section 800 or 801 has expired.
>
> "(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.055, excluding masturbation that is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegation. No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals."

The jury was instructed that the normal statute of limitations had expired and charges "were filed pursuant to" section 803(g), "which extends the normal applicable statute of limitations under specified circumstances. The statute of limitations is the period of time within which charges must be filed after crimes have been committed." Then the jury was instructed, "If you find the defendant guilty . . . of any of

the counts . . . you must further determine as to each count in which you find guilt, whether the People have proved" five facts necessary to extend the statute of limitations. During deliberations the jury asked in writing whether it could first decide the statute of limitations question and the trial court said no. The prosecutor pressed this point in closing argument. Thus, the jury had to find beyond a reasonable doubt that defendant molested J., and then determine whether or not he could be prosecuted.

Defendant raises claims about how the issue of the statute of limitations was litigated, contending that the trial court either had a duty to bifurcate the issue from the question of guilt or had discretion to bifurcate and abused that discretion.

Preliminarily, we observe that defendant concedes he did not move for bifurcation. Further, all of the instructions were jointly requested. However, he raises the common fall-back argument that trial counsel's failure to seek bifurcation reflects incompetence of counsel. (Cf. *People v. Ladd* (1982) 129 Cal.App.3d 257, 261.) We will review his claims on that basis.

Defendant asserts that the extension of the statute of limitation was a severable issue from the issue of guilt and therefore at a hypothetical bifurcated trial the victim's testimony would be inadmissible, thus leading to an abbreviated trial limited to corroborating evidence, thus imposing no undue burden on the courts or duplicative proceedings. He reaches this conclusion by the following chain of reasoning: (1) The

part of the statute most likely to be litigated requires corroboration of a "victim's allegation" (§ 803, subd. (g)(2)(B)); (2) an allegation is a charge set forth in an accusatory pleading, not testimony; (3) the victim cannot corroborate his or her own allegation. From these premises he derives the conclusion that "the statute expressly precludes the testimony of the victim on the issue of corroboration/statute of limitations."

We agree with premises (1) and (3). Often, as in this case, the questions whether the statute of limitations has expired, when the victim reported the abuse, whether it involved substantial sexual conduct and when a complaint was filed are not seriously disputed, and the statute itself requires the corroboration to be independent of the victim. We disagree with premise (2) and defendant's conclusion.

First, an allegation *in a criminal pleading* is made by and in the name of the *People*. (See *People v. Black* (2003) 114 Cal.App.4th 830, 832-834.) That is not the same as the "victim's allegation" referred to in section 803(g). Second, as the Attorney General points out, a jury would have no way of knowing what needed to be corroborated absent testimony by the victim. An accusatory pleading is not supposed to be larded with evidentiary detail; its purpose is to provide the accused with reasonable notice of the charges. (*In re Hess* (1955) 45 Cal.2d 171, 174-175; see § 952 [pleading may be in "ordinary and concise language without any technical averments or any

allegations of matter not essential to be proved"]; see also § 951 [giving statutory form criminal pleading].)

For example, in this case count III alleged lewd conduct with a child aged 14 or 15 by a person more than 10 years older, in violation of section 288, subdivision (c), specifically that between August 21, 1991 and August 20, 1993, "defendant had victim rub his penis while they were in his car." Defendant interposed no demurrer based on defective pleading. (§ 1004, subd. 2.) Without any explanation from the victim of the details of this alleged crime, a jury's effort to find corroboration in the testimony of other witnesses would be futile. There is nothing in the language of section 803(g) which suggests an intention to radically change accepted criminal pleading practices. Therefore we reject defendant's view that a bifurcated trial on section 803(g) would be more streamlined or would not be largely duplicative.

Defendant also contends that a separate trial is required because section 803, subdivision (g)(2)(B) partly provides "No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial." By its terms that language simply confirms that the corroboration must be admissible under otherwise applicable evidentiary rules. It does not explicitly or by implication provide for a separate trial on the issue of corroboration.

Defendant also relies on a generalized due process claim of unfairness absent bifurcation and invites us to exercise our inherent powers to create a rule of procedure mandating

bifurcation, or at least declaring that trial courts have discretion to bifurcate in such cases.

"All courts have inherent powers which enable them to carry out their duties and ensure the orderly administration of justice. The inherent powers of courts are derived from article VI, section 1 of the California Constitution and are not dependent on statute. [Citations.] These powers entitle courts to '". . . adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council."' [Citation.] Thus, a trial court has the inherent authority to create a new form of procedure in a particular case, where justice demands it. [Citations.] '"The . . . power arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function."'" (*In re Amber S*. (1993) 15 Cal.App.4th 1260, 1264.)

By statute, "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044.) Under this statute trial courts have discretion to fashion procedural rules as justice dictates. (See *People v. Cline* (1998) 60 Cal.App.4th 1327, 1333-1334.)

For example, in *People v. Calderon* (1994) 9 Cal.4th 69 (*Calderon*), the California Supreme Court held that under section

1044 a trial court could, in some cases, bifurcate the issue of a prior conviction allegation. (At pp. 74-80 [disapproving *mandatory* bifurcation].) "Having a jury determine the truth of a prior conviction allegation at the same time it determines the defendant's guilt of the charged offense often poses a grave risk of prejudice. As this court has recognized: 'Evidence that involves crimes other than those for which a defendant is being tried is admitted only with caution, as there is the serious danger that the jury will conclude that defendant has a criminal disposition and thus probably committed the presently charged offense.' [Citations.] [¶] It is clear, therefore, that a trial court, through the exercise of its general powers under section 1044, *may* order that the determination of the truth of a prior conviction allegation be determined in a separate proceeding before the same jury, after the jury has returned a verdict of guilty of the charged offense. The more difficult question is under what circumstances, if any, *must* a trial court bifurcate the trial in this manner?" (*Id*. at p. 75.)

The court concluded a trial court does not abuse its discretion to conduct a unitary trial unless evidence of an alleged prior conviction during the trial of the "currently charged offense would pose a substantial risk of undue prejudice to the defendant." (*Calderon*, *supra*, 9 Cal.4th at p. 77.) In some cases, such as where the evidence about the prior conviction would be admitted on the issue of guilt on the substantive offense, or admitted to impeach the defendant, a unitary trial would not be prejudicial. (*Id*. at p. 78.) In

other cases, the nature of the prior offense, as compared to the charged offense, may not be prejudicial. (See *id*. at p. 79.)

One factor the court relied on was that, except where the prior conviction would be admitted anyway in a unitary trial, presenting the issue of a prior conviction at the same time as the issues relating to the substantive charges does not advance judicial economy: There is little likelihood of overlapping evidence, and a bifurcated phase would not duplicate the evidence, instructions, and argument pertaining to the substantive criminal charges. (*Calderon*, *supra*, 9 Cal.4th at p. 77.) In contrast, as we have just explained, a bifurcated proceeding on corroboration under section 803(g) *would be duplicative*. Under defendant's view, the corroboration phase would *precede* the jury's adjudication of the substantive offenses. Contrary to defendant's view, the victim's testimony would be admissible. Presumably, in a bifurcated proceeding, at the close of evidence the court would instruct the jury on the offenses, corroboration and all the many other instructions required in a criminal case, the parties would argue the evidence of corroboration and the jury would deliberate. True, if a jury found no corroboration, the case would be over. But if a jury found corroboration, the rest of the evidence would have to be presented, the jury would have to be fully reinstructed, the parties would give arguments, and the jury would then deliberate on the substantive offenses. In addition to the loss of judicial efficiency by this duplication, the

process would be far more complicated than it needs to be. In short, bifurcation is not the answer to defendant's concerns.

But we agree with defendant that instructing the jury first to determine guilt and then and only then to determine whether the case may be prosecuted could present unnecessary risks. Some otherwise diligent jurors might feel pressured to be less than faithful as to the section 803(g) instructions, in order to avoid loosing a proven child molester on the public.

A better course would be to include the elements of section 803(g) into the definition of the crimes, as appropriate to the given case, *and not even tell the jury why those elements are present*. The jury's job is to find the facts, and the jury does not need to be told the legal consequences of its findings. The jury would make a unified finding on each count. That is, to convict a jury would be told it had to find the substantive elements of the charged crime have been proven beyond a reasonable doubt, and that the elements needed to trigger the extension of the statute of limitations have been proven by the applicable standards (preponderance of the evidence for the first four facts; clear and convincing for the fifth). This would be somewhat akin to a special verdict. In any event, there would be no need to refer to "statute of limitations." The jury need only be told to find the facts. In cases where some alleged acts may be barred and others could not be, (e.g., victim A's claims were reported immediately and charges brought, leading to victim B's older claims) a jury could be instructed on the substantive elements for counts X, Y and Z, and

instructed that for counts A, B and C, there are the following additional elements, listing the section 803(g) facts.

We find support in the rule, as the jury was instructed in this case, providing that the jury should not "discuss or consider the subject of penalty or punishment." (CALJIC No. 17.42.) It is improper to tell a noncapital jury about possible punishment because that subject is not only irrelevant to the jury's factfinding function, it has the potential to deflect the jury by inviting discussion and speculation about the results of whatever findings it makes. (*People v. Shannon* (1956) 147 Cal.App.2d 300, 306.) So, too, here: The jury's job was to find whether the facts necessary to trigger an extension of the statute of limitations existed (under the various applicable burdens of proof). Telling the jury that its findings on guilt (beyond a reasonable doubt) in effect would be set aside unless the jury also found the statute of limitations was extended carried the potential for irrelevant speculation and nullification. (See *People v. Nichols* (1997) 54 Cal.App.4th 21, 23-25 [three-strikes jury not to be told of sentencing consequences, lest it encourage nullification].) In a sense, telling the jury about the effect of its section 803(g) findings could have invited speculation about punishment, that is, *whether the defendant might escape all punishment*.

However, we agree with the Attorney General that this defendant is not entitled to a reversal. Defendant explicitly requested all of the instructions given. Trial counsel did not want the jury to "infer that the instruction package favors one

side or the other;" the court clarified: "Sure. Are you requesting all those instructions as well? [¶] [Defense Counsel]: Yes." That was arguably a rational tactical decision, thereby inviting any error. (Cf. *Maurer*, *supra*, 32 Cal.App.4th at pp. 1127-1128.)

More importantly, the finding of corroboration — the only section 803(g) factor in real dispute — was largely supported by defendant's highly incriminating audiotaped admissions, which we set out in detail above. Even had the instructions been modified in the way we have proposed, there is no reasonable probability the jury would have returned different findings. There is nothing in this record to show this jury had difficulty following the instructions on this point, as clarified by the trial court's response to the jury's question. Therefore, defendant cannot establish that it is reasonably probable he would have obtained a better result in the absence of trial counsel's alleged incompetence in failing to seek bifurcation or requesting modification of the instructions to address the concerns now raised. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-695 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.)

V. Defining Uncharged Offense

Some uncharged sexual acts may tend to show a defendant's propensity to commit such acts. (Evid. Code, § 1108; see *People v. Reliford* (2003) 29 Cal.4th 1007; *People v. Harris* (1998) 60 Cal.App.4th 727, 736 (*Harris*).) The jury was instructed (CALJIC No. 2.50.1) that if defendant committed "a prior sexual offense,

you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that [he] was likely to commit and did commit the crime [or crimes] of which [he] is accused."

Defendant contends: "Evidence Code section 1108 enumerates 23 statutes and four types of conduct that qualify as a 'sexual offense' for purposes of the statute. Of these, only one, Penal Code section 646.7 [child molestation], could possibly cover appellant's conduct with [B.]" The Attorney General agrees that that is the only crime defined by Evidence Code section 1108 which could apply in this case.

Defendant argues the jury should have been given instructions on the elements of child molestation. We agree. The alleged propensity offense must fall within the Evidence Code section 1108 definitions, and normally the particular way in which the uncharged offense satisfies the statute is identified in the trial court. (See, e.g., *People v. Mullens* (2004) 119 Cal.App.4th 648, 662-663; cf. *People v. Pierce* (2002) 104 Cal.App.4th 893, 898.) The pattern instruction given by the trial court contains the following note: "If the sexual offense is a violation of a particular statute, the crime must also be defined." (Use Note to CALJIC No. 2.50.1.) That was not done in this case.

Evidence Code section 1108 may be triggered by enumerated offenses, or by acts of unconsented genital or anal contact, or the derivation of pleasure from the infliction of injury, pain

or death. (Evid. Code, § 1108, subd. (d)(1) [defining "'sexual offense'"].) The prosecutor referred to the B. incident as an "inappropriate touching" but a touching — appropriate or not — does not trigger Evidence Code section 1108, unless it meets one of the definitions of "sexual offense" under that statute, such as an anal or genital touching, the infliction of pain, a sexual battery, child molestation, or an attempt to do any of those things. (Evid. Code, § 1108, subd. (d)(1)(A) & (F); §§ 243.4, subds. (e)(1) & (g)(1), 647.6.)

The conduct with B. may have been "inappropriate," but it was not necessarily the crime of molesting or annoying a minor. Child molestation under section 647.6 has specific elements which a jury would not know absent instruction. It is not enough that defendant invited sex and B. was annoyed, the jury would have to find the conduct would "unhesitatingly disturb or irritate a normal person" and was motivated "by an unnatural or abnormal sexual interest," (CALJIC No. 16.440) and in the context in which the act took place, a jury might have resolved either issue in defendant's favor, particularly since the People had the burden of proof. Further, if the trial court had given the required instruction defendant may have sought instruction on the defense of reasonable mistake of age, given that B. was nearly 18. (See *People v. Atchison* (1978) 22 Cal.3d 181, 182-183.) In any event, we agree with defendant that the trial court erred in this respect.

But defendant articulates no coherent reason why such error caused prejudice and offers only the assertion that B.'s

testimony "could very well have been a significant, if not dispositive, factor for the jury regarding corroboration of [J.'s] allegations." Because the error pertains to California evidence rules, specifically application of Evidence Code section 1108, we agree with the Attorney General that we apply the California standard of harmless error. This evidence did not paint defendant as a person with a propensity to abuse *young* girls. To the extent it showed he was allowed by his wife to engage in extramarital sex and was not above propositioning a female much younger than himself, it was relevant and not prejudicial. "Painting a person faithfully is not, of itself, unfair." (*Harris*, *supra*, 60 Cal.App.4th at p. 737 [in context of Evid. Code, §§ 352 and 1108].) Compared to J.'s testimony and defendant's damning statements during the pretext call, which we have described in detail above, B.'s testimony could not reasonably have been what tipped the scales, and therefore the misinstruction about what elements were necessary to permit use of that evidence was harmless. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818.)

VI. Defining Corroborating Evidence

Defendant contends the trial court should have defined "corroborates," in the instruction that required "independent evidence that clearly and convincingly corroborates" J.'s allegations, pursuant to section 803(g).

By analogy, defendant cites cases requiring definition of corroborating evidence in the context of accomplice testimony. (§ 1111; see *People v. Bevins* (1960) 54 Cal.2d 71, 75-76 [duty

sua sponte to instruct]; *People v. Swoape* (1925) 75 Cal.App. 404, 415-416.) The Attorney General does not discuss these cases. We agree with the Attorney General's view that "corroborate" is a word ordinarily understood, but that response does not of itself answer defendant's claim that *as used in this case* the word had a special meaning.

A case cited by defendant points out that it is enough that a jury is told what type of evidence can be corroborative. (*People v. Monteverde* (1952) 111 Cal.App.2d 156, 162-164 ["By telling the jury that accomplices cannot be corroborated by one another the idea was clearly communicated to the jury that the source of their corroboration must be 'additional evidence of a *different character*, to the same point'"]. Here, the jury was told the corroboration had to be "independent", which a reasonable juror would understand meant it could not come from J. herself. "Independent" is a common word which did not need to be defined. (See *People v. Jones* (1971) 19 Cal.App.3d 437, 447.) The jury was also told it could not use the expert evidence on CSAAS to corroborate J.'s story. The prosecutor reiterated this point in her closing argument, emphasizing the need for "independent" evidence apart from the expert evidence, and rested her case for corroboration entirely on B.'s evidence and the pretext call. (See *People v. Lee* (1987) 43 Cal.3d 666, 677 [arguments can help determine effect of instructions]; *Maurer*, *supra*, 32 Cal.App.4th at p. 1130.)

We conclude the instructions and argument adequately communicated to the jury what evidence could *not* be used to

corroborate J., and therefore any error in not giving a separate definition of corroboration under section 803(g) was harmless.

VII. Child Abuse Accommodation Syndrome

The People moved in limine to allow the introduction of CSAAS evidence, to "educate the jury about the common reactions of child sexual abuse victims" including the phenomenon of delayed reporting. The trial court gave a cautionary instruction (CALJIC No. 10.64), which partly explained that CSAAS evidence may not be used to show the victim was truthful, and the "syndrome research begins with the assumption that a [molestation] has occurred, and seeks to describe and explain common reactions of [children] to that experience. As distinguished from that research approach, you are to presume the defendant innocent." This instruction was given both before the expert testified and during the closing instructions.

The expert testified that there are five typical stages in an abuse victim's revelations: secrecy, helplessness, entrapment and accommodation, delayed or unconvincing disclosure, and retraction. He explained that in many cases a victim may not like the abuse but may love the abuser and the relationship (for example, a paternal relationship), and therefore not want to risk disrupting the relationship by revealing the abuse. This sort of evidence about CSAAS helps the trier of fact by dispelling common myths about child sexual abuse and is generally admissible for that purpose. (See *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301; *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1216.)

On appeal, defendant contends for several reasons that this evidence should not have been admitted. At the outset we observe that the only objection defendant interposed in the trial court was that "there is a lack of foundation in the case as to [J.] having the condition that he is going to testify about." The People replied that the evidence would help explain the delayed reporting of the abuse and the trial court overruled defendant's objection.

1. Defendant contends "no foundation whatsoever was laid" to show "that jurors have misconceptions about how a victim of child sexual abuse would react." There are many published cases, including several cited in defendant's brief, holding that jurors do, in fact, hold inaccurate beliefs about child sexual abuse. "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." (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745.) In light of such holdings, the trial court did not need to reinvent the wheel and conduct a hearing in this case to determine that CSAAS is a subject amenable to expert testimony.

2. Defendant contends the CSAAS evidence was not relevant because he did not argue that J.'s delayed report meant she lacked credibility: "Appellant's theory was that the acts happened after she turned 18 and, because appellant spurned her

attempt to prolong the relationship, [J.] falsely claimed the acts occurred when she was a child." By his plea of not guilty, defendant put the People to the burden of proving every element of each charged offense. (§ 1019; see *People v. Rowland* (1992) 4 Cal.4th 238, 260.) Before the expert testified the prosecutor explained, in response to a defense objection, that she wanted the evidence to explain the delayed report, and the trial court agreed it was admissible for that purpose. Except in cases involving children unable to communicate, inherent in all child molestation cases in which no immediate report is made is the question: Why did the child wait? The fact defendant tried to explain sexual conduct with J. in a noncriminal way does not mean that the issue of delayed reporting was not raised by the evidence.

3. Defendant contends the expert went too far afield in explaining various stages or components of CSAAS, and should have limited his testimony to delayed reporting. Defendant's failure to object in the trial court results in a forfeiture of this issue. (Evid. Code, § 353; *People v. Morris* (1991) 53 Cal.3d 152, 187-188 (*Morris*), disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Assuming the claim had been preserved, the background information about CSAAS was necessary to explain the expert's opinion. Had the expert been limited to testifying "children sometimes delay reporting abuse," the jury may well have discounted the testimony as bereft of support by clinical or academic research. Indeed, the jury was instructed that, "An [expert] opinion is

only as good as the facts and reasons on which it is based." (CALJIC No. 2.80.)

4. Defendant contends the expert's testimony too closely "mirror[ed] the facts of the instant case," such that it amounted in effect to testimony that J. was molested. In particular, defendant faults the expert's use of a father-daughter relationship as an example. No objection on these lines was lodged and the claim is forfeited. (*Morris*, *supra*, 53 Cal.3d at pp. 187-188.) Had the claim been preserved, the expert emphatically testified that he could not give any information about this particular case, that he had never met J., and the facts were for the jury to decide. The trial court gave a cautionary instruction to this effect. Therefore, defendant's claim lacks merit.

6. Defendant contends the CSAAS evidence was unduly prejudicial. (Evid. Code, § 352.) He lodged no such objection in the trial court and the claim is forfeited. (*Morris*, *supra*, 53 Cal.3d at pp. 187-188.) In any event, the cautionary instruction we have described above was adequate to insure the jury would not use the evidence for improper purposes and we presume the jury followed the instruction. (See *Yovanov*, *supra*, 69 Cal.App.4th at pp. 406-407 [cautionary instruction on CSAAS sufficed].) Compared to the evidence J. gave, detailing child sexual abuse over several years, the discussion of CSAAS by the expert, a professor and clinical psychologist, would not have been so shocking that the jury would ignore the trial court's instructions.

7. In the reply brief, defendant asserts the limiting instructions "were hopelessly confusing in and of themselves, to say nothing of their incomprehensibility when applied to the facts and testimony." This claim is forfeited because it was tendered for the first time in the reply brief. (See *Kahn v. Wilson* (1898) 120 Cal. 643, 644.)

VIII. *Blakely* Claims

The trial court imposed the upper term of three years on one count and imposed consecutive one-third midterm sentences on the other two counts, resulting in a total prison sentence of four years, four months. Defendant contends the upper term and consecutive sentencing violated his federal jury trial rights. We disagree. (*People v. Black* (2005) 35 Cal.4th 1238.)

IX. Imposition of Fines

The trial court ordered defendant to pay a $200 fine pursuant to section 290.3 and a $2,400 fine pursuant to section 1202.45. The Attorney General concedes section 1202.45 was enacted after the offenses in this case and concedes that at the time of the offenses section 290.3 authorized a maximum fine of $100. Accordingly, we will strike the section 1202.45 fine and reduce the section 290.3 fine to $100.

DISPOSITION

The judgment is modified by striking the section 1202.45 fine and reducing the section 290.3 fine to $100. The trial court is directed to prepare and forward to the Department of Corrections a new abstract of judgment. As so modified the judgment is affirmed.

MORRISON, J.

We concur:

SIMS, Acting P.J.

BUTZ, J.