

CERTIFIED FOR PARTIAL PUBLICATION¹

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LESLIE ALLEN LAMER,

Defendant and Appellant.

D038958

(Super. Ct. No. SCD129805)

APPEAL from a judgment of the Superior Court of San Diego County, Judge Albert T. Harutunian III. Affirmed.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr. and Lilia E. Garcia, Deputies Attorney General, for Plaintiff and Respondent.

Rebecca P. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

¹ Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts III A and III B.

I.

INTRODUCTION

A jury convicted the defendant, Leslie Allen Lamer, of 12 counts of lewd and lascivious acts on a child under the age of 14, in violation of Penal Code section 288, subdivision (a). The jury also found true all 10 special allegations of substantial sexual contact with a child under the age of 11, within the meaning of Penal Code section 1203.066, subdivision (a)(8). The trial court sentenced Lamer to a total prison term of 28 years. He timely filed an appeal, contending that the trial court erred in: (1) allowing the People to introduce sexual misconduct propensity evidence under Evidence Code section 1108, and instructing the jury regarding this evidence, pursuant to CALJIC No. 2.50.01; (2) admitting two videotapes of the victim children describing the abuse, pursuant to Evidence Code section 1360; and (3) instructing the jury, pursuant to CALJIC No. 2.62, that it could draw unfavorable inferences from Lamer's failure to explain or deny evidence against him. In the unpublished portion of this opinion, we find no merit in Lamer's first two contentions. In the published portion, we agree that the trial court improperly gave CALJIC No. 2.62. We conclude, however, that such error was harmless and affirm the judgment of the trial court.

II.

FACTS AND PROCEDURAL BACKGROUND

A. The Victims

The victims' mother, Michelle P., met Lamer in February 1991 and lived with him for much of the period between March 1991 and July 1994. During this time, one of the

victims, James C., who was then between the ages of four and five, lived with his mother and with Lamer, when Lamer resided with the family. Jessica C., the other victim, who was at the time between the ages of six and eight, also lived with her mother and Lamer through much of the period from March 1991 through March 1992, and with her grandparents after that. Jessica C. visited her mother and Lamer's apartment on a daily basis and occasionally spent the night there.

Although Michelle P. and Lamer broke up in July 1994, and both became romantically involved with other people, they secretly continued to have sexual relations with each other through the beginning of January 1997. Lamer frequently called Michelle P. at her place of work throughout late 1996. Lamer also sent cards and notes to Michelle P. through 1997.

B. The Disclosures Of The Molestations

In December 1994, Jessica told her older half-sister, Susan G., that Lamer had molested her. Susan G. informed Michelle P., their mother. Michelle P. stated that she did not believe Jessica. In 1995, Jessica tried to tell her mother that Lamer had touched her inappropriately. Her mother responded by suggesting that Lamer did not know where to put his hands. Jessica testified that at the time, her mother accused her of making up the accusations. In late December 1996, or early January 1997, Jessica told a family friend at whose house she was staying that Lamer had molested her. The family friend told Jessica that she should tell her father, which she did.

In January 1997, James disclosed to his mother that Lamer had molested him. A week or so later, Michelle P. asked Jessica if Lamer had molested her, and Jessica replied that he had. Michelle P. called the police that night.

C. The Investigation

On March 20, 1997, Detective Kurt Goldberg contacted Lamer by telephone and informed him that he was investigating child molestation allegations made against Lamer by James and Jessica. Lamer agreed to meet with Goldberg on April 17, 1997. Lamer did not keep that appointment, and Goldberg later learned that Lamer had left the area. A warrant was issued for Lamer's arrest in July 1997. Lamer was arrested in Florida and was extradited to California in December 2000.

D. James's Trial Testimony

At the time of trial, James was 13 years old. He testified that Lamer began molesting him when he was four or five years old. The molestations occurred when Lamer would ask James to lay down on the living room couch with him. Lamer would then touch James's penis and James would touch Lamer's penis. James testified that Lamer had molested him on numerous occasions, mainly in the mornings.

E. Jessica's Trial Testimony

At the time of trial, Jessica was 16 years old. She testified that when she was six years old, Lamer made her sit on top of him and rubbed her against his crotch. She also testified that when she was seven, Lamer would often touch her vagina while they sat together on the living room couch. Jessica also testified that Lamer touched her vagina with his penis numerous times and that he had attempted to put his penis in her anus.

Lamer also made Jessica put her mouth on his penis while he watched a pornographic movie. At some point, something wet came out of his penis. Jessica also testified that she saw Lamer molest James.

F. The Defense

Lamer denied that he had molested the children. He also claimed that he could not remember having slept with Michelle P. after 1994, but testified that she had continually attempted to contact him after their relationship ended. Lamer testified that the molestation allegations arose within a month after he told Michelle P. that he and his new wife and her children were planning to move. Lamer also testified that Michelle P. was irate when she learned that he was moving.

III.

DISCUSSION

*A. The Trial Court Properly Admitted The Propensity Evidence
And Correctly Instructed The Jury Regarding Such Evidence*

Lamer claims that the trial court improperly admitted evidence of his prior sexual misconduct with the victims' older half-sister, Susan G. He claims that Evidence Code section 1108, the statute which authorizes the admission of such evidence, and CALJIC No. 2.50.01, the jury instruction relating to the admission of such evidence, violate the right to due process and a fair trial guaranteed in the United States Constitution. He also claims that, even assuming Evidence Code section 1108 and CALJIC No. 2.50.01 are constitutional, the propensity evidence in this case should have been excluded as being

more prejudicial than probative. We disagree and conclude that the trial court properly admitted the evidence and correctly instructed the jury.

In their trial brief, the People indicated that they would seek to introduce at trial evidence of Lamer's commission of another sexual offense -- a molestation of Susan G. alleged to have occurred in 1991 -- pursuant to Evidence Code section 1108. Lamer objected, claiming that the evidence was substantially more prejudicial than probative. The trial court acknowledged that it was "required to do a balancing [test] under [Evidence Code section] 352" to determine the admissibility of the evidence, and proceeded to do so. In performing this balancing test, the court began by noting that other courts had admitted evidence of prior sexual misconduct far more remote in time to the charged offense than in this case. The court observed that the uncharged offense the People sought to introduce was less shocking than the charged offense, but was relevant because it supported the People's theory that Lamer was willing to engage in inappropriate sexual misconduct with Michelle P.'s children. Ultimately, after acknowledging that there were differences between the charged and uncharged offenses, the trial court overruled Lamer's objection.

At trial, Susan G. testified about an incident that occurred in 1991, when she was 15 years old. Early one morning while she was laying on her side on a sofa bed in the living room, Lamer came out of the bedroom and, on his way to the kitchen, grabbed her breast from behind. After returning from the kitchen, Lamer grabbed her breast a second time. Susan G. testified that she was scared and pretended to be asleep. That same day,

Susan G. told a counselor at school about the incident and the police were contacted.

Susan G. also filed a police report.

After the close of the trial, in the reported portion of its jury instruction conference with counsel, defense counsel stated that he had no objection to CALJIC No. 2.50.01 as the court proposed to give it. The jury was instructed as follows:

"Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. [¶] 'Sexual offense' means a crime under the laws of a state or of the United States that involves any of the following: Any conduct made criminal by Penal Code section 647.6 known as annoying or molesting a child. The elements of this crime are set forth elsewhere in the next instruction. [¶] If you find that the 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 of which he is accused. [¶] However, if you find that the defendant committed a prior sexual offense[,] that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime or crimes[.] [T]he weight and significance of the evidence[,] if any, are for you to decide. [¶] Unless you are otherwise instructed, you must not consider this evidence for any other purpose."

1. Evidence Code Section 1108 And CALJIC No. 2.50.01 Are Constitutional

The People claim that Lamer has waived his claims regarding the facial invalidity of Evidence Code section 1108 and CALJIC No. 2.50.01. Lamer concedes that he did not raise these constitutional challenges at trial, but states that this court has discretion to consider constitutional claims and claims raising pure questions of law that are raised for the first time on appeal. We agree that we have such discretion. (See, e.g., *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172 [exercising discretion to review constitutional

claim on merits and noting "our Supreme Court and other appellate courts have . . . sometimes addressed . . . constitutional questions in the absence of proper objection below. [Citations]"; 9 Witkin, Cal. Procedure (4th Ed. 1997) Appeal, § 398, pp. 450-451 ("The rule that the appellate court will not consider points raised below. . . . does not apply to . . . [a] [q]uestion of [l]aw".)

With regard to Lamer's instructional claim, we note that Penal Code section 1259 provides: "The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." In light of the fact that both Lamer's statutory claim and his instructional claim raise essentially the same facial constitutional challenge, and, as is discussed below, both challenges are foreclosed by recent California Supreme Court precedent, we exercise our discretion and reach the merits of his claims.

Lamer's claims that Evidence Code section 1108 and CALJIC No. 2.50.01 are facially invalid raise pure questions of law for which our review is *de novo*. (See, e.g., *City of Orange v. San Diego County Employees Retirement Assn.* (2002) 103 Cal.App.4th 45, 51.) "To prevail on such a constitutional claim, defendant must carry a heavy burden. The courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity." (*People v. Falsetta* (1999) 21 Cal.4th 903, 912-913 (*Falsetta*)).

Evidence Code section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section

1101, if the evidence is not inadmissible pursuant to Section 352." In other words, the "rule against admitting propensity evidence" (*Falsetta, supra*, 21 Cal.4th at p. 913) is not a bar to the introduction of evidence of another sexual offense, but a court may still "exclude evidence [up]on weighing probative value and prejudicial impact." (*Id.* at p. 911.)

Lamer's claims that Evidence Code section 1108 and CALJIC No. 2.50.01 violate his right to due process are foreclosed by the California Supreme Court's decision in *Falsetta*. In *Falsetta*, the court concluded that Evidence Code section 1108, which it noted permits "the admission, in a sex offense case, of the defendant's other sex crimes for the purpose of showing a propensity to commit such crimes" does not violate a defendant's right to due process. (*Falsetta, supra*, 21 Cal.4th at p. 907.) The Supreme Court recently reaffirmed its holding in *Falsetta* and the correctness of CALJIC No. 2.50.01, which instructs the jury regarding evidence admitted pursuant to Evidence Code section 1108. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013.) Accordingly, since we are bound by the Supreme Court's decisions, Lamer's claims that Evidence Code section 1108 and CALJIC No. 2.50.01 are unconstitutional, fail. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

2. The Trial Court Did Not Abuse Its Discretion In Concluding That The Propensity Evidence Was Admissible

Lamer also claims that the admission of the propensity evidence in this case was improper because the evidence was more prejudicial than probative. "We review a challenge to a trial court's choice to admit or exclude evidence under section 352 for

abuse of discretion. [Citation] We will reverse only if the court's ruling was 'arbitrary, whimsical, or capricious as a matter of law.' [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 282 (*Branch*), quoting *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1614.)

Uncharged sexual misconduct evidence may not be admitted under Evidence Code section 1108 unless it is admissible pursuant to Evidence Code section 352. Thus, such evidence is inadmissible "where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury." (*Falsetta, supra*, 21 Cal.4th at p. 917.) In conducting the weighing process mandated under section 352,

"trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra*, 21 Cal.4th at p. 917.)

The trial court in this case expressly considered such factors as the similarity, remoteness, nature, and relevance of the uncharged sexual misconduct evidence before ruling on its admissibility. Lamer maintains that the *Falsetta* factors weigh against the admission of the sexual misconduct evidence. Specifically, he argues that admission of the uncharged misconduct evidence was improper because it: (1) was not similar to the crimes committed upon the victims; (2) had great potential for prejudice; (3) may not

have occurred; (4) and was difficult to defend against. He also claims that the trial court failed to consider less prejudicial alternatives to admission of the testimony. We consider each argument in turn.

First, although Lamer's molestation of Susan G. was less serious than the molestations of James and Jessica, it was similar to the charged offenses in that all of the victims are children of the same mother, the offenses occurred in the same location, and all involved Lamer touching the children's private parts.

Second, with regard to prejudice, as the trial court noted, the charged offenses involved substantial sexual contact with two young victims on multiple occasions, while the uncharged offense was a single incident involving a less substantial touching with a single older victim. Because the uncharged misconduct evidence was far less serious than the charged offenses, the potential for prejudice was reduced. (See *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 (*Waples*) [prior misconduct evidence that related to one victim which was similar to current offense was not "any more inflammatory than the evidence of the current molestations, which involved five victims"]; cf. *People v. Frazier* (2001) 89 Cal.App.4th 30, 42 (*Frazier*) [concluding that admission of uncharged misconduct which was "much more severe" than charged misconduct did not mandate reversal under Evidence Code section 352].)

Third, although Lamer is correct that the fact that he was not charged or convicted of molesting Susan G. makes the evidence at issue less probative and potentially more prejudicial than if there had been a conviction, courts have routinely upheld the admission of evidence of prior misconduct for which the defendant was neither charged

nor convicted. (See, e.g., *Branch, supra*, 91 Cal.App.4th at p. 284; *Waples, supra*, 79 Cal.App.4th at p. 1395). Moreover, in *Waples* and *Frazier* the victims did not disclose the prior uncharged molestations near the time they occurred, nor was there evidence that authorities had been contacted. Nonetheless, no abuse of discretion was found. (See *Waples, supra*, 79 Cal.App.4th at p. 1394; *Frazier, supra*, 89 Cal.App.4th at p. 41.) In this case, Susan G. complained of the uncharged misconduct on the day it occurred, and filed a police report.

We also reject Lamer's argument that it was difficult for him to defend against the uncharged conduct. Lamer had the opportunity to cross-examine Susan G. regarding the incident and to attempt to demonstrate that she was biased against him. He was also able to make the point that no charges were brought in connection with the incident. Further, the uncharged offense was a single specific incident which occurred near the time of the misconduct charged in this case. Thus, Lamer was not forced to defend against vague allegations that were overly remote in time.

We further reject Lamer's contention that the trial court abused its discretion by failing to expressly state that it had considered alternatives to admitting Susan G.'s testimony. Lamer has failed to suggest, either at trial or an appeal, what those alternatives might have been. We conclude that allowing Susan G. to testify, subject to cross-examination, was a reasonable manner in which to allow the evidence of the uncharged sexual misconduct to be presented. Further, the court properly instructed the jury regarding its consideration of the evidence, and Lamer did not object to that instruction.

We also agree with the trial court that the evidence was probative of Lamer's willingness to engage in sexual misconduct with Michelle P.'s children. (Accord *Frazier, supra*, 89 Cal. App. 4th at p. 41 [prior misconduct evidence admissible to show "defendant has a pattern of molesting his young female relatives"].) In addition, we conclude that the fact that the uncharged offense occurred near the time of the charged misconduct supports the admission of the uncharged offense evidence. Susan G. testified that the uncharged misconduct occurred in September of 1991, while all of the counts of the amended information charged Lamer with misconduct that occurred between "July 1, 1992 and June 30, 1994" or between "October 1, 1991 and March 1, 1992." Appellate courts have upheld the admission of uncharged misconduct evidence far more remote in time. (See, e.g., *Branch, supra*, 91 Cal.App.4th at pp. 284-287 [reviewing remoteness case law and concluding that trial court did not abuse its discretion in admitting uncharged conduct that occurred 30 years before charged offense].) Finally, we note that Susan G.'s testimony comprised just 23 pages of a 716-page trial transcript. Thus, the testimony of the prior misconduct did not consume an undue amount of time in the trial. (See *Frazier, supra*, 89 Cal.App.4th at p. 42 [concluding that trial court had not abused its discretion in allowing nearly a third of the trial to be devoted to uncharged offense testimony].)

Accordingly, we conclude that the trial court did not abuse its discretion in admitting the evidence of Lamer's prior sexual misconduct pursuant to Evidence Code sections 1108 and 352.

*B. The Trial Court Did Not Err In Admitting In Evidence
The Videotaped Interviews Of The Victim Children*

Lamer claims that the trial court improperly allowed in evidence two videotapes showing the victims describing to social workers the abuse alleged in this case. Lamer claims that the admission of the videotapes violated his rights under the confrontation clause (U.S. Const., 6th Amend.), and that the videotapes were not properly admitted under Evidence Code section 1360. We disagree and conclude that the evidence was properly admitted.

In February 1997, shortly after the disclosures that prompted the initial police investigation in this case, each of the two victim children gave a separate videotaped interview concerning the abuse to social workers at the Center for Child Protection. In their trial brief, the People indicated that they would seek to introduce the videotapes in evidence pursuant to Evidence Code section 1360. Lamer objected, arguing that the tapes lacked sufficient indicia of reliability to be admitted under section 1360. The trial court held a hearing to determine if there were sufficient indicia of reliability. After extensive argument from both sides, the court concluded that the videotapes would be admitted. At trial, the videotapes were played for the jury and were admitted in evidence, together with transcripts of the tapes.

*1. The Admission of the Videotaped Interviews Did Not Violate
Lamer's Right To Confront and Cross-Examine Witnesses Against Him*

The People claim Lamer has waived his confrontation clause claim because he failed to raise it at trial. Lamer concedes that he did not raise the confrontation issue at trial, but argues that this court should consider the claim because this court has discretion

to consider constitutional challenges raised for the first time on appeal, and because he cannot waive his "fundamental Sixth Amendment right to present² witnesses on [his] behalf and [his] right to due process." We exercise our discretion to reach the merits of Lamer's confrontation clause claim.

It is well established that the admission of hearsay evidence does not violate a defendant's constitutional right to confront adverse witnesses when the declarant is available for cross-examination at trial. In *U.S. v. Owens* (1988) 484 U.S. 554 [108 S.Ct. 838], the United States Supreme Court concluded that an examination into the particularized guarantees of trustworthiness of hearsay evidence in a criminal trial is not "called for when a hearsay declarant is present at trial and subject to unrestricted cross-examination. In that situation . . . the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements." (*Id.* at p. 560.) Indeed, in *Idaho v. Wright*, on which Lamer relies for his claim that the confrontation clause required an inquiry into the particularized guarantees of trustworthiness in this case, the Supreme Court recognized this very point. (See *Idaho v. Wright* (1990) 497 U.S. 805, 814 [110 S.Ct. 3139, 3146] (*Wright*) ["*the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant*"], italics added, citing *Ohio v. Roberts* (1980) 448 U.S. 56, 65 [100 S.Ct. 2531, 2538]; see also *Roberts, supra*, 448 U.S. at p. 66 ["when a hearsay declarant is *not* present for cross-examination at trial,

² Although Lamer refers to presenting witnesses on his behalf, it is clear from his brief that he means confronting adverse witnesses.

the Confrontation Clause normally requires a showing that he is unavailable"], italics added.) Unlike in *Wright*, where the child victim hearsay declarant did not testify and was not available for cross-examination (*Wright, supra*, 497 U.S. at p. 809), in this case, both children testified at trial and were subject to cross-examination by defense counsel. Lamer's confrontation clause rights were thus not violated.

2. The Trial Court Properly Admitted The Evidence Pursuant To Evidence Code Section 1360

The People claim that Lamer waived his claim that there was no evidentiary foundation for the videotapes under Evidence Code section 1360. Although defense counsel stated at trial that he was raising no objection regarding a lack of foundation for the videotapes, he did object to the admission of the videotapes on the ground that they lacked sufficient indicia of reliability. That objection was expressly overruled by the trial court. It is this claim that Lamer raises in his appeal.

"We review a trial court's admission of evidence under section 1360 for abuse of discretion." (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367-1368.) Evidence Code section 1360 provides in relevant part:

"(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another . . . is not made inadmissible by the hearsay rule if all of the following apply: [¶] (1) The statement is not otherwise admissible by statute or court rule. [¶] (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability. [¶] (3) The child either: [¶] (A) Testifies at the proceedings. [¶] (B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child."

In this case, Lamer's sole claim with respect to the admission of the two videotaped statements is his assertion that the People failed to establish that "the time, content, and circumstances of the statement provide sufficient indicia of reliability" and that the "court and the prosecution seemed to assume that because the children testified and the children were taped at a prior date, the tapes were admissible."

In *People v. Brodit* (1998) 61 Cal.App.4th 1312, in interpreting the indicia of reliability requirement of section 1360, the court stated it would "consider the following nonexclusive factors in determining whether the statement was reliable: (1) spontaneity and consistent repetition; (2) mental state of the declarant; (3) use of terminology unexpected of a child of similar age; and (4) lack of motive to fabricate." (*Id.* at p. 1330, citing, *In re Cindy L.* (1997) 17 Cal.4th 15, 29-30; *Wright, supra*, 497 U.S. at pp. 821-822.)

With regard to the spontaneity and consistent repetition factor, the trial court in this case expressly found that the reliability of the videotaped statements was demonstrated by the fact that they were made to neutral persons, outside the presence of the victims' mother, and were consistent with statements the victims had made to their mother. The trial court distinguished such a "set of interlocking statements," from a single statement made to a person where a motive to fabricate was apparent. In addition, although the videotaped statements themselves were not strictly "spontaneous," in that the statements were the children's responses to questions posed to them by social workers, we have reviewed the transcripts of the interviews and find the questions to be

neutral and generally nonleading. Lamer makes no argument to the contrary. We also note that each of the children made spontaneous disclosures that preceded their videotaped statements. Accordingly, we find no abuse of discretion in the trial court's conclusion that the spontaneity and consistency of repetition of the statements constituted indicia of their reliability. (Accord *People v. Brodit, supra*, 61 Cal.App.4th at p. 1330 ["although those statements were not exactly spontaneous, [the victim] consistently repeated them, with minor variations, to at least five adults"].)

With regard to the mental state of the declarants, the People argued before the court below that there was no reason to "doubt the mental state of these children." Lamer has never contended otherwise. This too supports the admission of the videotapes. (Accord *People v. Brodit, supra*, 61 Cal.App.4th at p. 1330.) Third, although the children in the videotapes "used language . . . that one would expect of [children] of similar age, [their] description of the sexual acts showed a knowledge of such matters far beyond the ordinary familiarity of [children] of [their] age."³ (*Ibid.*)

Finally, although Lamer persuasively maintained that the people to whom the children had made their initial disclosures had a motive to fabricate such accusations, the People pointed out that the children themselves had no such motive. Further, the children made similar statements to the disinterested social workers. We conclude that this factor

³ For example, Jessica, in describing how her vagina felt when it was penetrated by Lamer's penis stated that it was "like trying to fit an oversize hotdog into your mouth. . . ." James described how his hand would be on Lamer's "privates" and that Lamer was "making his hand" do the same to him.

was essentially neutral and neither supported nor militated against admission of the videotapes.

In summary, we conclude that the trial court did not abuse its discretion in concluding that the videotapes were sufficiently reliable to be admitted in evidence pursuant to section 1360.

C. The Trial Court Committed Harmless Error In Giving CALJIC No. 2.62

Lamer contends that the trial court improperly instructed the jury, pursuant to CALJIC 2.62, that it was entitled to draw certain adverse inferences from his failure to explain or deny the evidence against him. Lamer claims that this improper instruction implicated his constitutional rights and constitutes reversible error. We conclude that it was improper for the trial court to give this instruction, but that the error did not implicate Lamer's constitutional rights, and was harmless.

During the reported portion of the jury instruction conference, the court informed counsel that the People were requesting CALJIC No. 2.62. Defense counsel objected, claiming that the instruction "tends to pinpoint [his] client's testimony." The trial court overruled the objection, stating: "The Court would give 2.62 over the defense's objection. It is an accepted instruction. It [is] specifically referring to the defendant. So it has been accepted that has singling out the defendant [*sic*], what I should say, and I think there is evidence in the record that the trier of fact may question, for example, testimony by the defendant of his denying, or should I say, some of his failing to explain the basis for James making allegations against him arguably. So there [are] other

examples too, and I think that there is sufficient evidence to support giving the instruction."

The jury was instructed as follows:

"In this case defendant has testified to certain matters. If you find that the defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonabl[y] be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonabl[y] be drawn therefrom those unfavorabl[e] to the defendant are the more probable.

"The failure of a defendant to deny or explain evidence against him does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

"If a defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain this evidence."

1. The Instruction Was Improper Since There Were No Facts Or Evidence In The Prosecution's Case Within Lamer's Knowledge That He Failed To Explain Or Deny

"[A]ssertions of instructional error are reviewed de novo." (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838.) "It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference [citations]." (*People v. Saddler* (1979) 24 Cal.3d 671, 681 (*Saddler*), quoting *People v. Hannon* (1977) 19 Cal.3d 588, 597.) An appellate court's duty in reviewing a claim that CALJIC No. 2.62 was improperly given is "to ascertain if [the] defendant . . . failed to explain or deny any

fact of *evidence that was within the scope of relevant cross-examination.*" (*Saddler, supra*, 24 Cal.3d at p. 682, italics added.) In order for the instruction to be properly given "[t]here [must be] facts or evidence in the prosecution's case within [the defendant's] knowledge which he did not explain or deny." (*Ibid.*) A contradiction between the defendant's testimony and other witnesses' testimony does not constitute a failure to deny which justifies giving the instruction. (*Ibid.*) "[T]he test for giving the instruction is not whether the defendant's testimony is believable. CALJIC No. 2.62 is unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear." (*People v. Kondor* (1988) 200 Cal.App.3d 52, 57.)

Appellate courts have frequently warned that trial courts should carefully consider whether CALJIC No. 2.62 should be given. For example, in *People v. Haynes* (1983) 148 Cal.App.3d 1117, the court stated:

"We heartily agree that in light of the hostile reception this instruction has received of late from legal logicians and semanticists (see *People v. Peters* (1982) 128 Cal.App.3d 75, 84; *People v. Campbell* (1978) 87 Cal.App.3d 678, 684), it will always be unwise of a trial court to include it among its general instructions without prior inquiry of the parties concerning it. *In fact, today it should not even be requested by either side unless there is some specific and significant defense omission that the prosecution wishes to stress or the defense wishes to mitigate.* In the typical case it will add nothing of substance to the store of knowledge possessed by a juror of average intelligence. Furthermore, if its terms are adhered to, as presumably they will be, its message will be essentially irrelevant in the absence of some designated glaring hiatus in the defendant's testimony. In such an instance, of course, this lacuna will presumably be the subject of debate and emphasis during the parties' arguments to the jury, with or without the neutral guidelines contained in this recently disfavored instruction." (*People v.*

Haynes, supra, 148 Cal.App.3d at pp. 1119-1120; see also *People v. Marks* (1988) 45 Cal.3d 1335, 1346, italics added.)⁴

As noted above, in this case the trial court stated, outside the presence of the jury, that it would give CALJIC No. 2.62 because Lamer failed to explain why James would make allegations of sexual molestation against him, and that there were "other examples" of such a failure to explain or deny. Lamer maintains that there "was not a single point on which [he] failed to explain or deny the accusations against him." Lamer's failure to explain why James would lie is the sole ground upon which the People attempt to justify the giving of the instruction.

Lamer did not "fail[] to explain or deny any fact of evidence that was within the scope of relevant cross-examination" with regard to James's motives (*Saddler, supra*, 24 Cal.3d at p. 682). Lamer was not asked any questions on cross-examination regarding James's motivations. Further, there were no facts or evidence in the People's case regarding James's motivations that could reasonably be said to have been within Lamer's knowledge. (See *Id.* at p. 683.) Thus, if Lamer had attempted to explain why James would lie, such testimony would likely have been deemed speculative and therefore, inadmissible. (See *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 582 ["A witness may not speculate regarding the state of mind of another person absent proper evidence of

⁴ We also note that appellate courts have frequently found CALJIC No. 2.62 to have been improperly given. (See, e.g., *Saddler, supra*, 24 Cal.3d at p. 683; *People v. Kondor, supra*, 200 Cal.App.3d at p. 57; *People v. James* (1987) 196 Cal.App.3d 272, 296; *People v. Marsh* (1985) 175 Cal.App.3d 987, 995; *People v. De Larco* (1983) 142 Cal.App.3d 294, 308-309; *People v. Peters* (1982) 128 Cal.App.3d 75, 83-87 [all concluding that CALJIC No. 2.62 was improperly given].)

such state of mind such as declarations or conduct"].)⁵ Because there is no evidence that Lamer had "facts or evidence in the prosecution's case within [his] knowledge" regarding James's motivations (*Saddler, supra*, 24 Cal.3d at p. 682), and any testimony he may have offered on that point would have constituted speculation on his part, it was improper for the court to suggest to the jury that it could draw an adverse inference from Lamer's failure to explain James's motivations. Accordingly, there was "no support for the instruction and it was error to give it." (*People v. Marsh, supra*, 175 Cal.App.3d at pp. 993-995.)

However, we reject Lamer's argument that the instruction violated his constitutional right to due process by requiring him to disprove the existence of an element of the offense. A nearly identical argument was rejected in *Saddler*. That court stated:

"It is claimed that the instruction denies to a defendant the presumption of innocence and places in its stead an 'inference of guilt.' Since principles of due process protect the accused against conviction except upon proof beyond a reasonable doubt (*In re Winship* (1970) 397 U.S. 358), an instruction to the jury which has the effect of reversing or lightening the burden of proof constitutes an infringement on the defendant's constitutional right to due process. [Citations.] CALJIC No. 2.62 does not violate these principles. After stating the circumstances under which adverse inferences may be drawn, the instruction cautions that 'The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor

⁵ See also *Gherman v. Colburn, supra*, 72 Cal.App.3d at page 582 ["Clearly the court was correct in sustaining plaintiffs' objections to defense questions propounded to [witness A] regarding his understanding of 'What [witness B] had in mind.' Such testimony by [witness A] would have constituted speculation regarding the state of mind of another person, and such speculation would have been both incompetent and irrelevant"].

does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of defendant beyond a reasonable doubt." (*People v. Saddler, supra*, 24 Cal. 3d at p. 679-680.)

The *Saddler* court concluded that the instruction "suffers no constitutional . . . infirmity." (*Id.* at p. 681.) The version of CALJIC No. 2.62 given in this case contained a similar cautionary statement as did the instruction given in *Saddler*. The instruction did not shift the burden onto the defendant to disprove any element of the People's case.

2. *The Error Was Harmless*

Because Lamer's constitutional rights were not implicated by the instructional error, we apply the harmless error standard adopted in *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *Saddler, supra*, 24 Cal. 3d at p. 683, citing *People v. Watson, supra*, 46 Cal.2d at p. 836; see also *People v. Roehler* (1985) 167 Cal.App.3d 353, 393 [stating that post-*Saddler* case law has held "rather uniformly" that if CALJIC No. 2.62 is given improperly, the *Watson* harmless standard applies].) Thus, the relevant inquiry is whether it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson, supra*, 46 Cal.2d at p. 836.)

Although, as noted above, courts have frequently found giving CALJIC No. 2.62 to constitute error, we have not found a single case in which an appellate court found the error to be reversible under the *Watson* standard. On the contrary, courts have routinely

found that the improper giving of CALJIC No. 2.62 constitutes harmless error. (See, e.g., *Saddler, supra*, 24 Cal. 3d at p. 684; *People v. James, supra*, 196 Cal.App.3d at p. 296; *People v. Marsh, supra*, 175 Cal.App.3d at p. 994; *People v. Peters* (1982) 128 Cal.App.3d 75, 83-87 [all concluding that CALJIC No. 2.62 was improperly but harmlessly given].)

One reason courts have found the improper giving of CALJIC No. 2.62 to be harmless is that the text of the instruction itself tells the jury that it would be *unreasonable* to draw an adverse inference if the defendant lacks the knowledge needed to explain or deny the evidence against him. As the court in *People v. Ballard* (1991) 1 Cal.App.4th 752, 756, noted: "CALJIC No. 2.62 does not direct the jury to draw an adverse inference. It applies only if the jury finds that the defendant failed to explain or deny evidence. It contains other portions favorable to the defense (suggesting when it would be unreasonable to draw the inference; and cautioning that the failure to deny or explain evidence does not create a presumption of guilt, or by itself warrant an inference of guilt, nor relieve the prosecution of the burden of proving every essential element of the crime beyond a reasonable doubt)." In addition, courts have noted that the fact that juries are instructed, pursuant to CALJIC No. 17.31, to "disregard any instruction which applies to a state of facts which you determine does not exist," also mitigates any prejudicial effect related to the improper giving of CALJIC No. 2.62. (*Saddler, supra*, 24 Cal. 3d at p. 684.)

Before reviewing the evidence in this case to determine whether or not it is reasonably probable that a result more favorable to Lamer would have been reached if the court had not given CALJIC No. 2.62, it is useful to examine the California Supreme Court's harmless error analysis in *Saddler*, which is the leading case on this instruction. In *Saddler*, there was a "clear conflict" between the testimony of the one eyewitness to the crime and the defendant's alibi, as well as "little corroborating evidence" of the defendant's guilt. (*Saddler, supra*, 24 Cal. 3d at p. 683.) Further, the challenged instruction was not given in a previous trial on the same charges, and that trial resulted in a hung jury. (*Id.* at pp. 683-684.) Nevertheless, based largely on the strength of the one eyewitness' testimony, the *Saddler* court concluded that giving CALJIC No. 2.62 was harmless. (*Id.* at p. 684; see also *Haynes, supra*, 148 Cal. App. 3d at p. 1122 [concluding that any error in giving CALJIC No. 2.62 would have been harmless where defendant claimed intercourse was consensual, but testimony of sexual assault victim was "unequivocal and not inherently improbable"].)

The evidence against Lamer was significantly stronger than was the evidence against Saddler. In this case, there was highly credible testimony from the victims regarding repeated sexual abuse at the hands of the defendant. There also was substantial corroborating evidence, including Jessica witnessing James being molested, multiple consistent disclosures over time by the two victims, and the propensity evidence.

Further, although Lamer denied having committed the acts charged, his credibility was effectively impeached.⁶ For example, at trial, Lamer claimed not to have known that the police were investigating this case during the three years he was living out of state. However, Detective Goldberg testified that in March 1997, he had spoken to Lamer and had informed him of the investigation. Lamer also claimed that he could not remember carrying on a sexual relationship with Michelle P. beyond 1994 and maintained that she had continually attempted to contact him. Yet he had no plausible explanation for the numerous phone calls that *he* placed to Michelle P. in 1996 or for the romantic Christmas card she received from him in 1996.

In addition to the strength of the People's evidence and Lamer's lack of credibility, there was no reference made by the People during closing argument to Lamer having failed to explain James's motivations for claiming that Lamer had abused him. Nor was there any reference to CALJIC No. 2.62. On the contrary, rather than focusing on what the defendant had *failed* to explain or deny, the People provided a detailed description of

⁶ We note that the trial court, at sentencing, reached the same conclusion with regard to the defendant's credibility that we have reached in reviewing the appellate record. The trial court stated: "The defendant has lied about many things during the course of this trial. He's lied about the [Susan G.] incident. He's lied about having an affair with Michelle [P.]. He's lied about his conduct with James. He's lied about his conduct with Jessica. He's lied about the issues of greeting cards and correspondence and the details of his continual relationship with Michelle. He's lied about the detective calling him. And he's lied about whether or not he fled the jurisdiction. [¶] His story is really incredible when you consider all of what other people have testified. And according to him, there is this great conspiracy of everybody else to lie about what's happening."

all the ways in which the defendant had explained and denied his activities by *lying*. Further, the court instructed the jury with CALJIC No. 17.31. Under these circumstances, it is not reasonably probable that a result more favorable to Lamer would have been reached in the absence of the error. (*Watson, supra*, 46 Cal.2d at p. 836.) Accordingly, we conclude that the giving of CALJIC No. 2.62 was harmless error.

IV.

CONCLUSION

The trial court did not err in admitting sexual misconduct propensity evidence pursuant to Evidence Code 1108 and instructing the jury pursuant to CALJIC No. 2.50.01, and did not err in admitting videotapes of the victim children describing the abuse, pursuant to Evidence Code 1360. The trial court improperly instructed the jury, pursuant to CALJIC No. 2.62, that it could draw adverse inference from Lamer's failure to explain or deny evidence against him, but this error was harmless.

V.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.