Filed 12/26/06

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS VALENCIA,

Defendant and Appellant.

_____/

H029370

(Santa Clara County Superior Court No. CC460324)

Defendant was convicted by jury trial of two counts of continuous sexual abuse of a child (Pen. Code, § 288.5) and two counts of forcible lewd conduct on a child (Pen. Code, § 288, subd. (b)(1)) for acts against his three younger sisters. He was committed to state prison for a term of 30 years. On appeal, he contends that his trial counsel was prejudicially ineffective in failing to obtain exclusion of his statement to the police on the ground that it was involuntary and in failing to object to and obtain the exclusion of other prejudicial and inadmissible evidence. He has also filed a petition for a writ of habeas corpus in which he repeats these same contentions, but does not submit any additional evidence to support them. We dispose of his habeas petition by separate order. In the published portion of this opinion, we conclude that defendant's trial counsel was prejudicially deficient in failing to object to inadmissible

* This opinion is certified for publication with the exception of sections IIIB, IIIC1 and IIIC2.

evidence that the prosecution relied upon to prove the time period element of one of the continuous sexual abuse counts. Consequently, we reverse and remand for potential retrial on that count. In the unpublished portion of the opinion, we reject defendant's other contentions.

I. Factual Background

Defendant's mother has eight children, including defendant and his sisters L., K. and D. In 2000, defendant came from Mexico to live with his mother in her home in San Jose where L., K. and D. also resided.

David and Rosalie Correa both worked at L's school and were acquainted with her. In the fall of 2003, L. told Rosalie Correa that she had seen defendant kissing K. on her mouth. In January 2004, L. told Rosalie Correa that defendant had "pulled off her blouse" while they "were horse playing." In February 2004, L., looking scared, nervous and embarrassed, told David Correa that her brother had "touched" her "in a bad way." David Correa told L. that she needed to tell her teacher or his wife, and David Correa informed Rosalie Correa of L.'s allegation. L. told Rosalie Correa that her brother had "crawled into bed with her" the previous week but "nothing happened." Rosalie Correa promptly filed a report with Child Protective Services (CPS).

Victoria Sandoval also worked at L.'s school and was acquainted with L. In March 2004, L. told Sandoval that defendant "tried to get in bed with her." Sandoval reported this to CPS. L. subsequently told Sandoval that defendant was "touching her." L. said that she had told her mother, but her mother did not believe her.

On July 15, 2004, L., D. and K. encountered Sandoval at a Walgreen's. K. told Sandoval that defendant "had been sticking his hand in their underpants and touching" K. and D. Sandoval took the girls to her home and tried unsuccessfully to contact CPS. She then contacted the police.

The police interviewed each of the girls twice that evening. In her initial interview, eight-year-old D. told the police that defendant had kissed her on the lips. He had also pulled her pants part of the way down, tried to remove her underpants and tried to put his hand on her private parts. This latter event had occurred in defendant's bedroom. D. insisted that there were "[t]wo times only."

In her initial interview, nine-year-old K. told the police that, a couple of years ago, defendant had pulled her pants part of the way down, but she had told him to stop, pulled her pants back up and run away. K. said defendant had tried to touch her four or five times. Several times, defendant had tried to remove her shirt, and one time he had succeeded. The time he succeeded, K. was wearing another shirt under that shirt. Defendant then proceeded to try to remove her pants, and he touched her chest near her neck. K. had recently seen defendant try to remove D.'s pants in their mother's bedroom. K. also described an incident that occurred in defendant's bedroom when he had offered to give her one of his fish if she took off her clothes. K. refused to do so. K. told L. about defendant's touchings, and L. said she "was gonna try [to get] somebody to help us."

In her initial interview, fourteen-year-old L. told the police that defendant had "tried to kiss" D. and "he touched their private." L. related that D. had told her that day that defendant had recently touched her private parts. L. said she had not known until that day that defendant was touching D. and K. Defendant had touched L. between her legs months earlier, when she was still thirteen. This touching had occurred on the stairs in the midst of an incident precipitated by defendant taking L.'s keys. L. and defendant began fighting. Defendant knocked her to the floor, hit her and then grabbed her between her legs over her clothing. L. responded by choking him. Defendant then somehow unsnapped her bra, pulled up her shirt and laughed at her.

L. described an occasion on which she had consumed six beers, and defendant had convinced her to spend the night in his bed. She said she had spent the whole night in defendant's bed, but he had not touched her at all that night though he slept in the same bed. Both of them had slept fully clothed. L. denied that defendant had ever touched her under her clothing.

L. said she had told her older sister N. about defendant touching her, and N. had said that defendant had done the same thing to her. L. had also told her mother about defendant's conduct. Her mother cried and told her that there were cameras in the house "[c]ause they were watching" defendant "[c]ause they felt that he, he did drugs and stuff."

In her second interview that evening, D. told the police about an incident in defendant's bedroom when she and K. had gone to see defendant's fish. Defendant tried to remove their clothing. On another occasion, defendant had tried to kiss her on the lips. She insisted that these was the only two times defendant had touched her.

In her second interview, K. told the police that defendant had removed her and D.'s pants and tried to touch them. She also said that defendant had once rubbed her chest, skin-to-skin, a year earlier. K. also reported either having seen defendant touch D. once or having been told by D. that defendant had touched D. K. stated that defendant had once tried to pull her pants down, but she had hit him, pulled her pants back up and run away. This event had occurred in her mother's room a week ago. She had been wearing shorts and underwear under her pants, so nothing was exposed by defendant's conduct, but defendant's action made her "scared" that he "was gonna touch" her "in my private." K. eventually disclosed that defendant had touched her "privates" on a separate fairly recent occasion. On a "really hot" day, D. and K. were sleeping on their parents' bed wearing only their underwear, and they were awakened by defendant touching their private parts under their underwear. K. felt defendant's

hand on her private parts and saw him touching D.'s private parts also. K. said L. had told her that defendant had touched her and "my other sister, too."

In her second interview, L. was asked if defendant "fought with the police before?" She said "Um, yeah." L. again described her fight with defendant over the key during which he touched her between her legs, "undid" her bra and pulled up her shirt. She had quickly pulled her shirt back down. L. insisted that this was the only time that defendant had touched her, but she "was already scared of him" because "he always stared at me and stuff . . . ." He had looked at her once when she was in the bathroom and another time when she was taking a shower. L. denied that defendant had ever "made you have sex or nothing like that." L. reiterated that she had told her mom about the key incident, and her mother had cried. L. had not seen defendant touch her sisters, but they had told her that he had touched them two or three times. K. had told L. that defendant had tried to kiss D. and had touched both her and D. between their legs under their pants.

After the girls had been interviewed twice, the police told the girls' parents[1] that the girls were alleging that defendant had inappropriately touched them, and the police said that they wanted to talk to defendant the next morning. The next morning, defendant voluntarily came to the police station with his parents and said that he wanted to "clear the matter up."

During his police interview, defendant admitted L's accusations, although he claimed that the touchings had occurred accidentally during their fight. He also admitted that he had twice touched K.'s crotch over her clothing. According to defendant, these two events had occurred six months apart several years earlier. Finally, defendant admitted that he had touched K.'s vagina under her underwear the

[1] Actually, these were the mother of defendant, K., L. and D. and the father of K. and D. Defendant and L. share a different father.

previous summer. He said he left his hand on K.'s vagina, under her panties, for three or four minutes. Defendant denied ever touching D. Defendant wrote a letter of apology to K. asking her "to excuse me for touching your intimate or private parts." He wrote a similar letter to L. asking her to excuse him "if some day I touched your intimate (private) parts" and saying he was "sorry for the day I pulled your blouse when I was playing with you."

On July 17, 2004, social worker Sylvia Roque interviewed the three girls and their mother. The mother told Roque that L. had told her that defendant had touched her vaginal area over her clothes while the two were "roughhousing." L. told Roque that she had told her mother about defendant touching her, but her mother had done nothing about it. L. said that defendant had touched her vaginal area over her clothes "while they were roughhousing." L. said nothing about defendant pulling up her shirt. L. also said that K. had told her that defendant had touched K. D. told Roque that defendant had pulled down K.'s pants. K. told Roque that defendant had touched D.'s vaginal area over her clothing.

In August 2004, L. told Rosalie Correa that defendant had "touched her sisters inappropriately, and a lot of bad things happened," but L. did not "elaborate." L. did tell Rosalie Correa that defendant had been "touching" D. "since she was 4 years old." L. told Rosalie Correa that she "would be in trouble" if she told the truth. L. said her mother had told her that "she better deny that these things happened, otherwise they would go back again to a foster home and be taken out of their home." L. also said her mother had told her that her brother would go to prison and "bad things would happen to him there" if he was convicted. L.'s mother had also told her that her accusations against defendant were responsible for the family's lack of money and the mother's loss of her job.

In September 2004, D. told Gabriella Nielsen, her therapist, that defendant had touched and caressed the front of her genitals. In October 2004, D. told Nielsen, in

D.'s mother's presence, that defendant had pulled down D.'s pants and touched D.'s private parts with his penis. D. also said that defendant had put his penis in K.'s mouth while they were under a fig tree in the backyard.

In September 2004, L., looking "very, very, very sad and confused," told Sandoval that L. "was going to have to lie to the police" because "her mother was pressuring her to lie." L. said her mother "wanted them to say that it didn't happen." L. explained that her mother was afraid that defendant would go to prison and "be hurt very bad" and that the children would be removed from their home. L.'s mother also had told L. that, if the molestation allegations were true, she would kill defendant and herself.

In October 2004, L. asked Sandoval to tell "the people" that Sandoval was lying. Sandoval "got angry" and refused, and L. seemed "relieved."

II. Procedural Background

Defendant was originally charged by information with two counts of continuous sexual abuse of a child (Pen. Code, § 288.5), one count of assault with intent to commit a sex offense (Pen. Code, § 220), five counts of lewd conduct on a child (Pen. Code, § 288, subd. (a)), two counts of attempted lewd conduct on a child (Pen. Code, §§ 288, subd. (a), 664) and two counts of forcible lewd conduct on a child (Pen. Code, § 288, subd. (b)(1)). It was specially alleged that he had committed acts against more than one victim. (Pen. Code, § 1203.066, subd. (a)(7).)

Defendant was represented by a retained attorney throughout the trial court proceedings. Defendant's first jury trial in February 2005 resulted in a mistrial after one juror held out for not guilty on all counts. The information was then amended to replace the assault with intent to commit a sex offense and attempted lewd conduct counts with lewd conduct counts, so that the information charged eight counts of lewd conduct, two counts of forcible lewd conduct and two counts of continuous sexual

abuse. The continuous sexual abuse counts charged defendant with abusing K. and D. between July 1, 2002 and July 15, 2004. The eight lewd conduct counts charged defendant with individual acts of lewd conduct against K. and D. during this same period. The individual lewd conduct counts against K. and D. were alternatives to the continuous sexual abuse counts. The forcible lewd conduct counts charged defendant with offenses against L. The prosecution sought convictions on the continuous sexual abuse counts and on the forcible lewd conduct counts.

Defendant was retried in May 2005. D. testified at trial that defendant had never touched her private parts. She said she had lied about this to the police, Nielsen and others, but she was unable to explain why she had lied. She did affirm that she had "changed [her] story to help" defendant. D. said she was "sad" that defendant was not living at home anymore.

K. testified at trial that defendant had never touched her private parts, bottom or chest and that she had never seen him touch her sisters in any of those places. K. said she had told Sandoval that defendant had touched her because she wanted defendant to leave their home. K. said that L. had told her to tell Sandoval that defendant had touched her. K. testified that she had told a police officer that defendant had touched her and D., but "it wasn't true, I just made it up." She said she lied to the police officer because she was "mad" at defendant for throwing away some of her toys. K. was sad that defendant was not living at home anymore, and she thought it was her fault because she had lied to the police.

L. testified at trial that, although she got along well with defendant, "we'd fight a lot." Defendant "used to make me mad" when he teased her and made fun of her. Defendant had never touched her breasts or vagina, and she had never seen him touch D. or K. Nevertheless, L. initially falsely told David and Rosalie Correa and Sandoval that defendant had touched her vagina. L. testified that, at the beginning of July 2004, she told K. and D. to tell someone that defendant had touched their vaginas or else she

would spank them. L. lied and told K. and D. to lie "'cause I was mad, 'cause my mom treated him differently than me." L. was "jealous" of defendant because their mother "gave him money and stuff and she didn't give me" and "he would go out with his friends and I couldn't."

Defendant's 19-year-old sister N. testified for the defense at trial. She asserted that she had been present at the time of the two alleged touchings of L. by defendant, and these events had occurred when L. and defendant were "play fighting." N. testified that L. got mad at defendant because their mother gave him "special treatment," and L. wanted defendant to move out of the house and go back to Mexico. On cross-examination, N. testified that during her fights with defendant he would sometimes touch her crotch area "accidental[ly]." N. admitted that she had accused her father of sexually molesting her, and she claimed that she had told L. that this molestation accusation was false. N. said she had made the false accusation against her father because he "was not responsible" when she and defendant were living with him in Mexico and he "used to hit us at times."

Defendant's mother testified for the defense at trial that she had falsely told defendant and L. that she had installed hidden cameras in the house so that she would know if they were fighting. She denied that she had ever told any of the children to lie.

Defendant testified on his own behalf at trial. He denied ever touching L.'s crotch or lifting up her shirt. Defendant said he had made false admissions to the police because "I thought, if I say what the girls were saying, then they would let them come back home, and so I tried to tell the story more or less the way L[.] had." Defendant asserted that he had "made . . . up" his statements about having touched K. in hopes that his family could be reunited. "I thought that if I told that story, maybe that would be enough so that the girls could come back." Defendant denied ever having inappropriately touched L., K. or D. He admitted that he had fought with L.,

but he claimed that he stopped fighting with her "[w]hen I heard that, I think, they had installed cameras in the house."

The jury deliberated for about a day and a half. It returned guilty verdicts on the continuous sexual abuse counts against K. and D. and the two forcible lewd conduct counts against L., and it found true the allegation that defendant had committed lewd acts against more than one victim. The jury acquitted defendant of the individual lewd conduct counts "pursuant to the court's instructions that they were in the alternative." The trial court committed defendant to state prison for a term of 30 years. Defendant filed a timely notice of appeal.

III. Discussion

A. Standard of Review

Defendant contends on appeal that his trial counsel was ineffective. "Defendant has the burden of proving ineffective assistance of counsel. [Citation.] To prevail on a claim of ineffective assistance of counsel, a defendant must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. [Citation.] A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . . Moreover, prejudice must be affirmatively proved; the record must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 389, internal quotation marks omitted.)

B. Trial Counsel's Failure to Seek Exclusion of Defendant's Statement

Defendant contends that his trial counsel was prejudicially deficient in failing to seek exclusion of his statement to the police on the ground that it was the product of coercion. He claims that the police officers who interviewed him used a combination of threats and promises to coerce an involuntary confession from him. Since the Attorney General concedes the admission of this statement was prejudicial, the sole question is whether the statement would have been excluded if defendant's trial counsel had interposed an objection to its admission.

"It long has been held that the due process clause of the Fourteenth Amendment to the United States Constitution makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion. [Citations.] A statement is involuntary [citation] when, among other circumstances, it was extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, however slight . . . [Citations.] Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the 'totality of [the] circumstances.'" (*People v. Neal* (2003) 31 Cal.4th 63, 79.)

"Promises and threats traditionally have been recognized as corrosive of voluntariness." (*People v. Neal*, *supra*, 31 Cal.4th 63, 84.) "In general, any promise made by an officer or person in authority, express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary and inadmissible as a matter of law. [Citations.] In identifying the circumstances under which this rule applies, we have made clear that investigating officers are not precluded from discussing any 'advantage' or other consequence that will 'naturally accrue' in the event the accused speaks truthfully about the crime. [Citation.] The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend

to produce a statement that is both involuntary and unreliable." (*People v. Ray* (1996) 13 Cal.4th 313, 339-340, internal quotation marks omitted.)

"In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances--both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226, citations omitted.)

"A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. [Citations.] A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it 'does not itself compel a finding that a resulting confession is involuntary.' [Citation.] The statement and the inducement must be causally linked." (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

"The line to be drawn between permissible police conduct and conduct deemed to induce or to tend to induce an involuntary statement does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth, as represented by the police. Thus, 'advice or exhortation by a police officer to an accused to "tell the truth" or that "it would be better to tell the truth" unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary.' . . . . [¶] When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the

other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. The offer or promise of such benefit need not be expressed, but may be implied from equivocal language not otherwise made clear." (*People v. Hill* (1967) 66 Cal.2d 536, 549.)

1. Background

After L., K. and D. reported on the evening of July 15, 2004 that they had been sexually molested by defendant, they were taken into protective custody and placed in a shelter because defendant resided in the same residence with them. The police told the parents that the girls were alleging that defendant had inappropriately touched them and said they wanted to talk to defendant the next morning.

The next morning, defendant came to the police station with his parents for an interview. Defendant had been aware for months that his sisters "were complaining about [him] touching them." Defendant, who was 20 years old and had no criminal history, "said he wanted to clear the matter up" and willingly agreed to talk to Detective Robert Dillon and Detective Adam Tovar about the allegations. Defendant was not restrained in any way, and the interview took place in an unlocked room. The detectives were not wearing uniforms. During the two-and-a-half-hour interview, they did not yell at or threaten defendant. Dillon and Tovar never told defendant "that the kids wouldn't go home, unless he confessed."

At the commencement of the interview, Dillon told defendant that he was "not under arrest " and was "free to leave at any time." "[Y]ou're not required to talk to us. Uh, but I'm sure you have questions, and I have questions. And we wanna, we wanna talk about this." Defendant affirmed that he wanted to talk to the officers because "I came to clean up this thing." Dillon reiterated that "you're not required to come in

here and do this." "And like I said, it's all about how honest you are with me, how much we can resolve today." "[D]on't be overly concerned that I'm tryin' to get you in trouble or get somebody else in trouble. That's not it." Later, Dillon repeated "you're not under arrest, and you can, you can walk out right now."

Defendant told Dillon and Tovar that D. was stubborn and wouldn't listen to him, but K. listened to him. L. was quiet and "don't talk to like nobody." At first he said that he and L. did not fight at all but occasionally called each other names in a joking manner. But he almost immediately admitted that he had been in fights with L. and that she had hit him two or three months earlier when he was trying to help their little brother. During another argument, he had pounded on L.'s bedroom door. He had then gone to the window and accidentally broken it with his fist. This incident had occurred five months before the interview, and it was triggered by D. and K. making a mess and then running into L.'s room and locking the door.

Dillon told defendant "I can't send them [defendant's younger sisters] back in the house unless I know the truth." "[I]f we can't talk and get the truth out, then we can't do anything about your brother and sister. Okay? All right, 'cause they're sayin' that they're gettin' smacked and hit and stuff like that." Defendant admitted that he had "hit her [D.] in the head" and "push[ed] her," but had stopped doing so a couple of months earlier. He also admitted that he had slapped his other sisters, including L., up until a couple of months earlier. Defendant said that his sister N. had falsely accused their father of "touching her parts and stuff." Defendant denied that he had ever touched his sisters' "parts."

Defendant described another incident when he and his younger siblings were "playing" in their mother's room, and he picked up L. and threw her on the bed. Defendant also recalled an incident that had begun with him taking L.'s keys and had ended with him grabbing L.'s shirt. Dillon accused defendant of "skippin' things" in his account of this incident. "I know what happened. Okay? If you wanna get

through here, with any amount of, any amount of dignity and respect, and without gettin' yourself in a lot of B.S., 'cause that's what's happening. You're diggin' yourself a grave. You're, you're getting' [*sic*] yourself into trouble by lying now. Okay? You lie, you're gonna get yourself in trouble. I already know what happened. Your sister told me . . . . All right, but if you start lying to me, this is done. I'm not gonna talk to you, I'm just gonna write a report. And then they'll arrest you later."

Defendant then admitted "pulling [L.'s] shirt up." Dillon said: "Are you gonna get in trouble for this? I don't know. That's not my place to say. But if you're gonna lie . . . ." He told defendant that L. had been upset because defendant had exposed her breasts. Defendant said L. was lying. But then he admitted that L.'s bra had been exposed.

Dillon and Tovar encouraged defendant to tell the truth and reiterated that "[i]f you tell lies it will be worse in this case." Defendant insisted that it was "an accident" that L.'s shirt was pulled up and her bra was exposed. Dillon and Tovar asked him why L. had said he had unsnapped her bra. Defendant conceded that this might have happened. And then he admitted that he had seen part of L.'s breasts. But he continued to insist that they had been "playing" and his actions had been accidental. Dillon and Tovar told him that L. had said he had put his hand on her vagina. Although he initially insisted that this was not true, he conceded that it was possible that it could have happened accidentally when he was wrestling with L.

Defendant denied ever having touched the private parts of D. or K. He suggested that "[m]aybe L[.], L[.]'s telling them to say that . . . ." After Dillon and Tovar described what D. and K. had said, defendant said: "Maybe that, the L[.] is true, but my little sisters? I didn't know about that." Defendant told the officers that D. had falsely told their mother that he was "kissing" K. Dillon and Tovar suggested that defendant was "scared." He insisted that he was not. "No, I'm not scared." "I'm not even like nervous." They continued to urge him to tell the truth. "We know the truth,

we know what happened; we just want you to tell us, and you're gonna feel better about it." "[T]hey're not lying. They're telling the truth. And if you want your family back together, you're the key to the whole thing, okay? It's on you." "Make it right, make it better for them. I'm not telling you to lie and make something up; I wanna know the truth about what happened. The truth is the only thing that's gonna fix all this, and keep your family together as a unit. That's the only thing that's gonna keep your family together."

Defendant insisted that he was telling the truth. He said "[m]aybe" he had touched L. accidentally, but he had never touched D.'s or K's private parts. Dillon and Tovar then described an incident that they said D. and K. had told them about during which defendant had touched their private parts. Defendant insisted that this had never occurred. Dillon said: "Okay, would you rather tell us right now about what happened, or do you wanna wait 'til we go, if, if we have to go to, after he does his report, then we go to uh, do you like going to court?" "[W]ould you rather tell us here what happened, or would you rather go to court and let them listen to your sisters tell the judge . . . ." Defendant said "[t]ell the truth here." Dillon and Tovar continued this line of persuasion. "[W]e're trying to get you to tell us here, rather than going to court, and then your sisters tell you, say this in front of strangers, the judge, other people there in court." "[Y]ou can tell us here, so that your poor sisters don't have to go through that, and you don't have to go through it either, be embarrassed about it."

Defendant continued to insist that he had never touched the private parts of D. or K. He suggested that D. and K. were making this up because they did not like him and wanted him to go back to Mexico. Defendant said that D. and K. used to watch "those movies, porno movie[s]" on cable, and he claimed that they might be basing their accusations on those movies. He then suggested that D. and K. were making false accusations against him because L. was mad at him. When Dillon and Tovar suggested that L. might be mad at him because he pulled her shirt up and put his "hand

on, over her private," defendant said "[m]aybe that's why." Yet he continued to insist that he had not touched the private parts of his sisters. "I don't wanna go to court. But that's not true." Defendant denied touching L.'s private parts, though he conceded that he had touched her thigh.

Tovar said: "We're trying to help you; we're not trying to, to get you in trouble." "I would rather you tell us right now" about K. "than have to go to court and have her—how would you feel having her say that in front of other people, the judge, and, and, and all that, and you're there?" Defendant said "I will feel bad." He continued to insist that he had never touched D. or K. except to spank them on the "butt." "[T]he truth is that I never touched them like on the front part; just on the butt" while "[s]panking." Dillon and Tovar continued to press him. "We're trying to make you tell us now, than to go over there in front of the judges and uh, strangers, and, and have your sisters tell them what you did, that you touched their front part one time." "[I]f it was one time, that's cool, that's good. If it's more than one time, a bunch of times, that's bad. . . . All we wanna do is get your family back together, but you gotta tell us. . . . [W]e're not gonna make you say things that aren't true, but then we can't help you anymore" Defendant continued to deny touching D. or K.

Dillon said "But if that's what you wanna do, then we'll just write up what they said and take it over to the D.A. and let them, let them deal with it in court." Tovar said "I can't help you any more." Dillon then said: "We can't, we can't write up, you know, we can't write up what you're saying; if you wanna tell us the truth about what happened, we can write it up for you." Defendant replied: "And how long she [D.] say that it was that, what was that?" Dillon and Tovar told him that D. had said it was a single occasion when defendant had placed his hand on her vagina inside her underpants. Defendant again said that it was not true. Yet he said that four and a half years earlier he had been playing with K. in their mother's room and "asked her where are the little testicles like this . . . [b]ut I didn't touch her . . . it was on top."

Defendant then admitted that he had touched K.'s vagina over her clothing. He insisted that only K. had been present and that the event had occurred four years earlier. As he described it, K. was sleeping in an upstairs bedroom in the afternoon, and he came into the room to watch a show on the television in that room. Defendant lay down on the bed and watched television while K. slept. While he watched television, he touched K.'s vagina over her panties. Defendant claimed that this event and the "little testicles" one were the only times he touched K.'s private parts.

Tovar told defendant that K. said he had touched her under her panties. Defendant said: "I'm trying to recall so I can say if I did it. If I did it I want to say how it was that I did it so I can say it because I don't want to go to court." He continued to deny that he had touched K. under her panties. Tovar said: "She's going to go to the court and she's going to explain . . . she's going to testify that, that you put your hand under her panties."

Defendant then described a third incident involving K. that had occurred in the last year during the summertime. D., K. and their little brother were sleeping on the floor in a bedroom at around noon. "I went and laid down next to [K.] and I did put my hand . . . I put my hand like this. Touched her here . . . ." He left his hand on K.'s vagina, under her panties, for three or four minutes.

Dillon asked defendant to write a letter of apology to his sisters "expressing what was on his heart." Dillon and Tovar did not tell defendant what to say in the letters. Defendant wrote letters to L. and K. In the letter to K., defendant asked her "to excuse me for touching your intimate or private parts." The letter to L. asked her to excuse defendant "if some day I touched your intimate (private) parts" and said he was "sorry for the day I pulled your blouse when I was playing with you."

2. Analysis

Defendant claims that Dillon and Tovar coerced his statements by promising that admissions would help him and his family by reuniting them and allowing them to

avoid going to court. The totality of the circumstances does not support defendant's claim that his statements were coerced.

Nothing that Dillon or Tovar said about the potential for reunification of defendant's family went beyond what could be expected to naturally follow from the circumstances. With defendant's younger sisters alleging that they had been sexually molested by him, his sisters obviously could not be permitted to return to the household they shared with defendant until the truth of their allegations was resolved. Dillon and Tovar did not offer defendant any leniency or other advantage in return for his statement. Early on, they told defendant that his sisters would not be returning to the family home until "the truth" was known. There was no impropriety in this statement because it merely noted the natural consequences of the allegations.

By the time the subject of the reunification of defendant's family came up again, defendant had already admitted touching L. Dillon and Tovar did not improperly coerce a statement by urging defendant to tell the truth in order to facilitate the reunification of his family, since this was something that would naturally spring from truthful disclosures. When Dillon and Tovar suggested that defendant would prefer to "tell us here what happened . . . rather [than] go to court and . . . listen to your sisters tell the judge" in front of other people, defendant acknowledged that he did not wish to go to court and would "feel bad" if that occurred, but he maintained that he was telling the truth and had not touched D. or K. Again, Dillon and Tovar did not offer defendant leniency or threaten him by suggesting that he could avoid having his sisters testify in court by confessing. Defendant could have admitted the allegations and pleaded guilty, and his sisters would then have avoided testifying in court about his molestations of them. When Dillon and Tovar told defendant they wanted to "help" him rather than "get you in trouble" and suggested that his admission to a single touching of K. would help to "get your family back together," they made no promises or threats but simply utilized a permissible ruse in order to make defendant

more comfortable admitting his guilt. Finally, the expression of frustration that Dillon and Tovar conveyed to defendant when he maintained his denial was neither a promise nor a threat. Their statement that they would "just write up what they said and take it over to the D.A. and let them, let them deal with it in court" and that they "can't help you any more" was another statement of fact. If defendant continued to deny the allegations, the matter would proceed through the judicial system.

Dillon and Tovar never suggested, and defendant could not have reasonably believed, that *he* would be permitted to rejoin his family if only he admitted molesting his sisters. Since the allegations by his sisters were the basis for the separation of his family, Dillon and Tovar were not precluded from truthfully representing that family reunification depended on the resolution of these allegations. Nor were such representations likely to produce an unreliable and involuntary statement. (*People v. Ray*, *supra*, 13 Cal.4th 313, 339-340.) The statements by Dillon and Tovar regarding going to court did not suggest that defendant was being offered *leniency* of any kind in return for his statements. The necessity of his sisters being required to testify in court could have been avoided had he admitted their allegations *and pleaded guilty* to charges based on those allegations. While defendant did end up having to go to court because he continued to deny touching D. and disavowed his admissions, the statements by Dillon and Tovar were not thereby rendered false.

None of the other circumstances of the interview were unduly coercive. It was made unmistakably clear to defendant that he could terminate the interview and leave at any time. Dillon and Tovar were not even wearing uniforms, and the interview was not particularly prolonged. Because the totality of the circumstances demonstrated that defendant's statements were not coerced, his trial counsel was not deficient in failing to seek the exclusion of those statements.

C. Trial Counsel's Failure to Make Evidentiary Objections

1. "Red Stain" Evidence

Defendant claims that his trial counsel was prejudicially deficient in failing to object to the admission of evidence that L. had a "red stain" on her clothing after spending the night in defendant's bedroom.

a. Background

In February 2004, L. told Rosalie Correa that her brother had "crawled into bed with her" the previous week but "nothing happened." In March 2004, L. told Sandoval that defendant "tried to get in bed with her."

In her initial statement to the police, K. made statements about defendant drinking and L. sleeping with defendant. "And then my sister, L[.], mm, mm, it, it was because he drinks. Because umm, I don't know why, he drinks, and then my sister, she, she umm, slept with him, she sleep with him, and-" K. said that L. had spent the whole night in defendant's bedroom with him. K. recounted that L.'s "shirt . . . it was uh, all red. And she had a red pants, I think umm, she had, I don't know, but it was all ho-, red over here, her shirt that she has right now." "It was all red, like-" When asked "Red who, red from what," K. said "I don't know, I think it was for the pants that she put something, and then she was like sleeping in her pants, I think." The officer said "Somethin' spilled?" K. responded "I think, I don't know, I'm not sure." K. confirmed that L.'s shirt was "stained."

When L. was initially interviewed by the police, she described an occasion on which she had consumed six beers, and defendant had convinced her to spend the night in his bed. She said she had spent the whole night in defendant's bed, but he had not touched her at all that night though he slept in the same bed. Both of them had slept fully clothed. L. denied that defendant had ever touched her under her clothing. During her second police interview, L. denied that defendant had ever "made you have sex or nothing like that."

All of the interviews of L., K., and D. were recorded and played for the jury at trial. Defendant's trial counsel made no objection to the admission of any portion of the statements above. K. testified at trial that she had lied when she told the police that she had seen L. coming out of defendant's room with a red stain on her shirt and pants after spending the night there.

The prosecutor argued this evidence to the jury. "On one account she's describing she drank six beers with the defendant. [¶] Not a big deal for teenagers to be drinking, we all did it, but if they're drinking like that alone in his bedroom or her bedroom and just the two of them and she passes out and falls asleep and says nothing really happened, I submit to you, she's probably minimizing. [¶] Something happened when she was drunk, doesn't remember, or she doesn't want to talk about it, something happened, and we know that something might have happened, because we hear K[.] describing a rather odd circumstance during her interview with Officer Torres, K[.] sees L[.] coming out of the defendant's room one morning with a red stain on her pants and a red stain on her shirt. [¶] There's no suggestion from L[.] or from K[.] that K[.] is well versed in the ways of what might have happen[ed] to a girl when she's sexually penetrated for the first time or for that matter, she has intercourse when she's on her period. [¶] K[.] is 9 years old. [¶] We don't have proof that there was intercourse on that day, that's why we haven't charged it, but I submit to you, ladies and gentlemen, there's enough evidence out there to lead you to believe that a whole lot more is going on here, a whole lot more." "K[.] talks about seeing L[.] with blood on her shirt and on her pants . . . [¶] . . . she mentioned seeing blood on the shirt and the shorts. [¶] That's not something the kid is going to make up, a 9-year-old, because she doesn't see it as anything significant." Defendant's trial counsel interposed no objections to these portions of the prosecutor's arguments to the jury.

b. Analysis

We will assume for the sake of argument that K.'s statement about L.'s stained shirt would have been excluded if defendant's trial counsel had interposed a timely and appropriate objection. The question then becomes whether defendant has established that the admission of this evidence was prejudicial. We think not.

K.'s statements were very difficult to parse. The only clear thing that K. said was that she had seen a red stain on L.'s shirt after L. spent the entire night in defendant's bedroom. K. did *not* say that L.'s *pants* were stained but only that L. "had a red pants . . . ." It is entirely unclear what this meant. Nor is it possible to make any sense out of K.'s response to the "red from what" question. K. said "I think it was for the pants that she put something, and then she was like sleeping in her pants, I think." Since K.'s statement in this regard was brief and substantially unintelligible, it would have had little potential for prejudice had the prosecutor not highlighted it in his argument to the jury.

The prosecutor's argument turned the red stain that K. had described seeing on L.'s *shirt* into a "red stain on her *pants and* a red stain on her shirt" and then morphed the evidence even further into "*blood* on her shirt and on her pants." The prosecutor also leapt from his revised version of the red stain evidence to a conclusion that he admitted he could not prove: that defendant had engaged in intercourse with L. that night and that this was L.'s first experience of intercourse or she had been on her period at the time.

We have little doubt that the prosecutor's argument was intended to be inflammatory. Yet within the context of the evidence and argument at trial, it is improbable that rational jurors would have allowed their decisions on the charged offenses, which did not include any allegations of intercourse, to be influenced by this unsupported argument. The potential for prejudice from the red stain evidence and the prosecutor's inflated argument was diminished because there was other evidence of

even more inflammatory allegations that was properly before the jury. D. told her therapist that defendant had pulled down her pants and touched his penis to her private parts and that she had seen defendant put his penis in K.'s mouth. D's accusations of attempted intercourse and oral copulation had far more potential to prejudice defendant than K.'s ambiguous testimony. The red stain evidence and the prosecutor's argument based on it pales in comparison to D.'s accusations. In addition, we must take into account that defendant admitted at least one unequivocal act of lewd conduct. This admission rebutted his claim that he lacked any sexual intent. Under these circumstances, we are confident that the jurors would not have reached different verdicts if only defendant's trial counsel had secured the exclusion of the red stain evidence that provided the seed for the prosecutor's argument. Defendant has failed to satisfy his burden of proving prejudice.

2. Evidence That Defendant Used Drugs and Fought With The Police

L. told the police that, when she told her mother about defendant's conduct, her mother cried and told her that there were cameras in the house "[c]ause they were watching" defendant "[c]ause they felt that he did drugs and stuff." The police asked L. if defendant "fought with the police before?" She said "Um, yeah." Defendant's mother testified at trial that she had falsely told defendant and L. that she had installed hidden cameras in the house so that she would know if they were fighting.

Defendant claims that his trial counsel was ineffective in failing to secure the exclusion of evidence that he "did drugs" and "fought with the police." These extremely fleeting bits of evidence had little potential for prejudice on the charges before the jury. Nothing in the trial evidence suggested that defendant's alleged use of drugs or his alleged interaction with the police played any role in his lewd acts against

his sisters.[2] Even if defendant's trial counsel could have obtained exclusion of this evidence by objecting to it, it had no real potential to influence the jury's verdicts, so any deficiency was non-prejudicial. Nor does the cumulative potential for prejudice of this evidence and the red stain evidence undermine our confidence in the jury's verdicts; these small bits of evidence were neither individually nor cumulatively prejudicial.

3. Testimony About L.'s Statement About Defendant's Molestation of D.

The continuous sexual abuse count involving D. required proof of "three or more acts of substantial sexual conduct" "over a period of time, not less than three months in duration." (Pen. Code, § 288.5.) Because D. testified at trial that defendant had not abused her and D.'s statements to the police and others provided no timeframe for her allegations of sexual abuse, the prosecution had to resort to other sources of evidence to prove that defendant's abuse of D. had occurred over a period of at least three months. Defendant asserts that his trial counsel was prejudicially deficient in failing to object to the admission of Rosalie Correa's trial testimony that L. had told her that defendant had been "touching" D. "since she was 4 years old." Defendant asserts that this testimony would have been excluded if his trial counsel had objected to its admission on personal knowledge grounds, since L. consistently reported that she had never seen defendant touch D. and did not learn of defendant's abuse of D. until the day that the girls reported the abuse to Sandoval.

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[2] Clearly, defendant's trial counsel did not believe that the mention of drugs was particularly prejudicial. At the very end of his closing argument to the jury, defendant's trial counsel said: "Don't feel pressured by anybody else, because they feel that Mr. Valencia's family is bad, because his mother has eight kids and is sleeping with a number of people, because his stepfather is a drug addict and a drug dealer. [¶] Because you learned about all these different things, this isn't about them, it isn't about his family upbringing. [¶] This is about what has been proved in this trial, and I think if you look at everything in toto that there is not gonna be sufficient evidence in which to convict Mr. Valencia."

a. Background

D. told the police that defendant had kissed her once and, on another occasion, tried to remove her clothing and touch her private parts in his bedroom where she and K. had gone to look at his fish. D. insisted that these were the only two times he had touched her. D. provided no timeframe whatsoever for these events.

K. told the police about a recent incident during which she had seen defendant try to remove D.'s pants in their mother's bedroom. K. reported another incident when defendant had abused both her and D. in his bedroom when they came to look at his fish. K. also reported a third incident that had occurred on a "really hot" day in their mother's bedroom. On this third occasion, K. had seen defendant touching the private parts of both D. and K. under their underwear.

L. told the police that she had only learned that day, July 15, 2004, that defendant was touching D. and K. D. told her that defendant had recently touched D.'s private parts. L. reported that she had never seen defendant touch either of her sisters, but they had told her that he had touched them two or three times.

In his statement to the police, defendant admitted touching K. under her underwear during an incident in their mother's bedroom the previous summer. However, defendant adamantly denied touching D. on that occasion or on any other occasion.

Rosalie Correa testified at trial that L. told her defendant had been "touching" D. "since she was 4 years old," and the prosecutor highlighted this testimony in his argument to the jury. "There's Rosie Correa's testimony in which L[.] said that the defendant has been molesting D[.] since she was 4 years old. [¶] That's pretty clear that molestation has been going on for more than three months as is required to convict under this count."

b. Analysis

"[T]he testimony of a *witness* concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." (Evid. Code, § 702, subd. (a), italics added.) Defendant contends that the prosecution would have been unable to demonstrate that L. had personal knowledge of the timeframe of defendant's abuse of D. because L. had consistently and unequivocally stated that she never saw any abuse of D. and did not learn of defendant's abuse of D. until the day the girls reported the abuse to Sandoval and the police.

The Attorney General maintains that a personal knowledge objection to Rosalie Correa's testimony would have been properly overruled because "Correa had personal knowledge of L[.]'s statement." He suggests that Evidence Code section 702 does not require that a hearsay declarant have personal knowledge so it was irrelevant that L. lacked personal knowledge of defendant's abuse of D.

While there is no question that *Correa* had personal knowledge that *L. had made the statement* Correa recounted, we disagree with the Attorney General's suggestion that L.'s hearsay declaration was admissible *for its truth* notwithstanding *L.'s* lack of personal knowledge of the truth of her statement. Although we have not been directed to, nor have we discovered, any California cases addressing this specific point, federal courts uniformly impose a personal knowledge requirement on hearsay declarations and at least one state court imposes the same requirement.

"Courts require that declarants of a hearsay statement have firsthand knowledge before the hearsay statement is admissible, however. [Citations.] The party offering a statement has the burden of proving personal knowledge." (*State v. Richardson* (Minn. 2003) 670 N.W.2d 267, 282.) "In a hearsay situation, the declarant is, of

course, a witness, and neither this rule [Federal Rules of Evidence, rule 803] nor Rule 804 dispenses with the requirement of firsthand knowledge." (Advisory Comm. Notes to Federal Rules of Evidence, rule 803; *Bemis v. Edwards* (9th Cir. 1995) 45 F.3d 1369, 1373.)

The rationale for requiring a hearsay declarant to have personal knowledge when the declarant's statement is admitted for its truth is identical to the rationale for requiring a witness to have personal knowledge of the subject matter of the witness's testimony. In the absence of personal knowledge, a witness's testimony or a declarant's statement is no better than rank hearsay or, even worse, pure speculation. The admission of a hearsay statement not based on personal knowledge puts the factfinder in the position of determining the truth of a statement without knowledge of its source and without any means of evaluating the reliability of the source of the information. We are convinced the personal knowledge requirement applicable to witnesses is equally applicable to hearsay declarants.

The Attorney General argues that "there is no doubt" that the prosecutor would have been able to establish that L. had the requisite personal knowledge. The record amply rebuts this argument. L. has consistently and repeatedly stated that she did not know that defendant had abused D. until the day that the girls reported defendant's abuse to the police. Thus, L. clearly lacked *personal knowledge* of *when* defendant's abuse of D. occurred. Defendant has established that a personal knowledge objection to Correa's testimony would have succeeded.[3]

The Attorney General's suggestion that Correa's testimony was admissible for something other than the truth of the matter is pointless. The prejudice that defendant claims is from the admission of this testimony for its truth. Had it not been admitted

[3] Correa did not testify that L. said that *D. had told her that* defendant had been abusing D. since D. was four years old. We express no opinion on whether such testimony would have been admissible over a hearsay objection.

for its truth, the prosecutor could not have relied upon it to satisfy the "not less than three months in duration" element of the count charging defendant with continuous sexual abuse of D. (Pen. Code, § 288.5.)

Finally, the Attorney General claims that defendant was not prejudiced by his trial counsel's failure to obtain exclusion of this evidence. While there was some other evidence from which the jury could have *inferred* that defendant had been abusing D. for more than three months, this evidence was far less compelling than Correa's testimony regarding L.'s statement. The exclusion of the most compelling evidence to support an element of the offense might well have opened the door to a reasonable doubt about whether defendant's abuse of D. lasted for three months or more.

Consequently, we lack confidence that the jury would have found defendant guilty of the continuous sexual abuse of D. if defendant's trial counsel had not failed to obtain exclusion of this inadmissible evidence. Reversal of this count is required.

IV. Disposition

The judgment is reversed and remanded for potential retrial on the count alleging continuous sexual abuse of D. If the prosecutor elects not to retry this count, the trial court shall resentence defendant on the other counts.

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Mihara, Acting P.J.

WE CONCUR:

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McAdams, J.

_____

Duffy, J.

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Honorable Gilbert T. Brown
Attorney for Appellant:	Dallas Sacher Under Appointment by the Sixth District Appellate Program
Attorneys for Respondent:	Bill Lockyer Attorney General of the State of California
	Robert R. Anderson Chief Assistant Attorney General
	Gerald A. Engler Senior Assistant Attorney General
	Rene A. Chacon Supervising Deputy Attorney General
	David M. Baskind Deputy Attorney General