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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BRUCE ALLEN ROUSE, Defendant and Appellant.	H034647 (Santa County Super. Ct. No. CC818769)

A jury convicted defendant Bruce Allen Rouse of sexual offenses. He claims that there was insufficient evidence for certain convictions and that the trial court erred in allowing all charges to be tried in front of the same jury, instructing on intent and propensity, allowing testimony about child sexual abuse accommodation syndrome, and failing to instruct on lesser included offenses.

We will affirm the judgment.

PROCEDURAL BACKGROUND

The jury convicted defendant of multiple crimes arising out of or relating to his sexual abuse of a number of children.

Some of the crimes involved physical contact with minors. Specifically, the jury convicted defendant of four counts of a forcible lewd or lascivious act on a child under

age 14 (§ 288, subd. (b)(1)),[1] one count of a nonforcible lewd or lascivious act on a child under age 14 (§ 288, subd. (a)), one count of a lewd or lascivious act with a child age 14 or 15 by a person at least ten years older (§ 288, subd. (c)(1); see *id*., subd. (a)), one count of sexual intercourse with a minor 10 years old or younger (§ 288.7, subd. (a)), and one count of battery (§ 242).

The other crimes involved child pornography. The jury convicted defendant of one count of possessing material depicting a minor engaged in sexual conduct (§ 311.11, subd. (a)), one count of using a minor to model or pose in order to produce sexually oriented images (§ 311.4, subd. (c)), three counts of sexual exploitation of a child by developing or duplicating sexually oriented images of a minor (§ 311.3, subd. (a)), and one count of exhibiting "harmful matter" to a minor for purposes of seduction (§ 288.2, subd. (a)).[2]

The jury found true allegations under the "One Strike" law that defendant committed sexual offenses against more than one child. (§ 667.61, subds. (b), (c), (e)(4).) The trial court sentenced defendant to 100 years to life in state prison consecutive to five years therein.

FACTS

I. *Overview*

There were five victims. Their first names begin with An., As., Br., Cy., and Sk. We will refer to them in ascending order of age as Victim One (Sk.), Victim Two (Br.), Victim Three (An.), Victim Four (As.), and Victim Five (Cy.).

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

[2] Within the meaning of subdivision (a) of section 288.2, "harmful matter" essentially consists of obscene pornography, a category of pornography described in *People v. Powell* (2010) 194 Cal.App.4th 1268.

Victim One is defendant's granddaughter. Victims Two, Three, and Four are the daughters of a Chula Vista (San Diego County) couple. That couple were friends with defendant and his family and would visit and have their children visit the San Jose home where defendant and his family lived.[3] Victim Five is defendant's niece by marriage.

In addition to the facts set forth in this section, additional facts will be stated in connection with specific claims that require their elaboration.

II. *Prosecution Case*

A. *Victim One*

Defendant's molestation of Victim One resulted in his conviction of having sexual intercourse with a child 10 years old or younger (§ 288.7, subd. (a)). In this case, the child was 11 months old.

A San Jose police detective who was inspecting digital images found on defendant's computer found about 15 that showed the erect penis of an adult male and a female baby; "in a couple of them, there's a penis penetrating the labia of the baby," a police detective testified. The baby turned out to be Victim One, defendant's granddaughter. The photographs' background showed defendant's bedroom. Other aspects of them, including the testimony of defendant's ex-wife that the erect penis seen in the Victim One pictures "looks like it could very possibly be his," provided evidence that defendant was the adult male, although the record suggests that the pictures did not show his face. The image files' time data showed that the pictures were taken on August 30, 2008. Victim One's mother testified that on that evening she and Victim One's father, defendant's son, went out to celebrate her birthday while defendant babysat Victim One.

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[3] The male head of the family is the natural father of Victim Four and Victims Two and Three's stepfather. For brevity and ease of reference, however, we will refer to him as the father of all three girls.

On cross-examination, defense counsel explored the possibility that these photographs were falsified composites that could have been produced by a photo-editing program. Five of the photographs had been opened in Photoshop Album Starter Edition 3.2, a program on defendant's computer. The detective had testified that the forensic evidence suggested that no material modification of the pictures had taken place, although some might have been cropped, had contrast adjusted, or had redeye reduced. The detective conceded, however, that sophisticated image editing software exists that could open files of separate photographs of a baby and an adult penis and combine them into one image in a way that he did not forensically detect.

B. *Victim Two*

Defendant's episodes of misconduct with Victim Two resulted in three forcible lewd or lascivious act convictions (§ 288, subd. (b)(1)) and conviction on the sole pornography count not involving Victim Three, i.e., the modeling or posing conviction (§ 311.4, subd. (c)).

In the first episode, Victim Two was a five-year-old kindergarten student and defendant was a houseguest of her family in Chula Vista. Defendant told Victim Two to remove her pants. She declined, but he persisted, even though she warned him that he would be in trouble. He pulled down her clothing and fondled her external genitalia. Victim Two told him to stop during the assault. Victim Two was scared during the episode, which ended when a neighbor walked onto the outdoor part of the premises and could be heard rummaging through garbage cans by Victim Two and defendant. Defendant told Victim Two not to tell her parents what he had done, which also scared her.

Victim Two did not tell anyone about the molestation and later her parents let her visit defendant's house in San Jose for about 10 days. She was then six years old. Defendant showed her pictures of teenagers engaged in sexual acts. He told her that he had taken the photographs. Later during this visit, defendant pulled down her clothing

and touched her buttocks with something that was moving up and down and was "[f]loppy." She was sure that it was his penis, although she did not see it. It was "going up my butt." The contact hurt to a minor extent. She was scared and thought defendant was "crazy." She asked defendant to stop the contact with her buttocks three times, and finally he desisted.

There was also evidence that defendant fondled Victim Two's external genitalia during her visit to San Jose, and the jury found him guilty of one of the section 288, subdivision (b)(1) violations for doing so, although Victim Two's in-court and extrajudicial statements conflicted—at trial she testified both that he did and did not do this, but the jury heard evidence that she had told a San Jose police detective and her father about this incident. Victim Two's father testified that she told him defendant "touched her [external genitalia] two times, had made her pull down her panties; one time in San Jose when she was there, and one time in Chula Vista."

The San Jose police detective's interview of Victim Two was played to the jury. It elicited detailed information about the two incidents of defendant's contact with her external genitalia:

"[Victim Two] I was watching TV"—this was the incident in Chula Vista when she was five years old—"and then um, he started pulling down my pants, and then um, and then I told him to stop, and he didn't . . . ." "I said uh, 'Pull back my pants,' and then he didn't." Once defendant did this "[h]e was keep on touching me there, and then um, I told him to stop again . . . .

"[¶] . . . [¶]

"[Detective] When you said he was touching you there, where was he touching?

"[Victim Two] Um, on, under.

"[¶] . . . [¶]

"[Detective] . . . Um, and where, um, how did he touch you?

"[Victim Two] With his hand.

"[¶] . . . [¶]

"[Detective] . . . And what did he do when he touched you?

"[Victim Two] Mm, he was like, trying to touch me under there.

"[Detective] When you say under there, tell me . . . . [ellipsis in original]

"[¶] . . . [¶]

"[Victim Two] Like on my private.

"[¶] . . . [¶]

"[Detective] Okay . . . so he was touching you on your privates?

"[Victim Two] Mm-hmm.

"[¶] . . . [¶]

"[Detective] Um, when he, when he touched you on your privates, how did that make you feel?

"[Victim Two] Sad.

"[¶] . . . [¶]

"[Detective] . . . how many times did he touch you there?

"[Victim Two] Two.

"[Detective] Two times? Was, were they both in the same, the same . . . . [ellipsis in original]

"[Victim Two] No.

"[Detective] Night, or—

"[Victim Two] One at my old house [in Chula Vista], and at uh, oh, in San Jose.

"[¶] . . . [¶]

"[Detective] . . . And so tell me what happened there [in San Jose].

"[Victim Two] I was laying on his bed, and then he started touching me.

"[¶] . . . [¶]

"[Victim Two] [H]e started, he started pulling down my pants, and then he started touching me.

"[Detective] Uh-huh. When you, when you say pulled down your pants, did he, were you wearing underwear?

"[Victim Two] Yeah.

"[Detective] Yeah? Did he, what'd he do with those?

"[Victim Two] He pulled them down too.

"[Detective] Okay. And you said that he touched you; tell me about that.

"[Victim Two] The same thing that happened down at my old house [in Chula Vista].

"[Detective] Okay. Um, and did you tell him to stop?

"[Victim Two] Yeah.

"[Detective] Did he stop?

"[Victim Two] No.

"[Detective] 'Mmkay. Um, how did that make you feel that time?

"[Victim Two] Sad.

"[¶] . . . [¶]

"[Detective] Okay. Did you try and stop him from pulling your pants down?

"[Victim Two] Yeah.

"[Detective] What did you do to try and stop him?

"[Victim Two] I was trying to pull them up.

"[Detective] Mm, and then what did he do?

"[Victim Two] He was still trying to pull down my pants.

"[Detective] Okay. And then he, he eventually did?

"[Victim Two] Yeah."

On all of the molestation occasions defendant and Victim Two were the only ones in the house

The police search uncovered nude digital pictures of Victim Two. Although forensic investigation showed that several of the picture image files had been opened

using the Adobe Photoshop Elements 4.0 image organization and basic image editing application, a detective testified that he did not believe the photographs had been altered to paste Victim Two's face on another girl's body. Photoshop Elements would not be able to do that work. However, computer information indicated that Photoshop Elements had been used on the images of Victim Two for a minor editing task such as cropping, contrast adjustment, or redeye reduction.

C. *Victim Three*

All but one of the child pornography charges (specifically, the three section 311.3 charges and the section 288.2 charge) and one of the forcible lewd or lascivious act charges (§ 288, subd. (b)(1)) involved Victim Three. She was 10 years old when molested.

In the summer of 2008 Victim Three's family visited defendant's family and left Victim Three behind for an additional two-week stay.

During that stay, defendant sexually assaulted Victim Three by getting on top of her. He began kissing her and then "asked me if he can touch me," Victim Three testified. "[H]e said, 'You'll like it.' " "I said, 'Okay.' " Thereupon defendant fondled Victim Three's breasts, lifting up her clothing to do so. She felt "[u]ncomfortable." Then defendant asked if he could touch her external genitalia. "At first I said 'No,' " Victim Three testified, "and then he said, 'You'll like it.' " "[A]nd then I said, 'Okay.' " She could not remember whether she wanted or did not want defendant to touch her external genitalia. Defendant made the contact, possibly removing Victim Three's pants, according to her testimony, which showed an uncertain memory about that aspect of the incident. She may have helped him remove them. Again, despite Victim Three's acquiescence or cooperation, his touching of her external genitalia made her feel "[u]ncomfortable" and eventually "I told him to stop," she testified, because "I didn't like it." He stopped. No one else was home. Afterward, defendant told Victim Three not to tell anyone about the episode and that "what happened in Vegas, stays in Vegas."

The prosecutor and Victim Three had this exchange before the jury:

"Q . When you were [lying] on your back between the bed and the wall, with [defendant] on top of you . . . with his knees on either side, and you were feeling uncomfortable because of how he was touching you, did you feel like you could just get up and leave the room?

"A. No.

"Q. Why not?

"A. Because his legs were on each side of me and I couldn't move.

"Q. Is he bigger than you?

"A. Yes.

"Q. Do you think he's stronger than you?

"A. Yes."

The jury heard a San Jose police detective's interview of Victim Three, including this exchange:

"[Victim Three] . . . I fell and he got on top of me and started kissing me and I'm like, get off me and he wouldn't listen so he told me to take off my pants and I didn't want to I kept him, no no no, and then he tol—, he told me to take them off and I'm like, oh fine, and then he started touching me there.

"[Detective] Okay, [all right], um, so when you said that he got on top of you, um, like, describe that to me?

"[Victim Three] He got his—, on his knees like, like, with his legs behind him.

"[Detective] Mm-hmm.

"[Victim Three] And sat on top of me, kind of.

"[Detective] Okay, cou—, could you have gotten out if you wanted to right then?

"[Victim Three] No.

"[Detective] Okay, and then did he tell you to take your pants off before or after he was on his knees on top of you?

"[Victim Three] After he started kissing me which was after he got on his ha—, knees.

"[Detective] Got it, got it, so he, he got on his knees and started kissing you and then he told you to take your pants off, and you said that you told him, no? Okay, and then what happened after that?

"[Victim Three] And then he kept begging me and begging me and I—, I kind of gave up cause I was also tired."

When Victim Three arrived home in San Diego, she felt vaginal irritation and, although the testimony of various witnesses conflicts on the point, it appears that she wondered whether defendant might be the cause (it turned out that he was not). She told her sister Victim Four about the molestation. Victim Four told their father that he needed to speak urgently with Victim Three. After hearing her story, the father contacted the Chula Vista police.

As for the charge of using "harmful matter" (§ 288.2, subd. (a)) for purposes of seduction, the jury heard evidence that defendant showed Victim Three pictures of underage girls, some about her age, some younger, and some older. In some, the girls' breasts or genitalia were visible. Defendant also showed Victim Three videos of girls, including one smaller than Victim Three's younger sister Victim Two, performing oral copulation on a man who defendant said was he, although his face was not visible.

The police searched defendant's house and found child pornography, including images of Victim Three asleep and naked from the waist down, a condition resulting from the pulling back or down of her shorts, and Victim Three naked in a shower. This evidence led to the three child pornography charges (§ 311.3, subd. (a)).

D. *Victim Four*

Defendant's misconduct with Victim Four resulted in two convictions, one for a lewd or lascivious act under subdivision (c)(1) of section 288 and one for battery (§ 242).

When Victim Four's family visited defendant's home in San Jose in July of 2007, Victim Four was 14 years old. Defendant pulled her onto his lap, tickled her, and brushed his hand across her chest. She could feel him become sexually aroused. She struggled to remove herself from his lap and soon succeeded. Another time during that visit, defendant squeezed a cheek of her buttocks.

E. *Victim Five*

Defendant's misconduct with Victim Five resulted in a conviction of performing a nonforcible lewd or lascivious act on a child under age 14 (§ 288, subd. (a)).

In the course of investigating defendant's background, San Jose police contacted Victim Five, defendant's niece by marriage. When Victim Five was 10 years old, she went on a camping trip that included defendant. One evening she was sitting on defendant's lap when he began to fondle her left breast over her clothing and attempted to reach her external genitalia with his hand.

F. *Possessing Child Pornography*

The jury convicted defendant of possessing child pornography (§ 311.11, subd. (a)) based on law enforcement discovery on defendant's computer of hundreds of still or moving sexually oriented images of girls. Some were clothed, others nude; in general, their ages appeared to range from five to 16.

III. *Defense Case*

Defendant did not present a case-in-chief. Defense counsel cross-examined prosecution witnesses and otherwise relied on the prosecution's burden of proving the crimes beyond a reasonable doubt.

DISCUSSION

I. *Sufficiency of Evidence for Convictions on Certain Counts*

Defendant claims that the evidence showed his lewd or lascivious acts to be nonforcible and that the evidence was constitutionally insufficient to convict him of forcible acts of that type.

Under the federal Constitution's due process clause, there is sufficient evidence to support a criminal defendant's conviction if, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) The same standard applies under article I, section 15, of the California Constitution. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1083, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) This test "does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia, supra*, 443 U.S. at pp. 318-319.)

As recently set forth in *People v. Soto* (2011) 51 Cal.4th 229, 237, "Section 288(a) prohibits the commission of a lewd or lascivious act on a child under age 14 done with the intent to arouse or satisfy the sexual desires of the perpetrator or the child. Section 288(b)(1) further prohibits the commission of such an act 'by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person. . . .'[4] The degree of force required for a conviction under section 288, subdivision (b) is force "substantially different from or substantially greater than the physical force inherently necessary to commit a lewd act proscribed under subdivision (a)." (*People v. Griffin* (2004) 33 Cal.4th 1015, 1027; see *Soto*, *supra*, 51 Cal.4th at p. 244, fn. 8.)

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[4] Section 288, subdivision (b)(1), provides: "Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for 5, 8, or 10 years."

Applying this standard, we find that testimony furnished constitutionally sufficient evidence that defendant used either duress or force against each victim relevant to the section 288, subdivision (b)(1) charges, and if he used force, it was substantially different from or substantially greater than the force needed to commit a nonforcible version of the lewd or lascivious acts charged.

A. *Victim Three*[5]

Defendant argues that the only force he used against Victim Three was that necessary for the sexual acts he subjected her to. He asserts that the record shows that he began by kissing her and did not restrain her beyond the minimum necessary for the acts involved, then or when he fondled her breasts and external genitalia. At most, he removed her clothing and straddled her temporarily, but only to access her body, not to restrain her. Nor did he move her about.

Substantial evidence, however, supports the verdict on the basis of force to the extent that some or all of the jurors found that defendant used force. (See *People v. Pitmon* (1985) 170 Cal.App.3d 38, 53, disapproved on another ground in *People v. Soto*, *supra*, 51 Cal.4th at p. 248, fn. 12 [“jurors only must agree that defendant’s conduct constitutes a violation of section 288, subdivision (b)”]; see also *Soto, supra*, at p. 236 [quoting a prosecutor’s argument that it suffices “ ‘if some jurors find force and some jurors find duress, but you must all unanimously agree that it was accomplished [by one or the other],’ ” and not disapproving of that statement].) Victim Three could not move because defendant had her pinned down.

As for lack of duress, defendant notes that Victim Three testified that she initially acquiesced to his physical contact with her when he told her that she would like it. The

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[5] We discuss Victim Three before Victim Two in this section because that is the order in which defendant’s opening brief proceeds.

transcript of the detective's interview with Victim Three provides a similar account of events.

However, *Soto* states that decisional law "establish[es] that 'duress' and its associated terms 'menace' and 'fear of . . . bodily injury' are used in section 288(b)(1) in their ordinary meanings, and that to commit a lewd act 'by use of' one of these means, as prohibited in section 288(b)(1), is to coerce the victim, by direct or implied threat or by exploiting the victim's fear, into performing or acquiescing in the lewd act against his or her will. To coerce an act by duress, menace or fear 'is to avoid or vitiate consent to [the] act, so that the act cannot be said to constitute an exercise of free will.' [Citation.] Such coercion is thus inconsistent with the exercise of the victim's 'freely given consent.' [Citation.]" (*People v. Soto*, *supra*, 51 Cal.4th at p. 251.)

Duress, including in the form of grudging acquiescence to which *People v. Soto*, *supra*, 51 Cal.4th 229, adverts, " 'can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. . . . "Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim" [are] relevant to the existence of duress.' [Citation.]" (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1320; *People v. Schulz* (1992) 2 Cal.App.4th 999, 1005.) There must also be a " 'direct or implied threat' " (*Espinoza*, *supra*, at p. 1321) or exploitation of the victim's fear (*People v. Soto*, *supra*, 51 Cal.4th at p. 251).

People v. Soto, *supra*, 51 Cal.4th 229, distills the foregoing principles in its direction to the CALCRIM drafters to amend CALCRIM No. 1111 "along the following lines: 'Duress means the use of a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to cause a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of

the child and (his/her) relationship to the defendant.' " (*Soto*, *supra*, at p. 246, fn. 9, italics deleted.)

Naturally, duress might be absent in certain circumstances. *People v. Soto*, *supra*, 51 Cal.4th 229, noted the range of possible violations of section 288, including "a 16-year-old boy who fondled his 13-year-old girlfriend's breast" (*id*. at p. 239), as contrasted with the more typical case involving circumstances like those here, i.e., a mature adult, children aged younger than 14 (in the cases of Victim One, Two, and Three, much younger), and the resultant inherently coercive circumstances. A rational trier of fact would be expected to find that truly consensual conduct, with both parties desiring to engage in it and neither feeling any inkling of coercion, would be a violation of subdivision (a), but not subdivision (b), of section 288.

The statutory language explains why this is so. Subdivision (a) of section 288 is broad. It penalizes "nonforcible or apparently consensual touching. A defendant can violate section 288, subdivision (a), even if the underage victim appears to consent to the touching . . . ." (*People v. Lopez* (1998) 19 Cal.4th 282, 293.) The same is true even if the object of the touching does factually consent to it. And that is true even if the initiator is under age 14; section 288 does not identify a lower limit on the age of the perpetrator of a section 288 violation. Therefore, " 'consensual sexual contact between minors where one is over 14 years and one is under 14 years of age is within the ambit of section 288, subdivision (a).' " (*In re Donald R*. (1993) 14 Cal.App.4th 1627, 1630.) "[S]ection 288, subdivision (a) simply proscribes *any* lewd or lascivious act, without regard to consent, upon a child under age 14 . . . ." (*In re Billie Y*. (1990) 220 Cal.App.3d 127, 131, disapproved on another ground in *In re Manuel L*. (1994) 7 Cal.4th 229, 239, fn. 5.)

Especially though not necessarily (*In re Billie Y.*, *supra*, 220 Cal.App.3d at pp. 129-130) in such circumstances, the perpetrator and the victim may have engaged in factually, if not legally (*People v. Soto*, *supra*, 51 Cal.4th 229), voluntary and consensual lewd or lascivious acts. It is of course common for minors to practically consent to

sexual activity that they may not legally consent to. "[T]here are minors under 14 who are voluntarily engaging in sexual activity . . . . Ample statistical studies show considerable voluntary sexual activity on the part of young adolescents, many under the age of 14." (*Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 268.) They may, if heterosexual, describe their relationship as boyfriend and girlfriend. In *In re John L*. (1989) 209 Cal.App.3d 1137, "John, 15 years old, and a neighbor girl, who was 11 and 12 years old at the time, engaged in voluntary consensual sexual activity on at least 3 occasions." (*Id*. at p. 1138.) The court acknowledged that a case may "involve consensual sexual acts as between a boyfriend and girlfriend" (*id*. at p. 1141) with "the victim and perpetrator . . . close in age as they were in this case." (*Ibid.*) Nevertheless, John L. was in violation of the law because "according to the plain language of the statute[,] 'every person' who engages in sexual acts with a person under 14 years of age violates section 288, subdivision (a)." (*Ibid*.)

However, as explained in *People v. Soto*, *supra*, 51 Cal.4th at page 243, *People v. Espinoza*, *supra*, 95 Cal.App.4th at page 1320, and *People v. Schulz*, *supra*, 2 Cal.App.4th at page 1005, a rational trier of fact can find duress within the meaning of subdivision (b) of section 288 even if there is no substantial evidence of overt duress if the trier of fact decides that the "inherent imbalance of power in an encounter between a child and an adult bent on sexual conduct" (*Soto*, *supra*, at pp. 245-246) made itself felt in a charged incident.

Conversely, if there is no evidence of any force or any form of overt or circumstantial duress, the trier of fact should not be instructed to consider a conviction under subdivision (b) of section 288, but should be instructed only on subdivision (a) of section 288. Our Supreme Court has "long held that '[t]he jury need not be instructed on a theory for which no evidence has been presented.' " (*People v. Ayala* (2000) 23 Cal.4th 225, 283.)

Seldom, however, will a trier of fact be persuaded of the existence only of "voluntary sexual conduct between a minor under age 14 and a person of disparate age constituting a violation of section 288, subdivision (a) . . . ." (*People ex rel. Eichenberger v. Stockton Pregnancy Control Medical Clinic, Inc*. (1988) 203 Cal.App.3d 225, 231.) Well understood psychological and biological reasons usually will militate against a finding that only subdivision (a) of section 288 has been violated when one participant is a mature adult and the other is under age 14. In this case, defendant's sexual abuse of 10-year-old Victim Three and (as we discuss below) five- and six-year-old Victim Two fits a category of depraved conduct that the Legislature meant to proscribe in enacting subdivision (b) of section 288. It enacted section 288 generally to " 'provide children with "special protection" from sexual exploitation. [Citation.] The statute recognizes that children are "uniquely susceptible" to such abuse as a result of their dependence upon adults, smaller size, and relative naïveté.' " (*People v. Soto, supra*, 51 Cal.4th at p. 243.) These considerations apply fully here.

In sum, defendant cannot successfully argue that there was insufficient evidence of duress to justify a verdict that he violated subdivision (b)(1) of section 288. Victim Three was a 10-year-old alone with defendant in his house and without any external source of aid or defense. Some or all jurors (*People v. Pitmon*, *supra*, 170 Cal.App.3d at p. 53) could act as rational triers of fact in finding that duress was present under the circumstances and the law stated in *People v. Soto*, *supra*, 51 Cal.4th at p. 243, *People v. Espinoza*, *supra*, 95 Cal.App.4th at pages 1319-1320, and *People v. Schulz*, *supra*, 2 Cal.App.4th at page 1005.

B. *Victim Two*

Defendant's contentions regarding force and duress are equally unavailing as regards his convictions for abusing Victim Two. With regard to force, he states that she "did not physically resist or try to get away . . . ." In addition, pulling down Victim Two's pants was "required to commit the lewd touching of making skin-to-skin contact

with her genital area" and thus did not contribute the additional force required for a forcible lewd or lascivious act conviction under subdivision (b) of section 288. However, that is incorrect. To perform defendant's self-gratifying acts involving Victim Two, he did not need to pull away her clothing; she could have removed it herself or been undressed in the first place. He had to overcome her resistance. With regard to duress, little need be said except that Victim Two was five or six years old, defendant was physically much larger and stronger than she, the two were alone, Victim Two had no means to summon help from a trusted nearby individual, and in one case Victim Two was in San Jose, hundreds of miles from her Chula Vista home. Some or all jurors (*People v. Pitmon*, *supra*, 170 Cal.App.3d at p. 53) could act as rational triers of fact in finding that duress was present under the circumstances and the law stated in *People v. Soto*, *supra*, 51 Cal.4th at p. 243, *People v. Espinoza*, *supra*, 95 Cal.App.4th at pages 1319-1320, and *People v. Schulz*, *supra*, 2 Cal.App.4th at page 1005.

II. *Severance of Charge Involving Victim One*

Defendant claims that the trial court abused its discretion under section 954 and violated his right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution when it denied his motion to sever the case Victim One from the charges involving the other victims.

We do not find an abuse of discretion or any violation of defendant's constitutional due process rights. We will describe and then examine the trial court's ruling, but first set forth applicable law so that the reader will understand the court's reasoning.

Both section 954 and California Supreme Court decisions in recent years have made it difficult to challenge a ruling of this type on appeal. The law was recently summarized in *People v. McKinnon* (2011) 52 Cal.4th 610, as follows:

"Section 954 governs joinder and severance, providing in pertinent part: 'An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are

filed in such cases in the same court, the court may order them to be consolidated . . . provided, that the court in which a case is triable, in the interest of justice and for good cause shown, may, in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately . . . .' When . . . the statutory requirements for joinder are satisfied, a defendant has the burden to clearly establish a potential of prejudice sufficient to warrant separate trials. [Citations.]

" '[T]he trial court's discretion under section 954 to deny severance is broader than its discretion to admit evidence of uncharged crimes under Evidence Code section 1101 . . .' because, in large part, a joint trial 'ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials.' [Citations.] 'Denial of a severance motion may be an abuse of discretion if the evidence related to the joined counts is not cross-admissible; if evidence relevant to some but not all of the counts is highly inflammatory; if a relatively weak case has been joined with a strong case so as to suggest a possible "spillover" effect that might affect the outcome; or one of the charges carries the death penalty.' [Citations.] . . . ". . . ' "While we have held that cross-admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice." ' [Citations.]" (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 630.)

At the time defendant filed his severance motion, the prosecution had filed its first information, which did not contain a charge that he showed harmful matter, i.e., obscene pornography, to Victim Three for purposes of seduction (§ 288.2, subd. (a)), and so defense counsel noted that the charges were of two types—those involving bodily contact and those involving photographic images—and argued that they should be severed accordingly; in the view of defense counsel they were not of the same class, nor were they connected in their commission, which is another factor to be considered under section 954. Counsel argued that the evidence in support of the counts involving photo

and video images was inflammatory vis-à-vis the rest of the case, particularly the images in which jurors could see defendant's penis penetrating the labia of 11-month-old Victim One. "It's just egregious," defense counsel stated of the pictures of Victim One being sexually abused.

As stated, the trial court denied the severance motion. It found that all charges were of the same class (§ 954) because they all alleged "sexual offenses involving young girls" and had common factual elements, both key elements such as the nature of the crimes and the victims' age and sex, but also such minor factors as the location of the crimes and the relatively recent time of their commission.

The trial court did not discern prejudice so great that the legal preference for a unitary trial should be disregarded. The evidence would be cross-admissible—as the court stated, "[i]t appears to the Court that there are witnesses and evidence that should be allowed to be used on the two group[s] of counts the defense wishes to sever . . . ." Victim Two and Three, of course, had told police similar accounts of being abused, including being shown pornography, and the court commented, "evidence of child pornography found on the defendant's computer should be admissible to support [their anticipated] testimony that the defendant showed the child pornography," the court commented. The court added that sexually oriented images of Victims Two and Three themselves would be cross-admissible, along with other child pornography defendant possessed, under Evidence Code section 1101, subdivision (b), to show intent, motive, or absence of mistake or accident.

In addition, defendant's face did not, as far as we can discern, appear in any of the lewd photographs of the victims whom defendant photographed. The prosecution was forced to use other evidence to present its case that defendant took the photographs. Victims Two and Three could be expected to testify when and where their molestations took place, but 11-month-old Victim One could not. In that respect, the Victim One case was less strong—to prove it, the prosecution had to rely on, for example, defendant's ex-

wife's identification of the penis in the Victim One pictures as possibly belonging to her ex-husband. (We recognize that defendant would disagree with our assessment—he maintains on appeal that the Victim One case was the strongest.) Thus the prosecution would have had reason to seek the testimony of Victims Two and Three following severance, not only in a prosecution for the crimes against them but also in the Victim One case prosecution. In addition, and as stated, the trial court was aware that the prosecution might legitimately seek to have the pictures of Victim One and defendant's penis introduced at trial on the charges involving Victims Two and Three to corroborate their testimony that it was defendant and not someone else who molested them in the same bedroom. (We recognize that defendant argues that identity was not at issue during the trial, but the court and the prosecution could not predict defense trial strategy and had to consider that identity could become a subject of contention at some point.) Beyond that, because Evidence Code section 1108 allows certain sexual propensity evidence when sexual offenses are charged, the Victim One photographs could have been introduced in the other trial even if the charges had been severed.[6]

The trial court also commented that no inflammatory evidence regarding less well supported counts would be unfairly bolstered by stronger evidence involving different incidents. "All of the counts involve disturbing conduct involving young girls," the court

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[6] Subdivision (a) of Evidence Code section 1108 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." The provision carves out an exception to the rule against admitting character evidence (*People v. Wilson* (2008) 44 Cal.4th 758, 797), and the California Supreme Court has found the provision to be constitutional (*id*. at pp. 796-797). Defendant argues in passing that some of the evidence here was substantially more prejudicial than probative and should have been excluded under Evidence Code section 352 even if admissible under Evidence Code section 1101, but, assuming that he has preserved this claim for review, we discern nothing in the record to justify his assertion.

observed. Also, Victim Two was named as a victim in each set of the counts defendant sought to sever and would have to testify twice, and she would not be alone, the court concluded: "a severance would require some of the victims to testify at both trials." Acknowledging the legal preference for joinder of counts in one trial, the court stated that "for judicial economy and the benefit of the defendant as well, it would be best to have one trial as opposed to two."

Defendant does not advance any persuasive reason to overturn the trial court's decision. There is little point to recasting and reframing the court's reasoning in detail—its reasoning is self-evidently persuasive based on the state of the law (e.g., *People v. McKinnon*, *supra*, 52 Cal.4th 610) and the posture of the case at the time defendant advanced the motion. Moreover, the court's wisdom in denying the motion became apparent in the record as the jury received evidence. The testimony that the victims provided, even Victim Four and Victim Five, who were older, was grueling and, even on the basis of the cold record before us, difficult to give. The crime against Victim One is of a shocking nature, but the crimes against other victims could hardly have affronted the jury much less. Victim Two, for example, was only five years old when defendant first molested her; when she was six years old defendant repeated his conduct and plied her with appalling images. Victim Three was not even a teenager when defendant did the same to her.

In his reply brief, defendant vigorously and voluminously takes issue with such conclusions—e.g., he argues that identity and intent were not at issue with regard to certain of the charged crimes and that the evidence involving Victim One was uniquely inflammatory. However, the standard of review is deferential (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 630). Defendant's arguments offer conceivable reasons for the court to have ruled differently, but not reasons for us to overturn its ruling. We have already noted that much of the evidence was shocking, not just that involving the crime against Victim One, and as for Evidence Code section 1101 considerations, the evidence

was cross-admissible as bearing on plan (*id*., § 1101, subd. (b)), even if defendant is correct that considerations of identity and intent were less significant. Except for Victim One, who was too young to testify, the girls' testimony was strong and compelling. Although we have noted that the evidence regarding Victim One was less strong than the evidence regarding the other girls' molestations, yet it was quite strong and compelling even without her testimony. We need not belabor the point.

Finally, we discern no violation of defendant's due process rights. " 'If the court's joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder " 'resulted in "gross unfairness" amounting to a denial of due process.' " ' " (*People v. Letner* (2010) 50 Cal.4th 99, 150.) Although defendant rests some of his contentions regarding due process on the notion that the evidence was weak with regard to the forcible nature of his molestations of Victims Two and Three, thus allowing weak evidence to infect the Victim One charge, we have already explained that the evidence of forcibility was not weak. The most obvious other argument is that the Victim One charge and evidence was so shocking that it would overwhelm the jurors' ability to assess defendant's guilt with regard to the Victims Two, Three, Four, and Five charges. We do not perceive this to be true, however. The evidence regarding all of the girls was, at a minimum, extremely disturbing.

In sum, defendant's severance claim is without merit.

III. *Instructing on Propensity and Intent*

Defendant claims that the trial court erred and violated his constitutional right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution when, over his objection, it instructed the jury that it could consider propensity evidence in deciding his guilt on certain counts.

At the prosecution's request, the trial court modified the CALCRIM No. 1191 pattern instruction and instructed the jury as follows:[7]

"The People presented evidence that the defendant committed the crimes of Lewd or Lascivious Act on a Child by Force or Fear; Lewd or Lascivious Act on a Child under 14 years; Lewd or Lascivious Act on a Child age 14 or 15 years; and Distributing or Exhibiting Harmful Matter to a Minor. These are crimes that are charged crimes in this case that are alleged in Counts 1, 2, 3, 4, 6, 7, 8, and 14.

"These crimes are defined for you in these instructions.

"If you decide that the defendant committed a charged offense listed above, you may, but are not required to conclude from that evidence that the defendant was disposed or inclined to have the requisite specific intent for the crimes charged in Counts 1, 2, 3, 4, 6, 7, 8, or 14, and based on that decision also conclude that the defendant was likely to and did have the requisite specific intent for other charged offenses alleged in Counts 1, 2, 3, 4, 6, 7, 8, or 14.

"If you conclude that the defendant committed a charged offense, listed above, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of other charged offenses alleged in Counts 1, 2, 3, 4, 6, 7, 8, or 14. The People must still prove each element of every charge beyond a reasonable doubt.

"Do not consider this evidence for any other purpose except for the limited purpose of determining the specific intent of the defendant as to Counts 1, 2, 3, 4, 6, 7, 8, and 14."[8]

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[7] We have removed certain brackets and parentheses from our quotation of the instruction, as these editorial marks are distracting and their presence could not have affected the jury's understanding of the instruction.

The instruction was modified to include the third paragraph, and it is the inclusion of that paragraph that defendant asserts could have led the jury astray to his detriment and in violation of his rights under state law and the federal constitutional guaranty to receive due process of law.

The trial court decided to give the foregoing version of the instruction after noting that we approved the modifying language in *People v. Wilson* (2008) 166 Cal.App.4th 1034, 1044-1053.

Defendant argues that *People v. Wilson*, *supra*, 166 Cal.App.4th 1034, is wrongly decided and that we should follow *People v. Quintanilla* (2005) 132 Cal.App.4th 572. The People argue the opposite: *Wilson* is correct and *Quintanilla* is in error.[9]

We adhere to our holding in *People v. Wilson*, *supra*, 166 Cal.App.4th 1034. Defendant offers no persuasive reason to do otherwise. Distilling the disagreement to its essence, the question is whether the propensity rule of Evidence Code section 1108 applies to charged crimes. We said in *Wilson*:

"We discern three reasons for permitting the jury to use evidence of charged sex offenses to show a propensity to commit another charged offense. First, the plain

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[8] We quote the written version of the instruction in this opinion. The trial court stated that it would give the jury copies of the written instructions for use during deliberations and the record offers no reason to doubt that it did so. In these circumstances (*People v. Wilson*, *supra*, 44 Cal.4th at p. 802) "[t]o the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control." (*Id*. at p. 803; accord, *id*. at p. 804.)

[9] The People also argue that defendant's "failure to request a limiting instruction bars him from claiming error . . . for the first time on appeal." However, even if that is so, we will elect to consider the claim on the merits as a matter of discretion. In most cases "an appellate court may review a forfeited claim—and '[w]hether or not it should do so is entrusted to its discretion.' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7; cf. *id.*, p. 888, fn. 7, 3d par. [appellate courts lack discretion to review otherwise forfeited claims regarding the admission or exclusion of evidence].)

wording of Evidence Code section 1108 does not limit its application to cases involving uncharged sex offenses. The statute provides that when a '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.' The statute does not distinguish between charged and uncharged offenses. Second, in cases such as this, involving multiple sexual offenses against multiple victims, permitting the jury to use propensity evidence in this way serves the legislative purpose behind section 1108. Third, the policy concerns or factors that [California Supreme Court authority] described as 'supporting the general rule against the admission of propensity evidence' are not implicated where multiple offenses are charged in the same case. [Citation.] The defendant does not face an 'unfair burden of defending against both the charged offense and the other uncharged offenses' or 'protracted "mini-trials" to determine the truth or falsity of the prior charge' or 'undue prejudice arising from the admission of the . . . other offenses' in cases such as this, since he is already required to defend against all of the charges. [Citation.] Thus, the reasons for excluding propensity evidence set forth in [those circumstances] do not apply to cases involving propensity evidence based on charged offenses. [¶] For these reasons, we are not persuaded that the court in *Quintanilla* was correct in precluding the use of charged offenses to show propensity." (*Id*. at p. 1052.) Defendant argues strenuously that this reasoning is incorrect, but as alluded to, he advances much the same arguments that *Wilson* rejected. He has preserved his claim for review in the California Supreme Court, but we reject it at this juncture.

IV. *Admitting Child Sexual Abuse Accommodation Syndrome Evidence*

Defendant claims that the trial court erred in admitting evidence of child sexual abuse accommodation syndrome, and by doing so violated his federal constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and their California constitutional equivalents, specifically rights to a fair

trial, to present a defense, to a trial free of improper reductions of the state's burden of proof, to a reliable guilt determination, and to an unbiased jury determination of his guilt. Child sexual abuse accommodation syndrome (CSAAS) evidence "is used to help understand a victim's behavior after abuse occurs. [¶] The CSAAS model has five components: (1) secrecy, (2) helplessness, (3) accommodation, (4) delayed disclosure, and (5) retraction. 'Secrecy' comes first because most child sexual abuse happens in secret. The longer the secret continues, 'the more the child feels like an accomplice rather than a victim. They start to feel more guilty. They start to feel blame. The more the child feels that, the more they'll keep the secret.' 'Helplessness' refers to the child's physical helplessness and inability to fight back. It also refers to the notion that children are raised to obey adults and, as a result may feel uncomfortable saying no to an abusive adult. 'Accommodation' is the notion that, if children feel helpless, they adapt in order to make the abuse more tolerable. For example, a child may pretend to be asleep during the abuse or pretend something is not actually happening. Many victims continue displaying affection toward their abuser, especially if he or she is a family member. 'Delayed disclosure' reflects the fact that most abuse victims do not immediately disclose the abuse and, when they do, reveal only small details to see if the person to whom the information is disclosed is supportive. If not, the victim will most likely shut down. 'Retraction' occurs when a child discloses the abuse and then, when familial support is lacking, takes 'back what they said in hopes of making the bad stuff that happened go away.' [¶] Feelings of helplessness, fear of upsetting one's parents, and being raised not to discuss sex combine to create circumstances making it unlikely a victim of sexual abuse will disclose the abuse. It is also common for abusers to try to make the victim complicit in the abuse by having the child do something forbidden like watching pornography, or driving a car. Disclosure of child abuse is rare and, when it does occur, is usually done in a disjointed fashion. Bits and pieces of information may be told at different times to different people, making it appear as though the victim is making conflicting disclosures.

Disclosure to family members is very rare, because children do not want to upset the family. Disclosure to the police is even rarer, even if the family knows about the abuse. . . . The younger a victim is when the abuse begins, the less likely it is that he or she will disclose it. . . ." (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 962.)

The trial court tentatively ruled that the evidence would be admitted, but wisely withheld a final decision "until all of the alleged victims have completed their testimony." Therefore, by the time the prosecution witness was allowed to describe the theory of CSAAS to the jury, the jury had heard (1) evidence that some of the girls delayed reporting defendant's abuse of them, and (2) Victim Two's inconsistent statements, i.e., her testimony in trial court that defendant fondled her external genitalia only once as opposed to her prior extrajudicial statements that he did so twice. The prosecution wished to present the CSAAS testimony to explain these aspects of the case.

The prosecution witness's eventual testimony covered *grosso modo* the themes described in *People v. Hernandez*, *supra*, 200 Cal.App.4th 953, although he did not parrot the example we have quoted above, giving evidence about the core tenets of child sexual abuse accommodation syndrome that varied to some extent in its particulars from the testimony given in *Hernandez*. The gravamen of the testimony was, however, the same. CSAAS, the witness summarized, attempts "to explain some unexpected behaviors or conditions that show up in these cases frequently that many people are unfamiliar with or might not expect," but "[i]t's not evidence of the presence or absence of molestation."

The People argue that defendant has forfeited this claim (Evid. Code, § 353) by failing to urge to the trial court the precise grounds for not admitting the evidence that he presents here. However, defense counsel argued that admitting CSAAS evidence would be irrelevant (*id*., §§ 210, 350), in part for want of a valid scientific basis, and substantially more prejudicial than probative (*id*., § 352). Counsel also argued that the prosecution witness on this subject was unqualified because he was not a psychologist or psychiatrist. Finally, counsel invoked the California Constitution generally and the

federal constitutional right to due process as bars to introducing the evidence. In making its final ruling allowing the testimony to proceed, the trial court stated that it was doing so over defendant's objection. We have proceeded to the merits of claims on far skimpier challenges than the one defense counsel made. The claim is preserved for review.

We have repeatedly rejected such claims on the merits, however, and do so again, i.e., "we discern no reason to depart from recent precedent, to wit: 'CSAAS cases involve expert testimony regarding the responses of a child molestation victim. Expert testimony on the common reactions of a child molestation victim is not admissible to prove the sex crime charged actually occurred. However, CSAAS testimony "is admissible to rehabilitate [the molestation victim's] credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation. [Citations.]" ' [Citations.] Moreover, it appears that our Supreme Court reached the same conclusion in *People v. Brown* (2004) 33 Cal.4th 892, 906, in which case we are bound by its reasoning. [Citation.] Here, we reiterate, the victim's testimony on direct examination was inconsistent with her prior statements in a way that tended to exculpate defendant. ' " 'Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior. . . .' [Citation.]" ' " (*People v. Perez* (2010) 182 Cal.App.4th 231, 245.)

To be sure, defendant presented no case-in-chief. Still, even if it cannot be said, at least not easily, that he suggested at some point on cross-examination " ' "that the child's conduct after the incident—e.g., a delay in reporting—[was] inconsistent with his or her testimony claiming molestation" ' " (*People v. Perez*, *supra*, 182 Cal.App.4th at p. 245), the evidence itself raised questions. In such circumstances, "the prosecution should be permitted to introduce properly limited [CSAAS] credibility evidence if the issue of a

specific misconception is suggested by the evidence." (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1745.) That is what occurred here.

Defendant acknowledges the existence of our recent *Perez* decision but argues that CSAAS is now not only a venerable theory but an antiquated one that has increasingly come under challenge. That may be. "Opinion testimony by experts has long generated controversy in both civil and criminal trials." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 390.) Expert testimony about psychology is no exception to that rule, and psychological theories invoked in criminal proceedings have been discredited in the past. The prosecution witness acknowledged on cross-examination that some literature claims that the theory of child sexual abuse accommodation syndrome "is not empirically-based, it is not a scientific instrument. There was no control group, for example." However, we remain bound by *People v. Brown*, *supra*, 33 Cal.4th 892. As with his claim of instructional error above, defendant has preserved his claim for further review.

Defendant also argues that CALCRIM No. 1193, which instructed the jury on CSAAS, is flawed. The trial court instructed the jury with CALCRIM No. 1193 as follows:

"You have heard testimony . . . regarding child sexual abuse accommodation syndrome. [The] testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [Victim Three, Victim Two, Victim Five, or Victim Four's] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of their testimony."

Defendant argues that " 'the jury must be instructed simply and directly that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true.' [*People v. Bowker*, *supra*, 203 Cal.App.3d at p. 394.] CALCRIM 1193 violates this rule. The instruction is internally inconsistent. It tells the jury on one hand, CSAAS evidence may only be used in deciding whether the victim's

conduct was not inconsistent with someone who has been molested; but on the other hand, they can also use the evidence to evaluate the believability of the victim's and propensity evidence witness's testimony. Using CSAAS evidence to 'evaluat[e] the believability of [the victims'] testimony' [CALCRIM No. 1193] is the same as using the evidence 'to determine whether the victim's molestation claim is true,' which is specifically prohibited by *Bowker.*"

CALCRIM No. 1193 informed the jury that the CSAAS evidence was to be used for the purpose of evaluating the victims' credibility in terms of whether the victims' behavior was consistent with comportment to be expected in light of the theory of CSAAS. The instruction did not tell the jury to believe the victims, or any of them, if their conduct was consistent with the theory. Rather, it cautioned the jury against presuming that the victims were unbelievable because they did not immediately report the abuse and/or testified inconsistently with prior extrajudicial statements about what happened. Nothing in the instruction informed the jury that it could presume defendant was guilty.

Moreover, if error occurred, it was harmless under any standard of review, whether under state law (*People v. Watson* (1956) 46 Cal.2d 818, 836) or the federal constitution (*Chapman v. California* (1967) 386 U.S. 18, 24). Review for prejudice under *Chapman*'s beyond-a-reasonable-doubt standard requires a determination whether any error was " 'unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citation.] . . . [T]he focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is 'whether the . . . verdict actually rendered in *this* trial was surely unattributable to the error.' " (*People v. Neal* (2003) 31 Cal.4th 63, 86.) In this case, the verdicts surely were not attributable to any error. As stated, except for Victim One, who was too young to testify, the girls' testimony was strong and compelling. The evidence regarding Victim One was strong and compelling without her testimony.

V. *Failure to Instruct on Lesser Included Offense*

Defendant claims that the trial court erred under state law and violated his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution by rejecting his request that the jury be instructed, with regard to the incident in which Victim One was the victim, on certain lesser included offenses.

The second amended information charged defendant with intercourse with a minor 10 years old or younger (§ 288.7, subd. (a)). That minor was Victim One, the 11-month-old. Defendant asked the trial court to instruct the jury on statutory rape (§ 261.5), a lewd or lascivious act on a child under age 14 (§ 288), or battery (§ 242) as lesser included offenses. The court declined to do so. On appeal, defendant argues that the court should have instructed on attempted intercourse with a minor 10 years old or younger and battery as lesser included offenses.

Defendant argues in support of this claim that "a trial court must instruct on any lesser offense necessarily included in the charged crime when the evidence raises a question as to whether all of the elements of the charged offense were present." That may be, but it is not as simple as defendant makes it sound. Otherwise, for example, a murder case would see the jury instructed on attempted murder and battery, and extraneously so, when attempt and battery were not at the core of the dispute. The law recognizes this, and our Supreme Court has held accordingly:

"A criminal defendant has a constitutional right to have the jury determine every material issue presented by the evidence, and an erroneous failure to instruct on a lesser included offense constitutes a denial of that right. To protect this right and the broader interest of safeguarding the jury's function of ascertaining the truth, a trial court must instruct on an . . . offense that is less serious than, and included in, a . . . greater offense . . . , whenever there is substantial evidence raising a question as to whether all of the elements of the charged greater offense are present." (*People v. Huggins* (2006) 38 Cal.4th 175, 215.) Thus, " ' "such instructions are required whenever evidence that the

defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]" ' that the lesser offense, but not the greater, was committed." ' [Citation.] The classic formulation of this rule is expressed in *People v. Webster* [1991] 54 Cal.3d 411, 443: 'When there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of a lesser included offense, the court must instruct upon the lesser included offense. . . .' " (*Ibid.*)

A lesser included offense exists when "all the statutory elements of the lesser offense are included within those of the greater offense. In other words, if a crime cannot be committed without also committing a lesser offense, the latter is a necessarily included offense." (*People v. Ramirez* (2009) 45 Cal.4th 980, 985.) We will assume for purposes of discussion that battery is a lesser included offense of intercourse with a minor 10 years old or younger. This assumption should be uncontroversial, inasmuch as battery is any "unlawful touching of the victim." (*People v. Rundle* (2008) 43 Cal.4th 76, 144, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) As for attempted intercourse with a minor 10 years old or younger, an "attempt is a lesser included offense of any completed crime." (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 609, fn. omitted.)

We review the trial court's determination independently. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) (We note that the court stated of defendant's request that "we discussed this informally" in a "discussion off the record," and the court's reasons for denying the request do not appear in the record at the point at which the court made these observations.)

In so doing, we discern no error, nor any violation of defendant's constitutional rights. To justify the instructions defendant mentions, there would have to have been substantial evidence from which a jury composed of reasonable persons could conclude

that the lesser offense, but not the greater, was committed. (*People v. Huggins*, *supra*, 38 Cal.4th at p. 215.) There was no substantial evidence here of a mere attempt that did not result in a completed violation of section 288.7, subdivision (a), nor of simple battery alone. Defendant argues that photographs of his penis in the vicinity of Victim One's external genitalia are open to interpretation and that the jury could have found no penetration, which is required, in howsoever slight a degree, for a completed act of unlawful intercourse. (§ 263.) However, " '[p]enetration of the external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not thereafter succeed in penetrating into the vagina.' " (*People v. Quintana* (2001) 89 Cal.App.4th 1362, 1366.) The San Jose police detective who was inspecting the digital images found on defendant's computer testified that "in a couple of them, there's a penis penetrating the labia of the baby." Defendant's claim, which rests on an assertion that the jury could have disagreed about the location of his penis but points to no evidence that only an attempt and not a complete crime occurred, accordingly fails.

VI. *Cumulative Error*

Defendant claims that his due process right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution was violated because of the cumulative effect of the trial court's errors.

A claim of cumulative error is in essence a due process claim and is often presented as such (see, e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 911). "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

" '[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.' [Citation.] The few errors that occurred during defendant's trial were harmless, whether considered individually or collectively. Defendant was entitled to a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) Here, we discern no errors at all,

with the minor reservation that if error occurred regarding the CALCRIM No. 1193 instruction, it was harmless under any standard of review. Thus, this case does not raise even the same concerns as *Cunningham*. Taking all of defendant's claims into account, we are satisfied that he received a fair trial and we deny his claim.

DISPOSITION

The judgment is affirmed.

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.

Trial Court:	Santa Clara County Superior Court No.: CC818769
Trial Judge:	The Honorable Arthur Bocanegra
Attorney for Defendant and Appellant Bruce Allen Rouse:	Heather J. MacKay under appointment by the Court of Appeal for Appellant
Attorneys for Plaintiff and Respondent The People:	Edmund G. Brown, Jr., Kamala D. Harris Attorney General Dane R. Gillette, Chief Assistant Attorney General Gerald A. Engler, Senior Assistant Attorney General Stan Helfman, Supervising Deputy Attorney General Mark S. Howell, Deputy Attorney General