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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH HYUNGSEOP SHIM, Defendant and Appellant.	B264605 (Los Angeles County Super. Ct. No. BA411385)
In re JOSEPH HYUNGSEOP SHIM, on Habeas Corpus.	B269737

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund W. Clarke, Jr., Judge. Affirmed.

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Petition denied.

Tara K. Hoveland and Fay Arfa for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Joseph Hyungseop Shim was charged by information with three counts of continuous sexual abuse of a child under the age of 14 (Pen. Code, § 288.5, subd. (a); counts 1, 4, 5),[1] and two counts of lewd and lascivious acts involving children aged 14 or 15 (§ 288, subd. (c)(1); counts 2 & 3) against his three minor daughters. The information also included special allegations that the crimes were committed against more than one victim, warranting a sentence of 25 years to life. (§ 667.61, subd. (e).) Defendant was convicted by jury of all counts, and the special allegations were found true. Defendant received three concurrent 25-year-to-life terms for counts 1, 4, and 5, and also received two concurrent two-year terms for counts 2 and 3.

Defendant makes numerous claims of error on appeal. Principally, he contends the trial court was biased against his trial counsel, evidenced by numerous "discourteous and disparaging remarks," favoritism toward the prosecution and its witnesses, and "interruptions, corrections and hostile comments" which deprived him of his right to confront and cross-examine witnesses. In addition, he claims: the prosecutor and the trial court committed misconduct by misstating the burden of proof; the evidence was insufficient to support all counts, because the daughters' testimony was implausible; the victim support people used by the daughters during their testimony improperly

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

influenced the jury with their facial expressions and conduct, and that the court's comments about the support people vouched for the daughters' credibility; the trial court erred by refusing to release the daughters' school and therapy records to defense counsel; the prosecutor committed misconduct by failing to timely disclose videos and transcripts of the lead officer's interviews with the daughters; his 25-year-to-life sentence is cruel and unusual; and, cumulative error requires reversal.

In his habeas petition, defendant contends the trial court erred when it failed to grant him a continuance or additional funds so that he could hire a memory expert.

Although we have concerns about several remarks by the trial judge, neither those concerns nor any other claim of error warrants reversal. Accordingly, we affirm the judgment and deny the habeas petition.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant is the father of daughters S.S., born in 1996, J.S., born in 1998, and P.S., born in 2001. Defendant and the girls' mother, V.C., divorced in 2007. Before the divorce, defendant never touched the girls sexually. However, he did hit the girls. After the divorce, the girls lived with their mother, and had visitation with defendant.

I. Inappropriate Touching

Between 2008 and 2012, S.S., J.S., and P.S. visited with defendant at his apartment nearly every weekend. Defendant would pick the girls up on Friday, and return them home to their mother on Sunday evenings. All three girls testified that he touched their breasts during the drive to his apartment. Usually, S.S. sat in the front seat, and therefore, she was touched the most frequently. This touching started when she was 11 or 12,

continued until she was 13, and occurred 3 or 4 times a month. When S.S. told defendant to stop, he told her that he was her father, and her body belonged to him so he was allowed to touch her.

J.S. sometimes sat in the front seat of defendant's car, and was also touched by defendant. J.S. testified that defendant touched her breasts once a month, over a period of 20 months. He touched her both over and under her clothing, starting when she was 11 or 12 years old. He also sometimes touched her breasts in his apartment. When J.S. told defendant to stop, he acted like it was a "joke" and told her "he could touch [her] whenever he wanted."

P.S. also testified that defendant touched her breasts in the car.

Defendant also touched the girls' buttocks. S.S. testified that defendant "grab[bed]" her buttocks three or four times a month between the ages of 11 and 12. This occurred mostly in his apartment, but also in the elevator and hallway.

J.S. testified that defendant slapped or grabbed her buttocks, starting when she was 11 years old. This happened once or twice a month.

P.S. testified that defendant would also "squeeze" her buttocks. This happened during every visit over a six-month period. She also saw defendant touch her sisters' buttocks.

Defendant also touched the girls' vaginas. The touching occurred in the bedroom the girls shared at defendant's apartment. S.S., J.S., and P.S. each testified similarly, that defendant would hold them down on the bed, with their legs dangling off of the bed. Defendant would stand at the edge of the bed, and place his foot on their vaginas, and would "shake" or rub

his foot on their vaginas. S.S. testified that defendant did this to her one time, and that she saw defendant do it to P.S. J.S. testified that defendant started touching her this way when she was 11, and that it happened once every three or four months until she turned 13. She saw defendant do it to her sisters. P.S. testified that defendant touched her this way more than once. It started when she was 10 or 11. She also saw defendant do it to both of her sisters.

Defendant also once tongue-kissed S.S. when she was 11 or 12, came into the bathroom when J.S. was showering, and touched P.S.'s vagina with his hand, both over and under her clothing. Defendant also hit the girls when he was angry, and around August 2012, dragged S.S. by her hair.

II. Disclosure

After the hair pulling incident, S.S. refused to see defendant. S.S. did not tell mother why she no longer wanted to visit with defendant. Mother noticed she was "upset" and had lost her appetite. Mother was also concerned because J.S. and P.S. appeared angry after visitation with defendant. Therefore, mother enrolled all three girls in counseling.

When S.S. began counseling, she told her counselor about the hair pulling incident, but did not initially discuss the sexual touching. With S.S.'s permission, the counselor reported the physical abuse to the Los Angeles County Department of Children and Family Services (Department), and when social workers interviewed S.S., she told them about the sexual abuse. After she reported the abuse to the social workers, mother took her to the police to make a report. Mother also contacted the Department and made a report.

S.S. initially told mother that defendant had only touched her breasts. However, after several months, she told mother more details about the touching. At the time S.S. first disclosed the sexual abuse to mother, neither J.S. nor P.S. had told mother that defendant touched them inappropriately.

At first, S.S. only told police that defendant touched her breasts. She "wasn't ready" to disclose the full extent of the abuse. She was also afraid defendant would get in trouble. Eventually, she told police about defendant touching her vagina and tongue-kissing her.

Prior to disclosing the abuse to social workers, S.S. had never discussed it with her sisters or her mother.

In 2012, after S.S. disclosed that defendant had sexually abused her, mother no longer allowed the girls to visit with defendant. She sought a temporary restraining order in the family court. The order was granted, and after that defendant did not see the children.

J.S. was "very angry" after she was first interviewed by social workers and discovered that S.S. had disclosed the abuse. She was upset because she could no longer visit with defendant, and because she had to meet with police and miss school.

When J.S. first spoke with police, she did not tell them what happened because she did not want defendant to get in trouble. However, she began to feel guilty for being untruthful with the police so she told her counselor the truth. When she later met with the police, she told them what happened.

P.S. did not tell mother about the touching until after S.S. disclosed the abuse. Mother took P.S. to make a report to police. P.S. initially did not share all the details of the abuse, but eventually told police everything because she felt it was

important to be truthful. She did not share everything at first because she was embarrassed. After the abuse was reported to police, P.S. did discuss it with S.S., but not with J.S.

Clinical Psychologist Jayme Jones testified about sexual abuse accommodation syndrome, explaining why abuse often stays a secret and why victims might delay disclosure, disclose in bits and pieces, and even recant their allegations of abuse. He explained that it is also not unusual for a victim to express feelings of affection for an abuser.

III. Investigation

Los Angeles Police Officer Mauricio Moisa was assigned to investigate the allegations in this case. He first interviewed S.S. on August 22, 2012, and the interview was recorded. S.S. initially disclosed that defendant had touched her breast over and under her clothing while driving in the car, and that defendant had tongue-kissed her. She appeared very concerned about getting defendant in trouble, but wanted to protect her sisters, and wanted the touching to stop.

Officer Moisa interviewed J.S. and P.S. the following day. P.S. admitted to seeing defendant touch S.S.'s breasts. P.S. also admitted to seeing defendant touch J.S.'s breast in the car, and that defendant had touched her own breasts in the elevator at his apartment. She did not disclose any other inappropriate touching during this interview.

J.S. appeared upset when Officer Moisa interviewed her, and did not disclose any abuse during the August 23 interview.

The next morning, Officer Moisa received a voicemail from mother indicating that J.S. had disclosed to her that she was not truthful during her interview. On August 24, 2012, Officer Moisa interviewed J.S. She admitted she had not been truthful because

she loved defendant and did not want him to get in trouble. She admitted to seeing defendant touch both S.S.'s and P.S.'s breasts, and that he had touched her breasts. She did not disclose any additional touching during this interview.

In a later interview of P.S., P.S. offered more details about the abuse, indicating that defendant had touched her vagina with his hand and massaged her vagina with his foot. When Officer Moisa re-interviewed S.S., she disclosed that defendant would throw her on the bed and place his foot on her vagina. J.S. also disclosed that defendant would pin her to the bed and touch her vagina with his foot. No additional touching was disclosed.

IV. Defense Case

Department social worker Mike Oh testified that he investigated a referral for the family in August 2011 based on an incident where defendant's new wife intentionally stepped on S.S.'s foot. S.S. reported that her mother threatened her and was upset with her every time she visited defendant, and that mother was upset that defendant was not paying child support. S.S. told Mr. Oh that she would rather live with defendant. Neither younger sibling disclosed any problems with either parent.

Social worker Steven Song testified that he investigated a referral for the family in the summer of 2012 based on the hair pulling incident. When he interviewed S.S., she only disclosed that defendant had pulled her hair. Both younger sisters denied any abuse. When mother was interviewed, she did not suspect any abuse of the younger daughters.

During cross-examination, Mr. Song testified that the Department received another referral sometime after July 2012, and S.S. disclosed to Mr. Song that defendant had touched her

"boob." S.S. was worried that defendant would touch her sisters. P.S. also disclosed that defendant touched her breasts.

Casey Lee testified that she was co-ministers with defendant at a church in 2007 and 2008. Defendant left the church and formed his own church in 2010. Lee later joined defendant's church. Lee's children were very close to defendant's daughters. Lee never witnessed any abuse or improper touching by defendant.

Tiffany Park (also known as Jung Hee) testified that she married defendant in 2010. She never saw defendant throw the girls on the bed, or touch their breasts in the car. The girls' bedroom door was always open.

Clinical and forensic psychologist David Thompson testified. He formerly worked as the interim director of the Walworth County Department of Health and Human Services in Wisconsin. One of his responsibilities was to supervise the child welfare office which was in charge of investigating child abuse. He ensured that social workers were trained to conduct interviews correctly. Generally, child forensic interviews should be recorded so that the interview techniques can be properly evaluated because the way the interviewer asks questions can affect responses and the recollections of the child. Questions should initially be broad and open-ended, and not provide the child with any new information so that their answers do not become tainted. Leading questions should be avoided. The questions may become more focused as the interview progresses, related to the responses that the child has already given.

Children can report things that did not happen. Also, children are prone to source monitoring error, where they can recall an event, but cannot recall their source of information

about the event (e.g., whether they personally had an experience or whether someone told them about an experience). Also, if a child is exposed to negative comments about a person, it can affect the child's statements. Parental coaching can also affect a child's memory. So can tension between the parents, and sibling interactions. Repeated interviews, if the interviews are not done correctly, can reinforce and solidify untrue memories.

DISCUSSION

I. Judicial Bias and Misconduct

Defendant complains of a number of instances of judicial bias and misconduct aimed at his trial counsel, Fay Arfa (who also represents defendant on appeal). Specifically, he complains that the trial court: (1) told counsel that she was not the right lawyer for the case; (2) made "explosive" remarks during voir dire; (3) "constantly disparaged" defense counsel; (4) aligned itself with the prosecution; (5) "vouched" for victims J.S. and P.S.; (6) told the jury that sex crimes might not require physical findings or medical evidence; (7) accused defense counsel of misconduct and constantly interrupted her; (8) asked defense witnesses pro-prosecution questions; and (9) tried to remove trial counsel when defendant moved for a new trial. Defendant contends that the misconduct had the consequence of depriving him of his right to counsel, due process, and a fair trial.

Respondent contends that defendant never objected on the basis that the court was biased or had engaged in misconduct. Defendant arguably concedes this point, contending in his reply brief that any objection would have been futile, or that his trial counsel rendered ineffective assistance by failing to object.

However, our examination of the record shows that even though counsel did not utter the magic words "I object," on at

least two occasions she made it clear to the court that she believed the court was biased against her. During a February 18, 2015 pretrial hearing, counsel complained that the court had disparaged her in front of defendant and his family. During voir dire on March 17, 2015, counsel told the court that its comments had caused the jury to lose all respect for her and questioned whether the court could be fair to her.[2]

We will address defendant's contentions on the merits, to the extent we can, in part because we believe some attempts at objection were made, but primarily to resolve defendant's claim that his trial counsel rendered ineffective assistance by not further objecting. (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 466-467 [in order to demonstrate ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, *and* that he was prejudiced

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[2] We also note that during trial, defendant filed a document captioned "Scheduling Issues/Jury Issue" in which she explained the availability of defense witnesses, and also stated, "Trial judges ' "should be exceedingly discreet in what they say and do in the presence of the jury lest they seem to lean toward or lend their influence to one side or the other." [Citation.]' (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237-1238.)" Out of the presence of the jury, the court asked counsel why it was necessary to tell the court to be discreet. Counsel responded that she believed the court was "picking on [her] in front of the jury." When asked for examples, the only example counsel provided was that the court was critical of her questioning style. The court explained that her questioning style made it hard for the jury to understand the evidence, and for the child witnesses to understand what was being asked of them. When queried, counsel failed to provide any further examples.

by counsel's performance]; see also *People v. Farley* (2009) 46 Cal.4th 1053, 1110; *People v. Samuels* (2005) 36 Cal.4th 96, 114.)

Although we accept that defendant did not forfeit some of his arguments, we find problematic defendant's selective summarization of the record, generally only citing the objectionable comments by the trial court without providing any context for the comments, or only providing string citations to the record without *any* discussion of the court's purportedly objectionable comments. An appellant's brief is required to contain all "significant facts" (Cal. Rules of Court, rule 8.204(a)(2)(C)), and the failure to fairly characterize the proceedings in an appellant's brief waives any alleged error. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 737-738.) Further, defendant's briefs generally fail to provide any targeted analysis for *why* the court's comments were improper. (Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Stanley* (1995) 10 Cal.4th 764, 793 [a brief must contain reasoned argument and legal authority to support its contentions or the court may treat the claim as waived]; *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)[3]

Where no adequate discussion of the relevant facts or reasoned analysis appears in defendant's briefs, we decline to

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[3] For this reason, we decline to reach defendant's general claim that the court "aligned itself with the prosecution," as defendant did not cite a single example in his brief under this subheading. Rather, a string of citations to the record, with no discussion whatsoever, has been provided.

reach the merits of any claimed error. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881.)

II. Legal Standards

" 'A fair trial in a fair tribunal is a basic requirement of due process,' " and " 'the Due Process Clause guarantees a criminal defendant the right to a fair and impartial judge.' " (*People v. Freeman* (2010) 47 Cal.4th 993, 1000.) Trial judges should be " 'discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.' [Citation.]" (*People v. Burnett* (1993) 12 Cal.App.4th 469, 475.) A trial judge has the duty to be impartial, courteous, patient, and dignified. (*Ibid.*)

"Although the trial court has both the duty and the discretion to control the conduct of the trial . . . , the court 'commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution'. . . . Nevertheless, '[i]t is well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior.' " (*People v. Snow* (2003) 30 Cal.4th 43, 78 (*Snow*), citations omitted.) "Mere expressions of opinion by a trial judge based on actual observation of the witnesses and evidence in the courtroom do not demonstrate a bias. [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111.) A trial court's rulings against a party, even if erroneous, do not establish a charge of judicial bias. (*Id.* at p. 1112.)

On appeal, " '[o]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether

some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.' [Citation.]" (*Snow*, *supra*, 30 Cal.4th at p. 78; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1112.)

III. Analysis

Defendant has complained of numerous instances of judicial misconduct. We have examined the entire record, consisting of over seven volumes of reporter's transcripts and over four volumes of clerk's transcripts, spanning nearly two years of proceedings, and, although we are troubled by several of the court's remarks, we can find none that cross the line of judicial bias or misconduct.[4] In most instances, the court merely made stern or disapproving comments to defense counsel. A fair reading of the record shows that the trial court was doing its best to control the proceedings in the face of a difficult and sometimes emotional defense counsel.[5] We also observe the court sometimes

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[4] We discuss these in part I of this discussion.

[5] As part of our analysis, we will set forth several incidents involving defense counsel that appear to have exasperated the trial court. Other examples of defense counsel's conduct include the following: At a hearing on the prosecution's motion to quash defense counsel's subpoenas of the victims' diaries, the court complimented defense counsel's points and authorities but expressed concern that the requested discovery was too broad and invaded the victims' privacy. Defense counsel noticeably rolled her eyes and gestured at the court.

After asking for a continuance and obtaining the trial court's assistance in determining whether there were records concerning the daughters in the possession of the juvenile court

rebuked the prosecutor, and many of the comments about which defendant complains were made outside of the presence of the jury.

Where the defendant has identified specific instances of misconduct, we examine them below.

A. Trial court told counsel that she was not the right lawyer for the case

Defendant contends the trial court disparaged defense counsel, out of the presence of the jury, when the court told counsel "[i]f I have to tell you what a pretrial date is for, I am concerned about whether you're the right lawyer for the case."

This statement was made on February 18, 2015, after protracted discussions concerning defendant's readiness to go to trial. After the court indicated that the case would be going to trial in early March, and would not be continued further, the court asked defendant for a "date next week you want to come back." The context of the exchange made completely clear that the parties were returning for a *pretrial conference*.

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or the Department, defense counsel waited more than a month before contacting the Department to obtain the records.

Defense counsel requested continuances at the next two pretrial hearings. At one, when the court explained why it was denying the request, defense counsel rudely gestured by "gaz[ing] skyward and rais[ing] her hands to the side as if calling on some higher power."

While cross-examining the victims' mother, defense counsel raised for the first time the notion that the case against defendant was time-barred. When the court asked whether the issue should have been raised earlier, defense counsel responded "I don't know."

Nevertheless, defense counsel asked "What is the next date for? Is it going to go to [Department] 100? Is it going to be here? I'm not ready. . . . I am objecting to the court's ordering me to trial at this point."

We can discern nothing inappropriate about the court's comment. The court was simply remarking on counsel's lack of attention, and expressing disapproval for counsel's unwillingness to accept that the case was proceeding to trial.

B. Trial court made "explosive" remarks during voir dire

Defendant contends that the trial court "explode[d]" during voir dire, when the court cautioned defense counsel to not ask prospective jurors to "explain their marriages, their divorces, their children," and then rebuked counsel when she persisted and continued to ask the prospective jurors for "intensely personal information."[6]

Despite the court's repeated warnings, counsel persisted in her attempts to ask the prospective jurors about divorces and custody issues. When counsel again failed to heed the court's warning and asked "Is there anything--you know, I've been asking these questions and the judge has been admonishing me. Is there anything . . . ," the court rebuked counsel, and stated that her remark was "inappropriate." Apparently flustered, defense counsel asked for a break, stating that she needed to leave the room. The court allowed her to take a break.

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[6] Defendant's theory of the case was that mother manipulated the daughters to falsely accuse defendant of molestation to help mother in her custody dispute with defendant.

When the proceedings reconvened, the court told defense counsel that she could continue her voir dire. Defense counsel indicated that she was "too upset" to continue. Later, outside the presence of the jury, defense counsel expressed her concern that the panel had "lost all respect for [her]" based on the court's "harsh" comments, and that the court should direct critical comments to her at sidebar instead of in the presence of the jury. The court explained its view that counsel "seemed to have a level of sensitivity . . . to virtually anything that comes from the bench" and that as an attorney, counsel should "learn to deal with it." The court also explained that it could not efficiently address every issue that came up at sidebar.

The record makes clear that defendant persisted with voir dire questioning that the trial court deemed inappropriate, and that counsel then went so far as to improperly accuse the trial court of "admonishing her," when the court was simply directing the scope of voir dire after counsel's repeated violation of the court's orders. (*People v. Williams* (2006) 40 Cal.4th 287, 307 ["The trial court has considerable discretion in determining the scope of voir dire."]; *People v. Chong* (1999) 76 Cal.App.4th 232, 243-244 [an attorney may be reprimanded when the attorney fails to maintain a respectful attitude toward the court and ignores the court's directives].)[7]

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[7] Defendant does not raise on appeal the separate point that it was error to preclude defendant's inquiry into the details of the jurors' marital dissolution matters. That, of course, would be the vehicle to assert error, not to ignore the court's ruling or argue the point in front of the jury.

C. Trial court "constantly disparaged" trial counsel

Defendant cites to numerous comments by the court that defendant characterizes as disparaging or disrespectful. First, defendant complains that the court accused defense counsel of being "wrong" and "wasting time."[8] These comments arose during an exchange about whether the prosecutor and the court had correctly instructed the jury about the presumption of

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[8] During the jury selection process, the prosecutor commented about the presumption of innocence. Defendant objected that the prosecutor was "preinstructing the jury," however the objection was overruled.

Following these comments, the trial court explained the presumption of innocence and the reasonable doubt standard to the jury.

Outside of the presence of the prospective jurors, defense counsel expressed that she was "very concerned" about the prosecutor's comments about the presumption of innocence. The court asked whether counsel had heard its comments about the presumption of innocence, and defense counsel stated that "I don't think the court, in my mind, addressed what the instruction actually says." When the court asked what was wrong with its instruction, counsel indicated "I don't remember, but it wasn't what the jury instruction said." The court expressed its view that counsel was "wrong" and that it had correctly instructed the jury. The court explained that when the time came, it would instruct the jury with CALCRIM instructions. However, counsel persisted that the court did not properly instruct the jury, and attempted to describe for the record what had been said. The court expressed its view that it was a "waste of time" for counsel to attempt to describe what had occurred in the courtroom when the reporter was making an accurate record of the proceedings.

innocence, where defense counsel labored to describe what had been said by the prosecutor and the court. The court's comments hardly disparaged counsel. Rather, the court was merely explaining that counsel was misrepresenting the record, and that her objections were noted but further discussion on the topic was not an efficient use of time as the reporter's notes accurately recorded what was actually said.

Second, defendant contends that the court made comments that conveyed that the jury "needed to [be] protect[ed]" by the court, when the court explained to the jury that it was the court's role to direct the proper scope of voir dire "to protect you if I feel you should be protected from questions that are maybe a little more invasive, or whatever you might want to call it, than what I think. Doesn't mean I'm saying lawyers are doing something wrong. They're advocating for their clients. [¶] . . . Don't hold anything I do against Mr. Shim, or against his lawyer, or against Mr. Mueller."

We find nothing wrong with the court's comments. The court was merely explaining its role in controlling voir dire, and expressly admonished the jury that it should not hold its comments against defendant or his attorney.

Lastly, defendant complains that the court accused counsel of being "passive aggressive" and "inconsiderate to the jurors,

disrespectful to the court."[9] Defendant has mischaracterized the record. These comments arose after counsel was dilatory and

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[9] During defendant's cross-examination of S.S., it was nearly time to take a recess. Defense counsel indicated that she had a new subject she wanted explore, and asked the court whether she should start the new subject. The court indicated that they would take their recess in 10 minutes, but that counsel should begin her new line of questioning. When questioning resumed, counsel persisted with the old line of questioning. After several minutes, the court asked "are you not going to the new subject just to show me you can run out the clock?" Counsel responded, "No. I'd rather just stay on this subject if I could." The court indicated that it would take its recess, and asked counsel if she would be ready to proceed to the next subject of her inquiry when court reconvened. Counsel indicated that she would.

Outside of the presence of the jury, the court asked why counsel had not proceeded to the new subject. Counsel explained there were only 10 minutes left. The court responded, "When I told you I wanted you to use the time we had, you decided to do what I think was a passive aggressive stunt, not go to the new subject, simply stay in the old one, which I think is inconsiderate to the jurors and disrespectful to the court." Counsel explained that she was "very tired." The court indicated that she should have asked for a break instead of "game playing" and using delay tactics.

When the proceedings resumed the following day, and both the prosecutor and defense counsel raised evidentiary issues for the court to address, the court explained that the jury was waiting and asked both defendant and the prosecutor why these issues had not been raised at another time. "Why are you so wasteful, both of you, with juror time? . . . [¶] . . . If it happens anymore, I'll just tell them why they're waiting and I'll tell them that you've had years to do this, so they can direct their resentment to the correct people."

wasted considerable time during cross-examination, after being warned by the court to use her time effectively. Moreover, *both* defense counsel and the prosecutor were warned about wasting time. We find no misconduct. It is clear that the court was attempting to manage the proceedings, and to ensure that both attorneys were effectively using their time.

D. Trial court "vouched" for J.S. and P.S.

Defendant complains that the court "vouched" for the minor victims, J.S. and P.S. Specifically, defendant complains that the court instructed J.S. that she did not have to identify defendant in court if it made her "uncomfortable"; instructed the jury that because J.S. was a minor the court was "required to protect a minor from . . . questioning"; and that the court implied that defense counsel wanted to prevent J.S. from attending a preplanned trip by continuing her questioning of J.S.[10]

Later, during defendant's continued cross-examination of S.S., defense counsel noticeably paused for some time, seemingly to find or formulate her next question for S.S. The court asked, "Do you have questions prepared. It seems that you're going through your laptop, spending some time, and then asking questions as you find things. It's not a prohibitive practice, but it's very time consuming. [¶] I would think you can just ask the things you want to know without scrolling through however much you have on that laptop." Counsel continued her questioning, but had some difficulty formulating a question, repeatedly trying to rephrase it. The court intervened, "Why don't you back up. Think of one good question. You need to make it clear to her whether you're asking of the time of the telling, the time of the events that she's describing, or something else."

[10] The court's comments concerning the court's duty to protect minor witnesses occurred after defense counsel had extensively

As to P.S., defendant contends that the court impermissibly implied that P.S. was not comfortable talking about the molestation, told her she could take "all the time [she] need[s]" to respond to questioning, and improperly implied that P.S. was "relieved" after providing her testimony.[11]

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cross-examined J.S., and indicated that she needed an additional one or one and one-half hours to continue the cross-examination. The court explained that it expected counsel to more efficiently cross-examine J.S. As to the comments concerning J.S.'s trip, J.S. had concluded her testimony, and both the prosecutor and defendant indicated they had no further questions for her. However, defense counsel wanted J.S. to be "subject to recall." The court indicated its intention to excuse J.S., and asked, "Do you want to ask more questions now? You know she's not around next week, don't you? You want me to order her not to go wherever she's planning to go next week? Is that what we're doing here?" Defense counsel asked if the discussion could continue outside the presence of the jury, and the court responded no. Defense counsel indicated that she wanted the court to order J.S. to stay in town, and the court denied the request.

[11] During redirect examination of P.S., the prosecutor asked P.S. how she felt after opening up and talking about the touching. P.S. said she felt "relieved." During recross-examination, defendant asked a series of questions asking P.S. to explain why she was relieved. The questions culminated in "[d]oes it make you feel better that you've accused your father of being a child molester?" The prosecutor objected that the question was improper and argumentative. P.S. started to cry. The court indicated that the question "crosses the line," reasoning that "[P.S.] feels relieved. Would not anyone feel relieved who's been on the stand this long . . . ." The court then asked P.S. if she needed a break, and told her she could take her time.

Defendant has again mischaracterized the record, and we can discern nothing improper about the court's comments. Evidence Code section 765 provides that "[t]he court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment." (*Id.*, subd. (a).) Moreover, this section provides that "[w]ith a witness under the age of 14 . . . the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to ensure that questions are stated in a form which is appropriate to the age or cognitive level of the witness . . . ." (*Id.*, subd. (b).) Both J.S. and P.S. were minors at the time of their testimony. P.S. was only 13. A trial court enjoys broad discretion under section 765 to control proceedings and protect witnesses from harassment. (*People v. Spence* (2012) 212 Cal.App.4th 478, 513-514 (*Spence*).) We can hardly view the court's comments as improper "vouching" or evidence that the court had aligned itself with the prosecution. (*People v. Harris* (2005) 37 Cal.4th 310, 347.)

E. Trial court's comments about physical evidence

Defendant contends the trial court made inappropriate comments that physical findings may not be necessary in a sex crime case. During jury selection, the prosecutor asked one prospective juror, a medical doctor, whether he would "always expect to see medical evidence in a sexual assault case?" The prospective juror responded that he would always expect such evidence. The court explained that the case did not involve allegations of intercourse, or the exchange of bodily fluids. "I

trust that you all understand that there are forms of sexual crime that don't necessarily involve that. There can be things like that, that wouldn't involve fluid exchange, and might not even leave anything that could be detected even minutes later. [¶] . . . [¶] . . . I don't want you to think . . . that there necessarily is scientific, physical evidence. It might just be testimony in some cases."

We can discern nothing improper about the trial court's statements. It is well settled that physical evidence is not required to support a conviction, and that the testimony of just one witness is enough to convict. (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1259; see also *People v. Gammage* (1992) 2 Cal.4th 693, 700-701.)

F. Trial court accused defense counsel of misconduct and interrupted defense counsel

Defendant contends the trial court accused counsel of misconduct and "constantly" interrupted her. As examples defendant cites to six comments by the court, which were made in the presence of the jury, including the court's comments that counsel was "stealing my staff's lunch hour" after she indicated that she wanted to conduct redirect examination of defense witness Steven Song. Also, the court advised counsel to not have "secret conversations at the witness stand" as counsel and witness Song were discussing a document that counsel presented to refresh Mr. Song's recollection. Defendant also points to the court's comments aimed at helping counsel focus her questioning, asking her to clarify her objections, and inquiring about the relevance of a line of inquiry. We are not persuaded that any of the comments were inappropriate, and find that they were in the proper scope of the court's obligation to control the proceedings.

G. Trial court asked defense witnesses pro-prosecution questions

Defendant argues that the trial court asked an impermissible "pro-prosecution" question of the defense expert, Dr. Thompson. During cross-examination, the prosecutor asked Dr. Thompson if a child who was repeatedly assaulted may be less likely to recall the specific details of what occurred than a child who was assaulted only once. Dr. Thompson responded that it was "possible" and depended on the age of the child. He later qualified his answer, urging that a witness's ability to recall an assault depended on how the victim was asked about the assaults. After the prosecutor completed his questioning, and defense counsel indicated that she had no further questions, the court asked the expert: "So long as the proper interview techniques are used, then they're going to do a better job of distinguishing details of one event from another. But the more you stray from those good techniques, the greater the chance is that they'll mix up incident three and incident five."

The court was well within its discretion to ask questions to clarify the expert's testimony, as was done here. (*People v. Cook* (2006) 39 Cal.4th 566, 597.) There was nothing pro-prosecution about the question. The question merely sought clarification about the matters to which the expert had testified.

H. Trial court tried to remove trial counsel when defendant moved for a new trial

Following the jury's verdict, and before the sentencing hearing, defendant moved for a new trial, and to reduce defendant's sentence, reasoning that a life sentence in this case would constitute cruel and unusual punishment. In support of the motion to reduce defendant's sentence, defendant submitted

an unsigned letter to the court, in which he claimed that he "was not fully represented at trial." Specifically, he contended that his attorney only visited him twice in jail, for a total of 30 minutes. He felt he never had an opportunity to discuss the case with his attorney. He also complained that his attorney did not leverage evidence well, did not ask proper questions of the witnesses, did not communicate with defendant about the prosecutor's offer to settle the case, and that counsel did not allow him to testify.

Based on defendant's letter, the court issued an order to show cause (OSC) why defendant should not relieve his attorney and retain new counsel, or that defendant should "show cause why he should not be required to waive all conflicts as to his current attorney as the case goes forward and to waive any disability he might claim to suffer from continuing with representation by the same attorney about which his 'letter' complains." The OSC indicated that defendant's letter evidenced a breakdown in the attorney-client relationship and that a conflict had arisen due to counsel overcoming defendant's will to testify and not communicating with him about settlement of the case.

At the hearing on the OSC, counsel indicated that she did not believe a conflict existed, and, in any event, that defendant intended to waive any conflict. The court questioned defendant about each of the accusations made against his attorney, and defendant agreed that he did not need a new attorney. The court advised defendant that he could seek a second opinion regarding the adequacy of counsel's representation. Defendant stated that he did not want to consult another attorney.

Defendant contends that defendant's letter did not evidence a conflict, and that the court's OSC was an "unprecedented

attempt to retaliate against [counsel] for filing a motion for new trial . . . ." Nothing about the court's conduct indicates bias. Instead, the court was responding to accusations by defendant that his counsel had interfered with this right to testify and had not adequately discussed the case with him. The court could have reasonably construed the letter as a request for a new attorney, or at least that it had a duty to explore the conduct complained of. (*People v. Smith* (1993) 6 Cal.4th 684, 695-696.)

I. Questionable trial court comments

Although we have determined that the trial court's statement during the February 18, 2015 pretrial hearing, that counsel might not be the right lawyer for the case, was merely a disapproval of counsel's actions, other statements at that hearing do concern us. When the trial court asked about setting the next pretrial hearing "before the eight of ten date," defense counsel said, "It's zero of 15, I believe. Today." The court replied: "Are you here to teach me math?" Counsel replied, "No, I want --" but the court cut her off, stating: "You shouldn't interrupt me if all you're doing is pointing out the obvious. We are zero of 15. I said that [earlier]."

This statement verges on the sarcastic, a tone judicial officers should avoid.[12]

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[12] Another example not raised by the defendant involved a hearing to set a pretrial hearing date. Defense counsel said she was unavailable on two dates because she was "attending a special conference that I got special dispensation." The trial court said, "I've heard two specials in there. That makes it very special. But you have a case that's set for trial. I'm sure you put that on your calendar when you accepted the trial date that I set. That you would have warned me if you had not only a special conference, but a special special conference." Our review of the

We have also discussed the events during voir dire on March 17, 2015, and concluded that the trial court did not commit misconduct or show bias when it tried to stop defense counsel from questioning prospective jurors about the details of their divorces and custody disputes.

However, when defense counsel complained in front of the jury that the court had caused the jury to lose respect for her, the trial court said it "had enough of your background and history. I know of it from other sources. I've seen you enough. You can save that. I know how you act. I don't intend to put up with it." When defense counsel asked what the court meant, it said, "Overly dramatic is one. You've got your hands raised up in the air, now, like to signal something to me. You walked out of the courtroom, unable to continue during jury selection. Which I must say in my decades of experience I've never seen . . . ." We understand that the court was faced with an apparently difficult lawyer, but two portions of this trouble us. First, it took place in front of the jury. Second, the trial court appears to have indicated a preexisting prejudice against defense counsel based on what it knew of her "from other sources."

Another exchange between the court and counsel is concerning. During voir dire on March 18, 2015, defense counsel asked prospective jurors whether they were aware defendant was a pastor. The trial court stopped her, calling any such questioning improper. It then told the jury that a person's

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record leads us to include it because it puts in context the level of acrimony between court and counsel.

religious affiliation or status "has no meaning in the criminal courts at all. [¶] Sorry to say, in my own faith many clerics have not only sinned, but committed criminal acts. So the fact someone is clergy, that's not a defense to anything." Setting aside whether the court was correct in limiting voir dire (and we can see potential religious bias as a proper area of inquiry on voir dire), in this case the trial court's example was particularly ill-chosen in a case where a clergy member was on trial for sexual abuse.

We note, however, that the voir dire limitation issue was waived because defense counsel did not accept the trial court's invitation to brief the issue for its reconsideration.

In conclusion, the court appears to have been presented with counsel who was intentionally delaying the trial and had sometimes engaged in emotional displays. As trying as this may be, a better practice is for the court's rebukes to be made outside the presence of the jury. At the end of the day, however, we believe these comments fall into the better left unsaid category and do not amount to judicial bias.

IV. Trial Court's Limitation of Cross-examination

Defendant contends that the trial court's "corrections and hostile comments" deprived him "of his constitutional right to counsel and to confront and cross-examine witnesses." Specifically, defendant complains that the court erroneously required counsel to use "interrogatories" when questioning witnesses; that the court used an "anti-Israeli" slur to teach cross-examination; that the trial court erroneously instructed the jury to disregard counsel's questions "to which the answer does not give meaning"; that the trial court constantly criticized or interrupted defense counsel; that the trial court refused to allow

defendant to recross-examine Officer Moisa; that the trial court refused to allow defense counsel to question mother about a declaration she signed; that the court criticized defense counsel; that the trial court aligned with the prosecution concerning S.S.'s "stolen car incident"; that the court aligned with the prosecution when it instructed S.S. how to refresh her recollection; that the court aligned with the prosecution concerning counsel's cross-examination of mother, and by preventing counsel from impeaching mother with a declaration she had signed; and that the court demonstrated pro-prosecution bias by not requiring the prosecutor to use interrogatories and by not correcting the prosecutor when he used compound questions.

A criminal defendant has the right to a reasonable opportunity to effectively cross-examine the witnesses against him. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) " ' "However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, unless the defendant can show that the prohibited cross-examination would have produced 'a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]' [Citation.]" (*People v. Virgil* (2011) 51 Cal.4th 1210, 1251.)

As with many of counsel's argument concerning judicial bias and misconduct, counsel has again failed to adequately support her claims of error by fairly summarizing the facts, or

providing any reasoned analysis of why the court's conduct was improper. And, many of the arguments made here overlap with the claims made in the first part of defendant's brief, and involve the same conduct by the trial court. As we explained above, we have reviewed the entire record, and are not persuaded that the court was discourteous or inappropriate with defense counsel. Therefore, we will only address those claims which were not raised before, and which may implicate defendant's right to cross-examine witnesses.

A. Use of interrogatories, anti-Israeli slur, and instructions

Defendant contends the court improperly required defense counsel to use interrogatory questions during her examination of witnesses, used an improper example to teach cross-examination, and improperly instructed the jury to disregard counsel's questions.

During defendant's cross-examination of J.S., J.S. was observed to be very upset; she was quivering and crying. She was often confused by counsel's questions, which were compound and framed as statements rather than questions.

The next day, *out of the presence of the jury,* the court explained to defense counsel how to conduct an efficient cross-examination using proper questions which started with interrogatory words rather than statements. Specifically, the court noted that the use of interrogatory words at the beginning of a question "should always be done with a witness of this type so it's clear with the first word that it's a question rather than a statement." The court noted that it was important to not confuse minor witnesses, and made clear that its directions applied to *both* counsel.

The court provided an example of effective cross-examination, explaining that " 'If I say 'the president of Israel has severely damaged relations with the United States,' pausing five seconds and saying, 'Don't you agree?' That is arguably a question, but it doesn't come across nearly the way that it might be to ask, 'Do you agree that the president,' et cetera."

On appeal, defendant contends that "[i]nterrogatories should never be used during cross-examination." He cites a treatise on cross-examination, which advises to "avoid enemy words that give control to the witness," and lists a series of interrogatories such as who, what, when, where, and so forth. (Pozner et al., *Cross-Examination: Science and Techniques* (2d ed. 2008) pp. 212-213.) Contrary to defendant's representation, the use of interrogatories is not itself improper, and was a reasonable mechanism by which the court could ensure that the minor witnesses properly understood the questions counsel was asking. The trial court understandably could have concluded that counsel's approach to cross-examination would cause the minor witness to believe she was not just being asked questions but instead, was in an argument. (See, e.g., *Spence*, *supra*, 212 Cal.App.4th at pp. 513-514.)

Further, the court did not *always* require that defendant use interrogatories. For example, when defendant was cross-examining P.S., the prosecutor objected that defendant was not using interrogatories, and the court indicated that the questions were fine because the witness seemed to understand them. This makes clear that the court was not unnecessarily restricting counsel's cross-examination, but was merely trying to protect the witnesses.

Moreover, the court did not improperly instruct the jury to disregard counsel's questions. Rather, the court merely instructed the jury, consistent with CALCRIM No. 222, that "Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to understand the witnesses' answers."

Lastly, concerning the court's example of how to conduct cross-examination, we can discern no anti-Israeli animus, or improper limitation on cross-examination.[13]

B. Recross-examination of Officer Moisa

Defendant was given an extensive opportunity to cross-examine Officer Moisa. In fact, counsel twice recross-examined him. When counsel concluded her final recross-examination, she indicted that she had nothing further. The prosecutor interposed several more questions, which merely sought to clarify some earlier testimony, and when he concluded, the trial court indicated that the witness could step down. Defense counsel started to speak, and the court indicated "You have to finish witnesses. We just cannot allow this trial to go on forever. Please take your seat at counsel table." No objection was made.

The trial court was well within its discretion to limit defendant's cross-examination. Trial judges have wide latitude to impose reasonable limits on cross-examination. (*People v.*

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[13] Defendant contends that the court's comments were anti-Israeli, and interjects in his brief that counsel's "grandparents, aunts and uncles were murdered by the Nazis" and that counsel's "parents survived the Nazi death camps."

Quartermain (1997) 16 Cal.4th 600, 623-624.) Moreover, defendant has not demonstrated any possible prejudice, or any fact that he was unable to elicit from Officer Moisa.

C. Questioning of mother about declaration, alignment with prosecution concerning questioning of mother, and impeachment

Defendant contends the trial court impermissibly limited his cross-examination of mother, by refusing to allow counsel to ask her about a declaration she signed in her divorce proceedings with defendant; by evidencing a pro-prosecution bias during counsel's questioning of mother; and by not allowing counsel to impeach mother with a declaration signed in the family law proceedings.

We find no merit in any of these contentions. Concerning the declaration, it appears that counsel was attempting to question mother about a family law document dated January 13, 2011, which was prepared by an attorney, signed by mother, and requested payment of child support arrearages. The court asked whether defendant intended to hold mother "responsible for what her attorney submitted? Is that where you're going with this?" Counsel indicated that she intended to ask if mother signed it and did not provide any proffer of the relevance of the document. The court "exclude[d] use of this because you avoided my question directly."

Defendant has not attempted to demonstrate any prejudice, and we can discern none. The trial court permitted extensive questioning of mother about the divorce and child custody proceedings, and allowed counsel to question mother about numerous family law documents.

Defendant also complains that the court evidenced a pro-prosecution bias with statements it made during defendant's cross-examination of mother. For example, defendant asked mother whether "the family law agreement" allowed defendant to visit the children "any time, whenever he comes to visit." The court asked defense counsel whether the agreement truly permitted visitation at any time, such as the middle of the night, or whether it provided for visitation at reasonable times.

We find no evidence of bias, or an unreasonable limitation on cross-examination. Counsel asked mother repeated questions about the divorce, utilizing legal terms of art or asking about forms that were prepared by an attorney, which were clearly confusing to mother. The court simply sought to clarify what counsel was asking, so that mother could properly answer the questions, and so that the jury could understand mother's responses to the questions.

Lastly, defendant contends that the court aligned with the prosecution when it prevented defendant from impeaching mother with a declaration she signed in the family law proceedings. However, a careful review of the record shows that defense counsel was taking an inordinate amount of time "thumb[ing] through the legal file in a slow, tedious fashion . . . looking for things to ask." The court was not favoring the prosecutor, or improperly limiting cross-examination, but was merely preventing the further delay of proceedings with questioning about documents with marginal relevance.[14] The

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[14] The document that counsel sought to impeach mother with was a responsive declaration to an OSC filed by defendant, which sought to change the custody arrangement. Mother's responsive declaration indicated that she did not consent to the requested

court did not evidence any pro-prosecution bias. In fact, the court's frustration was not limited to defendant. The court similarly limited the prosecutor's exploration of family law matters during his questioning of mother, and told the prosecutor "we're here on a criminal case here doing a family law dispute, which just confuses me as to whether it's an efficient us[e] of juror time and court time. [¶] Let's move on to something that relates to these charges and this evidence."

D. Court aligned with the prosecution concerning "stolen car"

Defendant complains that the trial court aligned with the prosecution in its handling of the "stolen car" issue during defendant's cross-examination of S.S. During counsel's cross-examination of S.S., counsel asked S.S. whether mother took her to counseling because "you and a friend took a car and crashed it?" The prosecutor began to object, and the court interjected, and stated that "when someone says you took someone's car, we listen carefully." The court then asked S.S. for clarification of the circumstances under which the car was taken, and S.S. disclosed that the car was taken from her friend's father without permission, and that they got into an accident. The court responded that the conduct was "not necessarily criminal."

Later, during mother's testimony, defendant asked mother about the "stolen car" incident. The prosecutor objected that the question was argumentative, and the court clarified that the car

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order, but did consent to father having visitation, and to mother retaining legal and physical custody. It appears that defendant's intent to was clarify whether the parties shared joint legal custody, or whether mother had sole legal custody.

was taken without permission, and disagreed with the assessment that the car was stolen.

We are not persuaded that any bias or unfair limitation on cross-examination is evidenced by these remarks. The court merely sought to clarify the facts and avoid any improper embellishment of those facts by defense counsel.

E. Refreshing S.S.'s memory

Defendant contends the court wrongly "taught" S.S. how to refresh her recollection of events by referring to documents. We disagree. A careful reading of the record indicates that the court explained to S.S. that a writing might help her remember events, but that just because something is written down does not mean that it occurred. "It would have to . . . actually trigger[] [her] memory." Here, the court was simply correctly instructing S.S. on how documents may be used to refresh her recollection. (Evid. Code, § 771.) We can discern no possible prejudice for the court's legally correct instructions, and cannot see how this instruction in any way interfered with defendant's cross-examination of S.S.

F. Trial court did not correct prosecutor

Defendant also cites to a handful of examples of when the prosecutor asked compound questions or did not start questions with interrogatories, where the trial court did not correct the prosecutor. The record is replete with similar examples of the court not correcting defense counsel, and examples of the court correcting the prosecutor. Again, defendant has selectively cited the record and provided an incomplete representation of the facts.

V. Prosecutor and Trial Court Misstated the Burden of Proof and Undermined the Presumption of Innocence

Defendant complains of three instances where the court or the prosecutor made impermissible statements lowering the prosecutor's burden of proof. First, during jury selection, the prosecutor commented to the prospective jurors that the presumption of innocence is "a cloak. And at some point in time, once the evidence starts coming in, once you start hearing the testimony and seeing all the other evidence, once that starts coming in, then you, in your mind, can start evaluating and start deciding, based on that evidence, whether-- [¶] . . . [¶] . . . that cloak can be shed. So once the evidence comes in, you can decide whether that cloak gets shed." Defendant objected that the prosecutor was "preinstructing the jury." The objection was overruled.

Following these comments, the trial court explained the presumption of innocence, and that unless there is "proof beyond a reasonable doubt, the defendant will win. Whether he has had a little evidence, no evidence, a lot of evidence, whether his lawyer helped you understand the evidence, . . . he still is entitled to an acquittal if the evidence is not sufficient. That's what the presumption says. [¶] So you can call it a starting line. You can start to call it a cloak. But it doesn't last forever. . . . [I]f there's enough proof you will convict. If there's not, . . . you'll find [defendant] not guilty."

Second, also during jury selection, defendant was questioning a prospective juror about whether he or she could be fair, and the juror paraphrased the Bible in his or her response. Defendant followed up by stating, "Now, as long as you brought

up the subject of religion, you know [defendant] is a pastor?" The prosecutor objected, and the court made the following remarks: "Ladies and gentlemen, please disregard that. I may have mentioned earlier that we don't usually talk about religion in the criminal courts, and it's really not something to consider at all. If it becomes relevant, then you'll know it. But whether or not a person has a faith discipline or not, whether they're high or low or nowhere in a church structure, has no meaning in the criminal courts at all. [¶] Sorry to say, in my own faith many clerics have not only sinned, but committed criminal acts. So the fact that someone is clergy is not a defense to anything."

Lastly, defendant complains that the prosecutor told prospective jurors that "[t]he People's burden of proof. It's beyond a reasonable doubt. You haven't been told yet what that means. At some point, if you're chosen as a juror, you will be told. Some of you may have heard that instruction before from prior experience. But, again, it's beyond a reasonable doubt. It's not beyond a shadow of a doubt. It's not beyond all doubt. [¶] Is there anyone here who feels that they would not be able to follow that instruction? In other words, that they would hold us, the People, to a higher burden. That they would need certainty—hundred percent certainty." No objection was made.

" ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.]

. . . [Citation.] Additionally, when the claim [of prosecutorial misconduct] focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) A prosecutor commits misconduct when he or she misstates the law generally (*People v. Bell* (1989) 49 Cal.3d 502, 538), particularly in an attempt to absolve the prosecution of its obligation to overcome reasonable doubt on all elements. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215; see also *People v. Hill* (1998) 17 Cal.4th 800, 831-832.)

As an initial matter, we conclude that defendant has not preserved this issue on appeal, as no objection was interposed that the comments lowered the prosecutor's burden of proof. (*People v. Stanley* (2006) 39 Cal.4th 913, 952.)

And, in any event, we find no prejudicial misconduct because the challenged statements did not misstate the burden of proof. The jury was correctly told that proof beyond a reasonable doubt is required before defendant may be convicted. (See CALCRIM No. 220.) The challenged remark, that the presumption of innocence does not last forever, is a logical corollary to the correct instructions they had received. Moreover, the prosecutor's remarks about the reasonable doubt standard correctly stated the law that "[t]he evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." (CALCRIM No. 220.) Also, the court's comment that clerics may also commit crimes in no way indicated that defendant was more culpable because of his status

as clergy, or that his status somehow lessened the prosecutor's burden of proof.

Also, defendant has failed to demonstrate that the challenged remarks resulted in any prejudice. There is no reasonable possibility the jury construed the comments to permit conviction despite reasonable doubts. Before the case was submitted to the jury, the jury was properly instructed on the correct standard of proof, and to disregard statements by attorneys which were in conflict with the court's instructions. We presume that the jury followed the court's instructions absent evidence to the contrary. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 37.)

VI. Verdict Not Supported by Substantial Evidence

Defendant contends "[t]he daughters' unreliable and nonsensical stories could only lead a rational trier of fact to believe [mother] fabricated the charges to gain full custody." He also contends that the daughters' testimony is inherently improbable, because the assaults where defendant rubbed his foot on their vaginas "seem physically impossible."

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) Therefore, the reviewing court's "opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not

warrant a reversal of the judgment." (*People v. Hill*, *supra*, 17 Cal.4th at p. 849.) Reversal is only warranted when it clearly appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*Bolin*, at p. 331.)

We defer to the trier of fact's evaluation of credibility. (*Snow*, *supra*, 30 Cal.4th at p. 66.) Neither conflicts in the evidence nor suspicious testimony justify the reversal of a judgment, because it is the exclusive province of the trier of fact to determine the credibility of witnesses and the truth or falsity of the facts testified to. (*People v. Huston* (1943) 21 Cal.2d 690, 693, overruled on other grounds in *People v. Burton* (1961) 55 Cal.2d 328, 352.) An exception to this rule is when the witness's statements are physically impossible or inherently improbable. To be inherently improbable, the falsity of the statements " ' " 'must be apparent without resorting to inferences or deductions.' " ' " (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 409.)

Substantial evidence supports the jury's verdict. There was nothing implausible about the daughters' testimony that defendant placed his foot on the daughters' vaginas as they lay with their legs dangling off of the bed. Defendant is essentially asking this court to reweigh the evidence, which we cannot do.

VII. Victim Support Person Error

A victim support person accompanied S.S., J.S., P.S., and mother during their testimony. Defendant contends that the support people made inappropriate gestures and facial expressions, that the trial court failed to admonish the support people to not influence the witnesses, and that the trial court failed to determine that a support person was necessary.

Where the charges in a criminal case involve, among other crimes, a violation of section 288 or 288.5, a prosecuting witness may have up to two support persons of his or her choice during testimony. (§ 868.5, subd. (a).) Only one of the support persons may accompany the witness to the stand. (*Ibid*.) "Prosecuting witness" includes not only the complaining witness, but also all witnesses who testify for the prosecution. (*People v. Adams* (1993) 19 Cal.App.4th 412, 433-434.)

J.S. was the first to testify, and utilized a victim support person. Before her testimony commenced, the court admonished the jury and the support person as follows: "So ladies and gentlemen, certain witnesses are allowed to have someone present who might assist them in remaining calm and testifying in a more steady, less distracted fashion. And so the woman next to the witness is here for that purpose. [¶] She of course will not be signaling any information to the witness nor responding in any way to the answers with approval or disapproval. She's only here with the belief that the witness may be a little more comfortable with someone right next to her. That she knows is here to make her feel better." No objection was interposed.

S.S. also used a support person without any objection and the jury and support person were similarly admonished of the support person's role.

P.S. also utilized a support person, with no objection or discussion in the record other than the court's statement that P.S.'s "support person is next to her." After direct examination, cross-examination, and redirect examination, defendant complained that P.S.'s support person was "shaking her head," "squinting her eyes," "rubbing the back of the witness" and "put her arm around the witness as she was leaving, whispered

something to the D.A." Counsel stated she was "concerned that her actions are impacting [defendant's] right to a fair trial."

The court acknowledged that it had seen the support person touching the witness's back but that the court could not see her face from the bench. The court asked the prosecutor what he had seen. The prosecutor admitted seeing back touching. The court asked whether it should address the support person before resuming testimony, and counsel agreed. When P.S.'s testimony resumed, the court instructed the support person to not "touch the witness or evidence any facial expression on your part that might distract the jury, who is watching the witness at all times to judge her testimony." Defendant did not ask for any further instruction.

Mother also testified with a victim support person. The court admonished the support person "not to reflect to the jury any impression a support person has of the answers, or questions, or anything else that's going on. Keep the poker face and do not have physical contact with the witness."

As an initial matter, we find that any claim of error has been forfeited, except as to P.S. Though several witnesses testified with the support of a victim advocate, defendant did not object below that the court failed to admonish them, or to any other aspect of the victim support procedure used at trial (other than the conduct by P.S.'s support person). As such, defendant forfeited this claim by failing to present it to the trial court. (*People v. Myles* (2012) 53 Cal.4th 1181, 1214 (*Myles*).) Further, as to defendant's claim that the court failed to evaluate whether victim support people were required, unless a defendant requests a hearing and determination on this issue, he may not challenge

the necessity for a support person on appeal. (*People v. Lord* (1994) 30 Cal.App.4th 1718, 1722.)

Moreover, the claims fail on their merits. The mere presence of a support person with a witness on the stand does not violate the defendant's due process rights or right to a fair trial. (*Spence*, *supra*, 212 Cal.App.4th at p. 514, citing *Myles*, *supra*, 53 Cal.4th at pp. 1214-1215.) There may be a due process violation, however, where the support person interferes with the witness's testimony in a way that adversely affects the jury's ability to assess that testimony. (*Spence*, at p. 514.) For example, emotional displays or gestures may indicate to the jury that the support person believes or endorses the witness's testimony. (*Myles*, at pp. 1214-1215.)

In determining whether a support person's presence or conduct implicates a defendant's due process rights, courts look to a number of factors, including the type of conduct the support person engaged in while the witness testified, and the type of admonitions given by the court with respect to the witness's use of a support person. (*Myles*, *supra*, 53 Cal.4th at pp. 1214-1215.) The defendant has the burden of demonstrating that the support person's presence or conduct prejudiced his or her rights. (*Id.* at p. 1215.)

First, the trial court properly admonished J.S.'s, S.S.'s, and mother's support people to refrain from signaling their approval or disapproval about the content of the testimony, and properly explained to the jury the role of a support person.[15] Although P.S.'s support person was not initially admonished, after some

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[15] We disagree with defendant's assessment that the court's comments about the support people in any way vouched for the daughters' credibility.

improper gestures were observed, she was promptly corrected by the trial court. We are hardly persuaded that P.S.'s support person influenced the jury, in light of the court's comments to the jury about the proper role of a support person.

VIII. Trial Court Erred in Not Releasing School and Therapy Records

Before trial, defendant subpoenaed the school and therapy records for S.S., J.S., and P.S. The trial court reviewed these records in camera and determined that no discoverable information existed. On appeal, defendant contends the trial court erred in failing to release these records to defendant, arguing that the records would have supported the defense theory that the daughters "manufactured the molestation." Defendant asks this court to independently review the records (which were maintained under seal by the trial court), to determine if the trial court erroneously failed to disclose the records. We have independently reviewed the sealed school and therapy records, consisting of six separate envelopes of records, and conclude that no discoverable information was withheld, and that no possible prejudice could have resulted.

IX. Prosecutorial Misconduct by Failing to Timely Disclose Videos and Transcripts of Victim Interviews

Defendant contends that the prosecutor failed to timely disclose video recordings of interviews that Officer Moisa conducted with the victims, as well as transcripts of those recordings, which were ultimately introduced into evidence. Defendant concedes that the prosecutor provided audio recordings of the interviews, and that defense counsel had the interviews transcribed. He contends that the belated disclosure

of the videos and transcripts amounts to a *Brady* violation. (*Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).)

A. Relevant facts

During Officer Moisa's testimony, he referred to transcripts of his interviews with the victims. Once a recess was taken, defense counsel complained that she had received the audio recordings of the interviews, but had not been provided with the transcripts by the prosecutor. She had been "working off [her] own transcripts" but had not seen the People's transcripts. The prosecutor represented that he mailed copies of the transcripts to defense counsel in January 2015, as soon as they were available. The court asked the parties to meet and confer about the status of discovery, and to raise any issues with the court.

When court reconvened the following day, the parties discussed the status of the discovery. That morning, in an abundance of caution, the prosecutor had turned over transcripts, and copies of *video* recordings of the interviews. Defense counsel represented that she only had some of the videos before trial. The prosecutor represented that all of the videos were previously turned over on May 17 and September 19, 2013, in two discs. Defense counsel confirmed she received two discs, but complained that one contained videos and one contained only audio. The prosecutor clarified that there was one video disc and one audio disc, containing all of the relevant recordings. The prosecution denied that defendant was not timely provided with everything. The court instructed defendant to make a motion related to the discovery issue if necessary once counsel had an opportunity to review the discovery in her possession.

Later in the proceedings, when the parties were discussing jury instructions, defendant requested an instruction on late

discovery. The court indicated that it intended to refuse the instruction. Defense counsel maintained that she had timely received an audiotape of the interviews, but insisted that she had not received the video recording of the interviews or transcripts. Defendant also made a section 1385 motion on this same basis.

At the hearing on defendant's motion, defendant admitted there was nothing in the transcripts that would have caused defendant to confront witnesses differently, and did not otherwise identify any prejudice resulting from the untimely disclosure of the videos. The court found there was no prejudice, and denied the motion and request for an instructed on late discovery.

B. Analysis

"Section 1054.1 (the reciprocal-discovery statute) 'independently requires the prosecution to disclose to the defense . . . certain categories of evidence "in the possession of the prosecuting attorney or [known by] the prosecuting attorney . . . to be in the possession of the investigating agencies." ' . . . 'Absent good cause, such evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial. (§ 1054.7.)' . . . [¶] Upon a showing both that the defense complied with the informal discovery procedures provided by the statute, and that the prosecutor has not complied with section 1054.1, a trial court 'may make any order necessary to enforce the provisions' of the statute, 'including, but not limited to, immediate disclosure, . . . continuance of the matter, or any other lawful order.' (§ 1054.5, subd. (b).) The court may also 'advise the jury of any failure or refusal to disclose and of any untimely disclosure.' (*Ibid.*)" (*People v. Verdugo* (2010) 50 Cal.4th 263, 279-280 (*Verdugo*), citations omitted.) "A violation of section 1054.1 is subject to the harmless-error standard set

forth in *People v. Watson* (1956) 46 Cal.2d 818, 836" (*Verdugo*, at p. 280) and is reviewed for an abuse of discretion (*People v. Ayala* (2000) 23 Cal.4th 225, 299).

A *Brady* violation occurs only when three conditions are met: "'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.] Under this standard prejudice focuses on 'the materiality of the evidence to the issue of guilt or innocence.' [Citation.] In the case of impeachment evidence, materiality requires more than a showing that 'using the suppressed evidence to discredit a witness's testimony "*might* have changed the outcome of the trial" [citation].' [Citation.] Rather, the evidence will be held to be material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " (*People v. Lucas* (2014) 60 Cal.4th 153, 274 (*Lucas*), disapproved on another ground in *People v. Romero* (2015) 62 Cal.4th 1, 53, fn. 19.)

The critical rule for purposes of *Brady* is that " '[e]vidence that is presented at trial is not considered suppressed, regardless of whether or not it had previously been disclosed during discovery.' " (*Lucas*, *supra*, 60 Cal.4th at p. 274; see also *People v. Morrison* (2004) 34 Cal.4th 698, 715.) Here, because the evidence was presented at trial, defendant cannot demonstrate a *Brady* violation. Even if the videos were not timely disclosed (which was contested by the parties), defense counsel received the videos during trial and the videos were ultimately presented to the jury.

Moreover, we can discern no prejudice. Defendant admitted he was not prejudiced by any belated receipt of the

People's transcripts, as he had made his own. Moreover, defendant had been provided with the audio recordings, and has identified nothing in the videos that would have led to a different outcome at trial. (*Verdugo*, *supra*, 50 Cal.4th at pp. 279-280.)

X. Cruel and Unusual Punishment

Defendant contends the imposition of a life sentence under section 667.61 constitutes cruel and unusual punishment under both federal and state standards, and that the trial court erred when it denied defendant's motion to reduce his sentence. Defendant reasons that section 667.61 is facially unconstitutional and that the sentence is "grossly disproportionate to [defendant's] crimes and personal circumstances."

Section 667.61 is "sometimes called the 'One Strike' law." (*People v. Anderson* (2009) 47 Cal.4th 92, 99.) The one strike law "was enacted to ensure serious and dangerous sex offenders would receive lengthy prison sentences upon their first conviction." (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1296.) It mandates a sentence of 25 years to life for specified sex offenses committed under certain aggravating circumstances. (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 186.)

Under federal law, a sentence is cruel and unusual under the Eighth Amendment if it is " 'grossly disproportionate' " to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) When assessing a claim of cruel and unusual punishment under the California Constitution, we look at the nature of the offense and the offender, the punishment for more serious crimes committed in the same jurisdiction, and the punishment for the same offense in other jurisdictions. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1431-1432.) If, after conducting this analysis, the court determines that defendant's sentence is "so disproportionate to

the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity," it is precluded under our state Constitution. (*In re Lynch* (1972) 8 Cal.3d 410, 424.) Whether a punishment is cruel or unusual is a question of law for the court, but the facts underlying this determination must be viewed in the light most favorable to the judgment. (*People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1390.)

We find no merit in defendant's contentions. Section 667.61's sentencing scheme has routinely been found to pass constitutional muster under both federal and state standards. (*People v. Estrada* (1997) 57 Cal.App.4th 1270, 1277-1283 (*Estrada*); *People v. Alvarado*, *supra*, 87 Cal.App.4th at pp. 199-201.)

"[P]unishment under the one strike law is precisely tailored to fit crimes bearing certain clearly defined characteristics. For the 25-year minimum term to apply, the predicate offense must be a crime of sexual violence *and* it must be committed under circumstances which increase the risk of injury or death to the victim. . . . Thus . . . , the defendant . . . cannot claim he is the victim of an indiscriminate sentencing scheme which metes out the same punishment for a broadly defined offense regardless of the circumstances surrounding the commission of the offense. [Citation.]" (*Estrada*, *supra*, 57 Cal.App.4th at p. 1280, citations & fn. omitted.)

Moreover, defendant's punishment is not grossly disproportionate to his crimes. Defendant continuously sexually abused his three daughters over a period of years, subjecting them to almost weekly violations. Defendant's lack of prior record, though worthy of consideration, does not diminish his culpability. The length of the sentence, when considered in light

of the severity of the offenses and defendant's culpability does not give rise to an inference of gross disproportionality.

Moreover, neither the extra- or intra-jurisdictional comparison of punishments provide any additional basis for finding the sentence to be so disproportionate that it " 'shocks the conscience.' " (*People v. Dillon* (1983) 34 Cal.3d 441, 477-478.) Defendant suggests that two or more acts of sexual conduct with a minor under the age of 11 over a period of three months garners a sentence of only 5 years to 25 years in New York (N.Y. Pen. Code, §§ 70.02, subd. (3)(a), 130.75, subd. (1)(a)), that murder in California receives a similar sentence to the one defendant has received (§ 187), and a defendant receives a lesser sentence for continuous sexual abuse of a child (§ 288.5), forcible rape (§ 264), infliction of corporal injury on a child (§ 273d, subd. (a)), forcible lewd conduct on a child (§ 288, subd. (b), and statutory rape (§ 261.5, subd. (d)) in California. However, "punishing [defendant's] conduct as severely as second degree murder is [n]either shocking [n]or outrageous." (*People v. Alvarado*, *supra*, 87 Cal.App.4th at p. 200; *Estrada*, *supra*, 57 Cal.App.4th at pp. 1278-1283.) We therefore conclude that defendant's sentence does not constitute cruel or unusual punishment under either the state or federal Constitutions.

XI. Cumulative Error

Lastly, defendant argues that cumulative error requires reversal. However, we have found no errors to cumulate.

XII. Habeas Petition

In his habeas petition, which we consolidate with his appeal for purposes of oral argument and decision, defendant contends "[t]he trial court denied [defendant] due process and a fair trial by denying more funds for a memory expert and by

refusing to grant defense counsel a continuance to hire a memory expert to prepare for trial."

A. Relevant facts

The information was filed in July 2013. Defendant was initially represented by Keith Kim, but Fay Arfa substituted in as counsel on August 28, 2013. The case was slow to proceed to trial. Proceedings were repeatedly continued, often by stipulation of counsel. Proceedings were further delayed by numerous defense motions, such as a demurrer to the information, motion to dismiss, a motion to compel discovery, among others. There were also repeated discovery disputes concerning the scope of discovery sought by the defense, such as medical records, therapy records, school records, and diaries of the victims that involved extensive litigation, and further delayed trial. Defendant also made several motions to continue trial, in August 2014, October 2014, and November 2014, asserting that he needed more time to prepare his defense and conduct his investigation. The court either granted these motions, or proceedings were continued by stipulation of the parties.

On May 8, 2014, defendant made an ex parte motion for appointment of a defense memory expert. The motion sought approval of funds to hire Dr. Geoffrey Loftus as a memory expert, to demonstrate that the victims' memories had been "tainted, decayed, distorted and confused." The motion was denied by the trial court, apparently urging counsel to select an expert from the Los Angeles Superior Court expert appointee list. Therefore, on June 3, 2014, defendant moved to appoint a panel memory expert, Dr. Michael Perrotti. The trial court granted the motion that same day, authorizing payment of $280 per hour, not to exceed $2,800.

On August 29, 2014, defendant sought additional funds for his appointed expert. In support of the motion, counsel included a letter from Dr. Perrotti, specifying the work completed to date, and the amount of time needed to continue his work. Dr. Perrotti contemplated reviewing 1,751 pages of documents, such as interviews of the victims, the preliminary hearing transcript, and police reports. He had expended 16 hours to date, and anticipated needing an additional 20 hours to complete his analysis. That same day, the court authorized an additional 10 hours of work. On September 4, 2014, the court authorized an additional six hours of work.

On January 14, 2015, defendant sought additional expert funds so that Dr. Perrotti could complete his analysis. An accounting of Dr. Perrotti's time showed he had expended over 26 hours reviewing family law records, court transcripts, and dependency records, among numerous other unspecified "records." This time, he anticipated needing an additional 25 to 30 hours to prepare for trial. The court refused to authorize more funds, expressing concern that the defense expert is "a bottomless pit who's gouging the public." However, the court was willing to allow Dr. Perrotti to come to court to explain his need for additional funds.

On February 3, 2015, defendant resubmitted his request for additional funds for Dr. Perrotti, this time seeking an additional 50 hours of compensation, anticipating it would take 35 hours just to review all of the discovery in the case. Alternatively, defendant sought an order appointing Dr. Loftus as his memory expert.

Also on February 3, 2015, defendant filed an ex parte application urging that defendant "needed several experts and

Dr. Perrotti advised . . . that he qualified as a memory expert, a taint and a CAAS expert." Defendant sought additional funds for Dr. Perrotti, or alternatively, funds to hire another "taint" expert, Dr. Phillip Esplin, at a rate of $350 per hour.

Dr. Perrotti appeared in court on February 18, 2015, to support his request for additional funds. In an in camera proceeding, Dr. Perrotti explained that counsel had asked him to review over 1,700 pages of discovery, including family law records, and law enforcement interviews. Counsel admitted that she sent the expert all of her discovery, and that she did not define the scope of the work for him. Counsel represented that the expert would testify that the victims were not telling the truth. The court asked the expert what "data" supported this assessment. Dr. Perrotti testified that the victims were asked leading questions by investigators, and that the victims contaminated each other's memories. The court expressed its concern that the expert was invading the province of the jury, reasoning that this was not scientific data, but the facts of the case. Dr. Perrotti expressed that he would testify to memory decay, and the science of effective interviewing. The court was skeptical that an additional 50 hours needed to be expended on this topic, about which Dr. Perrotti testified that he already possessed extensive knowledge. The court denied any additional funds for Dr. Perrotti.

That same day, defendant also made a motion to continue trial. The motion urged that a continuance was required because Dr. Perrotti had not yet completed his report, as he needed additional funds to complete his assessment of the case. Defendant represented that his family was raising money to pay for an expert, and that he needed more time. The court denied

the request for a continuance. Trial was set for February 25, 2015.

On February 20, 2015, defendant made another motion for a continuance, urging that on February 18, 2015, Dr. Perrotti informed defense counsel that he could not generate any reports or form any opinions because he had not been paid to complete his assessment. Counsel represented that "[b]ecause Dr. Perrotti was selected from the court approved list, I honestly believed his fees would be considered reasonable" and that counsel had expected that the court would authorize any additional funds requested and justified by the expert. Counsel represented that she needed to find a new expert, and that she could be ready for trial in "30 days if the court gives me time to hire and work with the new expert." Counsel also wanted a continuance so she could attend an MCLE conference from March 5 through March 7. The trial court continued trial until March 12, 2015.

On March 12, 2015, defendant made another motion to continue trial, urging that he had retained an out-of-state "taint" expert on March 3, 2015, and that the expert needed time to prepare for trial. Defendant expected to be ready for trial on March 25, 2015. The trial court expressed its concern that defendant had been in custody for two years waiting for the case to go to trial. The court explained that the case would be transferred to the trial department on March 16, 2015, and that counsel could explain why she needed more time to that department. The People announced ready for trial, the defendant was deemed ready for trial, and the court denied the motion. The case was ultimately assigned to the same judge for trial, and defendant did not again raise the issue of a continuance.

In support of defendant's habeas petition, Dr. Loftus submitted a declaration averring that "I was available to testify and, if called as a witness, I would have testified in accordance with my November 11, 2015 report." Attached to his declaration was a November 11, 2015 report, indicating that defendant had asked him to prepare a report in support of his habeas petition, and had forwarded to him "police reports, witness statements, witness interviews, counselors' reports, custody evaluation reports, court findings, case correspondence, petitions, and photographs." If called as a memory expert, Dr. Loftus would have testified to general theories of memory, circumstances under which memory fails, the effects of attention, the effects of forgetting, the suggestibility of young children, the consequences of post-event information on memory and witness confidence, and circumstances under which witness confidence cannot be relied upon as an index of reliability and accuracy.

Counsel also submitted a declaration in support of the petition, generally urging that defendant needed a memory expert to testify about the subjects identified in the Loftus declaration. Counsel averred that after the trial court refused to grant more funds for Dr. Perrotti, she did not have time to hire a new memory expert, and was only able to hire a "taint" expert, who ultimately testified at trial. She averred that she did not have sufficient time to retain Dr. Loftus, and that if she had more time, she would have retained Dr. Loftus in addition to Dr. Thompson who did testify.

B. Analysis

Defendant contends that "[i]f the trial court had originally appointed Dr. Loftus or given trial counsel . . . more time to hire an expert after denying Dr. Perrotti more funds, trial counsel

could have hired Dr. Geoffrey Loftus to testify how memory works. Dr. Loftus would have attacked the reliability of [defendant's] daughters[']' 'memories' of molestation and shown how the daughters developed false memories."

Because "a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) The petition must "state fully and with particularity the facts on which relief is sought," and "include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." (*Ibid.*) "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." (*People v. Karis* (1988) 46 Cal.3d 612, 656.) "An appellate court receiving such a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." (*Duvall*, at pp. 474-475.) If so, the required prima facie showing has been made. If no prima facie case is made, we will summarily deny the petition. On the other hand, if the allegations of the petition, taken as true, establish a claim for relief, we will issue an OSC why relief should not be granted. (*Id.* at p. 475.)

We find defendant has not stated a prima facie claim for relief, and therefore summary denial of the petition is proper. Defendant's only evidence outside of the appellate record was the declaration and report by Dr. Loftus, averring what he would have testified to had he been retained as an expert, and counsel's declaration that she did not have sufficient time to retain

Dr. Loftus. This evidence fails to demonstrate any different outcome at trial.

What's more, the record before us amply reveals no abuse of discretion in denying defendant's request for additional funds or a continuance. Evidence Code section 730 provides that "[w]hen it appears to the court, . . . that expert evidence is or may be required by the court or by any party to the action, the court . . . may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court."

"[C]ourt-ordered defense services may be required in order to assure a defendant his constitutional right not only to counsel, but to the effective assistance of counsel." (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319.) "[I]t is only *necessary* services to which the indigent defendant is entitled," however, "and the burden is on the defendant to show that the expert's services are necessary to his defense." (*People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1304.) "The decision on the need for the appointment of an expert lies within the discretion of the trial court and the trial court's decision will not be set aside absent an abuse of that discretion." (*Ibid.*)

Moreover, the decision to order a continuance is within the sound discretion of the court, and may only be granted for good cause. (§ 1050, subd. (e); *People v. Murphy* (1963) 59 Cal.2d 818, 825.) However, that discretion may not be exercised in a manner

that deprives a defendant of a meaningful opportunity to prepare a defense. (*Murphy*, at p. 825.)

Here, defendant had retained Dr. Perrotti, who would have testified as a memory and taint expert. It was only because of counsel's mismanagement of Dr. Perrotti's time that he was unable to render an opinion at trial. It was well within the court's discretion to deny counsel's eleventh hour request to retain new experts, and for a continuance of proceedings which had dragged on for nearly two years. Moreover, Dr. Thompson provided competent testimony on many of the proffered areas of expertise about which Dr. Loftus would have testified. Therefore, we can discern no possible prejudice.

DISPOSITION

The judgment is affirmed. The petition for habeas corpus is denied.

RUBIN, J.

WE CONCUR:

BIGELOW, P.J.

FLIER, J.