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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. REGINALD DENNISON FERGUSON, Defendant and Appellant.	B229731 (Los Angeles County Super. Ct. No. YA077454)

APPEAL from a judgment of the Superior Court of Los Angeles County. James Brandlin, Judge. Affirmed in part, reversed in part and remanded.

Ralph H. Goldsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Marc A. Kohm and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Reginald Dennison Ferguson of two counts of continuous sexual abuse (counts 1 & 4) (Pen. Code, § 288.5, subd. (a));[1] two counts of a lewd act on a child where the defendant was at least 10 years older than the victim (counts 2 & 3) (§ 288, subd. (c)(1)); and two counts of showing harmful matter to a minor (counts 5 & 6) (§ 288.2, subd. (a)). As to all counts, the jury found true the allegation that defendant committed his crimes on multiple victims within the meaning of section 667.61, subdivision (b).

Pursuant to section 667.61, subdivisions (b), (c), and (e)(4), the trial court sentenced defendant to state prison for two consecutive terms of 15 years to life in counts 1 and 4, the continuous sexual abuse counts, resulting in an indeterminate sentence of 30 years to life. In count 2, the trial court imposed the high term of three years. In each of counts 3, 5, and 6, the trial court imposed one-third the midterm, or eight months, to run consecutively to the other counts. The total sentence was 35 years to life.

Defendant appeals on the grounds that: (1) the accusatory pleading was facially defective and probably misled the jury; (2) the trial court and counsel failed to implement the overlapping offense provisions of section 288.5; (3) defendant's trial was unfair because the jury was not instructed regarding the limited purpose for which it could consider the expert opinion testimony on Child Sexual Abuse Accommodation Syndrome (CSAAS); (4) the trial court erred in treating a witness's opinion testimony as sufficient foundation for an adoptive admission instruction; (5) both counts of continuing sexual abuse must be reversed for failure to instruct on the lesser included offenses; and (6) the charges of displaying harmful material to a minor cannot stand.

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[1] All further references to statutes are to the Penal Code unless stated otherwise.

FACTS

Howard Ferguson is the father of two daughters, J. and S., by two different mothers. J. and S. lived with their mothers in Los Angeles. Howard's father, defendant, sexually molested his two young granddaughters over a period of seven years.

When J. was 8 and S. was 6, Howard was living with his parents for a period of approximately two and one-half years. J. stayed with Howard two or three weekends a month and occasionally on other days. S. also visited her grandparents frequently. The grandparents often watched the girls when both of their parents were working.

The first time defendant molested "J.", she was eight years old. She used the bathroom and needed help wiping herself. Defendant entered and helped her. As he did so, he put his fingers inside her vagina. J. was uncomfortable and she "felt funny." Defendant did not say anything, and J. did not tell anyone. J. testified that defendant touched her inappropriately "almost—all the time" when she was alone with him. He would orally copulate her and show X-rated movies. He asked her to orally copulate him twice. He rubbed her chest with his hands and put his mouth on her chest. She saw him touch himself about three times. She remembered bits and pieces of many incidents. Some incidents stood out more than others, and she could not remember each and every instance clearly.

When J. stayed overnight at defendant's, S. was also there on most occasions. J. began to lock the door and put a chair against the door where they slept because defendant would enter during the night. Defendant would unlock the door with a key. J. had her sister sleep on the side of the bed against the wall because S. was a sound sleeper. J. was trying to protect S. J. saw defendant trying to grab S. by reaching over J. Defendant tried to pull off S.'s pants while she slept. This happened more than twice. J. would wake S. up and tell defendant to get out. She would kick him away.

When J. was 13, defendant picked her up from her house to take her to the trucking company where he worked. No one was in the truck yard. J. got out and looked at defendant's truck and asked questions about it. When they returned to defendant's car,

J. put on her seat belt. Defendant began "rubbing on [her] again." He rubbed her shoulder and thigh and then tried to pull her on top of him as he sat in the driver's seat. J. held onto her seat belt. Defendant unzipped his pants and pulled out his penis. He said, "Come give me some honey." Defendant had frequently said this to J., and she knew it meant "to have sex with him." J. was mad and started crying. She told defendant to take her home, and he did.

When J. was 15 years old, defendant invited her to meet her cousin at his house and to watch Disney movies afterwards. Defendant took her to his house, but there was no one there. J. went to the room where she usually stayed. Defendant followed her into the room where she was sitting on the edge of the bed. He sat next to her and rubbed her shoulder. He was breathing very hard. He got a DVD from under the bed and played it. J. saw three X's appear on the screen and knew it was an adult movie. Defendant had shown her an X-rated movie three or four times before. At trial, J. identified the cover of the DVD as one of the DVD's her grandfather had shown her. The movie showed grown people having sex. Defendant took off his pants. J. tried to stand up, but defendant sat her back down. Defendant climbed on top of her and she leaned back. Defendant had removed his underwear, and he started to pull J.'s pants and underwear down to her knees. He grabbed her arms and put them over her head and kissed her body from her "neck down to my private area." J. felt defendant's beard on her private area. Defendant rubbed his penis against her vagina and attempted to put it inside her. Defendant said he would give her $50 if she let him take her virginity. J. said, "No," and pulled away. That was the last time he touched her. It occurred in February of 2010.

When S. was six years old, she spent a lot of time at her grandparents' house and sometimes her grandfather was alone with her. Her grandfather touched her when she was six. S. remembered defendant coming out of the shower. He was naked and his penis was hard. He started touching her. He touched her private part with his penis on top of her clothing. She pulled away. He tried to put his penis in her mouth and said "Give me honey."

Defendant touched S. inappropriately more than five times between the ages of six and 13. According to S., defendant would play pornographic DVD's for the sisters and "come on to us." Defendant said that they would get in trouble if they told what happened.

In August of 2009, when S. was 13, she and J. were supposed to see their cousins at her grandfather's but they just stayed in his house. Defendant began kissing her in her chest area. He pulled out his penis. He began masturbating in front of her. Defendant told S. that she looked like her mother and told her to give him some honey. He pushed her head toward his penis and tried to put her mouth on his penis.

S. said that between the ages of six and 11 she stayed with her grandparents once or twice a month, and defendant touched her inappropriately more than five times. When she spent the night and J. was there, they slept in the same bed. Defendant came into the sisters' bedroom several times while they were sleeping. One time, S. awoke to find defendant sitting at the edge of the bed. S. realized that she was naked. Defendant was naked, and his penis was sticking up. S. tried to wake her sister, but defendant placed his hand over her mouth. S. was going to try to hit the window blinds to wake her sister up, but defendant held her hand. Defendant kissed her chest and private part and inserted his penis between her legs. S. hit the blinds and J. woke up. She yelled at defendant. He grabbed his clothes and hurried out of the room.

S. recalled that defendant showed her adult movies with people having sex. He showed her about three different ones when she was under the age of 13. S. testified that defendant showed her the DVD in People's exhibit No. 2. It showed adults having sexual intercourse. Defendant told S. that if she ever told anyone what he had been doing something bad would happen or she would get in trouble. That scared her.

Over the years, the sisters talked with each other about the molestations, but did not tell anyone else. They agreed that they would not tell because J. was scared. In March 2010 J. started feeling bad. She did not feel she was "a regular young lady." She felt she could not have a normal life, and this was related to what happened with

defendant. On March 3, 2010, J. texted her mother at work and said she needed to talk with her and that she felt she was going to run away. She said she did not want to be on the Earth anymore, and she was hurting. J.'s mother called her right away and J. told her that defendant had been molesting her.

J.'s mother called J.'s father, Howard, and told him defendant had molested J. J. and her mother went to Howard's where J. told them about what had happened to her and S. Howard went to pick up S. from school. Howard asked S. what had happened between her and defendant. She became stiff and scared, and then J. told her it was okay. S. was crying and distraught while she told Howard what had happened. Howard called the Department of Child and Family Services hotline. The police contacted Howard the following day. The sisters were then interviewed by police officers in the presence of their parents. S. told an officer that defendant showed them "nasty tapes." Howard went to defendant's house and found some DVD's under defendant's bed and gave them to the police.

Dr. Jayme Bernfeld is a clinical psychologist in private practice. She had been treating victims of child sexual abuse for 20 years. Dr. Bernfeld explained that CSAAS is a "model that helps us understand how children behave following child sexual abuse." It is not really a syndrome, which implies a set of symptoms that allow one to make a diagnosis. Rather, it is a "model of explanation." It is helpful in treatment and it explains a child's behaviors after being abused. It does not predict molestation.

Dr. Bernfeld testified that there are five parts to the CSAAS model. The first part is secrecy. It describes the obvious fact that abuse happens in secret and is a message to the child that this is not to be discussed. The longer the child keeps the secret, the more they feel like an accomplice, and the less likely they are to say something. The second part is helplessness. First, the child is physically helpless in relation to an adult. In addition, children are socialized not to refuse adults. The third part of the model is accommodation, which describes the various ways children accommodate the abuse. Some pretend to be asleep, others cover themselves with stuffed animals or wear multiple

pairs of pajamas. The fourth part is delayed or partial disclosure where the victim "tests the waters" before giving detailed information. Details come out over time. The fifth part is retraction or recantation when negative things follow the disclosure, such as disbelief. This does not always occur. The CSAAS model applies when children are molested by people they know.

Dr. Bernfeld did not interview J. or S. and did not read any reports regarding the molestations. She was describing the model itself and not commenting on a specific case.

Defendant did not present a defense.

DISCUSSION

I. Defect in Accusatory Pleading

A. Defendant's Argument

Defendant asserts that there was a facial defect in the first count of the information, and no demurrer was filed. Defense counsel should have demurred and had no reasonable excuse for failing to do so.[2] Because of the defective information and conflicting directives from the trial court and the prosecutor's argument, the jury could have wrongly relied on acts outside the required time frame to convict defendant of continuous sexual abuse in violation of section 288.5, which requires three acts. As a result, defendant argues, count 1 must be reversed, and the multiple victim allegation for the remaining section 288.5 conviction can no longer stand.

B. Proceedings Below

J.'s mother testified that J. was born in 1994. Therefore, J. turned 14 in 2008. Count 1 of the information charged defendant as follows: "On or between *January 1, 2003 and February 7, 2010*, . . . the crime of CONTINUOUS SEXUAL ABUSE, in violation of PENAL CODE SECTION 288.5(a), a Felony, was committed by [defendant], who did unlawfully engage in three and more acts of 'substantial sexual

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[2] Defendant states in his reply brief that he is not arguing ineffective assistance of counsel with respect to this issue.

conduct,' as defined in Penal Code Section 1203.066(b), and three and more lewd and lascivious acts, as defined in Penal Code section 288, with [J.], a child *under the age of 14 years*, while the defendant resided with, and had recurring access to, the child." (Italics added.) Counts 2 and 3 charged defendant with a lewd act upon a child of 14 and 15, respectively, when defendant was 10 years older than the child.

On Monday, November 1, 2010, voir dire began. After introducing the parties, the trial court read the information to the prospective jurors in pertinent part as follows: "In count 1, it's alleged that *on and between the dates of January 1, 2003, and February 7, 2010*, that the defendant committed a violation of Penal Code section 288.5, commonly referred to as continuous sexual abuse upon an individual, a child *under the age of 14 years*, known as [J.]." (Italics added.) Voir dire continued on the following day, November 2, and continued throughout the day. Opening statements were given on November 3, and the jury reached verdicts on November 9, 2010.

C. Relevant Authority

Section 288.5, subdivision (a), provides in pertinent part that, "Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child *under the age of 14 years* at the time of the commission of the offense, . . . is guilty of the offense of continuous sexual abuse of a child . . . ." (Italics added.)

Section 1004 provides that a defendant may demur to the accusatory pleading at any time prior to entering a plea on the grounds that, inter alia, the information does not substantially conform to the provisions of Sections 950, 951, and 952[3] or that it contains matter that, if true, would constitute some type of legal bar to prosecution.

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3 Section 950 sets out the formal parts of an accusatory pleading. Section 951 provides a template for a suggested form of an indictment. Section 952 requires each

Section 1012 provides that, "[w]hen any of the objections mentioned in Section 1004 appears on the face of the accusatory pleading, it can be taken only by demurrer, and failure so to take it shall be deemed a waiver thereof, except that the objection to the jurisdiction of the court and the objection that the facts stated do not constitute a public offense may be taken by motion in arrest of judgment."

"The purpose of the waiver rule is twofold. First, it permits correction of pleading defects prior to trial, thereby promoting efficiency and conserving judicial resources. Second, it prevents '[a] defendant from speculating on the result of the trial and raising the objection after an unfavorable verdict.' (4 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Proceedings Before Trial, § 2132, p. 2502.) This rule is of long standing; we stated 90 years ago that a criminal defendant 'cannot, under our system, lie by until he shall see the result of a trial of his case on the merits and then be permitted to take advantage of a mere uncertainty in the indictment by motion in arrest of judgment.' [Citation.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 357 (*Jennings*).)

D. Issue Waived; Any Error Harmless

As the record shows, the information incorrectly stated the time period during which the crime of continuous sexual abuse of J. could have occurred—lengthening it by two years past J.'s 14th birthday. "Any uncertainty in the pleading amounts to no more than a defect of form, which should be attacked by demurrer under Penal Code section 1004. Failure to demur to an information on the ground of uncertainty constitutes a waiver of the objection [citations], and the validity of a subsequent judgment is not affected. (Pen. Code, § 960.)" (*People v. Washington* (1971) 17 Cal.App.3d 470, 475, disapproved on other grounds in *People v. Najera* (1972) 8 Cal.3d 504, 509, fn. 4.) Thus, defendant was obligated to demur pursuant to section 1012. Had defendant pointed out the error and demanded that the prosecutor amend the complaint, the error would have

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count to contain a statement that the accused has committed some public offense and must give the accused notice of the offense of which he is accused.

been cured at that point. The function of an information is to provide the defendant with sufficient notice of the charge he must meet at trial. (See *People v. Holt*, *supra*, 15 Cal.4th at p. 672; *People v. Codina* (1947) 30 Cal.2d 356, 359; *People v. Brac* (1946) 73 Cal.App.2d 629, 634-635; *People v. Washington*, *supra*, 17 Cal.App.3d at p. 475.) In this case, despite the incorrect ending date in count 1, defendant was clearly placed on notice of the charges he had to meet.

Defendant stresses in his reply brief, in response to respondent's waiver argument, that the essence of his argument is that the trial court misled the jury by reading the defective accusatory pleading to the jury. He claims that the court led the jury to believe that J. did not attain the age of 14 until February 7, 2010. Therefore, his claim is more than a mere defect in the pleading.

We do not believe the trial court's reading of the accusatory pleading misled the jury. Defendant attempts to distinguish the cases cited by respondent regarding forfeiture, such as *Jennings*, *supra*, 53 Cal.3d 334, as not presenting the same issue, i.e., the misleading of the jury by the trial court. We believe that in *Jennings*, as in most cases, it is likely the accusatory pleadings were read to the jury at the beginning of voir dire, as is required in felony cases. (§ 1093, subd. (a).) In any event, although the accusatory pleading in count 1 was overbroad in this case, the jury was never presented with the dates of the conduct after the court's initial reading, which occurred a week before closing arguments. The jury instruction in count 1, CALCRIM No. 1120, stated only that the defendant was charged in counts 1 (for J.) and 4 (for S.) with continuous sexual abuse of a child under the age of 14 years in violation of section 288.5, subdivision (a). It also stated that the People had to prove that the child was under the age of 14 at the time of the acts. The verdict forms for count 1 did not contain any dates. In sum, the trial court did not remind the jury by any means of the erroneous end date in the information after it first read the charge nine days before deliberations began, at a time when none of the prospective jurors had the means or the court's permission to take notes. The prosecutor did not mention dates in her opening statement. She did state that

the final incident of a lewd act on J. occurred when J. was 15, but defendant was also charged with two separate lewd acts on J. that occurred when she was 14 and 15.

It is true that the prosecutor alluded to the year 2010 during argument when she stated, "The first one, you'll see the charge is continuous sexual abuse. The victim is [J.]. Between 2003 and 2010." Then, when explaining that the evidence showed that more than three months passed between the first and last acts, the prosecutor stated, "far more than three months passed between the first act and the last act, in general, it was about 7 years." We believe these remarks were insignificant in the context of the prosecutor's argument as a whole. The prosecutor argued that defendant committed lewd acts upon the girls many times—far in excess of the three times necessary to prove the charge of continuous sexual abuse. The prosecutor contended that "this went on starting from age 8, continued on through her 10th and 11th years. And her 12th years. And on from there." She noted that there was also at least one incident when she was 14 and one incident when she was 15, which was the last incident. With respect to the element of "under the age of 14 years at the time of the act," the prosecutor stated, "You heard testimony from both [J.] and [S.], that it started when she was 8, and continued on through the age of 18. And there's two additional counts that we're going to talk about regarding after she was age 13. In other words, when she was over the age of 13." We believe the prosecutor adequately explained the time periods involved in the different charges.

In any event, any error committed by the trial court in reading the information was harmless. Most errors must cause prejudice in order to justify reversing a conviction. Article VI, section 13 of the California Constitution provides that a conviction shall not be reversed for a pleading error or "any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." "It is the law that even a defective information or indictment will not result in a reversal unless a substantial right of the accused on the merits is adversely affected." (*People v. Leiva*

(1955) 134 Cal.App.2d 100, 102-103.) The jury had to find only three instances of lewd conduct committed by defendant on J. before she turned 14. J. testified that the first incident occurred in the bathroom when she was eight years old, when defendant put his finger inside her vagina. J. testified that defendant touched her "a lot"—"almost—all the time" when she spent time with him. He performed oral sex on J. He would rub her chest and put his mouth on her chest. When she was 13, defendant took her to the "truck place" where he rubbed her as she sat in the car, unzipped his pants, and tried to pull her over to him. He pulled out his penis and told her to give him some honey.

J. answered in the affirmative when asked if it was fair to say that something happened to her with her grandfather when she was 9, 10, 11, 12, 13, and 14. J. said she had no doubt that her grandfather repeatedly touched her in her vaginal area with his fingers, put his mouth on her vagina, kissed her chest "skin-to-skin," and exposed his penis and masturbated in front of her. The prosecutor asked J. at one point if the final incident occurred when she was 15, and J. answered, "Yes." J. testified about the last incident—when defendant touched her and put an X-rated film on the television. He then attempted to have sex with her. The prosecutor elicited that it was in February of 2010. This incident was thus clearly marked out as occurring after J. turned 15.

We conclude defendant's claim that count 1 must be reversed due to the defective pleading and the trial court's reading of the charges before voir dire is without merit.

II. Section 288.5 and Overlapping Offenses

A. Defendant's Argument

Defendant again points out that in the accusatory pleading, count 1 alleged a time period that overlapped the time periods stated for the separate lewd acts alleged in counts 2 and 3. Defendant states that the error resulted in improper multiple convictions. He proposes reversal of the two lewd act counts. He argues that this would reduce his total sentence by three years and eight months and would render moot his separate contention

that the trial court misapplied section 654 and should have stayed the sentences in counts 2 and 3.[4]

B. Relevant Authority

Section 288.5, subdivision (c) provides that, "[n]o other act of substantial sexual conduct, as defined in subdivision (b) of Section 1203.066, with a child under 14 years of age at the time of the commission of the offenses, or lewd and lascivious acts, as defined in Section 288, involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved in which case a separate count may be charged for each victim."

C. Counts 2 and 3 Must be Reversed

In *People v. Johnson* (2002) 28 Cal.4th 240 (*Johnson*), our Supreme Court interpreted section 288.5, subdivision (c)'s requirement that "'[n]o other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense . . . is charged in the alternative, ...'" (*Johnson*, at p. 244.) In doing so, the court observed, its "role in construing a statute is to ascertain the intent of the Legislature in order to effectuate the purpose of the law. [Citation.]" (*Ibid*.) The court concluded that this portion of the statute was clear and unambiguous. (*Id*. at pp. 247-248.)

Johnson noted that a line of Court of Appeal decisions beginning with *People v. Van Hoek* (1988) 200 Cal.App.3d 811 had reversed convictions and concluded that the inability to effectively defend against charges involving multiple acts deprived defendants of due process and compromised the constitutional guarantee of jury unanimity. (*Johnson*, *supra*, 28 Cal.4th at p. 242.) The Legislature responded by

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[4] This argument consists of one sentence at the very end of defendant's opening brief.

enacting section 288.5. (Stats. 1989, ch. 1402, § 1, p. 6138.) Thereafter, the trier of fact had to unanimously agree only that the requisite number of specified sexual acts occurred. It did not have to agree on which acts these were. (*Johnson*, at p. 243.)

On the other hand, section 288.5 placed limits on the prosecution's power to charge both continuous sexual abuse and specific sexual offenses in the same proceeding. (*Johnson*, *supra*, 28 Cal.4th at p. 243.) "A defendant may be charged with only one count of continuous sexual abuse unless multiple victims are involved, in which case a separate count may be charged for each victim. [Citation.]" (*Ibid*.) In addition, "'[n]o other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative.' [Citation.]" (*Ibid*.) It disapproved the decision in *People v. Valdez* (1994) 23 Cal.App.4th 46, which held that such multiple convictions were permissible as long as there was not multiple punishment. (*Johnson*, at p. 245.)

In the instant case, as noted in the first portion of this opinion, the charges in counts 1 through 3, as written, contained overlapping time frames. The counts were not filed in the alternative, and all the charges involved the same victim. We therefore must conclude that *Johnson* is applicable. In general, the remedy when a defendant has been improperly convicted of multiple offenses is to reverse the conviction for the lesser offense, allowing the conviction for the greater offense to stand. (*People v. Black* (1990) 222 Cal.App.3d 523, 525.) Doing so would be consistent with the legislative intent behind section 288.5, which was designed to provide additional protection for child abuse victims. (*People v. Torres* (2002) 102 Cal.App.4th 1053, 1058-1059.) In *Torres*, the Court of Appeal determined that the defendant faced a greater aggregate penalty for the separate offenses and vacated the section 288.5 conviction for continuing sexual abuse, allowing the other convictions to stand. (*People v. Torres*, at pp. 1059-1061.) In the instant case, defendant's punishment is greater in count 1, and we therefore reverse his convictions in counts 2 and 3. It is well settled that a felony sentence is an integrated

whole, and that a trial court "'may reconsider all sentencing choices'" upon remand. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258-1259.) We therefore remand for resentencing to allow the trial court to exercise its discretion within the determinate sentencing scheme.

III. CSAAS Expert Testimony

A. Defendant's Argument

Defendant complains that no limiting instruction regarding the CSAAS evidence was given in this case. This despite the fact that the prosecutor acknowledged at the start of trial that such an instruction should be given but failed to draft one as requested by the trial court. Defendant argues that the trial court should have given an instruction sua sponte.[5] In the alternative, defendant contends that his trial counsel was ineffective for failing to request the instruction. According to defendant, the error is not harmless, since this case depended upon credibility alone, and the expert opinion testimony obviously swayed the jury.

B. Relevant Authority

A trial court in a criminal case has a duty to instruct on general principles of law applicable to the case (*People v. Blair* (2005) 36 Cal.4th 686, 744), that is, "'"'"those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.'"'" (*People v. Valdez* (2004) 32 Cal.4th 73, 115.)

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[5] The pattern instruction on CSAAS, CALCRIM No. 1193, provides: "You have heard testimony from _____ <insert name of expert> regarding child sexual abuse accommodation syndrome. [¶] _____'s <insert name of expert> testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against (him/her). [¶] You may consider this evidence only in deciding whether or not _____'s <insert name of alleged victim of abuse> conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of (his/her) testimony."

C. Proceedings Below

Prior to trial, the prosecutor told the court "there would have to be an additional instruction to the jury about the limited purpose of [the CSAAS expert's] testimony." The trial court responded that the prosecutor was welcome to draft one and that there were instructions in existence that could probably be readily modified. The prosecution did not provide an instruction, and none was read.

D. Any Error Harmless

As a general proposition, a trial court has no duty to give the jury a limiting instruction on the admissibility of evidence in the absence of a request by the parties. (Evid. Code, § 355; *People v. Dennis* (1998) 17 Cal.4th 468, 533.) With respect to CSAAS evidence, defendant relies on *People v. Housley* (1992) 6 Cal.App.4th 947 (*Housley*) for the proposition that "it is appropriate to impose upon the courts a duty to render a sua sponte instruction limiting the use of such evidence. Accordingly, in all cases in which an expert is called to testify regarding CSAAS we hold the jury must sua sponte be instructed that (1) such evidence is admissible solely for the purpose of showing the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested; and (2) the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true." (*Id*. at p. 959.) There are Court of Appeal decisions that disagree with this principle, but, as defendant points out, these precede the *Housley* decision. (See, e.g., *People v. Sanchez* (1989) 208 Cal.App.3d 721, 735 [instruction required only upon request]; *People v. Bothuel* (1988) 205 Cal.App.3d 581, 587-588 [same].)

In the instant case, any error in failing to give a CSAAS instruction was harmless. In analyzing claims of instructional error, we apply the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (See *People v. Flood* (1998) 18 Cal.4th 470, 490 [applying *Watson* standard in determining whether instruction removed an element of the crime from the jury's consideration].) Under *Watson*, reversal is warranted only on a determination that it is reasonably probable that defendant would

have obtained a more favorable result in the absence of any error. (*Watson*, *supra*, 46 Cal.2d at p. 836.) Instructional error such as that claimed here is "trial error whose prejudicial effect may be assessed in light of the entire record." (*People v. Flood*, *supra*, 18 Cal.4th at p. 503.)

Although opinion testimony can be very persuasive, we do not believe defendant would have obtained a more favorable result had the trial court read the CSAAS instruction. Dr. Bernfeld emphasized that, although it is labeled a syndrome, CSAAS is merely a model that helps one understand how children behave after sexual abuse; it is not "predictive" of whether someone has been molested or not, and it is not a diagnosis. She stated that she did not interview the victims or read any of the reports in this case, and she did not know that the case involved more than one victim. She was not asked to offer an opinion, and she did not, on whether the victims' behavior was typical of abuse victims; therefore, her testimony could not have been construed as corroboration of the victims' accounts. (See *Housley*, *supra*, 6 Cal.App.4th at p. 958.) Dr. Bernfeld stressed that it was not accurate to apply the model to a child's behavior and reach a conclusion that they were molested—it is not a tool for assessment. The model only explains how molested children cope.

It is to be expected that the prosecutor noted Dr. Bernfeld's testimony during her argument. In opening argument, the prosecutor stated that Dr. Bernfeld's testimony explained why children keep sexual abuse secret and provided enlightenment about the confusing way children recount sexual abuse when they finally reveal it. Her comments on Dr. Bernfeld took up less than a page out of 27 pages of opening argument. In her rebuttal argument, the prosecutor responded to the defense argument that the doctor's testimony did not add anything to the case and did not do anything to back up the girls' accusations. The prosecutor argued that Dr. Bernfeld was "not here to render an opinion about whether those girls were credible or not. That is not her job. That's not proper for her to do that." The prosecutor discussed the doctor's testimony for little more than one page in eight pages of rebuttal argument.

Furthermore, the trial court instructed the jury with CALCRIM No. 332 that the jury "must consider the opinion," but it was "not required to accept it as true or correct." The instruction states that the meaning and importance of the opinion testimony is for the jury to decide, and that the jury may disregard any opinion that it found unbelievable, unreasonable, or unsupported by the evidence. The instruction also stated that, if the expert is asked a hypothetical question based on assumed facts, it was up to the jury to decide whether the assumed facts upon which the expert's opinion was based had been proved. The trial court also instructed the jury that, in evaluating a witness's testimony it could consider, inter alia, how well the witness was able to remember and describe what happened and whether the witness made a past statement that was consistent or inconsistent with her testimony. (CALCRIM No. 226.) Moreover, the trial court permitted defense counsel, over the prosecutor's objection, to ask Dr. Bernfeld if she believed any of her clients lied about being abused. The trial court agreed with defense counsel that a negative answer would damage the doctor's credibility, and Dr. Bernfeld did answer in the negative.

We conclude defendant did not suffer prejudice from any error in failing to give a separate instruction regarding CSAAS. We further conclude defendant's alternative claim of trial counsel ineffectiveness lacks merit. To establish trial counsel was constitutionally inadequate, a defendant has the burden of proving trial counsel failed to act in a manner to be expected of reasonably competent trial counsel. Furthermore, a defendant must affirmatively show that it is reasonably probable a determination more favorable to him would have resulted in the absence of counsel's failings. (*Strickland v. Washington* (1984) 466 U.S. 668, 691-694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) A reasonable probability is one sufficient to undermine confidence in the outcome. (*Strickland v. Washington*, *supra*, at p. 694.) The deficit performance must render the result of the trial unreliable or the proceedings fundamentally unfair. (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 369-370.) Because defendant suffered no prejudice, defendant has not carried his burden of showing ineffective trial counsel.

IV. Adoptive Admission Instruction

A. Defendant's Argument

Defendant contends the trial court erred by allowing opinion testimony regarding defendant's responses to Howard's statement over the telephone, and by instructing the jury to consider the possibility that defendant's response was an adoptive admission of guilt. Defendant asserts that his response to Howard was a denial of the charges. By giving the instruction, the trial court was in effect commenting on the inadequacy of defendant's denial and inviting the jury to disregard the obvious fact that defendant denied the accusation.

B. Relevant Authority

As noted in the previous section, a trial court in a criminal case has a duty to instruct on general principles of law applicable to the case (*People v. Blair, supra,* 36 Cal.4th at p. 744.) These principles are those that are "'"'closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.'"'" (*People v. Valdez, supra,* 32 Cal.4th at p. 115.) A challenge to the propriety of particular jury instructions raises an issue of law that we review de novo. (*People v. Martinez* (2007) 154 Cal.App.4th 314, 324.)

Evidence Code section 1221 is an exception to the hearsay rule and provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

"'If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.' [Citations.] 'For the adoptive admission exception to apply, . . . a direct accusation in so many words

is not essential.' [Citation.] 'When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.' [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

C. Proceedings Below

Howard testified that he confronted his father in a telephone call. Howard told defendant that "'the girls told me that you were touching them.'" According to Howard, defendant "never answered [his] questions." Defendant "kind of like diverted to—it must be some mistake, you know. And—recheck wherever I got my information from." Defendant "didn't outright deny it." And he did not outright admit it. He "just kept diverting the conversation."

During the conference on jury instructions, defense counsel objected to the reading of CALCRIM No. 357. Counsel argued that defendant's response to Howard was neither evasive nor equivocal. Defendant's response could not be taken as anything other than a denial and was far from an adoptive admission. The prosecutor argued that, "you must be mistaken" was not an outright denial under the circumstances, and that defendant "kept diverting the conversation."

The trial court ruled that it would give the instruction, stating, "This is a factual issue for the jurors to resolve as to whether or not the defendant made such a statement; whether or not the statement on its face was such that it accused the defendant of the commission of a crime; whether or not a reasonable person under the circumstances would have denied the allegation; whether he heard it, et cetera." The trial court stated that it believed defendant's response was equivocal, and the jury could find that a reasonable person would have categorically denied the commission of the offense. The

court added, "And I think it's really up to them to decide whether or not the statement of the defendant is consistent with that."[6]

D. No Error

People v. Riel is instructive on the characteristics of an admission, stating that "'it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide.'" (*People v. Riel*, *supra*, 22 Cal.4th at pp. 1189-1190.) Here, the record supports the giving of an instruction on adoptive admissions. Although defense counsel argued that people do not react to accusations with the same degree of vehemence, under the circumstances of this case, defendant's evasive answer can properly be considered an admission. Therefore the trial court had a duty to give CALCRIM No. 357. Whether defendant's conduct constituted an adoptive admission was a question of fact for the jury to decide, and to do that, the court needed to instruct the jurors on the law of adoptive admissions.

Furthermore, even if the giving of the instruction was error, such error was not prejudicial. During argument, the prosecution made only one brief mention of defendant's response to Howard, stating, "He doesn't admit it. He doesn't deny it."

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6 The trial court read CALCRIM No. 357 as follows: "If you conclude that someone made a statement outside of court that accused the defendant of a crime, and the defendant did not deny it, you must decide whether each of the following is true: one, the statement was made to the defendant or made in his presence; two, the defendant heard and understood the statement; three, the defendant would, under all the circumstances, naturally have denied the statement if he thought it was not true; and, four, the defendant could have denied it, but did not. If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true. If you decide that any of these requirements has not been met, you should not consider either the statement or the defendant's response for any purpose."

Moreover, there was other strong evidence of defendant's guilt in the testimony of his granddaughters.

Finally, in a one-sentence argument, defendant contends that the error relating to the adoptive admission instruction must be considered in relation to the error in failing to limit the CSAAS testimony, and that cumulative prejudice arose as a result of these two errors. Having determined that the failure to read CALCRIM No. 1193 was not prejudicial, and having rejected defendant's arguments regarding the adoptive admission instruction, we conclude the cumulative prejudice argument is without merit. Our review of the entire record assures us that defendant received due process and a fair trial. As the California Supreme Court has stated, "A defendant is entitled to a fair trial, not a perfect one." (*People v. Mincey* (1992) 2 Cal.4th 408, 454.)

V. Failure to Instruct on Lesser Included Offense

A. Defendant's Argument

Defendant contends that in both counts of continuing sexual abuse (counts 1 & 4), the trial court had a sua sponte duty to instruct on the lesser included offenses of attempt to commit lewd acts. Because the jury was not so instructed, defendant argues, both counts of continuing sexual abuse must be reversed, since attempted lewd acts do not support a conviction under section 288.5

B. Relevant Authority

As noted previously, a trial court in a criminal case has a duty to instruct on general principles of law applicable to the case. (*People v. Blair*, *supra*, 36 Cal.4th at p. 744.) This obligation includes the duty to instruct on a lesser included offense if the evidence raises a question as to whether the elements of the lesser included offense, but not the greater offense, are present. (*Id*. at p. 745; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) However, the existence of "'*any* evidence, no matter how weak'" will not justify instructions on a lesser included offense. There must be "'evidence that a reasonable jury could find persuasive.'" (*Breverman*, at p. 162.) Attempt is a lesser included offense of the offense of which defendant was convicted. (§ 1159; see *In re*

Sylvester C. (2006) 137 Cal.App.4th 601, 609; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1322.)

If the trial court fails in its duty to instruct on a lesser included offense supported by the evidence, the error is at most one of state law alone. (*Breverman*, *supra*, 19 Cal.4th at p. 165.) It does not require reversal unless "an examination of the entire record establishes a reasonable probability that the error affected the outcome." (*Id*. at pp. 165, 178; *Watson*, *supra*, 46 Cal.2d at p. 836.)

C. Proceedings Below

Defense counsel confirmed to the trial court that he was not requesting lesser included offense instructions on any of the sex-related offenses. He also confirmed that the theory of the case was "all or nothing," and defendant categorically denied the commission of the offenses.

D. No Error

Defendant states he is not challenging the sufficiency of the evidence to support the completed offenses, but he argues that there can simultaneously exist evidence sufficient to allow an attempt finding as well as sufficient evidence to support a completed act. Defendant asserts that the complainants' own accounts suggested that many of the incidents that could not be recalled in detail were merely attempts. With respect to each of the girls, there were only two detailed descriptions of events that went beyond attempts as a matter of law. As for all other occasions, defendant asserts that the jury could have had a reasonable doubt as to whether there was the ultimate touching for a lewd purpose as opposed to a preparatory act.

Appellant posits, for example, that defendant's acts at the truck depot could qualify as an attempt, since his effort to pull J. onto his lap was not a lewd act but merely an act preparatory to a lewd touching that never occurred. He also cites the several occasions when defendant was apparently interrupted while pulling S.'s pants down while she slept. The act of pulling down her pants could have been treated as a preparatory act rather than as a lewd touching by the jury.

Appellant's examples do not advance his cause. J. said that shortly after she and defendant got in his car after viewing the truck, "he was rubbing on me again." He rubbed her shoulder and her thigh and tried to pull her on top of him. He could not because she had put on her seat belt. At the same time he unzipped his pants and pulled out his penis and told her to give him some honey. Clearly, the touching occurring in this incident constituted lewd or lascivious conduct, i.e., willful touching of a child accomplished with the intent to sexually arouse defendant or the child. The touching did not have to be done in a lewd or sexual manner or contact the child's bare skin. Actually arousing or gratifying the lust or sexual desires of the perpetrator or child was also not required. (See CALCRIM NO. 1120.) Likewise, pulling down S.'s pants qualified as lewd and/or lascivious conduct under the same criteria. The only claim defendant appears able to make is that, if the touching was intended merely to position the victim so that a lewd act could more easily be committed, it was an attempt. In the examples of his conduct with his granddaughters that defendant cites, this argument is not valid.

In any event, both girls cited numerous instances of touching that left no room for speculation as to whether the touching was merely an attempt. Defendant inserted his fingers in J.'s vagina when she was eight years old. J. said defendant touched her almost all the time, including having oral sex, rubbing her chest, and putting his mouth on her chest. S. remembered that defendant touched her private parts, stomach, and chest with his hands and his penis. He kissed S. as he told her she looked like her mother on another occasion. On the same occasion, he kissed her chest, masturbated in front of her, and tried to push her head onto his penis. Defendant touched her inappropriately more than five times at least. Even assuming error, it is not reasonably probable that defendant would have achieved a more favorable result had the attempt instruction been given.

VI. Display of Harmful Material

A. Defendant's Argument

Defendant contends that, because the jury did not watch the DVD that was the subject of counts 5 and 6, the jury had no factual basis for its verdict. Therefore,

defendant's convictions in counts 5 and 6 must be reversed. He suggests that this court review the film to determine whether retrial should be barred or not.

B. Relevant Authority

In determining the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Valdez, supra*, 32 Cal.4th at p. 104.) We presume the existence of every fact in support of the evidence that the trier of fact could deduce from the evidence, including reasonable inferences based on the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 58.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Subdivision (a) of section 288.2 provides in pertinent part: "Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by any means, including, but not limited to, live or recorded telephone messages, any *harmful matter, as defined in Section 313*, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of seducing a minor, is guilty of a public offense and shall be punished by imprisonment in the state prison or in a county jail." (Italics added.)

Section 313, subdivision (a), provides in pertinent part: "'Harmful matter' means matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors."

C. Proceedings Below:

J. testified that defendant rubbed her shoulders and got a DVD out from under the bed. After defendant pushed "play," J. saw "three X's" appear on the television screen. She knew this meant an X-rated movie. Defendant had shown her X-rated movies three or four times before. J. then saw "grown people having sex." J. said she would recognize the cover of a particular DVD that her grandfather showed her if she saw it again. J. identified the cover of the DVD in People's exhibit No. 2 as one of the DVD's with people having sex that defendant showed her.

When S. was asked if she remembered defendant showing her adult movies, she said she did. She knew they were adult movies because "they were having sex." The prosecution asked if there were adults having sexual intercourse, and S. said, "yes." She saw the covers of the movies and would remember a particular DVD if she saw the cover. She identified the cover of the DVD the prosecutor showed her as one defendant had shown her. S. stated that her parents would not have allowed her to watch the movies she was shown by defendant. The adults were naked.

D. Evidence Sufficient

In this case, the standard of review requires us to determine whether there is substantial evidence for a reasonable jury to conclude that the material defendant showed J. and C. was "'harmful matter'" as defined by section 313. (*People v. Dyke* (2009) 172 Cal.App.4th 1377, 1384 (*Dyke*).) The jury was instructed with the definition of harmful matter contained in section 313, subdivision (a), which "essentially 'tracks' the three-prong test for obscenity articulated by the United States Supreme Court in *Miller v. California* (1973) 413 U.S. 15, 24 (*Miller*)." (*Dyke*, *supra*, at pp. 1382-1383; see CALCRIM No. 1140.) *Dyke* noted that the definition adds that the lack of serious artistic, political, or scientific value must be evaluated with regard to minors. (*Dyke*, *supra*, at p. 1383.) "As to the first two prongs of the test for harmful matter, nothing in section 313 indicates that the 'average person' applying 'contemporary statewide standards' is anything other than an average *adult* applying *adult* standards, or that the

determination of whether sexual conduct is depicted or described in a patently offensive way should be made using anything but *adult* standards." (*Dyke, supra,* at p. 1383, fn. omitted.)

The Supreme Court has held that the "'portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.'" (*Kois v. Wisconsin* (1972) 408 U.S. 229, 231.) Moreover, the Supreme Court has also held that material even if characterized as "dismally unpleasant, uncouth, and tawdry" is not enough to make the material obscene. (*Manual Enterprises v. Day* (1962) 370 U.S. 478, 490.) Accordingly, not all portrayals of sexual conduct and nudity are considered "'harmful matter,'" which must be material that, taken as a whole, lacks "serious literary, artistic, political, or scientific value for minors." (§ 313, subd. (a).) The court in *Dyke* emphasized that some films with apparent artistic merit contain within them graphic depictions of sexual activity with the purpose of exploring their subjects. (*Dyke*, *supra*, 172 Cal.App.4th at pp. 1385-1386; see also, *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 247-248 (*Ashcroft*).) "[T]he question of what is '"patently offensive"' under the community standard obscenity test is essentially a question of fact." (*Dyke, supra,* 172 Cal.App.4th at p. 1384.)

In *Dyke*, a 16-year-old minor testified that, while she was staying at the house of a friend, her friend's father (the defendant), displayed what she referred to as "pornography" on the television while he flipped through channels. The minor remembered seeing a naked woman dancing for a period between one and eight minutes. She also saw the upper bodies of a naked man and woman who were "'having sex'" with the woman "on top" for around 45 seconds. The defendant told the minor that he should not "have this on" because she would "have funny dreams and feel funny." After the minor went to bed, defendant entered her room and rubbed her breast, kissed her mouth, and asked her if she felt "horny." The defendant was convicted of section 288.2, subdivision (a) as well as misdemeanor sexual battery. (*Dyke, supra*, 172 Cal.App.4th at pp. 1380-1381.)

The appellate court held the evidence was insufficient to establish that the images seen on television constituted "harmful matter" for purposes of section 288.2, subdivision (a). The court cited *Ashcroft* for the proposition that "'an essential First Amendment rule [is]: The artistic merit of a work does not depend on the presence of a single explicit scene.'" (*Dyke, supra, 172 Cal.App.4th* at p. 1386.) The court observed that, "in order to determine whether a portrayal of sex is patently offensive to the average adult, '[a] reviewing court must, of necessity, look at the context of the material, as well as its content'" and the record before it was missing "any context" from which it could be determined whether the images depicted were patently offensive to the average adult. (*Id*. at p. 1385.) The court concluded that, "[w]ithout more, neither we nor the jury are permitted to presume that such content [a nude woman dancing and a naked couple having sex, shown from the waist up] is patently offensive to the average adult, applying statewide community standards." (*Ibid*.) The court found the minor's reference to "'pornography'" also lacked evidentiary weight without testimony "as to what she meant by that term, or how broadly it may have been intended." (*Id*. at p. 1384, fn. 5.) The court observed that "it is not the minor's opinion that matters; the sexual conduct depicted must be judged patently offensive under a single contemporary statewide standard." (*Ibid*.)

In a more recent case, *People v. Powell* (2011) 194 Cal.App.4th 1268 (*Powell*), the defendant was convicted of raping his daughter, who was 10 years old or younger, and exposing her to pornographic movies. (*Id*. at p. 1274.) The victim testified that the movies the defendant showed her depicted "'girls and boys'" with their penises and vaginas exposed, engaging in sexual activity. (*Id*. at pp. 1284-1285.) The victim described a man in the movies uncovering his penis and putting it in the vagina. She said that the man's penis was covered by a "blob," which was presumed to be pixelization. (*Id*. at p. 1286.) The people in the movie were having sex, and the victim could see and hear them engaging in sex. (*Ibid*.)

In evaluating the sufficiency of the evidence in support of the defendant's section 288.2 conviction, the appellate court cited *Miller* for the proposition that "'no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed.' [Citation.]" (*Powell, supra*, 194 Cal.App.4th at p. 1293.) "*Miller* makes plain that 'hard-core pornography is synonymous with obscene pornography.' [Citation.] 'Based on *Miller*, the law distinguishes between hard-core pornography and soft-core pornography, which involves depictions of nudity and limited and simulated sexual conduct. Because it is not as graphic or explicit as hard-core pornography, soft-core pornography is protected under the First Amendment.' [Citation.]" (*Powell*, at p. 1293.)

The *Powell* court believed that most of the victim's description of the movies she was shown was insufficient to determine whether the material was "obscene." (*Powell, supra*, at p. 1293.) On the other hand, the victim's description of seeing a movie depicting people engaged in sexual activity in which "[p]enises, breasts, and vaginas [were] featured in lewd displays" was sufficient to satisfy the "harmful matter" element of the offense. (*Id*. at p. 1295.)

The factual scenario in the instant case is distinguishable from both *Dyke* and *Powell*. Unlike *Dyke*, here there was tangible evidence introduced at trial of precisely what the girls saw. (See *Dyke, supra*, 172 Cal.App.4th at p. 1384.) The victims' testimony here was not quite as detailed as in *Powell*. J. identified the DVD as having a triple-X rating and said that she saw "grown people having sex" when the DVD began playing. S. also testified that defendant showed her a DVD with naked people having sexual intercourse. However, J. and S. both identified the cover of the DVD labeled People's exhibit No. 2 as one that defendant had shown them. The trial court noted that there were bare-breasted women on the DVD cover, and it was concerned about showing the cover to the girls as they testified. The prosecutor noted that the DVD cover was "pretty graphic." At the end of evidence, the DVD was admitted into evidence without

objection. The jury also saw the cover of the DVD and apparently needed no other confirmation that the DVD contained harmful matter. Nor does this court. The cover depicts what can only be classified has "hard core" pornography, and the DVD inside corresponds to the cover. There is no indication that the 10 images on the DVD cover do not correspond to the contents of the DVD.[7]

Accordingly, even though the two victims in this case did not describe in precise detail what they saw when defendant showed them X-rated movies, the evidence, as a whole, supports the inference that the pornographic DVD was of the type deemed harmful by section 313, subdivision (a).

Defendant argues that, if this Court applies *Powell*, it would constitute a violation of ex post facto principles, since *Powell* was decided after the charged acts in this case. We disagree. As our Supreme Court has stated, "'[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates in the same manner as an ex post facto law.' [Citations.] In this case, however, we are not retroactively enlarging a criminal statute but merely *interpreting* one. . . . Our holding is a routine interpretation of existing law, not an overruling of controlling authority or a sudden, unforeseeable enlargement of a statute." (*People v. Billa* (2003) 31 Cal.4th 1064, 1073.)

We conclude the evidence was sufficient to sustain the convictions in counts 5 and 6.

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[7] The cover itself was harmful matter. Section 313, subdivision (b), provides: "'Matter' means any book, magazine, newspaper, video recording, or other printed or written material or *any picture*, drawing, *photograph*, motion picture, *or other pictorial representation* or any statue or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction or any other articles, equipment, machines, or materials. 'Matter' also includes live or recorded telephone messages when transmitted, disseminated, or distributed as part of a commercial transaction." (Italics added.)

DISPOSITION

The judgment is reversed as to counts 2 and 3 and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
ASHMANN-GERST