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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOSE LUIS HERNANDEZ,<br><br>Defendant and Appellant. | B277882<br><br>(Los Angeles County<br>Super. Ct. No. BA436981) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputies Attorney General, for Plaintiff and Respondent.

Jose Luis Hernandez appeals from his convictions on five counts for: unlawful sexual intercourse, sodomy and unlawful sexual penetration with a child age 10 years or younger and lewd or lascivious act on a child under age 14. He contends that reversal is required because (1) the trial court erred in refusing to suppress his post–arrest statements to police obtained in violation of his *Miranda* rights, and because he did not make a knowing, intelligent and voluntary waiver of his *Miranda* rights; (2) admission of evidence of the victim's forensic urine test which established her Chlamydia infection was inadmissible case–specific hearsay which violated his rights under the confrontation clause; (3) the sodomy conviction must be reversed because there is insufficient evidence he penetrated the victim's anus; (4) the conviction for lewd and lascivious acts involving a child should be reversed because it is a lesser included offense of the crime of sexual acts with a child age 10 years or younger; and (5) Penal Code section 654 bars concurrent punishment for the lewd act conviction that may be based on the same act as one of the other four convictions. We affirm.

## PROCEDURAL BACKGROUND

Appellant, a person over age 18, was charged by information with two counts of sexual intercourse or sodomy with a child age 10 years or younger (Pen. Code, § 288.7, subd. (a)[1]; counts 1 & 2), two counts of oral

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[1] Statutory references are to the Penal Code unless otherwise noted.

copulation or sexual penetration with a child age 10 years or younger (§ 288.7, subd. (b); counts 3 & 4), and a lewd or lascivious act on a child under age 14 (§ 288, subd. (a); count 5). Appellant was also alleged to have inflicted great bodily injury upon the victim, his daughter, Gabriela M., within the meaning of section 12022.7, subdivision (a) as to all five counts. A "One Strike" great-bodily-injury was alleged within the meaning of section 667.61, subdivisions (a)–(d) as to count 5.

Appellant pled not guilty and denied all allegations. The prosecution proceeded to trial on unlawful sexual intercourse as to count 1 and sodomy as to count 2. Counts 3 and 4 were prosecuted as unlawful sexual penetration. A jury found appellant guilty on all counts, but rejected the special allegations. Appellant was sentenced to a state prison term of 40 years to life. His sentence consists of a term of 25 years to life on count 1, and a
consecutive term of 15 years to life on count 3. The terms on the remaining counts (2, 4 & 5) were ordered to run concurrent to the sentences imposed as to counts 1 and 3. He timely appeals.

## FACTUAL BACKGROUND

*Prosecution Evidence*

Gabriela (born May 2006) was eight–to–nine years old when she lived with appellant, her biological father (born August 1980) in a residence in Los Angeles between May 4, 2014 and May 3, 2015. The child's mother, N.M., lived in Boston. Appellant was Gabriela's sole caretaker.

1. *Gabriela's Trial Testimony*

At trial in August 2016, then 10–year–old Gabriela testified that, when she was eight to nine years old, she and appellant lived in an apartment in Los Angeles with several other people. She and appellant slept in the same bedroom, Gabriela on a couch bed, her father on the floor. Gabriela always wore pajamas to sleep. Sometimes when Gabriela awoke she found appellant sleeping next to her on her bed.

When Gabriela was nine years old, appellant touched her body three to four times under her clothes at night, including her front "private parts" she uses to "go pee." It felt "weird," and hurt when appellant was touching her front "private part" with his fingers under her clothes, but she did not feel his fingers go "inside" her "private part." Another time, Gabriela awoke at night to find appellant touching her with his fingers. She felt something white, sticky and wet on her front "private part," her butt and on the back of her legs. Four other times appellant touched her buttocks under her clothes with his fingers. Once Gabriela woke up to find her pajama top "up," but not off. She wore "nothing" under her pajamas. Gabriela said what happened to her was not normal.

2. *Gabriela's Chlamydia Diagnosis and the Aftermath*

On May 8, 2015, Gabriela underwent a forensic child abuse examination conducted by Shana Cripe, a nurse practitioner at the Violence Intervention Program Clinic at LAC/USC Medical Center. The

clinic specializes in forensic exams of physical and sexual abuse of children, and adult sexual abuse and rape. Gabriela's exam, which included genital and anal examinations and the collection of bodily fluids for testing, was normal, and there was no evidence of trauma. Cripe testified that sexual contact does not always cause trauma, and she has "seen quite a few child sexual abuse exams that were normal." Urine collected from Gabriela during that exam was sent to a lab and tested positive for Chlamydia infection. The findings were memorialized on a document sent to a social worker at Department of Children and Family Services (DCFS).

After Gabriela was diagnosed with Chlamydia, several unsuccessful attempts to contact appellant were made. Eventually, a social worker contacted appellant's former girlfriend, Ana D., in an effort to find appellant and Gabriela. The social worker told Ana D. that DCFS was trying to find appellant because Gabriela needed medical attention. Ana D., who, until February or March 2015, had dated appellant for two–and–one–half or three years, became suspicious because she had contracted two Chlamydia infections during her relationship with appellant. She attributed the infections to him because Ana D. had been monogamous during that relationship. The first time Ana D. learned, during a routine medical exam, that she had contracted Chlamydia, both she and appellant took medication prescribed to treat the infection. When Ana D. learned she had a second infection in March or April 2015, she was no longer dating appellant and did not tell him.

After talking to the social worker, Ana D. contacted appellant. He agreed to meet her near a park on May 29, 2015. They met and spoke in Ana D.'s car while Gabriela played nearby. Ana D. asked appellant why the social worker was looking for him. Appellant told her Gabriela had been misbehaving at school. Ana D. suspected something more serious was afoot because the social worker had come to her house urgently seeking appellant, and had said Gabriela required medical attention. She asked appellant if he had "touched" Gabriela. Appellant dropped his head, remained quiet for a time and said, "No." Ana D. continued to pressure him, and asked, "So why they're looking for you?" Appellant responded, "I don't know how this happened." Ana D. asked appellant again, "did you touch" Gabriela? Appellant told her he "was asleep and when [he woke] up [his] penis was between [Gabriela's] legs." Ana D. angrily slapped appellant and told him to call the social worker. She and he waited in her car until the police arrived. Gabriela was taken into protective custody, appellant was arrested, and both were taken to the police station.

3. *Gabriela's Police Interview*

Gabriela was interviewed at the police station with the assistance of a social worker. Gabriela acknowledged that molestation had occurred on about eight occasions when she was eight years old. The child reported that, on one occasion, she felt a hard object rubbing on her buttocks under her clothing. She did not know what it was, but it made her feel very uncomfortable.

Gabriela described another incident during which she felt a hard object near her naked vaginal area. Another time, she woke in the middle of the night and was confused because her tights and underwear were around her ankles. She felt something wet, but she knew she had not urinated on herself. When she asked her father what had happened, he became upset and told her "to go take a shower." She felt "uncomfortable to her vaginal area and her buttocks," and felt pain and a burning sensation in the area of her vagina that lasted about a day. Gabriela denied that appellant had touched her with his penis or covered her mouth with his hand to keep her quiet during sex. She denied feeling anything "hard" next to her in bed, or that appellant took off her clothes, got on top of her, or spread her legs.

4. *Gabriela's Mother's Testimony*

N.M. testified that Gabriela told her about the molestation after she began living in Boston in January 2016. Gabriela told her mother that, when she had been nine–years–old and living with appellant in Los Angeles, he had taken off her clothes while she was asleep. On many occasions, appellant opened her legs, lifted her up, and had sexual intercourse with her, penetrating her vagina with his penis. He got on top of Gabriela to have sex with her, and also touched her butt. Gabriela said appellant covered her mouth with his hands to keep her quiet during sex. Gabriela had also told her mother she reported the molestation to school staff, and there was a meeting about it that N.M. attended.

5. *Appellant's Police Interviews*

After his arrest, Vanessa Prentice, a Spanish language certified police officer, interrogated appellant at the police station. A DCFS social worker was present during some of the questioning.[2] Appellant was advised of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He denied having raped or sodomized Gabriela. He admitted touching Gabriela's vagina and butt with his hand after he masturbated and ejaculated while she slept near him. He admitted putting his index finger in Gabriela's vagina during this sexual act.

Appellant said Gabriela slept on a futon and he slept on the floor next to the futon in the room they shared. He claimed a single incident of molestation had taken place two or three months before his arrest. Appellant said he had been asleep and not fully conscious when it happened. When he woke up and realized what he was doing, he stopped immediately. It had been a mistake and he did not want to do it to his daughter. As for transmission of the Chlamydia infection to his daughter, appellant said he must have infected her when he placed his finger with his semen in her vagina.

Appellant later admitted having inserted the tip of his penis into Gabriela's vagina, but then denied doing so and denied having

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[2] A recording of appellant's interrogation was played at trial, and the jury was given a redacted transcript of a Spanish-to-English translation of the recording.

penetrated Gabriela's vagina. He admitted that his erect penis was once "in/on" Gabriela's buttocks, and said he woke up to find his pants pulled down and his penis in that position and had "not completely penetrated." He had inserted his finger in her buttocks once. At the end of the interrogation, appellant wrote an apology letter in Spanish to his daughter, which was translated to English and read at trial to the jury.[3]

On June 1, 2015, appellant was interviewed again by LAPD Detective Ana Melara and her partner, each of whom is Spanish language certified. Appellant was reminded about the previously given *Miranda* rights, and agreed to talk to the detectives. He said he had touched Gabriela two to three times, touching her vaginal area with his hand and finger. He said he penetrated her vaginal area with his index finger, and drew a picture depicting how much of his finger had been inserted. Appellant said semen was on his finger when he touched Gabriela's vaginal area.

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[3] The letter states, "Hello daughter. I love you very much. I want to ask you to forgive me for what happened and please pay attention to the police officers. They will give you medicines. You just ask God to take care of you. They're good and don't worry about me. I am fine. I pray to God you forgive me and that everything comes out okay. I love you very much. Forgive me for not having taken you to school yesterday and today. I love you very much, my daughter, and soon you will be with your little sister Alison and with your mother. Now, as I showed you when you go to sleep, to pray and always have faith in God. I love you, daughter. I love you, my daughter, and forgive me. Thank you for the days that I took you to church and you behaved well."

Appellant also told the detectives that, on another occasion, he was on top of Gabriela's buttocks and touching her buttocks with his erect penis. He said he once penetrated in or on her buttocks with "just the tip of his penis." Appellant wrote a second letter of apology to Gabriela, which was also translated and read to the jury.[4]

6. *Expert Testimony*

Dr. Janet Arnold-Clark, the child abuse pediatrician who treated Gabriela for the Chlamydia infection, testified that Chlamydia are bacteria which live inside an infected person's cells. The transmission of Chlamydia from one person to another happens when mucous membranes of an infected person come into contact with the mucous membranes of another person. Mucous membranes are the moist, thin layers that cover one's eyes, the inside of the mouth, the rectum, tip of the penis and the opening of the cervix in adolescent women. Pre–pubertal girls have mucous membranes throughout their vaginas, including the hymen and the area immediately outside the hymen. Penile-vaginal penetration is required at least beyond the labia minora in order for one to contract a vaginal Chlamydia infection. Ejaculation

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[4] The second letter states, "Hello daughter. I am sincerely worried about your health, and I want to ask you to forgive me for having touched you in your private parts and for having done to you what no parent has the right to do, what no parent should do. Daughter, I love you very much, and I want you to forgive me. And God willing you'll be with your mom and your little sister. Remember that I love you very much. Signed Jose Hernandez and dated June 1, 2015, 1:20 p.m."

is not necessary. Dr. Arnold-Clark testified that Chlamydia can be transferred in pre–pubertal children through penal penetration of either the anus or vagina. In her opinion, Chlamydia cannot be transferred by digital penetration with semen deposited on a person's finger because Chlamydia bacteria die within seconds of being outside a human cell. Dr. Arnold-Clark reported the positive Chlamydia test to DCFS and the Department of Health so they could initiate sexual abuse investigations, and so Gabriela could be brought in to receive treatment.

The computer-generated report for Gabriela's urine test result was introduced at trial during the testimony of Melanie Osby, M.D., Laboratory Director for the Department of Health Services at Martin Luther King, Jr., Outpatient Center, the facility that tested Gabriela's urine sample. Dr. Osby, who did not personally perform the test on Gabriela's sample, described the process by which urine samples are handled and tested by the laboratory. She explained that Gabriela's urine sample tested positive for Chlamydia infection, and stated that the accuracy rate of the test performed exceeds 98 percent.

Jayme Jones, Ph.D., a psychologist, presented expert testimony about the child sexual abuse accommodation syndrome (CSAAS). Dr. Jones explained that CSAAS is a model for understanding the behavior of sexually abused children, and dispels the myth that children in abuse situations will fight back or immediately disclose abuse. CSAAS has five components: secrecy, helplessness, accommodation, disclosure, and recantation. Child abuse generally occurs in secrecy, signaling to the

child that they are not supposed to disclose what happened. In many cases children do not fight their abusers because they are physically weaker and have been socially conditioned to do as told by adults. Children adopt mechanisms to cope with trauma and frequently pretend the abuse did not happen. If the abuser is a family member, it is not unusual for a child to continue to show the abuser affection. Most children will delay disclosing the abuse or will only partially disclose, if at all. Victims may recant a prior version of events to avoid talking about the abuse, or to minimize negative consequences of disclosure, such as familial disapproval or removal from the home.

*Defense Evidence*

Appellant testified in his own defense. He denied having put his penis into Gabriela's anus or vagina. He admitted having touched his daughter twice. He took medication to sleep, and each time when he had woken up, he was half–asleep and half–awake, unconscious, like sleepwalking. He had not consciously taken off or lowered his daughter's clothes, or touched her vagina or buttocks. He had woken to find himself in these positions, and his sperm had unconsciously been transferred from his hands to Gabriela's vagina.

One time appellant woke up to find his finger inside Gabriela's vagina. As he pulled his hand away and stood up, he realized he had ejaculated and had semen on his finger. Appellant testified that he had put his hand "on" (not "in") his daughter's buttocks. He was confused

and was tricked by the police into making incriminating and untrue statements.

Dr. Ryan O'Connor, an emergency medicine physician, testified that Chlamydia bacteria can be found and transmitted in semen. Semen containing a Chlamydia infection that gets into a vagina can transmit the infection. In Dr. O'Connor's opinion, it does not matter whether the infected semen is delivered to the vagina directly from the penis, or transmitted by ejaculate on fingers placed in the vagina.

## DISCUSSION

### I. *The Trial Court Did Not Err in Admitting Appellant's Post-Arrest Statements To The Police*

Appellant contends that reversal is required because "[t]he police failed to honor [his] pre-interrogation invocation of his rights to counsel in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution, as interpreted by *Miranda v. Arizona* (1966) 384 U.S. 436, and its progeny," rendering his statements to the police inadmissible. Our review of the record, however, supports the trial court's conclusion that appellant failed unambiguously to invoke his rights, and that appellant's statements to the police were voluntary. We also conclude that, if error occurred, it was harmless beyond a reasonable doubt.

1. *Controlling Legal Principles*

The law is well settled. When reviewing a trial court's decision on a motion that a statement was collected in violation of a defendant's rights under *Miranda, supra*, 384 U.S. 436, we defer to the court's resolution of disputed facts, including the credibility of witnesses, if that resolution is supported by substantial evidence. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1032–1033 (*Bradford*).) "Considering those facts, as found, together with the undisputed facts, we independently determine whether the challenged statement was obtained in violation of *Miranda's* rules." (*People v. Weaver* (2001) 26 Cal.4th 876, 918, citing *Bradford, supra*, 14 Cal.4th at p. 1033; *Dickerson v. United States* (2000) 530 U.S. 428, 435.) We are governed by federal constitutional standards in determining "issues relating to the suppression of statements made during a custodial interrogation." (*People v. Nelson* (2012) 53 Cal.4th 367, 374.)

*Miranda* requires that a suspect be told, before questioning, that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Miranda, supra*, 384 U.S. at p. 479.) A suspect's custodial statement is inadmissible unless the suspect has been warned of his rights and knowingly, intelligently and voluntarily decides to forgo them. (*Ibid.*)

Once a suspect has received a *Miranda* warning, he "is free to exercise his own volition in deciding whether or not to make a

statement to the authorities." (*Oregon v. Elstad* (1985) 470 U.S. 298, 308; see *Berghuis v. Thompkins* (2010) 560 U.S. 370, 384 (*Berghuis*) [defendant who was advised of and understood *Miranda* rights found [not to have invoked/to have waived] rights by continuing to answer officers questions].) A *Miranda* waiver need not be explicit. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373 [waiver may be "inferred from the actions and words of the person interrogated"].)

If a custodial defendant requests counsel, all questioning must cease. (*Edwards v. Arizona* (1981) 451 U.S. 477, 482 (*Edwards*).) Statements made by a custodial defendant in violation of his *Miranda* rights are inadmissible in the prosecution's case-in-chief. (*Bradford, supra*, 14 Cal.4th at p. 1033.) Here, there is no dispute that police were interrogating appellant, or that he was in custody. The issue is whether he invoked his right to counsel before making the challenged statements.

In *Davis v. United States* (1994) 512 U.S. 452 (*Davis*), the United States Supreme Court clarified that a custodial suspect being questioned by police who wants a lawyer must clearly assert his right to counsel. (*Id*. at p. 461.) The *Davis* Court found that a suspect's remark to questioning officers–"'Maybe I should talk to a lawyer'"–was an ambiguous, equivocal reference, not a clear request for counsel during a custodial interrogation. (*Id*. at p. 455.) The Court observed that, under the rule established by *Edwards, supra,* 451 U.S. at page 482, when a suspect requests counsel, the police must stop questioning until a lawyer has been made available to the suspect or he reinitiates

conversation. Application of this rigid rule requires the court to determine whether the suspect "'actually invoked'" his right to counsel. (*Davis, supra*, 512 U.S. at p. 458.) "To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry." (*Id.* at pp. 458-459.) "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' [Citation.] But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." (*Id.* at p. 459.)

Rather, the suspect must unambiguously request counsel. As we have observed, "'a statement either is such an assertion of the right to counsel or it is not.' [Citation.] Although a suspect need not 'speak with the discrimination of an Oxford don,' [citation], he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, [*Edwards, supra*, 451 U.S. at p. 482] does not require that the officers stop questioning the suspect. [Citation.]" (*Davis, supra*, 512 U.S. at p. 459.)

The California Supreme Court has held that police may seek clarification when a suspect makes an ambiguous or equivocal request for counsel prior to any waiver of *Miranda* rights. (*People v. Sauceda–*

*Contreras* (2012) 55 Cal.4th 203, 217 (*Sauceda–Contreras*); *People v. Williams* (2010) 49 Cal.4th 405, 428 (*Williams*).) "Ultimately, the question becomes whether the *Miranda* waiver is shown by a preponderance of the evidence to be voluntary, knowing and intelligent under the totality of the circumstances surrounding the interrogation. [Citations.] The waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception' (*Moran v. Burbine* (1986) 475 U.S. 412, 421), and knowing in the sense that it was 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' (*Ibid.*)" (*Sauceda–Contreras, supra,* 55 Cal.4th at p. 219.)

Again, the standard is objective and asks what a reasonable officer would have understood the nature of the suspect's request to be under all the circumstances. (*Sauceda–Contreras, supra*, 55 Cal.4th at p. 217; *Davis, supra*, 512 U.S. at p. 459.) Using this standard, *Davis* found the statement, "'[m]aybe I should talk to a lawyer,'" was not a clear request for counsel, so officers were not required to cease their interrogation. (*Davis, supra*, 512 U.S. at p. 462.) Similarly equivocal statements must satisfy the objective test. (See, e.g., *Sauceda-Contreras, supra,* 55 Cal.4th at p. 219 ["'[i]f you can bring me a lawyer, . . . that way I can tell you everything that I know'" held to be "conditional, ambiguous, and equivocal" under the totality of the circumstances]; *People v. Bacon* (2010) 50 Cal.4th 1082, 1104, 1105 ["'I think it'd probably be a good idea for me to get an attorney'" held ambiguous or equivocal]; *Clark v.*

*Murphy* (9th Cir. 2003) 331 F.3d 1062, 1069, overruled on another ground by *Lockyer v. Andrade* (2003) 538 U.S. 63, 71 ["'I think I would like to talk to a lawyer'" deemed ambiguous or equivocal].).)

By contrast, more definitive statements have been found sufficiently clear to constitute unequivocal requests for counsel. (See e.g., *In re Art T.* (2015) 234 Cal.App.4th 335, 355–356 [teen suspect's statement: "Could I have an attorney? Because that's not me" held to be unequivocal request for counsel]; *Alvarez v. Gomez* (9th Cir. 1999) 185 F.3d 995, 996-997 ["'Can I get an attorney right now, man?'" "'You can have attorney right now?'" "'Well, like right now you got one?'" deemed sufficiently unequivocal]; *United States v. de la Jara* (9th Cir. 1992) 973 F.2d 746, 750 ["'Can I call my attorney?'" or "'I should call my lawyer'" sufficiently unambiguous to invoke right to counsel]; *Smith v. Endell* (9th Cir. 1988) 860 F.2d 1528, 1529 ["'Can I talk to a lawyer?'" and "'I think maybe you're looking at me as a suspect, and I should talk to a lawyer'" was neither ambiguous or equivocal].)

2. *Appellant's Motion to Suppress*

Appellant moved in limine to suppress incriminating statements he made during police interviews after his arrest. The trial court conducted an evidentiary hearing over the course of two days. Officer Prentice testified about the May 29, 2015, post–arrest interview she conducted, and a recording and transcript of that recording (including a Spanish to English translation) of her interview, and a *Miranda* rights

admonition form (in Spanish) signed by appellant on that date were admitted in evidence.

The *Miranda* admonition form signed by appellant was translated as follows:

"Number 1: You have the right to remain quiet. Do you understand?

"Number 2: Anything you say can be used against you in a court of justice. Do you understand?

"Number 3: You have the right to the presence of an attorney before and during any interrogation? Do you understand?

"Number 4: If you don't have the money to pay for an attorney, one will be named for you without cost before you are interrogated. Do you understand?

"Do you want to speak everything that happened?"

Officer Prentice testified that, on May 29, 2015 at 11:30 p.m., she used this form to advise appellant of his *Miranda* rights in Spanish. When her interview ended at 1:40 a.m. on May 30, appellant wrote "si" ("yes" in Spanish) after each advisement, and signed the form.

First, Officer Prentice confirmed that Gabriela was appellant's daughter and lived with him. She advised appellant that Gabriela had tested positive for Chlamydia, and said he was under arrest for sexually abusing his daughter. Officer Prentice advised appellant as follows:

> "INT[5] Okay. So now you know why you are here, and you want to tell us what happened, so then we can put whatever you say, in a

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[5] "INT" refers to the interviewing officer, or interpreter, "DET" refers to detective, "JH" refers to appellant, "SW" refers to a social worker, "UI" means unintelligible, italicization denotes that English was spoken.

paper, okay? Because you are under arrest, we are . . . first we detained you to . . . *You know* . . . to investigate the case. *So* . . . we talked to Gaby, we talked to, uh, well, to your family, okay? To your girlfriend and all the others, okay? I don't know who she is, no, we don't . . . how do you call her?
"JH Uh–hum.
"INT Okay. Your companion, or I don't know how you call her. Uh, but what happens is your daughter has that, that Chlamydia and there is no, no way to deny that. Those were the results, okay? *So* . . . Do you want to talk about that? First I'm going to read you your rights before you. . . . I already told you why you are under arrest. Uh . . . you have the right to remain silent, do you understand? You have to say yes or no.
"JH Uh–hum.
"INT No, yes or no.
"JH What do you mean?
"INT Those are, are your rights, I am reading you your rights.
"JH All right.
"INT *So* . . . You have the right to remain silent, do you understand?
"JH Yes.
"INT Okay. Anything you say, can be used in court, uh, in a court against you of justice, do you understand? [*sic*]
"JH Uh, wouldn't it be better for an attorney to be here, because I barely understand any of that.
"INT Okay. I am asking you your questions and you don't have the right to ask for an attorney yet.
"JH Uh-hum.
"INT Okay, because I'm not asking you anything. I am reading you your rights.
"JH Ah, okay.
"INT The only thing I need to know is if you understand or not.
"JH Uh-hum. [UI].
"INT Okay. So . . . anything you say, could be used against you in a court of law, do you understand?
"JH Yes.
"INT Yes. You have the right of the presence of an attorney before and during questioning, do you understand?

"JH Yes.
"INT If you have, if you do not have the money to pay for an attorney, one will be appointed to you free of charge before questioning.
"JH Yes.
"INT Do you understand? Okay. And now if you want to talk about what happened, that's when you can tell me what happened.
"JH Well, the word of a girl, like I explained to you/to her, last time, there was a result that she had something like that."

A social worker at the interview informed appellant that she was present on the girl's behalf. She noted that Gabriela had contracted a sexually transmitted venereal disease (Chlamydia), that appellant was a suspect and that it was important for Gabriela to receive medical treatment. She told appellant Gabriela had been detained from his custody and placed in foster care until DCFS could determine an appropriate, safe placement for her. The social worker noted that, in addition to the police investigation, independent investigations were being conducted by DCFS and the Health Department. The social worker told appellant she needed to know if he had contracted Chlamydia in the past, and if he was willing now to be tested for it. After appellant indicated that he was willing to be tested, this exchange occurred:

"JH I am doing this to collaborate, you know what I mean?
"SW And that's the best thing you can do . . . the collaboration. Uh, but yes . . . definitely, the girl has that and we are going to ask that you also get tested, okay?
"JH In case I have that, practically, practically I was the one who abused her, like the case says?

"SW I am not saying that, but that is going to be the investigation that the police are doing.
"JH If [UI].
"SW Now, if you want to say something and you want to be honest, like the police told you, then talk, talk to them and tell them what happened.
"JH And how many years would it be if I . . . ?
"SW I have no idea about that, I am not an attorney. It's a completely different department. I am here for the girl. I am the girl's social worker. I am not an attorney, or the police.
"JH Uh-hum.
"SW All of this, this is not my thing. My thing are the children. So . . . I couldn't answer any of those questions because I don't know.
"JH Yes, you are right.
"SW Okay. So . . . Uh, I wanted to ask you the girl's questions, you are going to stay here detained with them. They are going to interview you, ask you some questions and see how much you want to cooperate with them. I, we are done here. I am going to make sure that I talk to the mom and I am going to tell her what you have communicated."

Appellant made numerous admissions during the remainder of the interview. Toward the end of the interview, he said:

"JH I, am telling you the truth.
"INT Yes.
"JH But I believe an attorney should be present [UI] with you and all your intention, well, fine.
"INT Okay. *So* . . . Do you think your mouth touched her part?
"JH No."

At trial, Detective Melara testified that she and her partner, both certified Spanish speakers, interrogated appellant a second time on June 1, 2015. Appellant was reminded that his *Miranda* rights were

read to him by the arresting officers, and he was asked if he wanted to speak with the detectives. He agreed to do so. Appellant told the detectives he touched Gabriela's vaginal area with his hand two or three times, and touched her vaginal area with semen on the hand, had penetrated her vagina with his right index finger, and had once "penetrated" on or in her "buttocks" with the erect "tip of his penis" while he was on top of her. During that interview, appellant drew a picture depicting how much of his finger was inserted into Gabriela's vagina, and wrote the second apology letter.

In opposition to the motion to suppress, the prosecutor argued that, while being advised of his *Miranda* rights, appellant made "a rather equivocal comment about a lawyer being present." The officer responded that appellant "did not have a right to a lawyer yet, [because] she was reading him his rights at that point and then went on to do so, including reading him his rights to the presence of an attorney during any questions or before . . . any questioning." The prosecutor argued that, after the officer completed reading appellant's *Miranda* rights, she asked if he wanted "to talk about the investigation or the case?", at which point appellant proceeded "to provide information," thereby waiving his rights.

Appellant's counsel argued that appellant had requested counsel when Officer Prentice began reading his rights, and the officer failed to credit his request. Counsel conceded that appellant's statement– "Wouldn't it be better for an attorney to be here" was "potentially ambiguous." She argued that the process took a wrong turn once the

officer finished reading the rights, including the right to counsel, and "never attempted to clarify what could be described as an ambiguous comment." Instead, the officer said: "[t]he only thing I need to know is if you understand."[6] Counsel argued that appellant's constitutional rights were violated, given the officer's earlier confusing statement that he was not yet entitled to have a lawyer present, and her subsequent failure to clarify appellant's request after finishing the advisements. As a result, counsel argued that the prosecution failed to establish that appellant had knowingly and intelligently waived his *Miranda* rights.

The trial court rejected the motion to suppress. It found that appellant's statement "wouldn't it be better for an attorney to be here," was "equivocal and ambiguous," made before he was advised of his right to counsel, and that the officer's subsequent advisements clarified any confusion appellant may have had. The court found that *Davis, supra*, 512 U.S. 452 and its progeny did not require that the officer stop her questioning or ask clarifying questions. And, as discussed in detail below, the court found, after reviewing video and transcripts of the interview, and the signed admonition form, that appellant's "statement under the law was ambiguous as to his assertion of the right to

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[6] Actually, the last thing said by the officer before the questioning began was: "Do you understand? Okay. And now if you want to talk about what happened, that's when you can tell me what happened."

counsel," and that the "totality of circumstances show[ed] defendant knowingly and intelligently waived" his *Miranda* rights.[7] We agree.

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[7] The court's well-reasoned ruling is illuminating. We quote it at length. As to the issue of whether appellant unequivocally asserted the right to counsel, the court stated:

"THE COURT: The difference here is that in the progression of questions posed, the officer had not yet advised the defendant of his right to counsel. Now, there is no requirement that a defendant wait for the officer to admonish before the defendant invokes; however, the way in which the back and forth went between the defendant and the officer, he made the statement about an attorney before she advised. [¶] . . . on the right to counsel. And so what is clear to me from watching the video and reading the transcript is that you had an officer who having been taught that advisements need to be given was making sure that she did her job of reading the rights to the defendant. That is how I understood the situation to be. Now – [¶] . . . Did she articulate clearly that that is what she was doing? No. I also think that she's technically wrong. The defendant doesn't have to wait until she finishes admonishing. He can assert his right to counsel at any time at the very beginning, before any rights are read, he can say, 'I know what my rights are. I have a right to an attorney. I'm asserting that right now. You can't question me.' Had he done that, then she would have been required to stop. [¶] . . . . [¶]

"I think the *Edwards* rule is what is at issue here. If you have a clear invocation of an assertion of one of the rights, the rule is that the officer must stop any further questioning. There are a number of cases from the 70's and early 80's where a statement similar to what the defendant said here was considered an invocation of right to counsel and the Court of Appeal found it error for the court to introduce statements . . . taken after these advisements were given because the officer did not stop questioning the defendant. [¶] Then there was a case that changed the landscape of ambiguous . . . invocation of a right to counsel, and that is *Davis vs. United States*. The *Davis* case stands for the proposition that where there is an ambiguous statement, *Edwards* does not require that the officer stop questioning the suspect. After that the courts have said, California courts, that officers can ask clarifying questions. What [appellant is] saying is the officer did not ask a clarifying question here but instead told the defendant he didn't have a right to an attorney yet. But [the] ultimate question in my mind is still the

issue of whether or not the defendant knowingly and intelligently waived his rights.

"Because the officers according to *Davis* did not need to stop. They could keep going. Now, again, the difference here is under the *Sauceda*[–*Contreras*] line of cases, those cases say officers can ask clarifying questions; right? In our factual situation, the officer did not ask a clarifying question but made a definitive statement that the defendant didn't have a right to an attorney yet. The question at the end of the day, though, is still whether the defendant knowingly and intelligently waived his rights in my view because the officer didn't have to stop there. If the statement, in fact, was ambiguous, the assertion, the alleged assertion was ambiguous, the officer did not have to stop. [¶] . . . . [¶] She clarified what she was doing. She said, 'I am reading you your rights.' [¶] . . . . [¶]

"If you look at the video . . . when I watch the video, I look specifically for train of thought of the individual and the words uttered, which can't accurately be captured in a transcription. [¶] So, for example, when the officer says you don't have a right to an attorney yet, it seems like that's a separate statement from what happens thereafter, but it isn't because I've watched it. She says [it] in response to the defendant saying, 'Oh, wouldn't it be better for an attorney to be here because I'm barely understanding any of that'–that is what the defendant says, and then the officer says, 'Okay. I am asking you your question. You don't have the right to ask for an attorney yet,' and then a transitions [*sic*] to the defendant saying, 'Uh-huh,' and then it goes to the officer saying, 'Okay. Because I'm not asking you anything. I'm reading you your rights.'

"That is really not how it happened. It happened in a single flow. It was just really one continuous train of thought by the officer saying I'm asking you your questions and you don't have the right to ask for an attorney yet. Okay? Because I'm not asking you anything. I am reading you your rights. And then when she said that, I watched the defendant's reaction–it's as if a light went off. He says, 'Oh, okay.' He understood what she was saying, and in my opinion, as I looked at it, what she's saying is 'I'm reading you your rights. That is all that I'm doing right now.' And his response, 'Oh, okay' . . . . [¶] . . . . When he says, 'Oh, okay,' you see the light go off that what she's telling me are my rights, and then she goes and tells him what his rights are and he acknowledges it, he says, yes, yes, yes. . . . I didn't see confusion on the defendant's face. I didn't see contusion [*sic*] in his body language. So that's what I was looking for anyway. [¶] . . . . [¶]

"Based on the evidence that I have, . . . what you're asking me to do is look at the evidence that is before me, the videotaped evidence, the testimony of the officer, and based on those pieces of evidence, conclude that the People have not met the preponderance of the evidence standard that the defendant knowingly and intelligently waived; correct?
"[DEFENSE COUNSEL]: Yes.
"THE COURT: Okay. Here is my ruling.
"Defendant comes before the court seeking to exclude his admissions made to law enforcement in the pending case. [Trial court reiterates the previously detailed *Miranda* rights waiver colloquy from the transcript]. After that exchange occurred, the defendant began to speak about the incident. The court has also viewed the taped interview and also received and considered the testimony of Officer Prentice. Finally, the court has also received and taken a look at the signed admonition form. The seminal case by the United States Supreme Court is *Davis vs. United States* at 512 U.S. 452 at page 459. The court stated:

[']The suspect must unambiguously request counsel. As we have observed, a statement either is such an assertion of the right to counsel or it is not. Although a suspect need not "speak with the discrimination of an Oxford don," he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understood his statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officer stop questioning the suspect. [¶] "[']The law is settled if a suspect makes an ambiguous statement that could be considered as an invocation of his or her *Miranda* rights, the interrogator may clarify the suspect's comprehension of and desire to invoke or waive the *Miranda* rights.['] [*People v. Clark* [(1993)] 5 Cal.4th [950] at page 991.]

"This is an objective test whether a reasonable officer in light of the circumstances would have understood to signify only that the suspect might be invoking the right to counsel. The statement by the defendant 'Wouldn't it be better for an attorney to be here because I barely understand any of that?' fails to meet the requisite test of clarity under *Davis*.

"By its own terms, the statement is not an express request for counsel. A reasonable officer hearing these words would not inevitably conclude the suspect has invoked. . . . [¶] . . . . [']In certain situations words that would be plain if taken literally actually may be equivocal under an objective standard in the sense that in context it would not be clear to the reasonable

3. *Appellant Did Not Unequivocally or Unambiguously Invoke the Right to Counsel*

Appellant contends that, "[b]y questioning [him] about his living arrangement with his daughter and her Chlamydia infection without first advising him of his *Miranda* rights . . . , the police violated [his] rights." He is mistaken.

First, because Gabriela was only nine years old when taken into DCFS custody, there was an obvious need for the police and DCFS to confirm he was the child's guardian and physical custodian. Moreover, once it was confirmed that this young girl was infected with a sexually transmitted venereal disease, it was imperative that appellant be questioned about the genesis of the infection. Appellant's attempt to dismiss this line of questioning as mere "fishing," is unavailing. The record clearly reflects that a pivotal reason for this line of questioning bore directly on Gabriela's physical health and safety. It was necessary for medical professionals to know when Gabriela had contracted a Chlamydia infection in order for her to receive appropriate medical treatment. If the disease was caught early, doctors could give her

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listener what the defendant intends.['] [*People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 216]. Comparing the statement at issue in *Contreras–Sauceda* [*sic*] ["If you can bring me a lawyer, that way I–that way I can tell you everything that I know and everything that I need to tell you and someone to represent me." [55 Cal.4th at p. 216] to the instant case, the statement by the defendant in the instant case is far more equivocal and ambiguous. I conclude, therefore, defendant's statement concerning counsel was equivocal and ambiguous. This permitted the officer to continue with the advisement."

medication to safeguard her health. However, if the child had been infected for a long time (e.g., over a year, or closer to the time Ana D. believed she had contracted her first Chlamydia infection from appellant), a different course of treatment was necessary as the disease may already have impacted her organs and could have life–long effects on, among other things, her ability to bear children: "The longer it's been, the more [medical] treatment [Gabriela's] going to need." Police may question a suspect in custody when "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." (*New York v. Quarles* (1984) 467 U.S. 649, 657 (*Quarles*).) "*Quarles* teaches that where questions are reasonably directed to defusing a situation which threatens the safety of . . . members of the general public, a suspect's answers are admissible in evidence, even if the questions were not preceded by *Miranda* warnings, and even if they happened to elicit an incriminating response." (*People v. Simpson* (1998) 65 Cal.App.4th 854, 861, fn. omitted.)[8] Our conclusion finds further support in the record which

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[8] Appellant asserts this argument is improperly raised here, as it was not advanced in opposition to the suppression motion, and Officer Prentice did not testify that her pre–advisement questions about appellant's living arrangements and Gabriela's diagnosis were meant "to defuse a situation that threatens the safety of the . . . general public."

However, as appellant also observes, our independent duty of review requires that we review the entire record; i.e., all circumstances surrounding the interrogation, which includes those immediately impacting Gabriela's health and which initially precipitated DCFS's search for the girl and her

reflects that the reason the social worker participated in appellant's interview was to obtain information relevant to the severity, timing and source of Gabriela's medical condition.

Appellant contends that his inquiry "wouldn't it be better for an attorney to be here, because I barely understand any of that," made as the officer began reading his *Miranda* rights amounted to "an expression of a desire for the assistance of an attorney." The trial court expressly rejected this claim. As the court stated, appellant's query "fails to meet the requisite test of clarity under *Davis*. [¶] By its own terms, the statement is not an express request for counsel. A reasonable officer hearing these words would not inevitably conclude the suspect has invoked [the right to counsel]."

A "suspect . . . must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Davis, supra*, 512 U.S. at p. 459.) Police need not cease questioning if a suspect makes an equivocal reference to an attorney or an indecisive request for counsel. (*Id.* at pp. 460-462; accord, *Berghuis, supra*, 560 U.S. at p. 381.) A response that is reasonably open to more than one

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father. (See *People v. Flores* (1983) 144 Cal.App.3d 459, 469; *People v. Diaz* (1983) 140 Cal.App.3d 813, 820), not just the interrogation itself. (*Fare v. Michael C.* (1979) 442 U.S. 707, 725.) Appellant's exchange with the social worker makes it clear that there were several agencies concerned about the health implications of Gabriela's Chlamydia infection.

interpretation is ambiguous. (*United States v. Rodriguez* (9th Cir. 2008) 518 F.3d 1072, 1080.)

The standard for assessing whether a suspect has unambiguously invoked the right to counsel is an objective one that asks what a reasonable officer would have understood the nature of the suspect's request to be under all the circumstances. (*Sauceda–Contreras, supra*, 55 Cal.4th at p. 217; *Davis, supra*, 512 U.S. at p. 459.) If the suspect's statement is not an unambiguous, unequivocal request for counsel, an officer has no duty to cease questioning him. (*Davis, supra*, 512 U.S. at pp. 461–462; see *People v. Stitely* (2005) 35 Cal.4th 514, 535.)

We conclude that the trial court did not err when it found that appellant's statement failed to satisfy the requisite test of objective clarity under *Davis* and, as in *Sauceda–Contreras*, failed to rise to the level of an express request for counsel such that a reasonable officer under the circumstances would clearly have understood the statement to signify that appellant was invoking the right to counsel. Accordingly, the officer was permitted to continue with the advisement following appellant's statement.

4. *Appellant Knowingly, Intelligently and Voluntarily Waived his Right to Counsel*

Appellant argues that, even if he did not unequivocally invoke his right to counsel, reversal is nevertheless required because the prosecution failed to prove by a preponderance of evidence that he made a knowing, intelligent and voluntary waiver of his *Miranda* rights.

In California, issues regarding the suppression of statements made during a custodial interrogation are reviewed according to federal constitutional standards. (*People v. Nelson, supra,* 53 Cal.4th at p. 374.) A suspect, having been advised of his *Miranda* rights, may be found expressly or impliedly to have waived those rights. (*People v. Cruz* (2008) 44 Cal.4th 636, 667; *Berghuis, supra,* 560 U.S. at p. 384 [defendant held to have waived *Miranda* rights where he received and understood *Miranda* warnings, did not invoke his rights, and made a voluntary statement to the police]; *North Carolina v. Butler, supra,* 441 U.S. at p. 373 [waiver of rights need not be explicit and may be inferred from the actions and words of the person interrogated].) A suspect's express willingness to answer questions after acknowledging an understanding of his *Miranda* rights is sufficient to constitute an implied waiver. (*People v. Medina* (1995) 11 Cal.4th 694, 752 (*Medina*).)

To establish a valid waiver, the prosecution must show by a preponderance of the evidence that the waiver was knowing, intelligent and voluntary. (*People v. Lessie* (2010) 47 Cal.4th 1152, 1162, 1169 (*Lessie*); *People v. Markham* (1989) 49 Cal.3d 63, 71.) A waiver is voluntary if it is "'the product of a rational intellect and a free will.'" (*In re Cameron* (1968) 68 Cal.2d 487, 498.) The threshold presumption is against finding a waiver of *Miranda* rights. (*Williams, supra,* 49 Cal.4th at p. 425.) Ultimately, however, the question is whether a *Miranda* waiver was knowing and intelligent under the totality of the circumstances surrounding the interrogation. The determination of voluntariness is made upon the totality of circumstances surrounding

the confession. (*Procunier v. Atchley* (1971) 400 U.S. 446, 453; *People v. Sanchez* (1969) 70 Cal.2d 562, 572.) We review the evidence independently to determine whether a confession was voluntary, but will uphold the trial court's findings as to underlying disputed facts regarding circumstances surrounding the confession, and its evaluations of credibility, if supported by substantial evidence. (*People v. Lewis* (2001) 26 Cal.4th 334, 383; *People v. Massie* (1998) 19 Cal.4th 550, 576; *People v. Smith* (2007) 40 Cal.4th 483, 502.) As to those findings, if "'two or more inferences can reasonably be deduced from the facts,' . . . 'a reviewing court is without power to substitute its deductions for those of the trial court.' [Citations.]" (*In re Eric J.* (1979) 25 Cal.3d 522, 527.) We do not however, defer to inferences drawn or findings made by the trial court with regard to uncontradicted facts. (*People v. Jimenez* (1978) 21 Cal.3d 595, 609, overruled on another ground by *People v. Cahill* (1993) 5 Cal.4th 478, 509–510 (*Cahill*).)

The dispute here turns on whether, viewed in totality, the prosecution demonstrated that the circumstances of the interrogation show it was more likely than not that appellant fully understood the nature of the rights being abandoned and the consequences of his decision to do so.[9]

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[9] We do not address repetitive arguments previously addressed regarding the admissibility of post–arrest statements purportedly obtained in violation of *Miranda*.

As appellant concedes, after she finished the advisements, Officer Prentice asked "if he understood his rights" and said, "now if you want to talk about what happened, that's when you can tell me what happened."

The trial court rejected appellant's claim that his confession was effectively coerced. After reviewing the totality of the evidence, the court concluded it was clear to appellant that he was not obligated to speak to the police officer, and his decision to do so was a voluntary one. As the court observed:

"When [appellant] says, 'Oh, okay,' you see the light go off that what she's telling me are my rights, and then she goes and tells him what his rights are and he acknowledges it, he says, yes, yes, yes, and I watched the video. I didn't see confusion on the [appellant's] face. I didn't see contusion [*sic*] in his body language. So that's what I was looking for anyway."

In short, on disputed facts the court found that appellant understood the advisements and chose voluntarily to proceed after receiving them. Substantial evidence supports that conclusion. When "'"two or more inferences can reasonably be deduced from the facts," . . . "a reviewing court is without power to substitute its deductions for those of the trial court." [Citations.]'" (*In re Eric J., supra*, 25 Cal.3d at p. 527.)

The trial court further observed:

"The second question is whether the defendant knowingly and intelligently waived his right to remain silent and to the presence of counsel. [¶] . . . . [¶] I look to the totality of circumstances to determine whether the defendant here who spoke to the police officers after acknowledging his right, whether the implied waiver was knowing

and intelligent. . . . It is true the detective instead of asking clarifying questions simply told the defendant that he did not have a right to . . . ask for an attorney yet, which is technically incorrect, but this must be viewed in the context of how this interaction arose.

"The detective had just begun reading the *Miranda* rights to the defendant. She said the first of the admonishments on the right of self-incrimination . . . when the defendant made his ambiguous statement concerning counsel. The officer sought to read the entire *Miranda* admonishments . . . , including the two on defendant's right to counsel. While it is true the defendant does not have to wait for the officer to read the *Miranda* rights before asserting them, the meaning of the words spoken by the officer is clear, 'I am reading you your rights. You have to wait to assert your rights until I finish giving them to you.'

"The defendant appeared to comprehend the meaning of the word [*sic*] spoken by the officer by saying, 'Ah, okay,' as if a light had been turned on. The videotape shows body language and tone of voice that indicates he understood this. The detective then correctly admonished the defendant on both the right to remain silent and the defendant's right to the presence and assistance of counsel.

"The defendant indicated he understood these rights and spoke with the detective. The totality of circumstances shows defendant knowingly and intelligently waived. Furthermore, prior to the *Miranda* advisements, the officer had a lengthy conversation with the defendant as to why he was being investigated, what he was arrested for, and general information about the defendant's personal background. In this part of the conversation, the two spoke in a courteous manner and the defendant understood the questions posed by answering them immediately. No evidence suggests that the defendant did not understand the predicament he was in.

"No evidence has been presented to show the defendant believed he could not invoke at the end of the advisement. To the contrary, evidence suggests the defendant understood the officer meant she was first required to read all of the *Miranda* rights before the defendant could invoke either of his rights.

"This is further corroborated by the executed written waiver of his rights by the defendant at the end of the interview. He initialed and signed a waiver and gave a statement to the police. This further

corroborates under the totality of circumstances the defendant understood and waived his rights."

In sum, the court correctly concluded the evidence points to a knowing, voluntary, and intelligent waiver by appellant of his *Miranda* rights. Contrary to appellant's assertion, the officer had no obligation to tell him he could invoke his right to counsel after completing the advisements. Nor is an express *Miranda* waiver required before questioning. (See *Lessie, supra,* 47 Cal.4th at p. 1169; *Berghuis, supra*, 560 U.S. at pp. 384, 389.) A suspect's expressed willingness to answer questions after acknowledging that he understands his *Miranda* rights is sufficient to constitute an implied waiver of such rights. (*Medina, supra*, 11 Cal.4th at p. 752.)

We also find no merit in appellant's assertion that no waiver may be found because he "is an immigrant and does not speak English." Appellant was provided his *Miranda* rights in Spanish, and nothing in the record indicates that a language barrier caused any lack of understanding on his part. Nor may error be attributed to the fact that appellant signed his *Miranda* waiver after his interrogation, rather than before it began. There is no requirement that a waiver be written or signed before an interview may proceed. We find that appellant knowingly, voluntarily, and intelligently relinquished his *Miranda* rights. The motion to suppress was properly denied.

5. *Error, If Any, Was Harmless Beyond a Reasonable Doubt*

Even without appellant's interview statements, compelling evidence at trial demonstrated appellant's guilt. Thus, even assuming, appellant's statements were improperly admitted against him, we would nevertheless conclude that reversal is not warranted because any error in the admission of those statements was harmless beyond a reasonable doubt.

"[W]henever a confession admitted in a California trial has been obtained by means that render the confession inadmissible under the federal Constitution, the prejudicial effect of the confession must be determined under the federal standard." (*Cahill, supra,* 5 Cal.4th at p. 510.) The United States Supreme Court has held that federal constitutional law requires prejudice caused by erroneous admission of an involuntary confession is properly evaluated under the harmless–beyond–a–reasonable–doubt test. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 301–302; see *Chapman v. California* (1967) 386 U.S. 18, 23.)

Adverse testimonial evidence against appellant came from several sources. First, and most compelling, Gabriela testified that appellant touched her body three or four times under her clothes at night, including the front "private parts" she used to "go pee." She described the sensation as "weird," and said that on one occasion it hurt when he touched her front "private part" with his fingers under her clothes. She described another incident during which she woke up to find her father touching her with his fingers. She felt something white, sticky and wet on her front "private part," her butt and on the back of her legs. Four

other times, appellant used his fingers to touch her buttocks under her clothes.

When interviewed at the police station in May 2015 after appellant was arrested, Gabriela acknowledged having been molested on at least eight occasions the year before. She described one incident when she awoke confused in the middle of the night to find her tights and underwear inexplicably around her ankles. She felt something wet, but knew she had not urinated on herself. She asked her father what happened, but he got upset and sent her to shower. For the rest of that day, she felt "uncomfortable to her vaginal area and her buttocks," and felt pain and a burning sensation in her vaginal area.

N.M. (Gabriela's mother) testified that Gabriela told her there were times when appellant removed her clothing while she slept. The child recounted many occasions when appellant had opened her legs, lifted her up and had sexual intercourse with her, penetrating her vagina with his penis, or had gotten on top of her to have sex with her, and touched her buttocks.

Appellant's former companion became suspicious of him after a social worker contacted her during an urgent search for appellant and told her Gabriela needed medical attention. Ana D.'s suspicions arose because appellant had twice left her with Chlamydia infections during their relationship (and Ana D. had been monogamous). Ana D. also testified that when she met with appellant and asked him if he had "touched" Gabriela, he denied it at first. But, after Ana D. pushed a little and asked him "So why they're looking for you?", appellant said, "I

don't know how this happened." Ana D. asked appellant again if he had "touch[ed] [Gabriela]?", and he admitted that he had. He told Ana D. he had been asleep and woke up to find his penis between Gabriela's legs. Ana D. angrily slapped appellant and made him call the social worker.

A sample of Gabriela's urine was collected as part of her child abuse examination, and it tested positive for a sexually transmitted Chlamydia infection.[10]

When appellant testified, he admitted touching his daughter inappropriately on two occasions. One time, he woke up and found his finger inside her vagina. When he pulled his hand away, he realized he had ejaculated and there was semen on his finger.

The defense medical expert, Dr. O'Connor, testified that the semen of a man infected with Chlamydia was contagious and opined that ejaculate on a man's hand could transmit the infection if his fingers were placed in a vagina. The prosecution expert, Dr. Arnold–Clark, disagreed, and was not aware of any support for this theory. She testified that Chlamydia can be transferred in pre–pubertal children through penal penetration of the anus or vagina. In her opinion, Chlamydia cannot be transferred by digital penetration with semen on a finger because the Chlamydia bacteria die within seconds of being outside a human cell.

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[10] Appellant argues this report is inadmissible. However, as discussed in Section II below, we reject this contention.

In the face of this compelling evidence we cannot conclude that appellant was unduly prejudiced by the admission of his statements to investigating officers. Any error in the admission of appellant's interview statements was harmless beyond a reasonable doubt.

## II. *Admission of the Results of Gabriela's Urine Test Did Not Violate Appellant's Rights Under the Confrontation Clause*

### A. *Pertinent Facts and Procedural Background*

Before trial, appellant's counsel raised a Confrontation Clause challenge to a laboratory result reflecting that Gabriela's forensic urine test was positive for Chlamydia, and a document provided to the social worker on a DCFS (CalEMA) form. The prosecution opposed the motion.

Following argument, the trial court denied the motion. The court found that the child abuse investigation involved here was initiated by DCFS for two primary purposes: (1) to determine whether Gabriela was ill and, if so, to provide her appropriate medical treatment, i.e., to protect the child's physical health; and (2) to protect the child's physical security, i.e., if Gabriela's father had given her an infection that can only be transmitted through sexual contact, it was imperative that she be physically removed from his custody to ensure her safety. The court found the DCFS investigation was not initiated for the purpose of prosecuting appellant. Rather, the agency's duty to report the potential sexual abuse to police arose as a consequence of the fact that a nine–year–old's urinalysis revealed the presence of a sexually transmitted

disease. The court also found that neither document was prepared with the requisite degree of formality or solemnity to qualify as "testimonial." They were simply routine records generated in the course of business to record facts that occurred.

At trial, Cripe, the nurse practitioner who conducted Gabriela's forensic child abuse exam, testified that the child's urine sample was collected during a standard forensic exam and sent to a lab for testing. Cripe explained that the exam includes a physical examination and collection of samples of body fluids for testing. The findings are memorialized on a document sent to a DCFS social worker.

The computer–generated report of the results of Gabriela's urine test was introduced at trial by the Laboratory Director, Dr. Melanie Osby, who described the laboratory's practices used to handle and test urine samples, and explained that the accuracy rate of a Chlamydia test performed on a urine sample such as Gabriela's is greater than 98 percent.

Janet Arnold-Clark, M.D., the child abuse pediatrician who treated Gabriela for her Chlamydia infection also testified that the results of the child's urine test, which were positive for Chlamydia, were forwarded to a DCFS social worker and the Department of Public Health to allow them to initiate sexual abuse investigations, and so Gabriela would be brought in for treatment.

B. *Controlling Law*

Under the Sixth Amendment, a criminal defendant has the right to confront and cross–examine adverse witnesses. This bars admission of an adverse testimonial statement when the statement was made outside of court, unless the maker of the statement is unavailable at trial and defendant had a prior opportunity to cross–examine that person. (*People v. Lopez* (2012) 55 Cal.4th 569, 580–581 (*Lopez*); see *Crawford v. Washington* (2004) 541 U.S. 36, 59 (*Crawford*).) To be considered testimonial, the out–of–court statement: (1) "must have been made with some degree of formality or solemnity"; and (2) must have a primary purpose that pertains in some fashion to a criminal prosecution. (*Lopez, supra*, 55 Cal.4th at p. 581.)

In *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*), the California Supreme Court addressed the issue whether a defendant's confrontation rights were violated where a forensic pathologist testified about the victim's cause of death relying on photographs and facts taken from a report prepared by a nontestifying autopsy surgeon. (*Id.* at p. 614.) The court rejected defendant's claim, holding that the objective facts contained in an autopsy report were insufficiently formal to be testimonial. (*Id*. at p. 619.) On the formality prong, the statements contained in the autopsy report—which was not introduced into evidence—were "less formal than statements setting forth a pathologist's expert conclusions" and were akin to a physician's nontestimonial "observations of objective fact" in diagnosing a patient's injury or malady and indicating the appropriate treatment. (*Ibid*.)

As for the primary purpose prong, the court explained that "criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of [the victim's] body; it was only one of several purposes." (*Dungo, supra*, 55 Cal.4th at p. 621.) "The autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial." (*Ibid*., citing *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305, 324; see *People v. Rodriguez* (2014) 58 Cal.4th 587, 643–644; *People v. Edw*ards (2013) 57 Cal.4th 658, 705–707.)

The United States Supreme Court revisited the primary purpose test in *Ohio v. Clark* (2015) 576 U.S. __ [135 S.Ct. 2173] (*Clark*). In that case, the defendant was tried for beating a three-year-old. The child did not testify, but the state presented evidence that he told his teacher the defendant had assaulted him. *Clark* held that because there was no evidence that either the child or his teachers had the primary purpose of assisting in gathering evidence for defendant's prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial. (135 S.Ct. at pp. 2177, 2181.) On the contrary, it was clear that the primary goal was to protect the young boy. The teachers never told the child his answers would be used to arrest or punish his abuser, nor did the child indicate in any way that he meant his statements to be used by police or prosecutors. (*Id*. at p. 2181.) The court also pointed to the spontaneous informality of the child's statements during conversations with the teachers as an "additional factor." (*Id*. at p. 2180.) The teachers asked

the boy about his injuries as soon as they discovered them, in an informal preschool setting, just as any concerned adult would talk to a child whom they believed might recently have been the victim of abuse. (*Id.* at p. 2181.)

Most recently, in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), the California Supreme Court clarified the extent to which *Crawford* limits an expert witness from relating case–specific hearsay in explaining the bases for his or her opinion. The court held that state hearsay law permits an expert witness to refer generally to hearsay sources of information as a basis for the expert's opinion, but precludes experts from "rely[ing] on case-specific hearsay to support their trial testimony. [Citation.]" (*People v. Williams* (2016) 1 Cal.5th 1166, 1200.) "'Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.' [Citation.]" (*People v. Burroughs* (2016) 6 Cal.App.5th 378, 406.)

"In *Sanchez, supra*, 63 Cal.4th 665, the Supreme Court considered whether several different categories of out-of-court statements were testimonial. First, the court considered statements in written police reports referenced by the gang expert in testifying about the defendant's prior police contacts. [Citation.] *Sanchez* concluded the statements at issue in the reports were testimonial, reasoning that, although the reports were not as formal as an affidavit, they 'relate[d] hearsay information gathered during an official investigation of a completed crime.' [Citation.] Second, *Sanchez* considered a 'STEP' (California Street Terrorism Enforcement and Preservation Act;

§ 186.20 et seq.) notice the gang expert referenced in opining the defendant was a gang member. [Citation.] A STEP notice "'informs suspected individuals that law enforcement believes they associate with a criminal street gang.'" [Citation.] *Sanchez* concluded the statements in the portion of the STEP notice at issue were testimonial because the notice was a formal record of information about the subject of the notice, including 'biographical information, whom he was with, and what statements he made.' [Citation.] The purpose of the record was 'to establish facts to be later used against him or his companions at trial' and 'to prove that the recipient had actually been made aware that he was associating with a criminal street gang and that he might receive an enhanced punishment should he commit a future crime with members of that gang.' [Citation.] . . . Finally, *Sanchez* concluded that a field identification card describing a police contact with the defendant would be 'akin' to a police report and, thus, testimonial '[i]f the card was produced in the course of an ongoing criminal investigation.' [Citation.]" (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 584.)

*Sanchez* "adopt[ed] the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-

examination, or forfeited that right by wrongdoing." (*Sanchez, supra*, 63 Cal.4th at p. 686, fn. omitted.) An expert may rely on nontestimonial hearsay in forming an independent opinion.

C. *The Court Properly Admitted Evidence of the Results of the Urine Test*

As discussed above, each of two components must be present in order for a statement to qualify as testimonial: (1) "some degree of formality or solemnity;" and (2) the primary purpose must pertain in some fashion to a criminal prosecution. (*Sanchez, supra*, 63 Cal.4th at p. 689; *Dungo, supra*, 55 Cal.4th at p. 619.) Since both prongs must be established, here we need not determine whether the reports generated by the test results possess the requisite degree of formality or solemnity to qualify as testimonial, if we find first–as we do–that their primary purpose was not to further a criminal prosecution, but to protect a child's health and physical safety. (*Lopez, supra*, 55 Cal.4th at p. 583.)

As appellant's counsel observed during argument on the confrontation clause motion, DCFS's involvement here from the outset was no accident. DCFS had been involved with appellant's family in the past and had interviewed him at least three times regarding unsubstantiated allegations of sexual abuse regarding Gabriela. The record does not reflect precisely what concern prompted Gabriela to be sent for a forensic sexual abuse examination on May 8, 2015, or whether that exam was performed at DCFS's request. However, as counsel also noted, concerns had been expressed, presumably by staff at her school, that Gabriela had been "acting out sexually at school for

some time" and sexual abuse was suspected. The reports generated as a result of Gabriela's initial former abuse examination were forwarded to DCFS because they revealed that a nine–year–old child had a sexually transmitted infection. The purpose for preparing those reports for or on behalf of DCFS was primarily protective, as DCFS, which works in conjunction with the dependency courts, functions in order to protect children who are abused or at risk of being abused. (See Welf. & Inst. Code, §§ 202, 300.2, 16500 [first and foremost goal of dependency system is to protect children who have been seriously abused, neglected or abandoned or who are at substantial risk of being abused or neglected]; Welf. & Inst. Code, §§ 202, 300.2, 361, subd. (c), 361.2, subd. (a), 361.3, subd. (a)(8), 366.21, subd. (e) [safety, protection, physical and emotional well-being is primary goal of dependency system].) If a social services agency like DCFS suspects that a child is being sexually abused, the agency may consult with a medical practitioner with "specialized training in detecting and treating child abuse injuries" to determine if the child should be examined within a certain time period. (Welf. & Inst. Code, § 324.5, subd. (a).) In cases of known or suspected sexual abuse of a child, parental consent is not required for the child's examination and treatment. (§ 13823.11, subd. (c)(5).)

Once Dr. Arnold-Clark forwarded the lab results of Gabriela's urine test to DCFS, the child protective agency had an obligation and undertook a concerted effort to locate appellant for the twin purposes of ensuring that Gabriela receive necessary and prompt medical treatment for the Chlamydia infection, and to assess the child's physical safety. It

is not clear from the record whether appellant's former girlfriend shared with the social worker her suspicion that appellant might be the source of Gabriela's Chlamydia infection, but because of Gabriela's age, and the fact that appellant was her sole caretaker, it was reasonable to infer that appellant was the possible source.

Thus, we conclude that the trial court's analysis was correct. DCFS's primary purpose here was twofold. Its initial responsibility was to determine if Gabriela, whom it likely suspected had been the victim of sexual abuse, had an illness or infection requiring prompt medical treatment and, if so, to make every effort to find her and ensure she received treatment. Secondarily, if DCFS learned the child's Chlamydia infection was caused by her father, or that he had been unable or unwilling to protect her from someone who had engaged in sexual contact with the child, DCFS had a duty to protect Gabriela and ensure her safety by removing her from his custody. (Cf., *In re A.S.* (2011) 202 Cal.App.4th 237, 245–246 [Because the purpose of dependency law is to provide maximum safety and protection for abused and neglected children, the conclusive identity of the perpetrator is not a prerequisite of jurisdiction]; Welf. & Inst. Code, § 355.1].) Thus, it is clear that the reports were for or at the request of DCFS "primarily" for protective purposes, not to further a criminal prosecution or investigation. (See *Lopez, supra*, 55 Cal.4th at p. 583.)

Of course, the fact that DCFS's investigatory reports functioned primarily to protect the child's safety and welfare does not also prevent the agency from sharing information regarding suspected sexual abuse

with police to be used as a tool for gathering evidence for criminal convictions. (See e.g., *In re Cindy L.* (1997) 17 Cal.4th 15, 19-20.) A child welfare worker from a county social services agency who suspects a child has been sexually abused, has a statutory duty to report that abuse which may, of course, reveal evidence of a crime. An investigating social worker who suspects a child is a victim of child abuse, is a "mandated reporter," required to cooperate with local law enforcement and report suspicions of such abuse. (§§ 11165.7, subd. (a)(15) & (34), 11165.9, 11166, 11166.3.)

The fact that a collateral purpose or "one of several purposes" of recording the objective fact that Gabriela had a Chlamydia infection is to preserve evidence that can be used for a criminal prosecution, does not render the recorded observations testimonial. (*Dungo, supra*, 55 Cal.4th at p. 621.) *Sanchez* did not change this rule. *Sanchez* found that the primary purpose of recording information in a STEP notice was for producing evidence for later use at trial. (*Sanchez, supra*, 63 Cal.4th at p. 696.) Although there were other purposes for preparing the STEP notice, its principal purpose was plainly to preserve evidence for use against a defendant in criminal proceedings, rendering it testimonial. This analysis does not conflict with *Dungo's* holding that the primary purpose of an autopsy report is not to preserve evidence for criminal prosecution. Similarly here, the primary purpose of the test on the

child's urine sample was not to preserve evidence to prosecute appellant.[11]

III. *Substantial Evidence Supports the Sodomy Conviction*

Appellant contends there is insufficient evidence to support his conviction for sodomy upon a child age 10 or younger (§ 288.7, subd. (a)), because there is no evidence of the requisite degree of penetration.

The elements of the crime are: (1) the defendant engaged in an act of sodomy with the victim; (2) when he did so, the victim was 10 years of age or younger; and (3) at the time of the act, the defendant was at least 18 years old. (*People v. Mendoza* (2015) 240 Cal.App.4th 72, 79 (*Mendoza*); § 288.7, subd. (a); CALCRIM No. 1127; CALJIC No. 10.59.5.) The jury was instructed that "'Sodomy' is sexual contact consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy. Proof of ejaculation is not required." (See § 286, subd. (a); *People v. Farnam* (2002) 28 Cal.4th 107, 143; *Mendoza, supra*, 240 Cal.App.4th at p. 79.)

"[W]e review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose

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[11] Given our conclusion in Sections I-II above, we need not address appellant's claim of cumulative error. Numerous meritless claims do not amount to prejudice under any analysis. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1094 ["we have found no error to cumulate"].)

substantial evidence to support the verdict—i.e., 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. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Manibusan* (2013) 58 Cal.4th 40, 87 (*Manibusan*).) The testimony of a single witness, if believed by the factfinder, is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

The record refutes appellant's contention that there is insufficient evidence "to establish that [he] penetrated [Gabriela's] anus, as required for a sodomy conviction." First, Gabriela testified that during one incident she woke up during the night and was surprised to find her tights and underwear were down around her ankles. She felt something wet, though she knew she had not urinated on herself.

When she asked her father what happened, he became upset and told her to take a shower. For the rest of that day, she felt "uncomfortable to her vaginal area and her buttocks." This testimony is sufficient to support appellant's sodomy conviction. (See *People v. Thomas* (1986) 180 Cal.App.3d 47, 54-56 [victim's testimony that she felt pain when defendant pushed his penis against her anus is circumstantial evidence of penetration in a sodomy case]; *People v. Ribera* (2005) 133 Cal.App.4th 81, 86; *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 790, disapproved by *People v. Kurtzman* (1988) 46 Cal.3d 322, 330.) Further, the jury was instructed with CALJIC No. 10.60 which states that it is not essential that, "the testimony of the witness with whom sexual relations is alleged to have been committed be corroborated by other evidence." Gabriela's testimony alone would support the sodomy conviction. Further, unless "it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction." (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) The events ascribed to appellant in Gabriela's testimony are neither physically impossible nor inherently improbable. The testimony of one witness may be sufficient to support a conviction. (*People v. Scott* (1978) 21 Cal.3d 284, 296; Evid. Code, § 411.)

Second, appellant admitted in police interviews that penetration occurred. He acknowledged having "penetrated [Gabriela's] buttocks with his erect penis," but "wasn't sure how much." Detective Melara testified at trial that appellant told her "he was on top of [Gabriela]"

and "just the tip of his penis" had "penetrated" "in" or "on" her buttocks. During his interrogation by Officer Prentice, appellant acknowledged that he had been "on/in [Gabriela's] butt," but had "not completely penetrated." Although "the corpus delicti or body of the crime . . . cannot be proved by exclusive reliance on [appellant's] extrajudicial statements" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1165, italics deleted), as stated above, Gabriela's testimony itself is sufficient to support the conviction. Appellant's conviction does not rest exclusively on his statements.

Finally, Gabriela, who contracted a sexually transmitted Chlamydia infection, testified that she found white sticky stuff on her vaginal area, buttocks and the back of her legs. Dr. Arnold-Clark testified that Chlamydia can be transferred to a child of Gabriela's age through penal penetration of either the anus or vagina. The jury could reasonably have presumed that the child became infected as a result of anal penetration by appellant's penis. (See *People v. Nelson* (2016) 1 Cal.5th 513, 550 [we presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence]; *Manibusan, supra,* 58 Cal.4th at p. 87 [same].) Substantial evidence supports appellant's conviction for sodomy with a child age 10 or younger.

IV. *Section 288, Subdivision (a) is Not a Lesser Included Offense of Section 288.7, Subdivision (b)*

Appellant maintains that, because his conviction in count 5 for engaging in lewd and lascivious conduct with a child under 14 years of age, in violation of section 288, subdivision (a) is necessarily included within the offense of committing sexual acts with a child 10 years of age or younger, in violation of section 288.7, subdivision (b), the count 5 conviction must be reversed. We disagree.

A defendant cannot be convicted of both an offense and a lesser offense necessarily included within that offense based on the commission of a single act. (*People v. Pearson* (1986) 42 Cal.3d 351, 355 (*Pearson*), disapproved in part on other grounds in *People v. Vidana* (2016) 1 Cal.5th 632, 651.) "[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117.)

Although both the "facts actually alleged" and elements tests are used to determine if a defendant received sufficient notice so as to allow his conviction for an uncharged lesser offense, only the statutory elements test applies to determining if he may be convicted of multiple charged crimes. (*People v. Reed* (2006) 38 Cal.4th 1224, 1229–1230.) We compare the elements of the offenses of sexual act with a child age 10 or younger (counts 3 and 4) as stated in section 288.7, subdivision (b)

with the elements of the count 5 offense of a lewd and lascivious act on a child under 14 as stated in section 288, subdivision (a). The count 5 offense is not a lesser included offense of the other counts because only it requires an intent involving sexual gratification or arousal.

Specifically, section 288.7, subdivision (b), the basis for counts 3 and 4, applies to an adult sexually penetrating a child age 10 or under, whether or not done with an intent other than sexual desire. "Sexual penetration" is "the act of causing the penetration . . . for the purpose of sexual arousal, gratification, or abuse." (§ 289, subd. (k)(1).) "Sexual abuse," in contrast with sexual arousal or gratification, does not require that the motivation be sexual. (*People v. White* (1986) 179 Cal.App.3d 193, 204–206; accord, *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1541.)

Section 288, subdivision (a), by contrast, requires that anyone who "willfully and lewdly commits any lewd or lascivious act" upon the body of a child under the age of 14 do so "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." (See *People v. Raley* (1992) 2 Cal.4th 870, 907 [referring to the requirement for "specific intent" under section 288].) Thus, an act of "sexual abuse" committed without sexual intent can be an act of "sexual penetration" committed in violation of section 288.7, subdivision (b), but not section 288, subdivision (a).

The California Supreme Court has rejected the assertion that a lewd act on a child (§ 288, subd. (a)) is a necessarily included offense of either sodomy or rape. (See *Pearson, supra*, 42 Cal.3d at p. 355

[sodomy]; *People v. Griffin* (1988) 46 Cal.3d 1011, 1029–1030 (*Griffin*) [rape]; cf., *People v. Warner* (2006) 39 Cal.4th 548, 556 [nonaggravated lewd conduct on a child under 14 in violation of § 288, subd. (a) is a specific intent crime].) *Griffin* explained that rape, like sodomy, is a general intent crime, while "a lewd act on a child requires proof of the specific intent of 'arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child.'" (*Griffin, supra*, 46 Cal.3d at p. 1030.) Rape and sodomy are inherently sexual acts—rape is defined in terms of sexual intercourse (§ 261), and sodomy in terms of sexual penetration (§ 286)—and these definitions support an inference that in raping or sodomizing the victim, the perpetrator intended to sexually gratify himself or the victim. Under such circumstances, a conviction for lewd conduct with a child can be upheld on appeal on the same evidence used to show the defendant raped or sodomized a child. (*People v. Benavides* (2005) 35 Cal.4th 69, 97.) These cases compel the same conclusion here.

V. *Appellant Did Not Receive an Unauthorized Sentence*

Appellant's final contention is that section 654 applies to bar an unauthorized sentence because, "under the single-act test, . . . the jury could have reasonably convicted [him] of the count five lewd act and one of the other charged crimes based on the same act." Section 654 states: "An act or omission that is punishable in different ways by different provisions of the law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case

shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

The statute is intended to prevent multiple punishments for a single act or omission, even though that act or omission violates more than one statute and constitutes more than one crime. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) Distinct crimes may be charged as separate counts and result in multiple guilty verdicts, but the trial court may impose sentence for only one offense. (*Ibid.*) Under *Neal v. State of California* (1960) 55 Cal.2d 11, 19 "'[i]f all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Correa* (2012) 54 Cal.4th 331, 336.) The statute does not permit multiple punishment, whether for concurrent or consecutive sentences. (*In re Wright* (1967) 65 Cal.2d 650, 652–655.) Here, the jury was advised: "The defendant is accused of having committed the crime of SEXUAL INTERCOURSE OR SODOMY WITH A CHILD 10 YEARS OLD OR YOUNGER in Counts 1 and 2, and, SEXUAL PENETRATION WITH A CHILD 10 YEARS OF AGE OR YOUNGER in counts 3 and 4, and LEWD ACT ON A CHILD in Count 5. The prosecution has introduced evidence for the purpose of showing that there is more than one act upon which a conviction on these counts may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that he committed any one or more of the acts. However, in order to return a verdict of guilty, all jurors must agree that he committed the same act or acts. It is not necessary that the particular act agreed upon be stated in your verdict."

Jurors were also instructed: "Each Count charges a distinct crime. You must decide each Count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged. Your finding as to each Count must be stated in a separate verdict."

Gabriela's testimony established at least eight occasions on which appellant inappropriately touched her "private parts" or "buttocks." She testified to three or four occasions when she was under age 10 when he touched her body under her clothes at night, including her front "private parts" she used to "go pee." On four other occasions he used his fingers to touch her buttocks under her clothes. On one occasion Gabriela woke up and found her pajama shirt "up," and she wore nothing underneath.

Appellant argues that, "[b]ased on the Information and evidence, the lewd act in count five may reasonably be predicated on one of the acts leading to [his] convictions in counts one through four." This argument ignores Gabriela's testimony, which, if believed, would support at least eight acts of molestation within a one–year period. He also ignores the court's advisements that: "Each Count charges a distinct crime. You must decide each Count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged. Your finding as to each Count must be stated in a separate verdict."

"The prosecution has introduced evidence for the purpose of showing that there is more than one act upon which a conviction on these counts may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that he committed any one or more of

the acts. However, in order to return a verdict of guilty, all jurors must agree that he committed the same act or acts."

There is no indication the jury failed to follow the court's instructions. Further, at sentencing, the court stated: "The reason why I'm imposing Count 5 concurrent is while we instructed the jury appropriately that there was to be unanimity, I don't know on what act the jury actually found the defendant guilty on Count 5. It seems a more appropriate [*sic*] for me not to run into any sort of problems by imposing that consecutively because technically Count 5 could have been any of the acts in Counts 1, 2, 3 or 4. Even though, as I say, we instructed the jury appropriately on that, in my view, the better course is not to impose that consecutively."

As observed above, Gabriela's testimony supported eight or more individual acts of sexual abuse. Any act which was not uniquely required for another count would suffice as the basis for a guilty finding on count 5. The jury was properly instructed as to unanimity. Appellant's claim fails.

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## DISPOSITION

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.