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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. STEPHEN SPYROS BOGDANOS, Defendant and Appellant.	B286435 (Los Angeles County Super. Ct. No. BA438434)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura F. Priver, Judge. Affirmed.

Verna Wefald, 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, Scott A. Taryle, Steven D. Matthews, and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

In an information filed June 10, 2016, the Los Angeles County District Attorney's Office charged defendant and appellant Stephen Spyros Bogdanos with criminal threats (Pen. Code, § 422; count 1),[1] unlawful sexual intercourse (§ 261.5, subd. (d); counts 2 & 3), oral copulation of a person under 18 (former § 288a, subd. (b)(1); counts 4 & 5), and sexual penetration by a foreign object (§ 289, subd. (h); counts 6 & 7). Following a jury trial, defendant was found guilty as charged. He was sentenced to a total term of four years in state prison.

Defendant timely filed a notice of appeal. On appeal, defendant contends that his conviction must be reversed because he received ineffective assistance of counsel when trial counsel withdrew a request for admission of mental health expert testimony to avoid a continuance requested by the prosecutor.

We affirm.

BACKGROUND

The People's Evidence

A. Defendant and L.T. meet online and begin their relationship

L.T. (born Sept. 1998) met defendant (born Mar. 1990) in around 2007, when she was nine or 10 years old, while playing an online game called Furcadia, an animal-themed role play game. In the game, players created avatars of themselves as animals and interacted with other players. They communicated through text chat. She played the game because she loved animals and knew other players from her elementary school.

When another player removed his or her avatar in the shape of a unicorn, L.T. texted that she loved unicorns.

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

Defendant sent her a private message that he bought that avatar for $60 and gave it to her. L.T. was "really excited and happy." Defendant and L.T. began chatting online. He asked how old she was, and she told him either that she was nine or 10. Defendant said that he was 20 years old. At first, defendant said that he did not believe her age, but L.T. said that it was true. Defendant then said that he wanted to be her "mate," which was essentially her boyfriend in the online game. They talked every day.

At some point, L.T.'s mother took away her computer access for a month, so she could not play Furcadia. When she returned to the game, defendant had another mate. L.T. was upset and asked him what he was doing. He said that she had been gone for a month. She continued to play the game and did not have any interactions with defendant for a while.

About a year to 18 months later, when L.T. was 12 years old, defendant asked her for her real name so he could add her as a friend on Facebook. She accepted his Facebook friend request. Her Facebook page showed several photographs of her and indicated that she was 12 years old. Defendant and L.T. chatted every day through Facebook messenger. Defendant told her that she was "cute" in her photographs and wanted to talk to her by phone. He gave her his phone number, and she called him. He told her that he could make her "fall in love" with him, and she believed him. The next morning, she told him that she was in love with him.

A few days later, L.T. asked defendant if he would get her "coins" on another online game, Wizard 101, that were available for purchase. He said that he would if she sent him a picture of her wearing panties. She sent him a photograph of herself in her underwear. L.T. then sent defendant nude photographs of herself "[a]lmost every day," "whenever he asked for it." In most of these

photographs, L.T. was completely nude; in some, she wore "kid's clothes."

At some point, defendant asked L.T. to use a webcam so they could see each other, saying that it would show that she loved him. After he begged, she agreed. L.T. used the webcam on her laptop computer and used Skype to communicate with defendant. Defendant remotely told her to undress and spread her legs, and she did. He told her to touch her vagina and put things, like a highlighter, inside her buttocks. L.T. could also see defendant on his webcam. Often, defendant masturbated while he watched L.T. From when they started communicating by webcam, when she was 12 years old, until the relationship ended, when she was 16 years old, they had about 50 video chat sessions. She used the webcam in her bedroom very late at night. Defendant told her that she was beautiful and that she was a "perfect little girl."

If L.T. refused defendant's request to do something sexual on the webcam, he got upset and called her names, like "slut" and "whore," which made her cry and feel horrible. She usually then changed her mind and did what he asked her to do. Defendant got upset when she wore jeans and a baggy T-shirt.

Defendant told L.T. not to tell her parents about their relationship. He said that her parents were bad people who would not like him. He did not want her to hang out with her friends because he did not like them. He also did not want her to sleep over at her friends' houses because they would not be able to talk on the phone.

When they began using Skype, defendant was living in Texas. He then moved to New York. When L.T. was about to start her freshman year of high school, he told her that she should be home-schooled instead because going to high school would make her a "slut." She told him that she was going to be

living with her mother in Northern California. He became upset because he did not like her mother and called her a "bitch."

Defendant told L.T. not to talk to boys and not to bring any friends to her house. She told one friend, Maddie, about her relationship with defendant. At some point, defendant came to believe that L.T. was cheating on him and became upset. He got on the webcam, put a gun in his mouth, and told L.T., "'I'm going to kill myself.'" L.T. was scared because she did not want defendant to die because of her. He told her to tell the police that her mother was abusing her so she would lose custody of her. She would then have to live with her father in Los Angeles. L.T. did as defendant told her, and when she was 14 years old, she began living with her father in Los Angeles.

B. Defendant and L.T. separately move to Los Angeles to begin their sexual relationship

In 2013, when L.T. was 14 years old and living in Los Angeles, defendant moved to Los Angeles to be closer to her. One day, she told defendant where she lived, and defendant parked down the street from her house and texted her. She got into his car, and they kissed in the back seat. She got out and then went to the store because that was what she told her father she was doing. She returned to defendant's car, and he kissed her again. He told her that he loved her, and she said it back.

The next day, defendant told L.T. via text to meet her at his car, parked a few blocks from her house. She got into the back seat, they said hello, and then he told her, "'I want you to put it in your mouth.'" She asked, "'Do I have to?'" He "made a face" at her that made her feel degraded. She felt threatened because he told her before that he might do something to her when he got upset. She put his penis in her mouth, and he ejaculated.

Defendant then took off L.T.'s clothes. He touched her vagina and put his fingers inside her. He asked if she wanted to

have sex, and she said no. He got upset and said, "'I came all the way out here for you and you're not even going to have sex with me?'" She said that she wanted to wait but did not know for how long. Defendant yelled at her, and she apologized for making him upset. She left the car and went home.

The next day, defendant brought L.T. someplace else. In the car, he touched her, and she gave him oral sex. He put his mouth on her anus, and he made her put her mouth on his. The following day, defendant took her to a mall and bought her a necklace and clothes that he picked out. In the parking lot, he told her that he really wanted to have sex with her, and she said "'okay.'" She felt that she had to agree to have sex because he bought her a lot of things, including clothes.[2] They had sexual intercourse in the car.

The next day, they had sexual intercourse again in his car in a different parking lot.

Defendant became increasingly controlling over L.T. He made her steal things for him at the grocery store, and he made her call his work and tell them he was sick. Once, when she was 15 or 16 years old, he made her put his penis in her mouth while they were on a bench at a mall. He often told her to put things inside her buttocks, saying that if she did not do it, it meant that she did not love him. He also wanted her to take off her top in a store to test her love, but she refused. He became angry and dragged her out of the store. He told her that she was not allowed to talk to any boys at school or hang out with any friends.

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[2] Defendant told her that she dressed like a boy and that he wanted her to wear skirts and dresses. He took her to a children's section in a clothing store and picked out clothes for her, including tights with cupcakes and rainbows on them. She did not like the clothes he bought for her and wanted to wear her own clothes. He said that "kids are so much cuter."

Defendant showed L.T. pictures of naked "little kids" on his computer. The children were engaged in various sex acts. He told her: "'These are amazing. I've never found any like these before.'" He told her that he wanted to bring her to a different country and make her have sex with a little boy.

Once, after an argument, defendant went to L.T.'s apartment and hit her cat. Another time, defendant found out that L.T. was cutting herself. He punched her in the face in order to teach her a lesson.

Defendant took L.T. to Texas to meet his family. He told her that she needed to get the money for a plane ticket. She told her father that she was going to the Grand Canyon, and she gave the cash to defendant. Defendant bought her a plane ticket, and, at the airport, she used her identification, which showed her birthdate and age as 16 years old. They stayed at defendant's father's house for a week.

L.T. loved defendant, but she was also scared of him. She did everything he told her to do. He regularly told her that if she broke up with him, he would kill her. He said that he would also kill her family and her pets, and that he would wait until she was older and then kill her family. She thought that the only way out was to kill herself. Defendant told her that he would only date girls who were 12 years old, and when she grew up, she would be a slut. He said that he wished that she were a child again, but that their age difference did not matter because he just knew better.

During their relationship, defendant and L.T. had sex "[t]oo many [times] to count," and that they had oral sex over 50 times. He put his fingers inside her vagina over 30 times. She often stayed overnight at defendant's apartment, telling her father that she was staying with a friend.

C. L.T. breaks up with defendant, and he threatens and attacks her

On June 12, 2015, when L.T. was 16 years old, defendant picked her up at her apartment in Culver City, and they drove to his apartment in Los Angeles. Defendant wanted her to clean his apartment, and they argued. He told her that she should just leave. She replied, "'Okay, maybe I should,'" and got her belongings. Defendant then grabbed her iPhone out of her hand and asked, "'What are you doing? I need to go through your phone' and 'I'm going to kill you.'" L.T. moved toward the door to leave, and defendant grabbed her and threw her to the floor. L.T. got up, ran to the bathroom, and tried to close the door. Defendant pulled the door open, put his arm around her neck in a chokehold, grabbed her hair, and punched her in the back with his closed fist. She felt him squeeze her neck, and she bit him on the arm until he let her go. L.T. believed that defendant was going to kill her because this was the first time that he was physically violent in this way.

L.T. grabbed her dog and ran out of the apartment around the corner. When she saw defendant's car, she knocked on the nearest residential door. She told the woman who answered the door that someone was trying to kill her and that she needed to call the police. L.T. called 911.

Los Angeles Police Department officers David Weston and Paolo Molina responded to the domestic violence call at 5:10 p.m. and spoke to L.T. She was shaking and crying and appeared nervous and upset. She told the officers that defendant demanded to look at her phone, and she refused. When she ran into the bathroom, he punched her on the back of the head multiple times. He grabbed her phone, and she bit his arm. He threw her to the living room floor, saying, "'I will kill you and your dog.'" When he locked himself in the bathroom, she ran out

of the apartment. L.T. also said that defendant threatened to kill her in the past if she broke up with him. The officers tracked her iPhone and found that it was moving on the freeway toward L.T.'s apartment in Culver City. L.T. told them that she was scared that defendant would go to her apartment and hurt her father and her animals. She complained about pain to the back of her head. She had bruises on her left inner arm and three bruises on her back.

At the time, L.T. was five feet four inches tall and weighed less than 100 pounds. Defendant was five feet nine inches tall and weighed about 300 pounds.

D. Defendant's arrest and statements to police

Culver City police officers detained defendant in front of L.T.'s apartment. Officer Weston advised defendant that he was under arrest for threatening to kill his girlfriend. Defendant responded, "'Yeah, I did say that.'" Defendant had a bite mark on his left arm. L.T. identified defendant outside her apartment. She told Officer Weston that during their two-year relationship, she and defendant had consensual sexual intercourse over 100 times.

At the police station, later that night, defendant told Officer Weston that he and L.T. were in a dating relationship and that he first met her eight years earlier while playing Furcadia online. Defendant said that they got into an argument at his apartment earlier that day. He believed that she might be cheating on him and wanted to examine her cell phone for any evidence of that. Defendant said that he tried to take her phone, and she bit his arm. He pushed her head away and said that he would kill her. He went into the bathroom with her phone and locked himself inside. When he came out, she was gone. He went to her apartment to see if she was there. Defendant said he moved to California to be with her and that they had been dating

for two years. When asked if he had sexual intercourse with L.T., defendant hesitated and then denied having sex with her.

Defense Evidence

A. L.T.'s interviews with law enforcement

On July 7, 2015, Detective Sofia Lee interviewed L.T. at her college. L.T. said that, when they first played Furcadia, defendant told her that he was 18 years old. At the same time, she told defendant that she was nine years old. When she was 12 years old, they began dating. L.T. said that she sent him naked pictures of herself, and he sent her pictures of his penis. They communicated through webcam. L.T. said that she and defendant began their sexual relationship when she was 15 years old.

On July 20, 2015, Detective Lee was present when a forensic interviewer spoke with L.T. L.T. again described her relationship with defendant as she had in the prior interview. She said that they had sex for the first time a few days after he arrived in California, and that they had oral sex. She said that the argument on June 12, 2015, occurred because he was jealous of her and because she refused to touch him intimately. She also said that defendant told her that she should kill herself, that she decided to leave to avoid more violence, that defendant grabbed her and tossed her around, that defendant put her in a choke hold, and that she bit his arm and ran outside. L.T. also said that defendant wanted her to dress like a little girl and to keep their relationship a secret because it was against the law. And, she said that defendant threatened to kill himself and her at least once.

B. Defendant's testimony

Defendant testified that he first met L.T. when his friend Adrianna R. introduced them online in either 2007 or 2008. Defendant was friends with both of them and often chatted with

them. Early in their relationship, Adrianna R. and L.T. each told defendant that they were 13 years old. A couple of months later, Adrianna R. told defendant that she was actually 11 years old.

Defendant and L.T. began dating in 2010. He thought that she was 16 years old at the time, with a birthdate of September 1994. In the summer of 2013, he moved to California to be with her. He thought that she was 18 years old at the time. Defendant first saw what L.T. looked like in late 2012 or early 2013 when they exchanged photographs. They never used video chat or a webcam before they met in person. Defendant stated that he never saw L.T.'s photographs on Facebook, showing her at 10, 11, and 12 years old. They became Facebook friends after he moved to California.

Defendant testified that he and L.T. waited to start a sexual relationship until the end of 2013. Eventually, they had sexual intercourse and oral sex. He introduced her to several of his family members. Defendant and L.T. visited his family and Adrianna R. in Texas for about six days.

At some point, defendant believed that L.T. was cheating on him. On June 12, 2015, he tried to take her phone to check if she was seeing someone else. When she bit his arm, he said, "'Get off, or I'm going to kill you.'" He went to the bathroom to check her phone. When he came out, she was gone.

Defendant testified that he never possessed or viewed child pornography, and he never threatened L.T., other than the one time when she bit him. He denied threatening to kill her family, pets, or himself, and he denied ever putting a gun in his mouth, sending L.T. naked pictures of himself, asking her to send him naked pictures, or asking her to stick anything inside her body while they communicated online. He denied calling her names, telling her to dress like a little girl, or telling her that he only wanted to date 12-year-old girls. He also denied telling L.T. not

to associate with other boys, or not to go to high school, or telling her to undress or to give him oral sex in public.

C. Other witnesses

1. Adrianna R.

Adrianna R., who was 20 years old in 2017, met L.T. in 2007 or 2008 while playing Furcadia online. Adrianna R. met defendant while playing the game in 2009, and she introduced L.T. and defendant to each other soon after.[3] If players were under 13 years old, they needed parental permission to play Furcadia. Adrianna R. initially lied about her age because she did not want to get in trouble, telling both defendant and L.T. that she was 13 years old. L.T. eventually told Adrianna R. that she was nine years old, and Adrianna R. told defendant and L.T. that she was 10 or 11 years old. Defendant told Adrianna R. that he was 17 years old. According to Adrianna R., in a group chat, L.T. told defendant that she was 13 years old when she was actually only nine years old.

After a couple of years, Adrianna R. began chatting with both L.T. and defendant via Skype. At some point, both defendant and L.T. told Adrianna R. that they were dating. In the summer of 2014, defendant and L.T. visited Adrianna R. in Texas. L.T. told Adrianna R. not to reveal her age to defendant.

2. Mark West (West)

West, defendant's grandfather, testified that he spoke with L.T. during a family get-together in Carlsbad in February 2014. She was articulate about her future plans and did not seem fearful. West said that defendant has had a condition that affects his speech patterns since he first started school. Defendant often does not make eye contact, and his words do not project when he

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[3] Adrianna R. stated that she would be surprised if defendant said he actually met L.T. in 2007.

speaks to people. He also suffers from benign tremors that affect his hands.

3. Maria Bogdanos

Ms. Bogdanos, defendant's mother, testified that she first met L.T. on June 19, 2014, when she flew to Los Angeles to visit her son. During a family gathering, L.T. spoke with several of defendant's family members. When defendant and L.T. were together, they seemed playful and happy. Ms. Bogdanos felt close to L.T. and spoke with her 10 to 15 times on the phone after her trip.

Ms. Bogdanos testified that defendant told her that he and L.T. had an online relationship for about two years and that he moved to California in 2013 to be with her at her request. Defendant told his mother that L.T. was a senior in high school in 2013. She stated that defendant speaks in a robotic way and has a hard time showing emotion.

4. Angela Deleon (Deleon)

In January 2015, Deleon, a property manager, interviewed defendant and L.T., who were interested in a room to rent. According to Deleon, L.T. dominated the interview and acted like an "alpha female." Deleon recalled L.T. showing her an out-of-state identification card that showed her birthdate as September 1994.

DISCUSSION

Defendant contends that he received ineffective assistance of counsel when, to avoid a continuance request by the prosecution, trial counsel withdrew a request to put on expert testimony of defendant's diagnosis of Asperger's syndrome.

A. *Relevant proceedings*

Prior to trial, defense counsel moved to admit evidence of defendant's diagnosis of Asperger's syndrome. On July 11, 2017, the prosecutor moved for a continuance due to receiving late

discovery from the defense. One day before, the defense provided the prosecution for the first time with a statement from Dr. Brendan Greenway, who had been treating defendant since June 12, 2015. Dr. Greenway stated that defendant had been diagnosed with "Asperger's Disorder (now labeled Autism Spectrum Disorder in the DSM-V)" and offered an opinion as to whether he could form the mental state alleged here:

"This is well known to impair one's ability to pick up on social cues due to deficits in nonverbal communicative behaviors used for social interaction. This may very well have contributed to his inability and difficulty picking up on cues indicating that his previous partner was a minor which has led to the current legal situation. This also may have led to his inability to react appropriately to the stressful situation between the two."

The prosecution requested additional time to review these materials, find and appoint a mental health expert, and allow that expert to review those documents and examine defendant.

On July 12, 2017, the defense filed a response disputing any discovery violation. Defense counsel noted that on March 20, 2017, the defense had e-mailed the prosecutor a copy of a report that stated that defendant has "Asperger's Syndrome." But the report was not from Dr. Greenway; it was from Dr. Lydia Bangston, who examined defendant pursuant to section 288.1.[4]

At the July 12, 2017, pretrial hearing in Department 100 (the calendaring court), defense counsel acknowledged that he first provided Dr. Greenway's name to the prosecution only two days earlier. The trial court proposed two potential solutions:

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[4] Section 288.1 provides that a person who is convicted of any lewd act with a person under 14 years old shall not have the sentence suspended until the court obtains a report from a reputable psychiatrist as to the mental condition of that person.

Either the exclusion of the expert testimony, which would be the "ultimate sanction," and which the trial court was not inclined to do; or a continuance to allow the prosecution to prepare a response to the defense expert.

After discussing the matter with defendant, defense counsel stated that the defense would not call Dr. Greenway as an expert. Counsel requested the right to call Dr. Bangston as an expert, as her section 288.1 report had been provided to the prosecution on March 20, 2017. The prosecutor stated that she had received Dr. Bangston's report, but there was no indication before that day that the defense would call her as a witness. The defense had provided no discovery as to any other records or testing information. The trial court indicated that it would allow a continuance for the defense to provide these materials.

Defense counsel discussed the matter with cocounsel and the prosecutor and then informed the trial court that the defense would not call any expert, either Dr. Greenway or Dr. Bangston, to testify about defendant's mental state or Asperger's diagnosis.

Defense counsel sought to introduce evidence of defendant's diagnosis of Asperger's syndrome through lay witness testimony. Counsel argued that this testimony was relevant as to whether defendant had an actual and reasonable belief that the victim was over 18 years old. According to the defense, this testimony was also relevant to explain defendant's demeanor when he testified at trial. The prosecutor moved to exclude any mention of defendant's diagnosis of Asperger's syndrome by any lay witnesses because they were not psychiatric or mental health professionals and were not qualified to diagnose defendant or testify that a particular mental defect caused him to be unable to do any particular action.

The trial court noted that no expert would have been able to testify that "there is a casual link between [Asperger's]

syndrome and the ability or inability of someone to form this particular mental state." Accordingly, even if proper notice of the expert had been given, it would have disallowed this expert testimony. The trial court also disallowed any lay testimony about Asperger's syndrome related to defendant's mental state. But, the trial court found that defendant could testify about his personal experiences and demeanor. For example, defendant could state that he sought medical treatment, but he could not state any diagnosis that he was given because that would be hearsay. Family members could testify as to their perceptions of defendant's behavior.

Later, during discussions about jury instructions, defense counsel stated that he did not intend to argue "anything remotely about any impairment, mental state, as it relates to cognitive disability, or anything along those lines."

B. *Relevant law*

To prevail on a claim of ineffective assistance of counsel under either the Sixth Amendment or California law, defendant must show (1) that his representation by trial counsel fell below a standard of objective reasonableness, and (2) that prejudice resulted. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–695; *In re Lucas* (2004) 33 Cal.4th 682, 721.) This is a "highly demanding" test that essentially requires a criminal defendant to prove "gross incompetence" by counsel. (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382.)

Under the first prong of this test, counsel is strongly presumed to have rendered adequate assistance, to have exercised reasonable professional judgment, and to have made reasonable investigations or reasonable decisions that make particular investigations unnecessary. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 690–691.) "Judicial scrutiny of counsel's performance must be highly deferential." (*Id*. at

p. 689.) The defendant must show that counsel's alleged error was not attributable to a tactical decision that a reasonably competent, experienced criminal defense attorney would make. (*People v. Gurule* (2002) 28 Cal.4th 557, 661.) Thus, a defendant has the burden of proof of showing ineffective assistance of counsel as "'a demonstrable reality and not [as] a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656.) In addition, where "'the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, . . .'" the claim must be rejected on appeal, unless counsel was asked for an explanation and failed to provide one, or "'"unless there simply could be no satisfactory explanation."'" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

To demonstrate prejudice, the defendant must establish that as a result of counsel's failures, the trial was unreliable or fundamentally unfair. (*In re Visciotti* (1996) 14 Cal.4th 325, 352.) A defendant must show that "there is a reasonable probability that [he] would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) Mere speculation does not meet the Sixth Amendment standard for demonstrating prejudice. (*In re Clark* (1993) 5 Cal.4th 750, 766.)

C. *Analysis*

Applying these legal principles, we conclude that trial counsel was not ineffective for not agreeing to a continuance to allow for the admission of expert testimony.

"[S]ections 28 and 29 do not prevent the defendant from presenting expert testimony about any psychiatric or psychological diagnosis or mental condition he may have, or how that diagnosis or condition affected him at the time of the offense, as long as the expert does not cross the line and state an opinion that the defendant did or did not have the intent, or malice

aforethought, or any other legal mental state required for conviction of the specific intent crime with which he is charged." (*People v. Cortes* (2011) 192 Cal.App.4th 873, 908.) While Asperger's Syndrome is a "recognized mental diagnosis" (*People v. Larsen* (2012) 205 Cal.App.4th 810, 825), like all mental or psychological conditions, it cannot be the basis for an expert opinion as to whether a defendant had the requisite mental state for a specific intent crime. Thus, neither Dr. Greenway nor Dr. Bangston could have testified that defendant's mental health condition affected his mental state in committing count 1 (making criminal threats), the only charged offense that required specific intent. (*People v. Toledo* (2001) 26 Cal.4th 221, 230.)

Moreover, the experts could not have testified that defendant had a reasonable and actual belief that L.T. was not underage when they had sexual relations. (*People v. Hernandez* (1964) 61 Cal.2d 529, 534–536 [a reasonable belief that a victim was over the age of consent and voluntarily engaged in sexual intercourse may constitute a defense to statutory rape]; see also CALCRIM Nos. 1070, 1082, 1102 [instructions given to the jury in this case, informing that a defendant is not guilty of the charged crimes if he reasonably and actually believed that the other person was 18 years of age or older].) Any expert testimony about defendant's Asperger's diagnosis would not have been relevant as to whether defendant's belief about L.T.'s age was reasonable and actual. (See, e.g., *People v. Brady* (2018) 22 Cal.App.5th 1008, 1017.) Thus, defense counsel could not have been ineffective for failing to call these witnesses. (*People v. Bolin* (1998) 18 Cal.4th 297, 334 [counsel not ineffective for failing to take a futile action].)

Furthermore, the appellate record does not rule out that counsel had a tactical reason for withdrawing his request for the admission of expert testimony. If the defense had agreed to a

continuance, the prosecution could have secured its own expert witness to testify that a person with an Asperger's diagnosis is not more likely to reasonably and actually believe that a sexual partner is of age. Counsel also could have thought that the jury would have disbelieved the suggestion that defendant's mental health diagnosis made any difference; or counsel may have thought that such evidence actually highlighted the unreasonableness of defendant's claim that he believed L.T. was 18 years old.

Finally, defendant cannot show that but for counsel's alleged deficiencies, the result would have been more favorable. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1003.) There was overwhelming evidence that defendant knew that L.T. was under 18 years old when they had sex. She testified that she told defendant when they first met online that she was nine years old. After chatting online for over a year, defendant asked for L.T.'s real name so he could add her as a friend on Facebook. She accepted his Facebook friend request, and defendant had access to her Facebook page, which contained contemporary photographs of her and indicated that she was 12 years old.

A couple of years later, defendant requested, and L.T. sent him, naked pictures of herself. They also began to communicate through webcam, where she would perform sexually explicit acts as he watched. He saw what she looked like and how she behaved.

And, defendant sought to keep L.T. isolated, by telling her not to socialize with boys or other friends, trying to convince her to be homeschooled, and instructing her not to tell her parents about him, all acts that show that defendant was aware that L.T. was a minor and did not want anyone to know that he was dating her.

Furthermore, when L.T. was 14 years old, she and defendant engaged first in oral sex and later in sexual intercourse. Their early sexual acts occurred in defendant's car, indicating that he wanted to keep their interactions private. And, defendant showed L.T. videos of children engaged in various sex acts and told her that he wanted her to wear children's clothes, indicating that he was attracted to her minor age.

Moreover, when defendant took L.T. to Texas, he bought her plane ticket. At the airport, she used her identification, which showed her birthdate and age as 16 years old. It is patently unreasonable that defendant could have purchased L.T.'s plane ticket and accompany her on an airplane, through airport security, without being aware that she was 16 years old.

In short, there is no reasonable possibility that the jurors would have found that defendant reasonably and actually believed that L.T. was over 18 years old when they had sexual relations, regardless of any mental health expert testimony that the defense could have presented. Defendant cannot show any prejudice from counsel's decision to withdraw the defense request for admission of expert testimony. It follows that defendant did not receive ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT