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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. PEDRO ALEX DUNN, Defendant and Appellant.	B280982 (Los Angeles County Super. Ct. No. LA081979)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael V. Jesic, Judge. Affirmed.

Vanessa Place, 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 William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Pedro Alex Dunn (defendant) of ten counts of lewd acts on a child (Pen. Code, § 288, subd. (a))[1] and two counts of forcible lewd acts upon a child (§ 288, subd. (b)(1)). The jury found true the allegations that the offenses involved multiple victims (§ 667.61, subds. (b) & (e)), and that the statute of limitations had been extended for counts 8 through 13, which involved K.M. (§ 803, subd. (f)(1)). The second victim was K.M.'s sister, M.M. The trial court sentenced defendant to a total term of 180 years to life in state prison, consisting of a term of 15 years to life for each of the twelve counts imposed consecutively. Defendant filed a timely notice of appeal.

Several of defendant's friends and acquaintances testified at trial that defendant had not performed sexual acts on them when they were minors, and that they had not seen him do so with any other minor. Although the trial court did not read any instructions to the jury regarding character evidence, the trial court included a jury instruction regarding cross-examination of character evidence by "have you heard" questions in the written package of instructions without including the instruction that informed the jury that character evidence alone could be the basis for reasonable doubt. Defendant asserts this was error.

Defendant also contends defense trial counsel provided ineffective assistance of counsel when trial counsel failed to ask defendant's friends and acquaintances if they had an opinion on defendant's sexual predilections towards children and failed to request complete instructions on character evidence. Defendant contends trial counsel's failure to object to the prosecutor's

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[1] Further undesignated statutory references are to the Penal Code.

remarks in closing arguments that the defense witnesses' testimony was "useless" also constituted ineffective assistance of counsel.

Because we conclude the testimony of defendant's friends and acquaintances was not character evidence, the trial court did not commit instructional error requiring reversal even if the written package of instructions included an instruction on certain cross-examination of character witnesses. For the same reasons, trial counsel did not render ineffective assistance in failing to object to the absence of an instruction explaining character evidence. We conclude that strategic reasons may have supported trial counsel's failure to question defendant's witnesses on whether they had an opinion on defendant's sexual behavior towards children, and defendant's claim of ineffective assistance of counsel based on that failure is thus not well founded. Because the prosecutor's remarks were fair comment on the evidence, trial counsel did not render ineffective assistance in failing to object to those remarks. Accordingly, we affirm.

FACTUAL SUMMARY

A. Trial Testimony

Edith M. (Jackie) had two daughters, K.M., born in June 1987 and M.M., born in December 1988 (collectively, the M. family). In 1992 or 1993, Jackie began a relationship with defendant. At some point thereafter, defendant moved in with Jackie and her daughters in their apartment in Hollywood. None of the three women remembered the exact date when defendant began living with them. Based on K.M.'s and M.M.'s memories of their ages when defendant moved in, he would have moved in

sometime in 1994.[2] Soon, defendant, Jackie, and the girls moved into a two-bedroom apartment in Canoga Park. The girls shared one bedroom while Jackie and defendant shared the other. Jackie, M.M., and K.M. estimated defendant stayed with them for six or seven years, which would indicate that defendant moved out in 2000 or 2001. Jackie told defendant to move out after M.M. revealed to Jackie that defendant had been molesting her for years.

M.M., who was 27 at the time of trial, testified that the first time defendant touched her inappropriately was in the apartment when she was six years old. Defendant touched her vagina over her clothing. Afterwards, the M. family and defendant went out to a Chinese restaurant and then to a video game arcade. M.M. was upset but did not tell anyone about the incident.

This was not the only time when defendant touched M.M. inappropriately. M.M. testified that defendant's touching became more frequent over time; the duration of the contacts became longer, clothes were off, and the contacts escalated beyond simple touching. M.M. did not remember the exact number of times defendant touched her.

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[2] Jackie believed defendant moved in with her and her daughters when the girls were five and six years old, and stayed with them for six or seven years. K.M. was born in June 1987 and turned six in June 1993. M.M. was born in December 1988 and turned five in December 1993. M.M. believed that she was five or six when defendant first came into her life. K.M. believed that she was about seven years old when defendant joined her family. K.M. turned seven in June 1994.

At trial, M.M. was able to describe a few other specific incidents. One incident occurred at the apartment when M.M. was in fifth grade and had just "hit puberty." The incident took place in the bedroom her mother and defendant shared. Defendant inserted his fingers into M.M.'s vagina and then inserted his penis there. Defendant's actions caused physical pain to M.M., and upset her. M.M. testified that defendant inserted his penis into her vagina on "a handful" of other occasions, but it "wasn't something he did all the time." She did not remember the exact number of times intercourse occurred.

Once M.M. got older, defendant inserted his fingers into her vagina "all the time." He would ask her which finger she liked better or if it hurt. These incidents took place in her mother's bedroom, in the living room, and in the room M.M. shared with K.M. The incidents in the living room often took place when M.M. and defendant were sitting on the couch under the covers watching the "X-Files" on television.

M.M. testified further she remembered defendant putting his mouth on her private parts when they were under the covers in Jackie's room. He also put his mouth on M.M.'s private parts on other occasions when they were in Jackie's room, when they were on the couch in the living room, and when they were on the bunk beds in M.M.'s and K.M.'s bedroom.

M.M. testified defendant sometimes kissed her on the lips and inserted his tongue into her mouth when he dropped her off at school. On other occasions, defendant would kiss her and place her hand on his penis. Overall, defendant molested M.M. multiple times a week until M.M. was in the seventh grade. Based on her observations of defendant's behavior with K.M., M.M. believed that defendant was also molesting K.M.

M.M. did not tell her mother about defendant's molestation because she was uncomfortable talking to her about it. In January 2002, when M.M. was in the seventh grade, she told her friend, J.B. (J.), about the molestation. J. told her mother; J.'s mother told M.M. she should report the molestation to a teacher. M.M. did so, and the school called the police.

Los Angeles Police Detective Michelle Gomez came to the school to investigate. According to Officer Gomez, although M.M. was hesitant and afraid, she told the officer what had happened. M.M., however, also told the police officers who came to her school that she "didn't want to talk about it or that [she] didn't want to go through with anything."

Around this time, M.M. called Jackie at work and told Jackie that defendant had touched her.[3] Jackie spoke with K.M. and told her to stay in the room with M.M. until Jackie returned home. Jackie then called defendant and told him to leave. According to K.M., before defendant left the apartment, he asked her whether she had ever told her mother about "our special hugs." K.M. replied that she had not.

Later, Jackie took M.M. and K.M. with her to the police station. Jackie told the police she did not want to proceed with the investigation because she loved defendant.[4] K.M. told the

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[3] Jackie and M.M.'s testimony about the timing of this call does not clearly indicate when it was made. Jackie testified that M.M.'s call to her and the police involvement in the matter were "very close together." M.M. testified that she called Jackie and told her about the touching the day after she told J.

[4] Jackie continued to see defendant for several months after M.M. revealed the molestation. She told M.M. not to tell anyone about defendant's acts.

police nothing had happened. She did so because she did not want to hurt her mother or Chelsea, defendant's daughter from another relationship. The police took no further action because of the family's unwillingness to proceed.

K.M. testified defendant first touched her sexually when she was a month shy of her ninth birthday; K.M. believed she was in the fifth grade at the time. K.M. was on the bed in Jackie's room when defendant put his hands down K.M.'s shorts. She pulled away. Defendant told her that he knew she had "little hairs down there" and that she had gotten her first period. K.M. left Jackie's room and returned to her own room. M.M. was home when this happened, but Jackie was at work.

When K.M. was in the sixth grade, defendant grabbed her and tried to pull her closer to him. She resisted, but defendant pulled her to him and laughed. The incident occurred in Jackie's room.

K.M. recalled a number of incidents when she was in the seventh and eighth grades. In one incident, defendant tried to put his hand inside her shirt to touch her breast; the incident occurred while she was sitting on the couch in the living room. K.M. told him, "No." Defendant pulled her closer to him and said, "What do you mean, no?" He pulled K.M. closer to him with one hand and used his other hand to touch K.M.'s left breast under her shirt, which made her afraid and angry. In another incident, defendant swam up behind K.M. when she was in a family member's swimming pool and began touching her bottom. When defendant's mother looked out the window, defendant stopped touching K.M. and said they should go inside. Another time, defendant kissed K.M. her on her lips "with tongue" twice in one day.

K.M. also recalled several incidents from when she was 12 or 13 years old. Once, defendant called her to his bedroom to pick up a phone call from her mother, who was at work. As K.M. spoke with her mother on the phone, K.M. felt her shirt come up and either defendant's hand or penis touching her back. K.M. hung up the phone, turned around, and realized that defendant had taken off his clothing and exposed his genitals. She left the room. Another incident took place when K.M. was watching television on the living room couch with M.M. and defendant. They were under a blanket. K.M. felt defendant lower the back of her shorts and insert his penis into her anus. M.M. pulled the blanket off and saw what was happening. Defendant inserted his penis into K.M.'s anus at least one other time. On a different occasion, defendant came into K.M.'s room when she was on her bed and began touching her over her clothing. She fell asleep while defendant's hands were on her "vaginal area" under her clothing.

When K.M. started working, she began seeing a therapist. The therapy began in 2011 and continued intermittently for seven or eight years. In the initial intake form, K.M. indicated that she was seeking therapy because she had been sexually abused.

M.M. left home and joined the Army. She left the Army after four years and, in 2015, moved back into her mother's apartment. M.M. soon began having flashbacks about defendant's molestation. M.M. went to the police station and asked to speak to a detective about reopening the sexual abuse investigation from 2002.

Detective Ninette Toosbuy spoke with M.M. in August 2015. M.M. agreed to make a "pretext" phone call to

defendant. The phone conversation did not last very long. Defendant did not seem to be uncomfortable about discussing past events over the phone; he asked M.M. to meet him in person. At Detective Toosbuy's suggestion, M.M. arranged to meet defendant for lunch at a Chinese restaurant on Reseda Boulevard.

The lunch took place on September 17, 2015. M.M. had an audio device that recorded the encounter. The recording was played to the jury. After an extended period of small talk, M.M. asked defendant what he was thinking "the first time . . . that you touched me." Defendant responded, "It was . . . something that should have never happened." He added, "I don't understand it either. Okay? I don't know what possessed me. Yet you were a kid. You just kept on coming. I would sit there, and you would just come and look for me when I would just be sitting there watching TV." Defendant repeatedly apologized, expressed his regret, and asked for forgiveness. He insisted, however, that "[t]here was no sex involved" and "[t]here was no penetration" involved. He maintained that "there was only . . . inappropriate touching." When defendant left the restaurant, he was arrested.

To explain K.M.'s and M.M.'s delays and equivocations in reporting defendant's molestation, the prosecution presented the testimony of Dr. Susan Hardie, an expert on child sexual abuse. Dr. Hardie explained that it is common for a child victim of sexual abuse to delay reporting abuse for many years, or initially to report only some of the abuse. It is also common for a child victim to report the sexual abuse and later retract her account. It can be harder for a child victim to report sexual abuse when the abuser is a family member or a caregiver because the child might

worry about not being believed, blame herself for the abuse, or be ashamed or embarrassed. Dr. Hardie added that non-offending parents sometimes blame themselves for not preventing the abuse even though "we have to remember this occur[s] in secrecy." Dr. Hardie observed that a child victim may react differently to sexual abuse than an adult victim, for example, by not resisting or by "accommodat[ing]" the abuse into their regular lives by "compartmentaliz[ing]" and "cop[ing]" with the situation.

Defendant called nine witnesses to testify on his behalf.[5] Defendant's first witness, Rebecca Walker (Walker), had known him for about 23 years, since he became a manager of the apartment building where Walker lived with her family. Walker's eight-year-old son and six-year-old daughter regularly interacted with defendant. Although Walker and defendant lived in the same apartment building for only one year, they remained friends thereafter. When Walker's daughter turned 16 years old, defendant taught the daughter to drive. Walker never witnessed any improper sexual behavior between defendant and her daughter.

Chelsea Dunn (Chelsea), defendant's daughter, testified she met Jackie, M.M, and K.M. when she was five or six years old; she was born in 1990 or 1991. For about six years, Chelsea visited M.M. and K.M. at their apartment on a weekly basis. Chelsea never observed her father act in a sexually inappropriate way with K.M. or M.M.

Christina Pena (Pena) testified she met defendant about six years earlier when he began dating her mother, Elida Alcala

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[5] We refer to some of the defendant's witnesses by their first names only for clarity and ease of reference. We intend no disrespect.

(Alcala). She was 13 years old at the time. For the first few years of defendant's relationship with Alcala, defendant stayed at the Alcala family apartment three or four times per week. About three years before trial, defendant moved into the apartment full time. After two years, defendant moved out. Thereafter, defendant visited the apartment three or four times per week. Throughout the six years Pena had known defendant, she had been alone with him many times. Defendant never did anything of a sexual nature to her.

Alcala testified that she met defendant about six years earlier and was now his fiancée. Alcala agreed that her daughter, Pena, had frequently been alone with defendant over the six years Alcala and defendant had been in a relationship. Alcala never saw defendant behaving inappropriately or sexually toward Pena.

Ruben Chavez (Ruben) testified knowing defendant for more than 30 years; he considered defendant his best friend. Defendant was often alone with Ruben's children when they were growing up. Defendant came to many parties at Ruben's house. Ruben never saw defendant do anything improper or sexual toward his children or any child visiting the Chavez house.

Nathalie Chavez (Nathalie) testified that she knew defendant through her father, Ruben. Nathalie often spent time alone with defendant when she was growing up. Defendant never did anything sexually inappropriate to her or any other child. Nathalie barely remembered M.M. and K.M. and had no knowledge of anything that happened between the girls and defendant.

Kevin Chavez (Kevin) testified he knew defendant through his father, Ruben. Defendant came to various celebrations at the

Chavez residence over a 15- to 20-year period when Kevin was growing up. Kevin never saw defendant do anything of a sexual nature with anybody, including a child.

Connie Chavez (Connie) knew defendant through her husband, Ruben; the men were best friends. Over the course of 25 years, Connie never saw defendant do anything of an improper sexual nature.

Maria Franco (Franco) used to work with Walker and met defendant through Walker. At the time of trial, Franco had known defendant for about 15 years. Franco also knew Jackie, M.M., and K.M. Franco often saw K.M. and M.M. with defendant. K.M. and M.M. did not appear to be afraid of defendant. Franco never saw defendant do anything of an improper or sexual nature to K.M. or M.M.

Defendant testified on his own behalf and gave a slightly different timeline of his relationship with Jackie. According to defendant, he met Jackie at a nightclub in 1995 and moved into her apartment in 1996. K.M. and M.M. were about eight to ten years old at the time. Defendant treated the girls as if they were his daughters. Defendant brought his daughter Chelsea to stay with the girls almost every weekend. Defendant moved out of the M. family apartment in 2001 because he was not getting along with Jackie.

Defendant recalled that K.M. and M.M. fought a lot when he lived in the M. family apartment. He sometimes disciplined the girls by spanking them, which they did not like. When M.M. referred to "improper touching" during their 2015 lunch, defendant thought she was referring to a "slap, a hit, a grab." Defendant denied having sexual intercourse with K.M. or M.M. He also denied kissing them or touching them sexually.

B. The Trial Court's Jury Instructions Regarding Character Evidence

Two instructions are the focus of this appeal: CALCRIM Nos. 350 and 351. CALCRIM No. 350 describes character evidence and its relevance; CALCRIM No. 351 addresses cross-examination of character witnesses by "have you heard" questions.

CALCRIM No. 350 provides: "You have heard character testimony that the defendant (is a <*insert character trait relevant to crime[s] committed*> person [or] has a good reputation for <*insert character trait relevant to crime[s] committed*> in the community where (he/she) lives or works.) [¶] Evidence of the defendant's character . . . can by itself create a reasonable doubt [whether the defendant committed <*insert name[s] of alleged offense[s] and count[s], e.g., battery, as charged in Count 1*>]. [¶] However, evidence of the defendant's good character may be countered by evidence of (his/her) bad character for the same trait. You must decide the meaning and importance of the character evidence. [¶] [If the defendant's character for certain traits has not been discussed among those who know (him/her), you may assume that (his/her) character for those traits is good.] [¶] You may take that testimony into consideration along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt."

CALCRIM No. 351 states: "The attorney for the People was allowed to ask defendant's character witness[es] if (he/she/they) had heard that the defendant had engaged in certain conduct. These "have you heard" questions and their answers are not evidence that the defendant engaged in any such conduct. You may consider these questions and answers only to

evaluate the meaning and importance of (the/a) character witness's testimony."

The jury instruction conference occurred just before closing arguments and was brief. The prosecutor indicated that there were "[j]ust a few little changes I was noting." The prosecutor explained, "[CALCRIM No.] 351 we really didn't have cross-examination of character [witnesses] because they really weren't character [witnesses]." The court replied, "I took the other one out. I forgot to take that one out." Presumably the "other" instruction the trial court mentioned was CALCRIM No. 350, which was not read to the jury or in the written packet of instructions. Defendant did not object to removal of CALCRIM No. 351 and did not request CALCRIM No. 350.

The trial court did not read CALCRIM No. 351 to the jury. The clerk's transcript indicates that CALCRIM No. 351 was included in packet of the written instructions given to the jury despite the trial court's stated intent to remove it.

DISCUSSION

I. Neither The Law Nor The Facts Required The Trial Court To Instruct The Jury On Character Evidence And Its Inclusion Of What Was A Superfluous Instruction On Certain Cross-Examination Of Character Witnesses Does Not Mandate Reversal

A. General legal principles

" '[T]he court is required to instruct sua sponte only on general principles which are necessary for the jury's understanding of the case. It need not instruct on specific points or special theories which might be applicable to a particular case,

absent a request for such an instruction.' [Citations.] Alternatively expressed, '[i]f an instruction relates "particular facts to the elements of the offense charged," it is a pinpoint instruction and the court does not have a sua sponte duty to instruct.' " (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488-489.)

There is nothing in the record to indicate that defendant requested CALCRIM 350 or objected to the trial court's stated intent to remove CALCRIM No. 351. On appeal, defendant acknowledges that "a trial court generally has no sua sponte duty to instruct on character evidence (*People v. Bell* (1875) 49 Cal. 485, 489-490)." Citing *People v. Burney* (2009) 47 Cal.4th 203, 246 (*Burney*), defendant argues that a different rule should apply here where "the instruction is manifestly necessary for the jury's understanding of the case." Because the packet of jury instructions included CALCRIM No. 351, informing the jury that the prosecutor had asked defendant's character witnesses "have you heard" questions, the jury needed CALCRIM NO. 350 to evaluate that evidence, particularly CALCRIM NO. 350's instruction that character evidence alone could be the basis for reasonable doubt.

Defendant reasons the trial was "a credibility contest between him and his accusers—and [defendant's] credibility depended almost exclusively on evidence that [defendant] was a good and caring father and stepparent, that he was never seen to do or intimate anything improper with any other children during a lifetime of being with and around many other children [which] was evidence that [defendant] was of good character generally and specifically was not the sort of 'sexual psychopath' that would

have habitually and severely sexually abused two little girls he was parenting."

In general, "a claim that a court failed to properly instruct on the applicable principles of law is reviewed de novo. [Citation.] In conducting this review, we first ascertain the relevant law and then 'determine the meaning of the instructions in this regard.' " (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) "The trial court has no duty to instruct on a defense that is not supported by substantial evidence." (See *People v. Bohana* (2000) 84 Cal.App.4th 360, 370.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) We review independently whether substantial evidence supported giving an instruction on a defense theory. (See *People v. Waidla* (2000) 22 Cal.4th 690, 733.)

B. The testimony of defendant's friends and acquaintances was not character evidence and thus did not support instructing pursuant to CALCRIM NO. 350

Generally, evidence of someone's character is inadmissible, whether in the form of an opinion, reputation, or specific instances of conduct, to prove that person's conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).) In criminal cases, however, "evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation" is admissible when "(a) Offered by the defendant to prove his conduct in conformity with such character or trait of character[; or] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)." (Evid. Code, § 1102,

subds. (a) & (b).) Evidence of specific acts of conduct alone is inadmissible. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1311 (*McAlpin*).)

Defense counsel called nine witnesses: Walker, Chelsea, Pena, Alcala, Ruben, Nathalie, Kevin, Connie, and Franco. On direct examination, they testified that they had never observed any sexual or inappropriate behavior by defendant towards children. Although defense counsel asked these witnesses about their observations, defense counsel did not ask if they had an opinion about defendant's sexual predilections towards children. Defense counsel also did not ask them if they were aware of defendant's reputation in the community regarding any such predilections. Defendant acknowledges these omissions in arguing defense counsel failed to render effective assistance of counsel.[6]

Defendant relies on *People v. Jones* (1954) 42 Cal.2d 219 (*Jones)* and *McAlpin*, *supra*, to argue that the testimony of defendant's friends and acquaintances was evidence of defendant's not being a "sexual psychopath." Neither case is apposite.

In *Jones*, defendant was convicted of committing lewd and lascivious acts and showing pornography to a minor in violation

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[6] Defendant states "counsel did not connect the dots in presenting the character evidence: [W]hile each of the defense witnesses was asked whether he or she had personally seen or experienced [defendant] engaging in any sexually inappropriate conduct toward minors, none of the witnesses was asked whether he or she had any opinion as to whether [defendant] was the sort of person who would do so, or what [defendant's] reputation for sexual morality or predilection was within the community."

of sections 288 and 288, subdivision (a). Defendant testified at trial; he denied he engaged in any such acts. There was evidence that defendant had a good reputation for morality in the community; his wife testified about the victim's bad reputation for truth and veracity. Defendant argued the trial court erred in excluding expert psychiatric opinion that defendant was " 'not a sexual deviate and he [was] incapable of having the necessary intent to be lustive.' " (*Jones*, *supra*, 42 Cal.2d at p. 222.) Defendant asserted that this expert opinion was probative on whether he performed the acts for which he was on trial. (*Id*. at p. 223.) Relying on provisions in the Welfare and Institutions Code about hearings to determine whether someone is a "sexual psychopath," the appellate court held expert opinion that a defendant was not a sexual psychopath could support "an inference . . . that he did not commit the act denounced by section 288." (*Id*. at p. 225.)

Here, there was no such expert or lay opinion. There was no testimony about defendant's reputation in the community regarding sexual conduct towards children. As defendant acknowledges, the witnesses were not asked if they had an opinion about defendant's sexual predilections. We thus fail to see how *Jones* is instructive.

The same is true for *McAlpin*. There, defendant was convicted of lewd conduct with a child under 14 years old. The trial court refused to admit the opinion of three women who had dated defendant and who had daughters. The written proffer of proof for these witnesses was that, based on their observations of "no unusual behavior either by defendant or by their daughters" during the course of their relationship with the defendant, it was their "opinion" that "defendant [was] not a person given to lewd

conduct with children." (*McAlpin*, *supra*, 53 Cal.3d at p. 1309.) The prosecutor objected to admission of this lay opinion evidence on the ground that it violated the rule against "proving a character trait of the accused by means of specific acts." (*Ibid*.) The trial and appellate court agreed.

Our Supreme Court held this was error albeit not prejudicial. (*McAlpin*, *supra*, 53 Cal.3d at pp. 1312-1313.) "A fair reading of the offer of proof shows that the women witnesses would not have limited their testimony to specific instances in which defendant had the opportunity to, but did not, molest their daughters. Instead, the witnesses proposed to testify that they observed defendant's behavior with their children throughout the course of their relationship with him, and their opinion that he is not a person given to lewd conduct with children arose from that experience as a whole. Thus viewed, the proffered testimony was intended to prove the relevant character trait not by specific acts of 'nonmolestation,' but by the witnesses' opinion of that trait based on their long-term observation of defendant's course of consistently normal behavior with their children." (*McAlpin*, *supra*, 53 Cal.3d at pp. 1309-1310, fn. omitted.)

In contrast, here defendant did not elicit testimony from his witnesses on whether based on their observations of defendant with children, they had an opinion about defendant's sexual behavior towards children or about his reputation in this regard. There simply was no character evidence at trial; a fortiori substantial evidence did not support instructing the jury pursuant to CALCRIM 350. The instruction was not, in

defendant's words, "manifestly necessary for the jury's understanding of the case."[7]

C. Inadvertently including CALCRIM No. 351 in the written instructions sent to the jury room was error not requiring reversal in light of the other instructions and where there was no character evidence at trial

It was uncontroverted that the trial court's inclusion of CALCRIM No. 351 in the packet of instructions sent to the jury room was inadvertent. During the jury instruction conference, neither counsel objected to the trial court's statement of intent to remove that instruction. The trial court never read CALCRIM No. 351 to the jury.

As set forth in the preceding section, there was no need to give CALCRIM No. 350 because there was no character evidence at trial. Thus, CALCRIM 351 was " 'an "abstract" instruction,' " that is, "one which is correct in law but irrelevant." ' " [Citations.] 'It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the

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[7] *Burney*, *supra*, a death penalty case, does not assist defendant. There, defendant proposed a felony murder instruction that modified the applicable CALJIC instruction. The Supreme Court held the trial court properly denied defendant's modified instruction as duplicative of CALJIC instructions that were given to the jury. (*Burney*, *supra*, 47 Cal.4th at p. 246.) In doing so, the Supreme Court recognized "[t]he court may, however, 'properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation].' " (*Ibid.*)

case.' . . . Nonetheless, giving an irrelevant or inapplicable instruction is generally ' "only a technical error which does not constitute ground for reversal." ' " (*People v. Cross* (2008) 45 Cal.4th 58, 67.) This is particularly true when the jury is also instructed that some instructions may not apply. (*Ibid*.)

Here, the trial court's first pre-deliberation instruction, CALCRIM 200, reminded the jury: "You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you." The court then explained: "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts."

Defendant asserts including CALCRIM No. 351 in the written set of instructions had the effect of "[e]stablishing for [defendant's] jury not only the fact that there *was* character evidence, but that the prosecution's impeachment of those witnesses was properly done by way of the current accusations. No other guidance for the use of the character evidence was provided." Defendant argues that CACLRIM No. 350 "would have properly contextualized No. 351."

"A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]" (*People v. Cross supra,* 45 Cal.4th at pp. 67-68.) We independently review whether there was such a likelihood. (See *People v. Olivas* (2016) 248 Cal.App.4th 758, 772-773; see also *People v. Smithey* (1999) 20 Cal.4th 936, 963.) Defendant has failed to make this showing.

Defendant's argument would require us to find that the jury disregarded CALCRIM No. 200. A jury is generally presumed to follow the court's instructions. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 83.) Defendant fails to cite anything in the record that would overcome this presumption. For example, there were no jury questions about character evidence.

Nor was there any evidence of the kind of cross-examination that is the subject of CALCRIM No. 351, to wit, asking a witness if he or she heard about a defendant's engaging in certain conduct. The prosecutor's impeachment of the defense witnesses was limited to demonstrating that the witness (1) did not know defendant during the relevant time frame; (2) did not know K.M. and M.M.; (3) had never been to the M. family residence; or (4) had a close relationship with defendant. Defendant does not explain how the jury could have interpreted these questions as asking the witnesses whether they had heard about sexual conduct towards children involving defendant. We see no reasonable likelihood of confusion or misunderstanding by the inclusion of CALCRIM 351 in the packet of jury instructions. For all these reasons, we conclude the presence of CALCRIM 351 in the packet of written jury instructions was technical error not requiring reversal.

II. Defendant Failed To Carry His Burden To Demonstrate Ineffective Assistance Of Trial Counsel

Defendant contends his trial counsel was ineffective in "three interrelated" ways: (1) trial counsel failed to elicit lay opinion or reputation testimony from defendant's witnesses about his sexual behavior towards children; (2) trial counsel failed to object when the prosecutor improperly argued that defendant's

character evidence was "useless"; and (3) counsel failed to request CALCRIM No. 350.

A. Standard of Review

To prevail on a claim of ineffective assistance of counsel, defendant must establish his trial counsel's representation fell below professional standards of reasonableness and must affirmatively establish prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Hart* (1999) 20 Cal.4th 546, 623-624.) If the defendant's showing is insufficient as to one component of this claim, we need not address the other. (*Strickland*, at p. 697.)

"A claim on appeal of ineffective assistance of counsel must be rejected ' "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." ' [Citations.] Unless the record affirmatively discloses that counsel had no tactical purpose for his act or omission, 'the conviction will be affirmed and the defendant relegated to habeas corpus proceedings at which evidence dehors the record may be taken to determine the basis, if any, for counsel's conduct or omission.' " (*People v. Hinds* (2003) 108 Cal.App.4th 897, 901.)[8]

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[8] "Action taken or not taken by counsel at a trial is typically motivated by considerations not reflected in the record. It is for this reason that writ review of claims of ineffective assistance of counsel is the preferred review procedure. Evidence of the reasons for counsel's tactics, and evidence of the standard of legal practice in the community as to a specific tactic, can be

B. Not eliciting opinion character testimony might have been tactical because such testimony could have opened the door to cross-examination eliciting unfavorable testimony

Defendant argues trial counsel laid the foundation for eliciting lay character opinion when trial counsel asked defendant's friends and acquaintances about their relationship with defendant, their opportunity to observe defendant with children, and the absence of any observation of sexually inappropriate conduct towards children. Defendant contends there was no conceivable reasons for trial counsel's failure to ask these witnesses whether they had an opinion on defendant's sexual predilections regarding children. Accordingly, defendant argues that trial counsel's performance comprised ineffective assistance of counsel. Not so.

The defense witnesses' testimony concerning the absence of sexual behavior or acts by defendant with children was favorable to defendant. Defendant's trial counsel could have made a reasonable tactical decision not to provide the prosecution with an opportunity to rebut that favorable testimony. (See Evid. Code, § 1102, subd. (b).) Absent anything in the record as to trial counsel's reasons for not inquiring further after already eliciting favorable testimony, and the presence of a reasonable strategic explanation for trial counsel's decision not to do so, defendant has not carried his burden on appeal to demonstrate ineffective assistance of counsel. "Here, the record affords no

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presented by declarations or other evidence filed with the writ petition." (*In re Arturo A.* (1992) 8 Cal.App.4th 229, 243, citing Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 1991) Writs, ¶ 15.179.1, pp. 15-38.6, 15-38.7.)

basis for concluding that counsel's omission was not based on an informed tactical choice." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

C. Trial counsel had no obligation to request an instruction not grounded in the evidence

At the risk of being repetitive, there was no character evidence at trial. There was a reasonable tactical basis for trial counsel's stopping short of asking defendant's friends and acquaintances for opinion or reputation character evidence that could have left defendant vulnerable to cross-examination with unfavorable evidence. The trial court too noted there was no character evidence at trial and indicated its intent to remove character evidence instructions from the written set of instructions. "Counsel cannot have been ineffective for failing to seek an instruction for which there was no supporting evidence." (*People v. Ochoa* (1998) 19 Cal.4th 353, 434.) For all these reasons, we conclude trial counsel was not ineffective in failing to ask for CALCRIM 350.

D. The prosecutor's closing remarks constituted fair comment on the evidence and defense counsel's failure to object to those comments would thus have been futile

Defendant contends the prosecutor's following remarks during closing arguments were improper: "Let's go over . . . we heard from the defense witnesses. Again, I talked about Chelsea, Ruben Chavez, and the others. And, frankly, the defense witnesses really had nothing to add because, of course, they didn't see anything. These are crimes done in secret. They're not going to see anything happening. So, really, it was useless

testimony." Trial counsel did not object, and defendant contends this failure constituted deficient performance.

" ' " '[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.' " ' " (*People v. Stanley* (2006) 39 Cal.4th 913, 951.) M.M. and K.M. testified that almost all of defendant's molestation took place in the privacy of their home. None of the defense witnesses lived with the M. family; few spent any significant amount of time in the M. family home. Their testimony was thus limited; they did not witness any of the events described by M.M. and K.M. Dr. Hardie confirmed that typically, child molestation is done in secret. We have no trouble concluding that the prosecutor's description of the testimony of defendant's witness as "useless" was fair comment on that evidence.

Because the prosecutor's remarks did not constitute misconduct, there was no basis for trial counsel to object to them. "Counsel does not render ineffective assistance by failing to make . . . objections that counsel reasonably determines would be futile." (*People v. Price* (1991) 1 Cal.4th 324, 387.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.