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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JACOB MICHAEL DIAZ, Defendant and Appellant.	2d Crim. No.B276800 (Super. Ct. No. 2013007344) (Ventura County)

Jacob Michael Diaz sexually abused his biological daughter Ka.D. from 1991 to 1994. Following remarriage, he and his second wife Linda Diaz adopted a daughter, N.D., and became guardians of N.D.'s older sister, Ki.D. From 2005 to 2012, Diaz continuously sexually abused Ki.D. Ki.D. told Linda of the abuse, but was assured that the acts were only those of a loving father. Unable to endure the increasingly aggressive abuse, Ki.D. reported Diaz's conduct to a school counselor in 2012.

Ka.D. and Ki.D. did not know each other until after Diaz was arrested in 2013, yet they described parallel experiences while living in his home. He was convicted by jury of continuous

sexual abuse, lewd acts, and sexual battery. (Penal Code, §§ 288.5, subd. (a), 288, subd. (c)(1), 243.4, subd. (e)(1).)[1] He was sentenced to a prison term of 47 years to life plus 4 months.

On appeal, Diaz alleges numerous evidentiary errors, in large part arising from the use of purportedly hearsay statements of the victims relating the ongoing abuse to others. We conclude that the claims were forfeited by not only a failure to object but acquiescence in their admission. We also conclude that the claims are without merit. Evidence of the victims' statements to others concerning their abuse; feelings of antipathy expressed by the victims and witnesses about Diaz; evidence that he remarried without the benefit of divorce as that bears on credibility; and the opinion of the investigating officer concerning the similarity of Diaz's victimization of Ka.D. and Ki.D. were properly received, even had an objection been made. Further, the jury was correctly instructed that genital contact, however slight, is "masturbation."

We agree with Diaz that the conviction on two counts of continuous sexual abuse of Ki.D. was error and one of the two must be stricken, a conclusion that respondent concedes. Accordingly the aggregate term is reduced from 47 years to life plus 4 months to 32 years to life plus 4 months. In all other respects, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY

Testimony About the Molestations

Ki.D. was 21 years old at the time of trial. She described a peripatetic and difficult life since the age of one, when she relocated from her birthplace in Los Angeles to Mexico, with her mother. Her birth father moved her back to Los Angeles when she was six. He and his girlfriend beat Ki.D. with a belt and

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[1] Unlabeled statutory references are to the Penal Code.

obliged her to babysit when she should have been attending school. Ki.D. eventually reported the abuse and was removed from her father's care.

Ki.D. returned to Mexico, only to discover that her mother's boyfriend was a violent, verbally abusive drug addict and alcoholic. While in Mexico, Ki.D. was visited by her younger sister N.D., who was adopted as an infant by appellant and his wife Linda. The sisters bonded. In 2005, 10-year-old Ki.D. moved to Antioch, California to live with appellant, Linda, and N.D. Ki.D. was very excited about the move because she attended a good school, had food and clothing, and traveled. She started to call appellant "dad."

Ki.D. testified that when she was 11, appellant started "sneaking" into her bedroom late at night, stealthily climbing into her bed to avoid disturbances. Once under the bedcovers, appellant would begin by massaging her back, work his hand under her T-shirt and onto the top of her underwear. From a "spooning position," he would rub her breasts, beneath her training bra. He also reached under her panties to rub her vagina. She wrapped herself in extra blankets, and tried to prevent him from getting into the bed, but he was strong and would push her to the side. Each instance of abuse lasted for 10 to 15 minutes.

Ki.D. knew that what appellant was doing was wrong. She considered confronting appellant but feared that he might become violent, or make her leave her sister and the life she was enjoying in Antioch. She did not want to cry out and awaken N.D. The molestations occurred two or three times per month.

In 2006, Ki.D. traveled with appellant and his family to Puerto Vallarta. At the hotel, Ki.D. shared a bed with N.D.

Ki.D. testified that she was awakened one night when appellant entered the bed and, "just like always, started rubbing my stomach . . . then went under the underwear, started working his hand down and rubbing." N.D. did not wake up. Ki.D. did not confront appellant, though family members were in the room, because "I was scared. I was nervous . . . everything was in jeopardy." Ki.D. did not want her sheltered sister to lose everything and be moved from place to place, the way that Ki.D. had.

The next day, Ki.D. told Linda Diaz that appellant "touched me and . . . it wasn't right." Linda replied that this was "just cuddling. That's his way of showing you that he loves you." Ki.D. felt "shut down." Once they returned home, Linda sat Ki.D. down and reiterated that her accusations were untrue. Ki.D. knew that the last time she reported abuse (by her birth father) she was removed from the home. She did not want to be moved and leave N.D. Appellant continued to molest Ki.D. after the trip to Puerto Vallarta, two or three times per month.

The family moved to Thousand Oaks in 2007. Appellant continued creeping into Ki.D.'s room several times per month and molested her. She wrapped herself in blankets, but appellant was not deterred. When Ki.D. was 14 and 15 years old, appellant spent more time rubbing her chest because she was developing breasts, and pressed harder on her vagina with his fingers. Ki.D. would cry in silence when appellant touched her. At dinnertime, appellant stared fixedly at Ki.D. In private, he said, "I'm in love with you," which discomforted her.

N.D. testified that Ki.D. disclosed appellant's misconduct multiple times, starting on the trip to Puerto Vallarta. N.D. saw that Ki.D. wore a lot of clothing to bed, sometimes two pairs of

pants and shirts at once, and wrapped herself securely in a blanket. Ki.D. told N.D. that these measures were meant to deter appellant from touching her.

The abuse escalated when Ki.D. was 16. Despite giving Ki.D. a "purity ring" to signify innocence, appellant did not stop touching her. He licked his fingers and tried to put them in her vagina. Ki.D. grew accustomed to the abuse. Ki.D. testified that appellant rubbed his penis against her and ejaculated on her leg, when she was 17. She knew that the community saw appellant as "a great person" who volunteered at church, "[b]ut at nighttime it was completely different."

Ki.D. mentioned the abuse to a friend who expressed disbelief and did not encourage her to do anything about it. Ki.D. was within reach of leaving home for college and did not want to disrupt her trajectory toward that goal, fearful that if she said anything, the family would fall apart, and she could lose her relationship with N.D. After moving around most of her life, Ki.D. wanted stability, to just stay in one place. One day, Ki.D.'s biological father showed up, unannounced, at appellant's home. Ki.D. began crying because "he used to beat me. He scared me."

During a family gathering at Thanksgiving 2012, Ki.D. spoke privately to Jennifer Quach, the mother of appellant's grandchild. Quach said that appellant "gave her the creeps," which made Ki.D. feel comfortable discussing appellant. Ki.D. disclosed that appellant molested her at night. Quach responded that appellant had molested his biological daughter. Ki.D. was surprised to learn of the daughter's existence; she suddenly felt less alone and, "[i]n a weird way, excited, just because it validated me. I knew I wasn't crazy, someone could support me."

On December 18, 2012, appellant tugged forcefully on Ki.D.'s blankets and put his hand directly beneath her panties, inserting his fingers into her vagina. The following day, her best friend C.C. asked why she was distant and depressed. Ki.D. disclosed that appellant was "acting inappropriately with me, and I just didn't know what to do." C.C. encouraged her to report the abuse. Ki.D. was thinking of running away or killing herself.

C.C. testified that she and Ki.D. became close friends during high school. C.C. considered the Diaz home her second family; however, she frequently saw appellant peeping at her and Ki.D. through blinds. C.C. thought that appellant was "creepy" rather than parental because he tried to stay hidden while he watched them. C.C. recalled that in the fall semester of 2012, she was shocked when Ki.D. became emotional and disclosed that appellant was touching her. Without Ki.D.'s knowledge, C.C. and another friend documented in writing Ki.D.'s disclosures that appellant was molesting her.

Late in 2012, Ki.D. and appellant went on a two-week road trip to look at potential colleges. During the trip, appellant tried to get in bed with Ki.D. but she felt more assertive and refused; to her surprise, he backed away. She considered reporting the abuse, with N.D.'s encouragement.

N.D. began to sleep in Ki.D.'s bed, to protect Ki.D. from appellant. Ki.D. continued to wrap herself in blankets. One night, N.D. awoke when appellant bumped into some boxes in the bedroom at around one a.m.: he stood near Ki.D. and stared at her for five to ten minutes, as if he were fixated. N.D. found this "creepy." N.D. told Ki.D. and Linda Diaz about the incident the following morning. Linda said that appellant was "just being

protective" and "there is nothing to worry about. He just loves you both."

Ki.D. felt she could no longer tolerate appellant's abuse. On January 7, 2013, she spoke to a guidance counselor at her high school, Melinda H. Ki.D. was nervous, but stated that she "had been carrying something around for a long time." She wanted to disclose it before she went away to college, to "move on with the rest of her life."

Ki.D. told Melinda H. that "her dad" (meaning appellant) touches her, fondles her breasts and "fingers her vagina" while she pretends to sleep. The molestations occurred at least twice per month, for the past seven years. Ki.D. said that she informed Linda Diaz about the abuse but was not believed, and also told N.D. Melinda H. observed that Ki.D. was upset and cried as she disclosed the abuse.

Melinda H. is a mandated reporter of child abuse. A detective investigated the report; the jury listened to an audio recording of his interview of Ki.D. The detective learned that appellant may have molested his biological daughter Ka.D. He contacted Ka.D., who confirmed that appellant molested her when she was a child. Appellant was arrested.

Ki.D.'s life was turned upside down as a result of her report: she had no home, no job, no clothing, no telephone, and struggled to complete her final semester of high school. She felt alone and hopeless because she had nowhere to go and had lost her chance to attend college. She attempted suicide.

While Ki.D. was hospitalized after her suicide attempt, Ka.D. came and helped her. They were strangers, but felt bound by their common experience with appellant. Ka.D. helped Ki.D. get a restraining order and found her a place to live.

Ka.D., born in 1982, is the youngest of appellant's four natural children. She was 33 years old at the time of trial. She testified that when she was nine or ten years old, her family moved to a cockroach-infested house. Terrified of the insects, Ka.D. slept in her parents' bed. Appellant lay in a "spooning" position behind Ka.D.; when she awoke, her mother was no longer in bed and appellant's hand was between her legs, cupping her vagina outside her panties. When she scrambled out of bed, appellant said, "Move slowly. Don't go fast." This occurred on 10 to 20 occasions between 1991 and 1994. It made Ka.D. feel horrible, dirty, disgusting and confused. On the final occasion, appellant reached over his sleeping wife to drag his hand slowly down Ka.D.'s chest to her vagina. Ka.D. went to the bathroom and vomited, then awakened her mother to say that she was ill.

Ka.D. did not confront appellant because he was a "large, scary presence." She feared that if she told her mother, she would not be believed, giving appellant license to do whatever he wanted and no one would come to her aid. Ka.D. felt that nothing positive would come of disclosing the abuse.

As a result of the molestations, Ka.D. suffered nightmares, and had to undergo therapy. She was estranged from appellant and has not spoken to him since 2001. She decided to disclose the molestations to Jennifer Quach when she learned that Quach and Ka.D.'s brother were going to take their young daughter to visit appellant. Ka.D. warned Quach to protect the child from appellant. In 2012, Ka.D. learned from Quach that Ki.D. lived in appellant's house and was molested by him. After appellant's arrest, Ka.D. met Ki.D. By not coming forward earlier, Ka.D. felt responsible for appellant's abuse of Ki.D.

Quach testified that she befriended Ka.D. soon after giving birth to Ka.D.'s niece. In 2010, Ka.D. disclosed appellant's molestations. Quach was shocked but understood that Ka.D. was warning her to protect her daughter. Ka.D. asked Quach to keep the abuse a secret, to avoid stirring up family trouble.

Expert Testimony

Clinical psychologist Jody Ward has treated at least 500 child molestation victims, and evaluates defendants convicted of sexual crimes to determine their amenability to treatment. Dr. Ward did not interview Ki.D. or Ka.D. or read reports about this case, nor did she speak to the prosecutor or investigating officers.

Dr. Ward testified about the Child Sexual Abuse Accommodation Syndrome (CSAAS), which describes behavioral patterns seen in an extensive study of young females who were molested by adult male caregivers. Dr. Ward noted that CSAAS cannot be used to determine whether a child has been sexually abused. Instead, it helps people understand why children react to sexual abuse in counterintuitive ways. The hallmarks of CSAAS are secrecy, helplessness, accommodation of the abuser by the victim, delayed disclosure, and retraction.

Defense

The defense offered testimony from a deputy who interviewed Ki.D. in January 2013. Aided by an audio recording, the deputy recalled Ki.D.'s description of appellant's final molestation in December 2012, which consisted of squeezing both breasts then inserting his fingers repeatedly into her vagina.

Numerous character witnesses testified to appellant's good character. A priest stated that appellant is truthful and honest, volunteers at church events, and has a good reputation. A physician who knows appellant through church opined that

appellant is honest and truthful. One of Ki.D.'s schoolmates never had much interaction with appellant but opined that he is a kind, quiet and truthful person; her positive opinion did not change after Ki.D. disclosed appellant's abuse. Appellant's friend of 60 years expressed disbelief that appellant would molest children. More witnesses followed, attesting to appellant's reputation for honesty and their disbelief of the criminal charges. Some were surprised to learn of Ka.D.'s existence.

Appellant testified. He denied that Ka.D. slept in the parental bed or complained about a cockroach infestation. He denied touching Ka.D.'s breasts or vaginal area. He has no idea why she would say that he touched her 10 to 20 times. He is a loving and protective parent. He has had no contact with Ka.D. for many years.

Appellant denied getting into bed with Ki.D. in Puerto Vallarta in 2006, or touching her in an inappropriate manner. He denied rubbing Ki.D.'s breasts or genitals while she lived in his home, and denied that he sought to enter her bed during their 2012 road trip. He stated, "I wouldn't do that."

Appellant thought of Ki.D. as his daughter. He feels "betrayed" that she accuses him of wrongdoing after he brought her to the United States, gave her a good education and provided her upkeep with no compensation from her parents. Appellant testified that he suffers from erectile dysfunction, which means "that I have no sex drive."

On cross-examination, the prosecution recited from the transcript of a telephone conversation between Ki.D. and appellant, in which he promised to "stop cuddling you at night, [Ki.D]. I will stop kissing you. And I will stop anything you want me to stop." Appellant did not recall this conversation. He stated

that he sat on Ki.D.'s bed to "snuggle" without any physical contact. Appellant clarified that cuddling is sexual, whereas snuggling is "pushing up against each other."

Appellant testified that Ki.D.'s accusations are lies. Moreover, N.D.'s memory of seeing him stand by Ki.D.'s bed, staring for 10 minutes, is untrue. Appellant opined that Ki.D. was acting and seeking attention when she cried on the witness stand and described her trauma. Appellant does not know why there are similarities between Ki.D.'s and Ka.D.'s description of his nighttime conduct with them. He is unsure what Ka.D. has to gain from accusing him, but ascribed it to her being "aggravated" when he left her mother.

The Charges, Verdict and Sentence

In an amended felony information, appellant was charged in count 1 with continuous sexual abuse of Ki.D. from 2005 to 2007 (§ 288.5, subd. (a)); in count 2 with continuous sexual abuse of Ki.D. from 2007 to 2008 (*ibid.*); in count 3 with committing a lewd act upon 14-year-old Ki.D. (§ 288, subd. (c)(1)); in count 4 with committing a lewd act upon 15-year-old Ki.D. (*ibid.*); in count 5 with sexual battery upon Ki.D. (§ 243.4, subd. (e)(1)); and in count 6 with continuous sexual abuse of Ka.D. from 1991 to 1994 (§ 288.5, subd. (a)).

Appellant was convicted on all six counts. As to the continuous sexual abuse counts, the jury found true allegations that the victims were under the age of 14 and appellant had substantial sexual conduct with them; the jury also found true a special allegation that the offense was committed against more than one victim (§§ 667.61, subd. (e)(4), 1203.066, subd. (a)(8)). The trial court sentenced appellant to a prison term of 47 years to life, plus four months.

DISCUSSION

1. The Admissibility of Testimony Showing that the Victims Disclosed the Molestations to Others

Five witnesses testified that Ki.D. and Ka.D. disclosed appellant's misconduct. He argues, "The making of the reports, and the details, were used by the prosecution to support the credibility of Ki.D., and, to a lesser extent, Ka.D., but were . . . inadmissible hearsay, and should have been excluded."

Appellant waived or forfeited his hearsay objection. During pretrial discussions of motions in limine, the prosecution argued that the testimony of witnesses to whom the victims disclosed the molestations falls within the "fresh complaint" exception to the hearsay rule. When the court asked defense counsel to respond, he said, "I believe they are admissible, your Honor." One week later, the prosecutor listed the "individuals whom we intend to call as fresh complaint witnesses." Defense counsel stipulated to permit testimony from the witnesses. No objection was made when the witnesses testified.

Where, as here, the defense expressly agrees to proposed evidence, the right to appeal the admission of the evidence is waived. (*People v. Hensley* (2014) 59 Cal.4th 788, 811 [defense counsel said, "'I'm not objecting'"]; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1207, 1213 [defendant cannot challenge on appeal the admission of a letter after defense counsel agreed with the prosecutor's request to present the letter to the jury and did not object when it was read].)

Appellant asserts that his trial counsel provided ineffective assistance. Had counsel objected to the testimony, the outcome would not have been affected. A victim's disclosure of sexual abuse is admissible for nonhearsay purposes, if relevant to

determining whether an offense occurred. The court may allow the jury to hear "the fact that a complaint was made, and the circumstances surrounding its making," but not the specific details. (*People v. Brown* (1994) 8 Cal.4th 746, 760.) A disclosure need not be recent ("fresh") or spontaneous ("volunteered") to be admissible. (*Id.* at pp. 749-750, 762-763.)

Over the years, Ki.D. made generalized, unspecific disclosures of appellant's inappropriate conduct to N.D., C.C., Linda Diaz and Jennifer Quach. Ka.D. similarly made an undetailed disclosure to Quach, to warn Quach to protect her daughter. This evidence showed that the victims guardedly mentioned appellant's nighttime behavior to friends and relatives, before they finally reported it in 2013 to government authorities. The victims did not know each other, yet disclosed similar behaviors by appellant to other people. This was strong evidence that the molestations occurred.

The Attorney General concedes that Melinda H.'s testimony about Ki.D.'s disclosures contained impermissible detail. Respondent argues, and we agree, that even if Melinda H.'s testimony should have been constrained, its admission was harmless owing to the overwhelming evidence against appellant, as set forth in section 7, *post*. The jury heard details of the molestations directly from Ki.D., and need not have relied on third party hearsay. (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1526.)

2. Admission of Testimony About Appellant's Demeanor

The victims and their friends testified that appellant made them uncomfortable (Ki.D., Quach), or was creepy (Quach, C.C., N.D.), or was scary (Ka.D.). Appellant contends on appeal that he was prejudiced by this testimony; however, he forfeited his

claim by failing to object at trial about character evidence. (*People v. Alexander* (2010) 49 Cal.4th 846, 912.)

Evidence of a person's character or trait, in the form of an opinion, evidence of reputation or specific instances of conduct, cannot be "offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) The statute limits evidence of prior misconduct to provide ""'a realistic safeguard that ensures that the presumption of innocence and other characteristics of due process are not weakened by an unfair use of evidence of past acts.'"" (*People v. Disa* (2016) 1 Cal.App.5th 654, 671.)

The testimony here was not offered to prove the molestations, i.e., appellant's conduct on a specified occasion. Rather, the witnesses expressed opinions about appellant's demeanor based on direct personal observation of him over a period of time. (See, e.g., *Abdur Raheem v. Kelly* (2d Cir. 2001) 257 F.3d 122, 126, 139 [eyewitness testimony that the defendant "'had weird eyes'" was "merely a description of demeanor"].) Witnesses may describe a defendant's interactions with children "to prove [a] 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 . . . behavior with their children." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1309-1310.)

The victims' testimony about the feelings that appellant provoked is admissible to show their state of mind; their fear of or discomfort with appellant is relevant to charges that he molested them. (Evid. Code, § 1250, subd. (a)(1); *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1304 (disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12) [the court

permitted testimony that a child victim expressed fear of wearing dresses because the defendant touched girls who wore dresses]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1113-1114 [a victim's statements expressing fear of defendant are admissible].)

3. Evidence Regarding Bigamy

Appellant contends that he was improperly confronted with evidence that he committed bigamy, yet the jury was not instructed on the elements of bigamy or a "mistake of fact" defense to bigamy. The trial court allowed the evidence, to cast doubt on appellant's credibility, because bigamy shows moral turpitude. Where, as here, a defendant presents evidence of good character "to establish that one with his lofty traits would be unlikely to commit the offense charged," the prosecution may rebut that evidence by showing acts of moral turpitude, because "'the price a defendant must pay for attempting to prove his good name is to throw open a vast subject which the law has kept closed to shield him." (*People v. Eli* (1967) 66 Cal.2d 63, 78.)

Appellant testified that he "first married" Linda in 1992; in 1995, he discovered that his divorce from his wife Susan was never finalized and in 1998 he obtained a final decree. He and Linda had a second marriage ceremony in 1998, after his divorce from Susan. Without objection, the prosecutor asked—and appellant agreed—that this was bigamy.

The trial court has broad discretion to admit evidence of conduct that tends to show dishonesty, for purposes of witness impeachment. "'Whether the trial court admits evidence of past misconduct should be determined solely on the basis that [the] conduct evinces moral turpitude. The label is not important [i.e., what type of statutorily defined offense, if any, the conduct constitutes]—the conduct is.' [Citation.]." (*People v. Ayala* (2000)

23 Cal.4th 225, 273.) It is not necessary for the trial court to specify a crime that fits the conduct "since there never will be a conviction for any particular offense arising from the conduct." (*People v. Lepolo* (1997) 55 Cal.App.4th 85, 89.) Because appellant was not accused of any crime other than those arising from child molestation, the court did not need to instruct the jury on the elements of, or the defenses to, the crime of bigamy. The jury heard appellant testify to his mistaken belief that his divorce was finalized, and could take his explanation into account in assessing his credibility.

4. Jury Instructions

The jury found true an enhancement that appellant had "substantial sexual conduct with a victim who is under 14 years of age." (§ 1203.066, subd. (a)(8).) Substantial sexual conduct includes masturbation. (*Id.,* subd. (b).) The trial court instructed the jury that masturbation is "any willful touching or conduct or contact, however slight, either on the bare skin or through the clothing of the genitals of the victim."

Appellant challenges the instruction's use of the words "however slight." This is, however, the correct definition. (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1098, fn. 8 [masturbation encompasses any touching, "however slight" of the victim's genitals].) A child's testimony that the defendant "touched his 'private part' to hers clearly established masturbation." (*Ibid*.) There is no requirement that the offender manipulate or stimulate the victim's genitals. (*People v. Lopez* (2004) 123 Cal.App.4th 1306, 1313-1314.)[2]

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[2] At appellant's request, we take judicial notice of legislative history material he has submitted, but we do not find it helpful to our determination.

Here, the victims testified that appellant rubbed and cupped their genitals with his hands, ran his fingers from Ka.D.'s breasts to her vagina, and inserted his fingers into Ki.D.'s vagina. This is sufficient to satisfy the "substantial sexual conduct" requirement. The acts were more than "slight."

5. Testimony of Detective Taylor

Appellant argues that the investigating detective, Taylor, improperly opined at trial that Ka.D. corroborated Ki.D., to enhance Ki.D.'s credibility. Appellant forfeited this claim by failing to object that Taylor was offering an improper opinion about credibility. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 81-82.) The claim lacks merit, in any event.

Ki.D. told Taylor during her interview that she heard appellant touched his daughter, though she did not know, at the time, the daughter's name. Taylor located Ka.D., who said that appellant molested her during childhood by touching her vaginal area. Taylor testified that he believed, "given [Ki.D.'s] allegations, that there was some corroboration in terms of learning of Ka.D.'s."

Taylor did not vouch for Ki.D.'s credibility as a witness. This is not a case in which an expert opined to the jury that one codefendant's accusations against another co-defendant were "credible." (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at pp. 81-82; *People v. Sergill* (1982) 138 Cal.App.3d 34, 38 [a policeman testified that in his opinion, a child victim was "truthful"].) Taylor did not ask the jury to think that Ki.D. was "credible" or "truthful." Rather, he explained the course of his investigation to the jury. A complaining witness (Ki.D.) made accusations, and pointed the investigator in the direction of another possible victim. The second victim (Ka.D.) was located,

and her recitation paralleled that of the first victim. Taylor then had probable cause to arrest the perpetrator.

The statements an officer relies upon to make an arrest are admissible to show his state of mind. (*People v. Marsh* (1962) 58 Cal.2d 732, 738.) Here, Taylor testified about the similar reports he collected from the victims during his investigation. The jury was left to decide whether the victims were credible. Taylor's testimony was properly allowed.

6. Appellant's Conviction on One Count of Continuous Sexual Abuse Must Be Reversed

In counts 1 and 2, appellant was charged with continuously sexually abusing Ki.D. during overlapping time periods. "A defendant may be charged with only one count under this section unless more than one victim is involved in which case a separate count may be charged for each victim." (§ 288.5, subd. (c).) The Attorney General concedes that appellant cannot be convicted on both counts 1 and 2, which encompass appellant's continuous conduct from 2005 to 2008 against one victim. (*People v. Johnson* (2002) 28 Cal.4th 240, 248.) Accordingly, we reverse appellant's conviction on count 2 and order the sentence of 15 years to life imposed for that offense stricken.

7. No Cumulative Error

Appellant argues that errors committed during trial cumulatively deprived him of due process and a fair trial. The sole error we found involves appellant's convictions of continuous sexual abuse in counts 1 and 2, and his sentence will be reduced as discussed in section 6, *ante*. As detailed in other sections of this opinion, appellant forfeited his claims of error by failing to object at trial. Appellant argues that trial counsel provided ineffective assistance by failing to preserve issues on appeal with

timely objections. Even if objections had been made, no ground for reversal exists because there is no reasonable probability that the result would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Farnam* (2002) 28 Cal.4th 107, 148.)

Looking at the record as a whole, it is clear beyond a reasonable doubt that a rational jury would have found appellant guilty, regardless of the errors he claims on appeal. (*Neder v. United States* (1999) 527 U.S. 1, 18; *Chapman v. California* (1967) 386 U.S. 18, 23 [no reasonable possibility that the evidence complained of contributed to the conviction]; *People v. Leon* (2015) 61 Cal.4th 569, 604 [assuming evidence was erroneously admitted, the issue is whether the error was harmless beyond a reasonable doubt].)

Ki.D. described a chaotic childhood with a father who beat her, and a mother who lived with a violent drug addict. She escaped a bad life with her parents and sought a better life with appellant and his family. This was not to be. Ki.D. testified, in detail, that appellant sexually abused her for years. She was rebuffed when she disclosed the abuse to appellant's wife in 2006. Fearing the loss of her home and her relationship with her sister N.D., and feeling shut down by a trusted adult, Ki.D. tolerated appellant's abuse.

N.D. was aware of Ki.D.'s situation, and observed that Ki.D. wore multiple sets of clothing to bed and wrapped herself like "a burrito" in blankets. N.D. slept in Ki.D.'s bed, to deter appellant. N.D. awoke one night to see appellant standing and staring fixedly at Ki.D. Once again, appellant's wife shrugged off the report that appellant had bad intentions toward Ki.D.

One month before Ki.D. reported the abuse to school guidance counselor Melinda H., appellant became more sexually aggressive. With the support of her sister and friend C.C., Ki.D. stepped forward because she felt that the abuse was intolerable. Her report to police was consistent with her trial testimony. Ki.D.'s life was ruined as a result of the report: she became homeless, struggled to finish high school, was unable to attend college, and was hospitalized for an attempted suicide.

The jury, as the sole trier of witness credibility, could reasonably find that Ki.D. had nothing to gain, and everything to lose, by publicly disclosing appellant's abuse. The jury also learned about CSAAS, which explains that children accommodate abuse because they feel helpless and delay disclosure until adulthood, to avoid disrupting their homes.

Ki.D. and Ka.D. were strangers until Ka.D. received word of Ki.D.'s suicide attempt. Ka.D. expressed dismay for not stepping forward earlier, feeling responsible for appellant's abuse of Ki.D. Ka.D.'s descriptions of appellant's behavior, his "spooning" with her in bed and fondling her genitals, paralleled Ki.D.'s testimony. Both victims were discomfited by or fearful of appellant; both disclosed the abuse, at separate times, to family member Quach. Indeed, Ki.D. first learned of Ka.D.'s existence from Quach, who linked appellant's abuse of Ka.D. in the 1990's to his conduct with Ki.D. ten years later.

The jury heard appellant promise to stop "cuddling" and "kissing" Ki.D., in a recorded conversation. In his testimony, appellant told the jury that cuddling is sexual behavior. He admitted at trial to snuggling with Ki.D. (which he defined as "pushing up against each other") then inconsistently stated that he snuggled by sitting on Ki.D.'s bed, without having any

physical contact with her. Appellant could not explain the similarities between the testimony of Ki.D. and Ka.D. or why his estranged biological daughter accused him of abuse, so many years later. The jury did not believe appellant's denials of ever molesting the two victims.

In sum, the record contains overwhelming evidence of guilt. Appellant's claimed errors were, singly and cumulatively, harmless beyond a reasonable doubt.

DISPOSITION

Appellant's conviction in count 2 for violating Penal Code section 288.5 is reversed, and his sentence of 15 years to life on count 2 is stricken. The trial court shall prepare an amended abstract of judgment and forward a copy of it to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Charles W. Campbell, Judge

Superior Court County of Ventura

William P. Daley, 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, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Michael Katz, Deputy Attorney General, for Plaintiff and Respondent.