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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE RODOLFO ALVAREZ, Defendant and Appellant.	B283546 (Los Angeles County Super. Ct. No. BA436457)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed.

Richard J. Miggins, 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, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Jose Alvarez of sexually abusing his girlfriend's two granddaughters, and the court sentenced him to a total term of 93 years to life. He contends his convictions should be reversed because the prosecutor improperly introduced, the trial court improperly admitted, and his counsel ineffectively failed to object to the victims' testimony about their feelings and a nurse's testimony about the physical exams she performed on them. Defendant further contends the evidence was insufficient to support his conviction for showing harmful matter to a minor, and that his sentence for that conviction should have been stayed. We reject his contentions and affirm the judgment.

PROCEDURAL HISTORY

An amended information charged defendant with two counts of oral copulation or sexual penetration with D.J., a child 10 years of age or younger. (Pen. Code, § 288.7, subd. (b).)[1] It further charged him with four counts of committing lewd or lascivious acts against a child under the age of 14; two of those counts involved D.J., and two involved her younger sister, E.R. (§ 288, subd. (a).) The amended information alleged that each of those four counts was committed against more than one victim within the meaning of section 667.61, subdivisions (b) and (e). The final count of the amended information charged defendant with showing harmful matter to a minor (§ 288.2, subd. (a)(2).)

A jury convicted defendant on all counts and found the multiple victim allegations true. The trial court sentenced defendant to the midterm of three years on the only determinate count, showing harmful matter to a minor (§ 288.2, subd. (a)(2)).

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

The trial court sentenced him to the mandatory statutory term of 15 years to life on each of the two section 288.7, subdivision (b) counts, to be served consecutively. It also sentenced him to 15 years to life on each of the four section 288, subdivision (a) counts, pursuant to section 667.61, subdivision (b); the court ordered those sentences to be served consecutively as well, pursuant to section 667.61, subdivision (i).

Defendant timely appealed.

FACTUAL BACKGROUND

I. Prosecution Evidence

Dalia J. testified that she was the mother of five children, the eldest of whom were daughters D.J. and E.R. D.J. was born in 2004 and E.R. was born in 2006.

In 2012, Dalia and the children moved into an apartment with Dalia's mother, Guadalupe, and Guadalupe's boyfriend, defendant, whom the family called "Pancho." That arrangement was short-lived; Dalia testified she and the children moved out because defendant threatened her.

Dalia and the children moved in with Dalia's ex-boyfriend Luis and his then-partner, Maritza. The situation at that apartment was tumultuous: Luis hit Dalia and threatened to evict her and report her to immigration authorities unless she provided sexual favors to him and Maritza. The family was involved with the Department of Children and Family Services (DCFS), and Dalia eventually told a social worker about the abuse. The social worker helped the family move out. After brief stints in a shelter and a hotel, Dalia and the children moved into a different apartment with Guadalupe and defendant in approximately August 2013. D.J. was around eight years old at the time, and E.R. was around seven. Dalia and her children

slept in the apartment's only bedroom; Guadalupe and defendant slept in a bed in the living room.

On days that Dalia worked, she left the apartment at 6:00 a.m. and did not return until around 7:00 p.m. Guadalupe would take the oldest children to school, and either she or defendant would pick them up. Guadalupe worked as a street vendor in the evenings, and Dalia helped her with that work, sometimes until 11:00 p.m. Defendant, who did not have a job outside the home, watched the children when Dalia and Guadalupe were not home.

D.J. and E.R. testified that it was during those times that defendant touched them. D.J., who was 12 at the time of trial, testified that defendant started touching her "in weird ways" when she was nine. After sending the children to their bedroom at night, defendant would call D.J. into the living room (his bedroom) and touch her body with his hands. D.J. testified that he touched her "chest," which is what she called "the top part of [her] body in the front"; her "front," which is what she called "the part of your body that you go to the bathroom with no. 1"; and her "bottom," which is what she called "when you go no. 2." D.J. testified that defendant touched these areas both over and under her clothes and did so on more than one occasion. Defendant told D.J. that she could not tell anyone or he would blame it on her; he told her that "almost every single time." D.J. thought her mother would believe him because he was older[2] and took care of them.

D.J. testified that defendant used his finger to touch her "bottom." It made her feel disgusted and sometimes it hurt when she went to the bathroom afterward. He also used his hand to touch her "front." While she was standing and he was sitting or

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[2]The parties stipulated that defendant was born in 1961.

standing, defendant would open her legs and move his hand on her "front." D.J. said that it hurt sometimes and made her body feel weird.

Once, defendant used his "front" to touch her "back" or "bottom." On that occasion, defendant pulled down both of their pants and stood behind D.J. as she crouched down and bent forward. He moved his "front" forward and back; his "front" moved forward enough to touch D.J.'s "front." D.J. testified that both her "front" and "bottom" hurt when she used the bathroom after that incident. Defendant also once used his tongue to touch her "chest." On a different occasion, he used his tongue to touch her "front." D.J. testified that defendant pulled down her clothes, "laid me down on the bed," "opened my legs," and then touched her "front" with his tongue. D.J. felt "[d]isgusted" and felt "uncomfortable" talking about the incidents.

D.J. testified that defendant also took pictures of her naked "chest" and told her he was going to keep the photos. Defendant did not show the photos to D.J.; "he just took a picture and then he would send me straight back to bed." He did show her a "video" at least once, however. D.J. testified that the video, which was on DVD, depicted a man and woman who were not wearing any clothes. D.J. was able to see their "chest, front, and bottom," and said they were "doing something" that she did not "feel comfortable saying" to each other's chest, front, or bottom. D.J. thought the video was "really disgusting."

D.J. did not tell her mother, teacher, or the DCFS social worker who visited the family monthly about the abuse. At some point, however, she confided in E.R. D.J. did not feel good when she told E.R., but she "felt like I told just one person that I could trust," and also felt relief that someone else knew. She stated

that E.R. told her that defendant also touched E.R.

E.R., who was 10 at the time of trial, testified that defendant "did something he wasn't supposed to do" to her when her mother and grandmother were not home. E.R. testified that defendant would call her into his room while her siblings were watching television. She went because defendant told her he would tell her mother she had misbehaved if she refused. Sometimes, he made her dance with her clothes on while he looked on from the bed. Other times, defendant used his hand to touch E.R.'s "private part," which is what she called "the part of your body that you go pee-pee with," both over and under her clothes. When he touched her without her clothes on, defendant would remove E.R.'s clothes and have her lie on the bed. While standing, defendant moved his hand on her "private part." E.R. testified that it hurt when she went to the bathroom afterward.

On one occasion, defendant took a picture of E.R.'s "private part" with a camera. She was lying down and naked at the time. On another occasion, he showed her a "disgusting" movie on a DVD. The movie depicted "more than one person" without clothes on. The people were "doing something" to each other's "private part."

Defendant told E.R. not to tell anyone about the incidents, or else "he was going to tell my mom that I was behaving bad while she was working." E.R. believed him. She did not tell her mother, teacher, or any of the social workers who visited the home about the abuse. At some point, however, she told her sister D.J. that defendant "was touching my private part." D.J. told her "that he was doing the same and that we didn't tell anyone."

Eventually, the girls disclosed the abuse to Dalia after she got into an argument with defendant. Dalia testified that on May 10, 2015, Mother's Day, defendant and Guadalupe got into a "strong" argument. Dalia overheard the argument from the bedroom, where she was with her boyfriend and her three eldest children. The argument escalated when Dalia intervened, and defendant ultimately hit Guadalupe and kicked Dalia in the leg. Dalia's boyfriend called the police. Defendant left the apartment before they arrived and did not return.

The following day, Dalia was in the car with her sister, D.J., E.R., and one of their younger siblings. D.J. asked Dalia what had happened with defendant, and whether he was going to come back to the apartment. Dalia told her that defendant was not coming back, and asked why she had asked. D.J. responded, "Well, everything will be fine now." In response to Dalia's follow up questions, D.J. began crying and apologizing. She then told Dalia that defendant had touched her. D.J. further stated that she had not said anything earlier because defendant had threatened to call the social worker and the police.

While Dalia was talking with D.J., she noticed that E.R. had "her face lowered." D.J. told E.R. to tell the truth, at which point E.R. began crying and revealed that defendant had also touched her. Dalia told her sister to drive them to the police station. Dalia testified that D.J. and E.R. spoke to Los Angeles Police Department detective Dara Brown. The next day, Dalia took D.J. and E.R. to Stuart House in Santa Monica so they could be interviewed further. Later, she took them for physical exams. Both D.J. and E.R. testified that they told their mother about the abuse while riding in a car with their aunt, and that they went directly to the police station afterward.

Detective Brown testified that she was assigned to the West Bureau sexual assault unit in 2015. On May 12, 2015, at about 1:00 a.m., she was called to the station to respond to a sexual abuse claim filed by Dalia J. on behalf of her daughters, D.J. and E.R. Brown spoke to the girls individually, for about 25 minutes each. She did not record the interviews.

Brown testified that D.J. reported that her step-grandfather Pancho "had been touching her twice a week, her chest area, her vaginal area, and her anus," for over two years. The touching occurred in the living room, which served as a bedroom for Pancho and the grandmother. D.J. further reported that defendant took photos and videos of her and threatened that "he would show the video to the police and that her mom would be taken away." D.J. told Brown that she had told her sister E.R. about the abuse, and that E.R. said defendant also abused her.

Brown testified that she spoke to E.R. separately. E.R. told Brown that defendant touched the skin of her chest and "touched her vaginal area on top of her underwear." She further reported that defendant took pictures of her "chest and private parts." E.R. told Brown that she and D.J. had confided in each other about what happened.

Later on May 12, 2015, Brown went to the family's apartment to collect evidence. She returned a few days later with a search warrant. During the searches, Brown recovered a tablet containing photos of D.J. and E.R.; the girls were clothed in all of the photos. She also found DVDs that the prosecutor characterized as "pornographic materials" in a drawer and cabinet next to defendant's bed. Brown did not show the recovered movies to the girls or ask them for more details about

what they had seen, because they "were really grossed out" when describing the video defendant had shown them. They described it as "private parts. They were doing things to each other. And it was a man and a woman and it was really disgusting." No DVDs were introduced into evidence at trial.

Brown testified that she took both girls to Stuart House to be interviewed on May 12, 2015. Stuart House director and forensic interviewer Nicole Farrell testified that Stuart House is a "public private partnership that responds in coordinated fashion to allegations of child sexual abuse." Forensic interviewers there interview children in specialized interview rooms that have one-way glass through which related professionals like DCFS workers, law enforcement, and prosecutors can observe the interview rather than conducting their own. Stuart House interviewers use a 10-step "protocol" that is "designed to accomplish accessing the part of the memory, what's called free recall memory," which Farrell testified was "known to be the most accurate form of memory." The primary technique in the protocol "is called narrative exploration or asking for a narrative," which is designed to encourage the child to speak in paragraph form rather than "asking . . . a million questions to get one concept." If a child initiates discussion of sexual abuse, the protocol calls for interviewers to ask follow-up questions directed at eliciting more detailed information. Those questions should not suggest a particular answer.

Farrell interviewed D.J. and E.R. separately, using the 10-step protocol. Both interviews were recorded and played for the jury.

During D.J.'s interview, D.J. stated that defendant "started touching me in my private parts" when she was nine. He "[p]ut

his fingers in" her private part and "lick[ed her] boobs." On one occasion, she told Farrell, defendant stood behind her and put his "private part" in her butt and then it came out the other side, "through to [her] front private." D.J. also disclosed that defendant took pictures of her "private part." On a different occasion, defendant made her watch a DVD on which "the girl is, uh, putting his private part in her mouth." D.J. told Farrell that defendant told her to do that to him but she moved away and he did not make her.

E.R. similarly disclosed that defendant "would . . . touch me and my sister." She told Farrell that "[h]e would usually touch me in my private part," and also took pictures of her that he threatened to show her mother, "so my mom could hit me, and then she would go to jail by hitting me." E.R. also said defendant showed her a video and that he would pull her back into the room by the hand when she tried to leave. Farrell testified that E.R. was silent in response to some questions about the abuse. Farrell attributed her silence to "overwhelm," and responded to it with more directed questions. Farrell testified that D.J. was "more readily able" to tell her what happened.

Farrell was not surprised by the girls' divergent reactions. She testified that even among siblings, "[t]hat's as variable as can be." Farrell further testified that she has encountered some children whose accusations of abuse were false or coached. She explained that those children's narratives were characterized by "emotionless presentation" with a "vibe" that the child was "following orders," and typically "lacked relevant detail." In addition, she explained that children who are coached typically offer narratives with "no inconsistencies. It's the same story to the nurse, to the cop, to me because it's a rote memory." Farrell

testified that, in contrast, true memories "can't exist, you know, in this playback like a tape form."

Expert witness Dr. Susan Hardie, Ph.D., a developmental psychologist and registered nurse, offered further testimony about "the predicament that a child faces when considering making a disclosure of their abuse and talking about their abuse." Specifically, she described "child sexual abuse accommodation syndrome," which "summarizes five characteristics or five categories" of behaviors by child victims of sexual abuse.[3] Hardie testified that the five categories in the syndrome are secrecy, helplessness, accommodation, "delayed or conflicted, unconvincing disclosure," and "retraction or recantation."

Hardie testified that secrecy and helplessness are realities of sexual abuse, which occurs privately between the child and the perpetrator. The expectation of secrecy can be explicit or unspoken, and is often heightened when the child and perpetrator have a close relationship. Hardie opined that an abuser's threat to tell a child victim's mother that the child was misbehaving would enhance secrecy. Children often believe such statements from a trusted adult within the family or because they are generally taught to believe adults. She further opined that children often will keep abuse secret even when directly

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[3]At the time of Hardie's testimony, the court instructed the jury: "Dr. Hardie's testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [D.J.]'s and [E.R.]'s conduct was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of their testimony."

asked by a social worker, because "the threat of losing a parent and the disbelief can be far more frightening to a child than the . . . possibility of more abuse." Hardie opined that children naturally feel helpless in the face of abuse, because they are not prepared for the possibility that a trusted adult will abuse them.

Hardie testified that the third category, accommodation, occurs when a child tries to find ways to cope with abuse. She explained that children can accommodate by blaming themselves, gaining or losing weight, using drugs, or engaging in rebellious or promiscuous behavior. The fourth category is delayed, conflicted, or unconvincing disclosure, in which the victim does not disclose the abuse for "days, weeks, months or years and decades." Child victims delay reporting due to "secrecy, helplessness, fears, self-loathing, self-blame." Disclosure may be triggered by anger, frustration, or removal of the perpetrator from the child's home. A child may make a partial disclosure to see how their confidant will react, or may tell different people different things at different times. They may disclose to a sibling, friend, or classmate before disclosing to an adult, because "[t]hey feel more on an equal playing [field] with their classmates and peers . . . . There's not as much cost or possible consequence to it."

Hardie explained that the final category of expected behavior is retraction or recantation. Children may have many "reasons for taking it back and for not continuing to talk about" their abuse, including the reactions of others. Children also may be concerned about the consequences stemming from their disclosure, such as their removal from their home or school. Additionally, Hardie testified, it is not unusual for a child to forget or become confused about incidents they previously reported.

D.J. and E.R. met with a social worker on May 20, 2015, about a week after their initial disclosure. The social worker, Karmen Pena, testified that D.J. disclosed that her grandmother's boyfriend touched her "private part," which Pena clarified was both the vaginal and anal areas. D.J. also mentioned a picture, and told Pena that she had not told anyone about the abuse because she had been scared. Pena testified that E.R. "almost say [*sic*] the same like her sister, he touched her private part." E.R. also mentioned pictures and said she had been afraid to tell anyone about the abuse.

They also met with Elizabeth Thighe, a nurse practitioner at the Santa Monica UCLA Rape Treatment Center. Thighe testified that she performed non-acute sexual assault forensic examinations on both girls. She used cameras and sterile water to examine their genital and anal areas. Both girls' exams were normal; Thighe did not see any signs of previous or healed trauma to their genital or anal areas.

In addition to testifying about the exam results, Thighe also testified about the anatomy of prepubescent female children. Using a diagram, Thighe testified about the labia, "the two little fat pads that cover the opening to the vaginal area"; the hymen, "a ring of tissue to the opening of the vagina"; the "interior aspect of the labia"; the clitoris; the labia majora; the fossa navicularis; and "the urethra that people urinate through." She explained that these structures are "not as stretchy and elastic" in prepubescent children as they are in adult women, such that "[e]ven touching the structures in between the labia, . . . that would be really uncomfortable for them." Thighe continued, "[s]o if somebody's, you know, rubbing in between the labia or touching

or manipulating the tissue, the contents in between the labia, the hymen, urethra, all the structures, it's uncomfortable. It feels uncomfortable to kids. [¶] They don't have history of sexual experience so it feels like it's inside to them. So lots of times kids will describe it as inside." Thighe testified that she would not expect to see a healed injury if such rubbing occurred.

II. Defense Evidence

DCFS social worker Vanessa Diaz testified that she was assigned to make home visits to the family in 2013, when they were living with Luis and Maritza. When she visited in April 2013, no one reported that Maritza was living in the home.

Dalia contacted Diaz in June 2013 to report that she was being abused. Dalia told Diaz that she was living with her ex-boyfriend Luis and his girlfriend Maritza because they had offered housing for her and her children in exchange for sexual favors. Dalia disclosed that Luis threatened to kick her out and have her deported if she told anyone about the abuse or about Maritza living there. When Diaz interviewed D.J., she admitted she originally said Maritza did not live at the house. She further told Diaz that Dalia had told her to lie about it. D.J. also told Diaz that Dalia was "mean" and hit D.J. and her siblings with a sandal, belt, and shoes about twice a week. Diaz did not see any signs of injury on D.J. or the other children. E.R. told Diaz that Luis told her not to tell Diaz about Maritza's presence in the household.

Another DCFS social worker, Yareli Alday, testified that she became involved with the family in 2014 after the agency received a report of physical abuse. During an interview in May 2014, D.J. told Alday that E.R. once threatened to pull down her pants if she was not given the television remote. Alday testified

that this report of sexualized behavior led her to inquire whether sexual abuse was occurring in the home. E.R. denied the incident but reported that Dalia hit her in the arm with a belt. Alday did not find any marks on E.R., and Dalia denied hitting her. Dalia further told Alday that E.R. "always lies." During a later interview, E.R. told Alday that she had lied about getting hit because she was upset with her mother.

DCFS social worker Diana Martinez testified that she became involved with the family around September 2014. She testified that she was assigned to visit the family on a monthly basis to assess the home for safety and the children for any signs of abuse or neglect. During her visits, she spoke with the children individually and over time built a rapport with them. None of them ever disclosed any sexual abuse to her.

Bradley McAuliff, Ph.D., testified that he was a professor of psychology at California State University, Northridge. He studied "kids' memory and the role of children in the legal system," and his area of expertise was "children's suggestability in forensic interviewing." Prior to testifying as an expert in this case, he reviewed police reports, the girls' Stuart House interviews, and testimony from the preliminary hearing.

McAuliff explained to the jury that suggestability "refers to the accuracy of a witness's report." Suggestability is not synonymous with lying; it occurs when a person truly believes something. The accuracy of a person's report can be compromised by repeated questioning, particularly among children, because the child may assume their original response was incorrect. Also, adults can communicate their own beliefs about an individual's behavior to the children they are interviewing, which may influence the child's responses to their questions. When

presented with a hypothetical about children who observed their mother get into violent arguments with someone, McAuliff opined that the child might be influenced to believe that the person was "a bad person who does bad things." He also testified that children who exchange information with one another "can influence their memory and their reports." Children might also suffer suggestability through "source monitoring," meaning that they may have "a hard time disentangling versus [*sic*] what happened to me versus what I overheard." He opined that a younger child who overheard an older sibling disclose abuse might be influenced by that when subsequently disclosing.

McAuliff noted that there is "a linear relationship between age and suggestability," such that people become less suggestible as they progress from early to late childhood and then to adulthood. Even adults can succumb to suggestability, however. McAuliff also emphasized that suggestability is "a memory error that happens," and is therefore distinct from coaching or lying. He opined that certain interview protocols can minimize the likelihood of suggestability, such as those recommending the use of open-ended questions with children. He also stated that Farrell "does good work."

DISCUSSION

I. Admission of Exam and Feelings Evidence

Defendant contends that judicial misconduct, prosecutorial misconduct, and ineffective assistance of counsel led to the erroneous admission of two types of irrelevant and inflammatory evidence: (1) Thighe's testimony about the physical exams she performed, and (2) Dalia's, D.J.'s, and E.R.'s testimony about their feelings. He argues that the prosecutor committed misconduct by introducing the evidence, and that the trial court

should have protected him from an "emotional boondoggle" by sua sponte excluding the evidence under Evidence Code section 352. Defendant further contends that his counsel provided ineffective assistance by failing to object to much of the evidence or the prosecutor's and judge's conduct.

We reject these contentions. Defendant's failure to object to the alleged judicial and prosecutorial misconduct below has forfeited those claims here. Defendant's ineffective assistance claim also fails: the record sheds no light on the possible reasons for counsel's tactical decision not to object, and defendant has not demonstrated a reasonable probability that the outcome of the trial would have been different had the challenged evidence been excluded.

A. Exam Evidence

As discussed above, nurse practitioner Elizabeth Thighe testified that she performed non-acute sexual assault forensic examinations on both girls. She told the jury about the mechanics of the exams, including her use of a camera and sterile water to examine the girls' genital areas. Using a diagram, Thighe also testified about the various structures of the female anatomy and the ways they are affected by puberty. She further testified about the discomfort that prepubescent girls experience with even minor genital manipulation, and told the jury that most touching "feels like it's inside to them." Based on her review of the girls' forensic interviews, in which they alleged genital rubbing, Thighe testified that she did not expect to see signs of trauma during the exams. Indeed, she found none; she testified that both girls had normal exams. In accordance with her results, Thighe checked a box on her exam reports indicating that she could neither confirm nor rule out sexual abuse.

Defense counsel objected once during Thighe's testimony, on hearsay grounds. At sidebar, counsel argued that the forms documenting the exam protocol and Thighe's findings were hearsay. The trial court agreed and contemporaneously instructed the jury that the information on the forms was "admitted solely for the purpose of explaining what the particular witness and perhaps other people who work with her did and how they proceeded with their protocols. [¶] You cannot accept what is in there as proof of anything that is contained in there, the proof of the truth of it, only to explain what these witnesses did." Defense counsel did not raise any relevance objections, and the trial court did not otherwise limit Thighe's testimony.

B. Feelings Evidence

During her examinations of Dalia, D.J., and E.R., the prosecutor asked numerous questions regarding their feelings: how they felt about the abuse, how the abuse physically felt, how they felt about disclosing the abuse, and how they felt about testifying.

The prosecutor asked Dalia three such questions, including, "What are you feeling right now telling us this?" as she was crying, and, "How did you feel or what were you thinking when [D.J.] asked you that question or said that things are going to be okay?" Defense counsel objected to the latter question on relevance grounds, and the trial court sustained the objection. He also objected to the prosecutor's follow-up query of "And bad, why?" in response to Dalia's answer that she felt bad testifying. The trial court sustained that objection pursuant to Evidence Code section 352. The trial court overruled defense counsel's relevance objection to "And how were you when you were hearing that?"

The prosecutor asked D.J. and E.R. many more questions about their feelings, approximately 25 each. She asked D.J. how she felt about testifying, how she felt when defendant told her to keep the touching a secret, how her body felt during and after various instances of abuse and during the forensic exam, and how she felt about disclosing the abuse. Defense counsel objected on relevance grounds when the prosecutor asked D.J. what made her a little less scared on her second day of testimony; the trial court overruled the objection. Defense counsel also objected, on Evidence Code section 352 grounds, when the prosecutor asked D.J., "What feelings do you have sitting here and listening to" the tape of her forensic interview. The trial court sustained that objection, stating, "I don't see any relevance to it."

The prosecutor asked E.R. similar questions about how she felt about testifying, how she felt when defendant threatened to tell her mother she had misbehaved, how her body felt during and after various instances of abuse and during the forensic exam, and how she felt about disclosing the abuse. Defense counsel lodged two objections to these questions on relevance grounds. The trial court overruled the first, to a question about how E.R. felt when defendant told her to lie on his bed. It sustained the second, to a question about the feelings E.R. had while watching the video of her forensic interview. Aside from ruling on the objections defense counsel raised, the trial court did not comment on or interrupt the prosecutor's examination of the witnesses.

C. Judicial and Prosecutorial Misconduct

Defendant contends the court abdicated its statutory duty[4]

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[4]Section 1044 provides: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the

to control the trial proceedings by permitting the prosecutor to elicit what he terms "irrelevant 'non-evidence'" about the forensic exams and the witnesses' feelings. He contends the prosecutor "clearly knew the questions were improper," and therefore erred in asking them, because the questions relating to the exam were based on a report showing that the exams did not reveal abuse and the trial court sustained some of defense counsel's objections to questions regarding the witnesses' feelings. Both of these arguments are forfeited; defendant did not object to either alleged form of misconduct below.

"As a general rule, judicial misconduct claims are not preserved for appellate review if no objections were made on those grounds at trial." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237.) Likewise, "[t]o avoid forfeiture of a claim of prosecutorial misconduct, a defendant must object and request an admonition." (*People v. Perez* (2018) 4 Cal.5th 421, 450.) Defendant did not object or request admonitions regarding the alleged prosecutorial or judicial misconduct, and he lodged only a handful of relevance objections. He implicitly acknowledges as much, by arguing that his counsel rendered ineffective assistance in this regard.

The failure to timely object to suspected prosecutorial or judicial misconduct may be excused in limited circumstances, none of which are present here. "There are two exceptions to forfeiture [of a claim of prosecutorial misconduct]: (1) [t]he objection or the request for an admonition would have been futile; or (2) the admonition would have been insufficient to cure the

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introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

harm occasioned by the misconduct." (*People v. Pettie* (2017) 16 Cal.App.5th 23, 74; see also *People v. Panah* (2005) 35 Cal.4th 395, 462.) Here, the alleged prosecutorial misconduct was the elicitation of irrelevant evidence. A simple evidentiary objection could have cured the problem; indeed, the court granted the majority of the relevance objections defense counsel raised. An admonition to the prosecutor to cease asking questions the court determined to be improper, or to the jury to disregard certain evidence also could have been effective, given the nature of the alleged misconduct.

Defendant argues that "several courts have held a prosecutor's remarks which inflame the passions and prejudices of the jury constitute the sort of misconduct that is not curable by admonition, thus eliminating the need for defense objection in the first place to preserve the issue for appeal." The cases he cites, however, are inapposite to the situation here, because they concern "inflammatory rhetoric of the prosecutor," not the elicitation of irrelevant evidence. (*People v. McGreen* (1980) 107 Cal.App.3d 504, 519, disapproved of by *People v. Wolcott* (1983) 34 Cal.3d 92, 101 [inflammatory closing argument]; *People v. Wagner* (1975) 13 Cal.3d 612, 616, 618, 621 [inflammatory questions insinuating defendant engaged in drug use and sales]; *People v. Un Dong* (1895) 106 Cal. 83, 88 [inflammatory questions insinuating defendant lived in a house of prostitution]; *People v. Duvernay* (1941) 43 Cal.App.2d 823, 828 [inflammatory questions and closing arguments insinuating defendant engaged in drug use].) The alleged problem here was not the content of the prosecutor's questions, but rather the content of the answers they prompted. Timely objection to the questions could have prevented the jury from hearing the allegedly prejudicial answers.

A similar exception exists in the context of judicial misconduct. "[A] defendant's failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by' such misconduct, or when objecting would be futile. [Citations.]" (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1237.) Defendant has not suggested, nor does the record reflect, that a proper objection to the introduction of irrelevant evidence would have gone unheeded. If defendant was uncomfortable challenging the court's conduct in front of the jury, he could have requested a sidebar to explain his concerns and seek an admonition. He did not. Because he undertook no efforts to object to prosecutorial or judicial conduct below, he cannot assert his misconduct claims in this forum.

D. Ineffective Assistance of Counsel

Defendant argues that his counsel was ineffective in failing to object to or seek admonitions to mitigate the effects of the prosecutor's questions and the court's alleged misconduct. We disagree.

"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness . . . under prevailing professional norms.' (*Strickland v. Washington* [1984] 466 U.S. 668, 688.) Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be

rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.)

"[W]hether or not to object to evidence at trial is largely a tactical question for counsel, and a case in which the mere failure to object would rise to such a level as to implicate one's state and federal constitutional right to the effective assistance of counsel would be an unusual one." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1312.) "An attorney may well have a reasonable tactical reason for declining to object, and "'[i]f the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.'" [Citation.]" (*Id.* at pp. 1312-1313.)

Here, the record does not reveal the reason for counsel's failure to object to all of the feelings questions defendant now alleges were problematic, or indicate why counsel did not object to Thighe's testimony on relevance grounds. Counsel was not asked for an explanation, and we can discern several possible reasons why counsel may have refrained from objecting to the feelings and exam evidence. First, counsel may have wished to avoid underscoring the emotional nature of the trial by objecting to all of the feelings questions. "'[T]he decision whether to object, move to strike, or seek admonition regarding [undesired] testimony is highly tactical, and depends upon counsel's evaluation of the gravity of the problem *and whether objection or other responses would serve only to highlight the undesirable testimony*.' [Citation.]" (*People v. Seumanu*, *supra*, 61 Cal.4th at

p. 1313.) Second, counsel may have wished to avoid the appearance of insensitivity by repeatedly objecting and prolonging the testimony of witnesses who were visibly emotional. Third, counsel may have concluded, in light of the trial court's mixed rulings, that some of the questions were directed at eliciting evidence relevant to the witnesses' credibility. "Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact or consequence, including evidence relevant to the credibility of a witness." (Evid. Code, § 210.) A witness's feelings toward a defendant or the action generally bear on his or her credibility, which was a key issue in this case. (Evid. Code, § 780, subds. (f), (j).) Similar assessments of relevance may have led defense counsel to refrain from objecting to the exam evidence, which provided the jury with background information some jurors may have needed to understand and assess the allegations. He also may have believed the exam evidence would support his theory that defendant did not abuse the girls, given that the exam revealed no trauma.

A defendant also must establish that he or she was prejudiced by counsel's error, such that there is a reasonable probability of a different result absent the alleged error. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) Defendant has not made that showing here.

Defendant argues that the admission of the unchallenged feelings evidence prejudiced him by "overwhelming the jury with emotion," while the exam evidence was a "simply gratuitous" "emotional boondoggle." Even if defendant is correct that the evidence was wholly irrelevant and should not have been admitted, a question that we do not resolve, he has not

demonstrated that the outcome of his trial would have been more favorable without it. The jury also was exposed to heightened emotions independent of the prosecutor's questions about feelings and Thighe's clinical testimony about the female anatomy. The record reflects that Dalia cried at least four times during her testimony, and D.J. broke down twice while recounting her interactions with defendant. In any event, the jury was instructed not to allow "bias, sympathy, prejudice, or public opinion" to influence its decision, and we presume the jury followed this instruction.

Moreover, the other evidence against defendant was strong. D.J. and E.R. testified consistently with one another that defendant touched them inappropriately, took nude photographs of them, and made them watch a "disgusting" movie. Their testimony also was corroborated by prior interviews they gave, as well as testimony from a detective who spoke with them on a separate occasion.

Defendant has not carried his burden of demonstrating either deficient performance or prejudice. We accordingly reject his claim that he received ineffective assistance of counsel.

II. Sufficiency of the Evidence of "Harmful Matter"

Defendant was convicted of violating section 288.2, subdivision (a)(2), which prohibits the knowing distribution, transmission, exhibition, or offers to distribute or exhibit "any harmful matter" to a person whom the defendant knows, should know, or believes is a minor, if the defendant does so with specific sexually oriented intent. The statute defines "harmful matter" as "matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or

describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." (§§ 288.2, subd. (c), 313, subd. (a).) At least one court has likened this definition to hardcore pornography, a characterization the parties appear to embrace. (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1293-1295 (*Powell*).) That same court explained that hardcore pornography "is distinguished from its more mainstream soft-core counterpart by such things as lewd displays of the penis," the depiction of aroused genitalia, and the depiction of actual rather than simulated sex acts. (*Id.* at p. 1294.)

Defendant argues that the prosecutor failed to prove that the video(s) he showed to D.J. and E.R. met the definition of "harmful matter" because "[n]either girl stated what it was they saw the people doing." He contends, "In the absence of any evidence about the context and content of the movie beyond the fact of nudity, any conclusion that the material seen by the girls was 'harmful matter' as defined in section 313 is wholly unsupported by the record, and no reasonable juror could have concluded that the prosecutor satisfied that element of the offense." We disagree.

"Where, as here, a defendant challenges the sufficiency of the evidence on appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Hubbard* (2016) 63 Cal.4th 378, 392.) If the circumstances reasonably justify the trier of fact's findings, the possibility that the circumstances might also reasonably be

reconciled with a contrary finding does not warrant reversal. (*Ibid.*)

D.J. testified at trial that defendant showed her "videos of a man and a woman" who were not wearing clothes. She was able to see their "chest, front, and bottom," as she had defined those terms, and saw that they were "doing something" to each other. E.R. testified similarly. She stated that defendant showed her a movie depicting "more than one person" with "[n]o clothes"; she was able to see "[t]heir private." She reported that the people were "doing something," "[t]o each other['s] . . . private part." E.R. did not "know what it was, but it was something disgusting." D.J. was more descriptive about what she saw during her forensic interview, when she told Farrell, "the girl is, uh, putting his private part in her mouth." Detective Brown corroborated the girls' testimony about the video: "They said it was - - it was private parts. They were doing things to each other. And it was a man and a woman and it was really disgusting." Brown testified that she did not attempt to ascertain the precise video(s) the girls watched; she "felt like it wasn't my job to go toward that," because "they were really grossed out by the whole description of the video."

The jury reasonably could conclude from this evidence that the video(s) defendant showed the girls constituted "harmful matter." The girls' accounts of seeing "disgusting" movies are not alone enough. (*Powell*, *supra*, 194 Cal.App.4th at p. 1293.) Yet they were accompanied by testimony that the girls saw full nudity and actual or simulated sex acts, including oral copulation. *Powell* held that "the victim's description of seeing a movie in which actors engaged in simulated or unsimulated sexual activity while displaying all of those body parts [penises,

vaginas, and breasts]" was enough to support a conviction.[5] (*Id.* at p. 1295.) The evidence need not be "rich in detail" so long as it is "adequately descriptive." (*Ibid.*) The testimony before the jury here met that minimal standard. Although the girls did not use the scientific words for genitalia, it was clear from their testimony that they saw full nudity and sex acts.

Defendant argues that although "the applicable law and the rationale in Powell is correct," "the court reached the wrong conclusion" because depictions of nudity and sexual activity do not make a movie obscene. He suggests this case is more analogous to *People v. Dyke* (2009) 172 Cal.App.4th 1377 (*Dyke*). We disagree.

In *Dyke*, the 16-year-old victim was watching television with the defendant. The defendant "started flipping through the television channels" and landed on two programs the victim testified about. In the first, the victim saw "a naked woman dancing," for either one or eight minutes. (*Dyke*, *supra*, 172 Cal.App.4th at p. 1380.) In the second, the victim saw the upper bodies of a nude man and woman "'having sex'" for about 45 seconds. (*Ibid.*) She testified that both scenes made her uncomfortable. (*Id.* at p. 1381.) The court concluded this evidence was insufficient to satisfy the definition of "harmful matter." (*Id.* at p. 1384.) It concluded that neither nudity nor all

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[5]The victim in *Powell*, who was 10 years old at the time the abuse occurred, stated during an interview that the "nasty" movie the defendant showed her depicted fully nude men and women, and that she could see their penis, vagina, and breasts. (*Powell*, *supra*, 194 Cal.App.4th at pp. 1284-1285.) She further stated that the people in the movie "did it." (*Id.* at p. 1285.) On the stand, she testified that the man in the movie would "'put his penis in the vagina.'" (*Powell*, *supra*, at p. 1286.)

portrayals of sexual activity are per se obscene, and that the victim's testimony lacked the necessary context to demonstrate that what she saw crossed the threshold. "There is only a bare-bones recital by A.S. of what she saw: a nude woman dancing and a naked couple having sex, shown from the waist up, and her own characterization of it as 'pornography.'" (*Id.* at p. 1385.) From this, the court reasoned, it was "impossible . . . to conclude that the television segments A.S. observed did not contain 'serious literary, artistic, political, or scientific value for minors.' (§ 313, subd. (a).)" (*Dyke*, *supra*, 172 Cal.App.4th at pp. 1386-1387.) "Was the dance by the unclothed female lurid, artistic, or even a cultural or tribal dance? There is no way to know and no reasonable basis for inferring it lacked such value. As to the 45-second glimpse of the couple presumably having sexual intercourse, was the clip part of a tawdry adult film, a former Academy Award winner being shown on television that night, or even a brief scene from Shakespeare's Romeo and Juliet?" (*Id.* at p. 1387.)

Here, the girls testified that defendant showed them videos, not network or cable television. Though their testimony was not incredibly detailed, they plainly described graphic rather than waist-up sex acts. Unlike the victim in *Dyke*, they testified that they saw full frontal male and female nudity. The jury reasonably could conclude from this testimony that the videos the girls viewed with defendant lacked "serious literary, artistic, political, or scientific value for minors." (§ 313, subd. (a).)

III. Section 654

Defendant contends that the court erred by sentencing him to a consecutive prison sentence for the section 288.2 offense. He argues that "the sentence imposed for his section 288.2

convictions [*sic*] fell within section 654's prohibition against multiple punishment because the record reflects his single intent and objective in committing these acts was to engage in the lewd acts which occurred simultaneously or close in time to the exhibiting of the harmful material." He again asserts that *Powell*, which rejected a similar argument, "is incorrect," in this instance because it failed to account for the two separate intents required by section 288.2. We are not persuaded.

Section 654, subdivision (a) provides in relevant part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." It "precludes multiple punishments for a single act or indivisible course of conduct." (*People v. Hester* (2000) 22 Cal.4th 290, 294.) The defendant's intent and objective, not the temporal proximity of his or her offenses, determine whether multiple offenses constitute an indivisible course of conduct. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) A defendant who acts pursuant to a single objective may be found to have harbored a single intent and therefore may be punished only once. (*Ibid.*) "[M]ultiple sex acts committed on a single occasion . . . are generally 'divisible' from one another under section 654, and separate punishment is usually allowed." (*People v. Scott* (1994) 9 Cal.4th 331, 344, fn. 6.) "The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them." (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) We view

the evidence in the light most favorable to the sentence and presume in support thereof the existence of every fact the trier of fact reasonably could deduce from the evidence. (*Id.* at pp. 1312-1313.)

The Attorney General urges us to follow *Powell*. There, the defendant showed the victim "harmful matter" immediately before raping her, "in an unavailing effort to arouse the victim sexually." (*Powell*, *supra*, 194 Cal.App.4th at p. 1296.) The court held that the defendant acted both with intent to arouse the victim and with the subsequent intent to gratify himself by means of the rape. The court concluded these were separate, divisible objectives that were independent of one another and accordingly could be punished separately. (*Ibid.*) The court made this finding even though the offenses were immediately proximate in time.

Defendant contends that this analysis is incorrect because section 288.2 contains two separate intent elements. Section 288.2, subdivision (a)(1)[6] in fact enumerates three intents. It prohibits displaying (or transmitting, etc.) "harmful matter" to a minor (1) "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of the minor, [(2)] and with the intent or for the purposes of engaging in sexual intercourse, sodomy, or oral copulation with the other person, [(3)] or with the intent that either person touch an intimate body part of the other." To prove a violation, the prosecutor must prove that the defendant acted with intent (1) and (2) or (3). Defendant accordingly argues that "the commission

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[6]This same language applies to subdivision (a)(2), the provision under which defendant was convicted. (See § 288.2, subds. (a)(1) & (a)(2).)

of a section 288.2 violation in the scenario common to both Powell and this case necessarily includes an intent to arouse the victim and an intent to have illegal sex."

Defendant reads the statute too narrowly; he has ignored the intent element we have labeled (3), which requires an intent that either person touch an intimate body part of the other. D.J. stated during her interview that defendant showed her the video depicting a female orally copulating a male and told her, "'You have to do that, you have to do that.'" The court reasonably could conclude that this intent—to have D.J. touch him—was distinct from the intent underlying the other abuse, which involved defendant touching the girls. Even if he played the video close in time to his other abusive acts on D.J., as he suggests without record citation, the court reasonably could conclude he committed the acts with separate intents. We accordingly find no error in the trial court's consecutive sentence.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

MICON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.