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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ROY JOSEPH SENTER, Defendant and Appellant.	B225495 (Los Angeles County Super. Ct. No. YA072971)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Brandlin, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, and Scott A. Taryle and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Roy Joseph Senter appeals his conviction for two counts of continuous sexual abuse of a child in violation of Penal Code section 288.5, subdivision (a).[1] In his appeal, Senter argues that the trial court erred in (1) denying his motion for a new trial based on juror misconduct, (2) admitting expert testimony on the Child Sexual Abuse Accommodation Syndrome, (3) admitting evidence of weapons that Senter kept in his home, (4) admitting evidence of a select number of photographs that Senter took of the alleged victims, (5) instructing the jury with Judicial Council of California Criminal Jury Instruction (CALCRIM) No. 1120, and (6) sentencing Senter to two consecutive terms of 15 years to life under section 667.61, subdivision (b). We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Charges

In an amended information, the Los Angeles County District Attorney charged Senter with two counts of continuous sexual abuse of a child under the age of 14 in violation of section 288.5, subdivision (a). The charges were based on allegations that Senter sexually abused minor M. F. from July 2001 to April 2007, and sexually abused minor Ma. F. from March 2005 to November 2007. It was also alleged that Senter committed the charged offenses against more than one victim within the meaning of section 667.61, and had substantial sexual conduct with each victim within the meaning of section 1203.066. Senter pleaded not guilty to both charges and denied the special allegations.

II. Prosecution Evidence

A. M. F.

M. F. is the daughter of Me. F. In 1989, before M. was born, Me. and her husband moved into a house in Lomita. A few years later, Senter and his wife, Barbara Senter,[2]

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[1] Unless otherwise stated, all further statutory references are to the Penal Code.

[2] For clarity and convenience, and not out of disrespect, we shall refer to the Senter family members by their first names.

moved into an adjacent house across the driveway from Me.'s home. Me. and her husband became friends with Senter and his family. Me. was close with both Senter's wife, whom she viewed like a mother, and Senter's adult daughters. The two households often spent time together and treated each other like family.

In 1997, Me. gave birth to M. As M. grew, she spent a lot of time at the Senters' home. Senter was usually home during the day while Barbara was at work. Before she started school, M. visited the Senters' home on a daily basis and spent the night there twice a week. M. called Senter "Grandpa Joe" and treated him like a grandfather. Senter and his wife purchased many presents for M., including toys, stuffed animals, clothes, and boots. Senter also took M. shopping, to the movies, and to restaurants. Me. felt that the clothes that the Senters chose for M. were more grown-up than the clothes that she purchased for her daughter, and that Senter in particular spoiled M.; at some point, Me. asked him to reduce his gift-giving.

Over the years, Senter often took photographs of M. At times, he would direct M. how to pose for the picture, such as telling her to put her hand on her hip or to blow him a kiss. Senter shared many of the photographs that he took of M. with her mother. During the criminal proceedings against Senter, Me. was shown additional photographs of M. which she found disturbing because of the "adult poses." Some of the photographs showed M. wearing a dress off her shoulder, a leopard skin body suit, and other outfits that Senter had purchased for her. At least one photograph showed M. in her underwear.

In October 2004, when M. was seven years old, her family relocated to a new residence seven miles away in Carson. Ma. F. and her family then moved into the house in Lomita where M.'s family formerly lived. M. and Ma. sometimes played together at the Senters' home. Me. had some contact with Ma.'s mother when she visited the Senters, but considered her more of an acquaintance than a friend. After M. and her family moved to Carson, Senter began picking M. up from school three times a week. In 2005, when M. was eight years old, Me. returned to full-time employment. At that time, Senter began babysitting M. on a more regular basis while his wife was at work. He picked M. up from school each afternoon and cared for her in his home until Me. returned

from work in the early evening. M. continued to spend the night at the Senters' home twice a week.

According to M., when she was alone with Senter in his home, he would touch her inappropriately. The touching usually occurred in the daytime while M. watched television with Senter in his bed. The first time that Senter touched M. in a way that made her feel uncomfortable was when he rubbed her upper inner thigh with his hand. Over time, Senter also started touching M.'s vaginal area with his fingers. He initially touched M.'s vagina over her clothing while they watched television in his bed. He later touched M. under her clothing and rubbed her vagina with his fingers. Senter told M. that the touching was normal and that she would know more about the human body than the other children in her class. During the time that M. was living next door to Senter in Lomita, he touched her inappropriately three times a week. After M. and her family moved to Carson, Senter continued to touch her inappropriately, but did so less frequently.

On one occasion, M. was lying naked on Senter's bed before taking a shower. Senter came over to M. and touched her vagina with his mouth. M. was confused by Senter's touching and told him to stop. Another time, Senter was wearing pajama pants which were unbuttoned. When M. playfully grabbed Senter's penis, Senter directed her to rub it with her hand. M. did so, but stopped when she saw Senter ejaculate. Senter asked M. why she stopped, and M. answered that she did not know if it was bad. Senter told her it was normal. On another occasion, M. was watching the Disney Channel in Senter's bedroom when Senter began playing a DVD of an adult movie that depicted a man and woman having sex. After a few minutes, Senter stopped the movie and told M. that he had not meant to show it to her.

M. recalled that Senter had a wooden cabinet in his bedroom in which he kept a gun collection. The cabinet was always locked when she was there. Senter also kept a gun hanging in a holster on the side of his bed and another smaller gun under his pillow. M. did not know if any of the guns were loaded. When M. visited the Senters' home, the guns did not affect her, and she generally was not afraid that Senter would be violent

toward her. However, M. specifically feared that Senter would "come after" her family if she told her mother about the sexual abuse because Senter did not want anyone to know.

In April 2007, when M. was nine years old, Senter and Me. had an argument about the amount of time that Senter was spending with M. Senter told Me. that he wanted M. to spend more nights at his house, but Me. would not agree. Senter was upset and said that he did not want to be treated like a babysitter. He also said that if Me. could not agree to M. spending more nights with him, she would have to find other means of child care. When Me. told M. that she would not be going to the Senters' home anymore, M. did not seem unhappy or upset, which surprised Me. Me. asked M. why she was not upset, and M. simply said, "I just don't want to, Mom." After the argument with Senter, Me. made other arrangements for M.'s after-school care, but M. still visited Senter at his request once a week.

One evening in November 2007, when M. was 10 years old, Me. and her husband were socializing with some friends at their house in Carson. M. was upset because she wanted her mother to spend time with her and she started to act out. One of Me.'s friends, Dawn McClelland, offered to spend time with M. While they were alone in the living room, M. told McClelland that she sometimes felt lonely. McClelland assured M. that she was always available if M. needed to talk. At that point, M. told McClelland about Senter's sexual abuse. After asking M. some questions about the abuse, McClelland explained that she would have to tell M.'s parents, which upset M. When McClelland asked M. why she did not want her parents to be told, M. answered that she was afraid Senter would hurt them. M.'s disclosure to McClelland was the first time that she told anyone that Senter had touched her inappropriately.

Immediately after talking with M., McClelland spoke with Me. and her husband about what M. had told her. Me. then went to talk to M., who was crying. Me. asked M. if what she had told McClelland was true, and M. answered, "Yes." Me. also asked M. why she had not told her before, and M. said that she was afraid Me. would not believe her. The following day, Me. spoke with M. about pursuing the matter with the police, but M. was undecided about what she wanted to do. In the meantime, Me. sent an e-mail to

Senter's wife, Barbara, about M.'s disclosure. Me. did not receive any response to the e-mail and she never spoke to Barbara again.

Approximately four to five days after she first disclosed the sexual abuse to her mother, M. decided that she was willing to talk to the police. Me. and her husband took M. to the local sheriff's station where they made a report to the deputies on duty. On December 4, 2007, Los Angeles County Sheriff's Detective Paul Valle contacted M.'s parents about the police report. In an interview with Detective Valle at the district attorney's office, M. disclosed that Senter had touched her vagina with his fingers and had shown her a pornographic movie that depicted adults having sex. M. did not tell Detective Valle at that time that Senter had touched her vagina with his mouth or had directed M. to touch his penis.

During his initial investigation, Detective Valle asked Me. if there were any other children in Senter's home. Me. told Detective Valle that she believed Senter also provided child care for Ma. and that Ma.'s mother, Theresa, worked at Torrance Memorial Hospital. Me. never contacted Ma.'s mother directly, however, about M.'s disclosure of sexual abuse.

B. Ma. F.

In March 2005, when she was almost six years old, Ma. and her family moved into the house in Lomita. Over time, Ma.'s mother, Theresa F., became friends with Senter and his wife. Theresa saw that M. visited the Senters' home on a daily basis, and Senter told Theresa that he had practically raised M. Theresa later met M.'s mother, Me., but she did not know her very well. After Theresa had been neighbors with the Senters for about a year, Senter began babysitting Ma. every Thursday evening so that Theresa could go out, and occasionally at other times. Senter asked Ma. to call him "Grandpa Joe," but Ma. instead called him "Joe."

In September 2006, Ma.'s family relocated to another residence in Lomita and lost contact with Senter for a few months until March 2007. During the summer of 2007, Ma. began spending the night at the Senters' home twice a week. When Ma. returned to school in the fall of 2007, Senter would pick her up from school one day a week and Ma.

would spend the night at the Senters' home. Senter also asked Theresa if Ma. could spend a weekend with him, but Ma. was never available for a weekend visit.

When Ma. visited the Senters' home, she would watch television with Senter in his bedroom. Senter also would take Ma. to restaurants, and M. would sometimes accompany them. Senter purchased many presents for Ma., such as toys, clothes, and shoes. The clothing that Senter selected for Ma. included short skirts and boots, which Ma. did not typically wear and made her feel uncomfortable. Theresa was also uncomfortable with Senter's gift-giving and told him that it was unnecessary.

According to Ma., when she was alone with Senter, he would touch her inappropriately in her "private part." The touching usually occurred while Ma. was watching television with Senter in his bedroom, but also took place while Senter was bathing her. Senter often told Ma. to remove her pants after school because they were dirty, so she typically watched television in Senter's bed wearing only her underwear and shirt. The first time that Senter touched Ma. inappropriately, he touched her vagina over her underwear. Senter later touched her vagina beneath her underwear with his fingers. He then placed his finger inside her vagina "a little bit," which hurt Ma. and made her feel uncomfortable. At other times, Senter kissed Ma. on her mouth and squeezed her buttocks as she was getting dressed. Senter also took photographs of Ma. on his bed and he would sometimes move her thighs apart to pose her. The touching began a few months after Senter started babysitting Ma. and continued during the time he provided after-school care for her. Although Ma. knew the touching was wrong, she never told Senter to stop because she was afraid he would do something worse if she did. Marisa also did not tell her mother about the abuse because she was afraid her mother would not love her anymore.

In early December 2007, Theresa received a telephone call from Senter's wife, Barbara. Barbara told Theresa that Senter could not watch Ma. on his regular weeknight until further notice because he was sick. Shortly thereafter, Theresa learned from her employer that Detective Valle was trying to reach her. Theresa had not been in

communication with M.'s mother and did not know why Detective Valle was attempting to contact her at that time.

On December 6, 2007, Detective Valle came to Theresa's home and told her that he was investigating an allegation of sexual conduct at the Senters' residence. He did not disclose any other details about the investigation. Detective Valle then spoke privately with Ma., who denied that Senter ever touched her inappropriately. Ma. did not admit the abuse at that point because she was afraid her mother would not love her anymore and she hoped that the matter would simply go away. On other occasions, Theresa also asked Ma. if anyone had touched her inappropriately, which Ma. denied.

In the summer of 2008, Theresa became concerned about some odd behavior that she observed in Ma. Theresa had told Ma. to go through her things and decide what she wanted to get rid of for a garage sale. Ma. gathered all of the toys, shoes, and videos that Senter had given her, including many items that were brand new. When Theresa asked her daughter why she wanted to sell those items, Ma. made an excuse that they were old. Theresa contacted Detective Valle about her concerns, and he suggested that Theresa bring Ma. to the local sheriff's station.

At the station, Detective Valle first met with Theresa and Ma.'s father, Mark, and showed them photographs that Senter had taken of their daughter. Some of the photographs showed Ma. in her underwear. Theresa was aware that Senter took photographs of Ma. and he had shared many of them with Theresa. Although Theresa did not have any concerns about the photographs that she previously had seen, she was disturbed by the photographs that she viewed for the first time at the sheriff's station.

Detective Valle then spoke privately with Ma. and showed her the photographs. At first, Ma. said that she felt she looked good in the photographs, but as Detective Valle showed her other more provocative ones, Ma. became upset and began to cry. Some of the photographs reminded Ma. of what Senter had done to her and she started to feel guilty that she had not told her mother the truth. Ma. was also disturbed that many of the photographs were directed more at her lower body than her face.

Detective Valle left the interview room and told Theresa and Mark that Ma. was crying. Theresa and Mark tried to console their daughter. Ma., who was still crying and very upset, then told Theresa, "Mommy, he touched me in my middle part." Theresa asked Ma. why she had not told them before, and Ma. answered that she was scared they would not love her. A few minutes later, Detective Valle returned to the interview room and interviewed Ma. outside the presence of her parents. At that time, Ma. told Detective Valle about Senter's sexual abuse. At trial, both Ma. and M. denied ever talking to one another about Senter's molestation of each of them.

C. Search Of Senter's Home

On December 18, 2007, Detective Valle and other sheriff's deputies conducted a search of Senter's home pursuant to a warrant. No pornographic movies or materials were found inside the home. On the desktop screen of Senter's computer, Detective Valle found two folders labeled "M." and "Ma.," which contained more than a hundred photographs of the girls. A subsequent search of the computer's hard drive uncovered a total of six folders of photographs of M. and Ma., as well as other folders of photographs of Senter's family members. There were more photographs of the girls than of Senter's family on his computer.

D. Child Sexual Abuse Accommodation Syndrome

Dr. Jayme Jones, a clinical psychologist specializing in the treatment of sexually abused children, testified as an expert witness on the Child Sexual Abuse Accommodation Syndrome (CSAAS). As described by Dr. Jones, CSAAS is neither predictive nor diagnostic. It is simply a model that explains how sexually abused children often behave differently than the general public might expect. There are five components of the traditional CSAAS model: (1) secrecy; (2) helplessness; (3) accommodation; (4) delayed disclosure; and (5) retraction.

Dr. Jones acknowledged that not all five components of the CSAAS model will necessarily be present in a particular case. In addition, the lack of disclosure in a given case could mean that no abuse has occurred. As Dr. Jones made clear, the CSAAS model simply does not apply in cases where there has not been any sexual abuse. Dr. Jones

testified that she did not interview either M. or Ma., and had no opinion as to whether the evidence in this case was consistent with CSAAS.

III. Defense Evidence

Several members of Senter's family testified as character witnesses on his behalf. Stacy Murillo, Senter's 35-year-old granddaughter, testified that she and her sister lived with her grandparents for a few years starting around the age of 10. As a child, Murillo often watched television with Senter in his bedroom and she occasionally slept with both grandparents in their bed. Senter never touched Murillo inappropriately or showed her any pornographic materials. According to Murillo, Senter loved children and photographed Murillo when she was a child. Senter liked to take photographs of his entire family and none of the photographs ever made Murillo feel uncomfortable. Murillo described Senter as forthright and outspoken, and "a believer in taking responsibility for your actions." Murillo often saw M. at the Senters' home and considered her to be an outgoing child. Murillo was aware that Senter took photographs of M. and that M. watched television with Senter in bed, but she did not think such behavior was strange. Murillo never saw Senter touch M. or any other child in a sexual way, and did not believe that he would ever do so.

Teri Nichole Thayer, Senter's 28-year-old granddaughter and Murillo's younger sister, testified that she and Murillo lived with her grandparents for two years starting when Thayer was four years old. During that time, it was common for Thayer and her sister to watch television with Senter in his bed. Senter was affectionate with Thayer, but never touched her inappropriately. Senter took a lot of photographs when Thayer was growing up, including photographs of Thayer modeling outfits that her grandmother made for her. As an adult, Thayer frequently visited her grandparents at their home in Lomita where she saw M. and later Ma. Senter appeared to have an affectionate relationship with both girls. Thayer knew that M. watched television with Senter in his bedroom and that Senter took photographs of her. Thayer described M. as an extremely friendly and outgoing girl who enjoyed being photographed. Thayer never observed

Senter acting inappropriately toward a child, and she did not believe that Senter would ever touch a child in a sexual way.

Crystal Senter, Senter's 48-year-old daughter and the mother of Murillo and Thayer, testified that Senter frequently took photographs of the family over the years. As a child, Crystal watched television with her father in his bedroom and she sometimes slept with both parents in their bed. Crystal's daughters also watched television with Senter in his bed when they were young. Senter never touched Crystal inappropriately, and Crystal never saw Senter engage in inappropriate conduct toward any of his grandchildren. Crystal also did not see any pornographic materials in her parents' home. As an adult, Crystal visited the Senters' home on a regular basis and she had a close relationship with Me. and M. Crystal described M. as a friendly and outgoing child who seemed happy when she visited, and Ma. as a very sweet girl who was affectionate with Senter. It was common for Senter to take photographs of the girls, and M. told Crystal that she loved being photographed. Crystal recalled that she often saw M. running around the Senters' home in her underwear, and both girls watching television with Senter in his bed. Crystal did not consider such behavior to be unusual since she and her daughters did the same thing when they were children. Crystal did not think that Senter would ever touch a child in a sexual way, and she would not have testified on Senter's behalf if she believed he had done so.

Senter's wife, Barbara, testified that she had known Senter for 60 years and been married to him for 58 years. At the time of trial, they had five children, 10 grandchildren, and six great grandchildren. Barbara described her husband as a loving family man who always made time for his children. One of Senter's hobbies was collecting guns and he used to take their children shooting on the weekends and teach them about gun safety. Barbara considered Senter to be a man of integrity who was honest, open, and accountable for his actions. She never knew Senter to possess any pornographic material, or to act inappropriately toward any child.

When the Senters moved to their home in Lomita, they became neighbors and friends with M.'s family. Barbara was close to Me. and loved her like a daughter.

Barbara also had a loving relationship with M., and described her as a beautiful, bright child who was very talkative. From an early age, M. spent a lot of time with the Senters, and when she was age seven or eight, Senter started babysitting her on a regular basis while Barbara was at work. Barbara described Ma. as a beautiful and pleasant child who was very respectful of adults. Senter began babysitting Ma. when she was also age seven or eight. Senter had mutually affectionate relationships with both girls, and Barbara did not regard their affection as inappropriate. Barbara was aware that Senter watched television with the girls in his bedroom with the door closed, but she did not consider such behavior unusual. Barbara's children also had watched television in bed with their father, and the bedroom door was kept closed because there was an air conditioner in the room. Barbara knew that Senter took a lot of photographs of the girls, but he also frequently photographed his family. Barbara never saw any photographs of M. or Ma. that were sexually provocative, or observed any other behavior between Senter and the girls that she believed was inappropriate.

At some point, Barbara received an e-mail message from Me. regarding M.'s allegations of sexual abuse. Barbara was very upset by the e-mail and did not respond to it, but decided it was best if the Senters no longer had children in their home. In December 2007, Barbara called Theresa and told her that Senter could no longer babysit Ma., and she later returned the belongings that Ma. kept at the Senters' residence. Barbara did not believe that Senter would ever touch a child in a sexual manner, and she would not have allowed any such behavior to take place in her home.

Senter testified on his own behalf. He was 74 years old at the time of trial. He and Barbara married in 1951 after dating for two years. In 1989, Senter was forced to retire from work due to a back injury while Barbara continued working full-time. They moved to their home in Lomita in 1995, and met Me. and her husband shortly thereafter. Senter had a close relationship with Me. and regarded her as a daughter. He had known M. since she was born and described her as a "living and breathing" doll. Senter met Ma.'s family in 2005 when they moved into the home where M.'s family used to live. He became close friends with Theresa and she confided in him about her personal problems.

Senter's relationship with Ma. was similar to his relationship with M., and he treated both girls like his granddaughters. He never touched M. or Ma. in an inappropriate manner.

Senter began babysitting M. and then Ma. on a regular basis shortly after each child's eighth birthday. Senter watched television in bed with both girls as he had done with his children and grandchildren. After Senter installed an air conditioner in his bedroom in 2006, he kept the bedroom door closed but not locked. He never showed M. a pornographic movie and he did not possess any pornography in his home. Both M. and Ma. spent the night at the Senters' home on many occasions, and they usually slept between Senter and Barbara in their bed, which Senter did not think was inappropriate. There were a few times when Senter asked Ma. to remove her pants before she got into his bed, but only because her pants were filthy. Due to diabetes, Senter was unable to sustain an erection or ejaculate. He denied ever engaging in any sexual behavior toward either M. or Ma.

Senter was an avid photographer and he took many photographs of both girls. He rarely had to tell M. how to pose because she loved being in front of a camera and seemed to have fun being photographed. Senter stored the photographs that he took on his computer, which was accessible to all of his family members. He also placed a number of photographs on the walls of his home. Senter did not consider any of the photographs of M. or Ma. to be sexually provocative. However, he admitted that he had deleted one photograph showing Ma. lying on his bed because he did not think her mother would understand. Senter also took many photographs of his children and grandchildren when they were young. Some of the photographs showed his sons taking a bath, his daughters lying in the sun in their bathing suits, his daughter in her underwear, his granddaughter without a shirt, his granddaughter eating a popsicle with Senter in his bed, and his son watching television with Senter in his bed. Senter did not feel that these photographs of his family were sexually provocative.

Among other hobbies, Senter was also a gun collector and considered himself a small arms expert based on his training in the United States Marine Corps. He kept 15 firearms in a locked safe in his bedroom. In addition, he kept a loaded handgun on the

side of his bed for protection, but it was never out when M. or Ma. were present in the room.

Starting in January 2006, Senter had an ongoing conflict with Me. about his child care obligations toward M. Senter believed that he was assuming all of the parental responsibilities for M. without any of the "fun time." He was generally not able to spend weekends or nights with M. and felt that he was being treated as a babysitter rather than a part of the family. Over the next year, Senter continued to convey to Me. that he did not want to be "just a babysitter." On January 30, 2007, Senter and Me. had another argument about the same issue and Senter stopped babysitting M. at that time. However, M. continued to visit the Senters' home on an occasional basis for a few more months.

On December 3, 2007, Senter also stopped babysitting Ma. The day before, Barbara had received an e-mail from Me. stating that she would be reporting a sexual abuse accusation made by M. to the police. Senter was sickened by the accusation and felt betrayed by both Me. and M. At that point, Senter decided to stop providing child care for Ma. because he did not want "any more problems with any more parents."

IV. Verdict and Sentencing

At the conclusion of the trial, the jury found Senter guilty of the continuous sexual abuse of both M. and Ma. in violation of section 288.5, subdivision (a). The jury also found true the special allegations that Senter had substantial sexual conduct with M. and Ma. within the meaning of section 1203.066, and committed the charged offenses against more than one victim within the meaning of section 667.61. Following the verdict, the trial court sentenced Senter to two consecutive terms of 15 years to life pursuant to section 667.61, subdivision (b) for an aggregate prison term of 30 years to life. Senter has filed a timely notice of appeal.

DISCUSSION

I. Motion for a New Trial Based on Juror Misconduct

Senter contends that the trial court erred in denying his motion for a new trial based on juror misconduct. The specific misconduct claimed by Senter consisted of

(1) the jury discussing during deliberations the prospect of a hung jury and retrial at which M. and Ma. might again have to testify, and (2) the jury foreperson failing to disclose during voir dire that she had been sexually molested as a child. We conclude that there was no prejudicial juror misconduct in this case.

A. Relevant Proceedings

During voir dire, Prospective Juror No. 0313 stated that she lived in San Pedro, worked as a sales representative for a title insurance company, was married to a professional fisherman, had six children and three grandchildren, and did not have any prior jury experience. With respect to the jury questionnaire, she indicated that she wished to speak privately about her responses to the questions regarding her ability to be fair because of the nature of the charges and her prior experience as a victim of crime. In a side bar conference with the trial court and counsel, Prospective Juror No. 0313 related that she had an uncle who was a pedophile and had sexually abused her sister and cousins. She also had a good friend whose brother recently had been accused of child molestation but was found not guilty. She further reported that one of her daughters had been shot in a drive-by shooting and that she personally had been robbed years earlier.

The trial court asked Prospective Juror No. 0313 whether she thought she could evaluate all of the evidence fairly before deciding whether the defendant was guilty beyond a reasonable doubt. She answered, "I do. I gave it thought. I have seen both sides." The prosecutor then asked whether Prospective Juror No. 0313 thought she could set aside those two other situations, listen to the evidence in the case, and apply the law given by the judge. The juror confirmed, "I do. I could do that." In response to defense counsel's inquiry as to whether her uncle had ever been charged, Prospective Juror No. 0313 related that the incidents occurred in the 1960s and nothing was ever done, but she was not resentful about it. The questioning of Prospective Juror No. 0313 ended with the following exchange:

> [Defense counsel]: You don't think you would hold it against Mr. Senter that nobody ever --
>
> Prospective Juror 0313: Well, we haven't, I haven't heard anything. So, I mean --

[Defense counsel]: Okay. Then you spoke of an individual who was acquitted of these types of charges. Does that upset you that this person was acquitted?

Prospective Juror 0313: No. No. Not at all. He -- it was a jury. And you know, they found him not guilty and he wasn't. So justice was served.

[Defense counsel]: Very good.

Prospective Juror No. 0313 ultimately was seated on the panel as Juror No. 8.

Jury deliberations commenced on Monday, October 26, 2009. The jury found Senter guilty of all charges on Wednesday, October 28, 2009. At defense counsel's request, the trial court polled the jurors, each of whom confirmed that the verdicts as read were the juror's individual verdict in the case.

In December 2009, Senter brought a motion for a new trial based on alleged juror misconduct. The motion was supported by the declarations of two members of the jury, Jurors Nos. 2 and 8, who both stated that they believed they had made the wrong decision in the case. The prosecution objected to the admission of the declarations and requested an evidentiary hearing, which was held on March 30, 2010.

Juror No. 2 testified that, during the deliberations, there was discussion about what would happen if there was a hung jury and whether M. and Ma. would have to testify again at a new trial. Juror No. 2 recalled that three or four jurors participated in the conversation about the prospect of a hung jury and conveyed that it would be a negative thing to put the girls through a new trial. The discussion occurred on the first and second days of deliberations after the jurors had taken a first vote on the verdicts. The jurors then had further discussions about the evidence in the case and reached final verdicts on the third day. Upon hearing the conversation about the prospect of a hung jury, Juror No. 2 did not immediately change her vote from not guilty to guilty. Instead, she changed her vote at the very end of the deliberations. Juror No. 2 further testified that, during the second day of deliberations, one of the jurors stated more than once that she had been a victim of child molestation.

After the verdicts, while Juror No. 2 was still in the courthouse parking lot, she received a telephone call from Juror No. 8. Juror No. 8 indicated during the call that she

wanted to change her verdict. Juror No. 2 likewise felt that she may have made a mistake, but she did not think it was possible to change her verdict at that point. Juror No. 8 suggested that they contact the defense counsel, the district attorney, and the trial court about their concerns. Although Juror No. 2 came to believe that she had made the wrong decision in the case, she still felt she had scrupulously followed the trial court's instructions to the jury.

Juror No. 8 testified that she was the jury foreperson. She recalled that there were at least two discussions in the jury room about the prospect of putting the witnesses, including M. and Ma., through another trial. All 12 jurors participated in the discussions and about half of them said that putting the girls through another trial was a negative thing. One of the discussions took place immediately before the verdicts were rendered.

Juror No. 8 also testified that she failed to disclose during voir dire that she had been molested by her uncle. The molestation took place when Juror No. 8 was seven years old and consisted of her uncle touching her buttocks over her clothing on one occasion while she slept. She indicated that she was not traumatized by the incident. When asked why she had not disclosed the information during voir dire, Juror No. 8 answered, "I was embarrassed, I suppose. I think I was just really embarrassed at that moment." Juror No. 8 stated that she told the other jurors that she had been molested by her uncle during the second day of deliberations.

Juror No. 8 further testified that she was not prejudiced against Senter during jury selection or deliberations, but she was prejudiced against him when she rendered her final vote. When she went into the deliberation process, Juror No. 8 believed that Senter was innocent until proven guilty. During the deliberations, she tried to be as fair as possible, and she "pushed everything aside and focused on the evidence." Juror No. 8 did not think about the child molestation that she had experienced until "the very end" of the case. She also never suggested to the other jurors that they should convict Senter because of what had happened to her.

Immediately upon leaving the courthouse after the verdicts were read, Juror No. 8 believed that she had made the wrong decision and attempted to contact defense counsel.

She ultimately spoke on the telephone with defense counsel about five times and also exchanged e-mails with her. When Juror No. 8 returned home on the day of the verdicts, she looked up what she could find about the case on her computer. Later that evening, Juror No. 8's pastor came to her home at her request to comfort and pray with her. She told her pastor about her jury experience and that she had been molested as a child. The pastor commented that Senter did not fit the profile of a child molester. The next morning, Juror No. 8's husband showed her a newspaper article about the case. Juror No. 8 felt bad when she read about evidence that had not been presented to the jury, including the results of a lie detector test. Two or three days later, Juror No. 8 delivered a letter to the trial court in which she alleged jury misconduct.

On April 29, 2010, following argument by counsel, the trial court denied Senter's new trial motion. In a detailed ruling from the bench, the court set forth the reasons for its decision. With respect to the claim that the jury improperly considered the prospect of a retrial at which the children might have to testify, the court found that such information was extraneous and non-evidentiary. However, the court found that it was not the type of information that was inherently prejudicial or likely to cause a reasonable juror to be improperly influenced. The court further found that any potential prejudice was rebutted by the jurors' statements that they followed the law. With respect to the claim that Juror No. 8 improperly failed to disclose that she had been a victim of child molestation, the court noted that such information involving a single incident of touching over clothing would not, standing alone, be sufficient grounds for a challenge for cause. The court also noted that, based on the information that Juror No. 8 did disclose during voir dire, the parties were on notice of allegations of child molestation by a family member as well as the juror's views about the impropriety of that conduct. The court found that Juror No. 8's failure to disclose was not an intentional concealment, and that her testimony that she was fair during deliberations was credible.

In addition, the trial court found that Senter had been provided a fair trial. The court noted that, although Juror No. 8 appeared to genuinely believe she had made a mistake in her verdict, her change of heart likely was caused by post-verdict conduct.

Such conduct included Juror No. 8's review of news articles about the case which referenced a polygraph test and the virtual certainty of a life sentence, her pastor's statements that Senter did not fit the profile of a child molester, her actions in contacting defense counsel and attempting to recruit other jurors to join her cause, and her actions in contacting the court and the media about her verdict. The court found that, after the verdict, Juror No. 8 lost objectivity and neutrality, and became an advocate for her view that the jury had made a mistake. The court further found that there was substantial evidence to support the jury's verdict, which had been reached before Juror No. 8 was exposed to such outside influences.

B. Standard of Review

"When a defendant moves for a new trial based on jury misconduct, the trial court undertakes a three-part inquiry. 'First, the court must determine whether the evidence presented for its consideration is admissible. . . . [¶] Once the court finds the evidence is admissible, it must then consider whether the facts establish misconduct. . . . [¶] Finally, if misconduct is found to have occurred, the court must determine whether the misconduct was prejudicial.' [Citation.]" (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 475.) "'Misconduct by a juror . . . usually raises a rebuttable "presumption" of prejudice. [Citations.]' [Citation.]" (*People v. Danks* (2004) 32 Cal.4th 269, 302.) "'[T]his presumption of prejudice "'may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct]. . . .'" [Citations.]' [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1208.)

In determining whether misconduct occurred, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) As the California Supreme Court repeatedly has cautioned, "'before a unanimous verdict is set

aside, the likelihood of bias . . . must be *substantial*. [T]he criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. The jury system is fundamentally human, which is both a strength and a weakness. [Citation.] Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic.' [Citation.]" (*People v. Danks*, *supra*, 32 Cal.4th at p. 304.)

C. Reference to Prospect of a Hung Jury and Possible Retrial

Senter first asserts that the jury committed prejudicial misconduct by discussing during deliberations the prospect of a hung jury and consequent retrial at which the minor witnesses might again have to testify. "'[W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. . . .' [Citation.]" (*People v. Danks*, *supra*, 32 Cal.4th at p. 303.) A substantial likelihood of juror bias exists "'if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror.' [Citation.]" (*Ibid*.) "'[E]ven if the extraneous information was not so prejudicial, in and of itself, as to cause "inherent" bias . . .,' the nature of the misconduct and the 'totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose.' [Citation.]" (*Ibid*.)

In *People v. Riel* (2000) 22 Cal.4th 1153, the California Supreme Court considered whether there was prejudicial juror misconduct during deliberations in a penalty phase when a juror made a comment to the effect that "'[i]f we give him the death penalty, the judge will just commute it to life in prison anyway.'" (*Id*. at p. 1218.) The Court held that the juror's statement did not constitute misconduct because it "was merely the kind of comment that is probably unavoidable when 12 persons of widely varied backgrounds, experiences, and life views join in the give-and-take of deliberations." (*Id*. at p. 1219.) The Court went on to explain, "'[t]he introduction of much of what might strictly be

labeled "extraneous law" cannot be deemed misconduct. The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. "[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors." [Citation.] . . . .' [Citations.]" (*Ibid*.)

In this case, we conclude that the jurors' discussion about the prospect of a hung jury and retrial at which the children might have to testify did not rise to the level of prejudicial misconduct. While the jurors' comments on this issue were extraneous and non-evidentiary, they were more in the nature of "'general matters of law and fact that find their source in everyday life and experience.'" (*People v. Riel*, *supra*, 22 Cal.4th at p. 1219; see also *People v. Steele* (2002) 27 Cal.4th 1230, 1265 [no misconduct where jurors in a penalty phase believed the defendant could possibly be released someday if not sentenced to death because it was "a matter 'of common knowledge appreciated by every juror'"].) Certainly, it is conceivable that a deadlocked jury would discuss the potential consequences of their failure to reach a unanimous verdict.

Even if misconduct could be established, however, reversal would not be required because the record shows that there was no substantial likelihood of bias against Senter as a result of the jurors' discussion. A statement about the prospect of a retrial at which the minor witnesses might be required to testify is not the type of statement that is inherently or substantially likely to influence the jurors to convict Senter of a crime that they believed the prosecution failed to prove. As the Attorney General points out, merely discussing the prospect of a hung jury and possible retrial does not, on its face, favor the prosecution or the defense. Nor is it substantially likely that the jury was actually biased against Senter based on such discussion. While there was some conflict in the jurors' testimony about the timing of the discussion, Juror No. 2 recalled that the prospect of a

hung jury and retrial was raised on the first and second day of deliberations, but not on the third day when the verdicts were finally reached. Juror No. 2 also testified that, after the reference to a possible hung jury and retrial, the jurors had further discussions about the evidence in the case. In addition, the trial court instructed the jury to follow the law as explained by the court (CALCRM No. 200) and to consider only the evidence presented in the courtroom (CALCRIM No. 222), and there is nothing in the record to support a finding that any of the jurors failed to follow these instructions. To the contrary, Juror No. 2, despite her post-verdict conviction that she reached the wrong decision in the case, testified that she scrupulously followed the court's instructions in rendering her verdict. Based on the record before us, the trial court properly concluded that the jury's discussion about the prospect of a hung jury and consequent retrial was not prejudicial misconduct.

D. Failure to Disclose Child Molestation on Voir Dire

Senter also argues that Juror No. 8 committed prejudicial misconduct by failing to disclose during voir dire that she been the victim of child molestation. The failure to disclose background information in voir dire does not constitute juror misconduct in every case. "'Although intentional concealment of material information by a potential juror may constitute implied bias justifying his or her disqualification or removal [citations], mere inadvertent or unintentional failures to disclose are not accorded the same effect. "[T]he proper test to be applied to unintentional 'concealment' is whether the juror is sufficiently biased to constitute good cause for the court to find . . . that he is unable to perform his duty." [Citation.] [¶] Whether a failure to disclose is intentional or unintentional and whether a juror is biased in this regard are matters within the discretion of the trial court. Except where bias is clearly apparent from the record, the trial judge is in the best position to assess the state of mind of a juror or potential juror on voir dire examination. [Citations.]' [Citation.]" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 644.) Indeed, "'"[t]he determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a

manifest and unmistakable abuse of discretion clearly appears."' [Citation.]" (*People v. Carter, supra,* 36 Cal.4th at p. 1210.)

Here, the trial court acted within its discretion in finding that Juror No. 8's failure to disclose a single incident of inappropriate touching by a family member did not constitute misconduct. The trial court conducted a thorough examination of Juror No. 8 during voir dire, and following the verdict, held an extensive evidentiary hearing on the motion for a new trial, which included live testimony from the juror. After hearing the testimony of Juror No. 8, the court found that her failure to disclose that her uncle once touched her buttocks over her clothing when she was a child was not an intentional concealment. As the trial court noted, Juror No. 8 had disclosed during voir dire that her uncle sexually abused her sister and cousins many years ago and was never charged with a crime. Given the isolated nature of the touching later revealed by Juror No. 8, the court found that she may not have appreciated during voir dire that such information also should have been disclosed at that time. The trial court was in the best position to observe Juror No. 8's demeanor during the voir dire process and at the evidentiary hearing, and we must defer to its judgment on matters of credibility.

Moreover, even assuming that Juror No. 8 intentionally concealed her experience as a victim of child molestation, we conclude that there was no substantial likelihood that Senter suffered actual bias as a result of the nondisclosure. As the trial court explained, even without a specific disclosure by Juror No. 8 that her uncle touched her buttocks on a single occasion, the parties were on notice of allegations of child molestation by a family member and the juror's views about the impropriety of that conduct. Additionally, Juror No. 8 repeatedly confirmed to the trial court and both counsel during voir dire that she could fairly evaluate all of the evidence before deciding whether Senter was guilty beyond a reasonable doubt. At the evidentiary hearing on the new trial motion, Juror No. 8 reiterated that she tried to be as fair as possible during deliberations, and the trial court found her statement that she was fair to be credible. Any presumption of prejudice is further rebutted by the fact that Juror No. 8 was one of the jurors in favor of acquittal until late in the deliberations. After the verdicts were rendered, Juror No. 8 came to

believe that she had made a mistake in her verdict, but as the trial court noted, her change of heart was likely caused by post-verdict exposure to outside information and influences. In sum, because the record reflects that there was no prejudicial juror misconduct in this case, the trial court did not abuse its discretion in denying Senter's new trial motion.

II. Admission of CSAAS Evidence

Senter next contends that his conviction must be reversed because the trial court erroneously admitted evidence of CSAAS in violation of his constitutional right to due process and a fair trial. He specifically argues that the evidence was irrelevant and unduly prejudicial because CSAAS "did not apply to the facts of this case" and "there are no longer misconceptions to correct." He also asserts that the evidence was inadmissible under the *Kelly*/*Frye*[3] standard on the admissibility of scientific evidence. We conclude that the CSAAS evidence was properly admitted in this case.

"Expert opinion testimony must be '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . .' (Evid. Code, § 801, subd. (a).) We review the trial court's ruling in this regard for abuse of discretion. [Citation.]" (*People v. Smith* (2003) 30 Cal.4th 581, 627.) "[I]t has long been held that in a judicial proceeding presenting the question whether a child has been sexually molested, CSAAS is admissible evidence for the limited purpose of disabusing the fact finder of common misconceptions it might have about how child victims react to sexual abuse. [Citations.]" (*In re S.C.* (2006) 138 Cal.App.4th 396, 418; see also *People v. Perez* (2010) 182 Cal.App.4th 231, 245; *People v. Sandoval* (2008) 164 Cal.App.4th 994, 1001-1002; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1746; *People v. Bowker* (1988) 203 Cal.App.3d 385, 394-395.) As the California Supreme Court explained, CSASS evidence is "'not admissible to prove that the complaining witness has in fact been sexually abused; [however,] it is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's

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[3] See *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*) and *Frye v. United States* (1923) 293 F. 1013 (*Frye*).

conduct after the incident -- e.g., a delay in reporting -- is inconsistent with his or her testimony claiming molestation. [Citations.] "Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior."' [Citation.]" (*People v. Brown* (2004) 33 Cal.4th 892, 906, citing *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301.)

To be admissible, the CSAAS testimony "must be targeted to a specific 'myth' or 'misconception' suggested by the evidence." (*People v. Bowker, supra,* 203 Cal.App.3d at pp. 393-394.) However, identifying a myth or misconception does not require "the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation. [Citations.]" (*People v. Patino*, *supra*, 26 Cal.App.4th at pp. 1744-1745.) Moreover, the prosecution may offer CSAAS testimony in its case-in-chief whenever the testimony of the victim may raise an "obvious question . . . in the minds of the jurors" as to the victim's credibility, such as "why the molestation was not immediately reported if it had really occurred" or "why [the victim] went back to [the defendant's] home a second time after the first molestation." (*Id*. at p. 1745.)

In this case, the CSASS evidence was relevant because the credibility of the complaining witnesses was raised as a central issue at trial. The defense sought to challenge the credibility of both M. and Ma. by calling into question their apparent willingness to continue visiting Senter after the alleged sexual abuse began, their long delay in reporting the abuse to anyone, and their failure to fully disclose the details of the abuse once they did make a report. The CSAAS expert testimony was thus admissible to help explain why a sexually abused child might not report the abuse immediately and why the child might return to the perpetrator's home despite being subjected to ongoing abuse. It was also admissible to help explain why a child who discloses sexual abuse might only share small portions of information at a time.

Here, the trial court properly limited the scope of the expert's testimony. Prior to the introduction of the testimony, the trial court instructed the prosecution's CSAAS expert that she was not permitted to express an opinion as to whether the complaining witnesses were credible, whether they were victims of sexual abuse, or whether they were affected by CSAAS. The expert adhered to the trial court's instructions and did not offer any opinion on these precluded issues. In fact, the expert made clear in her testimony that she did not interview either M. or Ma., and did not have any opinion as to whether the evidence in this case was consistent or inconsistent with CSAAS. The trial court acted well within its discretion in admitting the CSAAS evidence.

Furthermore, contrary to Senter's claim, the CSAAS testimony was not inadmissible under the *Kelly*/*Frye* rule governing the admissibility of scientific evidence. As the Court of Appeal explained in *People v. Harlan* (1990) 222 Cal.App.3d 439, "[t]he *Kelly*/*Frye* rule does not apply to this type of evidence." (*Id*. at p. 449, citing *People v. Stoll* (1989) 49 Cal.3d 1136, 1161.) While the *Kelly*/*Frye* rule does "preclude the admission of CSAAS evidence to prove that a child has been abused," such evidence remains admissible "to dispel common misconceptions the jury may hold as to how such children react to abuse." (*People v. Sanchez* (1989) 208 Cal.App.3d 721, 734-735.) The *Kelly/Frye* rule is therefore inapplicable here because the CSAAS evidence was not admitted to prove that M. or Ma. had been sexually abused, but "'for the limited purpose of disabusing [the] jury of misconceptions it might hold about how a child reacts to a molestation.'" (*People v. Wells* (2004) 118 Cal.App.4th 179, 188.)

Senter's claim that the admission of the CSAAS evidence deprived him of due process and a fair trial likewise fails. The "introduction of CSAAS testimony does not by itself deny [a defendant] due process." (*People v. Patino, supra*, 26 Cal.App.4th at p. 1747.) Because the CSAAS testimony was relevant to the issues presented in the case and was properly limited in scope, it did not render Senter's trial fundamentally unfair.

III. Admission of Other Evidence Against Senter

Senter further argues that the trial court erred in failing to exclude evidence of (1) a gun collection that he kept in his home, and (2) select photographs that he took of

the alleged victims. Senter asserts that the admission of such evidence was irrelevant and unduly prejudicial and deprived him of his constitutional right to due process and a fair trial. We conclude, however, that the trial court did not abuse its discretion or violate due process in admitting the challenged evidence.

A. Standard of Review

A trial court generally has broad discretion concerning the admission of evidence. (*People v. Cole* (2004) 33 Cal.4th 1158, 1197; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "'[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question. . . .' [Citation.]" (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.) The trial court's exercise of discretion "'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Rodrigues*, *supra*, at pp. 1124-1125.) Under Evidence Code section 352, evidence is unduly prejudicial if it "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Crittenden* (1994) 9 Cal.4th 83, 134.) "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

B. Gun Collection Evidence

Senter contends that the trial court should have excluded testimony about the gun collection that he kept in his home because there was no evidence that he ever used any such weapons in the commission of the charged offenses. As Senter concedes, however, his counsel never objected to the testimony about his gun collection in the trial court. In order to preserve evidentiary issues for appeal, the objecting party must make a timely objection stating the specific ground on which it is made. (Evid. Code § 353, subd. (a); *People v. Williams* (2008) 43 Cal.4th 584, 620; *People v. Partida* (2005) 37 Cal.4th 428, 433-434.) In the absence of a specific and timely objection in the trial court, "'"questions

relating to the admissibility of evidence will not be reviewed on appeal."'" (*People v. Williams, supra*, at p. 620.) Because Senter did not object to the admission of the gun collection evidence at trial, he has forfeited this claim of error on appeal.

Alternatively, Senter claims that his counsel was ineffective in failing to object to the challenged evidence. "To secure reversal of a conviction for ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and that, to a reasonable probability, defendant would have obtained a more favorable result absent counsel's shortcomings. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-694 [104 S.Ct. 2052, 2064-2068, 80 L.Ed.2d 674].)" (*People v. Kraft* (2000) 23 Cal.4th 978, 1068.) Generally, we defer to trial counsel's tactical decisions when reviewing an ineffective assistance of counsel claim. (*People v. Ray* (1996) 13 Cal.4th 313, 349.) On this record, we cannot conclude that Senter's counsel was ineffective in failing to object to the challenged evidence because the testimony about the weapons in Senter's home was probative and not unduly prejudicial.

As a basic proposition, "[w]hen the prosecution relies on evidence regarding a specific type of weapon, it is error to admit evidence that other weapons were found in the defendant's possession, for such evidence tends to show not that he committed the crime, but only that he is the sort of person who carries deadly weapons. [Citations.]" (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1056.) On the other hand, evidence of weapons not actually used in the commission of a crime may be admissible when they are otherwise relevant to the crime's commission. (*People v. Prince* (2007) 40 Cal.4th 1179, 1248-1249; see also *People v. Cox* (2003) 30 Cal.4th 916, 956 ["when weapons are otherwise relevant to the crime's commission, but are not the actual murder weapon, they may still be admissible"], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In *People v. Escobar* (1996) 48 Cal.App.4th 999, 1023, for example, this Court held that there was no abuse of discretion in the admission of evidence that one defendant, Medina, previously carried a firearm because it was relevant to showing that his co-defendant, Escobar, "had acted out of fear of Medina"

in participating in the crime. Here, the evidence concerning Senter's gun collection was similarly relevant to explaining M.'s fear.

At trial, M. testified that she delayed in disclosing the molestation to her mother because she feared that Senter would "come after" her family if she told the truth about his inappropriate touching. McClelland likewise testified that when M. first reported the abuse to her, McClelland asked M. why she did not want to tell her parents and M. responded that she was afraid Senter would hurt them. The evidence of the weapons that Senter kept in his home was accordingly probative in explaining why M. delayed in reporting the sexual abuse to anyone even after she was no longer spending much time in Senter's home. Because M.'s credibility was a central issue in the case, evidence relating to her delayed reporting was substantially probative.

The gun collection evidence was also not unduly prejudicial. The testimony about Senter's possession of guns was a small portion of the evidence presented against him. The prosecution never suggested that Senter actually used a gun in the commission of the charged crimes, or that he threatened either of the victims with a gun if they told anyone about the abuse. The sole purpose of the evidence was to help explain why M., who was aware of the guns in Senter's home, did not promptly disclose the molestation to her parents. Furthermore, both Senter and his wife testified that his gun collection was a hobby which he had shared with his children and that he had taught gun safety to all of them. Given its substantial probative value as weighed against its prejudicial effect, the evidence of Senter's gun collection was properly admitted.

C. Photographs of the Victims

Senter also challenges the trial court's admission of approximately 20 photographs of M. and Ma. that were seized from Senter's computer. He contends that such evidence was irrelevant and unduly prejudicial because his computer contained thousands of photographs of the two girls, yet the prosecution was allowed to present only a select number of photographs that it deemed sexually suggestive. We disagree.

To prove that Senter committed the charged crimes of continuous sexual abuse of a child, the prosecution had to show that Senter touched M. and Ma. with a sexual intent.

(§ 288.5, subd. (a).) "In certain circumstances, evidence of sexual images possessed by a defendant has been held admissible to prove his or her intent." (*People v. Page* (2008) 44 Cal.4th 1, 40.) For instance, in *People v. Memro* (1995) 11 Cal.4th 786, 864 (*Memro*), overruled on other grounds by *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2, the California Supreme Court held that photographs depicting clothed and unclothed male youths were admissible to show the defendant's intent to sexually molest a young boy. The Court reasoned that, "[a]lthough not all were sexually explicit in the abstract, the photographs, presented in the context of defendant's possession of them, yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction. [Citation.]" (*Id*. at pp. 864-865.)

In this case, Senter placed his intent to violate section 288.5 directly at issue by pleading not guilty to the crimes charged. In addition, Senter testified at trial that he had no sexual interest in M. or Ma. The challenged photographs, which the trial court described as "rather sexually suggestive," were thus relevant to determining whether Senter had the requisite intent to sexually molest the two girls. As in *Memro*, the photographs constituted evidence from which the jury could infer that Senter had a sexual attraction to young girls and intended to act on that attraction with M. and Ma. (*Memro*, *supra*, 11 Cal.4th at pp. 864-865.)

Senter claims that the photographs selected by the prosecution were taken out of context because they were only a few of the thousands of photographs that he had taken the girls, and as such, they had minimal probative value when weighed against their prejudicial effect. However, at trial, Senter was allowed to present, and did present, evidence that was specifically aimed at placing these photographs in a non-sexual context. Senter elicited testimony from multiple witnesses that the photographs offered by the prosecution were only a small sampling of the photographs he had taken of M. and Ma. over the years. He also introduced photographs of his children and grandchildren in similar dress and poses to try to illustrate that the images of the girls selected by the prosecution were not sexual in nature. Under these circumstances, we cannot say that the

limited number of photographs presented by the prosecution lacked any probative value or were inherently prejudicial.

Senter also argues that the photographs should have been excluded because they were inflammatory and likely to evoke an emotional response in the jurors. We do not doubt that a reasonable juror would be disturbed by photographs of young girls in sexually suggestive poses. However, the Supreme Court in *Memro* rejected an argument similar to the one that Senter asserts here. In concluding that there was no abuse of discretion in admitting sexually suggestive photographs, the Supreme Court explained that "[t]o be sure, some of this material showed young boys in sexually graphic poses. It would undoubtedly be disturbing to most people. But we cannot say that it was substantially more prejudicial than probative, for its value in establishing defendant's intent . . . was substantial." (*Memro*, *supra*, 11 Cal.4th at p. 865.) Here, the trial court reasonably could have found that the probative value of the photographs on the issue of Senter's intent substantially outweighed any risk of undue prejudice. The trial court therefore did not abuse its discretion or deny Senter due process in admitting the challenged photographs.

IV. CALCRIM No. 1120

Senter contends that the trial court erred in instructing the jury with CALCRIM No. 1120, which defines the elements of a violation of section 288.5, because the instruction removed an essential element of the offense from the jury's consideration in violation of his constitutional rights. Senter specifically challenges the language in CALCRIM No. 1120 that "[t]he touching need not be done in a lewd or sexual manner."[4]

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[4] CALCRIM No. 1120 states, in pertinent part, that "[l]ewd or lascivious conduct is any willful touching of a child accomplished with the intent to sexually arouse the perpetrator or the child. *The touching need not be done in a lewd or sexual manner*. Contact with the child's bare skin or private parts is not required. Any part of the child's body or the clothes the child is wearing may be touched. Lewd or lascivious conduct also includes causing a child to touch his or her own body or someone else's body at the instigation of a perpetrator who has the required intent." (Italics added.)

As an initial matter, the Attorney General argues that Senter forfeited his claim of error on appeal because he did not object to the use of CALCRIM No. 1120 in the trial court. Although Senter failed to object to the challenged instruction, he has not forfeited his argument that the instruction either misstated the law or adversely affected his substantial rights. (§ 1259 ["appellate court may also review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7 [defendant did not waive right to object to instruction alleged to be incorrect statement of law and given in violation of due process]; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 139-140 [defendant's challenge to constitutionality of jury instructions not waived for failure to object because "the constitutional right to have all elements of a criminal offense proved beyond a reasonable doubt is substantial"].) We accordingly consider Senter's challenge to CALCRIM No. 1120, but conclude that it is without merit.

This issue has been resolved by the California Supreme Court in *People v. Martinez* (1995) 11 Cal.4th 434 (*Martinez*). Because the purpose of section 288 is to protect children from sexual misconduct, the statute "prohibits *all* forms of sexually motivated contact with an underage child. Indeed, the 'gist' of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act. [Citation.]" (*Id.* at p. 444.) Thus, "'[i]f [the] intent of the act, *although it may have the outward appearance of innocence,* is to arouse . . . the lust, the passion or the sexual desire of the perpetrator [or the child,] it stands condemned by the statute . . . .' [Citation.]" (*Ibid*.)

For this reason, there is no restriction on "the form, manner, or nature of the offending act." (*Martinez*, *supra*, at p. 444.) It "need not be 'sexual in character.'" (*Ibid*.) Rather, "*any* touching of an underage child is 'lewd or lascivious' within the meaning of section 288 where it is committed for the purpose of sexual arousal." (*Id.* at p. 445; see also *People v. Sigala* (2011) 191 Cal.App.4th 695, 697, 701 [holding that, consistent with *Martinez*, CALCRIM No. 1120's language that the "touching need not be done in a lewd or sexual manner" "accurately reflects settled California law"].) Stated

otherwise, it is not the touching which must be "lewd," but the intent of the perpetrator in committing the act. CALCRIM No. 1120 correctly states the law.

V. Sentencing

The jury found Senter guilty of both counts of continuous sexual abuse of a child under the age of 14 (§ 288.5, subd. (a)), and also found true the special allegations that Senter committed the charged offenses against multiple victims (§ 667.61, former subd. (e)(5)). Pursuant to section 667.61, subdivision (b), the trial court sentenced Senter to a mandatory term of 15 years to life on each count. The court also ordered that the sentences be served consecutively. On appeal, Senter contends that the trial court committed the following sentencing errors: (1) the court improperly relied on the jury's multiple victim finding both to impose terms of 15 years to life under section 667.61 and to order that the terms be served consecutively; (2) the court failed to understand that it had discretion to impose concurrent terms under section 667.61; and (3) the court cited to the incorrect subsection of section 667.61 in imposing the sentence.

"'Section 667.61 requires the trial court to impose a life sentence when the defendant is convicted of an enumerated sexual offense and the People plead and prove one or more of the specified aggravating circumstances.' [Citation.]" (*People v. Valdez* (2011) 193 Cal.App.4th 1515, 1522.) Under section 667.61, a person convicted of the continuous sexual abuse of more than one victim in violation of section 288.5 must be sentenced to 15 years to life for each conviction. (§ 667.61, subds. (b), (c)(9), (e)(4).) Section 667.61 does not require that multiple sentences for this specific offense be served consecutively. (§ 667.61, subd. (i).)[5] Rather, it is within the trial court's discretion to

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[5] Section 667.61, subdivision (i) states, in pertinent part, that "[f]or any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), . . . the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims . . . ." Because Senter's convictions for violations of section 288.5 are contained in paragraph 9 of subdivision (c), the mandatory consecutive sentence requirements of subdivision (i) do not apply.

impose consecutive or concurrent terms. (*People v. Valdez*, *supra*, at p. 1524; *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262.)

The trial court need not state its reasons for imposing consecutive indeterminate sentences (*People v. Murray* (1990) 225 Cal.App.3d 734, 750), and the court is presumed to have been aware of and have followed the applicable law in making its sentencing choices (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496). Where the record on appeal discloses that the trial court was unaware of the scope of its discretion in sentencing, the case generally must be remanded to permit the court to impose a sentence with the proper understanding of its discretion. (*People v. Rodriguez*, *supra*, 130 Cal.App.4th at p. 1263.) However, remand is not required if the record demonstrates that the trial court was aware of its discretionary authority, or if the record is silent as to whether the court misunderstood the scope of its discretion. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228-1229.) In other words, "we cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of [its] discretion. [Citation.]" (*People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527.)

With respect to Senter's contentions that trial court did not properly exercise its discretion in imposing consecutive sentences, the Attorney General asserts that Senter forfeited these claims on appeal by failing to raise a timely objection in the trial court. Our Supreme Court has held that the forfeiture doctrine applies "to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices." (*People v. Scott* (1994) 9 Cal.4th 331, 353.) Consequently, "complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*Id*. at p. 356.) Because Senter did not object to the trial court's imposition of consecutive terms at the sentencing hearing, we agree that he has forfeited these issues on appeal. In any event, we conclude that Senter's claims of sentencing error lack merit.[6]

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[6] In light of this conclusion, Senter's alternative argument that his trial counsel was ineffective in failing to make an objection at the sentencing hearing also fails.

First, we reject Senter's argument that the trial court relied solely on the multiple victim circumstance both to impose mandatory terms of 15 years to life under section 667.61, subdivision (b), and to order that the terms be served consecutively. In deciding to impose consecutive sentences, the trial court stated as follows: "With regards to this matter, the court finds that the defendant is ineligible and unsuitable for the grant of probation due to the fact that there are separate victims in this matter, and separate offenses, and there appears to be planning and premeditation. I do find it's appropriate for consecutive sentence." Thus, in addition to noting that there were separate victims, the trial court also found that there were separate offenses (see Cal. Rules of Court, rule 4.425(a)(3)), and there appeared to be planning and premeditation in the commission of the crimes (see Cal Rules of Court, rules 4.421(a)(8) and 4.425 (b)). The trial court's findings on these additional circumstances were sufficient on their own to support the imposition of consecutive sentences.

Second, based on the trial court's stated reasons for the consecutive sentences, we also reject Senter's argument that the court was unaware of its discretionary authority to impose concurrent terms. In support of this argument, Senter relies on the prosecution's incorrect statements in its sentencing memorandum and at the sentencing hearing that consecutive sentences were mandatory in this case under section 667.61, subdivision (i). However, nothing in the record suggests that the trial court relied on these statements by the prosecution in making its sentencing decision. In articulating its reasons for ordering that the sentences be served consecutively, the trial court never indicated that it believed consecutive sentences were statutorily required. Rather, the trial court set forth the aggravating circumstances that it found were present in the case and then specifically stated that it found that consecutive terms were "appropriate." The record accordingly reflects that the trial court affirmatively exercised its discretion to order consecutive sentences based on its evaluation of the applicable aggravating circumstances.

Third, contrary to Senter's claim on appeal, the trial court cited to the correct statutory authority in sentencing him to two mandatory terms of 15 years to life "under [section] 667.61(e)(5)." At the time of Senter's sentencing hearing on April 29, 2010, the

multiple victim circumstance that the jury found to be true was contained in subsection (e)(5) of section 667.61.

VI. Cumulative Error

Senter last contends that the cumulative effect of the claimed errors deprived him of due process of law and a fair trial. We disagree. Whether considered individually or for their cumulative effect, none of the errors alleged by Senter affected the process or accrued to his detriment. (*People v. Sanders* (1995) 11 Cal.4th 475, 565.) As our Supreme Court has observed, a defendant is "entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) In this case, Senter received a fair trial. There was no cumulative error requiring reversal.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.