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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER BARKLEY, Defendant and Appellant.	H032690 (Santa Clara County Super. Ct. Nos. CC757145, CC644740)

A jury convicted defendant Christopher Barkley of oral copulation with a minor under 16 (count 1), lewd or lascivious acts on a child 14 or 15 (count 2), and five counts of furnishing a controlled substance to a minor by an adult (counts 5-10). It also found true allegations that the minors were four years younger than defendant for purposes of one-, two-, or three-year sentence enhancements. The trial court then found that a prior prison-term conviction suffered and admitted by defendant constituted a strike for purposes of the Three Strikes law over defendant's objection that the prior did not amount to a strike because it was a misdemeanor. The trial court sentenced defendant to 30 years and four months consisting of a 12-year midterm (six years doubled under Three Strikes law) for count 5 plus a two-year enhancement, 16 months consecutive (one-third midterm doubled) for count 1, four years consecutive (one-third midterm doubled) each for counts 6, 7, and 9 plus eight-month enhancements for each, and a one-year term for the prior-prison-term finding. It imposed concurrent terms for counts 2 (four-year midterm), 8 (12-year midterm), and 10 (12-year midterm).

On appeal, defendant (1) asks that we review the sex-offense victim's confidential records that the juvenile and trial court declined to disclose in order to determine whether they were material and should have been disclosed, (2) contends that the trial court abused its discretion by excluding evidence that the sex-offense victim had once falsely accused another of sexual assault, (3) argues that the trial court erred by admitting evidence and instructing the jury (CALCRIM No. 1193) about Child Sexual Abuse Accommodation Syndrome (CSAAS), (4) urges that he suffered improper multiple convictions (counts 6, 7, & 10) and improper multiple punishments (counts 1, 2, 6, 7 & 10) (Pen. Code, § 654), (5) claims that insufficient evidence supports that he had suffered a strike, and (6) complains that the trial court imposed an unauthorized restitution fine.[1] We modify and affirm the judgment.[2]

BACKGROUND

The 14-year-old victim was a runaway. She lived with her 17-year-old boyfriend, J. Z., in an apartment on Almaden Avenue. Defendant lived in a neighboring apartment.

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[1] Defendant adds that he received ineffective assistance of counsel in the event we determine that the first three claims of error have been forfeited by a failure to object. And he argues that the cumulative prejudice from the first three claims of error justifies reversal in the event that no single error is prejudicial. Since we are addressing the claims on the merits and finding no error, we need not further mention these points.

[2] The trial court pronounced judgment in three cases against defendant: No. CC644740, No. CC757145, and No. CC509015. Defendant states in his brief that this is an appeal from the judgments in cases No. CC644740 and No. CC757145. But he raises issues from case No. CC644740 only. As to the two other cases, he (1) asks that we strike the same strike finding in case No. CC757145 that the trial court made in case No. CC644740, and (2) notes that his restitution-fine point is related to all three cases. We observe that defendant's notice of appeal references case No. CC757145 only. And it describes that the appeal is from a judgment based on a sentence or matters occurring after a plea. This description is consistent with case No. CC757145--a case in which defendant pleaded guilty. Ordinarily, this specific description would control what issues are on appeal. But since the notice of appeal references the single judgment date and there is but one abstract of judgment, we will treat the appeal as applying to all three cases.

After an argument with J. Z., the victim went to defendant's apartment to obtain drugs. At some point, defendant produced methamphetamine and the two smoked the drug. (Count 5.) The two got high and defendant orally copulated the victim. (Count 1.) They then engaged in sexual intercourse. (Count 2.) Afterward, defendant gave the victim money and methamphetamine. (Count 6.) He said that he would hurt her if she told anybody. (Count 4.)[3] On another occasion, the victim and J. Z. visited defendant at his new apartment on Duane Street and J. Z. gave defendant $20 in exchange for methamphetamine. (Count 9.) On another occasion, the two went to the Duane Street apartment, defendant produced methamphetamine, defendant sent J. Z. to Home Depot, defendant and the victim smoked the methamphetamine (count 7) and engaged in sexual intercourse (count 3).[4] When J. Z. returned, defendant gave methamphetamine to the victim (count 8) and J. Z. (count 10) who smoked it in the apartment before leaving.

Five or six months after the sex-offense incidents, the victim underwent counseling and revealed the incidents to the therapist who reported them to the police.

At trial, defendant's tactic was to impeach the victim with inconsistencies and her delayed reporting of the sex abuse. To this end, defendant had moved the juvenile court to disclose the victim's confidential file and had received some, but not all, of the file. And he had moved the trial court to review in camera the therapist's records and had received one of four pages. Over defendant's objections made during in limine proceedings and after the victim testified, Carl Lewis testified as an expert witness concerning CSAAS. According to Lewis, CSAAS is essentially a set of ideas deriving from a study to determine how victims responded to and reported child abuse; its purpose is to counsel the adult community against having preconceived notions about how a child

[3] The jury acquitted defendant of dissuading a witness by force.

[4] The jury failed to reach a verdict on a second count (count 3) of lewd or lascivious acts on a child 14 or 15, and the trial court later dismissed the charge.

would react; for example, it is common for a child to delay reporting child abuse. Defendant then introduced his own expert to rebut Lewis's testimony.

VICTIM'S CONFIDENTIAL RECORDS

Defendant asks that we review the victim's juvenile court file and therapist's records, which were not disclosed, to determine whether they were material and should have been disclosed. (*People v. Martinez* (2009) 47 Cal.4th 399, 453.) The files and records were transmitted to us under seal. Defendant directs us to an envelope designating sealed pages 15 through 70 from the juvenile court.[5] And the therapist's records are in a sealed envelope together with a settled statement from the trial court.

"We have reviewed the entire confidential juvenile court and superior court files, and have concluded that the undisclosed information was not material to the defense. In addition, having reviewed the confidential file[s], we conclude the contents do not support any claim that further disclosure is required to protect defendant's right to a fair appeal." (*People v. Martinez*, *supra*, 47 Cal.4th at p. 454, fn. omitted.)

EVIDENCE THAT THE VICTIM HAD ONCE FALSELY ACCUSED ANOTHER OF SEXUAL ASSAULT

During in limine proceedings, defendant sought an admissibility ruling as to evidence that the victim had made false "allegations against an individual saying that someone else was molested by him." He referred to the police report wherein the victim had stated that her friend B.'s father had molested the victim and also that B. knew that the father had molested their mutual friend, C. He proffered that C. would testify and deny that the father had molested her. According to defendant, such evidence would have a "direct bearing on [the victim's] credibility as a witness." When the trial court asked defendant how C.'s statement would impeach the victim, defendant gave an

[5] There is a second envelope of juvenile court files designating sealed pages 5 through 36. The content shows that this envelope contains what the juvenile court disclosed to defendant.

unsatisfactory answer prompting the trial court to clarify: "But the statement you have from the alleged victim . . . in this case is that [the victim] said [B.] knew that [the father] had done this to someone else." When defendant answered affirmatively, the trial court offered: "So we don't have a statement in the police report or that you have possession of that [the victim] spoke directly to [C.], so I don't even think there is an impeachment value, although maybe you're bridging gaps that don't lend themselves to be bridged." Defendant explained: "Well, my position is more--that frankly, it doesn't even go to the truth in and of itself, but rather her willingness to tell the police that someone was molested and that person adamantly denies it, so that's the reason." The trial court concluded as follows: "I understand, but this is really not impeachment because that doesn't impeach the alleged victim in any way. [The victim] is just telling the police, hey, you ought to know that I've heard that something else is going on out there with [the father]. But there are no statements by [the victim] that can be impeached from any other statements in the police report from [C.]. [¶] So for that reason, I am not going to allow her to testify under Evidence Code section 350 or 352.[6] And the court believes there is no probative value and that obviously the chance of confusion to the jury would be high, because it took me awhile just to sort through it myself. [¶] And also there is no possibility of this being cleaned up by redaction to the point it makes sense to the jury. And even if we could do that the jury is going to know that it has something to do with sexual molestation or guess that, because why else would they ask [the victim] what [the father] did. [¶] So for all of those reasons I am not going to allow [C.] to testify. However, if you find out later there is a statement which the victim . . . made which is impeachable by [C.] or anybody else I will be happy to review it." Defendant then urged that the evidence was admissible under section 782 but the trial court ruled: "Just so we're clear. Under [section] 782 subsection 2 you haven't met your burden. Secondly,

[6] Further unspecified statutory references are to the Evidence Code.

even if you had and even if the court allowed it to be cleaned up there is just no impeachment value of this statement of [C.], it's just not there."

Defendant contends that the trial court abused its discretion by denying his motion and that the exclusion of the evidence "violated due process." According to defendant, the evidence was admissible under section 782. But it is crystal clear that the trial court excluded the evidence under section 352 and only when defendant belatedly raised section 782 did the trial court make a fallback ruling. Thus, whether the evidence was admissible under section 782 is immaterial so long as the trial court correctly applied section 352. Defendant argues that the trial court erred under section 352 because the proffered evidence was relevant to the victim's credibility and would not "consume a significant portion of time or confuse or mislead the jury." Defendant's analysis is erroneous.

Section 1103 provides, in relevant part, as follows: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

Section 780, subdivision (e), provides: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] . . . [¶] (e) His character for honesty or veracity or their opposites."

"[A] prior false accusation of rape is relevant on the issue of a rape victim's credibility." (*People v. Franklin* (1994) 25 Cal.App.4th 328, 335 (*Franklin*), citing *People v. Adams* (1988) 198 Cal.App.3d 10, 18.)

"The fact that a witness stated something that is not true as true is relevant on the witness's credibility whether she fabricated the incident or fantasized it. [¶] The evidence therefore constitutes 'any matter that has any tendency in reason to prove or disprove the truthfulness of his [or her] testimony at the hearing,' including the extent of the witness's capacity to perceive, to recollect, or to communicate any matter about which he or she testified, the extent of the witness's opportunity to perceive any matter about which he or she testified, and the existence or nonexistence of any fact testified to by the witness. (§ 780, subds. (c), (d) & (i).)" (*Franklin, supra*, 25 Cal.App.4th at pp. 335-336.)

"As with all relevant evidence, however, the trial court retains discretion to admit or exclude evidence offered for impeachment." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) Under section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "For this purpose, 'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that ' "uniquely tends to evoke an emotional bias against defendant" ' without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

We emphasize that it is the exclusive province of the trial court to determine whether the probative value of evidence outweighs its possible prejudicial effect. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 402.) And the trial court's exercise of discretion on this issue will not be disturbed on appeal absent a clear showing of abuse. (*Ibid.*) This rule requires that the reviewing court engage in all intendments and presumptions in support of the decision and consider the evidence in a light most favorable to the prevailing party. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1015.) It also requires that the party claiming abuse of discretion affirmatively establish the point. (*Smith v. Smith* (1969) 1 Cal.App.3d 952, 958.) It requires "a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that

resulted in a manifest miscarriage of justice." (*People v. Rodriguez, supra*, 20 Cal.4th at pp. 9-10.)

Defendant's problem in showing that the trial court abused its discretion in excluding the evidence is that the evidence does not necessarily show that the victim made a false accusation. The victim said that B. knew that B.'s father had molested C. From this, the trial court could have rationally concluded, as it apparently did, that the victim was simply repeating what B. had told her rather than making an accusation against the father. Thus, the inference that the victim made a false accusation was weak and C.'s testimony that the father had not molested her would little impugn the victim's credibility. Undoubtedly, as implicitly recognized by the trial court, the matter would devolve into a mini-trial involving the victim and collateral witnesses (B., C., and the father) who would support and counter whether the victim had in fact accused the father, whether the father had molested C., whether B. knew about the molestation, and whether B. and C. had motives to lie so as to shield the father from exposure. Excluding such evidence is plainly not arbitrary, capricious, or patently absurd.

"The Supreme Court upheld a trial court's exercise of discretion to exclude evidence pursuant to section 352 under facts similar to those presented here. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1097.) The court stated: '[A witness] testified that when she rejected defendant's advances, he pulled a gun and said, "you wouldn't argue if I pulled the trigger." Defense counsel sought to impeach [the witness with] evidence that she had made false charges of sexual molestation against two other men. The trial court upheld an objection under Evidence Code section 352. Its ruling is not an abuse of discretion. The value of the evidence as impeachment depends upon proof that the prior charges were false. This would in effect force the parties to present evidence concerning two long-past sexual incidents which never reached the point of formal charges. Such a proceeding would consume considerable time, and divert the attention of the jury from the case at hand.' " (*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1458 (*Tidwell*).)

In *Tidwell*, the court made a similar point: "The same is true here. Although there was some evidence that [the victim] made inconsistent statements, there was no conclusive evidence that her prior rape complaints were false. The defense was unable to obtain evidence from the men that [the victim] accused, and inferences could be drawn either way from the circumstances of the prior incidents and [the victim's] statements concerning the incidents. In addition to the weaknesses in the evidence concerning falsity of the rape complaints, admitting the evidence would have resulted in an undue consumption of time as the defense attempted to bolster its view and the prosecution introduced evidence that [the accused rapist] had raped another female student. We therefore cannot say that the trial court abused its discretion in excluding the evidence based on the weak nature of the evidence of falsity of the complaints and the confusion of the jury and consumption of time it would have engendered for the parties to embark on the task of litigating the truthfulness of [the victim's] prior complaints." (*Tidwell*, *supra*, 163 Cal.App.4th at p. 1458.)

The same is true here. Defendant simply reargues his point and fails to demonstrate that the trial court's view was irrational. He therefore fails to carry his burden to show abuse of discretion.

We also find no constitutional error. The state and federal Constitutions guarantee a criminal defendant the right to confront and cross-examine witnesses against him. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) Those rights are violated when the government interferes with the exercise of a defendant's right to present witnesses in his own defense. (*People v. Mincey* (1992) 2 Cal.4th 408, 460.) As a fundamental element of due process of law, a criminal defendant must be afforded a meaningful opportunity to present a complete defense, subject to the limitations imposed by the rules of evidence. (*People v. Lucas* (1995) 12 Cal.4th 415, 464.) Further, "Central to the Confrontation Clause is the right of a defendant to examine a witness's credibility. See *Davis* [*v. Alaska* (1974) 415 U.S. 308,] 316; see also *Boggs v. Collins*, 226 F.3d 728, 736 (6th Cir. 2000)

('At the core of the Confrontation Clause is the right of every defendant to test the credibility of witnesses through cross-examination.')." (*United States v. Adamson* (9th Cir. 2002) 291 F.3d 606, 612.) However, "The right to present exculpatory evidence has limitations. (*Taylor v. Illinois* [(1988)] 484 U.S. [400,] 410.) Rules of procedure governing the organized presentation of facts and allowing parties the opportunity to contradict or explain the opponent's case must be adhered to." (*People v. Jackson* (1993) 15 Cal.App.4th 1197, 1203.) Ordinarily, proper application of the rules of evidence does not impermissibly infringe upon the accused's right to present a defense. (*People v. Lucas, supra,* at p. 464.) Although cross-examination to test the credibility of a prosecuting witness in a criminal case should be given wide latitude (*People v. Brown* (2003) 31 Cal.4th 518, 545), "Exclusion of impeaching evidence on collateral matters which has only slight probative value on the issue of veracity does not infringe on the defendant's right of confrontation." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 350.)

CSAAS

CSAAS, which was developed as a therapeutic tool to assist mental health professionals, describes five stages or behaviors commonly found in or experienced by children who have been sexually abused, including secrecy, helplessness, entrapment and accommodation, delayed disclosure, and retraction. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 389, fn. 3, 392, fn. 8 (*Bowker*).) Evidence regarding CSAAS " ' "is admissible *solely* for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested." ' " (*People v. Housley* (1992) 6 Cal.App.4th 947, 955 (*Housley*), quoting *Bowker, supra,* at p. 394.) Such evidence, however, "is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident--e.g., a delay in reporting--is inconsistent with his or her testimony claiming molestation." (*People v. McAlpin* (1991)

53 Cal.3d 1289, 1300 (*McAlpin*).) The expert testimony is "admissible for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation." (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744 (*Patino*).)

Because particular aspects of CSAAS are as consistent with false testimony as true testimony, and there is a possibility that a jury could use the expert evidence to improperly infer that the abuse occurred, the admission of such evidence is subject to certain limitations. (*Housley*, *supra*, 6 Cal.App.4th at p. 955; *Bowker*, *supra*, 203 Cal.App.3d at pp. 393-394; *Patino*, *supra*, 26 Cal.App.4th at p. 1744.) First, the CSAAS evidence must be addressed or tailored to some specific myth or misconception suggested by the evidence. (*Housley*, *supra*, at p. 955.) "Identifying a 'myth' or 'misconception' has not been interpreted as requiring 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 . . . paradoxical behavior, including a delay in reporting a molestation." (*Patino*, *supra*, at pp. 1744-1745.) CSAAS testimony "is admissible to rehabilitate [the complaining] witness's credibility when the defendant suggests that the child's conduct after the incident--e.g., a delay in reporting--is inconsistent with his or her testimony claiming molestation." (*McAlpin*, *supra*, 53 Cal.3d at p. 1300.) Second, the jury must be admonished that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true, but is admissible solely to show that the victim's reactions are not inconsistent with having been molested. (*Housley*, *supra*, at pp. 955, 958-959.)

A trial court's decision "to admit expert testimony 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.' " (*McAlpin*, *supra*, 53 Cal.3d at p. 1299.)

During in limine proceedings, defendant sought to preclude Lewis's CSAAS expert testimony on the ground that CSAAS is limited to children molested in the home and inapplicable to children living with boyfriends. He added that there was a great danger of prejudice because the jury would use the CSAAS components as a litmus test.

The trial court reserved ruling on the issue until after the victim testified. After defendant cross-examined the victim, the prosecutor noted that defendant had "developed a minimum of three themes, one, that she is lying, two, that she's not to be believed because of the delayed report and three, because there was conflicted reporting from the alleged victim on the alleged sexual assault." The trial court then explained as follows: "[B]ut that the secrecy, the accommodation, the delay, conflict, and the letting out a little bit of information at a time. For instance, in this case we have it was kissing and then it was intercourse that she revealed lends itself to an allowance of the CSAAS and indicates the CSAAS is probative. The prejudice is very low. There is little chance of confusion because the jurors understand that Mr. Lewis does not know the facts of this case so the parts that he is talking about which don't apply, they don't have to use and the parts he is talking about that do apply they may or may not use." It instructed the jury about CSAAS in the language of CALCRIM No. 1193 before Lewis's testimony and, as follows, during the jury-instruction phase of the trial: "You have heard evidence regarding Child Sexual Abuse Accommodation Syndrome. This 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 [the victim's] conduct was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of her testimony."

Defendant argues that the trial court erred in admitting the CSAAS evidence because it "is relevant only to a child who is secretive and helpless from sexual abuse by a parental figure." But he cites no authority for the proposition. Again, the evidence is admissible for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested. Admissibility is not dependent upon a syndrome connected with a parental figure: "An expert has little need to refer to the syndrome in order to testify that a particular type of behavior is not inconsistent with a child having been abused." (*Bowker*, *supra*, 203 Cal.App.3d at p. 392, fn. 8.)

Defendant was free to put on competing evidence and argue that CSAAS was inapplicable to the case, as he did. But he is incorrect in arguing that the CSAAS evidence was inadmissible as a matter of law.

Defendant urges that knowledge of sexual abuse has become so widespread, since the time when the CSAAS theory was first introduced, that the syndrome is no longer a proper subject of expert testimony. This claim--that the public has become so well informed about the behavior of child abuse victims as to obviate CSAAS evidence--is speculative and contrary to the controlling authority in this state. (See *People v. Brown* (2004) 33 Cal.4th 892, 906-907 [reaffirming earlier reasoning for admitting CSAAS evidence].) To the extent that our Supreme Court has recognized that such evidence may be relevant, useful, and admissible in a given case, as an intermediate appellate court, we are in no position to rule otherwise. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) In any event, Lewis's testimony concerning CSAAS was helpful in explaining the different stages of reaction that some victims progress through. (See *Patino, supra*, 26 Cal.App.4th at p. 1744 [CSAAS evidence admissible to disabuse misconceptions about how a child reacts to molestation].) Jurors may have an understanding that victims of abuse are reluctant to report the offense, but they may not understand the reasons for the delayed reporting, or why the victims did not retaliate. Accordingly, the trial court could have reasonably found that the expert testimony would add to the jurors' common fund of information regarding the reactions of abuse victims. Therefore, we conclude the trial court did not abuse its discretion in admitting the expert's testimony.

Defendant finally argues that Lewis's testimony ran afoul of the rule that proscribes testimony which recites the facts of the case at trial or obviously similar facts. (See, e.g., *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1384.) He relies on portions of Lewis's testimony where he asserts that Lewis "illustrated each category with 'examples' which coincided with the facts of the case." There is no merit to this point.

While particular "examples" arguably mirror some facts of the case, the "examples" could mirror the facts in any child abuse case. For instance, defendant complains that Lewis explained the stage of delayed, conflicting, and unconvincing disclosure as a stage that "could be caused by feeling uncomfortable about the subject or an inability to get help." He then makes the leap that the explanation mirrors the facts of the case because the victim "was a runaway, hiding from the authorities."

When Lewis's testimony is read as a whole, however, it is apparent that he is testifying about the CSAAS generally, not opining about the facts of the particular case or the victim's credibility. We see no error on this ground.

To the extent that defendant relies on several out-of-state cases that have excluded CSAAS evidence in its entirety on a variety of grounds to argue both that California should exclude this type of evidence in all cases and that, in the instant case, the evidence was improperly admitted (see, e.g., *Com. v. Dunkle* (Pa. 1992) 602 A.2d 830 [testimony about uniformity of behaviors of abused children not sufficiently established to have gained general acceptance in its particular field]), we reject the argument. Defendant has not produced any evidence or authority that CSAAS evidence is no longer accepted in the scientific community or that California courts are prepared to reconsider their opinions accepting such evidence. Again, the California Supreme Court has referred to the admissibility of CSAAS evidence in a variety of factual contexts to support various rulings.

Defendant urges that the admission of the evidence transgressed his due process rights because the evidence was irrelevant and prejudicial. But we have pointed out that the evidence was highly probative because it helped the jurors to understand that children who are molested sometimes act in ways that are counterintuitive. The evidence was not unduly prejudicial because it was not geared toward the facts of this case specifically, but was provided as a general explanation of how children who are abused sometimes act.

Defendant finally claims that the trial court erred by instructing the jury in the language of CALCRIM No. 1193 because it "advised the jury to use CSAAS evidence in evaluating the credibility of the alleged victim's testimony, which is the same as telling the jury to use the evidence to determine whether her molestation claim was true." We disagree.

CALCRIM No. 1193 is simply a cautionary instruction warning jurors they must not consider CSAAS testimony as evidence that the defendant committed the offense, and that they may consider CSAAS evidence only for the limited purpose of determining whether the victim's conduct was inconsistent with the conduct of someone who had been molested. (See *McAlpin, supra,* 53 Cal.3d at pp. 1300-1301 [generally, CSAAS evidence is offered to disabuse a jury of misconceptions it might hold about how a child reacts to a molestation].) It is true that CALCRIM No. 1193 broadens the scope of CSAAS evidence to allow the jury to consider it in evaluating the victim's credibility. But, when the victim's credibility is attacked, "[t]he [CSAAS] testimony is pertinent and admissible." (*Patino, supra,* 26 Cal.App.4th at p. 1745.) Here, the victim's credibility was in dispute. Thus, the jury could properly consider CSAAS evidence in weighing the victim's credibility and CALCRIM No. 1193 correctly stated the law in this regard.

MULTIPLE CONVICTIONS AND MULTIPLE PUNISHMENTS

Defendant contends that furnishing methamphetamine to the victim at the Almaden Avenue apartment after the sex acts (count 6) was a cooperative act with furnishing methamphetamine to her before the sex acts (count 5). He asserts that the two acts constitute but one offense and cannot support multiple convictions. He similarly reasons that furnishing methamphetamine to the victim and J. Z. at the Duane Avenue apartment after the sex act (count 7-victim; count 10-J. Z.) was a cooperative act with furnishing methamphetamine to the victim before the sex act (count 8). He concludes that insufficient evidence supports his convictions for counts 6, 7, and 10. We disagree.

In *People v. Lopez* (1992) 11 Cal.App.4th 844 (*Lopez*), the court held that it is permissible to convict a defendant of more than one nonincluded offense arising out of a single indivisible course of action and that the remedy for such a circumstance was found in Penal Code section 654, precluding multiple punishment. (*Lopez*, *supra*, at p. 848.)

Lopez involved an indistinguishable set of convictions under Health and Safety Code section 11352, offering to sell cocaine and transporting cocaine. Both offenses resulted from a set of events in which it was arranged to sell two kilograms of cocaine to an undercover detective, the cocaine was transported in a car to the site where the sale was to take place and, when the cocaine was removed from the trunk of the car, the defendant and his cohort were arrested. (*Lopez*, *supra*, 11 Cal.App.4th at p. 846.)

The court analyzed the development of the decisional law in the area of double conviction and double punishment, observing that the defendant's "criminal activities were directed to the single goal and objective of selling two kilograms of cocaine." (*Lopez*, *supra*, 11 Cal.App.4th at p. 850.) It cited Supreme Court cases that recognized a blurring of the line between the double-conviction prohibition and the double-punishment prohibition, which applied the remedy of staying punishment rather than reversing convictions. (*Id.* at p. 849, citing *People v. Pearson* (1986) 42 Cal.3d 351, 358-359, and *In re Adams* (1975) 14 Cal.3d 629, 635.) It concluded: "This 'entire transaction should reasonably be viewed as constituting . . . the commission of a single punishable offense.' ([*In re Adams, supra,*] at p. 635.) Here, appellant has already been afforded that remedy by the trial court, namely, a stay of the punishment imposed pursuant to count two. [¶] . . . [¶] Appellant was properly convicted of two counts of violation of Health and Safety Code section 11352." (*Lopez*, *supra*, at p. 850.)

We agree with *Lopez.* Thus, if defendant's acts amounted to a single course of conduct, the remedy is found in the bar against multiple punishment.

Penal Code section 654 provides, in relevant part: "[a]n 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." The purpose of the statute is "to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one offense--the one carrying the highest punishment." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) The section's protection extends to cases in which a defendant engages in a course of conduct that violates different offenses and comprises an indivisible course of conduct punishable under separate statutes. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) As this court explained in *People v. Braz* (1997) 57 Cal.App.4th 1, 10, multiple punishment is permissible notwithstanding Penal Code section 654 if the defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other. [Citation.] A defendant's criminal objective is 'determined from all the circumstances and is primarily a question of fact for the trial court, whose findings will be upheld on appeal if there is any substantial evidence to support it.' " We must view the evidence in a light most favorable to the respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698.) The proper procedure for disposing of a term banned by Penal Code section 654 is to impose and stay the sentence. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 420.)

Defendant contends that his punishment for the sex-acts counts (counts 1 & 2) and after-sex-acts furnishing count at the Almaden Avenue apartment (count 6) should be stayed because they "shared the same objective of distributing drugs in exchange for sexual favors" for which he was punished under his conviction for count 5. He similarly argues that the punishment for counts 7 and 10 "must be stayed in lieu of the punishment for count eight because [he] shared the same objective." According to defendant, "in

both instances, [he] shared a single objective to provide drugs to [the victim] (for sex or for recreational purposes)." There is no merit to defendant's contention.

The trial court was not required to make the inferences that defendant makes. There was no direct testimony as to defendant's intent. The trial court could therefore have accepted that defendant acceded to the victim's request for methamphetamine when she first appeared at defendant's Almaden Avenue apartment. (Count 5.) It could have then accepted that the two decided to have sex after getting high. (Counts 1 & 2.)[7] It could have further accepted that defendant gave the victim more methamphetamine to encourage the victim's silence about the sex acts. (Count 6.) The same can be said for the before-(count 7) and after-(count 8) sex furnishings at the Duane Avenue apartment. As to count 10, the trial court could certainly have viewed that act of furnishing as displaying an independent objective. The act was separate from counts 7 and 8 given that defendant furnished to the victim in counts 7 and 8 while he furnished to J. Z. in count 10; and the act was separate from count 9 given that defendant furnished to J. Z. in count 10 at a separate time than he furnished to J. Z. in count 9.

STRIKE PRIOR

Defendant contends that the trial court erred by concluding that his prior conviction constituted a strike. According to defendant, his prior was punishable as either a felony or misdemeanor and he had been sentenced as a misdemeanant. But defendant raised that very issue on appeal in another case. In *People v. Barkley* (2008) 166 Cal.App.4th 1590, we concluded that defendant's prior conviction was a felony (and a strike) because the trial judge granted probation and required that defendant serve a jail sentence as a condition of probation, a sentence "consistent with felony probation and inconsistent with the imposition of a misdemeanor jail sentence." (*Id.* at p. 1595.)

[7] Defendant concedes that each sex act is a discrete crime that can be separately punished. (*People v. Harrison, supra,* 48 Cal.3d at p. 324.)

Defendant argues that *Barkley* was wrongly decided. We agree with the conclusion reached in that case for the reasons stated therein. No purpose would be served by repeating the reasoning here.

The parties agree that the trial court stayed a five-year enhancement (Pen. Code, § 667, subd. (a)) stemming from defendant's admission of the prior that had been alleged in the information in relation to count 4. Since defendant was acquitted of count 4, there is no justification for the punishment. We will therefore strike the sentence imposing and staying the enhancement.

RESTITUTION FINES

Under Penal Code sections 1202.4 and 1202.45, the trial court imposed a maximum $10,000 restitution fine in case No. CC644740, an $800 restitution fine in case No. CC757145, and a $400 restitution fine in case No. CC509015 together with matching parole revocation fines, the latter of which were suspended.

Defendant claims that the imposition of separate fines in each case totaling more than $10,000 was unauthorized. We agree and strike the fines imposed in two of the three cases, leaving a single restitution fine of $10,000 and a suspended matching parole revocation fine of $10,000.

Penal Code section 1202.4, subdivision (a)(3)(A), provides that, in addition to any other penalty provided or imposed under law, the court shall order a person convicted of a crime to pay a restitution fine in accordance with Penal Code section 1202.4, subdivision (b). Penal Code section 1202.4, subdivision (b) provides, "In every *case* where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (Italics added.) Penal Code section 1202.4, subdivision (b)(1), states that the fine shall be set between $200 and $10,000 for felonies.

Defendant argues that the three cases herein constituted one case for purposes of sentencing. He relies on *People v. McNeely* (1994) 28 Cal.App.4th 739 (*McNeely*), and *People v. Ferris* (2000) 82 Cal.App.4th 1272 (*Ferris*).

In *McNeely*, the court addressed a claim similar to defendant's claim here. There, at separate hearings, the defendant pleaded guilty to eight burglaries charged in one information and two burglaries charged in another. At the next hearing, the court imposed sentence on all charges and also ordered the defendant to pay $93,000 in restitution to the various victims under former Government Code section 13967, subdivision (c), which applied at that time. On appeal, the defendant claimed that restitution was limited to $10,000. The reviewing court agreed. It explained that the statute "did not give the court authority to order restitution up to $10,000 for each victim or on each count. *Nor did it allow a restitution order exceeding $10,000 where, as here, a defendant is sentenced in one hearing on two or more cases.*" (*McNeely, supra*, 28 Cal.App.4th at p. 743, italics added.) Noting cases limiting restitution fines to the $10,000 limit, regardless of the number of victims or counts, the court observed that "[w]hile a trial court can separately sentence a defendant on different cases at a single hearing [citation], here the court combined the charges in both cases in imposing the prison term and ordering restitution. We do not believe this creates separate sentencing proceedings on the two cases. When a penal statute is ambiguous, it must be construed in the light most favorable to the defendant. [Citation.] When [Government Code] section 13967 is construed in this light, a restitution order on a crime committed in 1989 is limited to $10,000." (*Id.* at pp. 743-744.)

In *Ferris*, the court addressed a similar claim concerning restitution fines under Penal Code sections 1202.4 and 1202.45. As in *McNeely*, the defendant was charged in two cases with crimes committed on different occasions. After the defendant pleaded not guilty, the prosecutor moved to join the cases for trial under Penal Code section 954. The court granted the motion but did not formally consolidate the two cases under a single

information and case number. Thereafter, the jury returned separate verdicts of guilt in each case, and separate probation reports were prepared. At sentencing, the court imposed $10,000 restitution and matching parole revocation fines in each case. On appeal, the defendant claimed that the imposition of separate fines totaling more than $10,000 was unauthorized because the two cases had been consolidated, and Penal Code sections 1202.4 and 1202.45 limited fines to $10,000 "[i]n every case" where a person is convicted of a felony and the sentence includes a period of parole. (*Ferris*, *supra*, 82 Cal.App.4th at pp. 1274-1276.) To resolve the defendant's claim, the court construed the meaning of the phrase "in every case."

Observing that "joinder" and "consolidation" are terms often used interchangeably, the court first opined that under the facts of the case, any linguistic distinction was irrelevant because clearly, the defendant was "substantively tried and sentenced in one joint case." (*Ferris*, *supra*, 82 Cal.App.4th at p. 1277.) Finding the case similar to *McNeely*, the court noted that Penal Code sections 1202.4 and 1202.45 "do not specify whether the phrase 'every case' means every separately charged and numbered case or every jointly tried case." (*Ferris*, *supra*, at p. 1277.) Given this ambiguity, the court adopted the construction more favorable to the defendant and concluded that the phrase in " 'every case' " "includes a jointly tried case although it involves charges in separately filed informations." (*Ibid.*) The court noted that the charges had been joined for trial, which "effectively" joined the two cases despite the fact that they retained separate case numbers. Accordingly, the court held that it was error to impose restitution exceeding the statutory maximum of $10,000. The court further observed that allowing separate restitution fines in a case involving separate informations but joint trials and sentencing could lead prosecutors to seek numerous fines by filing multiple informations that allege a single offense. The court declined to condone such an exercise of form over substance.

In *People v. Enos* (2005) 128 Cal.App.4th 1046 (*Enos*), at a single hearing, the defendant entered into a negotiated disposition and pleaded guilty to charges alleged in three separate cases. The trial court imposed separate restitution and parole revocation fines in each case, totaling $1,800. Citing *Ferris*, the defendant claimed that the imposition of three separate restitution fines was unauthorized because the three separate cases were resolved in a comprehensive plea agreement at a single sentencing hearing. The court disagreed, finding *Ferris* inapplicable for two reasons.

"First, the facts are different. Here, there was never a motion to join or consolidate the three cases, and, even though there was a combined sentencing hearing, the cases were not tried together, as they were in *Ferris.* Here, throughout the proceedings, the trial court and the parties treated the cases as separate. In addition, three separate appellate records were prepared, each corresponding to its own number. Separate minute orders and separate notices of appeal were filed in each case.

"Second, we think the *Ferris* court's primary concern was not with the trial court's imposition of more than one [Penal Code] section 1202.4, subdivision (b) restitution fine and more than one suspended [Penal Code] section 1202.45 parole revocation fine but rather with the resulting total of the fines that exceeded the $10,000 statutory limit. [Citation.] The court cited its earlier decision in [*McNeely*] where it held that a restitution order cannot exceed $10,000 if the defendant is sentenced in multiple cases at a single hearing. [Citation.] Thus, in our view *Ferris* stands for the proposition that a trial court cannot impose multiple [Penal Code] section 1202.4, subdivision (b) restitution fines and multiple [Penal Code] section 1202.45 parole revocation fines in nonconsolidated cases where the total fines exceed the statutory maximum; the opinion does not address the question whether separate fines are proper where the total does not exceed the statutory maximum." (*Enos*, *supra*, 128 Cal.App.4th at p. 1049.)

Last, the court opined that nothing in the statutes prohibits multiple fines "in consolidated cases disposed of at a single sentencing hearing. To read these statutes as

precluding separate fines *that do not exceed the statutory maximum* would result in a rule of law with no practical effect, because a defendant could never show prejudice. A trial court sentencing a defendant in consolidated cases would simply calculate the amount of the restitution fines as a whole instead of breaking them down separately for each case. This is in essence exactly what the trial court did here; it expressed an intention to impose a *total fine* of $1,000, and then allocated that fine among the three cases so that the statutory minimum fine was imposed in each. Because the total fine would be the same, whether imposed in the aggregate or portioned and separately imposed in each case, there cannot be any prejudice to appellant." (*Enos, supra*, 128 Cal.App.4th at pp. 1049-1050, fn. omitted, first italics added.)

In *People v. Schoeb* (2005) 132 Cal.App.4th 861, the defendant entered a negotiated settlement to five separate cases, pleading guilty to nine charges in exchange for dismissal of the others. At a single sentencing hearing, the trial court imposed five separate restitution fines, totaling $2,600. On appeal, the court upheld the separate fines. It distinguished *Ferris*, noting that the defendant's cases were never consolidated for trial and that there were separate abstracts and minute orders in each case. Moreover, applying *Enos*, the court found no error because the total amount of restitution did not exceed $10,000.

This case, like *Enos* and *Schoeb*, is distinguishable from *Ferris* because defendant's three cases were not jointly tried. However, this distinction does not necessarily mean that defendant's fines were authorized. The phrase "in every case" is no less ambiguous here than it was under the circumstances in *Ferris.* In *Ferris*, the court's interpretation of the phrase "in every case" was not controlled by the fact that the cases were not formally consolidated. They retained separate numbers, and various administrative procedural details reflected the separate status of the cases, e.g., separate jury verdicts and probation reports in each case. Rather, focusing on substance rather than form, the court viewed the phrase in a practical rather than technical way and

considered it reasonably susceptible of an interpretation based on *how* the numerous charges in multiple cases were resolved. Implicitly, the court reasoned that a single trial on all the charges would be the same regardless of whether the charges were alleged in one case or multiple cases. In effect, therefore, the unified resolution of the charges consolidated the three technically separate cases into one for the purpose of restitution under Penal Code sections 1202.4 and 1202.45.

Here, we do not consider the fact that defendant's three cases were not formally consolidated under a single information or jointly tried controlling on the meaning of the phrase "in every case." Thus, we find no material basis to distinguish this case from *Ferris.*

Under the circumstances, we hold that the phrase "in every case" may reasonably be construed to include three cases that are fully and completely resolved at the same time.

As noted, in construing ambiguous restitution statutes, the courts in *McNeely* and *Ferris* adopted the construction more favorable to the defendant. Here, even if we assume that the phrase "in every case" reasonably may be interpreted to limit restitution fines to $10,000 *only* where there is one accusatory pleading and case number or where multiple cases are jointly tried, we shall adopt the interpretation more favorable to defendant. Thus, we hold that Penal Code sections 1202.4 and 1202.45 limit fines to $10,000 not only where there is one case number or where multiple cases jointly tried but also where the charges in multiple cases are fully and completely resolved at the same time.

Finally, we note that in *Enos*, the court read *Ferris* to mean that "a trial court cannot impose multiple [Penal Code] section 1202.4, subdivision (b) restitution fines and multiple [Penal Code] section 1202.45 parole revocation fines in *nonconsolidated* cases where the total fines exceed the statutory maximum." (*Enos, supra*, 128 Cal.App.4th at

p. 1049, italics added.) Thus, even under the *Enos* court's view of *Ferris*, the imposition here of three fines totaling $11,200 would be unauthorized.

We conclude that at sentencing, Penal Code sections 1202.4 and 1202.45 permitted the imposition of restitution and parole revocation fines up to $10,000. Thus, the imposition of restitution fines and parole revocation fines totaling $11,200 was unauthorized.

DISPOSITION

The judgment is modified to strike the Penal Code section 667, subdivision (a), enhancement. The judgment is modified to reflect a total restitution fine of $10,000 and total suspended parole revocation fine of $10,000. As so modified, the judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.