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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY MARK COLE,

Defendant and Appellant.

C049298

(Super. Ct. No.
04F01186)

OPINION ON REHEARING

Defendant Jeffrey Mark Cole appeals from the judgment after a second jury found him guilty of three counts of lewd and lascivious conduct on a child under the age of 14 years. The court sentenced him to an aggregate prison term of 12 years.

On appeal, he contends the trial court erred by allowing evidence that defendant admitted possessing methamphetamine for sale and using drugs at his first trial because it made him "forget," counsel was ineffective for failing to make timely and

specific objections to that evidence, imposition of the aggravated term on count four and two consecutive sentences on counts five and six violated his right to a jury trial under *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (hereafter *Blakely*), and the evidence is insufficient to support imposition of consecutive sentences. In a supplemental brief, defendant contends the amended abstract of judgment incorrectly states that he was sentenced pursuant to the two strikes law and asks that it be amended to correct a clerical error.

We agree with defendant as to the error and shall order the trial court to modify the amended abstract of judgment accordingly. As modified, we shall affirm the judgment and sentence.

FACTUAL BACKGROUND

A. The Prosecution's Case

Miles, the victim in this case, was born in May 1990. He lived with his mother Denise, his father Lloyd, and his younger brother Dylan. Lloyd worked as a heavy equipment operator with defendant who came over on weekends to socialize with the family. Defendant was nice to Miles and Dylan and brought them gifts. Denise and Lloyd separated in 1999. Lloyd previously had been diagnosed with cirrhosis of the liver and died in 2002.

Denise had a good relationship with defendant and considered him a trusted friend. On April 22, 2003, she and her two sons moved into a house with defendant in Antelope, Sacramento County. On one occasion while the foursome were

living in that house, Miles and defendant were watching a movie. They were sitting on the couch under a blanket and defendant's legs were draped over Miles' lap. Miles' hands were on the outside of the blanket and he accidentally touched defendant's penis. Miles was embarrassed, but defendant began rubbing Miles' penis under the blanket. Although Miles was "shocked," he did not say anything to defendant.

After a short while, it became apparent the living arrangement did not work, so in July, Denise moved to a separate apartment with her two sons and defendant moved into his own apartment although he continued to call Denise's apartment.

One weekend while Miles was 13 years-old, defendant came to visit his family and Miles asked if he could go to defendant's apartment. Defendant often bought Dylan clothes and compact discs (CD) and Miles was hoping defendant would buy him a CD or a shirt, but when they went to Target, defendant only bought him snack food and drinks before going to his apartment.

After watching television and eating, Miles decided to go swimming, so he and defendant went to the pool and sat in the hot tub. Afterwards, they went back to defendant's apartment and Miles changed his clothes and put on boxer shorts, pajama bottoms, and a t-shirt. Defendant also changed, wearing only shorts. They ordered a pay-per-view movie and began watching the movie, each one sitting on a different couch. About five minutes later, after Miles had moved to the floor, defendant

moved beside him, pushed Miles' pajama bottoms and boxers down and orally copulated him. Miles was shocked and scared.

During this first incident, Miles and defendant also laid together, facing each other so that their chests and penises were touching. Miles was moving back and forth partially by the motion of defendant's hands and partially by his own effort. Miles also touched defendant's penis with his hands and his mouth.

Afterwards, Miles went into the bathroom and then returned to the living room where he laid down on one of the couches. When defendant returned to the room, Miles pretended to be asleep, but defendant shook his shoulder and asked him if he was awake. Defendant sat on the floor and urged Miles to get down on the floor with him and began rubbing Miles' knee until Miles eventually moved to the floor.

At some point, Miles realized he had no clothes on and that defendant was wearing only his underwear. Miles sat on defendant's chest and defendant put his mouth on Miles' penis again. Touching Miles' bottom and hips, defendant moved Miles back and forth until Miles ejaculated.

Afterwards, Miles dressed himself and things appeared to be normal as if nothing had happened, although Miles was in shock and began to "freak[] out." He asked to go home because he did not feel good but defendant told him it was too late, so Miles asked if they could go for a drive. While driving, defendant told Miles that what happened never had to happen again. Miles

asked him if he had ever done that to anyone else and defendant told him no. They returned to the apartment and defendant went to sleep in his bedroom and Miles stayed on the couch unable to sleep.

The next morning, Miles and defendant had breakfast and played a video game. Later, defendant took Miles to Target where he bought him a CD and three shirts. This time, Miles felt wrong about taking things from defendant and blamed himself for what happened. He wanted to die.

The following day, Miles spoke to Anne Lyons, a school counselor who he trusted, and told her what defendant had done to him.

Sergeant Bielcik of the Sacramento County Sheriff's Department interviewed defendant five times from December 9 through December 19, 2003. He denied molesting Miles in the first interview. However, during the fourth interview, he admitted that on September 27, 2003, Miles spent the night at his apartment and that when he woke up on the living room couch, Miles was orally copulating him. He told Miles not to do it again and later he saw Miles masturbating. Defendant was reluctant to relate this to Bielcik in prior interviews because he "didn't think this thing was going to go this far."

B. The Defense

Defendant, who was 40 years of age at the time of the trial, took the stand and denied ever molesting Miles or any other child. He testified that he had been married for two

years and had been in the navy. He was a good friend of Miles' father and promised him that he would look after his sons. As a result, defendant took the boys out of a gun and drug infested environment, gave them a home with a room of their own, and tried to look after them. Many of defendant's friends and relatives testified that he was generous with their children.

The night of September 27, 2003, when Miles asked to spend the night at defendant's apartment, they used the hot tub, Miles swam in the pool, and then they watched a movie he had rented, during which defendant fell asleep. When he awoke, his shorts were down and Miles was orally copulating him. Defendant jumped up, expressed shock, excused himself, went into the bathroom, and then went to his bedroom. A short time later, Miles entered his bedroom and asked to go for a drive. He did not want to go home but the situation was awkward. When they returned from the drive, defendant went back to bed but woke up a couple of hours later and heard the television in the living room. He got up to turn it off and saw Miles sitting on the floor masturbating.

C. Procedure

Defendant was charged with 14 counts of lewd and lascivious acts on a minor under the age of 14 years. (§ 288, subd. (a).) Counts one through six were alleged in connection with Miles, counts seven to fourteen were alleged in connection with his younger brother, Dylan.

Defendant was first tried by a jury that deadlocked during deliberations and a mistrial was declared. At a second trial,

the jury found defendant guilty of counts four, five and six and not guilty of the remaining 11 counts. The trial court sentenced him to an aggregate prison term of 12 years by imposing the upper term of eight years on count four and two-year consecutive terms on both counts five and six.

DISCUSSION

I.

Prior Conviction

Defendant contends his Sixth Amendment right to a jury trial and his Fourteenth Amendment right to due process were violated when the trial court admitted impeachment evidence that defendant possessed methamphetamine for sale. Because he was only convicted of simple possession of that drug, he argues that the proffered evidence turned a drug possession conviction into a crime of moral turpitude by going behind the least adjudicated elements of the conviction. Respondent contends the evidence was properly admitted as a crime of moral turpitude to impeach defendant's character for honesty and veracity (Cal. Const., art. I, § 28, subd. (d); Evid. Code, § 786) and that the error if any was harmless. We find the evidence was properly admitted.

A. Background

The prosecution filed an limine motion to impeach defendant with evidence of two acts of moral turpitude. The first was evidence of a 1992 conviction for petty theft. The second was evidence defendant told a narcotics detective that on April 14,

1994, he possessed one-eighth ounce of methamphetamine with intent to sell it.

Defense counsel objected to the proffered evidence on the grounds both offenses were remote and improper character evidence. The trial court ruled that both offenses were admissible to impeach defendant's credibility if he testified.

When defendant took the stand, he admitted that he had been arrested twice, first in 1993 for petty theft and again in 1994 for possessing methamphetamine with intent to sell. As to the latter offense, he pled guilty to possession of methamphetamine. He was also cross-examined by the prosecution about these two offenses.

B. Analysis

On appeal, we review the trial court's ruling on the admissibility of uncharged misconduct under the deferential abuse of discretion standard. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.)

Defendant first argues that although he was arrested for possessing methamphetamine for sale, he was only convicted of simple possession and that by granting the prosecution's motion to impeach him with the greater offense, the trial court improperly went beyond the least adjudicated elements of his conviction. Defense counsel failed to preserve this claim of error by failing to make a timely and specific objection on this ground. (*People v. Wheeler* (1992) 4 Cal.4th 284, 300 (*Wheeler*), superseded by statute on other grounds.)

Nevertheless, to forestall defendant's claim of ineffective assistance of counsel, we shall address the merits of his argument and conclude that admission of evidence of his prior misconduct, whether or not it resulted in a conviction, was admissible to impeach his credibility.

Evidence Code section 788 authorizes the use of a prior felony conviction to attack the credibility of a witness. In a line of cases beginning with *People v. Antick* (1975) 15 Cal.3d 79, the Supreme Court carefully limited the trial court's discretion to admit such evidence. (See *People v. Castro* (1985) 38 Cal.3d 301, 307-308 (*Castro*).) However, in June 1982, the voters adopted article I, section 28 of the California Constitution (section 28) as an initiative measure.

Subdivision (f) of section 28 provides that "[any prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment" In addition, subdivision (d) of section 28 provides in relevant part that "relevant evidence shall not be excluded in any criminal proceeding Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782, or 1103. . . ."

Harmonizing these two subdivisions, the court in *Castro*, *supra*, 38 Cal.3d 301, held that section 28, subdivision (f) did not abolish the trial court's discretion under Evidence Code section 352 with respect to felony-impeachment. (*Castro*, *supra*,

38 Cal.3d at p. 313.) Moreover, due process requires that the felony conviction bear a rational relation to the witness's readiness to lie. This is shown when the felony involves moral turpitude, which the court equated with a "readiness to do evil.'" (*Id.* at pp. 314-215.) The court held that to determine the presence of moral turpitude, the trial court may look only to the "least adjudicated elements of the conviction" (*Id.* at p. 317.)

However, section 28, subdivision (f) does not limit impeachment by conduct to prior felony convictions. (*Wheeler, supra*, 4 Cal.4th at pp. 292-294 [holding a misdemeanor conviction admissible to impeach defendant where the conduct involved moral turpitude].) "[S]ection 28(d) makes immoral conduct admissible for impeachment whether or not it produced any conviction, felony or misdemeanor. . . . Thus, impeaching misconduct now may, and sometimes must, be proven by direct evidence of the acts committed." (*Id.* at p. 297, fn. 7.)

The initial test for determining the admissibility of any past misconduct for impeachment purposes is the requirement of moral turpitude. Beyond that, "the latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad." (*Wheeler, supra*, 4 Cal.4th at p. 296.) In exercising that discretion, the trial court may look to those factors traditionally deemed pertinent in this area. (*Ibid.*; see *People v. Beagle* (1972) 6 Cal.3d 441, 453-454.) Those factors include (1) the extent to which the prior conviction reflects on

dishonesty, (2) the nearness or remoteness of the prior conviction, (3) whether the prior conviction is for the same or similar conduct for which the accused is on trial, and (4) whether defendant refrained from testifying. (*People v. Beagle*, *supra*, 6 Cal.3d at p. 453.)

The court in *Wheeler* cautioned however, that "impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*Wheeler*, *supra*, 4 Cal.4th at pp. 296-297, fn. omitted.)

In *People v. Lepolo* (1997) 55 Cal.App.4th 85, the court rejected the claim raised by defendant herein, that the trial court is limited to the least adjudicated elements of a prior uncharged offense when determining the admissibility of that offense to impeach the defendant's credibility. Relying on *Wheeler*, the court in *Lepolo* recognized that "[w]hen the fact that a defendant has suffered a prior *conviction* is used to impeach, anything beyond the least adjudicated elements may not be examined because problems of proof (and the confusion resulting therefrom) and unfair surprise do not exist." (*Id.* at p. 89.) However, when the question is whether to admit evidence of past misconduct, which did not result in a conviction, the sole test to be applied is whether "that conduct evinces moral

turpitude." (*Id.* at p. 90; see also *People v. Ayala* (2000) 23 Cal.4th 225, 273 [evidence that a witness admitted he lied is admissible to impeach him].)

Here the trial court ruled that possession of methamphetamine for sale was admissible to impeach defendant's credibility. Unlike simple possession of a controlled substance, which does not involve moral turpitude, possession of a controlled substance for sale involves moral turpitude because it demonstrates the intent to corrupt others. (*Castro, supra*, 38 Cal.3d at p. 317.) The evidence that defendant possessed methamphetamine for sale was therefore relevant on the question of his veracity and was admissible to impeach him. (*Ibid.*)

Nor do we find the trial court abused its discretion under Evidence Code section 352, which authorizes the trial court to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." As stated, in making its discretionary decision to admit or exclude a prior conviction for impeachment purposes, the trial court is guided by the factors set forth in *People v. Beagle, supra*, 6 Cal.3d 441. (*People v. Clair* (1992) 2 Cal.4th 629, 654.)

The first, third, and fourth factors clearly weigh in favor of admitting the evidence. As we have found, possessing a controlled substance for sale involves a crime of moral turpitude and therefore reflects on defendant's veracity

(*Castro, supra*, 38 Cal.3d at p. 317), the prior misconduct was not similar to the charged offenses and there was no evidence defendant used drugs during the commission of the charged offenses. Moreover, the trial court's ruling did not dissuade defendant from testifying. As to the factor of remoteness, while the misconduct occurred nine years before the charged offenses, we cannot say as a matter of law that nine years is too remote where the other factors weigh in favor of admission. (See *People v. Carpenter* (1999) 21 Cal.4th 1016, 1055-1056 [upholding admission of two 17-year-old convictions]; *People v. Benton* (1979) 100 Cal.App.3d 92, 97 [upholding admission of a conviction at least 11 years old].)

Defendant argues he was prejudiced because the misconduct did not result in a criminal conviction and therefore the jury was tempted to exact punishment for a prior uncharged crime. We disagree.

Although defendant was not convicted of possession for sale, the jury was informed that he was convicted of felony possession of methamphetamine for that offense. Thus, the possibility of jury confusion or temptation to punish defendant for an uncharged crime was eliminated.

Moreover, defendant was also subject to impeachment with his prior conviction for petty theft and he does not argue that this offense was improperly admitted. Any question as to whether the evidence in fact resulted in prejudice is dispelled by the jury's verdict. Although credibility was a key issue in

this case, the jury convicted defendant of only three of the charged offenses while acquitting him of the remaining 11 charges involving Miles and Dylan, thereby demonstrating that it was able to fairly and objectively consider the evidence without being unduly prejudiced by defendant's prior act of misconduct. (*People v. Watson* (1956) 46 Cal.2d 818, 835.) Accordingly, we find the trial court did not abuse its discretion in ruling the evidence admissible.

II.

Admission of Defendant's Statement He Used Methamphetamine to Forget

Defendant contends the trial court abused its discretion by admitting his statement that he used methamphetamine during the first trial to "forget." He argues that this statement was prejudicial and requires reversal. Respondent contends the statement was properly admitted to prove a consciousness of guilt and as a crime of moral turpitude to impeach his veracity. We agree with defendant that the evidence was not particularly relevant to show either a consciousness of guilt or moral turpitude. However we find under all the circumstances the error was not prejudicial.

A. Background

The prosecutor moved in limine to admit evidence that defendant told his sister during a jail house visit, that he used "crank" during the prior trial because it "makes me

forget.”¹ The record shows that defendant made the statement during a tape-recorded conversation with his sister in which he told her that his attorney had asked him whether “I was on crank when I was going thru that trial.” Defendant then told his sister that he told counsel he was using the drug because it “makes me forget.” Defendant advised his sister that counsel told him “that’s part of the reason we didn’t do well” and that “my testimony didn’t do very well.” As part of the same conversation with his sister, defendant further told his sister that the reason he didn’t do well at the first trial was because he was not getting much sleep and was tired but “I wasn’t high when I went into the court room.”

At the hearing, the prosecutor argued that the statement was relevant to defendant’s credibility and to show a consciousness of guilt on the theory defendant was trying to forget what he did to the boys in 2003. The defense argued the statement was not relevant because it could be interpreted a number of ways, including that defendant wanted to forget the strain of trial. The court took the matter under submission, indicating it may be too prejudicial under Evidence Code section 352.

¹ The motion states “Admit the statement made by Defendant COLE to his sister, Brenda Brocker, during a jail social visit, on November 12, 2004, admitting his use of ‘crank’ (methamphetamine) during the prior trial because the ‘crank’ ‘makes me forget’”

The issue was raised again at trial, when the prosecutor argued that defendant's statement to his sister was relevant to his credibility as well as to his ability to perceive and recollect the events he testified about at the first trial. The defense argued the evidence was irrelevant on the question of his veracity because it only showed possession and use of a drug, which does not involve moral turpitude and was irrelevant on the question of his ability to perceive and recollect because there was no evidence he used the drug during the day while the trial was going on. The prosecutor advised the court she was not seeking to impeach defendant with the statement under a theory of moral turpitude.

The trial court admitted the evidence finding it was relevant to show defendant was using the drug "at the time or during the time in which he testified during the former court proceeding . . . [b]ecause what his state of mind would be at the time he testified would be of relevance." The court limited the prosecutor to the question whether defendant used methamphetamine when he testified during a prior court proceeding.

On cross-examination, defendant testified that he used methamphetamine during the time of the court proceeding but that he did not use it the day he testified. On rebuttal, defendant testified that when he said he took methamphetamine so it would "make [him] forget," he was referring to "forgetting . . . [about] the horrible charges that were being made against

[him] and what was being done," in prosecuting him. He was trying to forget the experience of being prosecuted for things he never did and being cross-examined in front of family and friends.

Despite the prosecutor's advisement to the court, she argued to the jury that defendant's use of methamphetamine during the trial to make him forget together with his 1994 statement that he possessed methamphetamine to sell shows he had low moral character and was dishonest.

B. Analysis

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Evidence that leads only to speculative inferences is irrelevant. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035.)

The evidence had little probative value. Defendant's ability to recollect and perceive at the first trial had no bearing on his ability to do so at the second trial. Nor was it particularly probative to show a consciousness of guilt. The relevancy of defendant's statement depends on the strength of the inference raised by his statement, which turns on whether he was under the influence of the drug when he testified. However, as the record shows, he told his sister that counsel had asked

him whether "I was on crank when [he] was going thru that trial," but qualified his statement by stating that "I wasn't high when I went into the court room."

We find this evidence has weak probative value and is ambiguous at best. Nevertheless, we need not decide whether the trial court abused its discretion by admitting the evidence because we find any error was harmless. (*People v. Watson, supra*, 46 Cal.2d at p. 818.) For the same reason the evidence had minimal probative value, it also had little prejudicial impact. Moreover, defendant clearly testified at the second trial that he did not use methamphetamine the day he testified at the first trial and provided an innocent explanation for his statement "it makes me forget."

Furthermore, as discussed in Part I, defendant was properly impeached with two prior acts of misconduct, including a prior conviction for petty theft. Defendant also spoke to the investigating officer four times before admitting that he had sexual contact with Miles, and then came up with the implausible story that Miles initiated the contact while defendant was sleeping. Despite this evidence, the jury only found defendant guilty of three of fourteen counts of child molestations. The jury's verdict clearly demonstrates that it was able to objectively evaluate the evidence and was not prejudiced by the challenged statement. Accordingly, we reject defendant's claim of reversible error.

III.

Sentencing

As stated, the trial court imposed the upper term of eight years on count four and consecutive terms on counts five and six. Prior to imposing sentence, the court gave three basic reasons for selecting the upper term and consecutive sentences, namely that defendant took advantage of a position of trust and confidence, his past record, which included a conviction for petty theft and a drug related offense, and the "violations that occurred."

A. *Apprendi/Blakely*

Defendant contends the trial court violated his right to due process and a jury trial under *Blakely, supra*, 542 U.S. 296 [159 L.Ed.2d 403], and *Apprendi v. United States* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) by imposing an upper term and two consecutive sentences based on facts not found by the jury or admitted by him. Respondent argues this claim has no merit and is disposed of by *People v. Black* (2005) 35 Cal.4th 1238. We agree with respondent.

In *Apprendi, supra*, 530 U.S. 466 [147 L.Ed.2d 435], the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that *increases* the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490 [147 L.Ed.2d at p. 455], italics added.)

In *Blakely*, the Supreme Court applied the rule of *Apprendi* to invalidate a state court sentence imposed on a defendant who pled guilty to kidnapping his estranged wife. The high court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Blakely, supra*, 542 U.S. at p. 303 [159 L.Ed.2d at p. 413.]) Stated another way, "the relevant 'statutory maximum' is . . . the maximum he [or she] may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment'" (*Id.* at p. 303-304 [at pp. 413-414], italics omitted.)

In *People v. Black, supra*, 35 Cal.4th at page 1244, the California Supreme Court held that under the principles set forth in *Apprendi* and *Blakely*, "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." This holding is binding on us. We are bound by this decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The trial court's reliance on defendant's prior convictions does not implicate *Apprendi* and *Blakely* and its consideration of the fact defendant took advantage of a position of trust and

confidence does not violate *Apprendi* and *Blakely* for the reasons stated in *People v. Black*, *supra*, 35 Cal.4th at page 1244.

Accordingly, we reject defendant's claim.

B. Consecutive Sentences

Defendant also contends imposition of consecutive sentences violates his state and federal right to due process because the trial court predicated its sentencing choice on its implicit finding the crimes involved separate acts of violence and the evidence is insufficient to support that finding. Respondent argues defendant has forfeited this claim and that it has no merit because the record supports imposition of consecutive sentences.

Although we differ in our analysis, we agree with respondent's conclusion and find the record supports imposition of consecutive sentences.

After hearing argument from counsel and before imposing sentence, the Court stated as follows: "I sat through the whole trial myself, as the judge in the matter. And it's my opinion that these offenses did take place [¶] . . . [¶] But whatever the problem, it's my opinion that the three counts in which the jury found the defendant guilty that he was in fact guilty of those counts. . . . [¶] *But I do think that the defendant in this case did take advantage of a position of trust and confidence with these boys -- or with this boy in which he was found guilty of violating. [¶] And based on basically his past conduct and . . . or record, which is minimal -- it's a*

theft related offense and a drug related offense, and based on the position that he had with these boys and the . . . violations that occurred, it's going to be the order of this Court that as to Count Four, the defendant will be committed to the state prison for the upper term of 8 years. [¶] As to Count Five, it will be ordered that the defendant will be committed to the state prison for one-third of the mid term, which will be 2 years, to run consecutive with Count Four. [¶] As to Count Six, it will be ordered that the defendant be committed to the state prison for one-third the mid term, of 2 years, to run consecutive with the other two counts." (Italics added.)

While defendant contends the evidence fails to support the implied finding the crimes involved separate acts of violence, he ignores the trial court's stated reasons, which are supported by the record and he does not claim otherwise.

A single valid factor is sufficient to justify a sentencing choice, whether it is an aggravated term of imprisonment or a consecutive sentence. (*People v. Dancer* (1996) 45 Cal.App.4th 1677, 1695-1696, overruled on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123.) "Moreover, the same factor can support numerous consecutive sentences and a single proper statement of reasons will support them." (*People v. Dancer, supra*, 45 Cal.App.4th at p. 1696.)

Criteria justifying imposition of consecutive sentences include, inter alia, the crimes involved separate acts of violence or threats of violence (Cal. Rules of Court, rule

4.425, subd. (a)(2)), they were committed at different times rather than being committed so closely in time and place as to indicate a single period of aberrant behavior (rule 4.425, subd. (a)(1)) and any circumstance in aggravation. (Rule 4.425, subd. (b).)

Circumstances in aggravation include, inter alia, taking advantage of a position of trust or confidence to commit the offense (Cal. Rules of Court, rule 4.421, subd. (a)(11); see *People v. Dancer, supra*, 45 Cal.App.4th at p. 1695 [defendant cultivated a trusting relationship with victim, played with her and then molested her]), a record of prior convictions as an adult that are of increasing seriousness. (Rule 4.421, subd. (b)(2).)

While the probation report indicates the offenses involved separate acts of violence, the record does not support that finding nor did the trial court make such a finding. Nevertheless, the record supports the trial court's implied finding the offenses were committed at different times and that defendant's offenses are of increasing seriousness.

The three offenses were committed during two separate incidents. During the first incident alleged as counts four and five, defendant fondled Miles' penis and orally copulated him. During this incident, the two also laid together so that their chests and penises were touching and Miles orally copulated defendant. Afterwards, Miles went into the bathroom and returned to the couch where he feigned sleep. Undeterred,

defendant shook him and initiated a second incident, alleged as count six, in which he fondled Miles' penis and then orally copulated him while Miles sat on his chest.²

The record also supports the finding that defendant's prior criminal record is of increasing seriousness, beginning with a petty theft, moving to a drug related offense the following year, and then increasing to child molestation. These two factors adequately support imposition of consecutive sentences.³

C. Correction of Amended Abstract of Judgment

In a supplemental opening brief, defendant contends the amended abstract of judgment should be corrected because it erroneously states he was sentenced pursuant to the two strikes law. (Pen. Code, § 667, subds. (b) - (i) or § 1170.12.) Respondent concedes the amended abstract should be modified to correct a clerical error.

We agree with the parties. The information did not allege any prior convictions and defendant was not sentenced pursuant to the two strikes law. We shall therefore order that the

² The prosecutor argued that count four occurred when defendant orally copulated Miles while he was on the floor, count five occurred when Miles and defendant were lying on the floor chest-to-chest and privates-to-privates, and count six occurred during the subsequent incident when Miles sat on defendant's chest and defendant orally copulated him again.

³ Defendant makes no claim the stated factors are inadequate to support an upper term and two consecutive terms.

amended abstract of judgment be further amended to correct the error.

DISPOSITION

The trial court is directed to send an amended abstract of judgment to the Department of Corrections and Rehabilitation reflecting that defendant was not sentenced pursuant to the two strikes law. As modified, the judgment is affirmed.

BLEASE, Acting P. J.

We concur:

RAYE, J.

CANTIL-SAKAUYE, J.