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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE FRANCISCO GUEVARA, Defendant and Appellant.	A101011 (San Mateo County Super. Ct. No. SC051622A)
In re JOSE FRANCISCO GUEVARA On Habeas Corpus.	A105127

I. INTRODUCTION

Defendant Jose Francisco Guevara was convicted of three counts of forcible child molestation (Pen. Code, § 288, subd. (b)[1]); six counts of non-forcible child molestation (§ 288, subd. (a)); two counts of forcible oral copulation (§ 288a, subd. (c)(2)), and two counts of rape (§ 261, subd. (a)(2)). He was also convicted of four counts of spousal rape (§ 262, subd. (a)(1)). Defendant was sentenced to 96 years in state prison.

On appeal, defendant contends (1) the trial court erred in failing to conduct a competency hearing under section 1368; (2) with regard to the spousal rape conviction, there was no substantial evidence of "force"; (3) with respect to the same charge, there

[1] All further statutory references are to the Penal Code, unless otherwise noted.

was no independent corroboration as required under section 262; (4) the jury was erroneously instructed under section 288, subdivision (b), on the concept of "duress"; (5) the court punished defendant for exercising his constitutional trial rights by imposing a sentence more than ten times greater than the sentence it offered him if he waived those rights; (6) the court failed to state reasons for several of its sentencing choices; and (7) counsel was ineffective for failing to object to sentencing errors. In a supplemental brief, defendant also contends (8) there was not substantial evidence of lewd intent as to counts 3-5; (9) the court failed to instruct as to the lesser-included offense of battery as to counts 3-5 and 10-11; and (10) there was no substantial evidence of force as to counts 8-11.

Finally, in further supplemental briefing, defendant contends his sentence is unconstitutional and must be reversed pursuant to *Blakely v. Washington* (2004) __U.S. __, [124 S.Ct. 2531] (*Blakely*). For the court's guidance on remand we address this issue and conclude that *Blakely* applies to the trial court's imposition of the upper term and the trial court must comply with it on remand. *Blakely* does not, however, apply to the trial court's imposition of consecutive sentences.

We affirm the conviction. We also conclude, however, that the trial court erred in sentencing defendant to the aggravated term on the spousal rape charge. Accordingly, we remand for resentencing in its entirety.

II. FACTUAL AND PROCEDURAL BACKGROUND

The victim in this case is defendant's daughter (hereafter victim). When victim was in the fifth grade, defendant rubbed and squeezed her buttocks on top of and underneath her clothes. He did so at least five times.

A year later, when victim was in the sixth grade, defendant continued to touch her buttocks and also began to touch her vagina with his hand. Victim told him to stop and attempted to resist, but defendant held her arm. This happened several times when victim was in the sixth grade, sometimes while she was in bed. Defendant told victim that no one would believe her if she reported what he did to her.

When victim was in the seventh grade, defendant continued to touch her buttocks and vagina. He did this on several occasions; he also began to touch her chest. He

digitally penetrated her vagina. He held her so she could not escape. He also grabbed her hand and forced her to masturbate him and grabbed the back of her head and forced her to orally copulate him.

When victim was in the eighth grade, defendant continued to touch her buttocks and chest and to digitally penetrate her vagina. He removed her clothes and inserted his penis into her vagina. When she tried to push defendant away, he got on top of her and slapped her face. This occurred a few times.

When victim was in the ninth grade, defendant continued to touch her buttocks and chest. Later that year, she menstruated for the first time and defendant stopped molesting her.

During the summer of 2001, defendant's oldest son, Juan, observed victim and defendant alone in victim's room. Victim told Juan that defendant had been touching her. Juan grabbed defendant and told him not to touch victim. Defendant said, "I didn't do anything. We were just playing around." For the next few months, Juan called victim from college to ask whether defendant was still touching her. When Juan visited victim in January 2002, she told him that defendant had been molesting her since the sixth grade. Juan told his mother and the mother called the police.

Juan visited defendant in jail. Defendant told him "he put his finger in [victim's] butt, and that's the only thing he had done, and that that didn't make him a criminal." He also said, "I made a mistake, but I'm not the only one that's ever made this mistake."

Defendant's wife also testified that he had sexually assaulted her. She could not remember the exact dates. Defendant's wife testified that she told defendant she did not want to have sex because she was tired and had to go to work the next day. She used her elbow to push defendant away when he wanted to have sex with her and she would push him with her arms and sometimes with her feet. Defendant told her she "was his woman and that I had to have sex with him." When she did not want to have sex she "would tell him no, no, no." Defendant's wife testified that defendant, "would get on top of me and he would end up having sex with me even if I didn't want to." The defendant had oral sex, anal sex and vaginal intercourse with his wife on these occasions. Sometimes she

would resist in the ways she described and sometimes she would not. She was afraid of her husband during these incidents and believed if she did not cooperate he "could do something to me." She testified that she did not know what he would do.

Defendant neither testified nor called witnesses. On cross-examination, both victim and her brother testified that defendant was very strict and religious. He beat them and forbade them from listening to secular music. Victim felt defendant was more strict with her than he was with her siblings. She also testified that defendant believed the molestation was "playful and wrestling." Defendant's wife testified she was afraid the county was going to remove her children from her custody if she visited or supported defendant.

The jury convicted defendant of two counts of rape (§ 261, subd. (a)(2)), two counts of forcible oral copulation (§ 288a, subd. (c)(2)), three counts of forcible lewd acts on a child under age 14 (§ 288, subd. (b)) and six counts of non-forcible lewd acts on a child under age 14 (§ 288, subd. (a)). Defendant was also convicted of four counts of spousal rape (§ 262, subd. (a)(1)). He was sentenced to 96 years in state prison. This timely appeal followed.

III. DISCUSSION

A. *Competency Hearing*

Defendant contends he was denied due process under *Pate v. Robinson* (1966) 383 U.S. 375 (*Pate*) and *People v. Pennington* (1967) 66 Cal.2d 508, because the trial court did not order a competency hearing despite substantial evidence that he was incapable of understanding the nature of the proceedings against him and of assisting in his defense. We disagree.

"It has long been established that the conviction of an accused person while he is legally incompetent violates due process. (*Pate, supra*, 383 U.S. at p. 377.) Indeed, the United States Supreme Court has held that the failure of a trial court to employ procedures to protect against trial of an incompetent defendant deprives the defendant of his due process right to a fair trial and requires reversal of his conviction. (*Ibid.*, fn. omitted*; Drope v. Missouri* (1975) 420 U.S. 162, 171.)" (*People v. Hale* (1988) 44

Cal.3d 531, 539-540.) These constitutional protections are codified in Penal Code sections 1367, et seq.

Section 1367 provides that a defendant is mentally incompetent to stand trial when, "as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." A court is required to hold a competency hearing when substantial evidence of the accused's incompetence has been introduced. (*People v. Stankewitz* (1982) 32 Cal.3d 80, 91-92; *People v. Laudermilk* (1967) 67 Cal.2d 272, 283.) Evidence is substantial if it raises a reasonable doubt as to the defendant's competence to stand trial. (§ 1368; *People v. Jones* (1991) 53 Cal.3d 1115, 1152.) "Under the applicable substantial evidence test, 'more is required to raise a doubt than mere bizarre actions [citation] or bizarre statements [citation] . . . .'" (*People v. Davis* (1995) 10 Cal.4th 463, 527.)

Defendant argues that certain statements he made at hearings on September 12, 2002, and October 16, 2002, were enough to raise a reasonable doubt in the trial court's mind about his competence to stand trial. We disagree.

At the September 12 hearing, the court repeated to defendant the terms of the People's offer, i.e., that if defendant would plead guilty to several counts he would be sentenced to a nine-year prison term. After the court asked defendant if he wanted to go to trial and risk the maximum sentence of life plus 25 years, the defendant responded, "I'm a Christian, and I praise God. I made a mistake, God is fair, all right. I'm ready to die and go with God, all right. And they have vigil made against me as they wish, but God has helped me. God is with me, I know. [¶] I have decided that if my family who is accusing me, I don't know. I am going on seven months now, I don't even know who is accusing me. So then my decision is for my family to decide what's going -- what's my faith to be."

Defendant's statement does not, as he now suggests, raise a doubt as to his sanity. Although defendant characterizes his comments as the product of an unbalanced mind, his protestation of innocence is clear enough: defendant seems to be saying, as might be

expected of someone whose defense was that the charges against him were manufactured, that his fate is in the hands of his accusers who might or might not testify against him. These comments do not raise a reasonable doubt about his competence to stand trial.

At the October 16 hearing, the trial court informed defendant that "If you are going to decide that you think it is in your best interest to admit some of these crimes in return for the nine year state prison sentence that has been recommended by the district attorney, this is your time to make that decision and indicate that."[2] After an off-the-record discussion, defendant's attorney informed the court that defendant had decided to proceed to a jury trial. A lengthy conversation between the defendant and the court ensued.[3]

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2 The trial court explained to the defendant, "I only say that to you -- I don't want to interfere with your relationship with your attorney, and I don't want you to tell me things that are private, but I want you to think about it carefully, so that it is clear to everyone that you have thought about it, that if you go to trial and are convicted of even some of these charges, you stand to be sentenced to state prison for a very long time. [¶] I understand that a couple of these charges carry a life sentence, which means that, effectively, you are going to be locked up for the rest of your life. [¶] The district attorney, as I understand it, has made an offer, as we say, through -- with the court's approval, through your attorney to you, that if you plead guilty to one or two of these events, that you will be sentenced to nine years in the Department of Corrections. [¶] The district attorney's position is that if you go to jury trial and your daughter has to testify in front of strangers and go through what the district attorney views as a lot of anguish because she is doing this in public, then the district attorney's view is -- and he has informed your attorney as well as the court -- that he will ask for the absolute maximum sentence in the crimes with which you will be convicted. [¶] Which means his position will be, if he can urge the court to give you a life sentence, he will be doing that. [¶] And we just wanted to be sure that you understand your choices and that it is on the record that you are -- that you have decided, after careful consideration, to go to jury trial as opposed to admitting a few of these incidents and getting this nine year sentence." The defendant asked, "Do I need to speak?" The court replied, "Well, I will let you think about it a little bit and maybe talk to your attorney. And then I am going to ask you what your preference is in about a minute or two."

3 Because defendant argues this conversation demonstrates his incompetence, we reproduce it here:

"[Defense Counsel]: Judge, Mr. Guevara -- now I am going to speak for him -- has decided to proceed to jury trial on this.

"The Court: And, Mr. Guevara, you have talked to your lawyer?

"The Defendant: Yeah, I talked to him.

"The Court: No, just answer me in Spanish. Let [the interpreter] talk to you, so I know for sure what you are saying because I don't speak Spanish. So talk Spanish to the interpreter.

"The Defendant: This is the problem, maybe I can change. I don't know.

"The Court: I want you to listen to me -- you need to listen to me. I am only asking you a very simple question. Simple in the sense of just one issue. You have talked to your lawyer about this, right?

"The Defendant: yes.

"The Court: And you understand the risk?

"The Defendant: Risk of what?

"The Court: The risk is if you don't accept the district attorney's offer and you go to trial and you are convicted of some of these crimes, you may receive a life sentence in prison. Do you understand that?

"The Defendant: Give me an injection instead. I am a Christian. I am prepared to die.

"The Court: Okay. I want you to --

"The Defendant: I have not done any of those things.

"The Court: But I am asking you a very -- a very specific question. The specific question is: You understand if you go to trial and you are convicted of some of these offenses, that you are risking being sentenced to prison for life? Yes or no.

"The Defendant: There is no one who will accept that.

"The Court: I am not -- I am not saying that you will be convicted. I am just asking you if you understand that if you are convicted that you could spend life in prison.

"The Defendant: I don't understand why I have to be here.

"The Court: No, you have to listen to me. (Pause.)

"The Defendant: I don't understand what is happening. If I just --

"The Court: No, put down that mike from your mouth and I can understand you better. [¶] . . . [¶] I didn't understand what you were saying to me.

"The Defendant: I don't understand, Your Honor. They keep changing this on me all the time.

"The Court: Okay. Now, Mr. Guevara, I want you to focus on my question. It is a simple question. I don't want you to explain your feelings. I just want you to tell me if you understand that if you are convicted, if you are convicted, you could be sentenced to life in prison. Do you understand that? Give me a straight answer.

"The Defendant: The answer is I have never been a criminal. Something happened to me and I was a person --

"[Defense Counsel]: Excuse me judge. I have to cut this off.

"The Court: I don't want to know that kind of thing, Mr. Guevara. I don't want you to talk about your case. I don't want you --

"The Defendant: I am not --

"The Court: No, listen to me, Mr. Guevara. (Pause.) [] Mr. Guevara, look at me. Look at me, [the interpreter] will tell you what I am saying, talk to me. I want a simple answer -- yes or no -- to this question: Do you understand if you go to jury trial and you are convicted that you might be sentenced to life imprisonment? yes or no?

"The Defendant: I understand the reason for the problems.

"The Court: Tell him in Spanish. Tell him in Spanish.

"The Defendant: No, no. Me, I know the Bible. And I speak to you, okay. I see you now.

"The Court: Mr. Guevara, I told you I want a one-word answer: yes or no. I don't want these explanations.

"The Defendant: Not for me. It is not for me.

"The Court: Yes or no, I want you to give me a yes or no answer.

"The Defendant: It is not a plea for me.

"The Court: I don't want to know whether you think you did this or not. That is private information.

"The Defendant: If I were a criminal --

"The Court: No, no --

"The Defendant: []that would be fine.

"The Court: No. Mr. Guevara, we are going to stay here until I get a one-word answer from you. I am not playing games with you. I want you to look at me and listen to --

"The Defendant: I am not playing either.

Defendant argues this conversation clearly demonstrated he did not understand the "seriousness of his predicament" and was unable to comprehend why he was in court and, thus, provided substantial evidence that he was unable to assist in his defense. We disagree. Defendant's dramatic, impassioned protestation of his innocence, while a lengthy, unlawyer-like defense is not substantial evidence of incompetence. Nor can we agree that doubts about defendant's rationality were raised because he did not respond directly to the court's questions. It is quite clear from the record that defendant chose this opportunity to defend himself and, although his statements were not responsive to the court's request that he confirm his rejection of the plea agreement, defendant did not display any noticeable deficiency that might have justified a competency hearing.

Finally, defendant argues that his statement that he would rather be given a lethal injection evidences a willingness to submit to the death penalty and that this should have raised a doubt about his competence. The case on which defendant relies in making this argument, *Moran v. Godinez* (9th Cir. 1992) 972 F.2d 263, 264, reversed on other grounds in *Godinez v. Moran* (1993) 509 U.S. 389, involved facts that bear only the most superficial similarity to this one. In *Moran*, the defendant's incompetence was signaled by the fact that he was taking four different medications, among them several sedatives,

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"The Court: I want you to listen to me and answer the question.

"The Defendant: I am a pastor. I am a pastor. Everyone knows me -

"The Court: We are not interested in that. I want you to answer this question -- look at me, Mr. Guevara, answer the question: Do you understand that if you are convicted you may be sentenced to life in prison? Yes or no, do you understand that? (Pause.) [] One word, Mr. Guevara, yes or no: Do you understand if you are convicted --

"The Defendant: That is not applicable to me.

"The Court: All right. Well, I think we have done as much as we can on the record, counsel. He is not going to answer the question.

"Defense Counsel: I appreciate that, Your Honor.

"The Court: And I am convinced that he, at least, does understand the alternatives, that he is just not willing to consider the alternatives. Maybe for reasons of pride, I don't know. But anyway, we will have the jury come up.

and had earlier attempted suicide, wanted to fire his attorneys, plead guilty to three counts of capital murder, and die. (*Moran v. Godinez* (9th Cir.1994) 57 F.3d 690, 695) Defendant's histrionic statement, "Give me an injection instead. I am a Christian. I am prepared to die" does not evidence a suicidal bent and the trial court did not err in failing to hold a competency hearing.

B. *Spousal Rape*

Defendant argues there is insufficient evidence to prove that the acts, which formed the basis of the spousal rape charges, met the force requirements of section 262, subdivision (a)(1). In support of this argument, defendant characterizes Mrs. Guevara's testimony as establishing that she "resisted to some slight extent" by telling him "no," and shoving him with her elbow and sometimes with her feet. He states that the only evidence of force is that, as Mrs. Guevara testified, "He would get on top of me and he would end up having sex with me even if I didn't want to." Citing *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 153,disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 1015, 1028, defendant contends that "force" must involve something over and above that inherent in the commission of the sex act itself and there is no evidence that he employed such force against his wife.

We disagree and conclude substantial evidence supports defendant's conviction for spousal rape. We note that, in determining whether the evidence is sufficient to support a conviction, we "review 'the whole record in the light most favorable to the judgment' and decide 'whether it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Johnson* [1980] 26 Cal.3d 557, 578.) Under this standard, the court does not '" ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.)" (*People v. Hatch* (2000) 22 Cal.4th 260, 272.)

Section 262, subdivision (a)(1), defines forcible rape as an act of sexual intercourse "accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." "Force, within the meaning of section 261, subdivision (a)(2), is that level of force substantially different from or substantially greater than that necessary to accomplish the rape itself. [Citations.] This is not a heavy burden." (*People v. Mom* (2000) 80 Cal.App.4th 1217, 1224, disapproved on other grounds in *People v. Griffin, supra,* 33 Cal.4th at p. 1028; see *In re John Z.* (2003) 29 Cal.4th 756, 763.)

Defendant argues that the evidence showed only that he tried to take off his wife's nightgown and underwear and that his wife testified he "would get on top of me and he would end up having sex with me even if I didn't want to." This, according to defendant does not constitute "'force substantially different from or substantially greater than necessary to accomplish the rape itself." (*People v. Bergschneider, supra,* 211 Cal.App.3d at p. 153.) In *People v. Bergschneider, supra,* the court held that when the defendant pushed the victim's hands away from her vagina, this act alone "constituted force greater than that necessary to accomplish the leud act itself.'" (*Id.* at p. 153.) Here, defendant tried to remove the victim's clothes and got on top of her despite her efforts to push him away. Given the very slight amount of force necessary to meet the requirement of force greater than necessary to accomplish the act of intercourse, we have little difficulty in concluding that substantial evidence supports the jury's finding of forcible rape. (See also *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [where defendant picked up victims and carried them along, force requirement met]; *People v. Pitmon* (1985) 170 Cal.App.3d 38 [defendant grabbed victim's hand, placed it on defendant's genitals, and rubbed himself with victim's hand]; *People v. Babcock* (1993) 14 Cal.App.4th 383, 386-387 [defendant grabbed victim's hands and forced them to touch his genitals].)

C. *Reporting/Independent Corroboration Requirement*

Defendant contends he was denied due process because the requirements of section 262, subdivision (b), were not fulfilled. We reject this argument.

Section 262, subdivision (b), sets out certain exceptions to the statute of limitations applicable to spousal rape claims. It first states, "Section 800 [the six-year statute of limitations] shall apply to this section." The subdivision then imposes an additional limitation on prosecutions for spousal rape by providing that, despite the six-year statute of limitations, "no prosecution shall be commenced under this section unless the violation was reported to medical personnel, a member of the clergy, an attorney, a shelter representative, a counselor, a judicial officer, a rape crisis agency, a prosecuting agency, a law enforcement officer, or a firefighter within one year after the date of the violation." Finally, section 262, subdivision (b), establishes what is in effect an exception to this exception: "This reporting requirement shall not apply if the victim's allegation of the offense is corroborated by independent evidence that would otherwise be admissible during trial."

The prosecution in this case was commenced on February 15, 2002, with the filing of a complaint against defendant. The complaint and a subsequent information, filed on June 5, 2002, contained five spousal rape counts. An amended information was filed on October 23, 2003, and alleged four counts of spousal rape. Each count alleged that, "on and between January 1, 1997 and December 31, 2001, defendant had sexual intercourse with his spouse against her will, by means of force, violence, duress, menace or fear of immediate or unlawful bodily injury . . . in violation of section 262, subdivision (a)(1)." The last date on which the incidents were alleged to occur is December 31, 2001, only a few months before the commencement of the prosecution and well within the time period for reporting the spousal rape violations. Therefore, on its face, the information satisfies the reporting requirement of section 262, subdivision (b).

However, when she testified at trial, defendant's wife could not remember whether any of the rapes occurred during 2001. The Attorney General concedes on appeal that no evidence was admitted at trial that defendant's wife fulfilled the reporting requirements. Instead, the Attorney General contends that the reporting requirement does not bar the spousal rape prosecution because there was admissible evidence that corroborated the wife's allegations.

Defendant did not contend at trial that the requirements of section 262, subdivision (b), were not fulfilled and that the prosecution should not have commenced. Nevertheless, neither the Attorney General nor defendant consider whether and how defendant should have raised this issue below, whether the issue has been waived because defendant did not raise it until this appeal and, finally, whether this failure constitutes ineffective assistance of counsel. We invited the parties to address these issues at oral argument and now consider them on the merits.

The parties' initial failure to address these issues may be due in part to the paucity of case law on how a challenge to a prosecution based on the section 262, subdivision (b), exceptions to the statute of limitations for rape should be raised. Only one published decision construes section 262, subdivision (b), *People v. Garcia* (2001) 89 Cal.App.4th 1321 (*Garcia*).

In *Garcia*, the defendant moved prior to trial to dismiss charges that he had raped his wife. He argued the victim had not reported the rape within one year of its occurrence as required under section 262, subdivision (b). The court of appeal concluded that the trial court correctly determined that the reporting requirement did not apply because there was independent evidence, including evidence admissible under Evidence Code section 1101, of defendant's prior acts of domestic violence against the victim, which corroborated the victim's account. (*Garcia, supra,* 89 Cal.App.4th at p. 1334.) The *Garcia* court also concluded that this issue was for the trial court, rather than the jury, to determine. (*Id*. at pp. 1336-1337.)

The parties in *Garcia* raised the section 262, subdivision (b), reporting requirement and the corroboration exception through a motion to dismiss the prosecution prior to trial. This procedure is consistent with the language of the statute. Section 262, subdivision (b), provides that a victim of spousal rape need not have reported the crime within the statutory time period if her allegation "is corroborated by independent evidence that would otherwise be admissible during trial." The reference to evidence "otherwise admissible" suggests the need for some determination of admissibility. Trial courts, rather than juries, determine questions of admissibility, for example, through

motions in limine or through Evidence Code section 402 hearings. This language, therefore, strongly suggests that the question of whether a victim's allegation is corroborated is to be determined by the court, using trial-worthy evidence. Certainly the trial court could, without much difficulty, determine, as a threshold matter, whether admissible evidence would corroborate a victim's allegation. (*Garcia, supra,* 89 Cal.App.4th at p. 1337.)

Defendant, however, argues that the question of adequate corroboration is a factual one that should have been resolved by the jury and that his due process rights were violated because the jury did not make this determination. Preliminarily, we note that defendant made no such claim at trial. Defendant neither proposed a jury instruction on this point, nor argued to the jury that it should find defendant innocent of the spousal rape charge because of a lack of adequate corroboration. In contrast, the defendant in *Garcia* filed a motion to dismiss and, when this met with no success, proposed a jury instruction. The proposed jury instruction stated that the defendant could not be found guilty without independent corroboration of the victim's testimony. (*Garcia, supra,* 89 Cal.App.4th 1321.) In so doing, the *Garcia* defendant preserved this issue for appeal. Our Supreme Court has repeatedly held that constitutional arguments must be raised in the trial court in order to preserve them on appeal. (*People v. Williams* (1997) 16 Cal.4th 153, 250; see *In re Josue S.* (1999) 72 Cal.App.4th 168, 170-171.) Defendant did not do so and, therefore, the claim is waived.

Nevertheless, even if this issue had not been waived, defendant cannot prevail. The only authority defendant cites for his assertion that his due process rights were violated because the jury did not determine the question of corroboration is *Apprendi v. New Jersey* (2000) 530 U.S. 466, 477 (*Apprendi*). This case, however, does not support defendant's position. *Apprendi* reiterates the federal constitutional guarantee that a criminal defendant has the right to a jury determination that he is guilty of every element of a charged offense beyond a reasonable doubt. (*Ibid.*) *Apprendi* also holds that the federal Constitution guarantees a criminal defendant the right to have the jury determine,

beyond a reasonable doubt, any fact, other than a prior conviction, that increases the maximum penalty. (*Id.* at p. 476.)

Neither of these rights was violated because the jury did not decide whether there was adequate corroboration. The reporting requirement and the corroboration exception are not elements of the offense of spousal rape, which involves the same elements as rape set out in section 261. Nor do the requirements of section 262, subdivision (b), increase the maximum penalty for spousal rapes. Nor does defendant cite any cases holding that the federal Constitution requires that the fulfillment of the requirements set out in section 262, subdivision (b), must be determined by a jury beyond a reasonable doubt.[4]

This does not, however, end our inquiry. In anticipation of an ineffective assistance of counsel claim, we also consider whether counsel's failure to seek a determination of adequate corroboration[5] was deficient under an objective standard of professional reasonableness and whether any prejudice can be shown under a test of reasonable probability of a different outcome. (*Strickland v. Washington* (1984) 466 U.S.

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4 Indeed, the *Garcia* court found that the issue of whether there is independent corroboration under section 262, subdivision (b), was appropriately determined in that case by the trial court rather than the jury. (*Garcia, supra,* 89 Cal.App.4th at pp. 1337-1338.) During oral argument, defendant cited *People v. Zamora* (1976) 18 Cal.3d 538, 564-565, fn. 26 and 27 and *People v. Mabini* (2001) 92 Cal.App.4th 654, 658 on this issue. Neither of these cases involves section 262, subdivision (b). *Mabini* considered whether, under section 803, subdivision (g), there was independent evidence that clearly and convincingly corroborated the victim's allegation. The court held that, under the "clear and convincing" standard, the jury reasonably concluded that there was sufficient corroboration under that statute. The *Mabini* court, however, did not consider whether a jury determination of this issue was required under the federal Constitution. *Zamora* does not address this question either. However, the court in that case does make clear that the general issue of whether a statute of limitations has run is a matter to be decided under the preponderance of the evidence standard and can be decided by the trial court in some instances or by the jury in others. (*People v. Zamora, supra,* 18 Cal.3d at p. 565, fn. 27.)

5 We note that the issue of whether there was adequate corroboration could well be raised either through a demurrer or a motion under section 995.

668, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) We conclude that counsel was not deficient.

The Attorney General, citing *Garcia*, contends that the trial court could have found corroboration of the victim's allegation of spousal rape because there was evidence, admissible under Evidence Code section 1108, that defendant also raped his daughter. First, of course, we must determine whether it is reasonably likely that such evidence would have been "otherwise [have been] admissible during trial." (§ 262, subd. (b).)

In *People v. Yovanov* (1999) 69 Cal.App.4th 392, the court considered whether, under section 803, subdivision (g), evidence of the defendant's prior sexual offenses was "independent evidence that clearly and convincingly corroborates the victim's allegation."[6] (*People v. Yovanov, supra,* at p. 401.) The *Yovanov* court first pointed out that evidence of prior sexual offenses is admissible under Evidence Code section 1108. It explained, "evidence of uncharged misconduct is generally admissible only for the purpose of proving some fact other than the defendant's disposition to commit criminal conduct. (Evid. Code, § 1101.) However, '[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.' (Evid. Code, § 1108, subd. (a).) In enacting Evidence Code section 1108, the Legislature decided evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitations of Evidence Code section 1101. [Citations.] The only restrictions on the admissibility of such evidence are those contained in Evidence Code section 352. [Citations.]" (*Id.* at pp. 405-406, fn. omitted.)

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6 Section 803, subdivision (g)(2)(B), provides that the statute of limitations for certain enumerated sex crimes against children will be tolled so long as, among other things, there is "independent evidence that clearly and convincingly corroborates the victim's allegation."

Evidence that defendant raped his daughter would, therefore, be admissible to corroborate the wife's allegation that he raped her, unless restricted under Evidence Code section 352. In weighing the probative value of the evidence and the possibility of undue prejudice, "[t]rial judges must consider such factors as its nature, relevance, possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

Here, it would not have been an abuse of discretion for the trial court to conclude that evidence of defendant's rape of his daughter was admissible to corroborate the wife's allegation that he had also raped her. Defendant might have argued that the rape of his daughter is insufficiently similar to that of his wife and, therefore, should not have been admitted because not sufficiently probative. We note, however, that when the Legislature enacted Evidence Code section 1108, it did not intend to impose a requirement that the charged and uncharged offenses be strictly similar: "'At the hearing before the Judiciary Committee, there was discussion whether more exacting requirements of similarity between the charged offense and the defendant's other offenses should be imposed. The decision was against making such a change, because doing so would tend to reintroduce the excessive requirements of specific similarity under prior law . . . and could often prevent the admission and consideration of evidence of other sexual offenses in circumstances where it is rationally probative. Many sex offenders are not "specialists," and commit a variety of offenses which differ in specific character.'" (See Historical and Statutory Notes, West's Ann. Evid. Code (2004 supp.) foll. § 1108, p. 133.)

A strong argument can be made that defendant's behavior in molesting and raping his daughter bears more than a passing similarity and temporal proximity to the rapes of his wife and thus, evidence of this behavior bears important fingerprints of

trustworthiness. Defendant's assaults against his daughter and his wife display a propensity to sexually violate the females in his family. Moreover, defendant's molestation and raping of his daughter is contemporaneous with the rapes of his wife. The two events are sufficiently similar in nature and time to have probative value, and, therefore, it is not reasonably likely the trial court would have found them inadmissible under section 352. (See, e.g., *Satterwhite v. State* (Ga.Ct.App. 2001) 551 S.E.2d 428, 431 [evidence of rape of adult admissible in trial for rape and molestation of child].)

Second, we must consider whether this evidence corroborates the victim's allegation. We note that section 262, subdivision (b), does not, unlike section 803, subdivision (g), require that the corroboration meet the clear and convincing standard. Moreover, the Legislature considers evidence of other sexual offenses committed by a defendant uniquely probative in "evaluating the victim's and the defendant's credibility." (*People v. Falsetta, supra,* 21 Cal.4th at p. 911.) Thus, in *Garcia*, for example, the court found evidence of prior domestic violence against the victim corroborated her allegation that the defendant had raped her. Similarly, here, evidence that defendant raped his daughter corroborates his wife's claim that he also raped her.

Although defendant might have argued that, in *Garcia*, the prior sexual offenses were against the same victim, and this requirement should be imposed here, the factual scenario in *Garcia* is relatively unusual. Neither section 1108 nor 1109 even suggest that, to be admissible, the evidence of an uncharged sexual offense must involve the same victim. In fact, evidence admissible under these sections concerns evidence of other sexual offenses; offenses which almost always involve different victims. It is also the case that the defendant in *Garcia* made other statements that corroborated the victim's claim of spousal rape. Nevertheless, although there was *more* evidence corroborating the victim's allegation in *Garcia*, *Garcia* does not represent the minimum amount of evidence required. Indeed, the *Garcia* court made no such suggestion.

In sum, had the trial court been asked to dismiss the prosecution of the spousal rape claim on the ground that there was no independent corroboration of the victim's

allegations, it is not reasonably probable that it would have concluded that evidence that defendant raped his daughter was not sufficient to corroborate the victim's claim.

D. *Jury Instruction Regarding Definition of Duress*

Defendant was accused of four distinct sex crimes: lewd and lascivious acts on a minor (§ 288); oral copulation on a minor (§ 288a, subd. (c)); rape (§ 261) and spousal rape (§ 262). Each of these statutes applies to the commission of acts accomplished against the victim's will "through "force, violence, duress, menace, or fear of immediate and unlawful bodily injury." The trial court defined the term "duress" with regard to the section 288 and section 288a counts as including "hardship . . . sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed, or (2) acquiescence in an act to which one otherwise would not have submitted." This definition was approved in *People v. Pitmon, supra,* 170 Cal.App.3d at page 50.

In 1990, the Legislature amended the definitions of rape and spousal rape to include duress and defined duress to include a direct or implied threat of hardship. (Stats. 1990, ch. 630, § 1; see also *People v. Bergschneider*, *supra,* 211 Cal.App.3d at p. 152, fn. omitted ["For reasons which escape us, rape is the only major sexual assault crime which cannot be committed by means of duress."] In 1992, the Legislature deleted the term "hardship" from the definition of duress in the rape and spousal rape statutes. (Stats. 1993, ch. 595, § 1.) Accordingly, the trial court provided the jury with a definition of duress with regard to the counts of rape and spousal rape, which did not include any reference to "hardship."

On appeal, defendant argues the trial court erred in providing the jury with a definition of duress as to the section 288, subdivision (b), count because this definition included a reference to "hardship." He also asserts that the jury improperly would have assumed that duress as to section 288a, subdivision (c), would include "hardship."

Our Supreme Court has granted review of two cases involving the appropriate definition of "duress" in cases other than rape and spousal rape. (See *People v. Leal* (2003) 105 Cal.App.4th 833, review granted Apr. 23, 2003, S114399 and *People v.*

Edmonton (2002) 103 Cal.App.4th 557, review granted Jan. 22, 2003, S112168.) We need not wade into the merits of this issue because it is quite clear that, even if the definition of "duress" provided to the jury by the trial court with regard to the lewd act counts was erroneous, any error was harmless beyond a reasonable doubt. There is no evidence that defendant either directly or impliedly threatened the victim with hardship or that the victim felt herself to be threatened in this way.

Although defendant argues that hardship is inherent in the relationship between an abusive parent and child, the People's case rested on force as the means by which the lewd acts were accomplished and there was neither evidence nor argument to the effect that defendant used the threat of hardship to sexually assault his daughter. Instead, the victim testified that defendant grabbed her so she could not escape, grabbed her arm to make her masturbate him, grabbed her head and forced her to orally copulate him and beat her in order to force her to submit to the rapes.

Defendant also contends that, even though the court provided the jury with a separate definition of duress, which excluded any reference to hardship with regard to the rape charges under sections 261 and 262, the jury would not have appreciated the difference and, therefore, the instruction was erroneous. We disagree. The jury is presumed to understand, correlate, and follow the court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) The jury was given an accurate instruction regarding the definition of duress and we will not presume they misunderstood it.

E. *Exercise of Trial Rights*

Defendant declined the People's offer that he plead guilty to two counts of sexual assault in return for a sentence of nine years. After a trial, the jury found him guilty of 17 separate sex crimes. The trial court sentenced defendant to 96 years in prison. Defendant now contends that, in imposing this sentence, the trial court improperly punished him for exercising his constitutional right to a trial. We disagree.[7]

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[7] We need not, therefore, consider the People's claim that defendant waived this argument by not objecting to the imposition of the sentence on this ground.

"It is well settled that to punish a person for exercising a constitutional right is 'a due process violation of the most basic sort.' [Citation.] . . . '[A court] may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right.'" (*In re Lewallen* (1979) 23 Cal.3d 274, 278-279.) Therefore, the "refusal of an accused to negotiate a plea with the prosecution must not influence the sentence imposed by the court after trial. Appellate courts in California and in other jurisdictions have vacated sentences when the trial court has apparently used its sentencing power, either more severely or more leniently than the norm, in order to expedite the resolution of criminal matters." (*Id.* at p. 279) In *Lewallen*, for example, the court found that a trial court's comment at sentencing about a defendant's decision to plead not guilty 'clearly reveals that [the court] gave consideration to petitioner's election to plead not guilty in imposing sentence. That a defendant pleads not guilty is completely irrelevant at sentencing; if a judge bases a sentence, or any aspect thereof, on the fact that such a plea is entered, error has been committed and the sentence cannot stand." (*Ibid*.)

The trial court's remarks at the sentencing hearing do not indicate that defendant's decision to reject the proffered plea had any relevance to the imposition of the consecutive sentences and aggravated terms. Rather, as the court explained, "[t]he thrust of what the court is doing is sentencing the defendant to a life of misery because that is what he sentenced his daughter to: A life of misery."

Defendant seems to accept that these statements do not support his argument. Instead, he points to statements made by the court *prior* to trial and the imposition of his sentence, when the court discussed the People's offer with defendant. Defendant contends these statements were a "coded" message to the defendant that, should he reject the offer, the court would retaliate by imposing a stiff sentence. These are the remarks which, according to defendant, delivered that message: "The district attorney's position is that if you go to jury trial and your daughter has to testify in front of strangers and go through what the district attorney views as a lot of anguish because she is doing this in public, then the district attorney's view is . . . that he will ask for the absolute maximum sentence in the crimes with which you will be convicted. [¶] Which means his position

will be, if he can urge the court to give you a life sentence, he will be doing that. [¶] And we just wanted to be sure that you understand your choices and that it is on the record that you are -- that you have decided, after careful consideration, to go to jury trial as opposed to admitting a few of these incidents and getting this nine year sentence." A few moments later, the court again emphasized the risk defendant would be taking in going to trial: "The risk is if you don't accept the district attorney's offer and you go to trial and you are convicted of some of these crimes, you may receive a life sentence in prison."

The trial court's remarks were not a veiled threat to retaliate against defendant for refusing the People's offer. The court was clearly concerned that defendant understand the enormity of the choice before him. Defendant, however, points to three circumstances, which, he argues, indicate that the court penalized him for exercising his right to a trial. First, defendant argues that the disparity between the sentence he was given (96 years) and the one he was offered (nine years) is so great that we must conclude it was motivated by a desire to punish him for exercising his constitutional rights. What defendant does not seem to acknowledge, however, is that the jury convicted him of *seventeen* counts of sexual abuse and that, even at a minimum, these convictions carried with them sentences far in excess of the nine years offered by the People. The contrast between the People's offer and the defendant's ultimate fate does not indicate that the trial court intended to punish defendant for exercising his right to a fair trial. In our view, it is far more appropriate to see it as an example of the defendant's very poor judgment. To conclude otherwise would be to suggest that whenever a trial court sentences a defendant to a prison term far in excess of that offered in a plea agreement an untoward motive on the court's part must be found. This we will not do.

Defendant states that no new facts arose during the course of the trial to justify the term ultimately imposed because the court already was aware of the nature of the allegations against him before the trial began. At the outset, we reject defendant's suggestion that we must assume the court's sentence was illegitimately motivated simply because the court agreed, prior to trial, that an appropriate term, should defendant plead

guilty to two counts, would be nine years. We are not privy to the considerations that went into this arrangement, but assume that the nine-year sentence recognized in some way that by pleading guilty defendant was remorseful and willing to accept responsibility for his wrongdoing. Nor do we agree that the court could not take into account, at sentencing, aggravating factors that the court was either aware of prior to trial or that emerged during the course of the trial. Defendant's daughter testified to repeated rapes and molestations over a long period of time. The court also heard evidence of the repeated rapes of defendant's wife. Although the trial court may have been aware of the general contours of these crimes prior to trial, the detailed narration of them legitimately entered into the sentence imposed.

Finally, defendant theorizes that, because the court approved the nine-year sentence, defendant's rejection of it was an affront to the court and thus the ultimate sentence must be seen as retaliatory. This link is purely fictional -- there is nothing in any statement made by the court to indicate a retaliatory motive on the court's part and we will not infer one in the absence of such evidence.

F. ***Sentencing***

Defendant points to a number of errors in the trial court's articulation of its sentencing choices. Defendant did not object to any of these purported errors during the sentencing hearing and the People argue they have been waived.

When a defendant does not object to the trial court's failure to state a valid reason for a sentence choice, this issue may not be considered on appeal (*People v. Gonzalez* (2003) 31 Cal.4th 745, 748; *People v. Scott* (1994) 9 Cal.4th 331, 356.) However, defendant also contends that counsel's failure to object constitutes ineffective assistance of counsel. Therefore, we address the merits of this claim, keeping in mind that a defendant asserting ineffective assistance of counsel must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome. *Strickland v. Washington, supra,* 466 U.S. at p. 694; *People v. Ledesma, supra,* 43 Cal.3d at pp. 215-218.)

We have reviewed the trial court's explanation for its sentencing choices and conclude the trial court erred in imposing the aggravated term on the spousal rape charges. In light of the record, we also conclude that, had defendant brought this claim to the court's attention, it is reasonably probable the court would have reached a different outcome. Accordingly, we remand the matter for resentencing.

The trial court is required to state on the record the reasons for its decision to sentence a defendant to the aggravated term and for imposing consecutive sentences. (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1769; § 1170, subds. (b) & (c).) "[T]he judge shall state in simple language the primary factor or factors that support the exercise of discretion or, if applicable, state that the judge has no discretion. The statement need not be in the language of these rules. It shall be delivered orally on the record." (Cal. Rules of Court, rule 4.406(a).) "Such reasons must be supported by a preponderance of the evidence in the record and must 'reasonably relat[e]' to the particular sentencing determination." (*People v. Scott, supra,* 9 Cal.4th at pp. 349-350, fn. omitted.) Because the trial court is not permitted to use the same fact as a basis for both aggravation and imposition of consecutive terms (Cal. Rules of Court, rule 4.425(b); *People v. Lawson* (1980) 107 Cal.App.3d 748, 756-758), the court is required to state separate reasons for its decision to impose the aggravated term and consecutive sentences.

The trial court sentenced defendant to four consecutive sentences on the spousal rape convictions (§ 262, subd, (a)(1)). The court explained the imposition of consecutive sentences: "each is a separate incident, clearly; and also on the ground that the crimes constituted or demonstrated a great degree of viciousness, cruelty and callousness on the part of the defendant." The court, however, gave no reason for choosing the aggravated term.

Defendant correctly points out that the trial court was not required to give *any* reason for ordering the terms to be served consecutively because, under section 667.6,

subdivision (d), the court was required to impose consecutive terms.[8] Defendant is also correct, however, that the trial court erred when it failed to give any reason for imposing the aggravated term.

The People argue that the court's error is harmless because the reason given by the court in support of the consecutive sentences -- that "the crimes constituted or demonstrated a great degree of viciousness, cruelty and callousness on the part of the defendant" -- would also support the aggravated term. We do not agree. In order to be properly characterized as a circumstance in aggravation, the acts committed by defendant must go beyond the basic crime of spousal rape. As one court has put it, "The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary." (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110.)

As noted earlier, defendant was convicted of rape of a spouse "accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (§ 262, subd. (a)(1).) Although the facts testified to by the wife (see *ante*) are substantial evidence sufficient to justify the jury's finding that defendant violated section 262, subdivision (a)(1), they do not establish that "the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness." (Cal. Rules of Court, rule 4.421(a)(1).) Defendant's actions were heinous. However, there is no evidence that the defendant's actions in committing these crimes involved violence or the threat of violence greater than that necessary to commit the crime of spousal rape.

We are aware that, in general, so long as the record evidences other factors in aggravation beyond those cited by the court in support of its sentencing choice, we may find the court's failure to properly support its sentencing choice harmless error. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Here, however, we are unable to find the error

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8 Section 667.6, subdivision (d), provides that "A full, separate, and consecutive term shall be served for each violation of . . . paragraph (1) . . . of subdivision (a) of Section 262. . . . if the crimes involve separate victims or involve the same victim on separate occasions.

harmless. No additional factors in aggravation as to the spousal rape crimes are evident from the record. Although the People mention defendant's lack of remorse generally, neither the record nor the probation officer's report makes any reference to defendant's lack of remorse with regard to the spousal rape charges. We also note that defendant denied committing this crime and, in those circumstances, lack of remorse is generally not a valid reason to aggravate a sentence. (*People v. Key* (1984) 153 Cal.App.3d 888, 900-901.)

When a case is remanded for resentencing, the trial court is "entitled to reconsider all of its sentencing choices . . . ." (*People v. Savala* (1983) 147 Cal.App.3d 63, 68-69, disapproved on other grounds in *People v. Foley* (1985) 170 Cal.App.3d 1039, 1044; see also *People v. Sanchez* (1991) 230 Cal.App.3d 768, 772.) We would encourage the trial court to do so here. The record indicates a significant degree of confusion on the trial court's part about the nature of the task in front of it. For example, defendant was convicted of five counts of committing a lewd or lascivious act on a child under the age of 14 years. (§ 288, subd. (a).) These counts do not involve the use of force. The trial court initially indicated an intent to impose consecutive sentences on these five counts under section 667.6, subdivisions (c) and (d). The court articulated, as a reason for this choice, "that the crimes involved here show a great deal of callousness." After an interruption by the interpreter due to technical difficulties the court went on to explain, "Because of the reason that court just stated, 421(a)(1), that the crime involved a great degree of viciousness and callousness and cruelty, the court chooses to sentence the defendant pursuant to 667.6(d), of the California Penal Code."

The court then referenced an incorrect Penal Code section as to the fifth count and, after the People corrected it, the court realized it was using an information that had been subsequently amended. The court then stated, "I had all my notes on this the last time we were in court and I set them somewhere safe, and they are really safe because I couldn't find them, so I am working from the information."

After an unreported bench conference, the trial court resumed its explanation of its sentencing choices and again indicated its intent to sentence the defendant to consecutive

sentences on counts three through seven. The court gave as a reason for the consecutive sentences: "because of the nature of the case, the duration of the suffering of the victim, the complete lack of empathy for her position, and that the victim was particularly vulnerable, as set forth in 421(a)(3), the court will sentence the defendant consecutively." The People again corrected the court, pointing out that, because the counts involved nonviolent felonies, the court could only sentence the defendant to "one-third the midterm." The court disagreed and the People informed the court that section 667.6, subdivision (d), applies only to forcible sex counts and does not apply to violations of section 288, subdivision (a). The court stated, "Well, I am not sure I agree with that. However, if that is what you are requesting, that is what I will do."[9] The court went on, "the court sentences the defendant on Count 3 to eight years, the aggravated term, and sentences the defendant consecutively on counts 4, 5, 6, and 7 to two years each, which is a total of 16 years in the Department of Corrections."

Defendant correctly points out that the trial court did not give reasons for imposing either the consecutive sentences under section 1170.1 or the aggravated term. The circumstances cited by the court in support of its decision to impose a consecutive sentence under section 667.6 may be sufficient to justify both the imposition of a consecutive sentence under section 1170.1 and the aggravated term.[10] We note, however,

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9 In fact, the consecutive sentencing provision of section 667.6 , subdivision (d) does not apply to section 288, subdivision (a), and the trial court was without jurisdiction to impose consecutive sentences for counts 3 through 7 under section 667.6, subdivision (d). Nor could it do so under section 667.6, subdivision (c), which similarly does not apply to section 288, subdivision (a). Therefore, to the extent the trial court wished to sentence defendant to consecutive sentences for counts 3 through 7, it was required to do so under section 1170.1.

10 The trial court's remarks indicate it believed the actions that form the basis of Count 3 fell within the aggravating factor described in California Rules of Court, rule 4.421(a)(1) (previously rule 421(a)(1)). Rule 4.421(a)(1) applies to crimes that involve "great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness." In *People v. Fernandez* (1990) 226 Cal.App.3d 669, 679, the court held that this aggravating sentencing factor could not be

that the People recommended that the court impose the midterm of six years on these counts and also recommended that these terms be served concurrently and the trial court's statements indicated it was inclined to accept the People's recommendations.

The court's admission of unpreparedness for defendant's sentencing is troubling. Defendant was sentenced to what is, in effect, a life term in prison. The process by which this serious result was reached is substantially undermined because the court's explanation of its sentence is replete with misstatements about the legal basis for its sentence. We are also concerned that defendant's trial counsel did not attempt to offer any evidence in mitigation despite the fact that defendant was subject to a sentence ten times in excess of what, at one point, the People had offered.

Under these circumstances, a remand for resentencing is appropriate. The trial court will have an opportunity to clearly pronounce a correct sentence and defense counsel an opportunity to present evidence and argument regarding mitigating circumstances. Defendant's sentences on all counts are, therefore, vacated and the matter remanded for resentencing.

G. *Substantial Evidence of Lewd Intent*

In supplemental briefing, defendant also contends there was insufficient evidence of lewd intent as to the three violations of section 288. During the time period these counts covered, the victim was between eleven and thirteen years old. The victim testified that, when she was eleven years old, the defendant "rubbed" and "squeezed" her buttocks inside or underneath her clothing. She also testified, in response to the prosecutor's question about these touches, that the touching occurred "outside" her clothing. She also testified that, when she was twelve years old, the "same" touching continued. This touching occurred "a lot" both in the daytime and in the nighttime when

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used to aggravate a sentence for lewd and lascivious conduct upon a child under section 288, subdivision (a), when that crime does not involve forcible lewd conduct. The crime that forms the basis of Count 3 similarly did not involve forcible conduct and, therefore, this circumstance in mitigation may not be used to either aggravate the sentence or impose a consecutive sentence.

she was in bed. When the victim was thirteen years old, defendant continued to touch her in the same way. This occurred "a lot."

Defendant attempts to characterize the victim's testimony as "merely" a parent's rubbing and squeezing of a child's buttocks and, citing *People v. Martinez* (1995) 11 Cal.4th 434, 450, argues that the jury did not have substantial evidence of lewd intent. We disagree.

Martinez certainly does not stand for the proposition that a parent has license to sexually abuse a child. Rather, *Martinez* points out that the perpetrator's intent is crucial in determining whether a violation of section 288 has occurred. (*People v. Martinez, supra*, 11 Cal.4th at p. 450.) Here, the jury concluded that, when defendant rubbed and squeezed his daughter's buttocks, he did not do so as part of the routine acts of a "normal and healthy upbringing" (*ibid.*) but, rather, did so with lewd intent. Both the "manner of touching" and "other acts of lewd conduct admitted or charged in the case" are relevant to the issue of intent. (*Id.* at p. 445.) Here, the victim described a way of touching her buttocks that went well beyond what could be expected from a loving parent. In addition, there was evidence that, apart from the many incidents in which defendant rubbed and squeezed the victim's buttocks, defendant also touched the outside of her vagina , placed his finger into her vagina, forced her to masturbate and orally copulate him and raped her. Thus, substantial evidence supports the jury's finding that the acts described in these counts were of the requisite lewd character.

H. *Sua Sponte Instruction on Simple Battery*

Defendant also argues in supplemental briefing that, as to counts 3-5, the trial court erred by not instructing sua sponte on the lesser-included offense of misdemeanor battery. The Attorney General, citing *People v. Breverman* (1998) 19 Cal.4th 142, 162, argues that a reasonable jury would not have concluded defendant committed battery and not lewd and lascivious conduct. However, the simpler and far more fundamental response to defendant's argument is that battery is not a lesser-included offense of section 288 and, therefore, the trial court had no sua sponte duty to instruct on it.

It is well established that an offense is a lesser-included offense if it satisfies either the "elements" test or the "accusatory pleading" test. (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) If a crime cannot be committed without also necessarily committing a lesser offense, the latter is a necessarily included offense under the "elements" test. (*Ibid.*) Under the "accusatory pleading" test, a lesser offense is included within the greater if "the facts actually alleged in the accusatory pleading [ ] include all the elements of the lesser offense . . . ." (*People v. Birks* (1998) 19 Cal.4th 108, 117.) Under neither of these definitions is battery a lesser-included offense of lewd and lascivious conduct.

Section 242 provides that "[a] battery is any willful and unlawful use of force or violence upon the person of another." "[B]attery cannot be accomplished without a touching of the victim." (*People v. Marshall* (1997) 15 Cal.4th 1, 38.) The touching must be "willful," that is, displaying "'a purpose or willingness to commit the act . . . .'" (*People v. Lara* (1996) 44 Cal.App.4th 102, 107.) Any "'harmful or offensive'" touching, no matter how slight, satisfies the element of "'force or violence.'" (*People v. Pinholster* (1992) 1 Cal.4th 865, 961.)

The elements of battery, however, are not included in the elements for a lewd and lascivious act on a child under section 288. Subdivision (a) of section 288 provides that "[a]ny person who willfully and lewdly commits any lewd or lascivious act, . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ." A violation of section 288 does not require that the defendant touch the body of the child. Several appellate courts have made clear that a defendant may violate section 288 without touching the victim. Thus, in *People v. Mickle* (1991) 54 Cal.3d 140, 175-176, the court found a violation of section 288, subdivision (a), when the defendant compelled the child to remove her own clothing. In *People v. Meacham* (1984) 152 Cal.App.3d 142, 154, section 288, subdivision (a) was found to be violated when the children touched their own genitalia at the defendant's instigation. Similarly, *People v. Austin* (1980) 111 Cal.App.3d 110, 112-114, involved a situation in which the child touched her own body. Consistent with these cases is *People*

v. Santos (1990) 222 Cal.App.3d 723, in which the defendant was charged under section 288, subdivision (b) with a lewd and lascivious act on a child by force. The *Santos* court held that "battery (§ 242) is not a lesser included offense to the offenses charged in this case . . . ." (*People v. Santos, supra,* at p. 739.) Rather, "[a]t best, battery was a lesser related offense . . . ." (*Ibid*.) In sum, battery is not a lesser-included offense of the crime of committing a lewd and lascivious act on a child and, therefore, the trial court had no duty to instruct on it sua sponte.

Nor does defendant's argument meet with any greater success under the accusatory pleading test. Under that test, "a lesser offense is included within the greater charged offense '"if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." [Citation.]'" (*People v. Lopez, supra,* 19 Cal.4th at pp. 288-289.) Here the information alleged that defendant "did willfully, unlawfully, and lewdly commit a lewd or lascivious act upon or with the body or certain parts or members thereof of [the victim], a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the defendant(s) or the said child . . . in violation of Penal Code section 288(A), a felony." This accusatory language does not specify any particular manner in which the crime was committed. Therefore, under the accusatory pleading test, battery is not a lesser-included offense.[11]

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11 Defendant also contends that the trial court had a duty to instruct the jury sua sponte on battery as a lesser-included offense of oral copulation, which was charged in counts 10 and 11. Battery is not a lesser-included offense of oral copulation. (*People v. Santos, supra*, 222 Cal.App.3d 723, 739.) Nor does the accusatory pleading allege facts beyond a bare recitation of the statutory elements of oral copulation under section 288a. Finding *Santos* persuasive, we conclude the trial court did not have an obligation to instruct on battery as to these counts. Moreover, even were we to conclude battery is a lesser-included offense of oral copulation, we agree with the Attorney General that, in light of the fact that defendant's theory was that no oral copulation occurred, and the victim testified that defendant resisted and the defendant held her head so as to make her

Moreover, even were we to conclude that battery is a lesser-included offense of lewd and lascivious conduct, there was not substantial evidence from which a jury composed of reasonable people could conclude that the defendant committed the lesser offense but not the greater offense. (*People v. Breverman, supra, 19* Cal.4th at p. 162.) Although defendant argues there was little evidence that he rubbed and squeezed his daughter's buttocks with lewd intent, in fact, a reasonable jury would not have concluded that these touchings constituted misdemeanor batteries, rather than violations of section 288. As we have already explained, this is not a situation where the evidence in support of the section 288 violations was weak. The victim's descriptions of both the manner of the touching that formed the basis of these counts as well as defendant's other actions made it extremely unlikely that a reasonable juror would have believed this testimony, but nevertheless convicted defendant of the lesser included offense of misdemeanor battery.

I. ***Evidence of Force***

In supplemental briefing, defendant also contends there was not substantial evidence of "force, violence, duress, menace, or fear of immediate and unlawful bodily injury," under section 288, subdivision (b), to support the convictions on counts 8-11. We disagree.

With regard to counts 8 and 9, the victim testified that defendant touched her vagina by rubbing it or putting his finger in it. As to count 8, the victim testified that she tried to stop the defendant and tried to resist him. However, he held her arm so she could not get away. Although defendant contends the victim's testimony was that he *merely held the child* and that this is not evidence of a use of force substantially different from or substantially greater than that necessary to accomplish the lewd act itself, this effort to recast the victim's testimony is unconvincing. Viewed in its entirety and in the light most favorable to the judgment, the victim's testimony was sufficient evidence from which a

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put her mouth on his penis, no reasonable jury believing the victim's testimony could have found a battery, but not oral copulation, to have occurred.

jury could reasonably conclude that the lewd act alleged in count 8 met the requisite requirement of force. Similarly, the victim testified as to count 9 that she tried to stop the defendant from putting his finger inside her vagina. However, he held her so she could not get away. Again, although defendant attempts to suggest that this testimony does not supply substantial evidence of force, viewed under the substantial evidence test, it more than sufficiently supports defendant's conviction.

Defendant similarly argues that, as to counts 10 and 11, which alleged that defendant forced the victim to orally copulate him, there was insufficient evidence that he did so by means of force. The victim testified that the defendant made her touch his penis with her mouth, that she tried to resist him and was not strong enough to do so and that the defendant touched or held her head in the back to make her put his mouth on his penis. Again, viewing this evidence under the substantial evidence standard, we conclude the amount and type of force described by the victim were more than sufficient to support the jury's verdict.

J. *Blakely Error*

While this appeal was pending, defendant obtained leave of this court to file a supplemental brief alleging sentencing errors based on the United States Supreme Court's recent decision in *Blakely, supra,* 124 S.Ct. 2531. Defendant argues the trial court violated *Blakely* when it imposed upper and consecutive terms without submitting the facts on which the imposition of these terms was based to the jury. Although we have already concluded that this matter must be remanded to the trial court for resentencing, we discuss this issue in order to provide the trial court with guidance on remand.

In *Blakely*, the Supreme Court held that a Washington State court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the "standard range" of 53 months to 90 months based on the trial court's finding that the defendant acted with "deliberate cruelty." (*Blakely, supra*, 124 S.Ct. at p. 2537.) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi, supra,* 530 U.S. at p. 490 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." (*Blakely, supra,* at p. 2536.) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the "statutory maximum" is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely, supra,* at p. 2538.)

1. *Imposition of Upper Term*

Defendant contends that *Blakely* was violated because the trial court relied on aggravating factors to impose the upper term for his child abuse convictions. In this case, the jury convicted defendant of two counts of rape (§ 261, subd. (a)(2)), two counts of forcible oral copulation (§ 288a, subd. (c)(2)), three counts of forcible lewd acts on a child under age 14 (§ 288, subd. (b)) and six counts of non-forcible lewd acts on a child under age 14 (§ 288, subd. (a)). Defendant was also convicted of four counts of spousal rape (§ 262, subd. (a)(1)). Defendant was sentenced to the upper term on counts 1 through 3 (lewd conduct by force, § 288, subd. (b)), counts 8 and 9 (lewd conduct by force, § 288, subd. (b)), counts 10 and 11 (oral copulation by force, § 288a, subd. (c), counts 12 and 13 (rape, § 261, subd. (a)(2)) and counts 14 through 17 (spousal rape, § 262, subd. (a)(1).) The court also ordered that the sentences on counts 4 through 17 be served consecutively. The imposition of these upper terms, none of which is based on facts found by a jury, offends *Blakely.*

The People, however, contend that California's "triad" sentencing system does not offend *Blakely* at all; that any one of the three legislatively authorized terms for an offense, including the upper term, can be imposed by a trial court without violating a defendant's Sixth Amendment rights. Under California's determinate sentencing law, the maximum sentence a judge may impose for a conviction without making any additional findings is the middle term. Section 1170, subdivision (b), states that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Furthermore, California Rules of Court, rule 4.420, subdivision (b), states that "[s]election of the upper term is justified only if, after a consideration of

all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation."

Under the People's view of this system, although there is a "presumptive mid-term sentence," the upper term is the statutory maximum sentence that the trial court has discretion to impose. The People's argument may have been persuasive before *Blakely* was decided. Now, however, it is flatly contradicted by the Supreme Court's holding that the statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but rather the sentence it may impose without making *any additional findings*. (*Blakely, supra*, 124 S.Ct. at p. 2538.) Under California law, the maximum sentence a judge may impose without any additional findings is the middle term. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420.)

We also reject the People's contention that defendant forfeited his right to claim *Blakely* error by failing to raise this issue in the trial court. Because of the constitutional implications of the error at issue, we question whether the forfeiture doctrine applies at all. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental, constitutional rights not forfeited by failure to object].)

Furthermore, there is a general exception to this rule where an objection would have been futile. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648, and authority discussed therein.) We have no doubt that, at the time of the sentencing hearing in this case, an objection that the jury rather than the trial court must find aggravating facts would have been futile. (See § 1170, subd. (b); Cal. rules of Court, rules 4.409 & 4.420-4.421.) In any event, we have discretion to consider issues that have not been formally preserved for review. (See 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, p. 497.) Since the purpose of the forfeiture doctrine is to "encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors," (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060), we

find it particularly inappropriate to invoke that doctrine here in light of the fact that *Blakely* was decided after defendant was sentenced.[12]

Thus, we conclude that the upper term may not be imposed in this case unless the facts on which it is based are submitted to a jury and proved beyond a reasonable doubt. (*Blakely, supra,* 124 S.Ct. at p. 2536.) We have already concluded that the trial court erred in imposing the upper term on the spousal rape charges. In addition, on remand, we have directed the court to reconsider all its sentencing choices. On remand, the trial court must also ensure that, in imposing an upper term, it does so in compliance with *Blakely*.

2. *Imposition of Consecutive Terms*

The trial court in this case imposed consecutive sentences under both section 667.6, subdivision (d) and under section 1170.1[13] Defendant contends that this, too, offends *Blakely* because a jury must determine, beyond a reasonable doubt, those facts on which consecutive sentences are based. For the court's guidance on remand, we conclude that such a procedure is not mandated by *Blakely*.

As we have held, *ante*, the court was required to impose consecutive terms under section 667.6, subdivision (d) on the spousal rape convictions.[14] Section 667.6 neither anticipates nor requires that the trial court make *any* finding of fact before imposing consecutive terms and, thus, *Blakely* simply has no application in this context.

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12 We are not persuaded otherwise by the People's references to two federal cases, which, they contend, characterize *Apprendi* claims that were not raised in the trial court as forfeited notwithstanding the fact that *Apprendi* was decided while the cases were on appeal. (See *United States v. Cotton* (2002) 535 U.S. 625; *United States v. Ameline* (2004) 376 F.3d 967.) As these cases illustrate, under federal appellate procedure, characterizing a claim as "forfeited" does not mean that the claim may not be reviewed on appeal. Rather, such a claim is reviewed for "plain error." (*Ibid*.)

13 We point out, *ante*, that, defendant may be sentenced to consecutive sentences for counts 3 through 7 under section 1170.1, rather than section 667.6.

14 Section 667.6, subdivision (d), provides that "A full, separate, and consecutive term shall be served for each violation of . . . paragraph (1) . . . of subdivision (a) of Section 262 . . . if the crimes involve separate victims or involve the same victim on separate occasions.

We also conclude that consecutive sentences imposed under section 1170.1 do not offend *Blakely*. *Blakely* makes clear that a jury must find any fact "that increases the penalty for a crime *beyond the prescribed statutory maximum*." (*Blakely, supra,* 124 S.Ct. at p. 2536, emphasis added.) As we have noted, the midterm is the prescribed statutory maximum under California's determinate sentencing scheme and, therefore, a jury must determine facts to support the imposition of a greater term. Defendant argues that there is a similar statutory presumption that a concurrent, rather than consecutive, term will be imposed. Defendant bases this argument on the last sentence of section 669, which states "Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently." This language cannot be read as creating a presumption that the concurrent term is the norm. In contrast to section 1170, subdivision (b), which states that "the court shall order imposition of the middle term," section 669 operates only in the event the trial court does not specify whether a term should run consecutively or concurrently. This can hardly be said to create a statutory presumption that the court will sentence a defendant concurrently. Our conclusion is consistent with that reached by the court in *People v. Reeder* (1984) 152 Cal.App.3d 900, 923 ["there is no . . . statutory presumption in favor of concurrent rather than consecutive sentences . . . ."] Therefore, *Blakely* does not apply to the trial court court's imposition of consecutive sentences.

IV. DISPOSITION

The cause is remanded for resentencing. In all other respects, the judgment is affirmed. By petition for writ of habeas corpus, defendant raises the issue of ineffective assistance of trial counsel. This petition is denied.

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Haerle, J.

I concur:

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Ruvolo, J.

Concurring opinion of Kline, P.J.

I concur in the judgment and in all portions of the majority opinion except part III.E in which the majority determines that the trial court did not improperly punish appellant for exercising his constitutional right to a trial. I write separately to disassociate myself from that determination. In my view, the question whether the sentence appellant received was, at least in part, calculated to punish him for rejecting a plea bargain is much closer than the majority opinion indicates. In light of the remand we order, it is unnecessary to resolve the question, and I would not do so.

It is elemental, and our Supreme Court and the Supreme Court of the United States have repeatedly emphasized, that the state may not punish a defendant for the exercise of a constitutional right. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort [citation], and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' [Citations.]" (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363; accord, *United States v. Jackson* (1968) 390 U.S. 570, 580-582; *Waley v. Johnston* (1942) 316 U.S. 101, 104; *People v. Collins* (2001) 26 Cal.4th 297, 305-306; *In re Lewallen* (1979) 23 Cal.3d 274, 278-281.) However, notwithstanding the constitutional prohibition, it is widely believed by knowledgeable observers of our criminal justice system that judges commonly "sentence closer to the tops of applicable [sentence] ranges to penalize defendants for burdening them with cumbersome jury trials." (Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas* (2001) 110 Yale L.J. 1097, 1154-1155, fn. 345.) For this and other reasons, the propriety of the plea bargaining process is coming under increasingly critical scrutiny. (See, e.g., Bibas, *Plea Bargaining Outside the Shadow of Trial* (2004) 117 Harv. L.Rev. 2463; Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow* (2004) 117 Harv. L.Rev. 2548, 2561; Fisher, *Plea Bargaining's Triumph* (2000) 109 Yale L.J. 857.)

One of the difficulties in determining whether the exceptional sentence in this case was retaliatory arises from the unusually assertive role played by the trial judge in the bargaining process. The judge did not simply endorse a sentencing offer proposed by the prosecutor, as the majority opinion suggests, but made a better offer. The district attorney agreed only to accept pleas to two counts, which would have exposed appellant to a maximum term of 16 years (two upper terms of eight years imposed fully consecutively). The trial judge and the district attorney explicitly and repeatedly referred to the nine-year offer as "the court's offer," making clear her direct personal involvement in the bargaining and, therefore, the reliability of the representation.[1] The fact that the judicial offer was more explicitly favorable than that proposed by the prosecutor, and the persistence with which the judge advanced her offer, creates the inappropriate appearance that appellant's rejection of the judge's significant effort to induce a plea may have been taken into account in sentencing, as it is considerably easier to infer a vindictive sentence from the rejection of a plea bargain proposed by the sentencing judge than from the rejection of a bargain offered by a prosecutor.

This inference is supported by the *magnitude* of the disparity between the offer and the sentence. Ninety-six years, more than 10 times greater than the nine-year offer, amounts to a life sentence without possibility of parole, as appellant can be released only if he lives to be more than 130 years of age. The sentence substantially exceeds even that initially proposed by the district attorney, which was "only" 80 years.

The disparity is not easily explained by the additional factual information provided the court as a result of the trial. At the time of the offer, the information contained 47 counts, including "aggravated sexual assault of a child" (Pen. Code, § 269) and

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[1] After the district attorney acceded to "the court's offer," the judge reminded appellant that he was exposed to "an awfully long time which apparently is your lifetime," and told him: "So *the court* and the prosecutor have offered what's called a plea bargain which means that if you enter a plea to certain counts, you would be sentenced to not more than nine years—you would be sentenced to nine years in state prison. So have you really thought through that, whether or not you want to go to trial and take the risk that you're exposing yourself to a life sentence?" (Italics added.)

numerous counts of violation of Penal Code section 288 by force, and exposed appellant to 255 years in state prison. It was obvious from the information that appellant was charged with repeated forcible molestations of his daughter and multiple sexual assaults of his wife. After trial—during which the information was amended by dropping 30 of the 47 counts, including all counts alleging "aggravated sexual assault of a child"—appellant's exposure was reduced to the 96 years the court imposed.

The trial court must be deemed to have believed that a nine-year sentence would be just in the circumstances, particularly because the district attorney did not object to the court's sweetening of the deal.[2] The trial court was certainly not bound to that sentence if appellant refused to enter a plea, and could impose a significantly higher sentence after trial. However, a judicial offer of a nine-year sentence to a defendant then exposed to 255 years indicates that the court clearly did not believe exceptionally severe punishment was in order, as does the fact that the plea bargain proposed by the district attorney, who was certainly aware of the quality of the evidence against appellant and the forcible nature of his many molestations, exposed him to no more than 16 years.

Furthermore, it is at least questionable whether the trial produced evidence appellant committed his crimes in such an exceptionally vicious or callous manner that he deserved a maximum sentence more than 10 times longer than that previously urged by the court, and far longer even than the sentence that could have been imposed if appellant accepted the district attorney's offer and received the maximum sentence to which that offer exposed him. Nor does the Attorney General genuinely argue that the evidence produced at trial dramatically altered the pretrial perceptions of the court and the district attorney as to the appropriate measure of punishment.[3] As just noted, the charges of

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[2] Though the district attorney did not object, the Attorney General has. At oral argument in this court, the Attorney General contended that the propriety of the sentence should not be measured by the court's nine-year offer, because that offer was improper.

[3] As the majority opinion indicates, the Attorney General's primary justification for the maximum sentence imposed is not evidence that appellant committed his crimes more callously than is necessary to commit the offenses, but because, as stated in the

"aggravated sexual abuse of a child" were dropped during trial, the People do not argue that appellant's forcible molestations were distinctively worse than most, and, as the majority points out, the evidence pertaining to the spousal rapes does not show violence or the threat of violence greater than that necessary to commit the offense. Given the absence of any other rationale for a sentence more than 10 times longer than that the court previously felt appropriate, it is not unreasonable to suspect that imposition of the maximum sentence may have been retaliatory.

That suspicion is also fueled by the considerable effort made by the court to impress upon appellant the risk he ran by exercising his right to trial. The court emphasized that if he insisted on a trial, which the court said would require his daughter "to testify in front of strangers and go through what the district attorney views as a lot of anguish because she is doing this in public," the district attorney might ask for more time. This statement, which carried with it the implication the court might grant such a prosecutorial request, was obviously designed to persuade appellant not to exercise his constitutional right to confront the witnesses against him, particularly his daughter. Trials of defendants charged with the sexual abuse of a child invariably require the child to testify. As the Supreme Court has noted, "face-to-face presence may, unfortunately, upset the truthful . . . abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." (*Coy v. Iowa* (1988) 487 U.S. 1012, 1020.) The trial court's emphasis of the adverse consequences of asserting his right to compel his daughter to testify at a public trial provides yet another

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probation report, appellant "did not admit guilt or take any responsibility for his actions." According to the Attorney General's brief, "if appellant had admitted his crimes and pleaded guilty, that would suggest contrition and a recognition of wrongdoing essential to subsequent rehabilitation. Instead, he refused to admit that he had done anything wrong and saw himself as the victim. As a result, appellant's sentence was appropriately based on the facts developed during the trial and in the probation report." In effect, the Attorney General argues that appellant's plea of not guilty explains and justifies the disparity between the plea offered by the court and the maximum sentence it imposed. This argument is, of course, constitutionally untenable.

reason to believe appellant's rejection of this advice may have been vindictively taken into account in sentencing.

Finally, the court's failure to provide any reason for imposing aggravated terms, the absence of any evidence justifying such a sentence choice, and the trial judge's repeated "misstatements about the legal basis for its sentence" (maj. opn., at p. 28) also indicate that in sentencing appellant the trial court may have been less concerned about the law than with punishing appellant for asserting his constitutional right to a trial.

The absence of any other persuasive explanation for the huge difference between the judge's offer and the maximum sentence is, to say the least, troubling. For that reason, and because the remand for resentencing we order renders it unnecessary, I do not join in my colleagues' determination that the sentence imposed in this case did not punish appellant for exercising his constitutional right to a trial.

Furthermore, given the many reasons to believe the sentence punished appellant for rejecting the plea bargain proposed by the sentencing judge, I think it prudent to remand this case for resentencing by another judge.

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Kline, P.J.