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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT RAY HARLESS, Defendant and Appellant.	H026885 (Monterey County Super. Ct. No. SS022393)

I. INTRODUCTION

Defendant Robert Ray Harless appeals after conviction by jury trial of one count of lewd and lascivious acts on a child under the age of 14 (Pen. Code, § 288, subd. (a)),[1] 11 counts of forcible lewd acts on a child under the age of 14 (§ 288, subd. (b)(1)); and four counts of aggravated sexual assault (forcible rape, §261, subd. (a)(2)) of a child under the age of 14 when defendant was more than 10 years older than the victim (§ 269, subd. (a)(1).). As to each of the section 288 counts, the jury found true the allegation that defendant had committed the offense on more than one victim. (§ 667.61, subd. (e)(5).)

Defendant also was convicted of two counts of inducing a minor to use or sell marijuana (Health & Saf. Code, § 11361, subd. (a)); two counts of furnishing cocaine to a minor at least four years younger than defendant (Health & Saf. Code, § 11353.1, subd.

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[1] All statutory references hereafter are to the Penal Code unless otherwise indicated.

(a)(3)), and two counts of furnishing Valium to a minor. (Health & Saf. Code, § 11380.) Prior to trial, defendant pleaded guilty to two counts of child endangerment. (§ 273, subd. (a).)

Defendant was sentenced to a total term of 152 years to life. The trial court also imposed a $10,000 restitution fine (§ 1202.4) and a $10,000 suspended parole revocation fine (§ 1202.45).

On appeal, defendant contends: (1) the admission of the prior statements of victim B. violated his Sixth Amendment right to confrontation under *Crawford v. Washington* (2004) ___U.S. ___ [124 S. Ct. 1354]; (2) CALJIC 10.42, the jury instruction given on the element of duress on the charges of forcible lewd acts on a child under the age of 14 (§ 288, subd. (b)(1)), erroneously includes "hardship" in the definition of "duress"; (3) there was insufficient evidence of duress to prove the charges of forcible lewd acts on a child under the age of 14 (§ 288, subd. (b)(1); (4) there was insufficient evidence of duress to prove the charges of aggravated sexual assault of a child under the age of 14 (§ 269, subd. (a)(1)); (5) the consecutive sentences on all four convictions of aggravated sexual assault of a child under the age of 14 (§ 269, subd. (a)(1)) violate the prohibition against multiple punishments (§ 654); and (6) the imposition of the upper term on count 37 (furnishing cocaine to a minor in violation of Health & Saf. Code, § 11353.1, subd. (a)(3)), based on aggravating factors not found by the jury, violate the right to jury trial under *Blakely v. Washington* (2004) ___ U.S ____ [124 S.Ct. 2531].

We will affirm the judgment.

II. BACKGROUND

The facts underlying defendant's offenses are set forth in the light most favorable to the judgment. (See *People v. Valencia* (2002) 28 Cal.4th 1, 4.) Victims B. and M. are

defendant's daughters.[2] B. was born in 1992. Her older sister M. was born in 1987. The charges against defendant arose from allegations that he sexually abused B. and M. and provided them with drugs at various times during September 1998 through February 6, 2001.[3]

Defendant's Household

After their mother, Vicki Harless, died in 1997 or 1998, defendant asked a friend, Rafaela A., and her two teenaged daughters, Maria and Cynthia, to move into defendant's home in Greenfield and help care for B. and M. Both Rafaela and her daughter Maria testified at trial regarding their observations of defendant and his daughters.

While she was living with defendant's family, Rafaela saw M. and B. use cocaine given to them by defendant. Rafaela also observed defendant give marijuana to M. and B., and smoke marijuana and take cocaine with them. M. knew how to prepare the drugs,

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[2] To protect the victims' privacy, we will refer to them by the initials of their first names throughout this opinion.

[3] The first amended information alleged 39 counts, including counts 1 through 11--commission of a lewd and lascivious act on a child (B.) under the age of 14 years (§ 288, subd. (a).); count 12--inducing a minor (B.) under the age of 14 to use or sell marijuana (Health & Saf. Code, § 11361, subd. (a)); count 14--furnishing Valium to a minor (B.) (Health & Saf. Code, § 11380); count 15--child endangerment (B.) (§ 273a, subd. (a)); counts 16 through 26 and 31 through 35--commission of a lewd and lascivious act on a child (M.) under the age of 14 years by force or violence (§ 288, subd. (b)(1)); counts 27 through 30--aggravated sexual assault of a child (M.) under the age of 14 years when defendant was more than ten years older than the victim (§ 269, subd. (a)(1)); count 36--inducing a minor (M.) under the age of 14 to use or sell marijuana (Health & Saf. Code, § 11361, subd. (a)); count 37--furnishing cocaine to a minor (M.) (Health & Saf. Code, § 11353.1, subd. (a)(3)); count 38--furnishing Valium to a minor (M.) (Health & Saf. Code, §11380); and count 39--child endangerment (M.) (§ 273a, subd. (a).) As to each of the counts charging a violation of section 288, the information included a sentencing enhancement alleging that defendant had committed the offense on more than one victim. (§ 667.61, subd. (e)(5).)

including cutting lines of cocaine and rolling a marijuana joint. According to Rafaela, M. would wake up and seek cocaine. M. and B. also took Valium. Defendant had a prescription for Valium and would give half a pill to M.

Rafaela also noticed something unusual about the relationship between defendant and M. As she described it, whenever M. wanted something and defendant was against it, M. would say, " 'Can I talk to you, Dad?,' " and they would go into defendant's bedroom. M. would then come out with whatever she wanted.

Maria A. was 13 years old when she and her mother, Rafaela, and her older sister, Cynthia, lived with defendant's family in Greenfield. Like her mother, Maria saw M. and B. use cocaine. Sometimes the drugs would be available on a table in the home, and other times M. would ask defendant for drugs. M. used cocaine almost every day. All of them, including Maria, her mother and sister, and defendant and his daughters, would use cocaine together. Maria also saw defendant give B. marijuana two or three times, and give Valium to M. When asked whether she ever saw defendant do anything strange with M., Maria replied that defendant used to shower with M.

Defendant's wife, Lona Ranell Harless (Ranell), testified that she became a member of defendant's household in 1999 and married him in 2000. B. and M. were living with defendant at that time. Ranell observed M. under the influence of Valium, crack cocaine, and marijuana. Nevertheless, Ranell asserted that she and defendant took care of his daughters' general welfare and they had plenty of food to eat.

Removal from Defendant's Care

Monterey County Child Protective Services removed M. and B. from the care and custody of defendant in February 2001 because it was determined that he could not appropriately provide for their general welfare. The two girls were then placed in foster care with Karen Craig.

Karen Craig recalled her observations of M. and B. in her trial testimony. When the girls were placed with her, they were both thin and lethargic. She took them to

Dr. Barnes at Natividad Medical Center for a physical exam. B. was admitted to the hospital for several days. Several months later, Craig received a call from B.'s school about an incident involving B. that led to an investigation. B. was interviewed by a deputy sheriff and by Susan Gleason (a child abuse interview specialist) at Natividad Medical Center's Bates Clinic. B. also underwent a physical examination at the Bates Clinic in the course of the investigation, as well as an interview at the district attorney's office. Eventually, Craig asked Child Protective Services to remove B. because of B.'s conduct in her home. B. would get Craig's three-year-old daughter out of Craig's sight, then pinch her nipples.

Susan Gerard, the school principal, testified regarding the incident at B.'s school. B. told Gerard that she and another girl were engaged in sexual activity, including exposing their breasts and private parts and kissing, in the school restroom when the school custodian walked in. As a result of B.'s report, Gerard contacted the sheriff's department. At trial, the school custodian, Debra Bauer, denied that she had ever walked in on two girls having sex or doing anything unusual in the bathroom.

Medical Investigation

As part of their physical examinations at Natividad Medical Center upon entering foster care, both B. and M. underwent urinalysis, including a drug screening test. A clinical laboratory scientist, Carmen Kovacs, testified that M. tested positive for cocaine and benzodiazepine. B. tested positive for benzodiazepine only. Benzodiazepine is another name for Valium.

Valerie Barnes, M.D. is the Director of Pediatric Services at Natividad Medical Center. She is also Director of the Child Abuse Center, where children who may have been abused are interviewed and examined. Dr. Barnes testified regarding her physical examinations of the two girls. When M. was examined shortly after being placed in foster care in February 2001 at the age of 13, she was emaciated to the point of looking like an eight-year-old girl. Dr. Barnes diagnosed M. as suffering from failure to thrive

and suspected that M. had symptoms of drug withdrawal. B. was also very thin and failing to thrive. Because she had bronchitis, B. was admitted to the hospital for treatment.

M. was also examined by an ear, nose and throat specialist, Albert Roller, M.D., in February 2001. Dr. Roller testified that M. had a chronic perforation of the nasal septum similar to that seen in cocaine users. However, he could not positively state that the hole in M.'s septum was caused by cocaine use.

Several months after her initial physical examination, Dr. Barnes performed a sexual abuse examination of B. Before the examination, B. was interviewed by Susan Gleason at the Bates Clinic, who obtained a general history of abuse that she passed on to Dr. Barnes. Dr. Barnes also obtained a history of abuse. B. told Dr. Barnes that her father put his penis and his finger in her vagina. He also put his penis in her anus and rubbed her there with his finger. Additionally, defendant fondled, licked, kissed and sucked B.'s breast area. On examination, B.'s genitalia were normal in appearance. Dr. Barnes noted that the majority of sexually abused children do not show any signs of injury.

However, B. had an abnormal reaction when Dr. Barnes examined her anal sphincter. Although a child's anal sphincter normally relaxes in one or two minutes upon examination, B.'s anal sphincter dilated very rapidly, in 5 to 10 seconds. Rapid dilation usually indicates that repeated penetration of the anus has occurred. Dr. Barnes found this abnormal reaction consistent with B.'s history of her father penetrating her anus with his penis. Dr. Barnes concluded that she could neither confirm nor negate sexual abuse, absent more definite proof such as the presence of sperm or a sexually transmitted disease. However, Dr. Barnes believed that B. had been sexually molested, based on B.'s clear history and her abnormal anal dilation.

Criminal Investigation

B.'s interview with Susan Gleason at the Bates Clinic was arranged by Detective Bryant in the course of his investigation of allegations that defendant had committed child molestation. Detective Bryant testified that he had monitored the interview, which was held in a room equipped with audio and video recording equipment and a two-way mirror. The interview took place in November 2001 when B. was nine years old. B. identified various body parts on anatomical drawings of a boy and a girl. M. was also interviewed by Susan Gleason at the Bates Clinic. She denied that her father had molested her. Detective Bryant testified that the videotapes of the girls' interviews accurately reflected the interviews. A redacted version of the videotape of B.'s interview was played for the jury and admitted into evidence. The jury was also provided with a transcript of the audio portion of the redacted videotape.

Detective Bryant's investigation also included an interview with defendant in December 2001. Defendant stated that he and his daughters lived with Rafaela A. and her daughters in Pine Canyon and Greenfield. Regarding his own drug use, defendant denied using marijuana since the death of his wife, but admitted to Detective Bryant that he had used crack cocaine a couple of times and snorted cocaine seven or eight times. He denied using drugs in the presence of B. and M. and also denied giving them drugs. Defendant acknowledged that he occasionally slept and showered with his daughters. However, defendant denied any type of sexual contact with B.

Defendant also was interviewed by Deputy Oakley in December 2001. Deputy Oakley testified that defendant admitted during the interview that he had smoked marijuana and used cocaine in M.'s presence. However, he denied using drugs in front of B. and also denied giving his daughters any drugs, with the exception of smoking marijuana with M. Defendant also denied molesting either girl.

B.'s Testimony

At the time of trial, B. was 10 years old. She recalled that when she lived with her father in Greenfield, they shared their home with a woman and her two daughters. While living with her father, B. smoked marijuana in a pipe and in a bong. Her father gave her marijuana and smoked it with her. She also took cocaine and crack cocaine. She knew how to cut up cocaine into a powder and sniff it up her nose. Sometimes her father would make a line of cocaine for her. The cocaine would be available in their home, or they would drive to Salinas to buy cocaine, crack or marijuana. They would take the drugs home or use them on the spot in her father's truck. She also knew how to prepare crack for smoking in a glass tube. Her father or sister would light the crack for her, and they would smoke it together. Her father also gave her Valium pills when her legs hurt.

During a break in B.'s testimony, there was testimony from David Norum, a district attorney's investigator. He testified as a narcotics expert that B.'s testimony about marijuana, cocaine, and crack cocaine accurately described the appearance of these drugs, as well as the various methods of ingesting the drugs and their effects on the drug user. Norum also testified later in the trial regarding his interview with B. B. told him that M. showed her how to smoke marijuana and that M. would steal crack cocaine from their father. B. also described an incident in their Prunedale house, where her father rubbed his groin area against her groin area while they were watching television on his bed.

When she continued her testimony, B. stated that she did not see Rafaela or her daughters use drugs in defendant's home and did not recall telling David Norum or Susan Gleason anything to the contrary during her interviews with them. She did remember "a little bit" telling Norum that M. stole marijuana from their father. She also remembered using marijuana and cocaine with M. when Rafaela A. was present.

When questioned about sexual activity, B. testified that she had been touched in her private part "where you go pee" by a little boy a long time ago and once by her sister.

She denied that anyone else had touched her private parts. B. did recall telling Susan Gleason during her interview at the hospital that her father's penis had touched her private parts. However, she denied the incident had actually occurred, stating, "Well, I said that. But he really didn't." B. could not remember other things she had told Gleason, including her father telling her to touch his private part, how his private part felt, her father being naked from the waist down, and his touching her when they were on drugs. Nor could she remember telling Gleason that her father had lain on top of her with his private part touching her private part. B. did recall telling Gleason that her father would touch her private part with his hand. She did not remember saying that her father put his private part in her private part, and denied that he had ever done so or that he had ever kissed her breasts.

B. did recall telling Dr. Barnes that her father had touched her private parts with his fingers. She also told Dr. Barnes that her father had put his private part "where he goes pee" in her "butt where you go poop." B. also remembered telling David Norum that her father's naked private part had touched her private part at least two times. Additionally, she remembered telling Norum that when they were living in Prunedale and King City, her father would kiss her breasts when she had no clothing on. However, on cross-examination B. stated that she had also told Norum that her father had never touched her in her private parts, and that none of the things she had said about "sex stuff" with her father was true. She claimed that she had told Norum that she had learned about the "sex stuff" from M.

Regarding the incident at her school, B. stated that she and another little girl showed each other their private parts. She could not remember if they touched each other's private parts, or whether an adult came into the school bathroom and saw them. She told the school principal and then Karen Craig about the incident. During their discussion, Craig kept saying, " 'Who else touched you?' " B. told Craig that she had been touched by the little girl, by her sister M., and, finally, upon Craig's repeated

questioning, her father. Craig gave B. a big hug when B. said her father did it, and stopped asking questions.

M.'s Testimony

At the time of trial, M. was 16 years old. She took drugs for the first time when she was six years old, and has used marijuana, cocaine, and rock cocaine. The day before going to the hospital upon being taken into foster care, M. took Valium and crack cocaine. Her father gave her the crack cocaine, which he kept in the glove compartment in his truck. M. described the appearance of marijuana, cocaine, Valium, and rock cocaine, as well as the methods of using them and the way the drugs made her feel. She would get the money to buy cocaine by stealing it or asking her father. She also stole drugs from her father and lied to him about it. She lied because he would not give her drugs for a while if she stole them from him. M. and her father snorted cocaine together more than 20 times, and also smoked crack together. Her father gave her Valium to calm her down and when she had a leg cramp. Altogether, she has snorted cocaine 200 times or more. Sometimes she would snort cocaine from morning until night, or stay up all night snorting cocaine. M. did notice blood and cartilage on the tissue when she blew her nose, which she attributed to cocaine use. She also used drugs with Rafaela and her daughters.

Regarding sexual activity, M. stated that her father had touched her breasts when they were living in Greenfield. Her father had also touched her vagina with his hands and his penis. On probably 10 occasions, her father's penis would touch her vagina but not go inside. On five or six other occasions, he had penetrated her vagina with his penis when they were lying on a bed together and they were both on drugs. Her father would tell her to take off her clothes. If she did not do it, he would get mad at her. When her father was mad at her, she would not be able to get drugs from him. He never forced her to have sex. She just had to do it. When asked why she thought she had to have sex with defendant in order to get drugs, M. responded, "I didn't get any drugs if I didn't.

Because if I didn't do that, I didn't get no drugs." Their sexual activities occurred when the family lived in Greenfield and in Prunedale. Her father told M. not to tell anyone or she would be taken away and put in foster care.

M. acknowledged telling Susan Gleason in an interview that her father had not molested her, and that someone named Domingo had molested her. She blamed Domingo so that her father would not get in trouble. M. also told Gleason that she had molested B. more than once. During her first interview with David Norum, she did not say that her father had molested her. In their second interview, she told Norum that her father had tried to have sex with her when they were living in Greenfield. She also told him she had lied about Domingo. Eventually, M. told Susan Gleason that her father had molested her because M.'s family had told her that she could not live with them unless her father went to jail. However, M. maintained that she had told the truth when she told Gleason that her father had molested her.

After M.'s testimony, David Norum testified that her testimony about drugs and drug use was accurate. He also stated that during his interview with M., she described specific instances of sexual activity with defendant, including holding his private part in his hand on one occasion and touching it another time. Also, when they were living in Prunedale, M. watched a "dirty movie" with her father while they were lying on his bed and he rubbed her vagina with his fingers. He also kissed her bare breasts and touched her butt "where she goes poop" with his fingers once or twice.

Child Abuse Accommodation Syndrome

Anthony Urquiza, Ph.D., testified as an expert witness about child sex abuse accommodation syndrome, which describes "the common characteristics of children who have been sexually abused," including "secrecy, helplessness, entrapment and accommodation, delayed or unconvincing disclosure and retraction." Dr. Urquiza explained that most children are sexually abused by a person with whom they have an ongoing relationship, who may be bigger and stronger, or who may have manipulated or

bribed the child to ensure secrecy. He also explained that most child victims are helpless, because they do not have the ability to protect themselves from their molesters. Children therefore feel trapped and cope with the experience of abuse by accommodating it.

Dr. Urquiza noted that it is a common misperception that children who are being sexually abused will report the abuse right away, and stated that disclosure actually is a process. Due to factors such as fear and shame, a child's disclosure of abuse may be delayed, or the disclosure may be unconvincing or given in several different versions. The child may provide more information at a later time upon overcoming feelings of being "a bad kid for being abused." Further, a child may later retract his or her report of abuse when the abuse stops, or to ensure that a perpetrator the child cares about does not get in trouble. Dr. Urquiza also stated that the process of testifying in court is very difficult for a child, and may cause a child to retract in order to avoid testifying.

Defendant's Testimony

B. and M. lived with defendant from the time they were born. After his wife Vicki died in 1997, the family lived in Pine Canyon, and then moved to Greenfield. The household in Greenfield included himself and his two daughters, and Rafaela A. and her two daughters. By 1999, he and his two daughters had moved to Prunedale and were living with the woman who became his wife, Lona Ranell Harless. They later moved back to Pine Canyon. B. and M. last lived with defendant in King City, where they had moved from Pine Canyon. Defendant acknowledged that he had pleaded guilty to a charge of failure to support his children and that they were not well cared for while they were in his custody due to his drug addiction.

Defendant also acknowledged using cocaine and marijuana in the presence of his daughters when they lived in Greenfield. Defendant and M. smoked marijuana with Rafaela and her daughters, and he saw M. under the influence of marijuana, cocaine and Valium. Defendant would take both girls with him when he went to Salinas to buy drugs

because he did not want to leave them at home alone. He would use marijuana and cocaine in his truck with the girls present.

When defendant was interviewed by Detective Bryant, he did not tell the truth about using any drugs with M. or giving drugs to her because he was scared and ashamed. He admitted to Deputy Oakley that he had smoked marijuana with M. When questioned by Detective Bryant, defendant stated that he took showers with M. and B. immediately after their mother's death. During the same time period, both girls slept with him. However, defendant denied having any sexual contact with either B. or M.

III. DISCUSSION

A. B.'s Prior Statements Were Admissible Under Crawford v. Washington

Defendant contends that the conviction on count 6, lewd and lascivious acts on a child under the age of 14 (B.; § 288, subd. (a)), must be reversed because the conviction was based on inadmissible evidence from B.'s prior statements. At trial, defendant argued that B.'s prior statements to Dr. Barnes about being sexually molested by defendant, which she made during Dr. Barnes' sexual abuse examination, were inadmissible under Evidence Code section 1253[4] because the statements were not made for the purpose of medical diagnosis or treatment. Defendant also argued at trial that B.'s

[4] Section 1253 provides, "Subject to Section 1252, evidence of a statement is not made inadmissible by the hearsay rule if the statement was made for purposes of medical diagnosis or treatment and describes medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. This section applies only to a statement made by a victim who is a minor at the time of the proceedings, provided the statement was made when the victim was under the age of 12 describing any act, or attempted act, of child abuse or neglect. "Child abuse" and "child neglect," for purposes of this section, have the meanings provided in subdivision (c) of Section 1360. In addition, "child abuse" means any act proscribed by Chapter 5 (commencing with Section 281) of Title 9 of Part 1 of the Penal Code committed against a minor."

prior statements to Dr. Barnes were inadmissible under Evidence Code section 1360[5] because the prior statements were irrelevant to Dr. Barnes' opinion that the manner in which B.'s anal sphincter dilated during examination indicated anal penetration by a foreign object.

On appeal, defendant abandons these arguments in favor of a new argument: admission of B.'s prior statements about sexual molestation to Dr. Barnes, David Norum, and Susan Gleason (on the interview videotape), violated defendant's Sixth Amendment right to confrontation under *Crawford v. Washington* (2004) ____ U.S.____ [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*). In *Crawford*, the United States Supreme Court ruled that the testimonial statements of a witness absent from trial are admissible at trial only where the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. (*Id.,* 124 S.Ct. at p. 1369.) Defendant contends that B. was absent from trial and unavailable within the meaning of *Crawford*, despite B.'s physical presence at the trial, because "she could not remember what she had said or to whom she

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[5] Section 1360 provides, "(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply: [¶] (1) The statement is not otherwise admissible by statute or court rule. [¶] (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability. [¶] (3) The child either: [¶] (A) Testifies at the proceedings. [¶] (B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child. [¶] (b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement. [¶] (c) For purposes of this section, "child abuse" means an act proscribed by Section 273a, 273d, or 288.5 of the Penal Code, or any of the acts described in Section 11165.1 of the Penal Code, and "child neglect" means any of the acts described in Section 11165.2 of the Penal Code."

had said it." Defendant further contends that because B. testified at trial that defendant had not molested her, admission of B.'s prior inconsistent statements in violation of his Sixth Amendment right was clearly prejudicial. Trial counsel's failure to object to the admission of B.'s prior statements on Confrontation Clause grounds at the time of trial did not constitute a waiver of the issue, defendant argues, because *Crawford* represents a significant departure from previous high court rulings on hearsay evidence and therefore trial counsel could not have anticipated the decision.

The People respond that defendant's failure to object waived his Confrontation Clause claim because defendant's new argument, that B. was unavailable as a witness due to her failure of recollection, relies upon pre-*Crawford* authorities such as *People v. Simmons* (1981) 123 Cal.App.3d 677. In *Simmons,* the appellate court ruled that admission of the prior inconsistent statement of a witness who subsequently sustained a serious head injury causing amnesia violated defendant's rights under the Confrontation Clause, because the witness had not been cross-examined before trial, and defendant had no meaningful opportunity to cross-examine the witness at trial due to his complete failure of recollection. (*Id.* at pp. 681-682.)

Alternatively, the People assert that the admission of B.'s prior statements did not violate the Confrontation Clause because B. appeared for cross-examination at trial, and her inability to answer every question did not render the opportunity to cross-examine her meaningless. The People rely on *People v. Perez* (2000) 82 Cal.App.4th 760, 762, in which the appellate court ruled: "[A] criminal defendant is not denied the constitutional right to confront a witness when the witness is present at trial and subjected to unrestricted cross-examination but answers 'I don't remember' to virtually all questions."

In making this argument, the People implicitly concede that B.'s prior statements were testimonial. We find the concession appropriate. B. spoke to Dr. Barnes during a sexual abuse examination and was interviewed by Susan Gleason and by David Norum in the course of the district attorney's investigation of child abuse allegations against

defendant. Thus, B.'s prior statements were " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " (*Crawford*, *supra,* 124 S.Ct. at p. 1364.)

However, that does not end our *Crawford* analysis. The Supreme Court also stated in *Crawford,* "we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements [citation] . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." (*Id.,* 124 S.Ct. at p. 1369, fn. 9.) Memory loss does not necessarily render a witness absent from trial or unavailable for cross-examination. The Supreme Court explained in an earlier case, " '[T]he Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." ' " (*United States v. Owens* (1988) 484 U.S. 554, 559 (*Owens*) quoting *Kentucky v. Stincer* (1987) 482 U.S. 730, 739.)

Thus, when a "hearsay declarant is present at trial and subject to unrestricted cross-examination . . . the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements." (*Owens, supra,* 484 U.S. at p. 560.) Accordingly, the high court found no Confrontation Clause violation where a victim's prior statement identifying the defendant as his assailant was admitted after the victim testified at trial that, although he could remember making the statement, he could no longer remember seeing his assailant. (*Ibid*.)

In the present case, we need not decide whether defendant waived his *Crawford* claim. Assuming no waiver, we determine that the claim lacks merit. B. was not absent from trial or unavailable as a witness within the meaning of *Crawford*. To the contrary, B. was present at trial to explain her prior statements to Dr. Barnes, Susan Gleason, and David Norum. For example, at trial B. recalled telling Susan Gleason that her father's

penis had touched her private parts, but then explained, "Well, I said that. But he really didn't." B. was also subjected to lengthy cross-examination. Her testimony revealed B.'s memory at the time of trial to be somewhat selective, as she had a detailed memory of matters pertaining to drug use, but either denied or could not recall sexual contact with her father during the same time period. B.'s partial failure of recollection did not prevent her from explaining her prior statements, or preclude the jury from assessing her demeanor and determining whether her prior statements or her trial testimony was more credible. Accordingly, defendant had the opportunity for effective cross-examination, and the admission of B.'s prior statements under Evidence Code section 1360 did not violate the Confrontation Clause under *Crawford*.

B. CALJIC 10.42 Properly Defines Duress to Include Hardship

Defendant contends that the trial court erred in instructing the jury on counts 16-26 and 31-34, pursuant to CALJIC 10.42[6], that the definition of duress for purposes of the

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[6] CALJIC 10.42 states, "[Defendant is accused [in Count[s] _____] of having committed the crime of lewd act with a child by force or fear in violation of § 288, subdivision (b)(1) of the Penal Code.] [¶] Every person who willfully commits any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of 14 years, by the use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the child or another person, and with the specific intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or the child, is guilty of the crime of a lewd act with a child by force or fear in violation of Penal Code § 288, subdivision (b)(1). [¶] A "lewd or lascivious act" is defined as any touching of the body of a child under the age of 14 years with the specific intent to arouse, appeal to, or gratify the sexual desires of either party. To constitute a lewd or lascivious act, it is not necessary that the bare skin be touched. The touching may be through the clothing of the child. [¶] [The law does not require that he lust, passions, or sexual desires of either persons be actually aroused, appealed to, or gratified.] [¶] The term "force" means physical force that is substantially different from or substantially greater than that necessary to accomplish the lewd act itself. [¶] [The term "duress" means a direct or implied threat of force, violence, danger, [hardship] or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed, or (2) acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the

charge of forcible lewd acts on a child under the age of 14 (M.; § 288, subd. (b)(1)) "means a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to, one, perform an act which otherwise would not have been performed, or, two, acquiesce in an act to which one otherwise would not have submitted." Relying on *People v. Valentine* (2001) 93 Cal.App.4th 1241 (*Valentine*), defendant complains that the erroneous inclusion of "hardship" in the definition of "duress" was prejudicial because the jury may have based its verdict on the legally incorrect theory that the defendant committed a forcible lewd act on M. by using the threat of hardship (withholding drugs) as a means of duress.

In *Valentine*, the appellate court ruled that when the Legislature amended the rape and spousal rape statutes (§§ 261, 262) to exclude "hardship" from the definition of duress, it also intended to exclude "hardship" from the definition of duress under three other sexual offenses, including forcible sodomy (§ 286, subd. (c)(2), forcible oral copulation (§ 288a, subd. (c)(2)), and forcible acts of sexual penetration (§ 289, subd. (a)(1).) The California Supreme Court recently disapproved *Valentine*, determining that the Legislature's "deletion of the term 'hardship' from the definition of 'duress' applies only to the rape and spousal rape statutes." (*People v. Leal* (2004) 33 Cal.4th 999, 1007, 1010.) Thus, the definition of "duress" for purposes of section 288, subdivision (b)(1),

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victim, and [his] [her] relationship to defendant, are factors to consider in appraising the existence of duress.] [¶] ["Menace" means a direct or implied threat, declaration, or act that shows an intention to inflict an injury upon another.] [¶] The fear of immediate and unlawful bodily injury must be actual and reasonable under the circumstances [, or if unreasonable, the perpetrator must have known of the victim's fear and taken advantage of it].] [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person touched the body of a child; [¶] 2. The child was under 14 years of age; [¶] 3. The touching was done with the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person or the child; and [¶] 4. The touching was done by the use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the child or another person.

continues to include "hardship", as established nearly twenty years ago in *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 (*Pitmon*), and properly incorporated in CALJIC No. 10.42, the "standard jury instruction for section 288, subdivision (b)(1)." (*People v. Leal*, *supra*, 33 Cal.4th at p. 1009.) Therefore, the trial court did not err in instructing the jury under CALJIC No. 10.42 that the definition of "duress" includes "hardship".

C. The Evidence of Duress Was Sufficient

Defendant next contends that the evidence of duress was insufficient for purposes of proving either that defendant violated section 288(b)(1) (counts 16-26 and 31-34) by committing forcible lewd acts on M. or that defendant violated section 269(a)(1) (counts 27-30) by committing aggravated sexual assault (forcible rape, § 261(a)(2)) on her.

1. Section 288, subdivision (b)(1)

"Penal Code section 288, subdivision (b)(1), makes it a felony for any person to commit a lewd act upon a child under the age of 14 years 'by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury.' " (*People v. Leal*, *supra*, 33 Cal.4th at p. 1004.) The definition of "duress" stated in *Pitmon* has been quoted with approval by our Supreme Court: "[D]uress as used in the context of section 288 [means] a direct or implied threat of force, violence, danger, *hardship*, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." (*People v. Leal*, *supra*, 33 Cal.4th at p. 1004, quoting *People v. Pitmon*, *supra*, 170 Cal.App.3d at p. 50, original italics.)

Defendant argues that the evidence showing that M. feared that defendant would withhold drugs from her if she did not comply with his sexual demands was not sufficient evidence of duress to prove a violation of section 288, subdivision (b)(1). According to defendant, "Her only real fear was that she could not get enough drugs to satisfy her cravings. That fear may have been real to M. but it is hardly the kind of fear that a reasonable person would find sufficient to submit to unwarranted sexual activity."

Defendant also asserts that this court in *People v. Espinoza* (2002) 95 Cal.App.4th 1287, ruled that psychological coercion alone does not constitute duress.

In determining whether the evidence is sufficient to support a conviction, we "review the whole record in the light most favorable to the judgment below to determine 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.' " (*People v. Hatch* (2000) 22 Cal.4th 260, 272, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319, original italics.)

Viewing the record in the light most favorable to the judgment, we find substantial evidence of duress. In the context of section 288, "[d]uress involves psychological coercion" that arises from direct or implied threats of force, violence, danger, hardship or retribution. (*People v. Senior* (1992) 3 Cal.App.4th 765, 775.) Thus, "[d]uress cannot be established unless there is evidence that 'the victim['s] participation was impelled, at least partly, by an implied threat. . . ." (*People v. Espinoza*, *supra*, 95 Cal.App.4th at p. 1321.)

However, an implied threat may be shown by the totality of the circumstances, including "the relationship between the defendant and the victim and their relative ages and sizes" (*People v. Senior*, *supra*, 3 Cal.App.4th at p. 775), as well as "the position of dominance and authority of the defendant and his continuous exploitations of the victim" (*People v. Cardenas* (1994) 21 Cal.App.4th 927, 940.) "A threat to a child of adverse consequences, such as suggesting the child will be breaking up the family or marriage if she reports or fails to acquiesce in the molestation, may constitute a threat of retribution

and may be sufficient to establish duress, particularly if the child is young and the defendant is her parent." (*People v. Cochran* (2002) 103 Cal.App.4th 8, 15.)

In the present case, the evidence amply demonstrates that M.'s compliance with defendant's sexual demands was impelled by his implied threats of adverse consequences. M. testified that defendant told her not to tell anyone about their sexual activities or she would be taken away and put in foster care. A reasonable trier of fact could find that this was an implied threat of retribution by defendant, M.'s only surviving parent, that M., at age 11 or 12, would be removed from the family home and placed with strangers if she did not acquiesce in defendant's continued sexual exploitation.

M. also testified that if she did not engage in sexual activities with defendant, he would get mad at her and she would not be able to get drugs from him. When asked why she thought she had to have sex with defendant in order to get drugs, M. responded, "I didn't get any drugs if I didn't. Because if I didn't do that, I didn't get no drugs." A reasonable trier of fact could find that these circumstances created implied threats of both hardship and retribution, whereby M. understood that if she did not comply, defendant would deprive her of the drugs on which she was dependent to the extent of seeking drugs upon awakening in the morning, developing a hole in her nasal septum consistent with cocaine use, and exhibiting symptoms of withdrawal.

For these reasons, we conclude that substantial evidence supports a finding that the offenses of committing forcible lewd acts on M. in violation of section 288, subdivision (b)(1) (counts 16-26 and 31-34) were committed by means of duress.

2. Section 269, subdivision (a)(1)

Section 269, subdivision (a)(1) provides: "Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated sexual assault of a child: [¶] (1) A violation of paragraph (2) of subdivision (a) of Section 261." Section 261, subdivision (a)(2), provides: "Rape is an act of sexual intercourse accomplished with a person not the

spouse of the perpetrator, under any of the following circumstances: [¶] (2) Where it is accomplished against a person's will be means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another."

The *Pitmon* definition of duress is also used to define "duress" in the context of the offense of aggravated sexual assault of a child in violation of section 269. (*People v. Pitmon*, *supra*, 170 Cal.App.3d at p. 50; *People v. Leal*, *supra*, 33 Cal.4th at p. 1005.) Thus, the definition of " 'duress' " is the same for purposes of a section 269 offense and a section 288 offense: " 'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' " (*People v. Cochran, supra,* 103 Cal.App.4th at p. 13, quoting *People v. Pitmon*, *supra*, 170 Cal.App.3d at p. 50.)

Defendant again argues that the evidence showing that M. feared that defendant would deprive her of drugs if she failed to acquiesce in his sexual demands is insufficient to prove duress. As discussed above, we disagree. The evidence of duress that we have determined is sufficient for the section 288 offenses is also sufficient for the section 269 offenses. Therefore, we conclude that substantial evidence supports a finding that the offenses of aggravated sexual assault (forcible rape, § 261, subd. (a)(2)) in violation of section 269, subdivision (a)(1) (counts 27-30) were committed by means of duress.

D. The Consecutive Sentences on Counts 6 and 31-34 Are Lawful

In his supplemental opening brief, defendant contends that he was unlawfully sentenced to consecutive sentences on count 6 (B.; § 288, subd. (a)) and counts 31-34 (M.; § 288, subd. (b)(1).) As to each count, the jury found true the allegation that defendant had committed a section 288 offense on more than one victim. As a result, the trial court imposed multiple victim sentencing enhancements pursuant to section 667.61, subdivision (e)(5). Defendant was sentenced to 15 years to life on each count, to run consecutively.

The trial court reasoned as follows in imposing the consecutive sentences:

"As to Counts 6, 31, 32, 33, and 34 sentencing will be pursuant to Penal Code Section 667.61(b). In each of those offenses you've been convicted of an offense listed in [section] 667.61(c), that is Penal Code Section 288(a) with no exception under [section] 1203.066(c) or Penal Code Section 288(b)(1). [It] was pled and proven that the offenses occurred under circumstances set out in subdivision [(e) of section 667.61]. That is that you have been convicted in this case . . . of committing an offense specified in subdivision [(c) of section 667.61] against more than one victim. Therefore, as to Count 6, the commission of a lewd act with B., you are sentenced to a term of 15 years to life in the State prison."

"As to Count 31, which is the commission of a forcible lewd act with a separate victim, M., specifically the first act of sexual intercourse, the court imposes a term of 15 years to life in the State prison. This term is to run consecutive to the term in Count 6 for the following reasons. The offense involves a separate victim. Under [Cal. Rules of Court, rule] 4.425 the crimes are objectively independent of each other. The crime against M. involved separate acts of violence or threatened violence. The crimes were committed at different times and places and do not indicate a single period of an abhorrent behavior. As to Counts 32, 33, and 34, that is the commission of the second, third and fourth forcible acts of sexual intercourse with M., you are sentenced to a term of 15 years to life in the State prison for each offense [pursuant] to Penal Code Section 667.61(g) and the holding of the California Supreme Court of [*People v. Jones* (1997) 25 Cal.4th 98] [¶] . . . [¶]

"In applying [Cal. Rules of Court] 4.425 the consecutive sentences are appropriate. [The] crimes and their objectives were predominantly independent of one another. They involve separate acts of violence, multiple physical insults against M. They were committed at different times and do not indicate a single period of abhorrent behavior. To summarize then, the court imposes, pursuant to Penal Code Section

667.61(b), five consecutive terms of 15 years to life in the state prison for Counts 6, 31, 32, 33 and 34. For a total sentence under this section of 75 years to life in the State prison."

Defendant argues that the consecutive sentences on counts 32, 33, and 34 must be stayed to prevent a violation of the section 654[7] ban on multiple punishment, because "[t]he trial court erred in imposing consecutive sentences on each and every one of these five counts when there were only two victims. Only one enhancement per victim is permitted under the multiple victim enhancement under section 667.61, subdivision (e)(5) in this case, as there was only one count of conviction for B."

We do not find any support for defendant's contention that section 667.61, subdivision (e)(5) limits the number of consecutive sentences that can be imposed to the number of victims. In *People v. Wutzke* (2002) 28 Cal.4th 923, 929-931, our Supreme Court explained the application of section 667.61, the "One Strike law": "[S]ection 667.61 ensures serious sexual offenders receive long prison sentences whether or not they have any prior convictions. [Citation.] According to a general statement of purpose in the legislative history, the targeted group preys on women and children, cannot be cured of its aberrant impulses, and must be separated from society to prevent reoffense. [Citation.] [¶] The sex crimes qualifying for One Strike treatment appear in section 667.61, subdivision (c). Almost all of the enumerated crimes involve the use of force or fear (*id.,* subd. (c)(1)-(6)), including forcible lewd conduct committed in violation of

[7] Section 654 provides: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other. [¶] (b) Notwithstanding subdivision (a), a defendant sentenced pursuant to subdivision (a) shall not be granted probation if any of the provisions that would otherwise apply to the defendant prohibits the granting of probation."

section 288, subdivision (b). . . . [¶] . . . [¶] Conviction of an enumerated offense alone does not trigger the One Strike law. The People also must plead and prove at least one aggravating circumstance specified in section 667.61, subdivision (d) or (e). [Citation.] [Where] only one circumstance under subdivision (e) of the statute is found, the requisite term is 15 years to life. [Citation.] [¶] *Moreover, persons convicted of sex crimes against multiple victims within the meaning of section 667.61, subdivision (e)(5), 'are among the most dangerous' from a legislative standpoint.* [Citation.] *The One Strike scheme therefore contemplates a separate life term for each victim attacked on each separate occasion.* [Citations.]" (*People v. Wutzke*, *supra,* 28 Cal.4th at pp. 929-931, italics added.)

As *People v. Wutzke* makes clear, the trial court in the present case was required by section 667.61 to impose five One Strike law sentences of 15 years to life, comprised of one One Strike sentence for the section 288 offense committed against B. on one occasion, and four One Strike sentences for the section 288 offenses committed against M. on four other separate occasions. The trial court was also required to impose consecutive One Strike sentences pursuant to section 667.61, subdivision (g). Section 667.61, subdivision (g), provides: "The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable."

Section 667.6, subdivision (d) provides in relevant part: "A full, separate, and consecutive term shall be served for each violation of . . . subdivision (b) of section 288 . . . or of committing sodomy or oral copulation in violation of section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person if the crimes involve separate victims or involve the same

victim on different occasions. [¶] . . . [¶] The terms shall be served consecutively to any other term of imprisonment and shall commence from the time the person otherwise would have been released from imprisonment. . . ." Thus, as this court has previously recognized, section 667.6, subdivision (d), "mandates consecutive sentencing on its face." (*People v. Jackson* (1998) 66 Cal.App.4th 182, 191.) Since defendant's offenses included four violations of section 288, subdivision (b), against one victim, M., and one qualifying violation of section 288, subdivision (a), against a second victim, B., defendant was properly sentenced under section 667.61, subdivision (e)(5), to five consecutive life sentences.

Accordingly, we find no merit in defendant's contention that the five consecutive life sentences violate the section 654 ban on multiple punishment. "Section 654 prohibits punishment under different code provisions for a single 'act or omission'. A penalty provision which relates solely to a defendant's status as a repeat offender does not punish an 'act or omission' and is not subject to section 654." (*People v. DeSimone* (1998) 62 Cal.App.4th 693, 700.) Section 667.61, subdivision (e)(5), comes within this rule, because that section is a penalty provision relating solely to a defendant's status as a repeat sex offender. (*Ibid.*) Since the five consecutive life sentences were imposed on defendant under section 667.61, subdivision (e)(5), due to his status as a repeat sex offender, the sentences do not violate section 654.

Having reached the conclusion that the five consecutive life sentences imposed on defendant under the One Strike law were mandatory and did not violate the section 654 ban on multiple punishments, we need not consider defendant's contention that the failure of trial counsel to object to the sentences as unlawful constituted ineffective assistance of counsel.

E. The Trial Court Did Not Commit Blakely Error on Count 37

On count 37, furnishing cocaine to a minor, M., the trial court imposed the upper term of nine years. (Health & Saf. Code, § 11353). The trial court also imposed a three-

year enhancement because M. was more than four years younger than defendant (Health & Saf. Code, § 11353.1, subd. (a)(3)), for a total term of 12 years. The trial court stated the reasons for its sentencing decision on count 37 as follows: "Mr. Harless, you're sentenced to the upper term of nine years for that offense. I find the following factors in aggravation. This crime involved a high degree of cruelty and callousness. You callously allowed your daughter to live in an environment where drugs were present, easily available, and where she was surrounded by drug abusers. You gave her [c]ocaine on multiple occasions. You took her with you when you made your drug buys in Chinatown. Further, you were convicted of other offenses for which consecutive offense could be imposed for which concurrent sentences will be imposed. You took advantage of a position of trust as [M.'s] father. She was particularly vulnerable because her mother had died. She had no one to protect her."

In his supplemental brief filed pursuant to *Blakely v. Washington, supra,* ___ U.S. ___, [124 S.Ct. 2531] (*Blakely*), defendant argues that the sentence on count 37 must be reversed. In *Blakely*, the United States Supreme Court announced a new rule that a defendant's right to a jury trial, as established in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), is violated when the trial court imposes a term greater than the specified statutory maximum for the offense because of a fact not admitted by the accused or found to exist by jurors. (*Blakely, supra,* 124 S.Ct. at p. 2537.) Defendant asserts that the trial court imposed the upper term on count 37 in violation of *Blakely* because the trial court, not the jury, made the findings on aggravating factors required by section 1170, subdivision (b), for imposition of the upper term.[8]

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[8] Section 1170, subd. (b), provides: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report,

Defendant also contends that his claim of *Blakely* error was not waived by trial counsel's failure to timely object to the sentence, because trial counsel could not have anticipated the new rule and because the violation of a defendant's constitutional right to a jury trial may be raised for the first time on appeal. The People respond that a defendant forfeits a claim of sentencing error by failing to object where, as here, the factors used to aggravate a sentence were stated in the probation report. The People further argue that *Blakely* does not apply because the sentence on count 37 did not exceed the upper term, which the People contend is the statutory maximum for *Blakely* purposes.

Turning first to the waiver issue, we reject the People's contention that defendant waived his *Blakely* claim. We agree with those courts that have decided that a claim of *Blakely* error is not waived or forfeited by trial counsel's failure to make a timely *Apprendi* objection before the United States Supreme Court announced its decision in *Blakely*.[9] The Supreme Court's decision in *Blakely* was an extension of the *Apprendi* rationale into a new area. Defendant cannot have forfeited or waived a legal argument that was not recognized at the time of his trial.[10] Accordingly, defendant did not waive

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or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

[9] The California Supreme Court is currently considering the issue in *People v. Black* (Jun. 1, 2004, F042592) [nonpub. opn] reviewed granted July 28, 2004, S126182.

[10] We also recently concluded in *People v. Ackerman* (2004) 124 Cal.App.4th 184, that the defendant cannot have knowingly and intelligently waived his right to a jury trial where *Blakely* was decided after the defendant was sentenced.

his claim of *Blakely* error by failing to make a timely objection in the trial court to the imposition of the upper term on count 37, and we will determine the issue on the merits.

The application of *Blakely* to the imposition of an upper term is an issue that has divided the appellate courts in our state.[11] The emerging majority view is that under *Blakely*, the midterm is the statutory maximum absent the fact of a prior conviction, the jury's finding of an aggravating factor, or the defendant's admission of one. Under this view, the maximum penalty the court can impose under California law without making additional factual findings is the middle term.[12]

The minority view disagrees that the middle term is the statutory maximum.[13] The analysis is that trial court is authorized to make a discretionary selection of the proper term from within the statutory range for the subject offense, because *Apprendi* determined that factual findings that increase a sentence within the statutory maximum do not trigger the right to jury trial. Thus, under the minority view, the trial court may make its own findings in determining whether to impose the upper term on the basis of aggravating factors, since the upper term is the statutory maximum under *Blakely*.

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[11] The issue of whether the trial court may make findings on aggravating factors in support of an upper term sentence is now pending in the California Supreme Court in *People v. Towne* [nonpub. opn], reviewed granted July 14, 2004, S125677, and *People v. Black* [nonpub. opn], review granted July 28, 2004, S126182.

[12] The California Supreme Court has granted review of several appellate decisions expressing the majority view. See, e.g., *People v. George*, review granted December 15, 2004, S128931; *People v. George*, review granted December 15, 2004, S128582; *People v. Butler*, review granted December 15, 2004, S129000.

[13] See, e.g., *People v. Wagener* (2004) 123 Cal.App.4th 424, 435-436, petition for review pending, petition filed November 29, 2004; *People v. Picado* (2004) 123 Cal.App.4th 1216, 1237-1238, petition for review pending, petition filed December 9, 2004.

In the present case, the imposition of the upper term did not violate the principles of *Blakely* under either the majority or minority view. Under the minority view, the trial court properly exercised its sentencing discretion to impose the maximum statutory term upon finding aggravating factors, such as the fact that victim was particularly vulnerable, the fact that defendant took advantage of a position of trust to commit the offense, and defendant was convicted of other crimes for which consecutive sentences could have been imposed for which concurrent sentences are being imposed. (Cal. Rules of Court, rule 4.421, subds. (a)(3), (a)(7), and (a)(11).)[14]

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[14] California Rules of Court, rule 4.421, provides: Circumstances in aggravation include: [¶] (a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that: [¶] (1) 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. [¶] (2) The defendant was armed with or used a weapon at the time of the commission of the crime. [¶] (3) The victim was particularly vulnerable. [¶] (4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission. [¶] (5) The defendant induced a minor to commit or assist in the commission of the crime. [¶] (6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process. [¶] (7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed. [¶] (8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism. [¶] (9) The crime involved an attempted or actual taking or damage of great monetary value. [¶] (10) The crime involved a large quantity of contraband. [¶] (11) The defendant took advantage of a position of trust or confidence to commit the offense. [¶] (b) Facts relating to the defendant, including the fact that: [¶] (1) The defendant has engaged in violent conduct which indicates a serious danger to society. [¶] (2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness. [¶] (3) The defendant has served a prior prison term. [¶] (4) The defendant was on probation or parole when the crime was committed. [¶] (5) The defendant's prior performance on probation or parole was unsatisfactory. [¶] (c) Any other facts statutorily declared to be circumstances in aggravation."

Under the majority view, imposition of the upper term without additional findings by the jury did not violate defendant's right to a jury trial under *Blakely* because one of the aggravating factors found by the trial court did not require any additional factual findings. The trial court found that defendant was convicted of other crimes for which consecutive sentences could have been imposed for which concurrent sentences are being imposed. (Cal. Rules of Court, rule 4.421. subd. (a)(7).) After sentencing defendant on count 37, the trial court sentenced defendant on count 12, inducing B. to use marijuana (Health & Saf. Code § 11361, subd. (a)), to the middle term of 5 years, to run concurrently with the sentence on the other counts. The trial court also sentenced defendant on count 16, commission of a lewd and lascivious act on a child (M.) under the age of 14 years by force or violence (§ 288, subd. (b)(1)), to a concurrent midterm sentence of 6 years. Consecutive sentences could have been imposed on counts 12 and 16 because, as the jury verdict reflected, defendant had been found guilty beyond a reasonable doubt of committing two or more offenses. (§ 669.)

One valid factor in aggravation is sufficient to support the imposition of an upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434.) Therefore, even if under the majority view the trial court's consideration of other factors in aggravation in the absence of factual findings by the jury, such as the victim's particular vulnerability and defendant's taking advantage of his position of trust, violated the rule of *Blakely*, the imposition of the upper term on count 37 did not. The trial court properly relied on an aggravating factor, that defendant was convicted of other crimes for which consecutive sentences could have been imposed for which concurrent sentences are being imposed, in its decision to impose the upper term without violating *Blakely*.

III. DISPOSITION

The judgment is affirmed.

_____
BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

_____
MIHARA, J.

_____
MCADAMS, J.

Trial Court:	Monterey County Superior Court Superior Court No.: SS022393
Trial Judge:	The Honorable Wendy C. Duffy
Attorney for Defendant and Appellant: under appointment by the Court of Appeal for Defendant and Appellant: ROBERT RAY HARLESS	Marylou Hillberg
Attorneys for Respondent: THE PEOPLE	Bill Lockyer Attorney General Robert R. Anderson Chief Assistant Attorney General Gerald A. Engler Senior Assistant Attorney General Michele J. Swanson Deputy Attorney General Joan Killeen Deputy Attorney General