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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MANUEL DEJESUS HERNANDEZ, Defendant and Appellant.	B174486 (Los Angeles County Super. Ct. No. YA042302)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dudley W. Gray II and Francis J. Hourigan III, Judges. Modified and affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

A multiple count information was filed against appellant Manuel DeJesus Hernandez, alleging, inter alia, that he had engaged in lewd acts upon a child. The judgment following appellant's first trial was reversed, and the matter was remanded for retrial. At appellant's second trial, a jury found appellant guilty on all counts. We modify the judgment following the second trial with respect to appellant's sentence, and affirm the judgment so modified.

PROCEDURAL BACKGROUND

On April 20, 2000, an information was filed against appellant, alleging that he had committed numerous offenses against a single victim. The information charged him in count 1 with continuous sexual abuse. (Pen. Code, § 288.5, subd. (a).)[1] In addition, it charged him with 10 counts of lewd acts upon a child under 14 years of age (§ 288, subd. (a)), nine counts of lewd acts upon a child of 14 or 15 years of age with an age difference of 10 years (§ 288, subd (c)(1)), one count of sexual penetration with a foreign object (§ 289, subd. (i)), and one count of oral copulation with a person under 16 years of age (§ 288a, subd. (b)(2)).

The jury in appellant's first trial found appellant guilty on all counts. We reversed the judgment following appellant's first trial, concluding that the trial court's improper removal of a juror had denied appellant's right to a trial, and that the doctrine of double jeopardy proscribed a retrial. (*People v. Hernandez* (Feb. 6, 2002, B145238) [nonpub. opn.].) In *People v. Hernandez* (2003) 30 Cal.4th 1, our Supreme Court held that this violation of jury trial rights did not create a double jeopardy bar to retrial. We subsequently remanded the matter for retrial. (*People v. Hernandez* (Jul. 29, 2003, B145238) [nonpub. opn.).)

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[1] All further statutory citations are to the Penal Code unless otherwise indicated.

Trial by jury began on January 14, 2004. At the outset of the trial, the trial court denied appellant's motion to suppress a confession that he had made to police investigators. On February 10, 2004, the jury found appellant guilty on all counts.

On March 25, 2004, the trial court imposed a total sentence of 43 years and four months in prison. This appeal followed.

FACTS

A. *Prosecution Evidence*

The key prosecution witness was M.H., who testified that she is appellant's daughter. M.H. further testified that appellant began to abuse her sexually in 1995, when she was nearly 10 years of age, and that his conduct continued until November 1999, when she first disclosed the abuse to her mother and other relatives. M.H.'s mother and some relatives also testified about this disclosure and appellant's subsequent arrest. These relatives included M.H.'s half-sister, E.M. Sheri Lovall, a nurse practitioner, testified that although M.H. did not display signs of sexual abuse, her physical condition was consistent with the alleged sexual misconduct.

Finally, Hawthorne Police Detective Joel Romero testified that when he interviewed appellant on November 10, 1999, appellant admitted that he had engaged in sexual relations with M.H. on several occasions, and appellant subsequently made a recorded statement. A videotape of the interview and the statement were played to the jury.

B. *Defense Evidence*

Hawthorne Police Officer Yency Mena testified that on November 9, 1999, M.H.'s mother described to her a family gathering on the same day at which M.H.

disclosed appellant's misconduct. Hawthorne Police Officer Robert Storey testified that E.M. told him about the same family gathering during an interview on November 10, 1999.

Wilfredo Hernandez, appellant's brother, testified that he resided with appellant and his family for periods of six to eight months in 1997 and 1998. According to Wilfredo Hernandez, he and appellant worked together at construction sites after 8:00 a.m, and he sometimes accompanied M.H.'s mother to her workplace. He saw only normal relationships within appellant's family.

Finally, Aristides Molina testified that appellant performed shift work in Molina's factory for periods between 1992 and 1997. According to Molina, appellant was "a great worker."

DISCUSSION

Appellant contends that (1) the trial court erroneously denied his motion to suppress his confession, and (2) there was sentencing error under *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531].

A. *Confession*

Appellant contends that the trial court erred in concluding that his confession was voluntary. We disagree.

1. *Governing Principles*

"The Fourteenth Amendment to the federal Constitution and article I, section 15, of the state Constitution bar the prosecution from using a defendant's involuntary confession. [Citation.] . . . [¶] Under both state and federal law, courts apply a 'totality of circumstances' test to determine the voluntariness of a

confession. [Citations.] Among the factors to be considered are '"the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health."' [Citation.] On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. [Citations.] In determining whether a confession was voluntary, '[t]he question is whether defendant's choice to confess was not "essentially free" because his will was overborne.' [Citation.]" (*People v. Massie* (1998) 19 Cal.4th 550, 576.)

2. *Evidence and Ruling*

At the hearing on appellant's motion, the trial court heard testimony from Romero and appellant, and it reviewed a video recording and translation of Romero's interview of appellant.

Romero testified that the interview was conducted at approximately 6:00 p.m. on November 10, 1999. Romero was initially assigned to act as a translator for the investigation officer, but he was permitted to conduct the questioning to avoid the difficulties of a translated interview.

Appellant testified that before the recorded interview, Romero visited appellant in his jail cell and told him that unless he cooperated, he would be "going to prison for a long time." In rebuttal, Romero denied that any such meeting had taken place.

The transcript of the interview discloses the following facts: Romero identified himself, determined that appellant spoke only Spanish, and issued

Miranda[2] warnings to appellant. After appellant agreed to talk with Romero, Romero said that he would tell appellant the truth. Romero explained that a member of appellant's family had charged him with crimes, and that as a detective, he "work[ed] with people who . . . commit crimes like these . . . ."

Appellant indicated that he was born in El Salvador, was then 42 years old, had left school after the second grade, and was not taking any medication. He stated that he was the father of M.H. and a boy, Mario. He subsequently denied any misconduct with M.H., attributed the allegations to his sister-in-law, and suggested that his sister-in-law's son may have engaged in sexual relations with M.H.

Romero explained a polygraph test to appellant, and asked him whether he would submit to such a test. Appellant said that he would do so, and that it would show that he was telling the truth. Romero then indicated that he was going to make some phone calls. Before leaving the interview room, he told appellant that "these are common cases," and that appellant had an opportunity to repair his family and to avoid having M.H. grow up to be "a person like a prostitute."

When Romero returned, he said that M.H. had been examined in a hospital, and that he had spoken with M.H. He indicated that the hospital examination had confirmed M.H.'s allegations, and that M.H. had agreed to take a polygraph test. Romero stated: "[T]here is no doubt in my mind that you committed the acts that you . . . are being accused of."

Romero continued: "I am not here uh, Manuel to accuse you, to say that you are less of a person, because I wouldn't, I wouldn't do that. I wouldn't be disrespectful to you, bro. Okay, but not what . . . the problem that we have is that

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

we have a family that is obviously suffering. Okay, Manuel, obviously we have a family that is torn apart. . . . [W]e are convinced that yes, this did happen. On many occasions Manuel, us, we men, need something . . . we need a little help. We need uh, we . . . we feel insecure about ourselves. . . . And sometimes the people we least want to hurt, are the ones we hurt the most. And it's not because you are a bad person, Manuel, it's not that. But you are . . . you are a person, Manuel, you obviously made a mistake. Right? And I see it as a, a mistake."

Romero thereafter emphasized the hurt and embarrassment that appellant felt, and his family's suffering and guilt. He indicated that M.H.'s examination had disclosed "riptures [*sic*] inside," and he suggested that M.H.'s mother wondered whether she was "woman enough" for appellant. He urged appellant to repair the damage to his family and acknowledge that he had hurt M.H.

Romero indicated that M.H. had said that the misconduct began when she was 11 years old, and appellant responded that it had started "a year ago." Romero then reported that M.H. had attributed her loss of virginity to appellant.

When appellant displayed reluctance to agree with this statement, Romero said: "[Y]ou well know and I well know Manuel, that she is not the person who we have to blame in this. And you know what . . . Manuel? I don't blame you either. And I don't blame you because I have sat down with people here in these same chairs and . . . there are people who say to me, "I have committed those, those, those acts. That did happen but they didn't happen because I am a, a criminal. They are . . . they happened because I need help."

Romero continued: "I believe you that you aren't a sexual molester, sexual predator. . . . I think that you committed some acts by mistake. You committed those mistakes when you possibly fell in love with your daughter. Maybe you lost a sense of what is love for your daughter and what is love for a person like a

girlfriend. . . . That is the only explanation I have. The only thing that I expect is that you can explain to me why and how it happened. . . ."

After Romero stated that M.H.'s examination had not disclosed any signs of force, appellant asked, "You don't have any proof that the [or: my] penis entered?" Romero responded, "Yes," and indicated that the results of DNA tests and M.H.'s polygraph test supported this answer. He said, "[T]he machine . . . didn't lie to us."

When appellant expressed concerns about losing his family, Romero said, "I know that I am talking with a father. . . . And I know that you as a father[] made some bad decisions. Right? And uh, I don't blame you because maybe there was something lacking in the family. And in your daughter you saw something that, that told you to have the satisfaction. Do you understand me? Uh, but we have to move on. We have to move on and obviously we have to try to, to figure out a way so that your family knows that you are sorry."

Appellant subsequently conceded that when he was having sexual relations with M.H., he knew that someone would eventually discover this conduct. He indicated that it had been going on for less than a year, and it occurred when appellant's wife and son were absent.

When appellant apparently denied that his relations with M.H. involved penetration, Romero told him that M.H.'s examination disclosed proof that he had engaged in penetration. He indicated that appellant's semen had been detected during M.H.'s examination, and that M.H.'s polygraph test confirmed the matter.

Romero stated: "You can say that all the . . . all the doctors are a bunch of liars and all that, but when one . . . one, one of those doctors, one of those experts comes and says, 'I found this,' there is no longer any doubt. No judge is going to

believe that this didn't happen after we present everything that we have discovered." He again stated that "there was damage inside of" M.H.

Romero then asked appellant to tell the truth for "the last time." Appellant said that the incidents had begun less than a year before, and they occurred when appellant's wife and son were absent. He acknowledged "a few" incidents, and said that "not all [were] penetrations." He also provided some details about the incidents.

Following the interview, appellant made a recorded statement for his family. In the statement, appellant asked for forgiveness and said that he needed "psychological help."

Upon review of the evidence, the trial court concluded that (1) no meeting between Romero and appellant had occurred before their recorded interview. It further found: (2) the interview did not involve a coercive atmosphere, beyond that inherent in a custodial setting; (3) appellant understood the seriousness of his situation and could read, notwithstanding his second grade education; (4) appellant made an express and intelligent waiver of his rights, after these rights were explained to him; (5) the interview was relatively short and gentle; (6) appellant had an adequate opportunity to reflect on the questions asked; (7) there was no use of physical force; and (8) nothing in Romero's questioning impaired the voluntariness of appellant's confession. It thus denied appellant's motion.

3. *Analysis*

Appellant does not directly dispute items (1) through (7), which are amply supported by substantial evidence. The focus of his challenge is item (8). He contends that Romero's questioning involved coercive psychological tactics that rendered appellant's confession involuntary. As we explain below, he is mistaken.

First, appellant argues that Romero misled appellant about the legal consequences of a confession, and coaxed appellant to believe that he was not accused of crimes, but merely needed to talk to the police to help his family. He points to Romero's statements that he believed that appellant was not a "bad person," sexual molester, or sexual predator, that appellant had made mistakes and needed "a little help," and that appellant could repair his familial relationships by admitting misconduct.

In *People v. Ray* (1996) 13 Cal.4th 313, 339-340, our Supreme Court stated: "In general, '"any promise made by an officer or person in authority, express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary and inadmissible as a matter of law.'" [Citations.] In identifying the circumstances under which this rule applies, we have made clear that investigating officers are not precluded from discussing any 'advantage' or other consequence that will 'naturally accrue' in the event the accused speaks truthfully about the crime. [Citation.] The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable. [Citations.]"

Here, Romero began the interview by giving appellant *Miranda* warnings, including that whatever appellant said would be used against him in a court of law. Furthermore, he stated that appellant had been charged with crimes, and he never said or implied that appellant's confession would alter or mitigate this fact. Accordingly, Romero's references to the possibility of help for appellant and appellant's opportunity to repair his family relationships, viewed in context, do nothing more than indicate advantages naturally accruing from a confession. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1043 [officer's reference to

possibility of help for defendant is not an improper promise of leniency]; *People v. Chutan* (1999) 72 Cal.App.4th 1276, 1282 [officer's remark to defendant charged with child abuse that what happened during interview affected defendant's family is not coercive]; *People v. Spears* (1991) 228 Cal.App.3d 1, 27 [officer's remark that defendant would be better off if he gave officer "the scoop" is not an improper promise of leniency because the indicated benefits were purely psychological].)

We recognize that Romero tried to establish a relationship with appellant by stating that he personally viewed appellant as a person who had merely made "mistakes," rather than as a sexual molester, sexual predator, or bad person. In one instance, Romero told appellant that he had previously interviewed people who admitted to sexual misconduct with children but denied that they were criminals.

Nonetheless, that Romero evinced a sympathetic personal view of the crimes to encourage appellant to confess does not, by itself, render appellant's confession involuntary. (See *People v. Holloway* (2004) 33 Cal.4th 96, 116 [officer's suggestion that killings might have been accidental or the product of drunken rage did not invalidate confession]; *People v. Bradford*, *supra*, 14 Cal.4th at p. 1043 [officer's efforts to establish a rapport with the defendant do not constitute coercion]; *Miller v. Fenton* (3d Cir. 1986) 796 F.2d 598, 612 [officer's friendly manner, remark that he personally believed that the defendant was not a criminal, and offer of psychiatric help did not impair voluntariness of confession].)

Here, Romero never suggested that appellant's "mistakes" were not punishable as crimes, or that Romero's ostensible personal views could affect the legal consequences of appellant's confession. The record indicates that throughout the interview, appellant understood the gravity of the charges against him. We therefore conclude that under the totality of the circumstances, Romero's

sympathetic approach to appellant did not impair the voluntariness of appellant's confession.

Appellant disagrees, citing *People v. McClary* (1977) 20 Cal.3d 218, disapproved on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 510, footnote 17, *People v. Hinds* (1984) 154 Cal.App.3d 222, *People v. Cahill* (1994) 22 Cal.App.4th 296, and *People v. Flores* (1983) 144 Cal.App.3d 459. However, in each of these cases, the interrogating officer misrepresented the legal consequences of the defendant's confession, and therefore they are factually distinguishable. (*People v. McClary*, *supra*, 20 Cal.3d at p. 229 [officers implied that if defendant confessed, she might be charged only as accessory after the fact to murder, rather than as principal to murder]; *People v. Hinds*, *supra*, 154 Cal.App.3d at p. 238 [officers repeatedly suggested that if defendant confessed to murder, his punishment might be less than the death penalty]; *People v. Cahill*, *supra*, 22 Cal.App.4th at pp. 314-315 [officers suggested that defendant might avert a charge of murder if he admitted to unpremeditated killing, notwithstanding plain possibility of a charge of felony-murder]; *People v. Flores*, *supra*, 144 Cal.App.3d at pp. 470-471 [officers indicated that defendant might avoid death penalty if he confessed to murder and robbery].)

Second, appellant contends that Romero's deceptive statements about the evidence incriminating appellant amounted to coercion. Contrary to Romero's statements, no examination of M.H. had disclosed physical evidence of appellant's misconduct, and no DNA or polygraph testing had occurred.

As our Supreme Court explained in *People v. Farnam* (2002) 28 Cal.4th 107, 182, "'[l]ies told by the police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary.' [Citations.] Where the deception is not of a type reasonably likely to

procure an untrue statement, a finding of involuntariness is unwarranted. [Citation.]"

An elaboration of this standard is found in *People v. Chutan*, *supra*, 72 Cal.App.4th at page 1280: "So long as a police officer's misrepresentations or omissions are not of a kind likely to produce a *false* confession, confessions prompted by deception are admissible in evidence. [Citations.] Police officers are thus at liberty to utilize deceptive stratagems to trick a guilty person into confessing. The cases from California and federal courts validating such tactics are legion. [Citations.]"

Thus, in *People v. Farnam*, *supra*, 28 Cal.4th at pages 182-183, the court held that the defendant's confession to an assault and robbery was voluntary, even though the interrogating officers had falsely told the defendant that his fingerprints had been found on the victim's wallet. Again, in *People v. Thompson* (1990) 50 Cal.3d 134, 161, 166-170, the court made a similar determination, notwithstanding the interrogating officer's false representations to the defendant that several items of evidence identified the defendant as the perpetrator of a murder.

In view of this authority, we conclude that Romero's false statements about the evidence against appellant did not invalidate his confession. Citing *People v. Hogan* (1982) 31 Cal.3d 815, disapproved on another ground in *People v. Cooper* (1991) 53 Cal.3d 771, 836, appellant nonetheless contends that Romero's representations about the compelling nature of this evidence rendered them coercive. We are not persuaded.

In *Hogan*, officers investigating two homicides repeatedly interviewed the defendant, who initially denied his guilt. (31 Cal.3d at pp. 834-844.) They falsely stated that eyewitnesses had seen him commit the murders, asked him whether he had a mental problem, and offered him help. (*Id*. at pp. 835-841.) He became

distraught, began to question his own sanity, and made incriminating admissions. (*Ibid*.) The court in *Hogan* concluded that these admissions were not voluntary due to improper offers of leniency based on the defendant's purported mental problem. (*Id*. at p. 841.) In so concluding, the *Hogan* court noted that the officers' false statements about eyewitnesses had caused the defendant to doubt his sanity, and thus made their offer of leniency more compelling to the defendant. (*Id*. at pp. 840-841.)

The situation before us does not resemble the extraordinary circumstances presented in *Hogan*. Unlike *Hogan*, nothing suggests that Romero's false statements about evidence caused appellant to question his sanity. Furthermore, unlike *Hogan*, Romero's references to help were related to appellant's motivation for sexual contact with M.H., rather than to any cognitive inability on appellant's part to understand his situation.

Finally, appellant contends that Romero used interrogation techniques that often result in false confessions. In support of this contention, he points to two publications by different psychologists that were cited to the trial court, but never admitted into evidence. Because these expert opinions fall outside the evidentiary record before us, they are not material to our analysis. (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625.)

In sum, the trial court properly concluded that appellant's confession was voluntary.

B. *Blakely Error*

Appellant contends that his sentence is improper under *Blakely v. Washington, supra*, 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*).

The trial court imposed a term of imprisonment totaling 43 years and four months. It sentenced appellant to the high term of 16 years for the count of continuous sexual abuse. Furthermore, pursuant to section 1170.1, subdivision (a), it imposed additional consecutive two-year terms for the counts of lewd acts with a child under 14 years of age, and consecutive eight-month terms for the remaining counts.

Appellant argues that *Blakely* bars the imposition of (1) the high term for continuous sexual abuse and (2) consecutive—rather than concurrent—terms for the remaining offenses. As we explain below, we agree with item (1) (see pt. B.1., *post*), but reject item (2) (see pt. B.2., *post*).

Blakely relies on the holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). In *Apprendi*, defendant's sentence had been doubled because the trial court found the crime to have been motivated by racial animus. The *Apprendi* court held that the doubling was improper because "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490.)

In *Blakely*, the defendant was convicted of kidnapping under Washington state law. (*Blakely*, *supra*, 124 S.Ct. at p. 2535.) The trial court increased the defendant's sentence for this offense above the statutorily defined standard range for the offense (Wash. Rev. Code Ann. § 9.94A.320) pursuant to a separate statutory provision permitting such exceptional sentences when the trial court found that there were "substantial and compelling reasons" (*id*. at § 9.94A.120(2)). (124 S.Ct. at p. 2535.) The court in *Blakely* concluded that *Apprendi* barred the enhanced sentence because the jury had not determined the facts cited by the trial court for increasing the sentence. (*Id*. at p. 2539.)

At the outset, respondent argues that appellant has waived or forfeited his challenges under *Blakely* by failing to raise them before the trial court. Because appellant was sentenced before *Blakely*, we decline to find a waiver or forfeiture.[3] (*People v. Saphao* (2005) 126 Cal.App.4th 935, 945, fn. 3.) We therefore examine appellant's contentions on their merits.

1. *High Term*

We begin the trial court's imposition of the high term for continuous sexual abuse, as defined in section 288.5, subdivision (a). Under this provision, it is an offense for a person who resides in the home of a child under 14 years of age to engage in three or more acts of substantial sexual conduct with the child over a period of three months or more.

Respondent argues that *Blakely* is inapplicable to the imposition of the high term for this offense because the pertinent provisions of California's sentencing laws are unlike those at issue in *Blakely*. We disagree.[4] (See *People v. Saphao*, *supra*, 126 Cal.App.4th at p. 946.) Accordingly, we examine the record in light of *Blakely*.

In imposing the high term, the trial court found no mitigating factors, and it cited a single aggravating factor, namely, that appellant had taken advantage of a position of trust to commit the offense. (Cal. Rules of Court, rule 4.421(a)(11).) It stated: "Even though that's only a single factor, the unique circumstances of this case involve a father abusing his daughter over a long period of time. So the court is giving great weight to that factor in aggravation."

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[3] We recently explained our reasons for rejecting this contention in *People v. White*, review granted March 23, 2005, S130777.

[4] See footnote 3 *ante*.

An abuse of trust grounded in the father-daughter relationship is not an element of the continuous sexual abuse, as defined in section 288.5, subdivision (a), and thus the trial court resolved factual issues not submitted to the jury when it identified this aggravating factor. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1262-1263.) In so doing, the trial court contravened *Blakely*.

The remaining question concerns the prejudice from this error. Here, appellant suggests that all *Blakely* error is structural, requiring reversal per se because it is tantamount to denial of a jury trial. By contrast, respondent contends that *Blakely* error is generally subject to prejudice analysis under *Chapman v. California* (1967) 386 U.S. 18, 22-24 (*Chapman*). Respondent thus argues that the error here is harmless because there is no reasonable doubt that a jury would have found that appellant is M.H.'s father.

Although our Supreme Court has indicated that *Chapman* provides the standard for prejudice for error under *Apprendi* (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327), it has not squarely addressed the extent to which *Blakely* error is subject to *Chapman* analysis. We conclude that *Chapman* analysis is inappropriate under the special circumstances of this case.

The *Blakely* error at issue here is akin to instructional error by which the trial court directs a finding on an element of a crime, and thereby removes this issue from the jury. As our Supreme Court explained in *People v. Flood* (1998) 18 Cal.4th 470, 502-503, instructional error of this kind "generally is not a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal under the federal Constitution." Nonetheless, citing *People v. Kobrin* (1995) 11 Cal.4th 416, it indicated that *Chapman* analysis may sometimes be inappropriate when the error "prevent[s] defendant from presenting evidence concerning a contested element of the crime." (*People v. Flood*, *supra*, 18 Cal.4th

at p. 503.) In *Kobrin*, the court reasoned that the trial court's instructional error had impaired the defendant's presentation of evidence, and thereby undermined the application of *Chapman* analysis, which is predicated on a review of the evidence actually present in the record. (11 Cal.4th at pp. 428-430.)

Here, the record indicates that appellant may have disputed his paternity of M.H., had he known that the resolution of this issue was properly submitted to the jury. M.H. and her mother testified at trial that appellant was M.H.'s biological father. Appellant did not testify at trial, and thus he did not directly challenge this testimony.

However, appellant's recorded confession, which was submitted to the jury, indicates that he may believe that he is not M.H.'s father. During appellant's interview with Romero, appellant initially stated that M.H. was his daughter. However, when Romero told him that M.H. had said that he had sexual relations with her, appellant responded: "That's what she says . . . [interruptions by Romero] . . . *if she is really my daughter*." (Italics added.)

Sometime later, the following exchange occurred:

"[Appellant]: I even feel like dying.

"[Romero]: Do you know that if you die you are going to cause your family a lot of harm? Because you are still their father.

"[Appellant]: Yes, but I mean . . . I am . . . I found repentance in the scriptures and . . . . And [unintelligible] repentance is death. Perhaps not physically but . . .

"[Romero]: Mentally?

"[Appellant]: [Unintelligible]. *Because I am not* [unintelligible]*'s father*.

"[Romero]: Hmm.

"[Appellant]: Because [unintelligible] Mary's [*sic*] father is Jesus." (Italics added.)

Romero did not press for clarification of these remarks, and the interview does not establish whether they conveyed a denial of paternity or something else, for example, a religious sentiment. Because appellant had no notice that he was entitled to a jury determination of his paternity, we conclude that the *Blakely* error here precludes *Chapman* analysis.

For this reason, the trial court committed reversible error in finding that appellant had breached a position of trust founded on a father-daughter relationship. Because there are no mitigating factors and the improper aggravating factor was the sole basis for imposing the high term, setting this factor aside mandates the imposition of the middle term of 12 years for continuous sexual abuse (§ 288.5, subd. (a)). (*People v. Simpson* (1979) 90 Cal.App.3d 919, 924; Cal. Rules of Court, rule 4.420(a).)

2. *Consecutive Sentences*

We now address appellant's contention regarding the consecutive sentences. Section 669 provides that "[w]hen [the defendant] is convicted of two or more crimes," the trial court is to "direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively." If it fails "to determine how the terms of imprisonment on the second or subsequent judgment shall run, the terms of imprisonment on the second or subsequent judgment shall run concurrently." (§ 669.)

Despite this language, courts have held "there is no . . . statutory presumption in favor of concurrent rather that consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial

court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Section 669 does not specify the grounds upon which the trial court's decision to impose consecutive sentencing must lie. However, rule 4.425 of the California Rules of Court enumerates "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences," which include aggravating and mitigating circumstances.

The key issue is whether *Blakely* proscribes the trial court's exercise of this discretion under the circumstances of this case. We do not believe that *Blakely* or *Apprendi* apply to the sentencing decision before us. Although a trial court contemplating whether to impose consecutive sentences may and often does consider aggravating and mitigating factors as part of its decision making process, its decision does not involve the facts necessary to constitute a statutory offense, and the decision can be made only after the accused has been found beyond a reasonable doubt to have committed two or more offenses.

Prior to the decision in *Blakely*, but in the wake of *Apprendi*, the court in *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231, stated: "If the specific fact at issue is not an element of the crime but is a factor that comes into play only after the defendant had been found guilty of the charges beyond a reasonable doubt and no increase in sentence beyond the statutory maximum for the offense established by the jury is implicated, then the state may consider this factor based on a lesser standard of proof." (Fn. omitted.)

In *People v. Cleveland* (2001) 87 Cal.App.4th 263, the defendant raised the similar issue of whether the rule announced in *Apprendi* was implicated by the trial court's refusal to apply section 654. "Section 654 precludes multiple punishment

for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the 'intent and objective' of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citation.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" (87 Cal.App.4th at pp. 267-268.)

Because of the requirement that the trial court determine the offender's "intent and objective," the defendant in *Cleveland* contended that application of section 654 ran afoul of *Apprendi*. (87 Cal.App.4th at p. 270.) The Court of Appeal disagreed: "Unlike in the 'hate crime' provision in *Apprendi*, section 654 is not a sentencing 'enhancement.' On the contrary, it is a sentencing 'reduction' statute. Section 654 is not a mandate of constitutional law. Instead, it is a discretionary benefit provided by the Legislature to apply in those limited situations where one's culpability is less than the statutory penalty for one's crimes. Thus, when section 654 is found to apply, it effectively 'reduces' the total sentence otherwise authorized by the jury's verdict. The rule of *Apprendi*, however, only applies where the nonjury factual determination *increases* the maximum penalty beyond the statutory range authorized by the jury's verdict." (*Ibid*.)

We conclude that a trial court's imposition of consecutive sentences does not usurp the jury's factfinding powers, provided that each sentence imposed is within

the pertinent offense's prescribed statutory maximum. Although our laws permitted the trial judge to order the separate sentences imposed for each crime run concurrently, its decision in this regard is similar to the discretion afforded under section 654, and can result in a lessening of the prescribed sentence, but never in an enhancement.

For these reasons, we do not believe that the consecutive sentences imposed are invalid under *Blakely* or *Apprendi*.

DISPOSITION

The judgment is modified to reflect that appellant's term of imprisonment on count 1 for continuous sexual abuse (§ 288.5, subd. (a)) is 12 years. In all other respects, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment to reflect this modification.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURRY, J.

I concur:

EPSTEIN, P.J.

GRIMES, J., Concurring and Dissenting.

I concur in the majority opinion affirming the judgment of conviction and the imposition of consecutive sentences. Respectfully, I dissent with respect to the disposition and discussion in part B of *Blakely* error in sentencing appellant to the high term for the offense charged in count one. The majority concludes that *Blakely v. Washington* (2004) 124 S.Ct. 2531 (*Blakely*) mandates reversal of the upper term imposed on appellant's conviction for continuous sexual abuse of a child and remands for resentencing on that count.

My colleagues conclude that imposition of the upper term requires fact finding by the jury, and that appellant is entitled to a jury trial to decide paternity before the trial court may impose a high term sentence on the basis that appellant took advantage of a position of trust or confidence to commit the offense. Until our Supreme Court concludes otherwise,[1] I am of the opinion that *Blakely* does not apply to the tripartite prison scheme (upper, middle, and low term) of the California determinate sentencing law (Pen. Code, § 1170, subds. (a)(3) & (b); see also, Cal. Rules of Court, rules 4.420(a)-(c), 4.421 & 4.423). It is my view that our California sentencing scheme is the type of discretionary sentencing within a range authorized by law to which *Blakely* does not apply.

In view of the foregoing, I would affirm the trial court's imposition of the upper term on appellant's conviction of continuous sexual abuse of a child.

GRIMES, J.[*]

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[1] The issue of whether *Blakely* applies to the upper term choice is pending before our Supreme Court in *People v. Black*, S126182 and *People v. Towne*, S125677.

[*] Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.