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Opinion following remand from U.S. Supreme Court

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE, Plaintiff and Respondent, v. KURT EUGENE SINDORF, Defendant and Appellant.	C045737 (Super. Ct. No. YKCRBF03539)

On February 20, 2007, the United States Supreme Court granted a petition for writ of certiorari in this case, vacated the judgment of this court and remanded the case to us for further consideration in light of *Cunningham v. California* (2007) 549 U.S. __ [166 L.Ed.2d 856] (*Cunningham*). We directed the parties to submit supplemental briefs addressing the *Cunningham* issues only. Upon further consideration of the issues, we shall remand for resentencing pursuant to *Cunningham,* but otherwise affirm the judgment. We reissue our previous

opinion as follows with a new section dealing with the *Cunningham* issues.

After a court trial, defendant Kurt Eugene Sindorf was convicted of three counts of committing a lewd and lascivious act on a child aged 15, defendant being at least 10 years older than the child (Pen. Code, § 288, subd. (c)(1)),[1] six counts of unlawful sexual intercourse with a minor (§ 261.5, subd. (d)), one count of oral copulation with a minor (§ 288a, subd. (b)(2)), and two counts of attempting to dissuade a witness. (§ 136.1, subd. (a)(2).) Defendant was sentenced to state prison for the upper term of four years for one of his convictions of unlawful sexual intercourse, given consecutive one-third of the middle term or one-year sentences for two of his other convictions of unlawful sexual intercourse, given a two-year consecutive term for one of his convictions of attempting to dissuade a witness and concurrent middle terms for the remainder of his convictions, for a total prison sentence of eight years.

On appeal defendant contends (1) the loss of the district attorney's files and the resulting failure to provide the defense with exonerating information from those files violated defendant's state and federal constitutional rights to due process, to confront witnesses and to present a defense, (2) he has been denied meaningful appellate review of the trial court's

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[1] Undesignated statutory references are to the Penal Code.

order denying his motion to compel discovery, (3) the trial court erred in allowing the district attorney's investigator to render an expert opinion on the usual behavior of underage girls who have been molested by older men with whom they are romantically involved, (4) the circumstances underlying the victim's testimony were so inherently conducive to perjury and her testimony was so inherently unreliable that her testimony could not support the verdicts as a matter of law, and (5) defendant's waiver of his right to jury trial was not knowing and intelligent because he was not informed he was giving up the right to have factors affecting his sentence heard by a jury pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*), and *Cunninghan, supra,* 549 U.S. __ [166 L.Ed.2d 856]. Defendant claims his jury trial waiver was invalid in its entirety and that he is entitled to reversal and a remand for a new trial.

We reject defendant's contentions. As to the last issue, we conclude the scope of defendant's waiver of his right to jury trial was limited to the trial on his guilt or innocence of the charged offenses and did not include his right to have a jury determine the factors relevant to the imposition of an upper term. Therefore, his jury waiver was not invalid in its entirety and we shall affirm the judgment of conviction, but based on *Cunningham* we shall remand for resentencing.

FACTUAL BACKGROUND

The Prosecution

C.M. was 10 years old when she first met defendant who was one of her mother's coworkers. She became more familiar with defendant when she was 15 years old. Defendant often came into the market where C.M. worked.

In September 2000, when C.M. was 15 years old, defendant, who was 37 years old at the time, began a sexual relationship with her. After a day of hunting with defendant and his five-year-old son, C.M. invited them over to her house for dinner. Her mother was not at home. After dinner, when they were sitting on the couch watching TV and defendant's son had fallen asleep, defendant said, "I don't know if I should do what I'm about to do." Not knowing what he was talking about, C.M. replied, "You don't know until you try." Defendant reached over and started to kiss her. Defendant reached under C.M.'s shirt and touched her breasts over her bra. He laid her down on the couch and continued to touch her. C.M. did not refuse him as she had some feelings for him. They moved to her bedroom where defendant undressed her and himself. Defendant laid C.M. down on her bed and got on top of her. He put first his fingers, then his penis into her vagina. After about 15 minutes of sex, they got dressed and went back out to the living room. Defendant did not spend the night.

The next day C.M. got an e-mail message that said: "C[.M.]: Hi. It's 2:45, and I just got home and built a fire

and washed the dishes from the a.m. I am now ready for bed and should get almost two hours of sleep. This should be plenty as I am partially running off the 'L' word, too, and this is definite boost. I had the time of my life tonight and I owe it all to you. Good luck at the game and know my thoughts are with you always. Love Kurt. P.S. Someone has fallen."

Approximately a week later, C.M. had sex again with defendant, this time at his house. Defendant again penetrated her vagina with his fingers and penis. She spent the night with him in his bed.

A couple of weeks later, while S., C.M.'s mother was in the hospital, C.M. and defendant had sex again at defendant's house. Defendant touched her breasts and placed his fingers in her vagina. Then they had intercourse. She spent the night in defendant's bed.

Around this time, defendant and C.M. went to J.C. Penney's where defendant bought her an engagement ring, costing $1,000, to replace the promise ring he had earlier given her. Defendant talked to C.M. about marriage and wanted to go to Hawaii where it was legal to get married before she turned 18. They discussed her current age. Defendant told C.M. not to wear the ring in public or in front of her mother.

C.M. and defendant made another trip to Redding within a month after defendant bought her the engagement ring. On the way home in the car, defendant asked C.M. to give him a "blow job" while he was driving. She told him she was uncomfortable,

but he wanted her to do it. Defendant undid his belt, unzipped his pants, and pulled them down. C.M. sucked on his penis for maybe two minutes. She was really uncomfortable and stopped. Defendant put his arm around her and said it was okay.

On another occasion, between November and December 2000, C.M. was up by defendant's house. Defendant's son was sleeping in the truck and defendant asked C.M. to go into the house with him to have sex. Although she felt bad because defendant's son was sleeping in the truck, they went inside and had sex.

During November 2000 C.M., her mother S., defendant and defendant's son went on a trip to Canada. One evening S. was not feeling well and wanted to stay at the motel. C.M. and defendant drove to a restaurant for something to eat. Defendant sat next to C.M. and they were holding hands when C.M. saw her mom standing at the window of the restaurant watching them. S. came into the restaurant and yelled at C.M. She demanded to know what was going on. She wanted C.M. to walk back to the motel and pack her stuff to go. C.M. defied her mother and refused. Later, when they were back in their motel room, S. threatened to "call the cops" if C.M. would not leave with her. Defendant came to their room and told C.M. to go with S. C.M. refused. S. called the police, who came and took C.M. and S. to another hotel.

In December 2000, defendant sent C.M. an e-mail to an address he had set up for her, stating: "Hi, Hon. Some may think they are winning the war, but my love grows stronger for

you with each passing day. Thank you for being the most beautiful thing in my life. I love you more than words can say. Think of me, and I will be by your side, I promise. Love forever, Kurt."

C.M. and defendant had a meeting spot by the elementary school by C.M.'s house, which they referred to as "the rock." Defendant set it up as a place to meet and leave each other letters. After returning from Canada, around March of 2001, C.M. and defendant were at the rock. Defendant laid his jacket on the ground and wanted to have sex. C.M. told him that she did not want to. There was snow on the ground. Defendant told her everything would be okay and just to do what he told her. He laid her down on his jacket and they had sex even though she told him no.

The last time C.M. had sex with defendant was in March 2001 when she was supposed to meet defendant on the hill. When he failed to show up, she started walking home. Defendant drove up and asked C.M. to get in his truck. C.M. got in and they had sex.

C.M. testified there was some concern she might be pregnant because defendant had not always used a condom. Defendant arranged for K.M., his ex-girlfriend and the mother of defendant's son, to visit C.M. while she was at the College of the Siskiyou gymnasium playing volleyball. K.M. took C.M. into the girl's locker room where she gave C.M. a two-way radio to enable her to talk to defendant who was out in the parking lot.

Defendant told C.M. to take a pregnancy test K.M. had with her, that he loved her and everything would be okay. C.M. took the pregnancy test, which turned out negative. K.M. took the test stick, put it in a ziploc bag and said defendant wanted to keep it for himself. C.M. gave inconsistent statements regarding when this pregnancy test occurred.

When K.M. confronted defendant about being sexually involved with C.M., defendant denied it. Defendant did tell her at one point that he was only human and he could make mistakes. Defendant told her C.M. tried to come on to him.

When C.M.'s mother got a restraining order against defendant, defendant arranged for he and C.M. to meet sometimes at K.M.'s home.

Defendant wanted C.M. to be on birth control because of continued concerns over pregnancy. Defendant and C.M. went together to a health clinic. Defendant was present for her physical examination because C.M. was afraid to tell the nurse she didn't want him in the room. He left the room when she changed back into her clothes. C.M. did not feel free to tell the nurse the entire truth because of defendant's presence. She lied to the nurse about her sexual relationship with defendant because defendant told her to do so.

According to C.M., she lied when she denied any sexual relationship with defendant in early interviews with law enforcement. She was afraid to tell the truth and she still had some positive feelings for defendant.

Prior to the preliminary hearing, C.M. saw defendant and walked up to his truck. Defendant told C.M. to go to K.M.'s house the following night as K.M. needed to talk to her. When C.M. followed defendant's instructions, she discovered it was not K.M. who wanted to talk to her, but defendant. Defendant told her if she loved him, she would not testify. Defendant told her to think of what she would be doing to his son if she testified.

M.H., a friend of defendant's, came up to C.M. at the market where C.M. worked. She showed C.M. a picture of defendant's son and gave her an envelope with a message from defendant that if she loved defendant's son and loved defendant, she wouldn't say anything. The preliminary hearing was coming up. M.H. then took the items back and returned them to defendant. Defendant told M.H. not to tell the authorities anything if they ever asked her about delivering the envelope.

C.M. saw the numbers 381 painted on her mailbox and a number of other places around the town. Defendant told C.M. he was leaving those marks to show his love for her. "381" means "three words, eight letters, one meaning - I love you." K.M. testified she drove defendant around town to spray paint the numbers in various places.

C.M. found defendant's actions a bit scary. She was inhibited at first, but later overcame her fears to tell what had happened.

Patricia Morrison, public health nurse and family planning nurse practitioner with the Siskiyou County Public Health Department, testified defendant came into the county's Mt. Shasta clinic with C.M. on November 30, 2000. Defendant said C.M. needed birth control services, that it was important that it be confidential, and he was a very good friend of the family. Defendant's home phone number was provided as the means of contacting C.M. regarding any test results. When Ms. Morrison made it clear she was a mandated reporter and she would be required to report if someone under the age of 16 was having sex with someone who is 21 or older, defendant said he was not her partner; defendant was a friend of the family.

C.M. filled out a health questionnaire indicating she had sex on a regular basis, did not always use any method of birth control and was concerned about getting pregnant. Defendant was present while Ms. Morrison discussed with C.M. her responses to the questionnaire. At C.M.'s request, defendant was present in the exam room while Ms. Morrison conducted a breast and pelvic exam of C.M. Defendant stood at the head of the examination table during the exam, holding and patting C.M.'s hand and softly talking to her. Ms. Morrison thought the contact seemed more intimate than that of a family friend. At the end of the examination, defendant stayed in the exam room while C.M. washed and dressed.

Ms. Morrison called Child Protective Services and made a report of suspected child abuse.

Jeffrey Lierly, a special agent with the California Department of Justice Bureau of Investigation, spoke with K.M. regarding what she knew about defendant's relationship with C.M. Initially she denied knowing anything, but after she was granted immunity by the Attorney General's Office, she agreed to talk with Lierly. K.M. told Lierly she accused defendant of having a sexual relationship with C.M. and defendant responded: "All's I know now is I'm - and can make mistakes, too." Defendant said C.M. "was all over [him]" or "she came on to [him.]"

K.M. told Lierly that one night defendant came to K.M.'s house and told her he needed her help to help a friend with a pregnancy test. That was why K.M. was involved with C.M.'s pregnancy test at the gym. K.M. overheard defendant and C.M. talking on the walkie-talkies and defendant was generally saying comforting things to C.M., who was upset. Defendant told K.M. to deny the pregnancy test ever occurred. Defendant suggested that if she did not deny it, she could be implicated in the situation.

Defendant also instructed K.M. to say she was supposed to have gone with C.M. to the health clinic. When the issue of the engagement ring came up, defendant told K.M. to say it was her ring. He advised K.M. to deny the existence of the note sent to C.M. by Ms. Hobbs.

S. testified she saw C.M. and defendant together at the restaurant in Canada. C.M. was looking defendant eye to eye and rubbing defendant's arm very passionately. S. became very upset

and asked C.M. to go with her to the restaurant restroom. S. asked her daughter what she had just seen. C.M. didn't answer, but looked guilty, like she had just been caught. Defendant later asked for an opportunity to explain and told S. he was in love with C.M. S. later called the Canadian police who helped her relocate to a different motel for that night.

C.M. and her mother ended up driving back to California with defendant, who kept saying he was in love with C.M., it was better for C.M. to be with him than someone else, and kept asking S. if she would still remain "friends" with him. She refused to remain friends. When defendant said he had discussed marriage with C.M., S. told him he was "a sick S.O.B." She went straight to the police when they arrived back home and sought a restraining order against him. Her first attempt was procedurally defective.

Meanwhile, defendant continued to see C.M., so S. met with defendant to tell him to stay away. Defendant seemed embarrassed and told her he and C.M. had made up the whole story the night in Canada. S. angrily left. When she got home, she got a call from defendant telling her if she took the matter to the police, he would have her job. S. got a restraining order against defendant in March 2001.

After their return from Canada, C.M. became angry and cold towards S. S. took C.M. to counseling and was present when C.M. denied any inappropriate relationship with defendant. C.M. said she made the whole thing up to get more attention from S.

The Defense

C.M. was recalled as a witness and admitted she had denied any sexual encounters with defendant when interviewed by Shannon Bowlin (an investigator with the Siskiyou County District Attorney's Office) prior to March 2001. She referred to defendant as an old friend and a father figure.

C.M. said Bowlin told her child pornography, or pictures of other girls C.M.'s age, had been found on defendant's computer. According to C.M., her school principal also mentioned to her that he had seen such pictures from defendant's computer. Both Bowlin and the principal denied telling C.M. pornography had been found on defendant's computer.

The night before C.M. was admitted to Sutter Memorial hospital in March 2001, shortly before the hearing in court regarding the restraining order, she met with defendant at K.M.'s house. She spent two and a half hours listening to defendant tell her everything she needed to do, what she needed to believe, and what she didn't need to believe. Defendant told her if she said anything, it would ruin everything. Defendant told her not to believe what Bowlin was saying about him or them.

When C.M. got out of the hospital 7 to 14 days later, Bowlin contacted her again and C.M. decided to tell the truth of what happened. She ended up telling Bowlin part of the truth, but she still held back some things.

Bowlin testified she first interviewed C.M. in January or February 2001. During that interview, C.M. denied any inappropriate relationship with defendant. Bowlin talked to C.M. again in March and in May 2001.

C.M. contacted Bowlin prior to the May interview to say she was ready to tell Bowlin about the relationship between her and defendant. At the May interview, C.M. said defendant was in love with her, but she looked upon him as a father figure. She denied a sexual relationship. It was not until a meeting with Bowlin in August 2001 that C.M. said their relationship was of a sexual nature. In her experience, Bowlin could not think of a time when she interviewed a victim in this kind of circumstance where the victim immediately disclosed the relationship with the man she was involved with. That is, in the cases where the investigation ultimately showed there was a sexual relationship, she could not recall one where the victim had "disclosed" immediately.

Catherine Golden, an investigator with the Siskiyou County District Attorney's Office, conducted an interview with C.M. in May 2002. C.M. admitted she was embarrassed and not truthful in her earlier interview with Bowlin. She described various incidents of sexual contact with defendant. Golden talked to C.M. again in June 2002 and confronted her with discrepancies between what she told Bowlin and what she told Golden.

M.C., another son of K.M. and stepbrother to defendant's son, testified C.M. told him S. was making her say this stuff about defendant. C.M. said the accusations were not true.

M.P., a coworker of S., said when it comes to honesty, S. is "morally bereft." He denied there was "bad blood" between him and S., although he considered her the instigator of a problem between him and another worker, which ended up in the other worker filing sexual harassment charges against M.P.

C.A., S.'s former second line supervisor, testified S. does not have a good reputation for truthfulness and was a troublemaker.

Lierly, recalled for the defense, testified K.M. told him defendant isolated her from her friends. She also did not like the way he treated her oldest son M.C., whom defendant considered a bad influence on defendant's son.

Although C.M.'s mother, S., testified it was her belief a lot of C.M.'s emotional problems were the result of her relationship with defendant, she admitted C.M. had some history of depression.

The principal of the high school when C.M. attended testified defendant told him S. was mad because she wanted something more than a friendship from defendant. Defendant complained that, "the only information they got, they didn't get right." The principal never saw any improper conduct between defendant and C.M.

DISCUSSION

I.

LOSS OF THE DISTRICT ATTORNEY'S FILES

A. *Background*

This case was investigated originally by the Siskiyou County District Attorney's Office (D.A.) in 2001 and 2002. The D.A. decided not to prosecute the defendant. In March 2003, the California Attorney General (A.G.) on behalf of the People, decided to prosecute and filed a felony complaint against defendant.

B. *The Subpoena Duces Tecum for the D.A.'s Files*

Sometime prior to trial, it is unclear when, defendant issued a subpoena duces tecum to the D.A.'s office for their files.[2] On the first day of the court trial, November 4, 2003, defendant brought to the court's attention the failure of the D.A. to respond to the subpoena duces tecum. Defendant wanted to compare the D.A.'s files to his discovery to see if there was further information in them relevant to the defense. The deputy A.G. offered to make an inquiry regarding the D.A.'s position or progress on the subpoena duces tecum.

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[2] The subpoena duces tecum was not included in the record on appeal.

On November 19, 2003, the deputy A.G. informed the trial court of the receipt of a D.A. memo, dated November 17, 2003, regarding the D.A.'s files.[3]

The matter of the subpoena for the files was raised again before the trial court on November 24, 2003. Defendant complained he was informed verbally the D.A. could not find its files, but the memo received addressed the issue of only four pages of "discovery." Defendant wanted to know where the files were and wanted the court to order them brought to court.

The trial court read the memo dated November 17, 2003, from the senior legal secretary for the D.A. to the assistant D.A. and noted it listed pages 58, 74, 86, 87, 90 and 91 as being missing.

The deputy A.G. agreed the matter of the missing files needed clarification. He represented to the court the A.G. had both files of the D.A. in April 2002, that the files were copied by the A.G. in their entirety, and defense counsel was provided 107 pages of discovery from one case file and 123 pages of discovery from the other case file, "absent the six pages that are noted in this memo."

Defendant stated he took the deputy A.G. at his word that the defense received everything the A.G. received, but the issue was something else. Defendant referenced other subpoenas to the D.A. and indicated he was informed the D.A. was not going to

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[3] The memo is not part of the record on appeal.

prosecute based in part on the lies of the victim.[4] Defendant wanted to view the D.A.'s files to see if there was other possibly exculpatory evidence upon which the D.A. based its decision not to go forward. Defendant received no response to its subpoena duces tecum and there was no memo saying the files were missing. Defendant was confused by the memo of November 17th regarding missing pages and wondered how the legal secretary could determine six specific pages were missing if the entire two files were missing.

The deputy A.G. attempted to clarify the matter, indicating he received a verbal response to the inquiry regarding defendant's subpoena duces tecum that both files were missing. He requested the response be reduced to writing. And in response, either due to a simple miscommunication or lack of clarification, the deputy A.G. received the memo regarding the missing pages, which were missing "all the way back to April 2002, when the files were copied."

Defendant stated, however, the discovery he received included a page 58, 74, 86, 87, 90 and 91, the pages supposedly missing. It was possible he had those pages for only one of the two files since the pagination for both files began with number one, but he could not tell from what he had with him. The

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[4] Defendant's other subpoenas and the letter apparently providing the reasons the D.A. decided not to continue prosecution are not part of the record on appeal. We have no way of verifying defendant's statements.

deputy A.G. stated the defense had been provided everything the deputy A.G. had except the materials withheld as privileged, as listed in the privilege log, and the six previously listed pages. The deputy A.G. did not know from which file the pages were determined to be missing and the discovery provided to the defense began with sequence one again.

The trial court asked defendant the nature of his concern about the files, whether he thought the files contained materials that were not provided in discovery or accounted for by the privilege log. Defendant suggested there "might be." Defendant wanted the court to review the D.A. files to see if there was any exculpatory evidence in them that was not provided to the defense. Defendant found it "suspicious" the D.A. had not responded to his subpoena duces tecum and now claimed the files were missing.

The deputy A.G. responded, "suspicions aside," this was essentially an untimely discovery motion on discovery materials provided over a year earlier. In addition, it was based on pure speculation and the trial court was not the entity to review page by page what discovery exists in the D.A.'s files and compare it with the discovery provided by the A.G. The proper procedure was through the discovery process of section 1054 and not a subpoena duces tecum. If the defense was unhappy with the informal response provided to this point, it was up to defendant to file a formal discovery motion so the matter could be litigated before the court.

The trial court concluded the matter should be handled through the criminal discovery statutes, but did want a further response as to whether the D.A. files were available. After a response was received, it would be up to defendant to bring anything further to the court's attention.

Later that day, the deputy A.G. provided an addendum memo from the D.A. stating the two D.A. files were missing.[5] Absent further inquiry by defendant, the A.G. took the position the discovery inquiry was satisfied. When asked by the court if he had any comments, defense counsel replied, "no."

Defendant did not pursue the matter further.

C. *Defendant's Contentions on Appeal*

Defendant claims on appeal the loss of the D.A.'s files violated his state and federal rights to due process, to confront witnesses, and to present a defense.

Defendant argues the lost files were "clearly" material evidence favorable to the defense that should have been disclosed to the defense. Therefore, the failure to disclose the files violates defendant's rights under *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215] (*Brady*). Defendant also cites *Arizona v. Youngblood* (1988) 488 U.S. 51, 58 [102 L.Ed.2d 28] (*Youngblood*), for the proposition that "the *Brady* rule applies even to potentially useful evidence if the suppression of evidence is in bad faith[,]" that is, "the prosecution is

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[5] The addendum memo is not part of the record on appeal.

aware of the evidentiary value of the evidence to the defense." Defendant then points the court to *People v. Serrato* (1965) 238 Cal.App.2d 112 (*Serrato*) to argue fundamental notions of due process require the prosecution to "bear the burden of lost or destroyed evidence where the lost evidence is clearly material, possibly exonerating and lost solely due to the action of the state." By analogy to the reasoning of *Brady, Youngblood,* and *Serrato*, defendant contends reversal is required in this case.

Defendant also contends the loss of the files violates his state due process rights under article I, sections 7 and 15 of the California Constitution. The only cases defendant cites are *People v. Nation* (1980) 26 Cal.3d 169 (*Nation*), and *People v. Hitch* (1974) 12 Cal.3d 641, overruled on another ground in *People v. Johnson* (1989) 47 Cal.3d 1194, 1234 (*Hitch*).

D. *Analysis*

Preliminarily we note the D.A.'s office initial response to the subpoena duces tecum for the two files was a nonresponsive memo dated November 17, 2003, regarding six missing pages of discovery. As a result, in the trial court the discussion on the record about the files and whether or not the defense was missing discovery is less than clear. The trial court, the prosecutor and the defense attorney discuss interchangeably the alleged six missing pages and the two missing files as they relate to the subpoena duces tecum. Later in an addendum memo the D.A.'s office indicated the two files were missing.

A review of the record reflects defendant was provided a copy of the D.A.'s files by the A.G. in discovery and acknowledges receiving everything the A.G. received from the D.A. except the materials identified by the "privilege log" and except, perhaps, the six pages identified by the D.A.'s November 17 memo. It is, therefore, unclear whether defendant in alleging on appeal the violation of his constitutional rights by the loss of the D.A.'s files is asserting the loss of the six pages, the loss of some unknown and unpaginated material not copied by the A.G., or the complete loss of the original files.[6]

The mix of authorities to which we are referred is also confusing.

Brady held a prosecutor's failure to disclose favorable evidence to an accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady, supra*, 373 U.S. at p. 87 [10 L.Ed.2d at p. 218].) To establish that the government's failure to turn over evidence violates *Brady*, the defendant must demonstrate (1) the undisclosed evidence was favorable, either because it was exculpatory or impeaching; (2)

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[6] Defendant includes in this section of his argument a complaint regarding the trial court's failure to retain the documents the A.G. withheld as privileged, which the court reviewed in connection with defendant's motion to compel discovery. This argument more properly relates to defendant's second separate claim on appeal and will be dealt with in section II of this opinion.

the evidence was suppressed by the State, either willfully or inadvertently; and (3) the evidence was material to the defense. (See *Strickler v. Greene* (1999) 527 U.S. 263, 280-281 [144 L.Ed.2d 286, 301-302]; *In re Brown* (1998) 17 Cal.4th 873, 879.)

The failure to preserve, or the destruction of evidence by the prosecution, was specifically addressed in *Youngblood* and in *California v. Trombetta* (1984) 467 U.S. 479 [81 L.Ed.2d 413] (*Trombetta*). In *Trombetta*, the United States Supreme Court held the government has a duty under the United States Constitution to preserve evidence "that might be expected to play a significant role in the [defendant's] defense." To meet this standard, the evidence must "both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Trombetta, supra,* at pp. 488-489 [81 L.Ed.2d at p. 422], fn. omitted.) In *Youngblood* the United States Supreme Court added that to show a denial of federal constitutional due process from the destruction of such evidence, the defendant must also show that the police acted in bad faith. (*Youngblood, supra,* 488 U.S. at p. 58 [102 L.Ed.2d at p. 289].) Our Supreme Court has expressly adopted the holdings of *Trombetta* and *Youngblood*. (*People v. Frye* (1998) 18 Cal.4th 894, 942-943; *People v. Zapien* (1993) 4 Cal.4th 929, 964; *People v. Cooper* (1991) 53 Cal.3d 771, 810-811.)

In *People v. Serrato, supra,* 238 Cal.App.2d 112, the defendant, through no fault of his own, was deprived of his effective right of appeal by the failure of the trial court clerk to comply with the requirements of the law for preparation of a clerk's transcript and reporter's transcript for appeal. The court held this violated the defendant's fundamental constitutional rights. (*Id.* at p. 119.) We fail to see how this is applicable to defendant's situation here.

Nation, supra, 26 Cal.3d 169 and *Hitch, supra,* 12 Cal.3d 641, involved the same issue regarding the loss or destruction of evidence by the prosecution as *Youngblood* and *Trombetta.* Both *Nation* and *Hitch* were premised on federal due process and have not survived *Trombetta* and *Youngblood.* (*People v. Johnson, supra*, 47 Cal.3d at p. 1234; *People v. Frye, supra,* 18 Cal.4th 894, 942.) Moreover, the California Supreme Court has rejected the contention that *Trombetta* and *Youngblood* should not apply in California as a matter of state law. (*People v. Cooper, supra,* 53 Cal.3d at p. 811.)

Wending our way through the authorities cited by defendant, we conclude *Trombetta* and *Youngblood* are the most applicable to defendant's situation. However, we further conclude defendant has failed to show any due process violation under those authorities.

First, to the extent defendant is broadly complaining about the loss of the original D.A. files copied by the A.G., there is no showing, nor can we think of how defendant could show,

defendant's receipt of the copy of such files was not "comparable evidence" satisfying defendant's due process rights to potentially exculpatory or relevant impeachment evidence held by the prosecution. (*Trombetta, supra,* 467 U.S. at pp. 488-489 [81 L.Ed.2d at p. 422].)

Second, to the extent defendant is asserting a possible loss or destruction of some unknown, possibly unpaginated, material from the original files beyond the specifically identified six pages, we find such assertion entirely speculative. There is simply nothing in the record which suggests the D.A. lost more than the identified missing six pages of material, if indeed the six pages were actually lost. It is even more speculative, bordering on imaginative, that any such particular material was exculpatory or had impeachment value to the defense that was apparent to the custodian of the files when the material was lost and that no comparable evidence was reasonably available. (See *People v. Frye, supra,* 18 Cal.4th at pp. 943-944.)

Finally, to the extent defendant is asserting the loss of the six pages identified by the D.A. and A.G., we question whether defendant has actually shown those pages are lost. Defense counsel told the trial court he had received pages in discovery with the same numbers as the pages the November 17 memo listed as missing. Defense counsel suggested it was possible he had those numbered pages for only one of the two D.A. files, but counsel could not tell from what he had with him

at the time. This did not prevent counsel from later checking his discovery materials and reporting back to the trial court that he had only one set of such numbered pages or that his numbering appeared to be that of the A.G., not the D.A. Counsel never did so, perhaps because he could tell he did have the numbered pages from both D.A. files. Furthermore, it is often possible to determine a page is missing from copied materials even without relying on numbered pagination because one page may not logically follow the previous page. Defense counsel never reported finding such a problem in the photocopied material from the D.A.'s files. Thus, we cannot say with certainty, given the considerable confusion in the trial court over what, if anything, was missing, that the six pages were definitely missing from the files photocopied for the defendant.

Even assuming the pages were lost, however, defendant has failed to make the requisite showing for relief. It is quite possible the six pages were negligently misplaced, left out of the files sent to the A.G., or otherwise lost. (*People v. Ochoa* (1998) 19 Cal.4th 353, 417 [negligent failure to preserve evidence does not violate due process].) There is nothing in the record to support defendant's speculation that these specific six pages had apparent exculpatory or impeachment value so that their loss can be considered to be in bad faith.

Defendant has not shown any violation of his constitutional rights by the D.A.'s loss of its original files or any part of them.

II.

DENIAL OF MEANINGFUL APPELLATE REVIEW OF ORDER DENYING DISCOVERY OF PRIVILEGED MATERIAL

Defendant filed a motion to compel discovery of documents withheld by the A.G. as privileged. A hearing was held on defendant's motion to compel discovery on the first day of trial, November 4, 2003. The trial court reviewed the claimed privileged documents in camera and determined there was only one part of the medical records of C.M. that should be disclosed to defendant. The remainder was covered by the work product or psychotherapist privileges.

On appeal defendant complains the trial court did not retain the documents it reviewed for purposes of appellate review as required by *People v. Reber* (1986) 177 Cal.App.3d 523, 532 (overruled to the extent it held the confrontation clause requires pretrial discovery of privileged information in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123-1128), thereby precluding defendant from obtaining appellate review of the order denying him discovery, violating his constitutional rights to due process, to confront witnesses and to present a defense.

The documents listed in the A.G.'s privilege log and reviewed by the trial court in camera were, however, retained by the A.G. In compliance with our order to the trial court to transmit the documents under seal to this court, the trial court obtained the documents from the A.G. and the record on appeal has been augmented with those documents under seal. We have

reviewed the documents and find no error in the trial court rulings regarding them.

III.

ADMISSION OF INVESTIGATOR'S OPINION TESTIMONY

Shannon Bowlin testified she investigated sexual assault cases for the D.A., was a SART (Sexual Assault Response Team) member, and was previously a police officer and a deputy sheriff for nine years in San Diego. She had interviewed underage girls with regard to allegations of unlawful sex in "over a hundred [cases], for sure."

On appeal, defendant complains the trial court committed reversible error in allowing Bowlin "to render expert opinions on the characteristics, behaviors and motivations of underage girls who have been molested by older men with whom they are romantically involved." Defendant complains Bowlin was unqualified to provide expert opinion testimony regarding CSAAS (Child Sexual Abuse Accommodation Syndrome) and her lay opinion was irrelevant. We find no error.

Defendant refers to a portion of Bowlin's testimony where she was asked to "characterize [C.M.'s] reluctance to at first divulge her sexual relationship with the defendant? Was that normal or abnormal?" Defendant objected the question called for an opinion and there was no foundation for Bowlin's expertise. Specifically, defendant argued the question asked, "essentially for a psychological profile . . . and I don't think there is sufficient foundation laid for that." "Simply because she's

interviewed hundreds of girls doesn't mean she's an expert, and the reasons people may have for the psychological pressures or the psychological perspective on why one might say one thing and one another, and that's where we're going here." The court suggested the question be narrowed to ask whether this was unusual "in the experience that she has personally had, . . . versus a broader sort of a psychological evaluation of how alleged sex victims in general respond." The prosecutor then asked Bowlin, given her experience, how usual or unusual it was for an underage girl to at first deny she was sexually involved with an older man. Defendant objected that "how unusual is it is not the same as how unusual did you find it in your interviews." The prosecutor explained that was what he asked. After making sure Bowlin understood the question of how unusual it was referred to her own personal experience and not some broad generalization, the court overruled the objection. Bowlin answered: "In my experience, almost every -- I cannot think of a time when I have interviewed a victim in these circumstances where they have immediately disclosed their relationship with the man they were involved with."

Defense counsel asked Bowlin, on redirect examination, whether what she was saying was that an initial denial of a sexual relationship by an underage girl meant in fact the girl had a sexual relationship. Bowlin responded "no," but added, without objection from defendant, "in cases of unlawful sexual intercourse where there is also a romantic relationship of some

kind and you have a teenaged girl, they're very protective of these men, and, no, they do not disclose initially."

Respondent argues Bowlin's testimony was not opinion testimony at all. We disagree. In the context of the prosecutor's questioning of how unusual it was for a victim to initially deny a sexual relationship, Bowlin answered, essentially, that in her experience it was typical. In fact, based on her personal experience, underage girls involved in a sexual relationship with an older man had always initially denied the relationship. Bowlin also later stated these girls tend to be "protective" of the men with whom they are involved. Both these statements (the girls do not initially disclose and are protective of the man) are in effect opinions. However, while we agree Bowlin's testimony is properly characterized as opinion testimony, we do not agree with defendant that it was improperly admitted.

An expert may testify in the form of an opinion. (Evid. Code, § 801.) "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) A trial court has "considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown." (*People v. Kelly* (1976) 17 Cal.3d 24, 39.) "In considering whether a person qualifies as an expert, the field

of expertise must be carefully distinguished and limited." (*People v. King* (1968) 266 Cal.App.2d 437, 445.)

Here Bowlin did not have the qualifications of an expert in the field of psychology and could not testify to general psychological behaviors or motivations of underage girls involved in sexual relationships with older men. However, defendant failed to object to the portion of Bowlin's testimony expressing the general opinion that underage girls involved in situations of unlawful sex want to protect the man with whom they are involved. Defendant has forfeited any error in the admission of such testimony. (Evid. Code, § 353, subd. (a); *People v. Boyette* (2002) 29 Cal.4th 381, 424.)

With respect to the portion of Bowlin's testimony expressing her opinion, limited to her experience, that underage girls involved in situations of unlawful sex did not initially disclose the relationship, Bowlin did have considerable, specialized experience in investigating situations similar to C.M.'s for law enforcement or prosecution. She testified she had interviewed over a hundred underage girls with regard to allegations of unlawful sex in her prior positions with law enforcement and then her position as a D.A. investigator and SART member. The trial court carefully limited her testimony to just such personal experience. The trial court did not abuse its discretion in impliedly finding her qualified as an expert in the limited area of investigation of underage girls involved in sexual relationships with older men.

A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact. (Evid. Code, § 801, subd. (a).) The trier of fact does not need to be wholly ignorant of the subject matter of the opinion to justify the admission of expert opinion testimony. The testimony is admissible as long as it will "assist" the trier of fact. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300 (*McAlpin*).)

People v. McAlpin, supra, 53 Cal.3d 1289 (*McAlpin*), is helpful. In *McAlpin* the California Supreme Court concluded a law enforcement officer who properly qualified as an expert could testify to the common reactions of a parent of a child molestation victim, including their delay in reporting the molestation. (*McAlpin, supra,* at pp. 1300-1302.)[7] Such testimony was not admissible to prove the underlying molestation, but was admissible to rehabilitate the testimony of the parent as a corroborating witness after her credibility had been challenged. (*Ibid.*) The expert testimony was helpful to the trier of fact because it helped correct a common misassumption that a parent would always promptly report a

[7] The officer in *McAlpin* had considerably more qualifications from specialized training in the area of psychology than Bowlin and was allowed to express generalized opinions regarding how parents would commonly react in situations of child molestation. (*McAlpin, supra,* 53 Cal.3d at p. 1298.)

molestation. (*Id.* at p. 1302.) It was relevant to an evaluation of the parent's credibility. (*Ibid.*)

In *People v. Brown* (2004) 33 Cal.4th 892 (*Brown*), the California Supreme Court considered the admission of expert testimony regarding the behavior of victims of domestic violence. Using reasoning similar to *McAlpin,* the Supreme Court held the testimony was admissible under Evidence Code section 801 to assist the jury in evaluating the credibility of the victim's trial testimony when it was inconsistent with earlier statements. (*Brown, supra,* at pp. 905-907.)

Here defendant sought to impeach C.M.'s testimony regarding the sexual acts occurring between her and defendant with, among other things, C.M.'s multiple denials of any sexual relationship with defendant in her first several interviews with law enforcement. By analogy to *McAlpin* and *Brown,* Bowlin's expert testimony regarding underage girls initially denying unlawful sexual relationships was admissible and relevant to assist the court, as the trier of fact, in evaluating C.M.'s credibility. We are confident the trial court, as the trier of fact, remained aware of Bowlin's limited expert qualifications and gave her opinion its appropriate weight.

IV.

SUFFICIENCY OF THE VICTIM'S TESTIMONY

Defendant claims this case presents one of those relatively rare situations where the testimony supporting the verdicts is inherently improbable or unreliable as a matter of law.

Analogizing primarily to cases involving government informants (*People v. Medina* (1974) 41 Cal.App.3d 438, 452; *People v. Green* (1951) 102 Cal.App.2d 831, 834), although noting one case involving uncontradicted affidavits of coaching and tampering with a child victim/witness (*People v. Hudson* (1934) 137 Cal.App. 729, 730), defendant contends C.M.'s testimony was coerced by the demands of her mother and by C.M.'s desire to get more attention from her mother. Defendant also claims C.M.'s mother inflamed C.M. against defendant by telling her defendant had "pornography" or "picture of girls like [her]" on his computer.

"[E]vidence which is produced by coercion is inherently unreliable and must be excluded under the due process clause." (*People v. Lee* (2002) 95 Cal.App.4th 772, 786-787, italics omitted.)

There is some evidence in the record to support defendant's claims of coercion. However, in light of the evidence significantly corroborating C.M.'s trial testimony, the trial court as the trier of fact was not required to reject C.M.'s testimony as unreliable as a matter of law. (*People v. Sepeda* (1977) 66 Cal.App.3d 700, 707-709.) Important corroboration of C.M.'s testimony was provided by the testimony of K.M. regarding the pregnancy test she took to C.M. at the gym, defendant's instruction to K.M. to deny the test ever occurred or she could be "implicated," K.M.'s statement to the investigator of defendant's implicit admission of his sexual relationship when

accused of it by K.M., and defendant's requests that, if asked, K.M. should say the engagement ring was hers, that she was originally the person who was supposed to accompany C.M. to the health clinic, and that she should deny the existence of the note sent to C.M. by Ms. Hobbs. K.M. also drove defendant around town to spray paint the numbers "381" in various places. The public health nurse, Ms. Morrison, provided further circumstantial evidence of the sexual relationship between defendant and C.M. in her testimony regarding their visit to the health clinic. That a sexual relationship had started is one reasonable inference even from defendant's own first September 2000 e-mail to C.M. stating, "I am partially running off the 'L' word, too, and this is definite boost. I had the time of my life tonight and I owe it all to you." Further evidence of defendant's relationship with C.M. was memorialized in his December 2000 e-mail to her "my love grows stronger for you with each passing day. Thank you for being the most beautiful thing in my life. I love you more than words can say. Think of me and I will be by your side, I promise. Love forever, Kurt."

Thus, this case simply presented a situation where a wealth of conflicting information was presented to the trial court. It was up to the court, as the trier of fact, to resolve the conflicts and inconsistencies in the testimony and decide the credibility of the witnesses. We will not do so on appeal. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Barnes*

(1986) 42 Cal.3d 284, 303-306.) We conclude substantial evidence supports the verdicts of the trial court.

V.

***CUNNINGHAM* ERROR**

On October 2, 2003, prior to trial, defense counsel informed the trial court defendant was "ready and willing and prepared to enter a jury trial waiver and have the court hear the facts." The trial court then took defendant's waiver of his right to jury trial on the record as follows:

"THE COURT: All right. Mr. Sindorf, you just heard the representations of your counsel; that is, that you are willing to waive jury in this case. [¶] Do you understand what that means is that you are giving up the right to have 12 citizens hear the case, *decide the question of your guilt or innocence*?

"THE DEFENDANT: *That's correct*.

"THE COURT: That -- you understand that what is going to happen in [its] place is that a judge will be making that decision after having heard the evidence that is presented by both sides?

"THE DEFENDANT: That's correct.

"THE COURT: Do you agree with that waiver of jury and having the matter heard by a judge?

"THE DEFENDANT: Yes, I do." (Italics added.)

Defendant contends on appeal his jury trial waiver was not knowing and intelligent because he was not informed he was giving up the right to have factors affecting his sentence heard

by a jury pursuant to *Apprendi, supra,* 530 U.S. 466 [147 L.Ed.2d 435], *Blakely, supra,* 542 U.S. 296 [159 L.Ed.2d 403], and *Cunninghan, supra,* 549 U.S. __ [166 L.Ed.2d 856]. Defendant argues such information could have been material to his decision to waive a jury on the question of guilt or innocence. "The defendant could decide, that, win or lose, he would prefer to at least have a jury decide issues related to sentencing." Defendant claims, therefore, his jury trial waiver was invalid in its entirety and that he is entitled to a new trial, not just a resentencing, "because the defective waiver as to sentencing factors could have affected [defendant's] decision to waive [a] jury as to issues of guilt and innocence." We reject defendant's construction of his jury trial waiver. Defendant is not entitled to reversal and a remand for a new trial.

Both the federal and state Constitutions provide a criminal defendant with a fundamental right to a trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282 [124 L.Ed.2d 182, 190-191]; *Duncan v. Louisiana* (1968) 391 U.S. 145, 155-156 [20 L.Ed.2d 491, 499-500]; *People v. Collins* (2001) 26 Cal.4th 297, 304; *People v. Ernst* (1994) 8 Cal.4th 441, 444-445.) Under *Apprendi, supra,* 530 U.S. 466 [147 L.Ed.2d 435], *Blakely, supra,* 542 U.S. 296 [159 L.Ed.2d 403], and *Cunninghan, supra,* 549 U.S. __ [166 L.Ed.2d 856], defendant's right to jury trial extended to all but recidivist circumstances in aggravation under the California Determinate Sentencing Law (DSL). "Except for 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.'" (*Cunningham, supra,* 549 U.S. __ [166 L.Ed.2d at p. 873].)

A defendant may waive his right to jury trial. (*People v. Collins* (2001) 26 Cal.4th 297, 305 (*Collins*); *People v. Smith* (2003) 110 Cal.App.4th 492, 500.) A defendant may also waive his right to have the jury determine the existence of aggravating sentencing factors. (*Blakely, supra,* 542 U.S. at p. 310 [159 L.Ed.2d at pp. 417-418]; see *People v. Earley* (2004) 122 Cal.App.4th 542, 550.) However, any waiver must be knowing and intelligent -- that is, it must be made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. (*Collins, supra,* at p. 305; *People v. Johnson* (2002) 28 Cal.4th 1050, 1055.)

The record here demonstrates defendant waived his right to a jury trial as to his "guilt or innocence[.]" There is nothing in the record that suggests such waiver included his right to a jury trial as to any sentencing factors. In fact, the language of his waiver seems to expressly exclude such an interpretation since it was limited to trial of defendant's "guilt or innocence," that is, to the trial of the underlying offenses. Moreover, the trial court never advised defendant on the record

of any right he had pursuant to *Apprendi*[8] and nothing in the record even hints that either defendant or his counsel was considering waiver of any sentencing jury trial right as part of the waiver. Defendant's jury trial waiver cannot be construed as a knowing and intelligent waiver of his right to jury trial on sentencing factors.

We conclude the scope of defendant's waiver of his right to jury trial was limited to the trial of his guilt or innocence of the charged offenses. The scope of his waiver did not include his right to a jury trial for aggravating factors affecting his sentence. As defendant's waiver did not include his *Apprendi/Blakely/Cunningham* rights, the factual premise for defendant's argument for the invalidity of his jury waiver as to his guilt or innocence is missing. Defendant is not entitled to reversal and a new trial.

This leaves us with the question of whether the trial court erred under *Cunningham* in sentencing defendant to the upper term on count two (one of his convictions for unlawful sexual intercourse with a minor (§ 261.5, subd. (d)) and to consecutive one-third of the middle term or one-year sentences for two of his other convictions of unlawful sexual intercourse and to a two-year consecutive term for one of his convictions of attempting to dissuade a witness. (§ 136.1, subd. (a)(2).)

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[8] At the time of defendant's waiver, only *Apprendi, supra,* 530 U.S. 466 [147 L.Ed.2d 435] had been decided.

Respondent contends we need not address these issues because defendant forfeited his claim of error by failing to object at trial. Respondent claims defendant not only failed to object, but "virtually invited an upper term sentence." Respondent points us to comments made by defense counsel in response to the trial court's tentative decision regarding sentencing.

Specifically, the trial court indicated its tentative decision with regard to sentencing was to impose an upper four-year prison term on count two. The trial court stated that "[w]ith regard to all of the other counts, the court would anticipate that there would be a one-third the mid-term potential. The court does not at this time have a tentative with regard to the number of those counts that would be sentenced consecutively versus concurrently. And I do wish to hear from counsel with regard to that." In response, defense counsel pointed out there was no indication or evidence "or even inference" of violence or threat of violence by defendant "throughout the course." Defense counsel pointed out defendant's complete lack of any prior criminal record. Counsel went on to state: "It would strike me, in looking at the sentencing in this case, I would not even object to the court's imposition of the upper term of four years on count 2. But it seems to me that, given that, consecutive sentencings on the balance of the charges would be egregious and unfair and excessive. It seems to me that the sentence more in line of the

four-year upper and perhaps the balance of them being concurrent would be more appropriate."

We do not read these comments, as respondent implies, to be a concession by defendant that the upper term should be imposed. In fact, defense counsel emphasized the potential strength of two mitigating factors, apparently in an attempt to argue against the trial court's tentative decision to impose the upper base term. Only then did counsel indicate defendant would not object to the upper term, but as we understand it, apparently only on the basis that the court impose concurrent sentences on all of defendant's other convictions. We view the defense comments not as an invitation to impose the upper term, but as an argument, given the trial court's expressed intention to impose the upper term, for no more than a total of four years in prison.

The fact defendant did not agree to imposition of the upper term is, of course, not the same as objecting to the imposition of the upper term on the grounds that a jury rather than the trial court must find the aggravating facts beyond a reasonable doubt. Clearly defendant did not interpose such an objection. In this regard, respondent predicates its forfeiture argument primarily on the United States Supreme Court's decisions in *United States v. Booker* (2005) 543 U.S. 220 [160 L.Ed.2d 621] (*Booker*) as well as *United States v. Cotton* (2002) 535 U.S. 625 [152 L.Ed.2d 860] (Cotton) and the California Supreme Court's decision in *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*).

Respondent argues defendant was in the identical position as the defendant Blakely and any claim of futility is conjectural. We do not find forfeiture in this case.

In *Booker, supra,* 543 U.S. 220 [160 L.Ed.2d 621], the United States Supreme Court, in the portion of the opinion delivered by Justice Breyer, expressed its expectation that reviewing courts would continue to apply to cases involving *Apprendi* error "ordinary prudential doctrines, determining for example, whether the issue was raised below and whether it fails the 'plain-error' test." (*Id.* at p. 269 [160 L.Ed.2d at p. 665].) The Supreme Court noted that not all cases involving a Sixth Amendment violation would require resentencing after application of the harmless-error doctrine. (*Ibid*.) *Booker*, thus, contemplates the possibility of forfeiture for a Sixth Amendment right under *Apprendi* and its progeny.

United States v. Cotton (2002) 535 U.S. 625 [152 L.Ed.2d 860] held that a defendant's failure to object to *Apprendi* error in the trial court forfeits the right to raise it on appeal if the error did not seriously affect the fairness, integrity, and public reputation of the judicial proceedings, i.e., if a factor relied upon by the trial court in violation of *Apprendi* was uncontroverted at trial and was supported by overwhelming evidence. (*Id.* at pp. 631-633 [152 L.Ed.2d at pp. 867-869].)

In *Scott, supra,* 9 Cal.4th 331, the California Supreme Court concluded a defendant forfeits claims "involving the trial court's failure to properly make or articulate its discretionary

sentencing choices." (*Id.* at p. 353.) The Supreme Court found forfeiture appropriate "[i]n order to encourage prompt detection and correction of error, and to reduce the number of unnecessary appellate claims[.]" (*Id.* at pp. 351, 353.) The court based its conclusion on the practical reasoning that "counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing" and "[r]outine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Id.* at p. 353.)

Applying these cases, we cannot find defendant here forfeited his Sixth Amendment right to jury trial on aggravating sentencing factors by his failure to object at the trial court level.

First, while *Apprendi* had been filed several years before defendant's sentencing in December 2003, it appeared the holding of *Apprendi* did not extend to aggravating sentencing factors under the California DSL. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) No published case in California at the time of defendant's sentencing held *Apprendi* required a jury trial for any aggravating sentencing factor used to impose an upper term. Thus, what we now know is *Cunningham* error would not have been easily recognized, prevented and corrected by the trial court in this case if defendant had objected in 2003 based on *Apprendi.* Indeed, given the state of the law, any such objection would probably have been futile in terms of obtaining

any immediate relief from the trial court. The practical rationale of *Scott, supra,* 9 Cal.4th at p. 353, does not require a forfeiture be found in these circumstances.

We recognize counsel had an obligation, nevertheless, to preserve a potential appellate claim under *Apprendi*, as the defendant did in *Blakely*. A forfeiture under *Cotton*, *supra,* 535 U.S. at pp. 631-633 [152 L.Ed.2d at pp. 867-869], would be appropriate if this case presented a situation where the *Cunningham* error did not seriously affect the fairness, integrity, and public reputation of the judicial proceedings, i.e., if the factors relied upon by the trial court in violation of *Cunningham* were uncontroverted at trial and were supported by overwhelming evidence. This is not such a case.

The trial court here imposed the upper term on count two based on a finding that the aggravating factors outweighed the mitigating factors. It stated the aggravating factors as (1) defendant had induced others to participate in the commission of the crime (Cal. Rules of Court, rule 4.421(a)(4)),[9] (2) defendant threatened witnesses (rule 4.421(a)(6)), and (3) defendant took advantage of a position of trust or confidence to commit the offense. (Rule 4.421(a)(11).) The only mitigating factor the trial court found was defendant's lack of a prior record. (Rule 4.423(b)(1).)

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[9] Undesignated rule references are to the California Rules of Court.

The aggravating factors relied on by the trial court were not uncontroverted and while there was substantial evidence to support them, we cannot say they were supported by overwhelming evidence. We cannot say that if the aggravating facts had been submitted to a jury, the jury unquestionably would have found them to be true and, thus, the *Apprendi/Blakely/Cunningham* error was harmless beyond a reasonable doubt. We conclude the trial court erred in imposing the upper term on defendant for his conviction of count two and that the *Cunningham* error did seriously affect the fairness, integrity, and public reputation of the judicial proceedings so as to preclude the doctrine of forfeiture being applied to defendant's failure to object below.

As for the trial court's imposition of consecutive sentences on three of defendant's convictions, we note that *Cunningham* did not address whether the decision to run separate terms concurrently or consecutively must be made by the jury.

Section 669 imposes that duty on the trial court. In most cases, this is a matter of the trial court's discretion. (*People v. Morris* (1971) 20 Cal.App.3d 659, 666, overruled on another ground *People v. Duran* (1976) 16 Cal.3d 282, 292.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than 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 provides that when a trial court fails to determine whether multiple terms are to run concurrently or consecutively, they shall run concurrently. However, this does not create a presumption or other entitlement to concurrent sentencing. It merely provides for a default in the event the court neglects to perform its duty in this regard. The trial court here did not neglect its duty to state whether the sentences imposed for defendant's other convictions were to run concurrently or consecutively to the base term for count two. It specifically chose to impose consecutive sentences for three of defendant's remaining 11 convictions and concurrent sentences for the rest.

Entrusting to the trial court the decision whether to impose concurrent or consecutive sentences is not precluded by *Apprendi*, *Blakely*, or *Cunningham*. In this state, every person who commits multiple offenses knows that, if convicted, he or she runs the risk of receiving consecutive sentences without any further factual findings. While such a person has the right to the exercise of the court's discretion, the person does not have a legal right to concurrent sentencing. As the Supreme Court said in *Blakely*, "that makes all the difference insofar as judicial impingement upon the traditional role of the jury is

concerned." (*Blakely*, *supra*, 542 U.S. at p. 309 [159 L.Ed.2d at p. 417].)

Defendant's Sixth Amendment rights were not violated when the trial court imposed consecutive terms on counts four, six and twelve.

Although we conclude only the trial court's imposition of an upper term on count two violated *Cunningham*, we will vacate defendant's sentences in toto and remand the case to the trial court for resentencing proceedings in order to provide the trial court with the opportunity to structure overall sentences in compliance with *Cunningham*.

DISPOSITION

Defendant's sentences are reversed and the case is remanded to the trial court with directions to resentence defendant in compliance with *Cunningham v. California* (2007) 549 U.S. __ [166 L.Ed.2d 856]. In all other respects, the judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P.J.

DAVIS, J.