

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Mono)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JAY HARRIS,

Defendant and Appellant.

C064874

(Super. Ct. No.
MFE07004358)

The defendant sexually abused the twin daughters of his girlfriend over a period of more than three years. He also committed a lewd act on a neighbor girl. Convicted by jury of many lewd acts and rape and sentenced to state prison for 19 consecutive indeterminate terms of 15 years to life (an aggregate term of 285 years to life), the defendant appeals.

On appeal, the defendant contends: (1) the trial court abused its discretion in admitting evidence obtained from his computer hard drive, (2) the court violated his rights to due process and a fair trial by admitting evidence of the Child

Sexual Abuse Accommodation Syndrome (CSAAS), (3) the court improperly instructed the jury on CSAAS, (4) the court improperly admitted evidence of uncharged sexual acts on the same victims, (5) admission of uncharged sexual acts to show the defendant's propensity to commit such acts violated his due process rights, (6) the court improperly allowed lay witnesses to testify concerning their perceptions of the victims' truthfulness, (7) the cumulative effect of errors requires reversal, (8) the court improperly imposed consecutive sentences for multiple acts committed on a single occasion, (9) the court improperly imposed a 10-year parole term instead of the five-year term under the law existing at the time the defendant committed his crimes, and (10) errors in the abstract of judgment must be corrected.

We conclude that the proper parole period was five years and order the judgment to be modified accordingly. We also conclude that several errors in the abstract of judgment must be corrected. Finding no further prejudicial error, we affirm the judgment as modified and remand for preparation of an amended abstract of judgment.

FACTS AND PROCEDURE

The charges against the defendant involved three victims and four locations. The victims were the twin daughters (M.G. and C.G.) of the defendant's live-in girlfriend (K.) and a younger neighbor girl (R.D.). The charges covered the defendant's molestations of M.G. and C.G. from when they were 10 years old until they turned 14 years old and the defendant's

molestation of R.D. when she was nine years old. The four locations were: (1) the defendant's trailer in Bishop (Inyo County), (2) a home in Nevada County, (3) a trailer in Chalfant (Mono County), and (4) a home in Orange County.

We recount the charges and the verdicts in connection with the facts. However, the resolution of the issues raised by the defendant on appeal does not require a comprehensive description of the evidence.

A. *Locations and Crimes*

1. Trailer in Bishop

M.G. and C.G. were born in 1992. In 2002, when the girls were 10 years old, K. moved them into the defendant's trailer in Bishop. K. was there only off-and-on. It was during the time that they lived in the defendant's trailer in Bishop that the defendant began touching them sexually. The girls and the defendant lived in the trailer for about two years.

i. M.G.

During the time that M.G. lived in the trailer in Bishop, the defendant first reached down M.G.'s pants and touched her buttocks while M.G., the defendant, and K. were lying down, watching a movie. On other occasions, the defendant touched M.G.'s vagina (more than once, "probably a little over 10" times) and breasts (more than once). He took her pants off and rubbed her vagina. M.G. estimated that the sexual touching occurred every day while they lived in the trailer in Bishop. On one occasion, the defendant forced M.G. to orally copulate him.

Based on these acts with M.G. in the trailer in Bishop, the information charged the defendant with committing four lewd acts (Pen. Code, § 288, subd. (a)): count I -- touching her breast the "first time" in the trailer; count II -- touching her breast the "last time" in the trailer; count III -- touching her vagina the "first time" in the trailer; and count IV -- touching her vagina the "last time" in the trailer.

The jury convicted the defendant on counts I, III, and IV, and it acquitted the defendant on count II.

ii. C.G.

During the time that C.G. lived in the trailer in Bishop, the defendant touched C.G.'s chest, stomach, and legs, and kissed C.G. all over her body. This happened many times. On one occasion, the defendant started by touching C.G.'s chest. He then kissed her all over and took her clothes off her. Overcoming C.G.'s resistance, the defendant attempted to insert his penis into C.G.'s vagina. According to C.G., "he didn't get it in all the way." The defendant touched her sexually about twice a week.

Based on these acts with C.G. in the trailer in Bishop, the information charged the defendant with committing six lewd acts (Pen. Code, § 288, subd. (a)): count XII -- touching her breast the "first time" in the trailer; count XIII -- touching her breast the "last time" in the trailer; count XIV -- kissing her body the "first time" in the trailer; count XV -- kissing her body the "last time" in the trailer; count XVI -- touching her

leg the "first time" in the trailer; and count XVII -- touching her leg the "last time" in the trailer.

The jury convicted the defendant on counts XII, XIV, XV, and XVI, and it acquitted the defendant on counts XIII and XVII.

2. Home in Nevada County

During the time the girls were living with the defendant in the trailer in Bishop, they drove to visit K. at her house in Nevada County. They all watched a movie together in the bedroom. The defendant and K. lay on the bed, while the two girls sat in chairs. The defendant and K. began kissing under the covers, and the defendant grabbed C.G.'s hand and made her hold his penis while he had intercourse with K.

Based on this act with C.G. in the home in Nevada County, the information charged the defendant with committing a lewd act (Pen. Code, § 288, subd. (a)): count XXIV -- placing her hand on his penis.

The jury convicted the defendant on count XXIV.

3. Trailer in Chalfant

In 2003, the defendant, K., and the girls moved to a trailer in Chalfant.

i. M.G.

During the time that M.G. lived in the trailer in Chalfant, the defendant continued to molest her. As often as every day, the defendant touched her breasts and vagina. He also attempted to insert his penis in her vagina more than once. On one occasion, the defendant took M.G. into K.'s bedroom, where he put M.G. on a bed and took her pants and underwear off her. He

rubbed her vagina and put his finger inside. M.G. told the defendant that he was hurting her, but the defendant continued and then attempted to put his penis in her vagina. He succeeded in putting his penis about an inch and a half into her vagina. This caused M.G. even more pain, and she cried. On other occasions, the defendant kissed M.G. on her breasts and licked her vagina. He also rubbed his penis on her vagina and, again, put his penis inside her vagina.

Based on these acts with M.G. in the trailer in Chalfant, the information charged the defendant with committing six lewd acts (Pen. Code, § 288, subd. (a)): count V -- touching her vagina with his hand the "first time" in the trailer; count VI -- touching her vagina with his hand the "last time" in the trailer; count VII -- touching her breast the "first time" in the trailer; count VIII -- touching her breast the "last time" in the trailer; count IX -- touching her vagina with his penis the "first time" in the trailer; and count X -- touching her vagina with his penis the "last time" in the trailer.

The jury convicted the defendant on counts V, VII, VIII, IX, and X, and it acquitted the defendant on count VI.

ii. C.G.

During the time that C.G. lived in the trailer in Chalfant, the defendant continued to molest her too. On many occasions, the defendant touched her body with his mouth, hands, and, later, his penis. Once, he touched her leg, took her clothes off her, and inserted his penis two and a half to three inches into her vagina.

Based on these acts with C.G. in the trailer in Chalfant, the information charged the defendant with committing four lewd acts (Pen. Code, § 288, subd. (a)): count XVIII -- kissing her body the "first time" in the trailer; count XIX -- kissing her body the "last time" in the trailer; count XX -- touching her vagina with his penis the "first time" in the trailer; and count XXI -- touching her vagina with his penis the "last time" in the trailer. The information also charged the defendant with committing two aggravated rapes of a child (Pen. Code, § 269, subd. (a)(1)): count XXII -- having intercourse with her the "first time" in the trailer, and count XXIII -- having intercourse with her the "last time" in the trailer.

The jury convicted the defendant on counts XVIII, XIV, XX, and XXII, and it acquitted the defendant on counts XXI and XXIII.

iii. R.D.

In October 2003, R.D. was nine years old when she visited M.G. and C.G. at the trailer in Chalfant. The defendant came into the room as they were watching television. He rubbed her legs, then reached up her shorts and touched her vagina.

Based on this act with R.D. in the trailer in Chalfant, the information charged the defendant with committing a lewd act (Pen. Code, § 288, subd. (a)): count XXV -- touching her vagina with his hand.

The jury convicted the defendant on count XXV.

4. Home in Orange County

The defendant took M.G. to visit the defendant's father in Orange County. While they were there, the defendant took her clothes off her and put his penis in her vagina.

Based on this act with M.G. in the home in Orange County, the information charged the defendant with committing a lewd act (Pen. Code, § 288, subd. (a)): count XI -- touching her vagina with his penis.

The jury convicted the defendant on count XI.

B. *M.G.'s and C.G.'s Disclosure of Molestations*

The defendant was arrested, in 2003, after R.D. reported that the defendant had molested her. While the defendant was in jail, K. asked M.G. and C.G. whether the defendant had ever molested them. They responded that he had, but K. said she did not believe them and that the defendant "wouldn't do anything like that."

The twins did not report the defendant's sexual abuse again until more than three years later. M.G. and C.G. told their friends that the defendant had been touching them sexually. The twins also told a Child Protective Services worker about the sexual abuse, but did not reveal the extent of the abuse until later.

C. *Medical Evidence*

In February 2008, about 10 days before the twins' 16th birthday, they were examined by a nurse certified to perform child abuse examinations. She reported findings consistent with

the twins' statements concerning how the defendant had abused them.

The defense presented testimony from a doctor who stated that the pictures taken from the twins' physical examinations were inconsistent with claims of rape and sexual penetration.

D. *Defendant's Testimony*

The defendant testified and denied sexually touching the twins and R.D.

E. *Additional Evidence*

We recount a substantial amount of additional evidence in connection with our discussion of the defendant's contentions on appeal.

DISCUSSION

I

Admission of Images from Hard Drive and from Internet

At trial and over the defendant's objections, the prosecution used images and data found on the defendant's computer hard drive to establish the defendant's intent and motive in touching the victims and the absence of mistake. The images and other data included child pornography and erotica. Also over the defendant's objections, the prosecution introduced evidence that the defendant had visited various Web pages. In connection with that evidence concerning visited Web pages, the prosecution introduced representative images from those Web pages to establish the nature (again, child pornography and erotica) of the Web pages visited.

On appeal, the defendant contends that (1), as to all images and related evidence, admission was inordinately time-consuming and unduly prejudicial and therefore the evidence should have been excluded pursuant to Evidence Code section 352 and (2), as to the representative images from the Web pages, those images were irrelevant because there was no evidence that the defendant viewed those specific images on the Internet. We conclude that the trial court did not abuse its discretion in admitting the evidence.

A. *Background*

During a search of the defendant's trailer, a laptop computer and two computer hard drives were found. After extensive evidentiary hearings, the trial court overruled the defendant's objections to five types of evidence: newsgroups, URLs (Web page addresses), images of child pornography, images of child erotica, and a story about incest. For purposes of discussion, the evidence can be divided into two categories: (1) images and data accessed by the defendant and found on the seized hard drives and (2) representative images found on the Internet at Web pages the defendant accessed. All evidence relevant to this discussion came from just one of the hard drives located in the defendant's residence.

The evidence from the hard drive was extracted by Lydell Wall who, at the time, was a Stanislaus County law enforcement officer, assigned to the Sacramento Valley High Tech Crimes Task Force. He had worked in computer forensics since 1998 and

provided forensic services in the Chandra Levy and Laci Peterson cases.

In his testimony, Wall used the terms "child erotica" and "child pornography." He identified as "child erotica" any suggestive images of children, whether clothed or nude. He further identified as "child pornography" images of children in which the genitals are exposed and are the focal point of the image.

1. Images and Data Accessed by the Defendant

A key logger, a program to record what key strokes are used on a computer, captured the key strokes the defendant used for one month, from March 12, 2006, to April 19, 2006. Wall reviewed the data collected by the key logger and determined that the defendant had performed many Internet searches. The defendant typed in search terms, such as "lolita" and "nymphet," that are commonly used to search for child pornography and child erotica on the Internet. Many of the defendant's searches included the word "preteen," combined with words such as "breasts," "models," and "nymphet."

Newsgroups allow a person, such as the defendant, to subscribe to data provided on the Internet. The defendant subscribed to 39 newsgroups. Newsgroups to which the defendant subscribed included, for example, such terms as "pictures," "child," "erotica," and "lolita." The data from the newsgroups was mainly child pornography and child erotica. One of the newsgroups to which the defendant subscribed described an incestuous relationship between a "little girl" and her father.

The hard drive contained images that had been viewed by the defendant. These images included three of child pornography, featuring girls with exposed genitals. In addition to the child pornography, the defendant accessed numerous images of child erotica, ranging from "glamour" photographs to pictures of girls in gymnastics attire to pictures of girls in various states of undress.

2. Representative Images from Web Pages

Also on the hard drive was a temporary file containing the addresses (URLs) of Internet Web pages that the defendant accessed during a period of 12 days in May 2006. This file did not contain images, only the text of the addresses.

During his investigation, Wall visited the Web pages that the defendant had visited, as recorded in the temporary file recovered from the hard drive. Wall first visited the Web pages and printed out what was there in April 2009. Just before trial, in November 2009, Wall again visited the Web pages and printed out what was there.

Wall's printouts of the Web pages in April 2009 and November 2009 produced about 60 printed pages each, containing images, banners, text, and other Web page contents. Many of the images were child pornography and child erotica. We refer to these as "representative images" because the evidence did not establish that the defendant viewed these specific images but, instead, the printouts represented what types of images were displayed on the Web pages that the defendant accessed.

Many of the representative images appeared as thumbnails, which are smaller images typically provided so that the user can click on the thumbnail to get the full-size image. Many of the Web pages accessed by the defendant were the results pages of his Internet searches. For example, he did a search for images with the search term "lolita." When Wall accessed the results page for that image search in November 2009, he found 21 thumbnail images on the page, many of them child erotica.

3. Procedure

The defendant objected to the hard-drive evidence. And the trial court overruled the objection after considering the relevance of the evidence. The court also considered and overruled the defendant's Evidence Code section 352 objection after analyzing the probative value and prejudicial effect of the evidence, as well as consumption of time and possible confusion of the jury.

Before the hard-drive evidence described above was presented to the jury, through Wall's testimony and the exhibits, the trial court gave the jury this instruction:

"The [P]eople are about to present evidence that the computer hard drives seized from the defendant's residence contain[] images and text and present certain of that -- certain of that text and images. If you decide the defendant is responsible for any such images and/or text, you may but are not required to consider that evidence for the limited purpose of deciding whether or not the defendant was the person who committed the offense as alleged in this case and/or the

defendant acted with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the defendant or of any alleged victim and/or the defendant had the motive to commit[] the offenses charged in this case, and/or the defendant's alleged actions were the result of mistake or accident and/or the defendant had a plan or scheme to commit the offenses in this -- charged in this case.

"Do not consider this evidence for any other purpose. Do not conclude from this evidence that the defendant has a bad character or is predisposed to commit crime. Such evidence is not sufficient by itself to prove defendant is guilty [of] any or all of the charged offenses and allegations. The People must still prove each charge and allegation beyond a reasonable doubt."

Later, during Wall's testimony, the trial court again instructed the jury, focusing on the representative images evidence. The court said:

"Ladies and gentlemen, in connection with the computer evidence, you will have in mind the continuing instructions I gave you yesterday. I don't intend to read it in its entirety again. With regards to exhibits that are going to be discussed now, I have been asked to direct your attention to certain facts that I think are going to be developed through this witness and may be the subject of contention.

"Exhibits 55-A and -B [the URL evidence], which are going to be discussed next, have been admitted into evidence. We are going -- they are going to be displayed for your viewing for the

limited purpose I expressed yesterday. These are not necessarily images extracted from the computer because you are going to see, at least in 55-A and -B, printings of images that were lifted from URL sites. Those are Internet sites that were found on the computer. One run of these was done back in April of this year, and one was done Monday of this week.

"The reason for those being done will be explained to you through [the prosecutor's] questions of Mr. Wall. But I want to make sure, and I have been asked to make sure there is no confusion that 55-A and -B do not represent actual images that were taken off of the hard drive"

The prosecutor stated during closing argument that the evidence from the hard drive was used to establish the defendant's intent -- that is, that he was sexually interested in young girls. The prosecutor argued: "The defendant's computer shows the defendant has a clear, intense drive to have sex with preteen and teen girls. He likes little girls in bikinis. He likes them in tights. He likes their legs spread, and he likes incest. That is what the computer shows."

B. *Applicable Laws*

Evidence Code section 1101, subdivision (a) "prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Thus, evidence of other crimes or bad acts is generally inadmissible when it is offered to show that a defendant had the

criminal disposition or propensity to commit the crime charged. Evidence Code section 1101, subdivision (b), however, allows admission of the defendant's prior conduct if it is relevant to "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident."¹

Even when evidence is admissible under Evidence Code section 1101, subdivision (b), the trial court may exclude it "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

The trial court admitted the images evidence under Evidence Code section 1101, subdivision (b) to show identity, intent, motive, absence of mistake, and common plan. The defendant claims that the evidence did not establish identity or common plan, but he concedes that it "may have been relevant to intent, motive, or lack of accident." As we discuss later, the hard-drive evidence admitted as evidence of the defendant's prior conduct tended to establish the defendant's intent and motive

¹ Evidence Code section 1101, subdivision (b) states: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

and the absence of mistake. Since the evidence was admissible for some of the purposes listed in Evidence Code section 1101, we turn to whether the evidence was also admissible over an Evidence Code section 352 objection. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.)

Evidence of sexual images possessed by a defendant may be admissible to prove his intent to commit a sex offense. (*People v. Page* (2008) 44 Cal.4th 1, 40.) A defendant's possession of sexually-explicit and sexually-suggestive photographs of young girls or boys may be probative of his intent to commit lewd acts upon them. (See *People v. Memro* (1995) 11 Cal.4th 786, 864-865 (*Memro*).)

In *Memro*, the California Supreme Court held that "sexually explicit stories, photographs and drawings of males ranging in age from prepubescent to young adult" were admissible to show the defendant's intent to sexually molest a young boy in violation of Penal Code section 288, even though some of the photographs "depict[ed] youths in a manner that [was] not sexually suggestive." (*Memro, supra*, 11 Cal.4th at p. 864.) The court concluded that "the photographs, presented in the context of defendant's possession of them, yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction." (*Id.* at p. 865.)

"[T]he propriety or impropriety of admitting evidence of a defendant's pornography will vary from case to case depending upon the facts" (*People v. Page, supra*, 44 Cal.4th at

p. 41, fn. 17.) The trial court must "exercise caution in weighing the probative value of individual examples of pornography possessed or accessed by a defendant." (*Ibid.*) To determine whether the court properly admitted the images, we consider "(1) whether the photographs were relevant, and (2) whether the trial court abused its discretion in finding that the probative value of each photograph outweighed its prejudicial effect. [Citation.]" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 211-212.)

C. *Images from Hard Drive*

The images of child pornography and erotica involving preteen and other girls were relevant to the defendant's intent and motive and the absence of mistake. The trial court properly found that the images showed that the defendant was sexually attracted to preteen girls, which could lead to an inference that he was sexually attracted to the victims and acted on that attraction. The defendant put at issue this intent with respect to the crimes charged when he pleaded not guilty. (*Memro, supra*, 11 Cal.4th at p. 864.)

The defendant asserts that the images were "of minimal if any probative value." To the contrary, as noted in *Memro*, such images are probative of sexual interest and attraction. The jury could reasonably draw the inference from this evidence that, when he abused the victims, the defendant harbored the "intent of arousing, appealing to, or gratifying [his own] lust, passions, or sexual desires" (Pen. Code, § 288, subd. (a).)

The defendant also asserts that the evidence concerning computer images was time-consuming and unduly prejudicial.

Other than the citation to Evidence Code section 352, the defendant provides no authority for the assertion that the evidence should have been excluded because it was too time-consuming. While there was a large amount of evidence concerning the images, as can be seen from the summary of the evidence provided above, the determination of whether its admission was too time-consuming was subject to the discretion of the trial court. "Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, italics omitted.)

Even though the computer images evidence consumed a considerable amount of time, it was also probative on the issue of the defendant's guilt. Therefore, the trial court's decision to admit the evidence was not arbitrary, capricious, or patently absurd, and did not result in a manifest miscarriage of justice.

We next turn to whether the prejudicial effect of the evidence substantially outweighed its probative value. (Evid. Code, § 352.)

Concerning the prejudicial effect of the evidence, the defendant argues: "The computer evidence was beyond inflammatory, as the jury was repeatedly shown images in the courtroom of child pornography, child erotica, child sex-related newsgroup names, child sex-related website names, child sex-related searches, and even a child-related incest story, and was then given almost 500 pages of those exhibits to contemplate during deliberation." He then surveys some of the specific evidence.

The "prejudice" referred to by Evidence Code section 352 does not refer to damage "that naturally flows from relevant, highly probative evidence" (*People v. Zapien* (1993) 4 Cal.4th 929, 958), but instead to "evidence that poses an intolerable risk to the fairness of the proceedings or reliability of the outcome." (*People v. Booker* (2011) 51 Cal.4th 141, 188.)

While the evidence was unpleasant for the jury, it was meant to establish that the defendant intended to gratify his prurient desires in his abuse of the victims. It was highly probative in that regard. And it was not inflammatory compared to the shocking evidence of the defendant's repeated and substantial sexual abuse of the victims. In view of the probative value of the evidence, we cannot say that the evidence was so inflammatory that admitting it posed an intolerable risk

to the fairness of the proceedings or the reliability of the outcome. Thus, admitting it was not an abuse of discretion.

D. *Representative Images from Web Pages*

The admission of representative images from Web pages accessed by the defendant also was not an abuse of discretion. The defendant argues, in addition to the issues already discussed concerning consumption of time and the asserted inflammatory nature of the images, that the evidence obtained from the Web pages was irrelevant because the prosecution did not establish that the defendant ever viewed those particular images. He states: "The inference the prosecution sought to have drawn was that, three years earlier, [the defendant] had entered these URLs and looked at images 'something like these.' There was no dispute that [the defendant] had not viewed the actual images introduced in these exhibits" The defendant deems this inference too speculative to render the evidence relevant. (Evid. Code, § 350 [only relevant evidence admissible].)

To the contrary, the inference is not too speculative. It established the nature of the Web pages accessed by the defendant, which led to a reasonable inference that the defendant was sexually interested in and attracted to preteen girls, as shown by his activities in seeking out child pornography and child erotica on the Internet. As noted, the prosecutor argued to the jury that the representative images obtained from the Web pages established that the defendant visited Web pages full of child pornography and child erotica.

Therefore, the representative images were relevant, probative, and admissible.

II

Child Sexual Abuse Accommodation Syndrome Evidence

The trial court admitted the prosecution's expert testimony concerning CSAAS and instructed the jury on its proper use. On appeal, the defendant contends that admission of this evidence violated his due process and fair trial rights because "the evidence was so irrelevant and prejudicial that it rendered the state proceedings fundamentally unfair." We conclude the evidence was properly admitted.

Cathy McClennan, who is a forensic child interviewer, testified as an expert on CSAAS. She stated that a child suffering from CSAAS generally exhibits five stages: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delay in reporting, and (5) recantation. She explained that CSAAS is not a diagnostic tool -- that is, it is not intended to determine whether a child has been abused. Instead, assuming a child has been molested, it is meant to explain certain behaviors of the molested child.

The prosecution posited to McClennan a hypothetical based on the facts of this case and asked her whether the victims would continue to associate with the abuser socially and recreationally without reporting the abuse. She answered that such behavior would be consistent with having been abused because of the helplessness of the victims. She also gave her opinion that, if the victims tried to disclose the abuse to a

parent but were not believed, they would delay further reporting. McClennan testified that inconsistencies in the disclosure of sexual abuse victims are common.

Expert testimony concerning CSAAS is routinely admitted in child sexual abuse cases to show that certain behavior by the victim, such as delayed reporting or inconsistent disclosures, is not inconsistent with having been abused. (*People v. Brown* (2004) 33 Cal.4th 892, 905-906 [although case involved spousal abuse, court cited with approval cases admitting CSAAS evidence]; *People v. Bowker* (1988) 203 Cal.App.3d 385, 394 [expert testimony regarding CSAAS "admissible solely for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested," italics omitted].)

While the defendant concedes that the victims delayed reporting the sexual abuse and, after they reported it, made inconsistent disclosures about the abuse, the defendant asserts that the CSAAS evidence was too generic to be probative and can be misconstrued by the jury as evidence that the defendant committed the crimes. He also notes that the admissibility of CSAAS evidence is not universally-accepted outside of California.

Nonetheless, delays and inconsistencies in the victims' disclosures are the type of evidence that supports the need for expert testimony on CSAAS to establish that the victims' actions were not necessarily inconsistent with having been abused. We so held in *In re S.C.* (2006) 138 Cal.App.4th 396, 418.

The defendant encourages us to revisit and disapprove our *In re S.C.* holding and find that the CSAAS evidence here was improper and prejudicial. We decline. In that case, we relied on several previous Court of Appeal decisions in declaring that "it has long been held that in a judicial proceeding presenting the question whether a child has been sexually molested, CSAAS is admissible evidence for the limited purpose of disabusing the fact finder of common misconceptions it might have about how child victims react to sexual abuse. (See, e.g., *People v. Wells* (2004) 118 Cal.App.4th 179, 188; *People v. Housley* (1992) 6 Cal.App.4th 947, 955; *People v. Archer* (1989) 215 Cal.App.3d 197, 205, fn. 2; *People v. Bowker* (1988) 203 Cal.App.3d 385, 392.)" (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 418.)

Since no higher court has disapproved *In re S.C.* or the cases relied on in that decision, we conclude that CSAAS evidence was properly admitted here.

III

CALCRIM No. 1193

The trial court used CALCRIM No. 1193 to instruct the jury concerning the testimony of an expert on CSAAS. The instruction stated that the jury could use the CSAAS evidence "in evaluating the believability of [the victims'] testimony." The defendant contends that this instruction violated his due process and fair trial rights. The contention is without merit.

The trial court instructed the jury concerning CSAAS as follows: "You've heard testimony from Ms. Cathy McClennan and Dr. Lee Coleman regarding Child Sexual Abuse Accommodation

Syndrome. Their testimony about Child Sexual Abuse Accommodation Syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [the victims'] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of their testimony."

Expert testimony "'is admissible to rehabilitate [a victim's] credibility when the defendant suggests that the child's conduct after the incident -- e.g., a delay in reporting -- is inconsistent with his or her testimony claiming molestation.' [Citations.]" (*People v. Brown, supra*, 33 Cal.4th at p. 906, quoting *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300.)

The crux of the defendant's argument is found in this statement in his opening brief: "There is no authority for the proposition that CSAAS evidence may [be] used to corroborate the victim[s'] claims of abuse, but CALCRIM No. 1193 erroneously told the jury it could use the evidence to do so. Jurors are presumed to have followed a court's instructions. [Citations.]" This statement mischaracterizes the instruction.

Contrary to the defendant's argument, the trial court did not tell the jury that it could use the CSAAS evidence to corroborate the victims' claims of abuse. That interpretation reads into the instruction something that is not there. The instruction informed the jury that CSAAS evidence is not evidence that the defendant committed the crimes. Instead, the

jury's use of the CSAAS evidence was limited to "deciding whether or not [the victims'] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of their testimony." This limitation, including the clause concerning evaluating believability, did not give the jury latitude to use the CSAAS evidence to corroborate the claims of abuse. Consistent with Supreme Court precedent (*People v. Brown, supra*, 33 Cal.4th at p. 906), it allowed use of the CSAAS evidence only to evaluate the victims' credibility.

Therefore, the trial court properly instructed the jury using CALCRIM No. 1193.

IV

Admission of Uncharged Sexual Acts

The prosecution charged the defendant only with committing crimes against the victims before they turned 14. However, the evidence, admitted over the defendant's objection, further showed that the defendant continued to commit the acts against the twins when they were 14 and 15. The defendant contends that admission of this propensity evidence under Evidence Code section 1108 violated his due process and fair trial rights because the evidence was irrelevant and prejudicial. We conclude that the evidence was properly admitted.

In addition to the twins' extensive testimony concerning the defendant's crimes against them before they turned 14, the twins testified relatively briefly that the acts continued beyond their 14th birthday. M.G. testified that, on more than

one occasion after she turned 14, the defendant touched her vagina and breasts and "the rest of [her] body." C.G. testified that, after she turned 14, the defendant sexually abused her anytime her mother went out horseback riding during the day. She also testified that, on a trip to either Disneyland or Magic Mountain, the defendant pulled off C.G.'s pajama pants and underwear and attempted to penetrate her vagina with his penis.

The trial court instructed the jury concerning the proper use of the evidence of uncharged acts.

Evidence Code section 1108, subdivision (a), provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101 [generally prohibiting character evidence such as past conduct to prove that defendant committed the offense in question], if the evidence is not inadmissible pursuant to Section 352." Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

It is the exclusive province of the trial court to determine whether the probative value of evidence outweighs its possible prejudicial effect. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 402.) The trial court's exercise of discretion on this issue will not be disturbed on appeal absent a clear

showing of abuse. (*Ibid.*) "When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. [Citation.]" (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) "[D]iscretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]" (*Ibid.*)

In this case, the evidence of uncharged acts was not unduly prejudicial. The uncharged acts were no more egregious than the charged acts. And certainly the jury would not view the acts committed by the defendant when the victims were 14 and 15 more repugnant than the acts committed by the defendant when the victims were under 14. (See *People v. Yovanov* (1999) 69 Cal.App.4th 392, 406 [similarly involving charged and uncharged acts against twins].)

Unlike some cases involving Evidence Code section 1108, the evidence of uncharged acts came from the victims of the charged crimes. Commenting on a similar factual scenario, another court stated: "While evidence the defendant has committed other, similar, crimes is always probative due to its suggestion he has a propensity toward that type of crime, when such evidence comes in a child molestation case, from the same witnesses who supplied the evidence of the charged crimes, and amounts to evidence that the defendant molested the child even more times than he was charged with, it wouldn't seem to advance the ball

in any meaningful way." (*People v. Ennis* (2010) 190 Cal.App.4th 721, 733.) For that reason, argues the defendant, the evidence was less probative, even irrelevant, because it did not bolster the victims' testimony by showing, from evidence concerning molestations of other victims, that the defendant has a propensity for sexual crimes. That is true, however, only if you consider the twins as one person, which they are not. The evidence of uncharged acts against each twin served as propensity evidence supporting conviction of the defendant for the crimes against the other twin. Therefore, the defendant's argument, citing *People v. Ennis, supra*, 190 Cal.App.4th at page 733, that the evidence of uncharged acts was only slightly probative because it had to do with the same victim, is unpersuasive.

The defendant also argues that the prejudicial effect of the propensity evidence was increased because the prosecution may prove propensity by a preponderance of the evidence. The defendant complains: "The charged offenses appeared substantially more credible, because they were bolstered by the lessened burden to show the uncharged acts." We agree that the uncharged acts bolster the credibility of the charged acts; that is the whole point of propensity evidence. (*People v. Falsetta* (1999) 21 Cal.4th 903, 910-922.) But the defendant fails to establish that the lower burden of proof makes the propensity evidence unduly prejudicial. In our view, the burden of proof has nothing to do with whether the evidence is prejudicial -- that is, whether the evidence evokes in the jury an emotional

bias against the defendant. (*People v. Ennis, supra*, 190 Cal.App.4th at p. 734.)

The trial court did not abuse its discretion in admitting the evidence of uncharged acts.

V

Evidence Code Section 1108

The defendant recognizes that the California Supreme Court has held that admission of propensity evidence under Evidence Code section 1108 does not violate due process and fair trial rights. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016; *People v. Falsetta, supra*, 21 Cal.4th at pp. 910-922.) However, to preserve the issue for further review in the federal courts, the defendant contends that his due process and fair trial rights were violated by the admission of the Evidence Code section 1108 propensity evidence. As the defendant concedes we must (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we reject this contention because the Supreme Court has rejected it.

VI

Lay Opinions

The defense called Michael Hultz as a witness. He was a county-employed psychotherapist who assisted M.G. She reported to Hultz that the defendant had sexually abused her. On cross-examination by the prosecution, Hultz described M.G.'s demeanor when she talked about the sexual abuse and said she was upset and crying. The prosecutor then asked: "Did it appear to you, based on common experience, that she was feigning that -- that

reaction?" The defense objected based on "lack of personal knowledge." And the trial court overruled the objection, cryptically saying, "It's fairly common." Hultz responded that it did not appear to him that she was faking the reaction.

The prosecutor asked two other witnesses (another psychotherapist and an adult friend) essentially the same question with respect to C.G., and each responded that it did not appear to them that she was faking the emotional reaction (fear and embarrassment) to her disclosure of sexual abuse. The defense did not object to this questioning.

"Lay opinion about the veracity of particular statements by another is inadmissible on that issue." (*People v. Melton* (1988) 44 Cal.3d 713, 744.) "A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where 'helpful to a clear understanding of his testimony' [citation], i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. [Citations.]" (*Ibid.*) Improper admission of lay witness opinion testimony does not mandate reversal unless defendant can show it is reasonably probable he would have obtained a more favorable outcome had his objection been sustained. (*Id.* at pp. 744-745 [applying harmless error test of *People v. Watson* (1956) 46 Cal.2d 818, 836-837 to improper question calling for lay opinion testimony about the veracity of another witness].)

Initially, the Attorney General asserts that any error in admitting the evidence was invited because the defense, earlier, had asked other witnesses whether they believed the victims'

allegations. In support of this position, the Attorney General cites a case in which the defense elicited testimony from a pathologist concerning whether a killing was committed in "rage." The prosecution then asked the same pathologist whether the killing could also have been methodical. The California Supreme Court held that admission of the latter opinion was not improper because the defense had initiated the line of questioning. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1247-1248.) That case, however, does not support the proposition that, because the defense asked some witnesses whether they believed the victims, the prosecution could ask other witnesses the same question.

The defendant acknowledges that the defense did not object to two of the three questions it now finds objectionable. He asserts, however, that any objection to the latter two questions would have been futile because of the trial court's overruling of the objection to the first question. The Attorney General does not address this assertion and does not contend that the issue was forfeited for failure to object.

Although we disagree with the Attorney General's assertion that the asserted error was invited, we need not consider the forfeiture issue or even whether the trial court erred by admitting the evidence because any error in admitting the evidence was harmless. It is not probable that the jury, having heard the testimony that M.G. and C.G. were fearful and embarrassed when they disclosed the sexual abuse, would be swayed to believe that those disclosures were true based on the

testimony that it did not appear to the witnesses that the victims were faking their reactions. It is the unhelpful nature of such opinion testimony that makes it inadmissible. (*People v. Melton, supra*, 44 Cal.3d at pp. 744-745.) The admission of the witnesses' beliefs concerning faking the reaction did not add appreciably to the testimony concerning what the victims said and how they reacted. Therefore, based on the strength of the evidence against the defendant and the weak nature of the opinion evidence, we conclude there was no miscarriage of justice.

VII

Alleged Cumulative Error

Asserting that the trial was "infected with major errors," the defendant contends that there was "cumulative and collective prejudice." The contention fails because, as we have noted in this opinion, the trial was not infected with major errors. The record of the trial does not "raise[] the strong possibility" that aggregated prejudice from trial court error denied the defendant a fair trial. (See *People v. Hill* (1998) 17 Cal.4th 800, 844.)

VIII

Indeterminate v. Determinate Sentencing

Penal Code section 667.61 (the so-called "One Strike" law) provides for a life sentence for child molestation under specified circumstances applicable in this case. However, only one life sentence may be imposed for multiple counts committed on a "single occasion." The court imposed consecutive sentences

of 15 years to life for the defendant's lewd act convictions. On appeal, the defendant contends that the trial court could not impose the life terms for some of the crimes because the jury found they occurred on the same occasion as other counts. The contention is without merit.

At the time of the defendant's crimes, former subdivision (g) of Penal Code section 667.61 read, in relevant part: "The term specified in subdivision (a) or (b) [life term] shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim."² (Stats. 1998, ch.

² Penal Code former section 667.61 provided, in pertinent part:

"(a) A person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 25 years except as provided in subdivision (j).

"(b) Except as provided in subdivision (a), a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j).

"(c) This section shall apply to any of the following offenses: [¶] . . . [¶]

936, § 9, p. 6876, eff. Sept. 28, 1998, enacting Assem. Bill No. 105 (1997-1998 Reg. Sess.).)

The term "single occasion" in Penal Code section 667.61, former subdivision (g) meant "[the] sex offenses . . . were committed in close temporal and spatial proximity."³ (*People v. Jones* (2001) 25 Cal.4th 98, 107.) In *People v. Fuller* (2006) 135 Cal.App.4th 1336, at pages 1342-1343, for example, the court concluded three rapes occurred on a single occasion when all three occurred within an hour and in the same apartment.

"(7) A violation of subdivision (a) of Section 288, unless the defendant qualifies for probation under subdivision (c) of Section 1203.066. [¶] . . . [¶]

"(g) The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable." (Stats 1998, ch. 936, § 9, pp. 6874-6876 (Assem. Bill No. 105).)

³ In 2006, Penal Code section 667.61 was amended, the effect of which was to change the test for consecutive indeterminate sentencing on multiple counts to whether the defendant had a reasonable opportunity to reflect between counts. (Stats. 2006, ch. 337, § 33, p. 2641 (Sen. Bill No. 1128); Pen. Code, § 667.61, former subd. (i).) Because the defendant's crimes were committed before 2006, we apply the former statute, including the close-temporal-and-spatial-proximity test. (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1228.)

The applicable former version of Penal Code section 667.61 limits the number of life sentences that are imposed depending on the number of victims and the number of "occasions" during which the conduct resulting in multiple convictions occurred. (See, e.g., *People v. Fuller, supra*, 135 Cal.App.4th at pp. 1342-1343.) For any conviction not eligible for a life sentence under Penal Code section 667.61, the sentencing court imposes a sentence "authorized under any other law . . ." or, in other words, the determinate sentence. (Pen. Code, § 667.61, former subd. (g); see *People v. Stewart* (2004) 119 Cal.App.4th 163, 174-175.)

The defendant contends that the trial court erred by imposing several of the life sentences because (1) the court applied the wrong test and (2) the jury verdicts do not support the conclusion that those counts were not committed on a single occasion. Neither contention has merit.

The defendant asserts that, instead of using the "close temporal and spatial proximity" test which was applicable at the time of the defendant's crimes, the trial court applied the newer "reasonable opportunity for reflection" test, enacted in 2006. (See Stats. 2006, ch. 337, § 33, pp. 2639-2641, amended by initiative (Prop. 83, § 12), Gen. Elec. (Nov. 7, 2006).) We disagree that the court applied the wrong test. As the defendant acknowledges, the trial court stated that it was applying the version of Penal Code section 667.61 existing at the time of the crimes. Although the trial court stated, "the defendant . . . had significant opportunity to reflect on his

actions," it also stated that "none of the offenses found by the jury occurred on a single occasion or during a single episode or transaction." The court also noted that it was applying *People v. Murphy* (1998) 65 Cal.App.4th 35, which stated the appropriate test for the timeframe of the defendant's crimes. Accordingly, despite the trial court's fleeting comment about the opportunity to reflect, the court knew and applied the correct test.

The defendant also asserts that "the court was mistaken when it stated that the jury had not found any offenses occurred during a single transaction, as will be shown. Based on the counts on which the jury found [the defendant] guilty or not guilty and on the unanimity instruction the jury was given, the jury made factual findings that this court [*sic*] could not ignore in favor of reliance on testimony about conduct occurring on a daily basis or a certain number of times."

The defendant's argument relies on the unusual language in the pleadings about crimes committed the "first time" and "last time," along with the trial court's unanimity instruction, to make his argument that some of the counts were committed in close temporal and spatial proximity to others. For example, he argues that counts I through IV of the information alleged lewd acts that the defendant committed against M.G. in his trailer in Bishop between her 10th and 14th birthdays. Count I alleged the "first time" the defendant touched M.G.'s breasts, while count II alleged the "last time" the defendant touched M.G.'s breasts. Similarly, count III alleged the "first time" the defendant touched M.G.'s vagina, while count IV alleged the "last time"

the defendant touched M.G.'s vagina. The complaint followed this same first time/last time pattern for many of the remaining counts.

Returning to the example of counts I through IV, the proof concerning those counts was that the defendant touched M.G.'s breasts and vagina many times in the trailer in Bishop, where they lived from the time M.G. was 10 until she was 11 or 12. M.G. testified that, beginning a month or two after they moved into the trailer in Bishop, the defendant touched her breasts and vagina every day. Concerning the first time the defendant touched her sexually, M.G. remembered that they were lying down watching a movie. He reached down her pants and touched her buttocks. Another time, the defendant awakened her at night while she was sleeping on the couch. He took off her pants and rubbed her vagina. On another occasion, the defendant told M.G. to go into his bedroom, where he rubbed her vagina and "body." Based on this testimony, the jury convicted the defendant of touching M.G.'s breast the "first time" in the trailer in Bishop (count I) and of touching M.G.'s vagina the "first time" and "last time" in the trailer in Bishop (counts III and IV, respectively). However, the jury acquitted the defendant of touching M.G.'s breast the "last time" in the trailer in Bishop.

The defendant contends that the indeterminate sentence for count I ("first time" touching her breast) must be reduced to a determinate sentence because count I was committed in close temporal and spatial proximity to count III ("first time" touching her vagina). From M.G.'s testimony, the defendant

summarizes that he "touched her [breasts] and her vagina more than one time, that the touching of her [breasts] and vagina happened every day, and that he touched her [breasts] and vagina on the couch." He also notes that the jury was given a unanimity instruction and therefore must have agreed on the specific acts constituting the crimes. The defendant argues, because count I (touching M.G.'s breast the first time in the trailer in Bishop) and count III (touching M.G.'s vagina the first time in the trailer in Bishop) were committed in close temporal and spatial proximity, the trial court could not impose indeterminate sentences for both counts under Penal Code section 667.61.

This argument fails because there was no specific evidence that, when the defendant touched M.G.'s breasts the first time in the trailer in Bishop, he also touched her vagina in close temporal and spatial proximity. Generally, M.G. testified that the defendant touched her breasts and vagina every day, but she did not testify that he touched her breasts at the same time and in the same place as he touched her vagina each day. Accordingly, the record does not support the defendant's argument that the trial court improperly sentenced him to an indeterminate term for count I.

The defendant similarly contends that the indeterminate sentences imposed for counts V, IX, X, XII, XVI, and XX must be reduced to determinate sentences based on the same reasoning -- that is, they were committed on the same occasion as other counts for which an indeterminate sentence was imposed. The

victims testified to many acts, and the record does not support a contention that the specific acts for which he was convicted were committed on the same occasion as any other acts for which he was convicted. This contention fails for the same reasons discussed as to count I.

The defendant also asserts that the indeterminate sentences on the counts discussed violated his Sixth Amendment jury trial rights under *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403]. We rejected this assertion in *People v. Retanan, supra*, 154 Cal.App.4th at pages 1227-1230.

The trial court did not err by imposing consecutive sentences under Penal Code section 667.61.

IX

Period of Parole

The trial court ordered a minimum of 10 years of parole if the defendant should ever get out of prison. The defendant contends that 10 years is unauthorized because the statute in force at the time of his crimes provided for only a five-year parole term. We agree, as does the Attorney General.

When the defendant committed the crimes, former subdivision (b)(3) of Penal Code section 3000 stated: "[I]n the case of any offense for which the inmate has received a life sentence pursuant to Section 667.61, the period of parole shall be five years." (Stats. 2002, ch. 829, § 1, p. 5256 (Assem. Bill No. 2539).) In September 2006, after the defendant had committed the crimes, the parole period was changed to 10 years. (Stats. 2006, ch. 337, § 45, p. 2655 (Sen. Bill No. 1128).) Therefore,

the defendant's parole term is five years. (See *In re Thomson* (1980) 104 Cal.App.3d 950 [extension of parole term not retroactive].)

X

Abstract of Judgment

The defendant contends that some errors in the abstract of judgment must be corrected. The Attorney General disagrees but contends that another correction must be made. We conclude that all of the corrections are necessary.

First, the defendant asserts that sexually transmitted disease (STD) testing, which was ordered in the abstract of judgment, must be stricken because the trial court did not order it when pronouncing judgment. The Attorney General responds, off point, with the assertion that HIV testing is mandatory. We agree that the STD testing requirement must be stricken.

At the sentencing hearing, the trial court did not address STD testing. However, the abstract states: "Defendant is to submit to STD & HIV testing." In support of his argument that this language must be stricken, the defendant cites authority that, when there is a discrepancy between the oral pronouncement of judgment and the written record, the oral pronouncement prevails. (See, e.g., *People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

The Attorney General provides no authority that STD testing is mandatory or that the clerk can add it to the abstract of judgment if the trial court does not address it in sentencing. Therefore, we order it stricken. This leaves unaltered the

order for HIV testing. (Pen. Code, § 1202.1.) It also does not affect the trial court's order for the defendant to comply with Penal Code section 296, subdivision (a).

Second, the defendant asserts that a reference to Penal Code sections 667.5 and 1192.7 must be stricken from the abstract of judgment, which stated: "Defendant was sentenced pursuant to . . . [Penal Code section] 667.61 [and] other (specify): [Penal Code sections] 667.5 [and] 1192.7." We agree.

The Attorney General argues that the reference to Penal Code sections 667.5 and 1192.7 should not be stricken because the defendant's crimes were serious and violent felonies as described in those sections. This argument makes no sense because the abstract states that the defendant was sentenced under those provisions, not simply that they apply to the defendant's crimes. Accordingly, the defendant is correct that the reference must be stricken.

Third, and finally, the Attorney General contends, and the defendant agrees, that a transposition of numbers in the abstract of judgment should be corrected. The defendant was convicted in count XXII of aggravated rape of a child under Penal Code section 269, subdivision (a)(1). However, the abstract of judgment misstates it as "PC 296(a)(1)." We also agree that the abstract must be corrected.

DISPOSITION

The judgment is modified by changing to five years the length of parole after the defendant is released from prison.

As modified, the judgment is affirmed. The trial court is directed to modify the abstract of judgment by (1) changing the period of parole to five years, (2) deleting reference to STD testing, (3) deleting reference to Penal Code sections 667.5 and 1192.7 in the statement concerning what statutes the defendant was sentenced under, and (4) correcting the Penal Code reference with respect to count XXII to reflect conviction under section 269, subdivision (a)(1). The trial court is also directed to send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NICHOLSON, J.

We concur:

RAYE, P. J.

BUTZ, J.