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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Shasta)**

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
EARL EDWARD WALLNER,  
  
Defendant and Appellant.

C066899  
  
(Super. Ct. No. 10F5407)

A jury convicted defendant Earl Edward Wallner of continuous sexual abuse of a child under age 14 (Pen. Code, § 288.5–count 1)<sup>1</sup> and a count of lewd acts with a child age 14 or 15 (§ 288, subd. (c)(1)–count 2). It acquitted him of three additional counts of the latter offense (counts 3 through 5).

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<sup>1</sup> Undesignated statutory references are to the Penal Code in effect at the time of defendant’s sentencing on December 7, 2010, prior to the enactment of the Criminal Justice Realignment Act of 2011, which became operative on October 1, 2011, and divided felonies for the purpose of sentencing into three groups. This act thus modified numerous Penal Code sections. (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 1.)

Defendant was sentenced to state prison for seven years, consisting of six years on count 1 plus one year on count 2.<sup>2</sup>

On appeal, defendant contends (1) the evidence of continuous sexual abuse was insufficient; (2) admission of two prior digital penetrations of the victim was prejudicial error; (3) the prosecutor committed misconduct consisting of forum shopping; (4) the trial court mistakenly believed that full term consecutive sentences were mandatory; and (5) the abstract of judgment must be corrected. The Attorney General concedes this last point. We shall modify the judgment.

### **FACTUAL BACKGROUND**

#### ***Prosecution Case-in-chief***

In 2003, defendant lived in Missouri with his wife Catherine and their daughters A.C. and S.W. A.C. was born in March 1994 and was 16 years old when she testified at trial.

While the family resided in Missouri, Catherine was killed in an automobile accident. Prior to Catherine's death, defendant would kiss A.C. and her sister on the cheek or forehead. Following the death, defendant began molesting A.C.

One night shortly after Catherine's death, A.C. became frightened because she thought she had heard her mother's voice.

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<sup>2</sup> The relevant 2010 amendment to section 2933 does not entitle defendant to additional conduct credit because, e.g., he was ordered to register as a sexual offender. (Former § 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

A.C. climbed into defendant's bed with him. When she awoke the next morning, she discovered that her underwear had been pulled halfway down her legs. Defendant's fingers were in A.C.'s vagina, and his hand was moving. A.C. started screaming that the devil was making defendant do it to her. Defendant directed A.C. to not tell her sister what he had done. A.C. described the morning after this happened as "horrible," in that "everything was really quiet, and [she] didn't say or do anything, and [defendant] turned on the T.V." When asked how she had felt, A.C. testified, "I really don't think words could really explain it."

Soon after Catherine died, defendant became romantically involved with Nancy F., who was married to Catherine's brother, Harry F., also known as "Uncle Bub." Nancy and her children moved in with defendant, A.C., and her sister.

On one occasion when the other children were in the back room with the door shut, then nine-year-old A.C. went to the living room to watch television with defendant. He told her to lie on the couch with him. While A.C. was lying on the couch, "it started happening all over again." Defendant put his fingers in A.C.'s vaginal area. He asked her if she liked it, and she told him "no." When she got up off the couch, he told her not to tell anyone what had happened. She tried to tell someone, but she was unable to do so because defendant or Nancy always was present.

After residing in Missouri, defendant, Nancy, and their children moved to New Mexico where they lived for half of A.C.'s fourth grade year, her entire fifth grade year, and half of her sixth grade year. On five to seven occasions in New Mexico, defendant inappropriately placed his hands on the clothing covering A.C.'s breasts and buttocks and simultaneously kissed her on the neck. A.C. felt the kissing and the touching were inappropriate because "a father doesn't do that to a daughter. It's not right." Defendant's inappropriate touching made A.C. feel that "everything was going wrong that possibly could."

In late 2005 or early 2006, during the second half of A.C.'s sixth grade year, the group moved to Shasta County. Initially, they lived with friends, John, Kristina and their three children, on Bruce Street in Anderson. A few months later, they moved into an apartment next door.

Shortly after the family moved in with John and Kristina, defendant resumed his inappropriate behavior. While A.C. did the dishes in the kitchen and the younger children were outside, defendant would back A.C. into a corner near the kitchen counter and would place his hands on her breasts and buttocks while he kissed her neck. Defendant would tell A.C., "Don't tell anyone." This happened more than five times, but less than 10 times, while the family lived on Bruce Street. "Probably around five to seven" of these incidents occurred before A.C. turned age 14.

After residing on Bruce Street, the family moved in with some friends on Happy Valley Road. Nancy testified that this move occurred in January 2009.

Defendant continued his inappropriate behavior of touching A.C.'s breasts and buttocks while she was in the kitchen doing dishes. A.C. could not remember how many times it happened. She later estimated that it was "three or four times" after she turned 14.

As she got older, A.C. tried to tell people what defendant was doing to her but no one would listen. Following a previous attempt to run away, A.C. successfully ran away during her freshman year in high school. She returned to Bruce Street where she had friends who would help her. An aunt and uncle picked up A.C., and she reported defendant's behavior to Shasta County Sheriff's Detective Steven Curtiss in early 2009.

On the one occasion A.C. tried to tell Nancy what defendant had done to her, Nancy called A.C. a liar and refused to believe her. In June 2008, A.C. had spoken to counselor Wendy Scott about the abuse. Scott later discussed the matter with defendant and Nancy, and they told her that none of it was true.

On cross-examination, A.C. admitted that she was upset when defendant and Nancy started a relationship after Catherine died. Nancy had been driving the car when Catherine was killed; A.C. was not sure what caused the car accident. A.C. acknowledged that she did not particularly like Nancy because Nancy had put

her "through hell and back." A.C. believed that Nancy's "verbal and physical abuse" of A.C. had been unfair.

While in New Mexico, A.C. spoke to a school counselor about what defendant had done to her. The counselor brought the matter to defendant and Nancy, but the two denied that anything inappropriate had occurred. This same scenario happened with more than one counselor over time. A.C. also indicated that several Child Protective Services (CPS) workers had visited her home. When A.C. tried to talk about what defendant had done to her, he and Nancy would contradict A.C. and say that everything she had told the workers was a lie.

Melony Burns, a social worker for Shasta County Children and Family Services, worked with the Wallners to determine if the family could be reunified. In that capacity, she spoke to defendant about A.C.'s allegations. At first, defendant acted contrite and admitted he had "done it" on at least two occasions. Defendant also gave Burns a letter stating: "Shortly after Catherine . . . passed away, [A.C.] crawled in bed next to me while I was sleeping. I woke up the next morning to her yelling (dad, what are you doing). I was horrified to see that my hand was in her underwear. I immediately removed my hand and made precautions to prevent further incidents. I do not remember the details of the second incident, but I swear nothing has happened ever since."

In the course of his investigation, Detective Curtiss found that in June 2008, Shasta County Children and Family Services

had reported to the Anderson Police Department that A.C. had told counselor Wendy Scott that she had been molested by defendant. Curtiss interviewed defendant in February 2009 at the sheriff's major crimes office. After Curtiss confronted defendant about the molest allegations, defendant denied ever molesting A.C. The interview was videotaped and played for the jury. At the end of the interview, defendant claimed the molestation of A.C. was an accident.

### ***Defense***

Melanie Saechao, a former neighbor of the family, never observed any inappropriate behavior by defendant towards A.C.

Jeanine Wold lived with defendant and his family for approximately seven months in 2007. A.C. seemed to be angry at defendant, and she seemed even angrier with Nancy.

Nancy testified that A.C. had been happy with Nancy's new relationship with defendant until A.C. received some misinformation from Catherine's relatives. They had told A.C. that defendant and Nancy had been together prior to the accident and that they had plotted to kill Catherine. After A.C. obtained this information, her attitude toward Nancy changed. She started lying and taking things, and she would not obey Nancy.

In February 2009, CPS removed defendant's and Nancy's children from the home and placed them in foster care based on the allegations against defendant in this case. Social worker Burns told Nancy that, unless she came to terms with the fact

that defendant was guilty, she would not see her children again. In response to this threat, Nancy asked defendant to write a statement admitting his molestation of A.C. Since that time, Nancy has gotten two children back.

During all of her time living with defendant, Nancy had never seen any inappropriate behavior between defendant and A.C. She acknowledged that A.C.'s dislike of Nancy had escalated over time.

On cross-examination, Nancy admitted that on two occasions, A.C. had told Nancy that defendant had touched A.C. inappropriately. The prosecutor introduced a letter Nancy had written to social worker Burns documenting that, in October 2006, A.C. had told Nancy that defendant had inappropriately touched her. When Nancy confronted defendant about what A.C. had told her, he attempted to commit suicide by taking some pills. In her letter to Burns, Nancy had written: "I asked [defendant] if we could talk upstairs, and when I started questioning him about it, I knew right away that it was true." Nancy also had written: "He did admit to me and I was very angry with him." At trial, Nancy testified that what she had written to Burns was not true.

When she was interviewed by Detective Curtiss, Nancy admitted that, on at least three occasions, defendant had admitted touching A.C. in Missouri. In June 2009, defendant again tried to commit suicide by taking a handful of pills.

This happened just before Detective Curtiss was supposed to interview defendant.

Defendant testified that, shortly after Catherine's death, A.C. had crawled into his bed without his knowledge. He awoke to her screaming and his hands down her underwear. Defendant claimed that, in his sleep, he had mistaken A.C. for Catherine; he explained that he and Catherine often had awoken "to each other doing things to each other." Although his actions were accidental, defendant was ashamed of what he had done. After this incident, defendant never again touched A.C. in an inappropriate manner.

A.C. was not happy when defendant and Nancy started their relationship a week and a half after Catherine died. A.C. was angry with defendant when he and Nancy married in July 2008.

On cross-examination, defendant admitted that he had lied to an officer in 2008 and to Detective Curtiss in 2009.

## **DISCUSSION**

### **I. Sufficiency of Evidence of Continuous Sexual Abuse**

Defendant contends his continuous sexual abuse conviction must be reversed because there was insufficient evidence that he had committed lewd acts over a period exceeding three months within the dates alleged. We are not persuaded.

#### ***A. Background***

The jury was instructed that, in order to convict defendant of count 1, it must find: "Number one, the defendant lived in

the same home with the minor child. [¶] Number two, the defendant engaged in three or more acts of lewd or lascivious conduct with the child. [¶] *Number three, three or more months passed between the first and last act;* and [¶] Number four, the child was under the age of 14 years at the time of the acts." (Italics added; see *People v. Mejia* (2007) 155 Cal.App.4th 86, 94, fn. 2; CALCRIM No. 1120.)

In his opening summation, the prosecutor argued: "Here *there's no dispute* that [defendant] lived with his daughter, [A.C.], and that [defendant] engaged in three or more acts of lewd and lascivious conduct with [A.C.], and that *three or more months pas[sed] between the first act and the last act*, and that the child was under the age of 14 years at the time of the acts." (Italics added.) The prosecutor did not identify any evidence supporting his claim that a three-month separation had been shown.

In his summation, defense counsel rejected the prosecutor's claim that there was "no dispute" whether the requisite three months had passed: "Again, you are going to be asked to determine at least in the case of the [section] 288.5 that there were three touches in a three-month period. I don't think that [A.C.] is telling the truth, but more importantly, she doesn't even remember when they are. [The prosecutor] would have you believe that she isn't keeping a journal, she doesn't know, she can't tie it to dates, times, Halloween, birthdays, anything. These are just statements that she is making without being tied

to any specific type of reference that allows you to say, oh, on such and such a date this happened. [¶] She was certain enough about what happened in Missouri. She is not certain about what happened out here. Her testimony was at Bruce Street over approximately a one-year period five to 10 times maybe, can't remember, can't remember. How many times? I don't know. Then the . . . [prosecutor] asked more than five, more than 10? She is thinking about this. She can't even give you a number. . . . [¶] . . . *Remember, you have to be sure on a [section] 288.5 when those acts occurred. Did they all occur within three months?* Even if you believe her, that doesn't make him guilty of the crime. We don't know for sure when these were. It could have been as [the prosecutor] said, a week, a day, month. Nobody knows. She doesn't know. She can't tell you." (Italics added.)

### ***B. Analysis***

"On appeal, the test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. [Citations.] Evidence meeting this standard satisfies constitutional due process and reliability concerns. [Citations.] [¶] While the appellate court must determine that the supporting evidence is reasonable, inherently credible, and of solid value, the court must review the evidence in the light most favorable to the [judgment], and must presume every fact the jury could

reasonably have deduced from the evidence. [Citations.] Issues of witness credibility are for the jury." (*People v. Boyer* (2006) 38 Cal.4th 412, 479-480 (*Boyer*).)

Section 288.5, subdivision (a) provides in relevant part: "Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in . . . three or more acts of lewd or lascivious conduct . . . with a child under the age of 14 years . . . is guilty of the offense of continuous sexual abuse of a child . . . ."

"The words and syntax of the statute set forth the following elements: the defendant (1) must have (a) resided with, or (b) had recurring access to, a minor less than fourteen years of age, and (2) must have engaged in three or more acts of . . . lewd and lascivious conduct with the minor over a period of time not less than three months in duration. The requirement of a three-month period of time is grammatically attached to the requirement of three or more acts, not to the requirement of a shared residence or recurring access. The statutory language thus does not require that the defendant reside with, or have access to, the minor continuously for three consecutive months for a violation to be found, but would appear to be satisfied if, for example, a child regularly spent Christmas, spring, and part of the child's summer vacations with the defendant, and the defendant sexually molested the child during the visits, as long

as at least three acts of molestation could be proven." (*People v. Vasquez* (1996) 51 Cal.App.4th 1277, 1284-1285.)

In this case, the evidence showed that the *first* Shasta County (Bruce Street) incident occurred shortly after the family arrived in late 2005 or early 2006, and that four to six acts followed before A.C. turned age 14 in March 2008. According to Nancy, the family arrived at Bruce Street in March 2006.

In order to convict defendant on count 1, jurors applying CALCRIM No. 1120, as defense counsel urged them to do, would have to deduce that at least *one* touching occurred not less than three months *after* March 2006, i.e., sometime *after* June 2006, and *before* A.C.'s 14th birthday in March 2008. Defendant correctly notes that there was no direct evidence of a touching in this period.

However, when reviewing for substantial evidence, this court "*must* presume every fact the jury could reasonably have deduced from the evidence." (*Boyer, supra*, 38 Cal.4th at p. 480, italics added.) Jurors reasonably could reject a scenario favorable to the defense in which all seven acts occurred prior to June 2006 and an approximately 20-month hiatus intervened before the first age-14 incident suddenly occurred around March 2008.

Although A.C.'s recollection of events was vague in various respects, jurors reasonably could deduce that an unexpected resumption of molestations following a lengthy hiatus would be

more startling to the child, and thus more memorable to her, than a continuing series of similar touchings. From A.C.'s failure to testify to any sort of hiatus, jurors could infer that no significant hiatus occurred. Jurors had no duty to draw the less probable inference that a hiatus fatal to count 1 had occurred but A.C. failed to recollect it.

Moreover, the evidence shows that A.C. informed Nancy of the molestations in October 2006. A.C. testified that she "tried to tell [Nancy] that [defendant] has been doing this *and* he has done this in Missouri." (Italics added.) Jurors reasonably could deduce from the October 2006 date that it was *more probable* the molestations were ongoing than that they had stopped several months previously, i.e., by June 2006. The evidence showed no reason for a four-month delay in reporting, and the jury had no duty to infer that A.C. suddenly reported the molestations four months after they had ceased.<sup>3</sup> Defendant's count 1 conviction is supported by substantial evidence. (*Boyer, supra*, 38 Cal.4th at pp. 479-480.)

## **II. Admission of Prior Acts**

Defendant contends the trial court abused its discretion when it admitted the Missouri prior acts. We are not convinced.

### ***A. Background***

On August 3, 2010, the prosecutor sought to admit evidence of two incidents of digital penetration of A.C. in Missouri when

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<sup>3</sup> The Attorney General's argument in her briefing is unhelpful because it misses the point of the defense argument.

she was around nine years old. The next day, the trial court (Judge Bigelow) tentatively denied the request, finding that "the inflammatory nature of the uncharged acts and the possibility of confusion of issues would cause the Court to exclude the evidence of the prior conduct at this time based on the evidence and the offers of proof that I have heard." Judge Bigelow noted: "Obviously, if the evidence comes in different, I invite counsel to raise the issue again on the admissibility of such evidence."

The prosecutor subsequently moved to dismiss the case based on the court's tentative ruling. The prosecutor refiled the complaint, and the case was assigned to Judge Marlow.

Prior to trial, Judge Marlow conducted an Evidence Code section 402 hearing at which A.C. testified. A.C. indicated that she lived in New Mexico for a few years with her father and stepmother, where she attended fourth, fifth, and part of sixth grade. On five to 10 occasions, defendant touched A.C.'s butt or breasts while kissing her neck or lips. The incidents usually occurred in the kitchen while she was doing dishes.

A.C. indicated that this type of touching started after her mother died. A.C. responded to defendant's actions by moving away from him and telling him it was not right. Defendant would then back off a little bit. A.C. explained that the kissing was different than when defendant had kissed her on the forehead or cheek while her mother was alive. The kissing did not feel right.

Previously, when A.C. lived in Missouri, defendant put his finger in her vagina one morning after her mother's death. A.C. screamed and said it was the devil. Defendant stopped and instructed A.C. to not tell her sister and to act normal. Defendant placed his finger in A.C.'s vagina a second time after the family had moved into a trailer home that belonged to A.C.'s Uncle Bub. These two incidents reinforced A.C.'s belief that defendant's subsequent behavior in New Mexico was inappropriate.

When the family moved from New Mexico to Shasta County, defendant continued to touch A.C. while she was in the kitchen doing dishes. He would put his hand on her butt or breasts and stand with A.C. in the corner. On a couple of occasions, he also kissed her. A.C. knew the kissing and touching were inappropriate because "a father just doesn't do that to a daughter."

Before hearing arguments of counsel, the trial court made a tentative ruling to admit the New Mexico evidence and defer ruling on the Missouri evidence until it heard the direct examination. After hearing arguments of the parties, the trial court made a final ruling as follows: "I am convinced that the probative value does substantially outweigh the probability that its admission will create a substantial danger of undue prejudice or confusion of issues or misleading the jury. When I heard her testimony just a few moments ago, clearly there's a number of reasons why she felt what her father was doing was inappropriate and . . . it's highly probative of her state of

mind as to why she felt it was inappropriate for her father to touch her buttocks and breast area, and at the same time kiss her, and the two incidents in Missouri are among the reasons why she felt this was inappropriate. It's also highly probative as to whether these incidents actually occurred and what the nature of these incidents were and what the specific intent of the father was, so the court is going to allow this to come in and [it] can be mentioned during opening statements."

### ***B. Analysis***

"Subject to Evidence Code section 352, Evidence Code section 1108 permits a jury to consider prior incidents of sexual misconduct for the purpose of showing a defendant's propensity to commit offenses of the same type and essentially permits such evidence to be used in determining whether the defendant is guilty of a current sexual offense charge. [Citation; fn. omitted.] Although before Evidence Code section 1108 was enacted, prior bad acts were inadmissible when their sole relevance was to prove a defendant's propensity to engage in criminal conduct [citations & fn. omitted], its enactment created a statutory exception to the rule against the use of propensity evidence, allowing admission of evidence of other sexual offenses in cases charging such conduct to prove the defendant's disposition to commit the charged offense [citation]. The California Supreme Court has ruled that Evidence Code section 1108 is constitutional and does not violate a defendant's due process rights. [Citation.]

"However, because Evidence Code section 1108 conditions the introduction of uncharged sexual misconduct or offense evidence on whether it is admissible under Evidence Code section 352, [fn. omitted] any objection to such evidence, as well as any derivative due process assertion, necessarily depends on whether the trial court sufficiently and properly evaluated the proffered evidence under that section. 'A careful weighing of prejudice against probative value under [Evidence Code section 352] is essential to protect a defendant's due process right to a fundamentally fair trial. [Citations.]' [Citation.] As our Supreme Court stated in [*People v. Falsetta* (1999) 21 Cal.4th 903], in balancing such Evidence Code section 1108 evidence under Evidence Code section 352, 'trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other . . . offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]' [Citation.] In evaluating such evidence, the court must determine 'whether "[t]he testimony describing defendant's uncharged acts . . . was

no stronger and no more inflammatory than the testimony concerning the charged offenses.” [Citation.]

“On appeal, we review the admission of other acts or crimes evidence under Evidence Code section 1108 for an abuse of the trial court’s discretion. [Citation.] The determination as to whether the probative value of such evidence is substantially outweighed by the possibility of undue consumption of time, unfair prejudice or misleading the jury is ‘entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence.’ [Citation.] The weighing process under section 352 ‘depends upon the trial court’s consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules.’ [Citation.] ‘“The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’” [Citation.]’ [Citation.] We will not find that a court abuses its discretion in admitting such other sexual acts evidence unless its ruling ‘“falls outside the bounds of reason.” [Citation.]’ [Citation.] In other words, we will disturb a trial court’s ruling under Evidence Code section 352 only where the court has exercised its discretion in a manner that resulted in a miscarriage of justice.” (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1103-1105.)

It is undisputed that the prior Missouri acts involving digital penetration were more inflammatory than the charged acts involving touching the outside of A.C.'s clothing. However, they are not at all comparable to the prior vicious and bloody beating in *People v. Harris* (1998) 60 Cal.App.4th 727, which this court termed "inflammatory *in the extreme*." (*Id.* at p. 738.) If anything, the Missouri penetrations are more akin to *Harris's* charged offenses of "lick[ing] and fondl[ing]," which as early as 1998 we had found were "unfortunately, not unusual or shocking." (*Ibid.*) We thus reject defendant's claim that the inflammatory nature of the Missouri acts weighed "strongly against admission."

Defendant claims the Missouri penetrations presented a "real probability of confusion," because the jury was aware he had not been punished for the acts. However, A.C.'s testimony was the sole evidence supporting all the molestations, and her description of the Missouri acts was no more credible than her description of the charged offenses. Even though the Missouri acts were more inflammatory than the charged acts, it is unlikely that the jury disbelieved A.C.'s account of the charged offenses but believed her depiction of the Missouri acts and convicted defendant because he had eluded punishment for the Missouri incidents. (Cf. *People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

Defendant acknowledges that the Missouri evidence was material to intent. However, he claims the Missouri evidence

was unnecessary because the prosecution was able to present the New Mexico evidence. We disagree.

The New Mexico evidence was virtually identical to the evidence supporting the charged offenses. Thus, it shed little additional light upon the questions facing the jury. A.C. acknowledged that it was the Missouri evidence, not the New Mexico evidence, that led her to believe the subsequent touchings of her buttocks and breasts was wrong.

Defendant has not shown that admission of the Missouri evidence fell outside the bounds of reason or resulted in a miscarriage of justice. (*People v. Dejourney, supra*, 192 Cal.App.4th at pp. 1103-1105.) There was no abuse of discretion.

### **III. Alleged Prosecutorial Misconduct**

Defendant contends the dismissal and refiling of the complaint following Judge Bigelow's tentative exclusion of the Missouri evidence was "blatant forum shopping" that violated his federal due process rights. Defendant suggests the prosecutor's "sole purpose" in dismissing and refiling the case was forum shopping, i.e., an attempt "to obtain a favorable ruling before a different judge." The record does not support this suggestion.<sup>4</sup>

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<sup>4</sup> When the matter was brought before Judge Marlow, defendant argued that she was collaterally estopped from altering Judge Bigelow's ruling. Thus, defendant has adequately preserved this issue for appeal.

After the dismissal and refileing, the prosecutor appeared before Judge Marlow and acknowledged that he "may have provided Judge Bigelow with not the full information and not full briefs and that should have been done at that point in time and she did not have the full issue in front of her to make a decision." In particular, Judge Bigelow had addressed the first Missouri penetration but not the second Missouri penetration or the New Mexico prior acts. The entire record suggests, however, that the prosecutor's motivation was not, as defendant suggests, to avoid a judge who was unwilling to make a favorable ruling, but simply to refile in an attempt to correct his own perceived error and to make the most complete case possible.

Judge Bigelow's ruling supports this interpretation. Following her tentative ruling excluding the Missouri evidence, Judge Bigelow stated: "Obviously, if the evidence comes in different, I invite counsel to raise the issue again on the admissibility of such evidence." This comment suggests Judge Bigelow would have been willing to rule in favor of the prosecution if later admitted evidence provided a basis for the ruling. Her expressed willingness to reconsider the issue supports an inference that the prosecutor was not engaging in forum shopping but was seeking to correct his own mistake.

Defendant acknowledges that in California, the prosecution is entitled to move for a dismissal, which the trial court may grant in the interest of justice. (§ 1385, subd. (a).) Nothing in the record suggests the interest of justice would not have

been served by the fullest presentation of the issues by both sides. So long as jeopardy has not attached and the statute of limitations has not run, the prosecution may refile the charges. (See *Crockett v. Superior Court* (1975) 14 Cal.3d 433, 437-438.) Jeopardy does not attach when felony charges are dismissed prior to trial. (*People v. Gallegos* (1997) 54 Cal.App.4th 252, 267.)

Nor has defendant shown prejudice from the prosecutor's refiling. Had the prosecutor not dismissed and refiled the charges, he would have had another opportunity to litigate the admissibility of the Missouri acts in front of Judge Bigelow, and he could have raised additional grounds for admissibility as he did in front of Judge Marlow. Had Judge Bigelow heard A.C. explain the impact of the Missouri acts, it is reasonably probable that the court would have found the evidence's probative value to be substantially increased. Defendant's contrary claim that Judge Bigelow "not unlikely" would have excluded the evidence at trial is unfounded. Because defendant is unable to show prejudice, his due process claim necessarily fails.

#### **IV. Consecutive Sentences**

Defendant contends, and the Attorney General concedes, the trial court mistakenly believed section 667.6, subdivision (d) required it to impose consecutive sentences on counts 1 and 2 when, in fact, the court had discretion to impose concurrent sentences. We accept the Attorney General's concession.

Section 667.6, subdivision (d) applies only where a defendant stands convicted of multiple sexual offenses enumerated in subdivision (e) of that statute. (*People v. Jones* (1988) 46 Cal.3d 585, 594, fn. 5.) Here, defendant was convicted of violating section 288.5, which is so enumerated; and section 288, subdivision (a), which is not. Thus, section 667.6, subdivision (d) does not apply.<sup>5</sup>

The Attorney General claims remand is not necessary in this case of misunderstanding concerning the scope of sentencing discretion, because it would be "an idle and unnecessary, if not pointless, judicial exercise." (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889.) Where the trial court has enumerated factors in aggravation that are well supported by the record, and the circumstances show that it is "virtually certain" the trial court would again impose consecutive sentences, remand is unnecessary. (*Id.* at pp. 889-890.)

At sentencing, the trial court observed: "This is an aggravated example of the defendant engaging in several incidents of sexual conduct with his biological daughter. And he was able to gain cooperation—I wouldn't say compliance because I don't think his daughter ever intended to comply with

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<sup>5</sup> Because the trial court imposed a one-third consecutive term on count 2, not a fully consecutive term, this case does not present an issue regarding the application of section 667.6, subdivision (c). In any event, the present version of section 667.6, subdivision (c), does not apply because counts 1 and 2 were committed on different occasions. (*People v. Goodliffe* (2009) 177 Cal.App.4th 723, 732.)

this. But because of his parental authority and the difference in age and size, he had a distinct advantage over the situation. [¶] The incidents occurred in the victim's home, again giving the defendant a distinct advantage over the situation. [¶] This has had a serious impact on the victim. She has undergone counseling. I can hear through the words in this letter that was read to the Court, the pain that is still there for the daughter that the father just does not seem to this Court to want to acknowledge. The defendant was an active participant. It's an egregious violation of a position of trust and he repeatedly took advantage of and violated the trust that is inherent in a relationship between a child and a parent."

These comments confirm that it is "virtually certain" the trial court would impose consecutive sentences on remand. (*People v. Coelho, supra*, 89 Cal.App.4th at pp. 889-890.) Thus, the error in applying section 667.6, subdivision (d) was harmless.

Lastly, we note that the sentencing triad for section 288, subdivision (c)(1), is one, two, or three years. Defendant correctly notes that the consecutive sentence on count 2 should be one-third the middle term, or eight months, not one year. We shall modify the judgment accordingly.

#### **V. Correction of the Abstract of Judgment**

Defendant contends, and the Attorney General concedes, the abstract of judgment must be corrected by deleting the probation

revocation restitution fine. (§ 1202.44.) We accept the Attorney General's concession.

The probation revocation restitution fine was inapplicable, because defendant was never granted probation and probation was never revoked. (§ 1202.44.) The trial court did not orally impose the fine, and the abstract of judgment should not have included it. We shall order that the abstract be corrected to omit the fine. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

### **DISPOSITION**

The judgment is modified to impose an eight-month consecutive term on count 2. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment, stating the correct consecutive term for count 2 and omitting the section 1202.44 restitution fine. A certified copy of the amended abstract shall be forwarded to the Department of Corrections and Rehabilitation.

\_\_\_\_\_  
BUTZ, J.

We concur:

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ROBIE, Acting P. J.

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MAURO, J.