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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DEMETRIO BURCIAGA,

Defendant and Appellant.

C067245

(Super. Ct. No. 101655)

Defendant Demetrio Burciaga took in his 15-year-old niece E. after she had had a fight with her father (defendant's brother). The next morning, defendant gave E. a massage using a massage "machine." He then put aside the machine and touched her stomach and vagina with his hands and kissed her chest over her sweater. A jury found him guilty of committing three lewd acts -- touching her stomach, touching her genitals, and kissing her chest. The court sentenced him to two years and four months in prison.

Defendant appeals and raises issues relating to lesser included offenses, the evidence, and sentencing. Finding no prejudicial error, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A

#### *The Prosecution's Case*

E. got into an argument with her father that turned physical. Police were called to the home to separate E. from her father, and the father told police "he didn't want [E.] to stay" at the home that night. E. asked both of her aunts whether she could spend the night with them. Both rejected her. Defendant was "the last relative [who] [she] had, and he offered for [her] to stay at his house." E. was "happy" "[b]ecause [she] actually had a relative [who] still wanted [her] to be in their home."

One of defendant's sons drove E. to defendant's house. Defendant's wife and his daughter were not there because they were vacationing in Mexico. E., defendant, and his two sons watched movies. E. told defendant that her back was hurting her. He "didn't do anything about it or say anything, and then [E.] just went off to bed" in defendant's daughter's room.

The next morning, Friday, February 5, 2010, defendant made the family breakfast. E. was "pretty happy" because "[n]obody makes [her] breakfast." After breakfast, defendant's sons left for school. Defendant told E. she did not have to go to school. It "didn't seem like [defendant] was going to work" either. E. (who had on a shirt, sweater, jeans, and her shoes) told defendant her back was hurting from the fight with her father. Defendant said he could massage it. He directed her from the kitchen to his bedroom and told her to lie down on his bed. E.

lay down on her stomach. Defendant began using a massage machine on E.'s upper back, which is where she told him she was hurting. He did that for a "little bit" and "after that[, he] just focused on [her] lower back." E. "kept telling him it was on [her] upper back that was hurting" but defendant "just kept, like, going on [her] lower back." He then used the machine to massage her "butt," thighs, and legs. E. again "told him it was [her] upper back . . . but he just kept massaging that area." E. was feeling "a bit" uncomfortable. He then separated her legs and started massaging her inner thighs with the machine. E. asked what defendant was doing, and defendant responded by telling E. to turn on her back. Defendant then started using the massage machine on her stomach and her legs. Defendant then wrapped the cord around the machine and put it to the side of his bed.

Defendant put his hands on E.'s stomach and massaged her stomach (count 1). He then "reached down [her] pants, and in between [her] [vaginal] lips . . . touched [her] right there" (count 2). Then he kissed her chest on top of her sweater (count 3). She slapped his hand off her. Defendant tried to kiss her again, but E. pushed him off her. Defendant "kept saying he was sorry, and he kept cursing at himself" "that he was stupid." He told her "a couple of times" "not to tell anybody."

E. left defendant's bedroom, gathered some of her belongings, and told defendant she wanted to leave. When they

got into his van, defendant told E. "he thought [E.] was easy like [defendant's wife]."

They arrived at E.'s house, but E.'s father said he did not want her there. Defendant then dropped E. off at school. She left because she "didn't want to be there the whole day just thinking of what happened . . . ." Later that day, E. told a female cousin that defendant "touched [her]" and in "what area he had touched [her]" but did not get into the details. She ended up spending the night with the cousin's family and told the mother of the cousin that defendant "had touched [her]." E.'s father picked her up the next morning.

E. told her father what defendant had done one week later when her father was driving her home from school. "[S]he said that my brother had stuck his hand under her pants." "She told me that she had asked him to rub her back because she was sore." "[H]e used an electrical machine on her back . . . [a]nd then he stopped using the electric machine and started using [his] hands . . . and to lay with her stomach facing up. He stopped using the electronic machine and used his hands." "[H]e had been rubbing her stomach with his hands, but that she felt that he put his hands under her pants."

The following Monday, E.'s father reported the incident to police and then took E. to the Yolo County Child Protective Services Office in Woodland. E. met with social worker Amber Presidio. E. told Presidio defendant "rubbed her stomach" and "tried to put his hand down her pants." Presidio did not ask "any type of follow-up questions" because when social workers

"first get a report [of suspected child abuse], [they are] not taught to ask follow-up questions, [they] are taught to end the interview and contact law enforcement so that a full forensic interview can be set up . . . ."

Social worker Presidio reported "an attempted molestation of a victim" to the Yolo County Sheriff's Department. The sheriff's department set up an interview between E. and the center that specializes in interviewing children regarding sexual assaults.

An employee of the center, Maria Flores, interviewed E. E. told her, "[defendant] had touched her in different places on her body." E. said "he reached down and that she felt his finger on her private area," "[her] clit," and confirmed that E. told her defendant "actually . . . kissed her on her chest."

B

#### *The Defense*

Defendant testified on his own behalf. He was the family masseur and had acquired the massage machine about six years ago from the Roseville auction. When he was at his own home giving massages, he would use the machine; when he was visiting family in Mexico he would use his hands. E. told him she needed a massage because her "entire body" was hurting. He gave E. a massage using the machine "from the very top all the way down to the feet." He massaged her stomach with the massager "[b]ecause all the blood flows into the stomach, and when you massage the stomach, then your body feels better." He did not "step up the massage by using [his] hands."

DISCUSSION

I

*The Court Properly Did Not Instruct On Battery  
And Attempted Lewd Act As Lesser Included Offenses*

Defendant contends the court erred in not sua sponte instructing on the "lesser included offense of battery" as to all counts and on attempted lewd act as to count 2, which was "touch[ing] [E.'s] genitals with his hand and fingers."<sup>1</sup>

The trial court must instruct on all theories of a lesser included offense "which find substantial support in the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support. . . . [¶] . . . [T]he existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense . . . ." (*Ibid.*)

A

*Battery As A Lesser Included*

The issue of whether battery is a lesser included offense of a lewd act is currently pending before the California Supreme Court in *People v. Shockley* (2010) 190 Cal.App.4th 896, review

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<sup>1</sup> In his briefs, defendant mistakenly refers to count 2 as count 1. It is clear defendant's argument goes to count 2 (which is defendant touching E.'s genitals) and not count 1 (which was massaging E's stomach with his hand) because defendant's argument as to the lesser included of an attempted lewd act has to do with evidence as to whether defendant "made contact with [E.'s] genitals."

granted March 16, 2011, S189462. We need not decide whether battery is a lesser included offense. Here the court was not required to give a battery instruction because there was no substantial evidence defendant was guilty of battery but not lewd acts.

Defendant's theory of why there was substantial evidence to support a battery instruction for all three counts is that "[a] reasonable jury could have concluded that the touching was offensive to [E.], but not committed with the intent to gratify [defendant's] sexual desires" because he was the family masseur who was just giving her a requested massage. *As to the charged acts*, this theory is not consistent with the evidence or the defense. The charged acts were as follows: count 1 -- "[d]efendant massaged [E.'s] stomach with his hand"; count 2 -- "[d]efendant touched [E.'s] genitals with his hand and fingers"; and count 3 -- [d]efendant kissed [E.] on her chest." Thus, the charged acts involved defendant touching E.'s body with his own body parts and not the massage machine. A battery instruction would have been appropriate (assuming battery is indeed a lesser included offense) *if* the charged acts alleged the first set of touchings, i.e., defendant touching E. with the machine. That is because defendant presented evidence he touched E. from head to toe with the massager, but only in his role as the family masseur, i.e., without a lewd intent. However, the charged acts went to the second set of touchings, i.e., after defendant put the machine away and began touching E. with his body parts. There was no substantial evidence that defendant, in performing

these acts with his body parts, touched E.'s body without a sexual intent, meaning, without a lewd purpose and simply in a way that was offensive to E. Perhaps realizing this, the defense theory of the case was that E. made up the allegation that "uncle touched me last night when he gave me a massage" to conjure up sympathy. Consistent with this theory, the defense evidence was that defendant used the machine when at his house to give massages, he gave E. a "full body massage" using only the machine and he did not "step up the massage by using [his] hands." On this record, there was no evidentiary support for an instruction on battery as an allegedly lesser included offense to the three charged acts.

B

*Attempted Lewd Act As A Lesser Included*

We turn next to defendant's contention the court erred in not sua sponte instructing on an attempted lewd act with respect to count 2, which was "touch[ing] [E.'s] genitals with his hand and fingers." Defendant argues E. "repeatedly reported" that defendant "put the massaging machine away and 'tried to stick his hand down' her pants. The contact was initially reported as an attempted child molestation." "[E] continued that description at trial, where she said that [defendant] tried to stick her [sic] hand down her pants. While it is true, she then stated that he had made contact with her genitals, that statement is directly contrary to the common understanding of what 'tried' means."

Defendant's realization that "it is true, she then stated that he had made contact with her genitals" defeats his argument. There was no evidence to support a theory of attempted lewd act because E. consistently explained that what she meant by defendant "trying" to stick his hand down her pants was that defendant touched her. In E.'s interview with social worker Presidio, E. was not asked "any type of follow-up questions" as to what she meant when she initially reported to Presidio defendant "tried to put his hand down her pants." This was because when social workers "first get a report [of suspected child abuse], [they] are not taught to ask follow-up questions, [they are] taught to end the interview and contact law enforcement so that a full forensic interview can be set up . . . ." When E. was given an opportunity to explain what she meant by her statement "my uncle tried to touch me," she explained that meant he "actually touch[ed] [my] private parts, the [vaginal] lips . . . ." Contrary to defendant's argument, then, the jury had no basis to disregard her explanation of what she meant by defendant tried to put his hands down her pants, and therefore defendant had no evidentiary support for an attempted lewd act instruction as to count 2.

## II

### *Trial Counsel Was Not Ineffective For His Handling Of Evidence Admitted Under The Fresh Complaint Doctrine*

In a series of related contentions, defendant argues his convictions must be reversed based on improperly-admitted evidence and an erroneous jury instruction tied to that

evidence. Specifically, defendant contends the court erred in admitting the testimony of E.'s father and interviewer Marie Flores regarding the details of molestation E. had recounted to them. He makes two arguments why this is so: one, the fresh complaint doctrine did not allow introduction of the details of the molest without limitation;<sup>2</sup> and two, the spontaneous statement exception did not apply because the statements made by E. to her father and the interviewer were not spontaneous.<sup>3</sup> He further contends his trial counsel was ineffective if he did not properly object.

As we will explain, we find the following: The court impliedly admitted the statements under the fresh complaint doctrine and not the spontaneous statement doctrine. Defense counsel did not timely object to the introduction of the evidence and did not object at all to the jury instruction.

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<sup>2</sup> Under the fresh complaint doctrine, "an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault may be admissible for a limited, nonhearsay purpose--namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others--whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred." (*People v. Brown* (1994) 8 Cal.4th 746, 749-750.)

<sup>3</sup> The spontaneous statement exception to the hearsay rule is for a statement that "(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant" and "(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.)

Counsel was not ineffective, though, because there was a tactical reason for not doing so.

A

*Factual And Procedural Background*

The People filed an in limine motion to admit statements made by E. to her father and interviewer Flores under the fresh complaint doctrine. Defendant filed a written opposition arguing the statements were not admissible as fresh complaints because the statements were not "spontaneous" and also because the jury would not be able to understand that the statements were not to be used for the truth of the matter. The court responded to these written arguments as follows: [T]he motion to allow it . . . is dependent upon the foundation being laid for the application of [the] doctrine[]. I'm just going to have to defer ruling until we get into trial as to whether it is met or not. So that one is deferred . . . ."

During the testimony of E.'s father, the prosecutor asked whether E. "t[oll]d [him] about something that happened with [defendant] when she stayed the night at his house on February 4th of 2010?" Defense counsel objected as follows: "Excuse me, your Honor, if I could interpose an objection of hearsay at this point. I don't know if we ever --." The court stated, "Right now it is just did she say something. Let's wait for the next question to be framed." The prosecutor then asked, "Where were the two of you when your daughter told you that something had happened." The prosecutor followed with a series of questions about the circumstances during which E. made the statements to

her father. Then the prosecutor asked, "When she said that she had something to tell you, did you ask her what that something was?" E.'s father responded, "Yeah. I asked her, and she said that my brother had stuck his hand under her pants." The prosecutor then asked some more questions about the circumstances under which E.'s disclosure was made and the problems between the father and E. The prosecutor then returned to eliciting details of the molestation, which included the following statements by E.'s father: "She told me that she asked him to rub her back because she was sore." "[H]e used an electrical machine on her back . . . [a]nd then he stopped using the electronic machine and started using [his] hands . . . and to lay with her stomach facing up. He stopped using the electronic machine and used his hands." "[H]e had been rubbing her stomach with his hands, but that she felt that he put his hands under her pants."

Six witnesses later, interviewer Flores testified. The prosecutor asked Flores "did [E.] tell you that [defendant] had touched her in different places on her body?" Flores answered, "Yes." The prosecutor then asked what E.'s demeanor was like, and Flores responded, "She became emotional when she started talking about her uncle trying to kiss her on the chest. She broke down and started crying. . . ." The prosecutor then asked specific questions about what E. told her defendant had actually done to her, and Flores responded that E. said "he reached down and that she felt his finger on her private area" and confirmed

that E. told her he "kissed her on her chest." Defense counsel did not object to any of this testimony.

Just prior to closing statements, the court instructed the jury on the instructions applicable to the case, including the following: "You have heard evidence of statements that a witness made before trial. If you decide that the witness made those statements, you may use them in two ways. The first way is you may use those statements to evaluate whether the witness's testimony here in court is believable, and you can also use them as evidence that the information contained in those earlier statements is true."

B

*Defense Counsel Was Not Ineffective For Failing To  
Contemporaneously Object Because There Was  
A Tactical Reason For Him Not To Object*

Defendant contends the trial court erred in permitting evidence of the details of the molestation that E. recounted to her father and interviewer Flores under the fresh complaint doctrine and under the spontaneous statement doctrine and that counsel was ineffective for failing to adequately object.

At issue here, however, was only the fresh complaint doctrine.<sup>4</sup> The prosecutor moved to have the father's statements

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<sup>4</sup> Defendant argues the court must have admitted the statements as spontaneous statements because only under that doctrine (and not the fresh complaint doctrine) could the pretrial statements be used for the truth of the matter. And the court here instructed the jury the pretrial statements could be used for the truth of the matter.

and interviewer Flores's statements introduced under the fresh complaint doctrine only. And the court deferred ruling on that motion until trial. The court, however, never formally ruled the evidence was admissible. Defense counsel failed to make a contemporaneous objection when the allegedly objectionable statements were elicited. Defense counsel, in writing, objected to admission of the statements because he believed the fresh complaint doctrine did not apply. The court deferred ruling on the objection until trial. At trial during the father's testimony, defense counsel objected prematurely, before the prosecutor began asking questions about what E. told the father about defendant molesting her. The court said as much when it told defense counsel, "Right now [the prosecutor's question] is just did she say something. Let's wait for the next question to be framed." The prosecutor then asked, "Where were the two of you when your daughter told you that something had happened." When later the prosecutor started asking questions of the father regarding what E. told him in terms of the touching, defense counsel did not object. These arguments are forfeited on appeal. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186 ["`"questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely

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Defendant offers no legal support for the reasoning that we infer backward from a jury instruction (that does not make explicit the basis for the instruction) what the trial court must have ruled. The only doctrine tendered was the fresh complaint doctrine.

objection in the trial court on the ground sought to be urged on appeal"""]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1174 [rulings of the trial court in limine are necessarily tentative because the court retains discretion to make a different ruling as the evidence unfolds].)

Defense counsel was not deficient for not contemporaneously objecting to the statements and requesting a limiting instruction because the record shows a tactical reason for him refraining from doing so. It may have occurred to defense counsel that statements by E. to the father and then later to interviewer Flores that generally confirmed E. had been molested -- but varied in detail about how -- would provide a defense. That defense was that E. made up the story about the molestation from the outset to gain sympathy but she was not clever enough to tell a consistent story, as was apparent by the differing accounts of exactly what that molestation was. For example, E. told her father defendant rubbed her stomach with his hands and "put his hands under her pants." However, she told Flores defendant touched "[her] clit" and kissed her chest. Defense counsel pointed out differences in the testimony such as these in his closing argument to paint a picture of E. as an unsophisticated liar. On this record, where counsel was not asked to explain why he failed to contemporaneously object and ask for a limiting instruction, we will not find ineffective assistance if there is a conceivable tactical reason for counsel's acts or omissions. (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) "Were it otherwise, appellate courts would be

required to engage in the "perilous process" of second-guessing counsel's trial strategy." (*People v. Frye* (1998) 18 Cal.4th 894, 979.)

### III

#### *The Court Did Not Abuse Its Discretion*

##### *In Denying Defendant Probation*

Defendant contends the trial court abused its discretion in denying him probation because "it disregarded the entirety of the [report written by the court-appointed doctor who interviewed defendant regarding defendant's amenability to probation], and essentially insisted that [defendant] admit guilt for a grant of probation." While the court erred in considering defendant's lack of remorse (because defendant's guilt was not overwhelming), we hold the court would have reached the same result (denial of probation) had it not considered that factor.

### A

#### *Factual Background On The Court's Denial Of Probation*

Defendant introduced a report written by Dr. Captane Thomson, who interviewed defendant regarding defendant's amenability to probation. The report stated that Dr. Thomson "hope[d] that [defendant] would qualify for probation." Dr. Thomson had interviewed defendant, who told the doctor his version of events -- that he had only massaged E. in response to her request but "denie[d] that he massaged her pubic area or that he touched her with his hand." Dr. Thomson noted "[s]uch a case is always difficult as it is his word against hers and the

jury believed her." "In any event, [defendant] apparently has not had any previous accusations," [t]here is no claim that he attempted penetration," [h]e has no history of prior sexual misconduct, and he is the member of an extended and close family that is apparently more supportive of him than they are of the alleged victim." The doctor "f[ound] no evidence to suggest that [d]efendant is likely to re-offend or be a threat to the victim."

At the sentencing hearing, the court stated that Dr. Thomson's qualifications were "very well-founded and not subject to question" and that he provided a "reasoned opinion" but concluded the doctor's opinion to grant probation "carries little weight since it is based on matters that have not been proved to the trier of fact." The court explained as follows: "Dr. Thomson's understanding of the facts is based upon what [defendant] told him. Apparently, it is consistent with the position put forward by the defense throughout the life of this case, but it is completely inconsistent with the facts that [the court] was able to discern at trial, and the fact[s] that the jury ended up believing beyond a reasonable doubt."

The court then discussed "amenability toward probation, generally. Not only do I not have a psychiatric or psychological evaluation which I can rely upon to support a probation grant, but I can't see the amenability to probation. Obviously, in every case like this, one can argue they're taking advantage of a position of trust, but this was particularly egregious because of the problems that had already been faced by

the victim and then being put in a place where she thought she was getting a break, a time away from the other issues going on in her life, like someone who is taking her in. Her testimony in Court supported that she thought she was getting to a safe haven from a place of stress and violence and conflict, and instead was taken in by somebody who took advantage of all that. [¶] And so based on all that, I can't see that there's an amenability to probation for someone who now looks back on all this and says it still didn't happen."

B

*The Court Did Not Abuse Its Discretion*

The trial court's decision to deny probation will be reversed only upon a clear showing of abuse of discretion. (*People v. Martinez* (1985) 175 Cal.App.3d 881, 896.) When "a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." [Citation.]" (*People v. Calhoun* (2007) 40 Cal.4th 398, 410; *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1318-1319.)

Lack of remorse is a proper factor to consider when deciding whether to grant probation. (Cal. Rules of Court, rule 4.414(b)(7); *People v. Leung* (1992) 5 Cal.App.4th 482, 507.) And where the evidence of guilt is overwhelming, the court may consider the defendant's refusal to acknowledge guilt in considering whether to deny probation. (*People v. Holguin*

(1989) 213 Cal.App.3d 1308, 1319.) However, the court may not consider a defendant's lack of remorse or refusal to take responsibility for the offense if the defendant has denied guilt and the evidence of guilt is conflicting. (*Ibid.*) This is because a defendant may not be penalized for failing to confess following a conviction. (*People v. Coleman* (1969) 71 Cal.2d 1159, 1168, overruled on other grounds in *Garcia v. Superior Court* (1997) 14 Cal.4th 953, 966, fn. 6.)

Here, the evidence against defendant was not overwhelming because this was essentially a credibility dispute between defendant and E. in a case without physical evidence. It was therefore error for the court to consider defendant's lack of remorse as a factor in denying him probation. However, the court did not abuse its discretion in denying defendant probation. Defendant's denial he committed the crimes (which was recounted in Dr. Thomson's report and was the reason why the court placed "little weight" on the report) was not the trial court's only reason for denying probation. The trial court also denied probation because of what the court termed a "particularly egregious" example of a defendant violating the trust a victim had placed in him. Consistent with the court's characterization of defendant's actions, E. had just submitted a letter at the sentencing hearing that the court considered. In the letter, E. wrote that she "never felt that [she] couldn't trust [defendant,] he never gave [E.] a reason not to trust him." Because of what defendant did, E. has become "more hes[i]tant to[ward] [her] family and do[es] not feel as

comfortable around them anymore. [She] cannot be around any of [her] male cousins or [her] other two uncles by [her]self because [she] feel[s] that [she] will have the same problem like [she] did with [defendant.] Defendant does not contend the trial court erred in considering the fact defendant took advantage of a position of trust. Indeed, the court emphasized this factor when discussing defendant's unsuitability for probation and it was the focus of E.'s letter to the court. On this record, even if the trial court had not considered defendant's denial that he molested E., it is not reasonably probable that the trial court would have granted probation. The court therefore did not abuse its discretion in concluding that probation was inappropriate.

#### IV

##### *The Court Imposed Consecutive Terms Of Imprisonment*

Defendant contends "it is at a minimum, ambiguous as to whether the court intended to impose concurrent or consecutive sentences," which requires the imposition of a concurrent sentence. We disagree the record was ambiguous.

The court articulated defendant's sentence as follows: "[T]he court will order the lower base term of one year on Count 1. As you know, Counsel, this is an unusual triad. It is not 16, 2, 3 and 1, 2, 3. Count 2, these are all considered separate incidents under the law one after another after another. So it is one-third the middle-base term of eight months count 2, another eight months on Count 3, for a total aggregate term of two years, four months."

While the court did not use the word "consecutive," the only way it could have arrived at the aggregate term it did was by running the counts consecutively. Specifically, when a consecutive determinate term of imprisonment is imposed for an additional offense, that term is to be one-third the middle term. There is no such restriction for concurrent sentences. (Pen. Code, § 1170.1, subd. (a).) Here, where there was no evidence the court intended to impose concurrent terms and the only way the court could have arrived at the sentence it did was by imposing consecutive terms, we do not find the record ambiguous.

DISPOSITION

The judgment is affirmed.

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ROBIE, Acting P. J.

We concur:

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MAURO, J.

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MURRAY, J.