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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON EDGAR HALL,

Defendant and Appellant.

C069587

(Super. Ct. No. 10F8996)

Defendant Jason Edgar Hall molested his stepdaughter over a period of years. He also molested his stepdaughter's friend at a sleepover. An information charged defendant with two counts of a lewd act with a child aged 14, two counts of sexual battery by restraint, and two counts of a lewd act on a child under the age of 14. (Pen. Code, §§ 288, subd. (c)(1), 243.4, subd. (a), 288, subd. (a).)¹ A jury found defendant guilty of all counts. Defendant appeals, contending there was insufficient evidence on the sexual

¹ All further statutory references are to the Penal Code unless otherwise designated.

battery by restraint counts, the trial court improperly admitted defendant's statements of drug use and pornography possession, and sentencing error. We shall modify count 4 to reflect a conviction for battery and remand the case to the trial court for resentencing on that count. In all other respects, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant married M.M.'s mother when M.M. was about six years old. He began molesting M.M. when she was about eight years old. The molestation continued when M.M. was 11 and 12. Defendant also molested a 14-year-old friend of M.M. at a sleepover.

An amended information charged defendant with lewd act on a child aged 14 (counts 1 & 2); sexual battery by restraint (counts 3 & 4); and lewd act on a child under the age of 14 (counts 5 & 6). As to counts 5 and 6, the amended information also alleged defendant engaged in substantial sexual conduct. (§ 1203.066, subd. (a)(8), (b).) Defendant entered a plea of not guilty and a jury trial followed. The following evidence was produced at trial.

Prosecution's Case

M.M.

Defendant began molesting his stepdaughter when she was about eight years old. Defendant showed her his penis five times. On the first occasion, M.M. was in the bathroom adjacent to her parents' bedroom. Defendant, who was lying in bed, lifted the covers and showed M.M. his penis.

Another incident took place when M.M. was 12. M.M. was in her bedroom when defendant appeared at her door holding his laptop computer. Defendant touched his exposed penis for 10 to 15 minutes. On several occasions, defendant masturbated in M.M.'s presence.

When M.M. was 11, defendant sat next to her on the couch, grabbed her hand, and forced her to stroke his exposed penis. When M.M. was 12, she sat on defendant's lap

while defendant rubbed her vagina over her clothing. In 2007 M.M. told her aunt about the molestations but did not tell her mother because she did not want to hurt her.

H.S.

In 2010 14-year-old H.S. attended M.M.'s birthday party at defendant's home. Defendant, who was drinking during the party, offered the girls alcohol. H.S. took a "sip."

Defendant told H.S. to sleep next to M.M. because he did not want M.M. to sleep next to a boy. H.S. awoke to find a hand groping her breast. She silently pushed the hand away, but the person kept touching her breasts, first over her shirt, then under her shirt and bra.

Initially, H.S. was unsure who was touching her, but she determined it was defendant. Defendant touched her stomach and tried to reach into her pants. H.S. pushed his hands away "with all [her] strength." Defendant forced H.S. to touch his bare penis with her hand, telling her, "I know you want to." H.S. told defendant to stop.

Defendant got off the couch, grabbed H.S.'s face, and turned it toward him. He put his tongue in H.S.'s mouth. H.S. began to cry and defendant got on the couch.

H.S. approached her friend Z., who was on the couch, and asked to speak with her privately. H.S. told Z. what had happened. She also told defendant's wife, who looked mad and frustrated but not surprised.

Defendant then apologized to H.S. for the incident. Defendant asked, "Which one of you is it? I'm sorry, I thought you were my wife." After M.M. learned about the incident with H.S., she disclosed defendant's prior molestations.

Conversation Between Defendant and His Wife

The jury also heard a recording of a conversation between defendant and his wife while he was in jail following his arrest. Defendant's wife told him about M.M.'s allegations that defendant had masturbated in front of her on several occasions.

Defendant responded, "I don't know. [¶] . . . [¶] . . . I have no idea what the hell is going

on.” He told his wife he did not know he was doing anything and asked why he would need sex from a little girl.

Defendant then told his wife, “If she’s sayin’ I did it, I musta been doin’ something.” Defendant also said, “Sorry. Guess I’m just a fuckin’ perv or somethin’.”

Defendant and his wife had the following exchange: “[Defendant]: And then when I got caught up in drugs, doin’ that shit too. [¶] [Wife]: Yeah. You wouldn’t admit it . . . for the longest time and then you finally admitted. [¶] [Defendant]: I know. And I finally quit. [¶] [Wife]: Yeah . . . I don’t know what to do.” Defendant told his wife, “apparently this is when it all happens is when I drink and . . . [¶] . . . [¶] . . . I was doin’ drugs that time.” When defendant turned himself in to police he stated, “I groped a girl that was at my daughter’s birthday party last night.”

Evidence from Defendant’s Computer

At trial an investigator from the district attorney’s office testified he examined defendant’s laptop computer. The computer contained between 500 and 1,000 pornographic images. However, none of the pornography involved children.

Defense Case

Defendant’s son A.H., aged 16, testified. M.M. never confided in him about defendant’s alleged abuse. She never acted as though “there was a problem.”

The 2010 party at which the incident with H.S. occurred was a party for both A.H. and M.M. Defendant drank about a case of beer that evening. A.H. went to bed around 4:00 o’clock the next morning. At a family meeting the next day, defendant said he was probably going to jail.

Defendant’s wife testified she had been married to defendant for 10 years. In 2007 she spoke with child protective services about M.M.’s accusations against defendant, which M.M. had revealed to her aunt. M.M. did not tell her mother about the molestations. She tried to ask M.M. about the incidents, but M.M. would not tell her anything. Child protective services did not tell defendant’s wife what had happened.

Defendant's wife never observed anything sexual between defendant and M.M. Defendant drank heavily between 2004 and 2007. Defendant also used drugs.

According to his wife, defendant drank a 36-pack of beer the night of the 2010 party. She went to sleep around 1:30 a.m. but got up several times to check on everyone. Defendant was still up at 4:30 a.m. and seemed exhausted. Defendant's wife did not have a problem with his sleeping on the couch in a roomful of teenaged girls because when he drank he was "not sexual."

Defendant's wife returned to bed and woke up to hear three girls, including H.S., talking in the bathroom. One girl said, " 'Your husband touched her.' " Defendant's wife woke defendant, who was "groggy, sleepy, out of it." She accompanied defendant to the police station because she did not want to cause a scene at home.

Verdict and Sentence

The jury found defendant guilty on all counts and found the special allegations true. The court sentenced defendant to 13 years four months in state prison: on count 5, the upper term of eight years; on count 1, one-third the middle term, or eight months, to run consecutively with the principal term; on count 2, one-third the middle term, or eight months, to run consecutively; on count 3, one-third the middle term, or one year, to run consecutively; on count 4, one-third the middle term, or one year, to run consecutively; and on count 6, one-third the middle term, or two years, to run consecutively. Defendant filed a timely notice of appeal.

DISCUSSION

Sufficiency of the Evidence on Counts 3 and 4

Defendant challenges the sufficiency of the evidence to support his conviction for sexual battery by restraint, counts 3 and 4. Count 3 refers to the groping of H.S.'s breast; count 4 refers to defendant's placing H.S.'s hand on his penis. According to defendant, insufficient evidence supports a finding that he used " 'words, acts or authority' " to restrict H.S. against her will.

Standard of Review

In reviewing a defendant's challenge to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence. Substantial evidence is evidence that is credible, reasonable, and of solid value, such that a reasonable jury would find the defendant guilty beyond a reasonable doubt. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

We do not reassess the credibility of witnesses, and we draw all inferences from the evidence that support the jury's verdict. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) Unless the testimony of a single witness is physically impossible or inherently improbable, it is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Discussion

Section 243.4, subdivision (a) provides: "Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery." A victim is unlawfully restrained "when his or her liberty is being controlled by words, acts or authority of the perpetrator aimed at depriving the person's liberty, and such restriction is against the person's will" (*People v. Arnold* (1992) 6 Cal.App.4th 18, 28 (*Arnold*).

The element of unlawful restraint requires more than the mere exertion of physical effort required to commit the prohibited sexual act. (*People v. Pahl* (1991) 226 Cal.App.3d 1651, 1661 (*Pahl*)). Such restraint need not be physical and may be accomplished by words or acts. (*People v. Grant* (1992) 8 Cal.App.4th 1105, 1112 (*Grant*)).

Defendant argues these elements are not present in counts 3 and 4 since "[h]e was not an authority figure as to her, but was merely the stepfather of one of her friend's [*sic*].

He did not say anything to her during the commission of the acts . . . with the exception of saying ‘You know you want to,’ prior to kissing her. These were momentary events. [Defendant] did not physically restrain her in any way, such as pinning her down, or physically dominating her.” Defendant cites H.S.’s pushing his hands away in count 3 and jerking her hand away in count 4.

Count 4

As to count 4, the People concede the evidence is insufficient to support a conviction for sexual battery by restraint. The concession is warranted.

At trial, the prosecution argued count 4 referred to defendant’s grabbing H.S.’s hand and placing it on his penis. In *People v. Elam* (2001) 91 Cal.App.4th 298, the trial court found that the defendant’s act of forcing the victim’s hand to touch his penis was sufficient for sexual battery. The appellate court reversed, noting: “As defined, the term ‘intimate part’ [in section 243.4] does not include the victim’s hand. Moreover, it is the *perpetrator* who must touch the victim’s intimate part, not the other way around.” (*Elam*, at p. 310.)²

Since the evidence is insufficient to support sexual battery in count 4, the People suggest we reduce the offense in count 4 to simple battery under section 242, a lesser included offense of sexual battery. Defendant does not contest the People’s argument.

The evidence in count 4 is sufficient to support an unlawful touching constituting battery under section 242. Therefore, we will modify the judgment to reflect a conviction of battery, a lesser included offense of sexual battery, and remand the case to the trial court for resentencing on that count.

² The term “intimate part” in section 243.4 means “the sexual organ, anus, groin, or buttocks of any person, and the breast of a female.” (§ 243.4, subd. (g)(1).)

Count 3

Defendant's conviction of the charge in count 3 was based on touching H.S.'s bare breasts under her bra. Defendant argues that since he was not an authority figure and H.S. was able to push his hands away, insufficient evidence supports his conviction.

In support, defendant cites cases in which the victim was dominated by a larger perpetrator in a pickup truck (*Pahl, supra*, 226 Cal.App.3d at pp. 1653-1655) and by an authority figure outside his car (*Grant, supra*, 8 Cal.App.4th at p. 1108). Defendant contrasts these scenarios with *Arnold, supra*, 6 Cal.App.4th 18. In *Arnold*, the defendant pulled the victim toward him and fondled her breasts. The appellate court found this was not unlawful restraint, noting the victim expressed her displeasure and pushed the defendant away. (*Id.* at p. 29.)

Here, defendant asserts, he was not in a position of authority vis-à-vis H.S., and she was able to push his hands away. The testimony belies defendant's argument.

H.S. was awakened by a hand groping her breast over her shirt. Immobilized by shock, H.S. could not move. When she tried to push the hands away, the groping continued. When her assailant reached under her bra, she realized it was defendant because his hands "were big and not teenager hands." Frightened, H.S. had difficulty pushing defendant's hands away, but did so with all her strength as he tried to put his hands down her pants.

While defendant asserts H.S. was able to push his hands away, she was able to do so only after overcoming her shock and using all her strength against him. Her assailant was an adult, the owner of the home she was a guest in, the person who told her where to sleep, and the stepfather of her friend. The bottom line is not that "she did push his hands away." Rather, the bottom line is that defendant restrained H.S. physically while he groped her breasts. We find sufficient evidence to support count 3.

Admissibility of Evidence

Defendant's Drug Use

Defendant challenges the trial court's admission of his statements regarding his past drug use and asserts defense counsel's conduct in connection with this evidence constituted ineffective assistance of counsel.

Background

During cross-examination, defense counsel questioned M.M: "Q. [D]o you recall if [defendant] was drinking a lot at that time, would you know? [¶] . . . [¶] . . . At the times of the alleged incidents between 2004 and 2007? [¶] A. No. [¶] Q. Was he using any drugs that you're aware of? [¶] A. Yes. [¶] Q. What types of drugs was he using? [¶] A. Marijuana."

Following M.M.'s testimony, the prosecution introduced the jailhouse conversation between defendant and his wife. During the conversation defendant stated, ". . . I got caught up in drugs" Later in the conversation, defendant told his wife, ". . . apparently this is when it all happens is when I drink and . . . [¶] . . . [¶] . . . I was doin' drugs that time."

During the defense case, defense counsel asked defendant's wife if defendant drank a lot between 2004 and 2007. She answered in the affirmative. She testified defendant was a truck driver who was frequently away from home, but when he was home he would drink a lot. Defense counsel asked, "Was he using any types of drugs that you are aware of? [¶] A. Back then, I think he did. [¶] Q. Was there a time that you know that [defendant] stopped drinking or using drugs that you would see a change that you can identify? [¶] A. Yeah. I mean, he stopped doing drugs years . . . before 2007"

Defense counsel requested an instruction on voluntary intoxication on all counts. The court agreed to instruct the jury on voluntary intoxication on counts 1 through 4.

Discussion

Defendant argues the evidence of his prior drug use should have been excluded under Evidence Code section 352 as more prejudicial than probative. The People respond that defendant has forfeited the issue, but if the issue is preserved for appeal, defendant has failed to show a miscarriage of justice.

Defendant's prior drug use was introduced by defense counsel during M.M.'s cross-examination; therefore, we focus our analysis on defendant's claim that counsel performed ineffectively in eliciting the testimony. Under defendant's analysis, evidence of his past drug usage was unquestionably inflammatory, and defense counsel could have had no tactical reason for eliciting the testimony or failing to object to the jailhouse conversations between defendant and his wife.

To establish ineffective assistance of counsel, defendant must show counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and the deficient performance prejudiced defendant. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218 (*Ledesma*)). We accord trial counsel substantial deference and do not second guess counsel's reasonable tactical decisions. (*People v. Maldonado* (2009) 172 Cal.App.4th 89, 97.)

We will not reverse on appeal if the circumstances suggest counsel had a valid tactical reason for not objecting. If the record sheds no light on why counsel acted or failed to act, we affirm unless there could be no satisfactory explanation for the act or omission. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 (*Mendoza Tello*); *Ledesma, supra*, 43 Cal.3d at p. 218.)

Here, the record provides ample reason for defense counsel's lack of objection to the drug evidence. Voluntary intoxication can negate the mental state of specific intent required for conviction of an act of lewd conduct on a child. (§ 22, subd. (b).) Defense counsel's questioning of M.M. raised the issue of defendant's mental state during the molestations, implying it could have been altered by drug use. The trial court granted

defense counsel's request for an instruction on voluntary intoxication on counts 1 through 4. Defense counsel made the request, citing this testimony. Given these facts, we cannot find defense counsel performed ineffectively in failing to object to those portions of the jailhouse recording concerning drugs or in cross-examining M.M.

Possession of Pornography

Defendant also contends the trial court erred in admitting evidence that he possessed adult pornographic images on his laptop computer. As with evidence of his prior drug use, defendant contends trial counsel performed ineffectively in failing to object to the admission of this evidence.

Background

During his cross-examination of M.M., defense counsel asked: “[D]o you recall . . . telling a police officer . . . making a statement I believe to this officer here in which you said that [defendant] masturbated in front of you and [defendant's sons]? [¶] A. Yes. [¶] Q. Have you ever said that [defendant] was watching porn? [¶] A. Yes. [¶] Q. Would that be on his computer? [¶] A. Yes.”

M.M. also referred to another incident after 2007. Defense counsel asked her: “Was that when he was watching porn? [¶] A. Yes. [¶] Q. But except for watching or except for seeing him watching porn, there have been no other incidents since 2007; is that correct? [¶] A. Yes.”

Inspector Joe Hendrix testified that his examination of defendant's computer revealed between 500 and 1,000 pornographic images. None of the images were of children. Defense counsel did not object to this evidence.

During closing argument, the prosecutor discussed the pornography found on defendant's computer: “However, for both girls, we do have corroborating evidence. You heard Investigator Hendrix testify yesterday that he found pornography on the defendant's computer. You heard [M.M.] testify that on [*sic*] one incident, she came out, saw the defendant looking at pornography. And during one of the acts of him

masturbating in her doorway, he was holding the computer open while masturbating. And I think it's a pretty easy assumption to make that he wasn't looking at stocks or at sports scores while he was holding his laptop, masturbating to his eight to ten-year old stepdaughter. It was very likely he was looking at pornography. Investigator Hendrix found at least 500 or more images of pornography on that computer.”

In closing argument, defense counsel discussed the issue: “There was testimony that there was pornography on [defendant's] computer. Remember the officer testified it was not illegal pornography. I asked, well, what does that mean? He said what is illegal pornography is child pornography. That's truly an indication of a fixation on children. Adult pornography means you could have -- you were using adult figures and that is appropriate for an adult. There was no child pornography present on the computer.”

Discussion

As with the evidence of prior drug use, defendant argues the evidence of the pornography was more prejudicial than probative and constituted improper character evidence. The People argue defendant forfeited his right to claim evidentiary error. Defendant also contends counsel performed ineffectively in failing to object to the admission of the evidence.

Again, we focus on the claim of ineffective assistance of counsel and do not reverse on appeal unless there could be no satisfactory explanation for counsel's act or omission. (*Mendoza Tello, supra*, 15 Cal.4th at pp. 266-267.) Here, as defense counsel argued to the jury, the evidence revealed defendant possessed only adult pornography. Defense counsel could reasonably conclude the evidence was properly admissible to corroborate M.M.'s testimony that defendant viewed pornographic images during certain sex acts. Faced with M.M.'s testimony, defense counsel attempted to diffuse the impact of the evidence by pointing out it did not involve children; defendant was not interested in children sexually. Counsel did not perform ineffectively.

Sentencing Error

Consecutive Terms on Counts 1 Through 4

Defendant argues the trial court erred in imposing consecutive sentences for counts 1, 2, 3, and 4. According to defendant, the sentence violated California Rules of Court, rule 4.425 and section 654.

Background

During closing arguments, the prosecutor stated: “For Counts 1 and 2, it’s the same charge. Lewd act with a 14-year old child and we’re referring to [H.S.] Counts 1 through 4, all four of them refer to [H.S.] . . . ¶ So for Counts 1 and 2, there is an instruction that you want to write down the number 3501. It’s what I had brought up earlier called the unanimity instruction which lays out that you must all agree on the same act or you must all agree on all acts. ¶ And there are five acts that the defendant did to [H.S.] that could constitute a lewd act with a child. There is [*sic*] two counts so you only need to all agree on two of them. If you agree that all five occurred, then there is no issue. But if some of you agree that one of them didn’t occur, the basic point is that you must all agree on at least two of them to be able to find the defendant guilty of those two counts. ¶ So of the five acts, one is groping [H.S.]’s breasts over the clothes. That would be a lewd act because remember, in the instruction it says the lewd act is the touching a child anywhere on their body, either . . . over the clothes or under the clothes.”

The prosecutor enumerated the second act as defendant’s putting his hand underneath H.S.’s shirt and touching her breast. The third act occurred when defendant rubbed H.S.’s stomach and tried to unbutton her pants. In the fourth act, defendant grabbed H.S.’s hand and placed it on his penis. The fifth act took place when defendant kissed and put his tongue in H.S.’s mouth. The prosecutor stated: “[I]f you are able to all agree on at least two of these, then those two acts could count as violating Counts 1 and 2.”

As for counts 3 and 4, the prosecutor argued they were more specific: count 3 referred to defendant's groping H.S.'s bare breast; count 4 referred to defendant's grabbing H.S.'s hand and placing it on his penis. The prosecutor concluded, "So even though there are five acts that count for Counts 1 and 2, there are only two acts that count for Counts 3 and 4."

The jury found defendant guilty of counts 1 through 4 but made no specific findings of fact as to counts 1 and 2.

At sentencing, the prosecutor requested consecutive sentences on each count. Defense counsel argued section 654 applied.

The court sentenced defendant, stating: "As to Counts 1, 2, 3 and 4, what I believe the evidence is, or at least arguably, is the Count 1 involved, and this is involving the victim with the initials H. S., Count 1 was placing his hands over her breast outside of her clothing. The victim had pushed the defendant away. She testified throughout her testimony that she [was] repeatedly trying to push him away, pushing his hands away. [¶] Then he placed his hand under the victim's shirt and on her bear [sic] breast, fondling her breasts. He had time to reflect between those acts based on the testimony. That is my view of it. [¶] The third act would be trying or attempting to touch the victim's vagina. Again, the defendant was or the victim was attempting to push the defendant's hands away and was having a hard time doing that, but the defendant persisted, was trying to unbutton her pants and then the defendant, as a separate act, what I would clearly say was a separate objective, and after time to reflect, placed his hands or put his hands on the victim's [sic] and placed the victim's hand on his bear [sic] penis. [¶] So I view them as separate acts and will sentence them consecutive to each other and to . . . Counts 5 and 6."

Discussion

California Rules of Court, Rule 4.425

Defendant argues the court violated California Rules of Court, rule 4.425 in sentencing him consecutively. Rule 4.425 sets forth the criteria governing consecutive sentences. These include: “(1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place so as to indicate a single period of aberrant behavior.” (Cal. Rules of Court, rule 4.425(a).)

We review for an abuse of discretion the trial court’s decision to sentence consecutively. (*People v. Scott* (1994) 9 Cal.4th 331, 349.) The guidelines set forth in rule 4.425 of the California Rules of Court are not rigidly applied. (*People v. Calderon* (1993) 20 Cal.App.4th 82, 86-87.)

Defendant contends the offenses against H.S. involved a single victim on a single occasion, with the objective of sexual gratification. In addition, defendant argues H.S.’s own testimony did not describe any breaks in the acts or sufficient time for reflection.

However, in imposing consecutive sentences, the trial court determined counts 1 through 4 constituted separate acts. The evidence supports the trial court’s conclusion. Although defendant portrays the acts against H.S. as continuous with no evidence of an interval for reflection, H.S. testified to four discrete acts, not continuous, unceasing abuse. The reasons given by the trial court for imposing consecutive sentences need only refer to primary factors in support of the decision. (*People v. Black* (2007) 41 Cal.4th 799, 822 (*Black*).)

Section 654

Defendant also challenges the consecutive sentences as running afoul of section 654. Section 654 provides that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that

provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a).)

We review a court’s determination as to whether section 654 precludes multiple punishments under the substantial evidence standard of review. We view the evidence favorably to support the judgment and presume every factual finding that could reasonably be deduced from the evidence. (*People v. Tarris* (2009) 180 Cal.App.4th 612, 626-627.)

Defendant argues that as to counts 1 through 4, he “did not have a separate intent and objective. His objective was sexual gratification. There was no evidence he independently sought separate sexual gratification with the commission of each act.”

However, the Supreme Court has considered such blanket assertions of sexual gratification as invoking section 654 and found: “A defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act. We therefore decline to extend the single intent and objective test of section 654 beyond its purpose to preclude punishment for each such act.” (*People v. Perez* (1979) 23 Cal.3d 545, 553.)

Defendant also contends the conviction in count 3, groping H.S.’s breast under her shirt, was for the same conduct the prosecution argued could be the basis for a conviction in count 1 or 2. Therefore, defendant should only have been sentenced as to counts 1 and 2, but not count 3.

However, the jury had multiple acts upon which to base the convictions in counts 1, 2, and 3. H.S. testified defendant groped her breast over her shirt, fondled her breasts under her shirt, touched her stomach, and tried to reach into her pants. There is no reason to assume the jury used the act from count 3 to support either count 1 or count 2.

Upper Term on Count 5

Finally, defendant claims the court's imposition of the upper term on count 5 constituted error. Defendant disputes the court's assertion that he violated a position of trust and that M.M. was particularly vulnerable. In addition, defendant argues defense counsel performed ineffectively in failing to object to the sentence.

Background

The probation report recommended the upper term of eight years in state prison on count 5. The report found the victim particularly vulnerable and that defendant's commission of the crime indicated planning.

In imposing sentence, the court found the upper term of eight years appropriate "because of the violation of the position of trust by the defendant on his step daughter. Also, she was particularly vulnerable, and he took advantage of an opportunity when she was alone at the residence with him to commit the sexual acts on her and also I find that his act involved planning and taking advantage of opportunities to molest the victim. And one thing that struck me was the defendant was essentially taunting the victim, at times standing in her doorway at night with his computer, presumably one would argue that he was looking at pornography at the time, and while she was in her own bedroom. And she testified about how it effected [sic] her while this was going on, the fear that she had. [¶] There was another incident where the defendant was standing at a sliding glass door while the victim was outside, I believe, on a trampoline. I just found that, it struck me as predatory and taunting of the victim, and it is one of those cases where she's home alone and he's taking advantage of that situation. [¶] So for all of those reasons, I believe that the aggravated term is appropriate." Defense counsel made no objection.

Discussion

We review the trial court's imposition of the upper term for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) Here, the record supports the sentence.

M.M.'s vulnerability stems, in part, from her mother's reluctance to believe her daughter's accusations. M.M. did not confide in her mother because she was afraid of hurting her. Defendant violated a position of trust because he was her stepfather. A single aggravating circumstance is sufficient to support the upper term. (*Black, supra*, 41 Cal.4th at p. 813.) Since the court did not abuse its discretion by imposing the upper term, defense counsel did not perform ineffectively by failing to object.

DISPOSITION

The judgment shall be modified to reflect a conviction of battery on count 4, and the case is remanded to the trial court for resentencing on that count. In all other respects, the judgment is affirmed.

RAYE, P. J.

We concur:

BUTZ, J.

MAURO, J.