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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT JOHN JONES,

Defendant and Appellant.

C075147

(Super. Ct. No. CM037138)

A jury found that 41-year-old Robert John Jones raped, sodomized, and orally copulated his 14-year-old daughter over a two-week period in August 2012 based on the child's testimony, substantial physical evidence that corroborated her testimony, DNA evidence extracted from the crotch of her underwear, and testimony of similar prior acts he perpetrated against her mother.¹ On appeal, defendant challenges the admissibility of

¹ The parties stipulated to defendant's and the victim's birth dates to establish their respective ages at the time of the offenses.

the prior uncharged crimes (Evid. Code, §§ 1101, subd. (b), 1108) and asserts sentencing error. The Attorney General concedes that one enhancement (Health & Saf. Code, § 11380.1) should be modified from three years to one year. We agree the sentence must be modified, but we affirm the judgment in all other respects.

FACTS

The Victim's Background

The victim's mother testified she lived with defendant for approximately five years but was not living with him when their daughter was born. He was very abusive. When she was in the process of moving out of their shared residence, defendant pointed a shotgun at her head and told her he was going to kill her if she did not sign the pink slip to her car. She thought she was going to die. After she moved out and was living in her own apartment, he kidnapped her, took her to the river, yelled at her that he was going to kill her, made her pull down her pants, and checked to see whether she had had sex. He also brutally sodomized her when she was eight months pregnant. Her anus was bleeding and it was very painful. She did not tell the victim who her father was until she demanded to know at age 11, but because she did not want the victim to be scared of her father, she did not tell her what her dad had done to her.

The mother was exceedingly permissive. Perhaps because she had a history of drug abuse herself, she allowed her daughter to smoke marijuana openly in her early teens. She did not insist that she attend school, and testified that she was aware her daughter was going out with her friends and drinking, and "[t]hat was part of why [she] needed her to be watched." She claimed she would restrict her from seeing her friends and take away her cell phone. They moved in with a friend, Kim Reynolds, during the 2011-2012 school year. But unable to support herself and her daughter, they both moved in with defendant in the summer of 2012. Defendant showed the mother his black handgun with a laser sight and a box of pornographic videos he kept in his bedroom.

After a short time, the mother left and abandoned the victim. Shortly thereafter, Reynolds and defendant began a sexual relationship.

According to his friends, defendant attempted to discipline the victim without much success. A friend of defendant testified that the victim smoked marijuana “a lot of the time.” She ran away from home and defendant grounded her. He took away her cell phone as well. She used defendant’s phone to try to contact her mother, but she could not reach her.

The Victim’s Testimony

The victim gave a grueling account of what defendant did to her over a two-week period in August 2012. It began on or about August 5, when defendant gave her what he called “fuck dope,” otherwise known as methamphetamine, which he kept in the drawer next to his bed. Inquiring about her familiarity with oral sex, he asked her if she had been “eaten out.” He showed her a pornographic movie in his bedroom. He took off her bottom clothes and licked her vagina. Then he had intercourse with her.

The victim was unable to differentiate all of the incidents of sexual abuse that followed. Suffice it to say, defendant forced her to “suck his dick” on several occasions, and he put his penis in her vagina on other occasions. Usually, he played a pornographic movie before engaging in sex.

Apparently frustrated that she was menstruating, defendant accused the victim of putting glass into her vagina so she would bleed. He licked her anus before sodomizing her. She described how horrible it felt. She also described how he gave her “hickies” by kissing her neck and chest.

The victim explained to the jury that defendant pointed his gun at her head and threatened to kill her and others if she told anyone what he was doing. He also threatened to use power tools to chop her up into little pieces. He demanded that she stay in close proximity to him. In fact, although she had her own room and bathroom, he made her sleep in his room and shower with him. She identified her razor, shampoo, soaps, and

conditioner from a photograph shown to her at trial and testified they were in defendant's bathroom.

According to the victim, defendant's mood was "[I]like insane." He exhibited paranoid behavior, which included turning off all the lights and walking around the house looking out the windows while carrying the gun. The detectives found a night vision scope in the kitchen and two sets of binoculars in another room.

On August 22 the victim, believing her father had gone into the backyard, stuffed some clothes into a backpack, grabbed the SIM (subscriber identity module) card for her cell phone, and ran out the front door. She called Carrie Peterson, a woman she had befriended at her dad's house. Peterson in turn called Kim Reynolds, defendant's then paramour. The victim told both women what her father had done to her, but neither called the police. Peterson took the victim to a friend's house, where she showered. A male high school friend of defendant came over and the victim told him about the sexual assaults as well. The friend told defendant right away about the victim's allegations. The police were not called until late the following day.

Physical Evidence

The sexual assault nurse who examined the victim collected her clothing and turned it over to law enforcement. The nurse did not find any physical injury to the victim's anus; although her findings were consistent with the victim's testimony, she was unable to prove or disprove a sexual assault.

A criminalist with the Department of Justice collected a red blanket from defendant's bedroom and detected both blood and semen on the blanket. There was no semen on any swab from the sexual assault examination, or on the tampon that had been removed during the examination. A DNA expert testified that the body fluid sample collected from the victim's underwear contained a mixture of DNA consistent with two people, defendant and the victim.

An investigator with the district attorney's office obtained a search warrant for defendant's house. He found hydrocodone and methamphetamine in defendant's bedroom, a glass device used for smoking methamphetamine inside the toilet in defendant's bathroom, and Eternity cologne bottles in the living room and in defendant's bathroom. He found a pornographic video in a DVD player in the same bedroom and another pornographic video behind defendant's entertainment center. Although no guns were found, the investigator found two gun-cleaning kits.

The Defense

The defense attacked the victim's credibility and disputed her account of the opportunity to commit the charged offenses. Defense counsel argued that the victim was a liar who told a "whopper." The defense theory was that the victim fabricated the charges because her father was too strict and she wanted her freedom. The victim's mother had poisoned her attitude toward her father by telling her how her father had abused the mother during their relationship. The defense also maintained the victim utilized other details of abuse of the mother by another boyfriend, including the use of a gun.

Several of defendant's friends testified on his behalf. Collectively they presented a portrait of a gregarious and generous man with an open-door policy to all. As a sprint car driver, he worked on race cars in his garage with the help of many of his friends, who dropped in on a daily basis. All of them testified that the victim behaved normally during the two weeks she was allegedly being raped. Nothing appeared to be amiss, and she never acted like she was afraid. She never asked any of them for help. Kim Reynolds by then was visiting on a daily basis and testified she spent nearly every night with defendant in his bed. People were always coming and going from the house at unpredictable times and without notice.

Verdicts and Sentencing

The jury found defendant guilty of forcible rape of a child 14 and older (Pen. Code, § 261, subd. (a)(2)), forcible oral copulation of a child 14 or older (Pen. Code, § 288a, subd. (c)(2)(C)), forcible sodomy of a child 14 or older (Pen. Code, § 286, subd. (c)(2)(C)), dissuading a witness by force or threat (Pen. Code, § 136.1, subd. (c)(1)), assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)), furnishing methamphetamine to a minor (Health & Saf. Code, § 11380, subd. (a)), possessing hydrocodone (Health & Saf. Code, § 11350, subd. (a)), possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)), lewd act upon a child (Pen. Code, § 288, subd. (c)(1)), and possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)). The jury also found true enhancing allegations including the use of force, the personal use of a nine-millimeter handgun, and that the minor was at least four years younger than defendant. The trial court sentenced defendant to state prison for a term of 91 years 8 months.

DISCUSSION

I

Admissibility of Prior Uncharged Misconduct

In motions in limine, the prosecution sought to introduce seven incidents of prior uncharged misconduct against the victim's mother and four incidents against a former girlfriend. The trial court ruled that three of the episodes against the victim's mother and two episodes against the girlfriend were admissible. The girlfriend would testify that on one occasion defendant stabbed her with a knife and kept her in the house overnight so she could not obtain medical treatment and, on another occasion, took her to the river and choked her. But after the prosecutor asked questions about one of the episodes involving the victim's mother that the trial court had proscribed, the court ruled the episodes involving the former girlfriend would no longer be admitted.

Defendant challenges the admissibility of the three episodes involving the victim's mother, one of which was admitted under Evidence Code section 1108 and two of which were admitted under Evidence Code section 1101, subdivision (b). Under either section, we review the trial court's assessment of the admissibility of uncharged offenses for an abuse of discretion. (*People v. Walker* (2006) 139 Cal.App.4th 782, 794 (*Walker*).

Evidence Code section 1101, subdivision (a) "prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*)). But Evidence Code sections 1101, subdivision (b) and 1108 create far-ranging exceptions to the general rule of inadmissibility. (*People v. Falsetta* (1999) 21 Cal.4th 903, 914.) Whereas section 1101, subdivision (b) allows evidence to prove identity, common plan, or intent if the prior uncharged acts are sufficiently similar to the charged crime (*People v. King* (2010) 183 Cal.App.4th 1281, 1300), section 1108 allows evidence of past sexual misconduct to prove propensity to commit the charged sexual offense (*Walker, supra*, 139 Cal.App.4th at pp. 796-797). "[S]ection 1108 was intended in sex offense cases to relax the evidentiary restraints section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility. In this regard, section 1108 implicitly abrogates prior decisions of this court indicating that 'propensity' evidence is per se unduly prejudicial to the defense." (*Falsetta, supra*, 21 Cal.4th at p. 911.)

"Without doubt, evidence a defendant committed an offense on a separate occasion is inherently prejudicial. [Citations.] But Evidence Code section 352 requires the exclusion of evidence only when its probative value is *substantially* outweighed by its prejudicial effect." (*People v. Tran* (2011) 51 Cal.4th 1040, 1047.) "The prejudice that section 352 " 'is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the

statute uses the word in its etymological sense of “prejudging” a person or cause on the basis of extraneous factors. [Citation.]’ [Citation.]” ’ ” (*People v. Doolin* (2009) 45 Cal.4th 390, 439.)

Admission of Evidence Pursuant to Section 1108

The victim’s mother testified that defendant forcibly sodomized her in the backseat of a Bronco when she was eight months pregnant. The sex act was very painful. Defendant argues the evidence was substantially more prejudicial than probative because it occurred 14 years earlier, was perpetrated against a woman with whom he was in a long-term relationship, and was highly inflammatory. In short, defendant contends the prior act was not sufficiently similar to the charged offense involving his 14-year-old daughter to justify its admission. As mentioned, we review the trial court’s ruling for an abuse of discretion.

Both victims were young and particularly vulnerable. The victim’s mother was 24 years old, 8 months pregnant, and confined in the backseat of the Bronco when defendant sodomized her. The victim was only 14 and subject to her father’s control. Because he had threatened both of them with a gun and physical violence, both were too afraid to resist. We cannot say the trial court abused its discretion in finding the two offenses sufficiently similar to merit admission of the prior act of sodomy.

Nor can we say the act was too remote as a matter of law. Defendant preyed on his young and defenseless family members when afforded the opportunity, and time did not tame his appetite. Thus, the evidence was not so remote as to make the evidence stale. (See *People v. Hernandez* (2011) 200 Cal.App.4th 953, 968 and cited cases therein [discussing 20-, 30- & 40-year gaps]; *People v. Harris* (1998) 60 Cal.App.4th 727, 741 [23 years].)

Both the charged and uncharged acts of sodomy are highly inflammatory. It is true, as defendant alleges, that forcing an eight-months-pregnant woman to painful sodomy risks inflaming a jury. But the charged offense, that a father would sodomize his

own young daughter, is no less inflammatory. Indeed, as the court wrote in *People v. Robertson* (2012) 208 Cal.App.4th 965 (*Robertson*), defendant's conduct toward both women was " 'depraved and sickening' " (*id.* at p. 993).

But defendant insists the prejudicial impact so outweighed the probative value of the prior misconduct as to deprive him of due process. Not so. The probative value of the propensity evidence was significant. Evidence that a man who would force his penis into the anus of the mother of his child when she was close to giving birth and cause her considerable pain logically has a propensity to sodomize another vulnerable victim, his daughter as she came of age. The evidence certainly had the potential to inflame the jury, but given the significant probative value it contributed, we find no deprivation of due process. (*Robertson, supra*, 208 Cal.App.4th at pp. 994-995.)

Defendant also asserts that admission of the evidence under Evidence Code section 1108 violated his constitutional rights to due process and equal protection. As defendant concedes, section 1108 has withstood both due process and equal protection challenges. (*Robertson, supra*, 208 Cal.App.4th at pp. 994-995.) He raises the claim to preserve it for federal review and invites us to reconsider the constitutional issues in light of *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, reversed on other grounds in *Woodford v. Garceau* (2003) 538 U.S. 202 [155 L.Ed.2d 363].) We decline the invitation in light of binding authority from our Supreme Court.

Admission of Evidence Pursuant to Evidence Code Section 1101, Subdivision (b)

Evidence Code section 1101, subdivision (b) is not as forgiving as Evidence Code section 1108. A section 1101, subdivision (b) analysis requires a much more nuanced consideration of the purpose for which the prior uncharged misconduct is offered, mindful of the general proscription, not applicable to section 1108, that the prior uncharged misconduct cannot be introduced merely to show propensity. Recognizing this fundamental distinction, defendant makes the forceful argument that the victim's

mother should not have been allowed to testify to two prior acts of violence because they were not relevant to the intent necessary to commit the charged sexual crimes.

If the prior acts had been admitted exclusively to prove rape, sodomy, and oral copulation, defendant might have a point. After all, the Supreme Court faced a similar scenario in *Ewoldt* and held that the evidence of prior misconduct was not admissible to prove intent. The court explained, “[T]he evidence of defendant’s uncharged misconduct in the present case is inadmissible for the purpose of proving defendant’s intent as to the charges of committing lewd acts. Evidence of intent is relevant to establish that, assuming the defendant committed the alleged conduct, he or she harbored the requisite intent. In testifying regarding the charges of lewd conduct, Jennifer stated that defendant repeatedly molested her, fondling her breasts and genitals and forcing her to touch his penis. If defendant engaged in this conduct, his intent in doing so could not reasonably be disputed. [Citations.] As to these charges, the prejudicial effect of admitting evidence of similar uncharged acts, therefore, would outweigh the probative value of such evidence *to prove intent.*” (*Ewoldt, supra*, 7 Cal.4th at p. 406.)²

Defendant asserts that intent was not at issue and therefore evidence of prior misconduct was irrelevant. We need not focus on the intent to commit the elements of the various sex crimes, or whether they are specific or general intent crimes, because defendant was specifically charged with using force to accomplish his objectives. As the Attorney General characterizes it, defendant “sought to coerce and subjugate [the victim] into being his daily sex slave.” Similarly, the trial court referred to defendant’s intent to dominate his partner and daughter and to carry through on his threats.

² *Ewoldt, supra*, 7 Cal.4th 380 was decided before the Legislature enacted Evidence Code section 1108. (Stats. 1995, ch. 439.) The court therefore did not consider whether the evidence of past sexual misconduct was admissible under the more expansive provisions of section 1108.

The victim's mother testified as to two incidents: (1) an occasion when defendant pulled a gun on her and forced her to sign a pink slip, and (2) when he physically kidnapped her, took her to the river, threatened to bury her out there, and checked to see if she had had sex. While disallowing five other incidents the prosecution sought to introduce into evidence, the court allowed the description of these two because they were offered to prove not that he intended to achieve sexual gratification from the sex acts, but that he intended to dominate his vulnerable victims and thereby force their compliance. The trial court did not abuse its discretion in allowing the testimony, limited to these two examples of defendant's persistent use of force to achieve his objectives. Because there was no abuse of discretion on this ground, we need not consider the Attorney General's alternative theory that the evidence would have been admissible to prove a common plan or scheme.

It also bears noting that defendant's prejudice analysis is misguided. He insists that the prosecution's case rested on the testimony of an incorrigible truant who had been poisoned against him by her mother, who was angry because he had attempted to discipline her, and who had abused drugs, had previous sexual experience, and had no guidance or support from her mother. Beside the fact we find it incredible that a 14 year old would have the sophistication, let alone the motive, to concoct such an elaborate web of lies to put her father in prison for nearly 100 years because he grounded her, there is a mountain of physical evidence to corroborate her testimony.

The victim testified her father made her watch pornography, and there was a pornographic video found in the DVD player in his bedroom. She testified he made her take "fuck dope," and the investigators confiscated methamphetamine from his bedroom. She drew a picture of a gun, including a laser sight, that she said looked like the gun he used and matched the description her mother gave of a gun defendant had shown her after she moved in with him. She testified that he made her shower in his bathroom. Her pink razor, shampoo, and soap were found in his shower. She testified she was on her period

the last time he made her have sex. The criminalist described blood and semen on a blanket taken off his bed, and the sexual assault nurse collected a tampon from the victim during her examination. And upon fleeing, she gave a consistent accounting of the abuse to several adults, including law enforcement and the sexual assault nurse.

We agree with the Attorney General that the most damning physical evidence of all was the DNA evidence that defendant's sperm was on the crotch of the victim's underwear.

Thus, we disagree with defendant that the admission of the prior uncharged conduct was prejudicial. Even if, as he argues, the trial court had abused its discretion, the evidence of guilt was overwhelming. Had there been any error, and we have concluded there was not, it was harmless beyond a reasonable doubt.

II

Sentencing

Age Used to Impose the Upper Term

Despite the fact he stipulated to the victim's age at trial and the trial court read the stipulation to the jury, defendant asserts he was denied due process because the judge imposed the upper term on five counts based on the stipulation and not on any specific jury findings. The information charged in several counts that defendant committed the specified sex crimes against a minor "over 14 years" (counts 3, 4, 5, 7, 8) or "14 or older" (count 6). The verdicts signed by the jury foreperson include this same language. Although several instructions alluded to the victim's age, none of the instructions required the jury to make a factual finding as to the victim's age before returning a guilty verdict, and no specific findings were made.

According to the Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*), a criminal defendant has the constitutional right to have a jury determine, beyond a reasonable doubt, any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum" (*id.* at

p. 490). The deficiency, in defendant's view, constitutes a violation of due process and requires us to reverse the judgment as to those counts in which age was used to aggravate his sentence.

Defendant overlooks a basic principle that undergirds *Apprendi* and its progeny. The constitutional mischief these cases were designed to prevent and remediate is the imposition of an aggravated sentence based on a judge's determination of disputed facts, rather than a jury's. *Apprendi* and its progeny "are rooted in the historic jury function—determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." (*Oregon v. Ice* (2009) 555 U.S. 160, 163 [172 L.Ed.2d 517].) The Supreme Court "has not extended the *Apprendi* . . . line of decisions beyond the offense-specific context that supplied the historic grounding for the decisions." (555 U.S. at p. 163.)

When a defendant stipulates to a fact, there is no dispute and the judge does no violence to the due process clause by adhering to the defendant's version of the facts and sentencing him accordingly. In other words, the judge has not usurped the role of the jury, because once a defendant stipulates to a fact, the jury has no further role.

"Aggravating factors admitted by the defendant need not be tried to a jury." (*People v. Landaverde* (2007) 157 Cal.App.4th 28, 34.) By stipulating, the defendant has removed the factual issue and can no longer assert that the judge, by honoring the stipulation, has transgressed his right to a jury determination. "The United States Constitution does not require a jury trial as to *all* aggravating factors cited by the sentencing court; it is sufficient that one factor has been admitted." (*Landaverde*, at p. 34.)

In *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), the California Supreme Court expressly recognized the same exception to the *Apprendi* rule. The court wrote: "The United States Supreme Court has recognized two exceptions to a defendant's Sixth Amendment right to a jury trial on an aggravating fact that renders him or her eligible for a sentence above the statutory maximum. First, a fact admitted by the defendant may be

used to increase his or her sentence beyond the maximum authorized by the jury's verdict. (*Blakely* [v. *Washington* (2004)] 542 U.S. [296,] 303.) Second, the right to jury trial and the requirement of proof beyond a reasonable doubt do not apply to the aggravating fact of a prior conviction." (*Sandoval*, at pp. 836-837.)

Similarly, in *People v. Munoz* (2007) 155 Cal.App.4th 160, our now Chief Justice Cantil-Sakauye concluded, "Thus, throughout the sentencing proceedings, defendant effectively 'stipulate[d] to the relevant facts' necessary to impose the upper term, thereby waiving his right to have a jury trial and proof beyond a reasonable doubt on those facts. . . . [D]efendant cannot now complain of error under *Blakely* and *Apprendi*." (*Munoz*, at p. 168.)

In his reply brief, defendant acknowledges *Sandoval* but insists that a factual stipulation by defense counsel does not include sufficient procedural protections to invoke the exception for a fact admitted by defendant. To satisfy *Apprendi*, defendant asserts, his factual stipulation must have been entered pursuant to proceedings with substantial procedural safeguards of their own. He relies on *People v. Cross* (2015) 61 Cal.4th 164 (*Cross*), a case in which the trial court failed to advise the defendant of the full penal effect of a finding of the truth of an allegation of prior convictions and failed to obtain a waiver as required by *In re Yurko* (1974) 10 Cal.3d 857, 865 (*Yurko*).

Cross is inapposite. The case does not involve the question before us, that is, whether defendant's right to have a jury decide disputed factual issues has been violated. Rather, the issue in *Cross* involves a defendant's right to be fully informed of the full penal consequences that follow from a prior conviction. Tracing the venerable precedent in which a criminal defendant is entitled to be fully informed of his rights before entering a guilty plea (*In re Tahl* (1969) 1 Cal.3d 122, 130-133) to the analogous situation in which he is asked to stipulate to a prior conviction (*Yurko, supra*, 10 Cal.3d at p. 863), the Supreme Court set aside the defendant's sentence because he was not advised of the consequences of entering the stipulation and did not knowingly waive those rights

(*Cross, supra*, 61 Cal.4th at pp. 179-180). The court did not consider or cite to *Apprendi* or the principles upon which it was decided. Thus the case is not controlling on the issue before us.³

Even if we assume the jury should have determined whether the victim was 14 years of age or older, the failure to obtain such a finding is not structural error and is subject to harmless error analysis. (*Washington v. Recuenco* (2006) 548 U.S. 212, 221-222 [165 L.Ed.2d 466]; *Sandoval, supra*, 41 Cal.4th at p. 839.) The information charged that defendant committed the specified sex crimes against a minor victim “over 14 years” or “14 or older.” The verdict forms contain the same language. Both the prosecutor and defense counsel acknowledged the victim was 14 at the time of the offenses. And, of course, defendant stipulated as to the victim’s birth date. Thus, had the issue been submitted to the jurors, we conclude beyond a reasonable doubt that they would have found the victim was 14 at the time of the offenses. If there was error, it was clearly harmless.

Modification of the Enhancement

Defendant was convicted of count 11, furnishing methamphetamine to a minor, which carries a sentence of three, six, or nine years in state prison, and the jury found true the allegation that the minor was at least four years younger than defendant, which subjected defendant to an enhancement of one, two, or three years. After designating count 11 as a subordinate term, the trial court imposed one-third of the nine-year term but nonetheless imposed the full three-year upper term for the enhancement. The parties

³ Defendant does not argue that he should have been advised of the penal consequences of his stipulation as to the victim’s age under the rationale of *Yurko*. Rather, he attempts to graft the *Yurko* rationale onto any fact admitted by the defendant under *Apprendi*. He does not cite any authority for this vast expansion of *Apprendi*, and because we hereafter conclude any error was harmless beyond a reasonable doubt, we need not consider it further here.

agree the court erred; the sentence for the enhancement should have been one-third the upper term of three years, or one year. (*People v. Hill* (2004) 119 Cal.App.4th 85.) The judgment must be modified to correct the error.

DISPOSITION

The judgment is modified to reduce the enhancement on count 11 to one year. As modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment reflecting the modification and shall forward a certified copy thereof to the Department of Corrections and Rehabilitation.

RAYE, P. J.

We concur:

HULL, J.

BUTZ, J.