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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO LUCIANO TAPIA,

Defendant and Appellant.

E052250

(Super.Ct.No. RIF150883)

**OPINION**

APPEAL from the Superior Court of Riverside County. H.A. Staley, Judge.

(Retired judge of the Kern Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Kristin A. Erickson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Gerardo Luciano Tapia repeatedly molested his stepdaughter C. from the time she was 9 years old until she was 14 years old. Defendant was found guilty of one count of attempted aggravated sexual assault and seven counts of lewd and lascivious acts with a minor under the age of 14 years through the use of force, duress, menace, or violence.

Defendant now claims on appeal as follows:

1. His due process rights to notice of the charges was violated because new and distinct crimes were presented at trial that were not presented at the preliminary hearing.
2. The trial court abused its discretion by imposing the upper term on four of the counts based on improper aggravating factors.
3. The trial court's imposition of the upper term on four counts based on several aggravating factors that were not presented to the jury violated his federal constitutional rights.
4. The Penal Code section 290.3 fine must be reduced because imposition of the current fine violates ex post facto laws.

We agree that the fine imposed under Penal Code section 290.3 must be reduced. We agree with the People that the trial court erroneously failed to impose other fines. We will order the judgment modified to correct those errors. We find no other error.

## I

### PROCEDURAL BACKGROUND

Defendant was found guilty by a Riverside County Superior Court jury in count 6 with attempted aggravated assault by sexual intercourse of a child under the age of 14 years (Penal Code, §§ 664/269, subd. (a)(1))<sup>1</sup> and seven counts of committing lewd and lascivious acts with a child under the age of 14 years through the use of force, violence, duress, menace or fear (§ 288, subd. (b)(1)).<sup>2</sup>

Defendant was sentenced to the upper term of eight years on four of the counts of forcible lewd acts, the midterm of six years on three of the counts of forcible lewd acts, and seven years on the aggravated assault. All of the sentences were ordered to run consecutively. He received a total state prison sentence of 57 years.

## II

### FACTUAL BACKGROUND

#### A. *People's Case-in-Chief*

The victim, C., was born in January 1995, and was 15 years old at the time of trial. Defendant was her stepfather. He began living with C. when she was five or six years

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Defendant was found not guilty of several charges alleged to have occurred in Orange County, which were counts 1 through 5.

old. Defendant began touching her inappropriately when she was about six years old.<sup>3</sup> He continued touching her until she reported the abuse to police.

When C. was beginning fourth grade (when she was nine or 10 years old), she, her mother, her brother, and defendant moved into a house located in Moreno Valley. Once they moved to Moreno Valley, defendant tried to insert his penis in her vagina more than 50 times. This occurred when she was between the ages of 9 and 14. Part of his penis would enter her vagina. She could not recall how far it would go in.

Defendant also rubbed his penis on her buttocks more than 200 times. C. first claimed that defendant would do this weekly, then she said daily, and then she said two to three times per day. When she entered middle school, he made her put her mouth on his penis. He also put his mouth on her vagina. Defendant continually committed all of these acts from the time she was 9 years old until she was 14 years old.

Sometimes when these incidents happened, the mother would be home and in the shower. On other occasions, the mother would be gone. C.'s younger brother would be

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<sup>3</sup> Defendant was charged in the first five counts of the information with crimes occurring in Orange County, but the jury found him not guilty of those charges. We briefly outline the facts of these charges to give context to C.'s remaining testimony. When she was six years old, defendant rubbed his penis on her "butt" while she had her clothes on. This continued for at least one year on more than 50 occasions. Defendant also made her put his penis in her mouth. C.'s family moved to another location in Santa Ana. Defendant touched his bare penis on her bare butt area at the new location. Defendant would have her lie down on her stomach in a bedroom in the apartment. He would get on top of her and rub his penis between her buttocks. He would do this for several minutes until he ejaculated. She estimated he did this over 100 times. She recalled him also rubbing his penis on her vagina while he was on top of her but not entering her vagina. She also recalled that he touched his mouth to her vagina five or six times.

outside playing. Defendant also would take her to his work and do these things in the bathroom at work.

C. told defendant all of the time that she did not want to do these things. She told him it stressed her out, and she wanted him to stop. Defendant kept telling her each time that it would be the last time. C. felt like she was “nothing” and that she was just a “piece of trash.” She did not want to tell anyone because she was concerned about what would happen to her family. Defendant repeatedly told her that if she told her mother she would be ruining the family. He also told her that it was okay and that everyone was doing it.

At one point when C. was in seventh grade, child protective services came to their home, but she denied that she was being sexually assaulted. She denied the abuse because she was afraid of what would happen to her family. She thought it would make things worse. C. also lied to a police officer who came to the house and asked about her being abused. C. finally disclosed the abuse when a friend’s mother told her that she had been raped by her grandfather.

C. admitted that in the month preceding defendant’s arrest, she was sneaking out of the house in the middle of the night to be with her boyfriend. C. did not come back one night and stayed with her boyfriend. Defendant came to get her, but she did not want to go with him. Instead, she went to the police and reported what defendant had been doing to her.

C. had never told her mother what was going on because she felt there was no point in telling her. She did not want her mother to come in the room and see what

defendant was doing to her. She claimed that defendant would have just blamed it on her and said that she was crazy and making things up.

C. stated that defendant would block her when she would try to leave the room “most of the time.” He would hold her down and grab her with force. She would not just sit and let him molest her. When C. tried to leave the room, he would grab her arms. Defendant held her down when he tried to push his penis in her vagina. He had grabbed her arms or stopped her from leaving more than 10 times. Defendant would stop assaulting her when she started crying.

Robert Heard was employed by the San Bernardino County Sheriff’s Department as a polygraph examiner. A polygraph test was not administered to defendant. However, defendant had agreed to take a test, and Heard asked him some preliminary questions in anticipation that a test might be performed. The test was not performed because defendant made admissions during this pretest.

During the interview with Heard, defendant initially denied any inappropriate touching of C. Defendant was then asked how many times his penis touched her vagina. He responded, “I don’t know truthfully.” He also said he could not remember but denied it was five, 10, or 15 times.

Defendant then admitted that it happened one time. He acknowledged that C. had problems. He then stated that he touched C.’s vagina with his penis three times. He stated he just touched her and did not insert his penis in her vagina. The touching occurred in the bedroom on the floor. He would put his penis on her buttocks and would

ejaculate, but he would get off her before he ejaculated. Defendant did not want his family to know and that he should probably just go to jail. He felt bad about what he had done.

Defendant stated the first time he touched C. was the prior year. He explained that C. got out of the shower, and no one else was home. Defendant started touching C.'s back. He claimed that she wanted to be in the situation too because she did not tell him no. C. told him it was better from "behind." She pulled her own pants down. They were on the floor. Defendant said that they did it on the floor because "Never, it was never profound sex. Never, never anything." He took off his pants. Defendant did not insert his penis in her but rather just rubbed it on her buttocks. He never engaged in more than this activity. He never put his penis in her vagina.

Defendant claimed this only happened in Moreno Valley. He claimed that while the mother was in the shower, C. would take defendant to an empty room in the house. He then admitted that these events occurred about seven times.

Defendant wanted to grab C. during these incidents, but she would not let him. He claimed that C. would squeeze her buttocks together so he could not enter her. He felt that she was experimenting. All seven times he would get up and ejaculate in the bathroom. Defendant did these things because of temptation.

B. *Defense*

Defendant testified on his own behalf, as follows.

Defendant married C.'s mother in 2001; he was 27 years old at the time. He denied he ever sexually abused C. when they lived in Santa Ana. When the family moved to Moreno Valley, defendant rented rooms to four men. Defendant and the mother also had a seven-year-old boy. Defendant never sexually abused C. while they lived in Moreno Valley either in the home or at work.

Defendant had suspected that C. was sneaking out of the house at night. She had snuck out and not come home one night. Defendant found her at the mall. C. looked like she was drunk or on drugs. A woman with C. promised to bring her home, but she never did. The woman later called defendant from the police station.

Defendant claimed he admitted to touching C. seven times because Heard offered to help him by getting him into a family program. Defendant had never really touched her.

The mother testified that C. never complained about anyone touching her inappropriately. The mother never saw any indication on C.'s body that she was being abused. The mother confirmed that there were many people who lived in the Moreno Valley house. C. got caught sneaking out of the house, and that is when she told the police about the abuse. This was the first time the mother found out about the abuse. The mother insisted that the door to her bedroom was never closed.

### III

#### NOTICE OF THE CHARGES

Although defendant's argument in the opening brief was not entirely clear, based on the reply brief, it appears the crux of his contention is that since C. testified to sexual acts through the use of force for the first time at trial, he did not have adequate notice of the charges against him. He claims that his right to notice of the charges was infringed because C. testified to acts of molestation involving duress at the preliminary hearing. Acts by use of force presented at trial were new and separate crimes.

#### A. *Additional Factual Background*

##### 1. *Complaint*

Defendant does not appear to be arguing that the information filed by the People was improper or not supported by sufficient evidence, and therefore only a brief recitation of the history of the filing of the complaint and information is required.<sup>4</sup> An amended felony complaint was filed on or about December 11, 2009, alleging nine counts. The first two counts alleged lewd and lascivious acts occurring in Orange County. Count 1 alleged lewd and lascivious act against a minor under the age of 14 (§ 288, subd. (a)) between 2003 and 2008, and count 2 also alleged a violation of section

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<sup>4</sup> Understandably, the People appear to have misconstrued defendant's argument to be that the information filed was erroneous. However, defendant has clarified that the sole issue he is raising is that C. did not testify to sexual acts committed by force at the preliminary hearing, and therefore he did not have adequate notice of these charges.

288, subdivision (a) occurring between 2000 and 2003. Counts 3, 4, and 5 alleged that defendant engaged in sexual intercourse or sodomy with a child 10 years of age or younger (§ 288.7), between January 2003 and January 2005 in Riverside. Counts 6, 7, and 8 alleged that defendant committed oral copulation on a minor under the age of 14 (§ 288a, subd. (c)(1)) occurring in Riverside between 2000 and 2009. Finally, in count 9, defendant was charged with having sexual intercourse with C. through the use of force or violence (§ 261, subd. (a)(2)) in March 2009 in Riverside.

## 2. *Preliminary hearing*

C. testified at the preliminary hearing that they moved to Moreno Valley when she was just starting fifth grade. She could not recall the first thing that occurred in Moreno Valley, but defendant rubbed his penis on her buttocks every week while they lived there. On occasion, he would try to put his penis in her vagina. He would try to insert his penis in her anus and it would hurt, so he would stop. Defendant would rub his penis on her buttocks until he ejaculated. He would ejaculate on his hand, but on occasion it got on her. She recalled this happening over 100 times.

C. was asked if she tried to get away from defendant. She responded, “Yes. I would tell him to stop, but he said it was natural, that everybody did this, that . . . we weren’t doing nothing wrong.” Defendant would not stop until she cried. C. explained, “I could fight physically back, but it wouldn’t do much, because . . . he’s stronger than me, so it was common sense.” She was afraid he might hurt her.

When defendant would try to insert his penis in her anus, she would try to “scurry away” or crawl away but he would just get on top of her. He tried to push his penis in her vagina but it came out. He was only able to insert “halfway.” It hurt her. On one occasion, C. ran to the restroom and locked the door.

A few times defendant rubbed his penis on her vagina until he ejaculated when she was 12 or 13 years of age. Defendant told C. that he was in love with her and that the mother would not understand. He rubbed his penis on her buttocks over 100 times.

Defendant did not threaten her but told her if she told anyone she would ruin the family. He also put his mouth on her vagina 10 to 15 times while they were in Moreno Valley.

The magistrate concluded that the evidence supported the nine counts alleged in the complaint. The magistrate referred to evidence that she had asked him to stop, she had squeezed her buttocks, and she had cried, which all showed fear.

After the preliminary hearing, the People filed its information on December 23, 2009, and then an amended information on May 3, 2010.<sup>5</sup> Counts 6 through 13 charged him with crimes committed in Riverside County between 2004 and 2009. In count 6, he was charged with rape of minor under the age of 14 years (§ 269, subd. (a)(1)). In counts 7 through 13, he was charged with committing lewd and lascivious acts upon a minor under the age of 14 with the use of force, duress, or violence (§ 288, subd. (b)(1)).

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<sup>5</sup> The original information inaccurately stated that the crimes in counts 1 through 5 were committed in the “County of Santa Ana” but contained the same charges.

During cross-examination at trial, defense counsel asked C. if defendant had ever prevented her from leaving the room during these incidents. C. testified that defendant would block the door, and she could not get out because he would grab her arms. When asked how many times that defendant grabbed her arms or tried to stop her, she initially stated, “It was most of the time.” She then was asked if she could quantify the times and she agreed it was more than 10 times. She also testified that he held her down when he tried pushing his penis in her vagina.

As set forth, *ante*, defendant was found not guilty of the charges in Orange County. On count 6, the jury found defendant guilty of the lesser offense of attempted sexual intercourse (§§ 664/269, subd. (A)(1)). Defendant was found guilty of counts 7 through 13 as charged.

#### B. *Analysis*

“Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them. [Citations.]” (*People v. Seaton* (2001) 26 Cal.4th 598, 640.) “Under modern pleading procedures, notice of the particular circumstances of an alleged crime is provided by the evidence presented to the committing magistrate at the preliminary examination, not by a factually detailed information. [Citation.]” (*People v. Jennings* (1991) 53 Cal.3d 334, 358.) “[T]he information has a ‘limited role’ of informing defendant of the kinds and number of offenses; ‘the time, place, and circumstances of charged offenses are left to the

preliminary hearing transcript,’ which represents ‘the touchstone of due process notice to a defendant.’ [Citations.]” (*People v. Jones* (1990) 51 Cal.3d 294, 312.) “‘Where . . . the particulars are *not* shown by the preliminary hearing transcript, the defendant is *not* on notice in such a way that he has the opportunity to prepare a meaningful defense.’” (*People v. Graff* (2009) 170 Cal.App.4th 345, 366.)

“[A]ppellate courts are compelled to reverse convictions where substantial evidence was presented at trial that did not correspond to the charges established at the preliminary hearing. [Citations.]” (*People v. Graff, supra*, 170 Cal.App.4th at p. 362.)

This case is similar to *People v. Gil* (1992) 3 Cal.App.4th 653. In *Gil*, the defendant was convicted of five counts of forcible lewd conduct on two girls under the age of 14. At trial, one girl testified to incidents involving touching of her breasts and the defendant putting his penis in her vagina, and the other girl testified to acts of touching her breasts, putting his finger in her vagina, and putting his penis in her vagina. (*Id.* at pp. 655-657.) The defendant testified that he had not committed any of the offenses. On appeal, defendant claimed that he was denied notice of the charges because the evidence adduced at trial involved offenses not shown at the preliminary hearing. He claims the inconsistencies regarding the dates of offenses and other changes to testimony at trial rendered the charges different than those proved at the preliminary hearing. (*Id.* at p. 657-658.)

In rejecting the claim, the court held, “[T]his is not a case of a trial court lacking jurisdiction to proceed because an information charges offenses not shown by the

evidence at the preliminary hearing. The evidence at the preliminary hearing clearly supported five counts of lewd conduct . . . .” (*People v. Gil, supra*, 3 Cal.App.4th at p. 658.) It noted, “Inconsistencies and contradictions during the course of thorough cross-examination of child witnesses at trial is not persuasive of appellant’s contention that the incidents at trial were completely different from the incidents described at the preliminary hearing. The inconsistencies went to the weight and credibility of the testimony, not to the question of notice claimed by appellant. [Citation.]” (*Id.* at p. 659.) Further, the court found that even if there were inconsistencies, “it is unlikely appellant’s ability to defend was prejudiced; his defense was not a specific alibi but a denial that molestations occurred at all. [Citations.]” (*Ibid.*)

Defendant here presumes that the numerous acts to which C. testified at the preliminary hearing were not the acts to which she testified at trial. C. described numerous acts occurring while she lived in Moreno Valley at the preliminary hearing, including defendant rubbing his penis on her buttocks and vagina, trying to put his penis in her vagina, and trying to put his penis in her anus. There is nothing in the record that supports that these incidents were different than the ones involving defendant grabbing her and holding her down.

Moreover, she testified that he told her she would ruin the family if she told anyone, which defendant admits supported the element of duress. Hence, the preliminary hearing supports the seven counts of forcible lewd conduct under section 288,

subdivision (b)(1). Defendant was clearly on notice of the charges of forcible lewd conduct after both the preliminary hearing and the filing of the information.

It is true that C. did not directly state that defendant blocked her way or held her down during these incidents at the preliminary hearing. However, she did state at the preliminary hearing that she asked defendant to stop. She also stated, “I could fight physically back, but it wouldn’t do much, because . . . he’s stronger than me, so it was common sense.” She was afraid he might hurt her. Nonetheless, this testimony, as in *Gil*, constituted an inconsistency with her preliminary hearing testimony rather than new charges. There is nothing to support defendant’s claim that these were new or different incidents.

This case differs from *People v. Burnett* (1999) 71 Cal.App.4th 151, relied upon by defendant. In *Burnett*, the defendant received ineffective assistance of counsel due to counsel failing to object to one of two possible theories that the prosecution presented at trial to support his felon in possession of a firearm charge. The alternative theory of possession of a different gun than that presented at the preliminary hearing was a new charge. (*Id.* at pp. 164-165.) The court concluded, “There can be no question that the evidence in this case showed two completely different incidents, involving two separate weapons . . . .” (*Id.* at p. 169.) The court distinguished *Gil*, finding that the preliminary hearing “testimony described an offense entirely separate from and unrelated to the only offense described by the evidence at the preliminary hearing.” (*Burnett*, at p. 172.)

This case also differs from *People v. Graff, supra*, 170 Cal.App.4th 345, in that the charges in that case were added at the time of trial, and the magistrate found the evidence of those charges insufficient at the time of the preliminary hearing. (*Id.* at p. 367.)

Here, C. consistently testified at the preliminary hearing that defendant continually molested her between 2004 and 2009, and that each time he either rubbed his penis on her buttocks, tried to put his penis in her vagina, or rubbed his penis on her vagina. C. maintained such testimony at trial, only adding that “most” times he used force by blocking her way or holding her down. She already had testified to duress that supported the forcible lewd conduct. These inconsistencies do not support these were entirely separate or unrelated incidents to the offenses described at the preliminary hearing.

Moreover, defendant has not stated, and it is not apparent, how his right to meaningfully defend against the charges against him was somehow abridged by the fact that C. recalled that the acts involved force in addition to duress. Even if we were to accept defendant’s argument that it is possible the jury only concluded that some of the acts to which C. testified at trial occurred, and those acts were committed by force rather than duress, there is no conceivable argument that this abridged his right to defend against the charges.

Defendant was clearly on notice that he was being charged with committing lewd and lascivious acts through the use of force, duress, menace, or violence. He does not contend that the information would have been presented differently had the preliminary

hearing testimony included force. Defendant defended the charges at trial by claiming that he never inappropriately touched C. either in Orange County or Moreno Valley.

Defendant claims that he is not required to show prejudice. We need not address the issue because *he does* have to show a due process violation by alleging that he did not have adequate notice of the charges.

The prosecutor explained that counts 7 through 12 were “common child molestation charges” involving lewd and lascivious acts through the use of force, duress, menace, or fear. The prosecutor added that when they got to Moreno Valley, the molestations grew from duress to his using physical force to restrain her or blocking her exit. Her feelings of hardship and his position of trust were duress. The character of the new evidence -- that defendant blocked her way or held her down -- is not such that he would defend differently than if the People’s theory was based on duress. Defendant denied engaging in any illegal conduct whatsoever, whether through the use of force or duress. The specific conduct that defendant engaged in was never of any significance at trial.

Based on the foregoing, defendant had adequate notice of the charges against him.

#### IV

#### AGGRAVATED TERM

Defendant makes two claims regarding the imposition of the upper term on counts 10, 11, 12 and 13. First, he claims that the trial court abused its discretion by imposing the upper term on these counts based on improper aggravating factors and failing to

adequately consider mitigating factors. He further contends that his right to a jury trial guaranteed by the federal Constitution was violated by the use of aggravating factors not found true by a jury. He claims that despite the determinate sentencing law (DSL) being amended to not require such a finding, it should not be applied to him.

A. *Additional Factual Background*

At the time of sentencing, the trial court considered a statement by C. It also had read and considered the probation report, which listed the following aggravating factors under the California Rules of Court: rule 4.421 (a)(1) (crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness); rule 4.421(a)(8) (the manner in which the crime was carried out indicates planning, sophistication, or professionalism); rule 4.421(a)(11) (defendant took advantage of a position of trust or confidence); and rule 4.421(b)(1) (the defendant engaged in violent conduct which indicates a serious danger to society). The sole factor in mitigation was that he had no prior record (Cal. Rules Ct, rule 4.423(b)(1)). The trial court noted that it had read the defendant's sentencing brief requesting that the lower term be imposed.

Defendant argued that there was no violence and that C. never resisted. Defendant also scored low on the test regarding recidivism and was not a danger to the community. He had no priors, was employed, and supported his family. He argued that C. claimed she was still a virgin, and there was no physical evidence of abuse.

The trial court ruled, “The Court would find, in aggravation, that this involved the threats of violence or harm. That it was a callous manner in which it was carried out. And due to the repeated nature of it, it indicated planning and sophistication in the manner in which it was carried out.” The trial court imposed consecutive sentences because the actions were all on separate occasions. Further, “[e]ven if this were not the case, the Court would impose consecutive terms, because he violated a position of trust; that he represents a danger to society, as a result of this conduct; and that it was spread out over a large amount of time. This was certainly not a single period of aberrant behavior.”

The trial court then stated, “As to Counts Seven, Eight, and Nine, the Court would sentence him to the mid term of six years. But given, then, having committed those offenses, the Court, in consideration of all the other factors just previously mentioned, Counts Ten, Eleven, Twelve and Thirteen, would sentence him to eight years, a total of 50 years.” He was sentenced to the midterm of seven years on count 6.

B. *Analysis*

We note defendant did not preserve this claim for appeal by objecting to the trial court’s asserted failure to make proper discretionary sentencing choices and taking into account improper aggravating factors. (See *People v. Gonzalez* (2003) 31 Cal.4th 745, 751; *People v. Scott* (1994) 9 Cal.4th 331, 353.) Defendant contends that if his claim is forfeited, he received ineffective assistance of counsel. We review the claim and conclude the trial court did not abuse its discretion.

“Sentencing courts have wide discretion in weighing aggravating and mitigating factors . . . .” (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) “Under the DSL, a trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions. [Citations.] The [trial] court’s discretion to identify aggravating circumstances is otherwise limited only by the requirement that they be ‘reasonably related to the decision being made.’ [Citation.]” (*People v. Sandoval* (2007) 41 Cal.4th 825, 848 (*Sandoval*), fn. omitted.) “In making such sentencing choices, the trial court need only ‘state [its] reasons [citation]; it is not required to identify aggravating and mitigating factors, apply a preponderance of the evidence standard, or specify the ‘ultimate facts’ that ‘justify[ ] the term selected.’ [Citations.] Rather, the court must ‘state in simple language the primary factor or factors that support the exercise of discretion.’ [Citation.]” (*Id.* at pp. 850–851.)

A single factor in aggravation is sufficient to justify the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) The court need not weigh aggravating and mitigating factors, nor state a reason for rejecting a mitigating factor. (*People v. Avalos, supra*, 47 Cal.App.4th at p. 1583.) The sentencing court is only required to engage in an “individualized consideration of the offense, the offender, and the public interest.” (*Sandoval, supra*, 41 Cal.4th at p. 847.) “. . . ‘The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a

particular sentence will not be set aside on review.’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Defendant first objects that his crimes did not involve “great” violence as required by the California Rules of Court, and the trial court improperly relied on the factor that the crimes involved threats of violence or harm. However, under *Sandoval*, the trial court could consider that the crimes involved threats of harm or violence in finding the upper term was proper. Defendant admitted that when he was on top of C., he wanted to grab her. This created a potential for harm. C. also testified that defendant grabbed her arms and held her down. She testified that he threatened her that she would ruin the family if she told anyone and he would only stop if she cried. It was clear that C. was in fear of defendant and was afraid of what would happen to her. Defendant caused C. irreparable harm.

Defendant also claims that the callous nature of the crimes was no more than any other continuous child molestation. We disagree. Defendant was particularly callous in the way that he committed his crimes. Despite members of the family being home, defendant would abuse C. He disclosed during his interview that he knew that she was having problems, but he continued the abuse. Further, the sheer number of times that defendant abused C. showed that he had no regard for her or her well-being. Defendant blamed the abuse on C., claiming that she was wanted to engage in these acts with him. Defendant had no regard for C. and only cared about his own sexual needs.

Finally, as for the planning and sophistication, defendant continually abused C. for at least five years without being caught. Defendant took C. to work with him so that he could molest her. Defendant continually planned to sexually assault C. and constantly planned ways to engage in sexual acts with her.

The aggravating factors were properly considered by the trial court. Moreover, the trial court noted that it had read the probation report, and it can be inferred that it considered the sole mitigating factor.

Even if the trial court erred in relying on one or more of the above contested factors, any error was harmless. “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. Cruz, supra*, 38 Cal.App.4th at pp. 433-434.) We find no such reasonable probability.

In sentencing defendant to consecutive sentences, the trial court stated that even if consecutive sentences were not required because all the offenses occurred at separate times, it would impose consecutive sentences because defendant violated a position of trust and was a danger to society. Defendant had absolutely no regard for C., his own stepdaughter. He repeatedly molested her, lied to her, and lied to others about his actions. He committed heinous acts against C. and then blamed her for tempting him. He clearly violated a position of trust and was a clear danger to C. and society. The trial

court clearly made an individualized sentencing choice well within its discretion. The trial court properly sentenced defendant to the upper term on counts 10 through 13.

As for defendant's second contention -- that his rights to jury trial were violated by the imposition of the upper term without the jury finding such factors to be true -- he acknowledges that the California Supreme Court found differently in *Sandoval, supra*, 41 Cal.4th at pages 852-855.

Defendant's argument is based upon *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Blakely v. Washington* (2004) 542 U.S. 296, [124 S.Ct. 2531, 159 L.Ed.2d 403] and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. [Citations.]" (*Apprendi*, at p. 490.) In *Blakely*, the court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely*, at p. 303, italics omitted.) In *Cunningham*, the court found that under California's determinate sentencing law, as it read at the time, the middle term was the "statutory maximum" for *Apprendi* purposes. (*Cunningham*, at p. 288; see also *Sandoval, supra*, 41 Cal.4th at pp. 852-853.)

Defendant was sentenced on November 5, 2010. In response to the above case law, section 1170, subdivision (b) was amended effective January 1, 2008. (Stats. 2007,

ch. 740, § 1, p. 6196.) At the time defendant was sentenced, the DSL provided that “the choice of the appropriate term shall rest within the sound discretion of the court.”

(§ 1170, subd. (b).) This amendment “cure[d] the constitutional defect in the statute” and permitted the trial court to impose an upper term sentence based on facts not found by a jury beyond a reasonable doubt. (*Sandoval, supra*, 41 Cal.4th at p. 844.) Furthermore, in *Sandoval*, the court concluded that application of the amendment to crimes committed before its effective date does not violate ex post facto or due process principles. (*Id.* at pp. 853-857.)

Hence, even though defendant committed the crimes in this case between 2004 and 2009, he was not sentenced until after the effective date of the amended statute. Although defendant criticizes *Sandoval*, we decline to address these contentions, as we are bound by our Supreme Court’s determinations regarding these matters. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 454.)

## V

### PENAL CODE SECTION 290.3 FINE AND

### ADDITIONAL MANDATORY FINES

Defendant’s final contention is that the imposition of the \$3,800 fine pursuant to section 290.3 violates the prohibition against ex post facto laws since the amount of the fine in effect at time he was convicted was \$200 for the first conviction and \$300 for any other convictions. Hence, the total fine that should have been imposed was \$2,300.

At sentencing, the trial court imposed a \$3,800 fine under section 290.3. This amount was clearly based on the probation report.

Section 290.3, subdivision (a) provides that a defendant must pay specified fines for violating offenses listed in section 290, subdivision (c), which includes a violation of section 288. Section 290.3 was amended in 2006 to raise the fines to \$300 for a first offense and \$500 for each subsequent offense. (Stats. 2006, ch. 337, § 18, p. 2145, eff. Sept.20, 2006.) Prior to that date, the fines were \$200 for a first conviction and \$300 for each subsequent conviction. Defendant committed his offenses between 2004 and 2009.

Under ex post facto principles, the assessable amount of a section 290.3 fine is calculated as of the date of the offense. (See *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248.) The People admit that it is unclear when defendant committed his offenses, and in order to avoid an ex post facto violation, the fine should have been \$200 for the first offense and \$300 for each of the remaining seven offenses. Hence, the fine should be reduced from \$3,800 to \$2,300. We shall so order the reduction of the fine.

However, the People have argued that the trial court failed to impose other mandatory fines. Despite the People's failure to object in the lower court, an unauthorized sentence may be corrected at any time even if there was no objection in the trial court. Such unauthorized sentence can be corrected by the appellate court. (*People v. Smith* (2001) 24 Cal.4th 849, 852, 854.)

The People contend that in addition to the fine under section 290.3, the trial court was required to assess a state penalty assessment in the amount of \$2,300 (\$10 for every \$10 of the underlying fine) pursuant to Penal Code section 1464, subdivision (a), and a county penalty assessment of \$1,610 (\$7 for every \$10 of the underlying fine) pursuant to Government Code section 76000, subdivision (a). These fines are mandatory. (*People v. Chardon* (1999) 77 Cal.App.4th 205, 216-217, called into doubt on other grounds in *People v. Murphy* (2011) 52 Cal.4th 81, 90-91.) Defendant does not contest their imposition. We will order the judgment modified to add the state and county penalty assessments.

In addition to the section 290.3 fine, the trial court imposed a fine of \$240 pursuant to section 1465.8, subdivision (a)(1). The People contend the fee should have been imposed in an amount of \$40 per conviction instead of \$30 per conviction for a total of \$280. As noted by defendant, that fee increase was not effective until October 19, 2010. (Stats. 2010, ch. 720, § 33.) The court security fee is imposed at the time of conviction. (See *People v. Davis* (2010) 185 Cal.App.4th 998, 1000.) Defendant was convicted on September 30, 2010. We will not increase the fine.

The People also argue that the trial court should have imposed a \$460 state surcharge pursuant to section 1465.7, subdivision (a). Section 1465.7, subdivision (a) currently reads in pertinent part, “A state surcharge of 20 percent shall be levied on the base fine used to calculate the state penalty assessment as specified in subdivision (a) of Section 1464.” We agree with defendant that the fee cannot be imposed since it was

inoperative between July 1, 2007, and August 24, 2007, and the jury could have found defendant committed offenses against C. during this time period. (Stats. 2003, ch. 365, § 4, p. 2410, inoperative July 1, 2007; Stats. 2007, ch. 176, § 63, p. 2150, eff. Aug. 24, 2007.)

Finally, the People argue that defendant was subject to a state construction penalty mandated by Government Code section 70372, subdivision (a). That section provides in pertinent part, “There shall be levied a state court construction penalty, in the amount of five dollars (\$5) for every ten dollars (\$10), or part of ten dollars (\$10) upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses . . . .” Defendant does not contest the fee or the amount provided by the People. Here, the fee would only apply to the fine under Penal Code section 290.3 and would amount to \$1,150.

## VI

### DISPOSITION

The fine imposed pursuant to Penal Code section 290.3 shall be reduced from \$3,800 to \$2,300. Fines shall be imposed in the amount of \$2,300 pursuant to Penal Code section 1464, subdivision (a), and \$1,610 pursuant to Government Code section 76000, subdivision (a). Finally, an additional fine of \$1,150 shall be imposed pursuant to Government Code section 70372, subdivision (a). The clerk of the Riverside County Superior Court shall amend the minute order from sentencing on November 5, 2010, and shall amend the abstract of judgment to reflect the correct fines and forward a copy to the

Department of Corrections and Rehabilitation. As thus modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI  
J.

We concur:

HOLLENHORST  
Acting P. J.

KING  
J.