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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.

KENNETH ANDREW BENJAMIN,

Defendant and Appellant.

E056733

(Super.Ct.No. SWF10002681)

OPINION

APPEAL from the Superior Court of Riverside County. Jean P. Leonard, Judge.

Affirmed.

Patricia M. Ihara, 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, Barry Carlton and Jennifer B. Truong, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant, Kenneth Andrew Benjamin, guilty of seven counts of willfully committing a lewd or lascivious act upon a child under the age of 14 years old. (Pen. Code, § 288, subd. (a).)¹ The jury found true seven allegations that defendant committed lewd or lascivious acts upon more than one victim under the age of 14 years old. (§ 667.61, subd. (e)(5).) The trial court sentenced defendant to prison for a term of 30 years to life.

Defendant raises four issues on appeal. First, defendant contends there is insufficient evidence to support his conviction against victim1 in Count 3. Second, defendant asserts there is insufficient evidence to support his conviction against victim2 in Count 4. Third, defendant contends the trial court erred by admitting the recordings of victim1's interviews with law enforcement. Fourth, defendant asserts the trial court relied upon improper factors when imposing consecutive sentences. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. BACKGROUND INFORMATION

Victim1 and victim2 are sisters (collectively “the victims”). The victims’ mother (Mother) met defendant through her friends, Marie and Ron Larsen (collectively “the Larsens”), in approximately 2003 or 2004. Mother and defendant became friends; they attended the same birthday parties and barbeques.

¹ All subsequent statutory references will be to the Penal Code unless otherwise indicated.

In August or September 2008, Mother traveled to New Hampshire to care for her mother. In November 2008, Mother was in the hospital. The victims stayed with the Larsens while Mother was in New Hampshire and in the hospital. Defendant often stayed at the Larsens' house. The victims also went to defendant's house; sometimes they stayed overnight at defendant's house during weekends. The victims stayed at defendant's home approximately 10 times. For a period of "months," beginning in February 2009, defendant regularly stayed at the home of the victims and Mother while he helped repair their house. In December 2010, defendant was 44 years old.

B. COUNTS 1, 2, AND 3

Counts 1, 2, and 3 pertain to victim1. Victim1 was born in 1996. Victim1 described three incidents of molestation. In recorded law enforcement interviews victim1 described three incidents that were slightly different than the three incidents she described at trial—the details of the events were combined in different ways.

1. *RECORDING VERSION*

In the recorded interviews, victim1 said she believed defendant started touching her when she was 12 or 13 years old. The first incident victim1 recalled was victim1 sleeping at the Larsens' home and waking up to defendant "hovering" over her. Defendant touched victim1 on "the parts that are covered by [her] underwear," over her clothing. Victim1 pretended she was asleep.

The second incident occurred when Mother was in the hospital in November 2008. Victim1 and defendant were both staying at the Larsens' house. Victim1 again awoke to defendant touching her "down there" over her clothing. A third incident occurred when

Mother was in New Hampshire. Victim1 was watching a movie at the Larsens' home. Defendant touched victim1's knee and then moved his hand up, so he was touching her "down there" over her clothing. Victim1 "just sat there, like it wasn't happening." Victim1 did not want defendant to touch her genitals.

2. *TRIAL VERSION*

At trial, victim1 recalled three molestation incidents. The first incident happened while Mother was in the hospital, and involved defendant standing over victim1, rubbing her vagina over her clothing, as she pretended to sleep at the Larsens' home. The second incident occurred while Mother was in New Hampshire. The same acts occurred—defendant rubbed victim1's vagina over her clothing while she pretended to sleep. The third incident took place while victim1 was watching a movie. Defendant "started touching" victim1, and she acted like it was not happening. Victim1 believed the molestations occurred when she was 13 or 14 years old.

3. *CLOSING ARGUMENT*

During closing arguments, the prosecutor explained: (1) Count 1 pertained to defendant touching victim1 at the Larsens' home while Mother was in the hospital; (2) Count 2 concerned defendant touching victim1 while Mother was in New Hampshire; and (3) Count 3 pertained to "the other time when [victim1] wasn't as clear about when it happened."

C. COUNTS 4, 5, 6, AND 7

Victim2 is younger than victim1. Victim2 was born in 1999. Defendant began touching victim2 when she was seven or eight years old. Victim2 believed the first

touching occurred at the Larsens' house. Defendant touched victim2 "almost every day" until she was 10 or 11 years old. Defendant repeatedly touched victim2's genitals over her clothing when he was waking her up for school; defendant rubbed the victim's vagina for "like five minutes." Defendant also touched her buttocks and breasts over her clothing. On one occasion, defendant touched victim2's buttocks under her clothing. Victim2 estimated defendant touched her "[p]robably more than a hundred" times. The last time defendant touched victim2 was in December 2010. Victim2 tried to avoid defendant by going to friends' houses. Victim2 did not tell people about the touching during the time period when it was occurring because she was afraid she would "be in trouble."

During closing arguments, the prosecutor explained: (1) Count 4 pertained to defendant touching victim2 when she was eight years old; (2) Count 5 pertained to defendant touching victim2 when she was nine years old; (3) Count 6 concerned defendant touching victim2 when she was 10 years old; and (4) Count 7 concerned defendant touching victim2 when she was 11 years old.

D. LAS VEGAS TRIP

Around Thanksgiving 2010, when victim1 was 14 years old, she and defendant travelled to Death Valley to camp with defendant's family. After a few nights in Death Valley, on the Friday after Thanksgiving, defendant and victim1 went to Las Vegas. In Las Vegas, defendant and victim1 shared a hotel room with two beds. On Friday night, victim1 stayed awake until 6:00 a.m. because defendant "just kinda creeped [her] out"

and she was scared due to her prior experiences with defendant. Victim1 slept from 6:00 a.m. to approximately 8:00 a.m.

On Saturday, when defendant woke up, he said, “[W]hat if I went down on you?” Victim1 ignored defendant, “like it wasn’t happening.” The two “hung out” and went sightseeing. Victim1 shopped for dresses and high heel shoes. Victim1 found a “little black dress” she liked. Defendant purchased clothes and a ring for victim1. After shopping, defendant asked victim1 what she would like to do. Before she could answer, defendant said going back to the room and watching victim1 try on dresses “would be enough show for [him].” Victim1 ignored defendant’s comment.

The two walked around Caesar’s Palace. Defendant “kept saying” he could not believe how much money he spent on the ring and that the ring “deserve[d] to be given to someone really special to [him].” After returning to the hotel room, victim1 asked defendant for strawberries. Defendant went out shopping, but returned with alcohol and condoms. Victim1 was “really creeped out” when she saw the condoms in the bag. Victim1 told defendant he should go out and meet women, rather than stay in the hotel room with an “underage” girl. Defendant said he ““wouldn’t feel right”” doing that.

Defendant “kept like kinda bugging” victim1 about when she would start drinking alcohol. Victim1 drank one drink. Victim1 tried to stay awake, but eventually fell asleep. On Sunday morning, defendant said to victim1, “I keep hoping that if I keep buying you nice stuff, that’s how I’m gonna get you.” During the drive home, victim1 was listening to her iPod, presumably wearing earphones, but the volume was low enough that she could hear defendant. Defendant said to victim1, “So I can say dirty

things and you wouldn't even care because you, cuz you can't hear me." Defendant's comment "freaked [victim1] out."

The night victim1 arrived home, she told Mother that defendant asked her what she would do if he "went down on her," which Mother believed referred to oral copulation. Mother contacted law enforcement.

E. ARREST

Mother made a pretext telephone call to defendant. During the phone call, defendant admitted touching victim2's vagina "a couple times." Defendant admitted grabbing victim1's buttocks "a couple times." Defendant said he used his fingers when touching the victims over their clothes. Defendant admitted his penis may have touched the victims' legs or feet while the victims were asleep.

On December 13, 2010, defendant was interviewed by an investigator. Defendant admitted touching victim1 over her blanket while she was sleeping, in 2008. Defendant also admitted touching victim1's breast over her bra, "brushing" against her buttocks, and "maybe" grabbing her buttocks. Defendant explained that he did not touch the victims with his exposed penis, but he may have accidentally "rubbed" his penis against the victims' legs, while he was wearing jeans or pajamas.

Defendant admitted rubbing victim2's buttocks over her clothing when waking her up "maybe five times." Defendant said he last touched victim2 approximately two weeks prior to December 13, 2010. During that last incident, defendant touched victim2 on her buttocks while waking her up for school.

F. DEFENSE

Defendant testified at trial. Defendant admitted having a sexual interest in victim1. Defendant believed his sexual interest in victim1 began six months prior to the Las Vegas trip. Defendant wanted to see victim1 naked, engage in intercourse with her, orally copulate her, and receive oral copulation from her. Defendant admitting giving victim1 alcohol and asking her, ““What if I went down on you?”” Defendant explained he was referring to oral copulation when he posed that question to victim1.

Defendant said he purchased condoms in Las Vegas because he believed he might meet a woman at the hotel Jacuzzi. Defendant denied “waking” victim1 at night while at the Larsens’ house, when Mother was in the hospital. Defendant also denied rubbing victim1’s vagina while she watched a movie. Defendant said he touched the outside of victim1’s bra accidentally. Defendant admitted touching the victims’ buttocks when waking them up, but said it was not for sexual arousal.

DISCUSSION

A. COUNT 3

Defendant contends the evidence supporting his conviction in Count 3 does not meet the substantial evidence standard. The information reflects the act constituting Count 3 took place against victim1 on January 1, 2009, through and including December 31, 2009. Defendant asserts the evidence does not support a finding that he touched victim1 after 2008.

We review the record to determine whether any rational trier of fact could have found the essential elements of the crime were satisfied beyond a reasonable doubt. We

view the record in the light most favorable to the prosecution; make all reasonable inferences in favor of the prosecution; and resolve all evidentiary conflicts in favor of the prosecution. We do not resolve credibility issues. ““A reversal for insufficient evidence “is unwarranted unless it appears ‘that upon no hypothesis [whatsoever] is there sufficient substantial evidence to support’” the jury’s verdict. [Citation.]’ [Citations.]” (*People v. Mecano* (2013) 214 Cal.App.4th 1061, 1068-1069.)

Section 955 provides, “The precise time at which the offense was committed need not be stated in the accusatory pleading, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense.” If the prosecution opts to allege a particular time period for the offense, case law provides, “[w]here time is not of the essence of the crime it may be proved that the act was committed at any time before the information and within the period of limitations. [Citation.]” (*People v. Roebling* (1936) (1936) 14 Cal.App.2d 586, 589; *People v. Krupnick* (1958) 165 Cal.App.2d 755, 764.) Our Supreme Court has held child molestation cases need not be proven with precise dates; rather, a general time period will suffice. (*People v. Jones* (1990) 51 Cal.3d 294, 315-316.)

As set forth *ante*, the information reflects the act constituting Count 3 took place against victim1 on January 1, 2009, through and including December 31, 2009. During closing arguments, the prosecutor asserted Count 3 consisted of “the other time when [victim1] wasn’t as clear about when it happened.” Counts 1 and 2 took place while Mother was in the hospital and New Hampshire, but the exact timing of Count 3 was less clear.

Victim1 believed the molestations began when she was 12 or 13 years old, which would have been 2008 or 2009. When asked for an exact year, victim1 said, “I think it was two thousand eight.” In 2010, when asked how old she was when the molestations occurred, victim1 responded, “Two years ago, so I was, I was like twelve.” Upon further questioning, victim1 said defendant did not molest her in 2009. Defendant told a police officer that he “grabbed” victim1’s buttocks in the kitchen. Defendant was unsure if the incident occurred in 2008 or 2009, but he believed it was 2009.

Defendant’s crime requires the victim be “under the age of 14 years,” therefore there is a time element of the offense. (§ 288, subd. (a).) Victim1 was born in 1996. If the crimes took place in 2009, then victim1 would have been 12 or 13 years old. If the crimes took place in 2008, then victim1 would have been 11 or 12 years old. Thus, under the victim’s timeline of the events or defendant’s timeline of the events, the timing/age element of the crime is satisfied by the evidence because victim1 was under 14 years old.

The prosecution does not need to prove the date of the offense with exactness, so long as it is shown the victim was under 14 years old. (§ 955; *People v. Roebing, supra*, 14 Cal.App.2d at p. 589; *People v. Krupnick, supra*, 165 Cal.App.2d at p. 764.) In this case, as set forth *ante*, the evidence reflects the crime occurred when the victim was under the age of 14 years. Therefore, we conclude substantial evidence supports the

jury's verdict.² (See *People v. Jones, supra*, 51 Cal.3d at pp. 315-316 [a general time period, but not a precise date, is needed in child molestation cases].)

Defendant raises three arguments. First, defendant contends a prosecutor may not satisfy its burden of proof by relying exclusively upon out-of-court statements by a defendant. Defendant's argument is not persuasive because the jury could have used defendant's admission to confirm victim1's statement that the molestations occurred in 2009. In other words, the jury could have concluded victim1 was mistaken when she said the events occurred only in 2008, and that her initial statement of the events occurring in 2008 and/or 2009 was correct. Thus, the jury could have relied on victim1's and defendant's statements about crimes occurring in 2009 when concluding the Count 3 molestation occurred in 2009. Thus, the crime was not proven solely by defendant's out-of-court statements, rather, the timing of the molestation could have been confirmed by defendant's statement that he was molesting victim1 in 2009.

Second, defendant contends a unanimity instruction should have been given if different acts could have constituted Count 3. We infer defendant is referring to the differing versions of events between victim1's recorded interviews and her trial testimony. Defendant's argument about a unanimity instruction is raised for the first time in his appellant's reply brief, within the substantial evidence contention. An argument

² As set forth *ante*, at trial, victim1 said she was 13 or 14 years old when the molestations occurred. We rely on the evidence reflecting victim1 was 12 or 13 years old when the molestations occurred, because we do not resolve conflicts in the evidence and must look at the evidence in the light most favorable to the prosecution. (*People v. Mecano, supra*, 214 Cal.App.4th at pp. 1068-1069.)

about a unanimity jury instruction is markedly different than a substantial evidence argument. Since defendant did not raise the unanimity issue in his opening brief, we do not address it. (*People v. Zamudio* (2008) 43 Cal.4th 327, 353-354.)

Third, defendant raises what appears to be a due process argument. Defendant asserts he was charged with a crime occurring in 2009, when he was primarily staying at Mother's and the victims' home—not the Larsen's home. Thus, defendant did not believe Count 3 would require defending against events occurring at the Larsens' home. The due process argument appears for the first time in defendant's appellant's reply brief. The due process argument appears to concern a lack of notice about the charges against defendant. This issue is distinctly different from a substantial evidence analysis. Since defendant did not raise the due process issue in his opening brief, we do not address it. (*People v. Zamudio, supra*, 43 Cal.4th at pp. 353-354.)

B. COUNT 4

Defendant contends substantial evidence does not support his Count 4 conviction because victim2's testimony was too generic. We disagree.

The substantial evidence standard is set forth *ante*, so we do not repeat it here. Generic testimony can be substantial evidence in a child molestation case; however, some detail is required. There must be evidence of “the kind of act or acts committed with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g. lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged in the

information or indictment (e.g., ‘twice a month’ or ‘every time we went camping’). Finally, the victim must be able to describe the general time period in which these acts occurred (e.g., ‘the summer before my fourth grade,’ or ‘during each Sunday morning after he came to live with us’), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim’s testimony, but are not essential to sustain a conviction.” (*People v. Jones, supra*, 51 Cal.3d at pp. 315-316.)

Count 4 pertained to victim2 being molested when she was eight years old. First, we address the act. Victim2 said defendant touched her buttocks, breasts, and genitals over her clothing. Defendant used his hands when touching victim2. Defendant rubbed the victim’s genitals, as opposed to hitting or poking. Typically the rubbing lasted for “like five minutes.” Based upon the foregoing evidence, the trier of fact could determine the type of act that occurred—molestation wherein defendant rubbed victim2’s breasts, buttocks, and/or genitals with his hand over her clothing. There was not intercourse, oral copulation, sodomy, or victim2 touching defendant.

Second, we address the number of acts committed to ensure there are acts supporting each of the counts alleged in the information. Victim2 said the touching started when she was seven or eight years old and generally took place when defendant was waking her up for school. Victim2 said the touching was continuous from age seven to 10 or 11. Victim2 estimated defendant touched her “[p]robably more than a hundred” times. Count 4 accounted for the year victim2 was eight years old. Given that there were

likely 100 touches from ages seven to 11, the one count for age eight is supported by the evidence, because a trier of fact could reasonably infer at least one of the molestations occurred when victim2 was eight years old.

Third, we address the general time period in which the acts occurred, in order to assure the acts were committed within the applicable limitation period. A prosecution for a violation of section 288 “may be commenced any time prior to the victim’s 28th birthday.” (§ 801.1, subd. (a).) Victim2 said she was 12 years old when she testified at defendant’s trial. Thus, the evidence reflects the applicable statute of limitations was satisfied because victim2 was under 28 years old. Given the foregoing evidence, we conclude victim2’s testimony was not too generic—substantial evidence supports defendant’s conviction on Count 4.

C. RECORDINGS

1. *PROCEDURAL HISTORY*

Prior to trial, the prosecution moved to admit the victims’ statements to Mother and law enforcement officers pursuant to the fresh complaint doctrine and the child abuse exception to the hearsay rule. (Evid. Code, § 1360.) At the hearing, the prosecutor informed the court, “it will depend on how [the victims] testify in court to see whether it’s even necessary to play those [recordings].” Defendant’s trial counsel asserted the recordings would be cumulative of the victims’ testimony, if the recordings were played at trial. The trial court reserved ruling on the motion until the victims’ testified.

Defense counsel moved the court to exclude victim1's "crying and emotional outbursts" from the recordings and transcripts. The court permitted 30 seconds of crying in the recordings to provide victim1 with credibility, in that she "did feel some emotion." The court concluded more than 30 seconds of crying would become too prejudicial.

During victim2's testimony, the prosecutor played a recording of her interview with law enforcement. After the victims and Mother testified, the prosecutor said he planned to present videos of victim1's interviews with Detectives Judge and Cadenhead, because victim1 was "more specific with time frames" in the videos. Defense counsel asserted the recordings would be cumulative of victim1's testimony.

The trial court found the recordings were more probative than prejudicial because it "appear[ed] that these are relatively straightforward interviews; [and] that they have been redacted at [defense counsel's] request." The trial court permitted the prosecutor to play the recordings for the jury. The prosecutor played three recordings of victim1's interviews with Detective Cadenhead. The recordings lasted approximately 90 minutes.

2. ANALYSIS

a) Issue

Defendant contends the trial court erred by admitting recordings of victim1's interviews with law enforcement officers. Defendant asserts the recordings (1) were not admissible under the fresh complaint doctrine, (2) did not fall within an exception to the hearsay rule, (3) were more prejudicial than probative, and (4) violated his rights to due process. The People assert defendant forfeited the errors related to the recordings by

failing to raise these specific objections in the trial court. Defendant contends that if the issue was forfeited, then his trial counsel was ineffective.

b) Forfeiture

At the outset, we address the forfeiture issue. At the trial court, defendant objected to the recordings because they were cumulative of victim1's testimony. The fresh complaint argument is waived because defendant conceded the issue at the trial court. Defendant's trial counsel said when speaking about the recordings, "[I]t can come in under fresh complaint."

A "'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable. [Citations.]" (*People v. Seijas* (2005) 36 Cal.4th 291, 302.) Defendant did not raise the hearsay issue or Evidence Code section 352 issues below, and thus they are forfeited. The due process issue is also forfeited for failing to raise it at the trial court. (*People v. Partida* (2005) 37 Cal.4th 428, 435-436.) Since we have concluded defendant forfeited the issue for appeal, we address his argument that his trial counsel was ineffective.

c) Ineffective Assistance of Counsel

(1) *Law*

To prevail on the ineffective assistance of counsel contention, defendant "must prove "that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant." [Citation.] "A reasonable

probability is a probability sufficient to undermine confidence in the outcome.”

[Citation.] If a claim of ineffective assistance of counsel can be determined on the ground of lack of prejudice, a court need not decide whether counsel’s performance was deficient. [Citations.]” (*In re Crew* (2011) 52 Cal.4th 126, 150.)

(2) *Victim1 (Counts 1, 2, and 3)*

(i) Trial Testimony

We address the prejudice issue as it relates to victim1 (Counts 1, 2, and 3). At trial, victim1 recalled three molestation incidents. The first incident involved defendant standing over victim1, rubbing her vagina over her clothing, as she pretended to sleep at the Larsens’ home. The first incident happened while Mother was in the hospital. The second incident occurred while Mother was in New Hampshire. The same acts occurred—defendant rubbed victim1’s vagina over her clothing while she pretended to sleep. The third incident took place while victim1 was watching a movie. Defendant “started touching” victim1, and she acted like it was not happening.

Victim1 was unable to recall exactly when the movie incident occurred, but said it occurred before her trip with defendant to Death Valley. Victim1 said the Death Valley trip happened when she was 14 years old. Victim1 believed the molestations occurred when she was 13 or 14 years old.

While testifying, victim1 asked to take a break. The court gave victim1 a five minute break with the victim advocate. When victim1 returned, the court instructed her to “[t]ake a deep breath” and speak at a higher volume.

(ii) Recordings

On the recordings, victim1 said she believed defendant started touching her when she was 12 or 13 years old. The first incident victim1 recalled was victim1 sleeping at the Larsens' home and waking up to defendant "hovering" over her. Defendant touched victim1 on "the parts that are covered by [her] underwear," over her clothing. Victim1 pretended she was asleep.

The second incident occurred when Mother was in the hospital, in November 2008. Victim1 and defendant were both staying at the Larsens' house. Victim1 again awoke to defendant touching her "down there" over her clothing. A third incident occurred when Mother was in New Hampshire, in August 2008. Victim1 was watching a movie at the Larsens' home. Defendant touched victim1's knee and then moved his hand up, so he was touching her "down there" over her clothing. Victim1 "just sat there, like it wasn't happening." On one of the three recordings, crying and sniffing can be heard. It appears both Mother and victim1 were crying.

(iii) Defendant's Statements

In a pretext telephone call, in 2010, defendant admitted to Mother that he touched victim1's vagina "a couple times a long time ago." At trial, defendant admitted he understood Mother's question and confirmed he said he touched victim1's vagina "[a] couple times a long time ago." Defendant admitted having a sexual interest in victim1. Defendant believed his sexual interest in victim1 began six months prior to the Las Vegas trip. Defendant wanted to see victim1 naked, engage in intercourse with her, orally copulate her, and receive oral copulation from her.

(iv) Victim1 Analysis

Victim1's testimony at trial combined with defendant's statements reflect nearly the same information as that provided in the recordings. There was a variation in the recordings and trial testimony regarding the incident that took place while Mother was in New Hampshire. At trial, victim1 said she was asleep when defendant molested her while Mother was away in New Hampshire. In the recording, victim1 said she was watching a movie when defendant molested her while Mother was away in New Hampshire. However, either way, the molestation involved touching victim1's genitals over her clothing.

Likely the most important information taken away from the recordings concerned victim1's age at the time the crimes took place. Section 288, subdivision (a) requires the victim be under the age of 14 at the time the molestation occurs. On the recording, victim1 said the crimes occurred when she was 12 or 13 years old, thus satisfying the age requirement. At trial, victim1 said she was 13 or 14 when the molestations took place. If victim1 were 14, then the age element would not be met. However, defendant told Mother during a pretext call in 2010 that he touched the victim's vagina "a couple times a long time ago." In 2010, victim1 turned 14 years old. Thus, when defendant's statement is combined with victim1's testimony, the reasonable inference is that the molestations occurred when the victim was 13 years old, because if the molestations occurred when victim1 was 14, then they would have been recent—not "a long time ago." Accordingly, if defendant's trial counsel had raised the various objections and the recordings were

excluded, it is not reasonably probable a more favorable result would have occurred because the trial testimony provided nearly the same information as the recordings.

Defendant asserts the recordings were prejudicial because they permitted the jury to repeatedly hear victim1's allegations. We do not find this argument to be persuasive because the recordings were not entirely helpful to the prosecution. The recordings revealed victim1's memories of the incidents were problematic. Victim1 switched details of the incidents between the recordings and her trial testimony, in particular the incident that occurred while Mother was in New Hampshire and the "movie" incident. In this regard, the repeated allegations were helpful to defendant because they showed victim1's recollection may not have been reliable.

Victim1 testified about the Las Vegas incident at trial. Defendant contends that allowing the jury to hear repeated information about the uncharged Las Vegas harassment in the recordings was prejudicial because it had the effect of joining a strong case with a weak one. Defendant's argument is not persuasive because the strongest evidence concerning the Las Vegas incident came from defendant's trial testimony—not the recordings. At trial, defendant admitted making sexual comments to victim1 in Las Vegas and having a sexual interest in victim1. Defendant admitted he wanted to see victim1 naked, engage in intercourse with her, orally copulate her, and receive oral copulation from her. Thus, even if the recordings about the Las Vegas incident had been excluded, it is not likely a result more favorable to defendant would have occurred, given victim1's trial testimony about the incident and defendant's admissions.

(2) *Victim2 (Counts 4, 5, 6, and 7)*

Defendant asserts his convictions related to victim2 should also be reversed due to the admission of the victim1 recordings. Defendant asserts the evidence related to victim2 was “generic,” and therefore the admission of the victim1 recordings was prejudicial because the recordings allowed the jury to again hear about the uncharged Las Vegas conduct, which had a “spillover effect” that perhaps caused the evidence relating to victim2 to appear stronger. Defendant points out that the jury asked for a read-back of victim2’s testimony during its deliberations, which defendant infers means “the deliberations were close” for Counts 4 through 7.

As set forth *ante*, the evidence supporting Count 4 was not generic. The evidence allowed the trier of fact to determine the kind of acts that occurred to assure the exact type of unlawful conduct that took place (e.g. lewd conduct, intercourse, oral copulation or sodomy); the number of acts that occurred to be certain there was an act supporting each count; and the general time in which these acts occurred to assure the acts were committed within the applicable limitation period. (*People v. Jones, supra*, 51 at pp. 315-316.) Since the Count 4 evidence was not generic we find defendant’s underlying premise about generic evidence to be problematic.

Moreover, as set forth *ante*, defendant testified about the Las Vegas incident in addition to victim1’s trial testimony. Defendant admitted asking victim1 in Las Vegas, ““What if I went down on you?”” Defendant said that question referred to oral copulation. Defendant admitted he wanted to see victim1 naked, engage in intercourse with her, orally copulate her, and receive oral copulation from her. Given defendant’s

testimony, if the victim1 recordings had been excluded so the jury did not hear victim1's version of the events again, it is not reasonably probable a different result would have occurred on Counts 4 through 7, to the extent the Las Vegas evidence had any impact on those Counts.

D. CONSECUTIVE SENTENCES

1. *PROCEDURAL HISTORY*

At the sentencing hearing, the trial court said it believed the major cause of defendant's molestation behavior was methamphetamine and alcohol abuse. The court noted defendant received a score of zero on the Static-99R test, reflecting a low risk of reoffending. In regard to mitigation, the trial court found (1) defendant had no prior criminal record; and (2) he admitted wrongdoing before arrest. (Cal. Rules of Court, rule 4.423(b)(1) & (b)(3).)

In aggravation, the court found (1) defendant's offenses involved great bodily harm; (2) the offenses involved a high degree of callousness; (3) "[t]he victim was particularly vulnerable"; (4) "there was some planning and sophistication"; and (5) "defendant took advantage of a position of trust or confidence to commit the offense." (Cal. Rules of Court, rule 4.421(a)(1), (a)(3), (a)(8) & (a)(11).) The trial court also found defendant "engaged in conduct that indicates [he is] a serious danger to society." (Cal. Rules of Court, rule 4.421(b)(1).)

In electing not to apply section 654, the trial court said, "And my reasoning is, each of the crimes and their objectives were predominantly independent of each other.

They involved separate acts on separate days. They involved two different victims. And so I don't think that 654 is an issue in this case.”

The trial court imposed 15 year to life terms on all seven counts, with Count 4 being served consecutive to Count 1. The other five counts were ordered to be served concurrent to Count 1. Defendant's total sentence is 30 years to life. The trial court explained that Count 4 would be consecutive to Count 1 in part because “both of these victims need to feel that punishment has been meted out and that each one of th[em] was considered and their concerns were considered in this case. They're not just a number here. They're two little girls.”

2. ANALYSIS

Defendant contends the trial court relied on improper factors when imposing consecutive sentences. We disagree.

We apply the abuse of discretion standard when reviewing sentencing decisions. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) Factors relating to the decision to impose concurrent or consecutive sentences are set forth in California Rules of Court, rule 4.425. The factors include, in part: (1) “The crimes and their objectives were predominantly independent of each other”; (2) “The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior”; and (3) “Any circumstances in aggravation or mitigation,” unless the fact is used to impose an upper term, enhance defendant's sentence, or is an element of the crime. (Cal. Rules of Court, rule 4.425.)

The trial court found the crimes and their objectives were predominately independent of one another. The trial court explained that the crimes involved separate acts, separate victims, and took place on separate days. The trial court made these comments when speaking about section 654; however, they directly correlate with the consecutive/concurrent sentencing factors in California Rules of Court rule 4.425. As explained in more detail *post*, it appears the trial court was having a global discussion about its findings, as opposed to a strict discussion solely about section 654. To the extent the trial court cited the “separate victims” fact as a reason for imposing consecutive sentences, using that fact would be improper because it was used to alter defendant’s sentence to a term of 15 years to life. (§ 667.61, subd. (b) & (e)(4).)

The remaining factors are supported by the evidence. Count 1 took place in November 2008. Count 4 took place at some point during the time period from September 29, 2007 to September 28, 2008. Accordingly, the crimes were separated by at least one month—October 2008—if not longer. Thus, the evidence supports the finding that the crimes were committed at different times because they were separated by at least one month. As a result, the crimes indicate more than one period of aberrant behavior. (Cal. Rules of Court, rule 4.425(a)(3).)

“Only one criterion or factor in aggravation is necessary to support a consecutive sentence. [Citation.]” (*People v. Davis* (1995) 10 Cal.4th 463, 552.) Since the trial court could reasonably conclude the crimes were committed at different times, reflecting two periods of aberrant behavior, we conclude the trial court properly imposed consecutive sentences. (Cal. Rules of Court, rule 4.425(a)(3).)

Defendant asserts the trial court erred because it did not use the independent nature of the crimes as a factor for imposing consecutive sentences, rather, the court made that finding in relation to section 654. We agree the trial court referenced section 654 when discussing the independent nature of the offenses; however, the trial court's sentencing discussion weaved thoughts of concurrent and consecutive sentences throughout the discussion, so this court cannot so easily separate the section 654 analysis from the consecutive sentence analysis.

For example, the trial court said, "The Court finds that Penal Code Section 654 does not apply to this case. And my reasoning is, each of the crimes and their objectives were predominantly independent of each other. They involved separate acts on separate days. They involved two different victims. And so I don't think that 654 is an issue in this case. Although I am running those counts concurrently, as I indicated, because I do think that in considering the mitigation and considering the factors that I've enumerated, that that would be the appropriate sentence in this case. I'm also considering the defendant's age, his background, his—in addition, I'm also considering the fact that both of these victims need to feel that punishment has been meted out and that each one of th[em] was considered and their concerns were considered in this case. They're not just a number here. They're two little girls. And each one of them is part of this process."

Our reading of the record reflects a global, less organized discussion of the concurrent/consecutive sentencing factors. The trial court appeared to go back and forth between discussing things like section 654 and the consecutive sentencing factors. Of particular note is that the court used the consecutive sentencing factor language when

discussing section 654. The trial court said, “each of the crimes and their objectives were predominantly independent of each other.” California Rules of Court, rule 4.425(a)(1) reads, “The crimes and their objectives were predominately independent of each other.” Given that the trial court was quoting the rule relating to consecutive sentences when discussing section 654, it appears the court was having a more global discussion of the circumstances of the case—the court was not focused solely on section 654. Accordingly, we find defendant’s argument to be unpersuasive.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

McKINSTER
Acting P. J.

RICHLI
J.