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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANIN SEN,

Defendant and Appellant.

G045422

(Super. Ct. No. 92CF03613)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Theresa Osterman Stevenson, 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, Lilia E. Garcia and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Anin Sen of four counts of lewd and lascivious acts upon a child under age 14 (Pen. Code, § 288, subd. (a); all further undesignated statutory references are to this code), and the trial court sentenced Sen to 14 years in prison, consisting of the upper term of eight years on the first count, and consecutive sentences of two years each on the three other counts. Sen argues a delay of almost 18 years in which the police could not locate him after the district attorney filed a felony complaint and obtained an arrest warrant in 1992 violated his federal and state constitutional rights to a speedy trial and due process. He also contends the trial court improperly imposed the upper term and consecutive sentences. As we explain, these contentions are without merit, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Ten-year-old S.A. lived in an apartment on Halladay Street in Santa Ana between 1991 and 1992 with her mother, her nine-year-old brother, her adult sister, and 30-year-old Sen. When she was 11, the family moved to an apartment on Minnie Street, and Sen, considered a part of S.A.'s extended Cambodian family by his sister's marriage to S.A.'s older brother, moved to Victor Street, but visited the Minnie Street residence once or twice a day.

On November 17, 1992, S.A.'s mother returned home and found Sen on top of S.A., naked. She cursed at him, called the police, and Sen fled without his clothes. At trial, S.A.'s mother testified she surprised Sen when entering the residence, and saw Sen on S.A. on the living room floor. Her son K., however, testified *he* was in the living room when his mother entered the apartment, proceeded to the back bedroom, screamed, and Sen then darted out naked. According to K., Sen approached him outside the

apartment the next day and asked him to bring S.A. out so he could speak to her, but K. refused and he did not see Sen again until the trial in February 2011.

The day after the incident, S.A. spoke with Detective Maddox¹ from the Santa Ana Police Department. By the time of trial, Maddox had retired, moved out of state, and did not respond to the prosecutor's subpoena. At trial, S.A. did not remember telling Maddox that Sen did not put his penis inside her that day, nor had they previously had sexual intercourse. She remembered she told Maddox she feared Sen because he threatened to kill her and she believed he was a gang member. S.A. gave Maddox the underwear she wore the day Sen had sex with her. Her mother washed her body after the incident, including her vagina.

S.A. also spoke to Officer Susan Berenschot at her school six days after the incident, this time with a Cambodian interpreter. She explained at trial she felt more comfortable speaking to a female officer than to Maddox. She told Berenschot Sen raped her about 10 times, including five times at the Halladay residence before they moved. She identified four specific incidents of sexual abuse: soon after she had her first menstrual cycle in April 1991, Sen digitally penetrated and orally copulated her at the Halladay residence; on two other consecutive days that month Sen had sexual intercourse with her, and also digitally penetrated and orally copulated her; and he did each of these acts again in the last incident on November 17, 1992, at the Minnie Street residence. S.A. told two schoolgirl friends, Serena and Maryann, what Sen had done, but she did not tell her mother because she was embarrassed. Berenschot also interviewed S.A.'s mother, who told her she discovered Sen having sexual intercourse with S.A. in the back bedroom.

¹ Detective Maddox's first name does not appear in the record.

Berenschot and other officers' attempts to locate Sen failed, as we describe in more detail below. In 1993, Sen's landlord informed Berenschot that Sen had moved to San Francisco and left no forwarding address. Berenschot testified that to her knowledge, Sen did not surface again until Sen's naturalization application in 2010, when immigration authorities contacted the department concerning Sen's unresolved arrest warrant from December 1992. The police arrested Sen on the warrant in June 2010, and his trial commenced in early 2011.

Genetic testing on S.A.'s underwear before trial uncovered two spermatozoa and stains that included nonsperm biological material. The DNA profile of the sperm and material in at least one of the stains matched a sample provided by Sen, with initial testing showing a match rate of one in 10 million and further analysis showing a one in a trillion frequency estimation. S.A.'s mother testified she did not wash Sen's clothes alone or in combination with her family's clothes, and Sen did not wash her or her children's clothes.

Both before and after the trial, Sen sought dismissal of the charges based on the long delay before his arrest and prosecution, but the trial court denied both motions.

II

DISCUSSION

A. *Speedy Trial and Due Process Claims*

1. Governing Law

Sen asserts the delay of almost 18 years from the filing of the complaint in late 1992 to his 2010 arrest and 2011 trial violated his right to a speedy trial and due process under the federal and state constitutions. As we explain, these claims are distinct but overlap substantially. For example, unlike its state counterpart (Cal. Const., art. I,

§ 15), the Sixth Amendment speedy trial right includes a presumption the defendant is prejudiced by “uncommonly long” delay. (*People v. Martinez* (2000) 22 Cal.4th 750, 755 (*Martinez*), citing cases.) The federal speedy trial right, however, does not apply here because a felony complaint is only “preliminary to formal accusation” or the actual restraint in being “held to answer” necessary to trigger Sixth Amendment trial rights. (*Id.* at pp. 762-763.) Unlike the formal accusation and probable cause finding inherent in an indictment, for example, a felony complaint instead confers limited jurisdiction for a magistrate merely to review the charges, and *not* to commence trial proceedings. (*Id.* at p. 763; cf. also *id.* at p. 758 [unlike a complaint, a felony information triggers Sixth Amendment speedy trial protection because it may be filed in the trial court only *after* “examination and commitment by a magistrate”].)

In contrast to the Sixth Amendment, the state constitutional speedy trial right attaches when a felony complaint is filed (*Martinez, supra*, 22 Cal.4th at p. 754), but prejudice is never presumed even from a lengthy delay; rather, the defendant “must affirmatively demonstrate prejudice” from any delay preceding formal accusation or arrest (*id.* at p. 755). The right to due process under the state Constitution duplicates this state constitutional speedy trial guarantee for the preaccusation or arrest period and, unlike the Sixth Amendment, federal due process protection also applies to this period. (*People v. Catlin* (2001) 26 Cal.4th 81, 107 [delay before arrest or filing indictment or information “may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions”]; see also *Martinez*, at p. 765 [federal Due Process Clause spans “any gap” before Sixth Amendment speedy trial right engages].)

Federal and state speedy trial rights are *generally* broader than the due process right under either constitution, which consists of the right to a fair trial. (See

Martinez, supra, 22 Cal.4th at p. 767 [“the right of due process protects a criminal defendant’s interest in fair adjudication”].) The right to a speedy trial includes this right, and also protects the accused in the pretrial phase ““against prolonged imprisonment [and] it relieves him of the anxiety and public suspicion attendant upon an untried accusation of crime”” (*Barker v. Municipal Court* (1966) 64 Cal.2d 806, 813 (*Barker*); see *United States v. Marion* (1971) 404 U.S. 307, 320 (*Marion*) [citing same purposes for federal speedy trial right].)

But when as here the delay accrues in the postcomplaint, prearrest period and the defendant has *not* been “subject to restraints following arrest and has not been held to answer or formally charged” by indictment or information, the pain of pretrial imprisonment and taint or anxiety of official opprobrium are not implicated (*Martinez, supra*, 22 Cal.4th at p. 768), rendering the defendant’s due process and speedy trial rights essentially coextensive (*ibid.*). Specifically, those intertwined rights consist of the right to a fair trial, in other words, an “interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.” (*Id.* at p. 767; see also *Barker, supra*, 64 Cal.2d at p. 813 [state Constitution protects defendant against being ““exposed to the hazard of a trial, after so great a lapse of time” that “the means of proving his innocence may not be within his reach” — as, for instance, by the loss of witnesses or the dulling of memory””]; accord, *Marion, supra*, 404 U.S. at p. 320.)

Because these interests are the same “whether the claim is characterized as a speedy trial or due process issue, the same balancing approach is utilized,” namely, any “prejudice to the defendant resulting from the delay must be weighed against justification

for the delay.” (*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 505 & 505, fn. 9; accord, *Barker v. Wingo* (1972) 407 U.S. 514, 530 [balancing test when defendant complains of delay requires consideration of length of delay, its cause, and prejudice to defense].) “The ultimate inquiry” in examining the delay is simply “whether the defendant will be denied a fair trial.” (*Scherling*, at p. 507.)

It is the defendant’s burden to demonstrate prejudice arising from the delay. (*People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1328 (*Mirenda*) [due process claim under federal or state Constitution]; *People v. Roybal* (1998) 19 Cal.4th 481, 513 [state speedy trial claim].) Prejudice ““may be shown by loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.” [Citations.]’ The overarching theme is that the loss of such evidence, especially where the defendant or victims cannot independently recall details of the crime, makes it difficult or impossible for the defendant to prepare a defense thus showing prejudice.” (*Mirenda*, at p. 1328.)

Even a “minimal,” prima facie showing of prejudice requires the prosecution to explain the reasons for the delay. (*Craft v. Superior Court* (2006) 140 Cal.App.4th 1533, 1540-1541.) But it follows from the nature of a balancing test that if the evidence reveals no prejudice, “the court need not inquire into the justification for the delay since there is nothing to ‘weigh’ such justification against.” (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911 (*Dunn-Gonzalez*)). Put another way, the balancing test functions on a sliding scale: a minimal showing of prejudice may require dismissal when measured against petty or insubstantial reasons for the delay and, by the same token, more reasonable delay requires the defendant to show great prejudice to scuttle charges or a conviction. (*Mirenda, supra*, 174 Cal.App.4th at p. 1327.)

On appeal, we examine whether the trial court’s determination of prejudice, or a lack thereof, is supported by substantial evidence. (*Dunn-Gonzalez, supra*, 47 Cal.App.4th at pp. 911-912.) The defendant must establish actual prejudice shown by particular facts, not bare conclusory statements. (*Crockett v. Superior Court* (1975) 14 Cal.3d 433, 442; *Marion, supra*, 404 U.S. at p. 325 [assessment of trial’s fairness “will necessarily involve a delicate judgment based on the circumstances of each case”].) “When unjustified prejudice to the defendant’s ability to defend has been established[,] there can be no question that . . . dismissal [is] required.” (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 263-264.)

2. Particular Claims of Prejudice

Sen contends the delay between the filing of the complaint and his arrest years later prejudiced his right to a fair trial in the following manner: the remaining DNA sample from the victim’s clothing was too small for independent testing by a defense expert; had he known of the charges immediately, he could have sought to seize household members’ clothes to show they also bore traces of his or others’ DNA to support his “washing machine transfer” theory; a retired police detective was not available to bolster with live testimony his victim interview report, which differed favorably in some respects from a later police interview; and faded memories hindered his ability to develop potential evidence about other adult males who may have had access to the victim. We examine each of these claims in turn and cumulatively for prejudice.

Sen’s first claim is wholly unsupported by the evidence. He reasons from the fact only “a few [of his] sperm cells” were found on S.A.’s underwear and the prosecution expert’s admission biological material containing DNA degrades over time to

a conclusory assertion he was denied the opportunity to have a DNA expert conduct independent testing. He asserts “there was limited to no evidence left available for that potential expert to analyze in light of the lengthy delay between the collection of evidence in 1992 and trial in 2011.” Sen presented no evidence, however, that he was denied access to the underwear for retesting, nor that the prosecution expert’s testing consumed or destroyed all the remaining biological material.

His claim regarding a lost opportunity to sequester clothing at the residence is similarly speculative and unfounded. On cross-examination, the prosecution’s DNA expert acknowledged a 1996 academic study recognized the possibility of “washer transference,” or as Sen explains, “the potential for DNA from the sperm of one individual to be transferred to . . . other clothing during the wash cycle of a washing machine and then be found in small levels on that other clothing after the wash is complete.” Sen claims “because of the passage of time, the defense had no ability to collect the clothes that had been washed with [his] clothes at the household to provide support for his position that the few [recovered] sperm cells . . . could just have likely been transferred there during washing,” rather than as a result of sexual contact.

In other words, Sen asserts that if he had been able to collect the laundry of all the other household members and show *those* items *also* contained his sperm cells, just like S.A.’s underwear, his defense would have been complete. Merely stating the proposition shows its rife speculation. Moreover, Sen did not elicit or introduce details such as whether transferred sperm persists after more than one washing. Consequently, even assuming that with prompt notice of the complaint he would have been able to seize all the clothing from the home as evidence, by the time he might have done so, even at the earliest opportunity, they likely would have been washed again. Thus, it is far from

clear on the present record that any sperm could have remained on the other household members' clothing to bolster his explanation for S.A.'s underwear.

Sen's claim of prejudice is speculative for several other reasons, perhaps most importantly because he overlooks that S.A.'s mother testified she never washed Sen's clothes, let alone washed them with her family's clothing. Posttrial, Sen submitted a declaration stating the household laundry was washed together, but we may not second-guess the trial court's conclusion this belated claim lacked credibility. (*People v. James* (1977) 19 Cal.3d 99, 107 (*James*).

Additionally, the date of the academic study, four years *after* the offenses, magnifies the speculative nature of Sen's claim because even assuming Sen had retained counsel when the allegations arose, an attorney could not be charged with miraculous prescience to anticipate the study. Consequently, there would have been no legal basis to attempt to have household laundry seized as potential evidence, particularly the clothing of *other* family members who were *not* victims or suspected perpetrators. In essence, Sen claims seizing the laundry was necessary because a fair trial could not be had without DNA testing of *all* household clothing, but we see no basis for the claim. Furthermore, the possibility that sperm might transfer in the wash did not address the fact another *stain* on S.A.'s underwear included Sen's non-sperm biological material, and no evidence suggested washing transferred stains containing such material. In sum, Sen was able to present his sperm transfer theory to the jury to explain his DNA on S.A.'s underwear, and we cannot say the passage of time — rather than the speculation inherent in his theory — undermined his defense.

Sen also claims the passage of time prejudiced his right to a fair trial because witnesses became unavailable, specifically, his father died and a retired police

detective failed to respond to the prosecutor's subpoena. But Sen does not suggest his father had any evidence to offer, and Sen does not challenge the trial court's finding his father's unavailability bore no "relevan[ce] to any issue in this trial at all."²

Sen focuses instead on the absence of Detective Maddox, who interviewed S.A. the day after the November 17, 1992 incident, but did not testify at the trial years later. Sen asserts his right to a fair trial "was severely prejudiced by the inability to obtain the presence of Detective Maddox to testify to the jury consistent with his report that there was no penetration, no injuries, the victim was calm, and had reported she had never had sexual relations before" Sen acknowledges the substance of Maddox's report made its way into evidence on cross-examination, but he suggests he was disadvantaged by the manner of presentation: a stale, lifeless report instead of live testimony. He notes that Berenschot, who interviewed S.A. five days after Maddox, was able in live testimony to add detail to her report, including that she had interviewed S.A. with a Cambodian interpreter, which the jury may have found persuasive given the different accounts S.A. gave Maddox and Berenschot. "For example," Sen explains,

² Had Sen's father told him about police visits attempting to locate him, Sen might have experienced some anxiety about a pending arrest or prosecution, a circumstance the right to a speedy trial is designed to mitigate with a prompt opportunity to contest criminal allegations. (*Barker, supra*, 64 Cal.2d at p. 813; *Marion, supra*, 404 U.S. at p. 320.) But Sen never invoked this basis for a claim of prejudice from the long delay before trial. Notably, our Supreme Court has observed a citizen anxious about a pending felony complaint and arrest warrant may curtail the uncertainty by surrendering on the warrant, "thereby triggering" fixed statutory deadlines for a speedy arraignment, preliminary hearing, and trial. (*Martinez, supra*, 22 Cal.4th at p. 768, fn. 1.) Sen did not, if he knew about the pending charges, avail himself of this opportunity in which the statutory deadlines operate "without any need to affirmatively demonstrate prejudice" (*ibid.*), and as noted he did not assert anxiety as a basis for his constitutional speedy trial claim. We therefore discern no basis on which his father, a nonpercipient witness, might have had relevant evidence to offer, and Sen suggests none.

“while Berenschot reported sexual penetration and repeated sexual conduct . . . , Maddox’s report noted no penetration and no previous sexual relations.”

It is speculative, however, to suppose Maddox might have added persuasive details absent from his report or that he would have presented a compelling demeanor in live testimony. To the contrary, his testimony may only have been cumulative; indeed, adding details at trial would have exposed him to cross-examination on their absence from his report. Sen points to Maddox’s report as more probative than Berenschot’s because it was closer in time to the alleged incident. But it was for the trier of fact to weigh the evidence and resolve any conflicts in the reports or in S.A.’s accounts, and it was for the trial court to weigh any prejudice to Sen’s ability to present his defense at the time of trial. (*James, supra*, 19 Cal.3d at p. 107.) The delay did not prevent Sen from asserting his core defense, which consisted of cross-examining prosecution witnesses and pointing to discrepancies in their version of events. Accordingly, the trial court reasonably could conclude any prejudice from Maddox’s lack of live testimony was minimal at most.

Finally, Sen contends he “showed prejudice through the faded memories of the witnesses, making it difficult to effectively cross-examine them.” He cites as examples S.A.’s admission her memory about the incidents was much better in 1992 and her notable inability to recall at trial statements she made in Maddox’s report. He also cites her mother’s forgetfulness about seemingly basic details like the room in which she witnessed the incident, to whom she was married or other males having access to S.A. at the time, when she called the police, and the name or office location of the doctor who examined S.A. But given the inherent “he said/she said” component of sexual abuse

claims, these memory gaps provided ample grist to *undermine* the prosecution's witnesses on cross-examination, and do not appear to have prejudiced Sen.

For example, the jury heard that the examining doctor's report showed no injuries or trauma to S.A.'s genital area; rather, the exam results were "normal" and therefore neither confirmed, nor disproved the sex acts S.A. reported. And Sen was not precluded from casting doubt on his guilt by pointing to other potential perpetrators. He developed on cross-examination of S.A.'s brother and other witnesses a roster of adult males with access to S.A., including her uncle and her mother's boyfriend and eventual second husband. Of course, this evidence did not negate the one-in-a-trillion odds the DNA deposited in S.A.'s underwear was not Sen's, but nothing about S.A. or any other witness's memory lapses changed those odds.

Sen's reliance on dicta in *Mirenda* concerning prejudice is misplaced. Citing *Mirenda*, he argues "it was not required and would be impossible for the defense to prove with specificity the full extent of all the prejudice suffered by him." He quotes a passage in *Mirenda* acknowledging federal precedent on presumption of prejudice, as follows: "[A]t some point the delay becomes so long that efforts to show specific prejudice become meaningless because you don't even know what the prejudice may be." (*Mirenda, supra*, 174 Cal.App.4th at p. 1323.) As noted, however, that presumption does not apply to state constitutional speedy trial claims or to federal or state due process claims. (*Id.* at pp. 1327-1328.) Rather, any prejudice the defendant establishes must then be weighed against justification for the delay. (*Id.* at p. 1329.)

Here, the minimal prejudice Sen may have suffered from Maddox's unavailability or other, unspecified consequences of pretrial delay did not require dismissal. The prosecutor's justification for the long delay rested on repeatedly

unsuccessful police attempts to locate Sen. S.A.'s mother and brother explained he no longer lived with them, having fled the day he was caught *in flagrante delicto* (the trial court noted his flight reflected consciousness of guilt), and Berenschot testified she tried to locate him through family members, DMV records, neighborhood patrol checks where she thought he might be found, and by attempting to serve an arrest warrant at his last known address in 1993. There, the apartment manager told Berenschot that Sen had moved to San Francisco, leaving no forwarding address.

As best Berenschot could recall, her DMV check proved fruitless because Sen did not own a car and held no driver's license or identity card. Her information from family members suggested he was unemployed, so she could not attempt to contact him at work. She continued personally to attempt to locate Sen until her retirement in 1997, and she knew his arrest warrant remained outstanding thereafter, but to her knowledge he did not surface until his naturalization efforts in 2009-2010 ran aground on the warrant. Another police officer tried to locate Sen in 2000, to no avail. Sen's mother acknowledged in a declaration in 2011 that the police came to her home "asking about" Sen almost 20 years earlier.

According to Sen's mother, the police did not inquire about Sen's whereabouts during their visit (though she admitted the purpose of the visit was to "ask[] about [him]"), but she did not speak to them herself and only relied on what her husband told her. Sen claimed in his request for dismissal that he continually resided in Orange County over the preceding 20 years. He submitted copies of his tax returns from 2003-2008 bearing Santa Ana addresses, and dunning bills the Internal Revenue Service sent him at a Santa Ana address for additional taxes, plus proof of his payment of those taxes. But the trial court noted Sen submitted all those returns and back taxes in 2009,

consistent with preparing his naturalization application and not contemporaneous evidence of his residence. The trial court similarly could infer the California driver's license, identification card, and selective service registration forms Sen submitted showing Santa Ana addresses all arose in relation to his naturalization application and did not establish his previous whereabouts, since they did not turn up when Berenschot looked for them.

Sen also notes S.A.'s older brother remained married to Sen's sister, and he faults the police for failing to capitalize on this source to locate him. But it is not clear Berenschot or other authorities knew of this family connection and, in any event, S.A.'s younger brother explained that after the incident the families had little interaction until recently, and even then he did not see Sen again until the trial. No one in the family ever contacted the police to report Sen's new address, if they knew of it. In our view, it was not unreasonable that police efforts to locate Sen tapered off after initial efforts over the course of several years produced no leads.

On this record of a confirmed contact with Sen's landlord stating he moved to San Francisco in 1993, and other reasonable police efforts to locate Sen, the trial court did not err in concluding Sen was not entitled to dismissal. Simply put, measured against these efforts, the record shows the pretrial delay, although lengthy, prejudiced Sen's ability to present his defense only minimally or not at all. (*Mirenda, supra*, 174 Cal.App.4th at p. 1330 ["Whether preaccusation delay is unreasonable and prejudicial to a defendant is a question of fact"].) As in *Scherling*, "[w]e cannot say as a matter of law that the trial court erred in concluding defendant was not prejudiced by the delay." (*Scherling, supra*, 22 Cal.3d at p. 506.) To the contrary, the record discloses he

received a fair trial, and nothing about his claims undermines our confidence in the verdict.

B. *Sentencing Claims*

Sen contends the trial court abused its discretion by imposing the upper term on one count and consecutive sentences for the remaining ones. He complains the court disregarded mitigating factors, found aggravating factors without any evidentiary basis, and improperly used the same factors to support the upper term and consecutive sentences. The record does not bear out Sen's claims.

A trial court must state reasons for imposing an upper-term sentence or consecutive sentences. (Cal. Rules of Court, rule 4.406(b).) We review the trial court's selection of an appropriate term for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) Judicial discretion "'implies absence of arbitrary determination, capricious disposition or whimsical thinking.'" [Citation.] [D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) The burden is on the party attacking the sentence to clearly show the sentencing decision was irrational or arbitrary. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) Absent the requisite 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. (*Ibid.*)

Sen asserts the trial court failed to consider mitigating factors counsel urged for concurrent sentencing, including that the crimes occurred long ago, no evidence of other crimes in the interim, Sen's current age nearing 50 with a low-moderate score on a test for sexual offense recidivism, and the opportunity for close parole monitoring. That

the trial court imposed the maximum sentence, however, does not mean the court ignored these factors; rather, we must presume it found them unpersuasive. (Evid. Code, § 664.) In fact, the court expressly found numerous specific mitigating factors did not apply (e.g., Sen was not a passive participant in the offenses, nor were they committed due to unusual circumstances, great provocation, or coercion, nor did he take care to avoid harming his victim or voluntarily acknowledge wrongdoing, etc.). The trial court also specifically found “[t]here doesn’t appear to be any circumstances in mitigation” to warrant a lesser sentence, which in conjunction with the court’s express rejection of some mitigating factors precludes the conclusion the court refused to consider mitigating evidence.

Sen challenges the evidentiary basis of some of the court’s findings. For example, he argues the court’s finding he had no remorse could only be based on the probation officer’s notation that because Sen did not discuss the offense, he had not “express[ed] any particular remorse.” But the court’s observation stands in support of its “no mitigation” conclusion: Sen’s failure to voluntarily acknowledge wrongdoing did not entitle him to a lesser sentence. Sen argues the trial court should have disregarded his prior domestic violence conviction, for which he was on probation at the time of the current offense, because it was a misdemeanor and occurred 20 years before sentencing. But the court could reasonably find it probative of his culpability in preying on S.A. and his unwillingness to reform. Sen also takes issue with the trial court’s opinion the offense involved “great violence,” but he ignores the Legislature has concluded all serious sex crimes against children inherently involve significant coercion. (*People v. Hecker* (1990) 219 Cal.App.3d 1238, 1251.) We therefore presume the court referred to the violence inherent in Sen’s sexual abuse of his child victim figuratively, rather than literally.

Sen also asserts an improper dual use of facts in which the trial court relied on the same aggravating factors to impose both the upper term and consecutive sentences. The flaw in this argument, however, is that only a single aggravating circumstance is necessary to support imposing an upper term and another suffices for consecutive terms. (*People v. Moberly* (2009) 176 Cal.App.4th 1191, 1197-1198; *People v. Osband* (1996) 13 Cal.4th 622, 728-729.) Here, the court identified a host of aggravating factors to support imposing the upper term, including that S.A. was a particularly vulnerable victim, Sen exploited his position of trust in the family, and Sen was on probation when he committed the offenses. More to the point, the court identified a factor for consecutive sentences — Sen committed his offenses against S.A. at different times over more than a year and not as the result of a single episode of aberrant behavior — that did not duplicate any of the foregoing upper term factors. For example, the court found S.A. was a particularly vulnerable victim and the much older Sen abused his position of trust in the family. S.A. and her brother had specifically noted in their trial testimony they had considered Sen a “family member” and a “relative,” which Sen exploited. There is no basis to reverse the sentence imposed.

III
DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.