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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHN M. ANGOL, Defendant and Appellant.	B259874 (Los Angeles County Super. Ct. No. MA058870)

APPEAL from a judgment of the Superior Court of Los Angeles County. Eric P. Harmon, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * *

Defendant John M. Angol was charged by information with having sexual intercourse with a child who is 10 years or younger (Pen. Code, § 288.7, subd. (a); count 1) and with committing a lewd and lascivious act with a child under the age of 14 (§ 288, subd. (a); count 2). The jury convicted defendant as charged on count 2, but acquitted defendant of count 1, and convicted him of attempted sexual intercourse with a child who is 10 or younger (§§ 288.7, subd. (a), 664). Defendant was sentenced to nine years on count 1, and two years on count 2. His sentences were ordered to run consecutively.

Defendant appeals, contending the trial court erred in excluding evidence of the victim's sexual conduct, and evidence that she recanted a prior report of sexual abuse. Defendant also contends the trial court committed Penal Code section 654 error by sentencing him for both counts, urging they were based on the same conduct. Finding no merit in either of these contentions, we affirm.

FACTS

N.R. was born in November 2001. In 2011, N.R. lived with her adoptive mother and brother in Palmdale. She and her younger brother, John, shared an upstairs bedroom in the family home. Her mother's bedroom was downstairs.

N.R. met defendant in 2009 or 2010. He was a friend of the family, and he visited her home once or twice a month. He would bring candy, and play with N.R. and her brother John. Defendant was not permitted to play with N.R. or John in their bedroom.

In October 2011, when N.R. was nine years old, defendant "raped" her. N.R. was alone in her room, lying in bed, when defendant came into her bedroom and sat down on the bed next to her. He took the covers off of N.R., took off her pants and underwear, got on top of her, and "stuck" his penis in her vagina. Defendant moved up and down on top of her. N.R. told defendant to stop, and that "it hurts." After about a minute, N.R. heard defendant zip up his pants, leave her room, and walk out of the second story back door of the home. N.R. put on her pants and went downstairs to sleep with her mother. She did not tell her mother about what happened because she was afraid.

In March 2012, N.R. told her mother about the incident. N.R., who was not wearing pajama bottoms or underwear, got on top of her sleeping mother, and swayed from side to side. During cross-examination, defense counsel asked if this was the first time N.R. had done this to mother, and N.R. said that it was the first time. When mother awoke and asked what N.R. was doing, N.R. responded, "I don't know." When mother asked if anyone had done this to N.R., N.R. told mother that defendant had. Two or three days later, mother took N.R. to the hospital, where she received a medical exam. At the hospital, N.R. told law enforcement officers what had happened to her. She told them she had not reported the incident immediately because she was scared of defendant, and scared that she and her brother would be taken away from their mother.

N.R. denied telling police that defendant kissed her, or that he digitally penetrated her. She testified on cross-examination that these things never happened. She also testified on cross-examination that defendant never touched her chest.

N.R.'s adoptive mother, L.B., testified that she adopted N.R. in 2008, and had known her since birth. In October 2011, L.B. was living in her Palmdale home with N.R. and N.R.'s brother, John. N.R.'s bedroom was on the second floor. There was a back door on the second floor that was accessible by outdoor stairs.

L.B. met defendant in 2005 or 2006 when her son-in-law, Michael, brought defendant to her home. Defendant frequently came to L.B.'s home, as it was on his way to church. He would play with John and N.R., and would bring them sweets. He was not generally allowed upstairs. However, on one occasion, defendant spent the night and L.B. found him in the children's room at 1:30 or 2:00 a.m. watching television with the children. Defendant sometimes spent the night at L.B.'s home when her son, Darnell, was visiting. Around September 2011, defendant was visiting L.B.'s home two or three times a month. Following the October 2011 incident with N.R., L.B. only saw defendant once, in November 2011.

In February or March 2012, N.R. came into L.B.'s room while she was sleeping, and started "humping" her thigh. L.B. woke up, startled, and asked N.R. what she was doing. N.R. responded that "this is what happened to me." N.R. was crying and

hysterical and told L.B. that defendant had done this to her. N.R. told L.B. that defendant had "pushed hisself [*sic*] into her and that he . . . hurt[] her very badly." N.R. had never acted out sexually before this incident. In early March, L.B. took N.R. to the hospital, and later to the HUB clinic to be examined. L.B. and N.R. also met with Detective Laura Bruner and Deputy Omar Chavez with the Los Angeles Sheriff's Department.

In March 2012, at the request of Detective Bruner, L.B. made a pretext phone call to defendant. A recording of the call was played for the jury. During the call, defendant denied having sex with N.R. L.B. falsely told defendant she had underwear belonging to N.R. that was full of "discharge." L.B. intimated that the discharge found on N.R.'s underwear must be defendant's semen. Defendant continued to deny having sex with N.R.

Deputy Chavez testified that on March 8, 2012, he spoke with N.R. at the Palmdale Regional Medical Center. He spoke with N.R. alone, away from L.B. N.R. appeared to understand the difference between the truth and a lie. N.R. told Deputy Chavez that defendant had put his penis inside of her. She also told Chavez that defendant "kissed her in the privates." Chavez asked N.R. what she was referring to, and she pointed to her vagina. N.R. also told Deputy Chavez that defendant kissed her, and inserted a finger into her vagina. N.R. said that she did not tell her mother about the incident because she was afraid she would be removed from her home.

Detective Laura Bruner also interviewed N.R. alone, at N.R.'s home. N.R. appeared to understand the difference between the truth and a lie. N.R. told Detective Bruner that defendant came into her room, pulled down her pants, and "put his private into her private."

Detective Bruner contacted defendant, and he consented to be interviewed at the Palmdale sheriff's station. The interview was recorded, and played for the jury. In the interview, Detective Bruner falsely told defendant that L.B. found a soiled pair of N.R.'s underwear, and that they were being tested at the crime lab. Detective Bruner asked if she would find defendant's DNA on the underwear. Defendant told Detective Bruner he had masturbated while staying at L.B.'s home, and his semen got onto a pair of dirty

underwear that were under the couch. Defendant denied ever touching N.R. inappropriately. He consented to take a polygraph examination.

Deputy Scott Mitchell was assigned to the sheriff department's polygraph unit. A recording of defendant's pre-polygraph interview was played for the jury. During the interview, Deputy Mitchell told defendant that his participation was voluntary and he could leave at any time. Deputy Mitchell explained the test, and explained that defendant would pass if he was truthful, and that he should be truthful about what happened with N.R.

Defendant then confessed. When asked how long his penis was in N.R.'s vagina, defendant said "maybe just, like, a few seconds—a few minutes." Defendant said "I stopped myself, because it was, like, what am I doing?" He did not ejaculate in or on N.R.; he left the room and ejaculated in the bathroom. If defendant could speak with N.R., he would tell her he was sorry for what he did.

Deputy Mitchell denied having told defendant "you better tell us what we want to hear; otherwise, you're not going to go home."

Nurse Practitioner Nancy Breen worked at the child abuse clinic at the High Desert Regional Health Center. Ms. Breen examined N.R. in April 2012. She first interviewed N.R. alone. N.R. reported that she had been sleeping alone in her room when defendant "pulled her pants down and got on top of her and went back and forth . . . ." He "stuck his private" into hers.

When Ms. Breen examined N.R., she discovered an "abnormal appearance of the posterior fourchette area in the vagina," which is inside the vagina, near the hymen. There was scarring to that area, that could be caused by penetration or "force-type trauma." She could not say how old the scarring was. The injury was consistent with N.R.'s report of abuse.

Cari Caruso, a registered nurse and board certified sexual abuse examiner, testified for the defense. She reviewed Ms. Breen's report, and disagreed with Ms. Breen's characterization of N.R.'s injuries. The injuries noted by Ms. Breen were not necessarily caused by sexual abuse, but could have been caused by hygiene or clothing irritation.

None of the findings in the report could confirm, with certainty, that a sexual penetration occurred.

Defendant's mother, Michelle Shelley, testified that defendant has always lived with her, and was very dependent on her. He was in special education classes in school, and received social security disability benefits for mental and physical disabilities.

Clinical psychologist Edward Fischer evaluated defendant. He opined that defendant was "mentally retarded," with an I.Q. of 66. A mentally retarded person may try to accommodate or please authoritative figures such as law enforcement officers.

Law professor Dr. Richard Leo testified about false confessions and how police interrogation techniques may elicit a false confession.

Defendant testified that he met L.B. and N.R. in 2009. They treated him like family. He had witnessed N.R. humping L.B. four or five times. L.B. did not react; she did not push N.R. away during these incidents. Defendant last went to L.B.'s home on September 1, 2011. He stopped frequenting L.B.'s home because he moved further away. Defendant denied the allegations against him.

When defendant met with Deputy Mitchell at the sheriff's station, Deputy Mitchell told him "you better tell me what we want to hear, or you're not going to be able to go home." Deputy Mitchell looked "mad" when he said this. Defendant took him seriously. Deputy Mitchell's demeanor changed when they walked into the interview room.

Defendant admitted to the crime because he believed Deputy Mitchell's threat. When discussing the details of the crime with Deputy Mitchell, defendant was referring to his first sexual encounter with an ex-girlfriend, Jazzy. Defendant only said these things because he wanted to go home.

Deputy Mitchell testified in rebuttal that he never made the statements attributed to him by defendant.

DISCUSSION

1. Exclusion of evidence of prior sexual conduct

Defendant contends the trial court abused its discretion by excluding evidence of a prior incident of sexual abuse of N.R., or, alternatively, by excluding evidence that N.R.

previously made a false accusation of sexual abuse, either of which would bear on N.R.'s credibility. Defendant also contends the court's ruling unconstitutionally restricted his Sixth Amendment right to cross-examination and impinged on his right to present a defense. We are not persuaded.

a. Relevant Authority

"[E]vidence of specific instances of the complaining witness' sexual conduct . . . is not admissible by the defendant in order to prove consent by the complaining witness." (Evid. Code, § 1103, subd. (c)(1).) However, evidence of the complaining witness's sexual conduct may be admissible if "offered to attack the credibility of the complaining witness as provided in Section 782." (*Id.*, subd. (c)(5).) Section 782 provides a strict procedure when a defendant seeks to introduce evidence of a complaining witness's past sexual conduct to attack his or her credibility. (See *People v. Bautista* (2008) 163 Cal.App.4th 762, 781-782.)

Evidence Code section 782 requires the defendant to make a written motion "stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness." (§ 782, subd. (a)(1).) The motion must be accompanied "by an affidavit in which the offer of proof shall be stated." (*Id.*, subd. (a)(2).) "If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant." (*Id.*, subd. (a)(3).) "At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780 [(discussing assessment of a witness's credibility)], and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted." (*Id.*, subd. (a)(4).)

"Evidence Code section 782 vest[s] broad discretion in the trial court to weigh the defendant's proffered evidence, prior to its submission to the jury, and to resolve the

conflicting interests of the complaining witness and the defendant." (*People v. Rioz* (1984) 161 Cal.App.3d 905, 916.) " 'A trial court's ruling on the admissibility of prior sexual conduct will be overturned on appeal only if appellant can show an abuse of discretion.' [Citation.]" (*People v. Bautista*, *supra*, 163 Cal.App.4th at pp. 781-782.)

The trial court is not obliged to hold a hearing unless it finds that the defendant's sworn offer of proof is sufficient. (*People v. Rioz*, *supra*, 161 Cal.App.3d at p. 916.) "An offer of proof is sufficient if the proffered evidence is relevant, and if its probative value is not 'outweighed by the probability of undue prejudice or the undue consumption of trial time.' [Citation.] Only if the judge determines both questions in favor of admissibility is the offer of proof 'sufficient.' Only if it is 'sufficient' is the trial court required to conduct the hearing to determine if the offer truly recites what the evidence will be." (*People v. Blackburn* (1976) 56 Cal.App.3d 685, 691-692.)

b. Background

Before trial, defendant made a motion for a hearing under Evidence Code section 782 to examine N.R. about her past sexual conduct. Counsel's declaration in support of the motion averred that "the defense . . . would like to introduce evidence that the complaining witness had sexual intercourse with another male at the age of 7. She has also been seen 'humping' her adoptive mother long before the alleged incident. She has also been seen playing with her brother's penis. . . . [¶] . . . The SART exam shows minor injuries to her vaginal area, which could've easily been caused by an act other than the allegations. [¶] . . . In addition, the complaining witness disclose[d] to a social worker from [the Department of Children and Family Services (DCFS)] that a male inappropriately touched her when she was 7. However, she later recanted and changed her statement. [T]he defense seeks to introduce this evidence to impeach her credibility."

The motion first came on for hearing on August 12, 2014, before Judge Bernie C. La Forteza. The matter was continued at the People's request. The case was assigned to Judge Eric Harmon for trial. On September 17, 2014, defense counsel raised the issue of N.R.'s past sexual conduct. Counsel advised the court that she wanted to introduce evidence that N.R. had been seen humping L.B. before the October 2011 incident, and

that N.R. had sex with L.B.'s 13-year-old grandson when N.R. was seven years old. Counsel represented that she wanted to confront N.R. with this information, and that if she denied it, she wanted to question L.B. If L.B. denied witnessing the incident, defendant would impeach her, because L.B. had told defendant about witnessing the incident. Also, counsel proposed calling Maria Alvarez, a DCFS social worker, as a witness. Ms. Alvarez had interviewed N.R. N.R. did not tell Ms. Alvarez she had sexual intercourse, but said that L.B.'s grandson inappropriately touched her over her clothing. However, N.R. recanted her report of abuse after having a private conversation with L.B. When Ms. Alvarez asked why N.R. was recanting her report of abuse, N.R. told her "I just don't want to be moved or removed from home."

In opposition to defendant's motion, the People argued that N.R. never admitted to having sexual intercourse. She did tell the social worker about inappropriate touching, but the incident was too dissimilar from the current allegations to be probative of N.R.'s credibility, as it would not have imparted any knowledge about sexual intercourse. Also, the People argued that there was no evidence that N.R.'s report of abuse to the social worker was false, and therefore it had no bearing on her credibility. According to the prosecutor, it was defendant's mother who initiated the DCFS investigation concerning N.R.'s past sexual conduct, during the pendency of the case against defendant.

The court asked defense counsel if there was "evidence that [N.R] had prior sexual intercourse with someone else?" Counsel indicated that she did not know for sure, and she did not know "whether it was sexual intercourse or just touching." When the court asked defense counsel how she would prove that N.R. had engaged in sexual intercourse, counsel admitted that she could not prove it. Counsel admitted that N.R. never told anyone she had sex with L.B.'s grandson. However, L.B.'s daughter and son-in-law (the parents of the alleged perpetrator) told defense counsel they had been kicked out of L.B.'s home because of allegations that their son "raped" N.R., though they denied that the rape occurred.

The court asked for an offer of proof establishing that sexual intercourse had occurred, stating, "[i]f there is simply no way of proving that occurred, why would I let it

in front of the jury? [¶] Why would we hold a hearing if you're saying, 'I just want to ask her about it.' " Defense counsel again admitted that she had no competent evidence of intercourse. The court concluded that counsel had not met her "burden under [Evidence Code section] 782 to place the victim in this matter under oath and question her at a hearing." The court also found that the proffered evidence would be "confusing" and would necessitate an undue consumption of time under section 352. The court also stated its view that evidence of past "humping" by N.R. was too far afield from the allegations to bear on N.R.'s credibility.[1]

The court then turned to whether the defense could admit evidence that N.R. recanted an allegation of sexual abuse. Defense counsel argued that N.R.'s recantation bore on her credibility. N.R. made an initial report of inappropriate touching to the social worker, but then recanted because she was fearful of being removed from her home. Therefore, counsel reasoned she either lied when she reported the abuse, or lied when she recanted it. The court found that Evidence Code section 782 was inapplicable to N.R.'s recantation, as section 782 applies only to sexual conduct. The court found that there was no evidence that N.R.'s report of abuse was false, and therefore, at most, the evidence supported a conclusion that N.R. had made inconsistent statements, but that this did not bear on her credibility. Defense counsel represented that she would seek to prove that N.R. made a false report by asking her about it; she would then seek to impeach her with testimony from the social worker. The court found that under section 352, the risk of undue consumption of time and confusion of the issues outweighed any marginal probative value of the evidence.

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[1] The trial court later ruled that defendant could testify to seeing N.R. hump L.B., to impeach L.B.'s testimony that it never happened before the October 2011 incident.

c. Analysis

i. Prior sexual conduct

We find no abuse of discretion in the trial court's denial of defense counsel's request for a hearing under Evidence Code section 782 to examine N.R. about whether she had sexual intercourse with a male relative when she was seven years old.

"A child's testimony in a molestation case involving oral copulation and sodomy can be given an aura of veracity by his accurate description of the acts. This is because knowledge of such acts may be unexpected in a child who had not been subjected to them. [¶] In such a case it is relevant for the defendant to show that the complaining witness had been subjected to similar acts by others in order to cast doubt upon the conclusion that the child must have learned of these acts through the defendant. Thus, if the acts involved in the prior molestation are similar to the acts of which the defendant stands accused, evidence of the prior molestation is relevant to the credibility of the complaining witness and should be admitted." (*People v. Daggett* (1990) 225 Cal.App.3d 751, 757.)

In *People v. Mestas* (2013) 217 Cal.App.4th 1509 (*Mestas*), the defendant was accused of lewd acts, which included oral copulation and anal penetration, on two young children. (*Id.* at pp. 1512-1513.) The defendant sought to admit evidence of prior incidents involving the victims under section 782. (*Mestas*, *supra*, at pp. 1515-1516.) The incidents included one in which one of the victims reported being molested while in foster care when she was three years old, although "the specifics were 'sketchy and unconfirmed . . . .' " (*Id.* at p. 1515.) The trial court understood this incident "involved some kind of 'gentle rubbing . . . .' " (*Id.* at p. 1516.) Regarding another incident, the child's foster mother observed the child, when she was four years old, " ' "humping her younger brother and wanting to get under the covers . . . ." ' " (*Id.* at pp. 1515-1516.) The trial court declined to hold an evidentiary hearing as to these incidents. The molestation when the child was three years old "was too vague to permit proper Evidence Code section 782 analysis." (*Id.* at p. 1516.) Moreover, the humping incident "was not

relevant, even though it was sexualized conduct, because it was not similar to the facts of this case." (*Ibid.*) The Court of Appeal affirmed the trial court's rulings. (*Id.* at p. 1518.)

Here, defense counsel acknowledged she could not prove that N.R. had engaged in sexual intercourse. At best, she could prove some sort of inappropriate touching between N.R. and L.B.'s grandson. However, sexual touching over clothing between two children is not similar to the conduct of defendant, an adult who was alleged to have had forcible sexual intercourse with a child. Therefore, it had no bearing on N.R.'s credibility, as it did not provide any alternative explanation of her knowledge of sexual intercourse, or for her vaginal injuries. (*Mestas, supra,* 217 Cal.App.4th at p. 1516.) There was no evidence that N.R. ever admitted to sexual intercourse. Counsel's offer of proof was based on the self-serving statements of defendant, or rumors by estranged family members.

Any attempt to prove sexual intercourse would have relied on layer after layer of hearsay, and multiple impeachment witnesses, consuming a great deal of time, and running the risk of confusing the jury. On the sketchy facts provided by defense counsel, any inquiry of N.R. would have been tantamount to a fishing expedition. "The purpose of an Evidence Code section 782 hearing is to establish the truth and probative value of the offer of proof, not to allow a fishing expedition based on sketchy and unconfirmed allegations." (*Mestas, supra,* 217 Cal.App.4th at p. 1518.)

Because we find no abuse of discretion, we also find no violation of defendant's right to confrontation. (See *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1426.) Further, since the evidence was of little, if any, probative value, there was no violation of defendant's due process right to present a defense. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1014-1015.)

ii. False report of abuse

Alternatively, defense counsel sought to establish that N.R. had made a false report of sexual abuse, as she told a social worker she had been touched inappropriately by L.B.'s grandson, but then recanted that anything had happened. As the trial court correctly concluded, evidence of a victim's prior false complaint of molestation is not

evidence of "sexual conduct" as defined by Evidence Code section 782. (*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1454-1455; *People v. Franklin* (1994) 25 Cal.App.4th 328, 335.)

Even though evidence of a prior false report of molestation is not admissible under Evidence Code section 782, it may be admissible if it is relevant to the credibility of the victim. (*People v. Miranda*, *supra*, 199 Cal.App.4th at p. 1424; *People v. Franklin*, *supra*, 25 Cal.App.4th at p. 335.) However, absent proof that the prior complaint was false, the evidence has only marginal impeachment value. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1097; see *People v. Tidwell, supra,* 163 Cal.App.4th at p. 1457.) Admissibility of false molestation claims, like other evidence, is subject to exclusion under Evidence Code section 352, which provides that the court has discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A trial court has broad discretion to exclude evidence under section 352, and its decision will not be disturbed on appeal unless the court exercised its discretion in "an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

When there is no proof that a prior molestation report is false, the parties may be forced to conduct a trial within a trial on the truthfulness of the prior report, consuming considerable time and diverting the jury's attention from the current case. (*People v. Bittaker*, *supra*, 48 Cal.3d at p. 1097; *People v. Tidwell, supra,* 163 Cal.App.4th at pp. 1457-1458.) As the trial court pointed out, defense counsel had no evidence that N.R.'s statements to Ms. Alvarez were false. However, defendant argued that either N.R.'s initial complaint of abuse was false, *or* her recantation was false, either of which would bear on her credibility. We disagree. At best, there was evidence that N.R. made inconsistent statements to Ms. Alvarez. N.R. may have falsely recanted her report of abuse because she was scared of being removed from her home, which would have *bolstered* her credibility in the instant case. Therefore the evidence was minimally

probative for the purposes identified by defense counsel. We find no abuse of discretion, and no constitutional error. (See *People v. Miranda, supra*, 199 Cal.App.4th at p. 1426; see also *People v. Jenkins, supra*, 22 Cal.4th at pp. 1014-1015.)

2. Penal Code Section 654

Defendant contends that the trial court erred when it did not stay his sentence on count 2 under Penal Code section 654. Defendant contends there was insufficient evidence that he engaged any sexual act in support of count 2 that was different from the conduct supporting his conviction for count 1. Alternatively, defendant contends the conduct involved in both counts was part of an indivisible course of conduct. We disagree with defendant's characterization of the evidence.

Penal Code section 654, subdivision (a) provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The protections of section 654 extend to situations in which several offenses are committed during an indivisible course of conduct. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.) In order to determine whether a course of conduct is indivisible, the court looks to "defendant's intent and objective, not the temporal proximity of his offenses." (*People v. Harrison* (1989) 48 Cal.3d 321, 335; see also *People v. Hicks* (1993) 6 Cal.4th 784, 789.) If all the offenses are incidental to, or the means of accomplishing or facilitating a single objective, the defendant may be punished for any one offense but not more than one. (*People v. Harrison*, at p. 335.)

Alternatively, "if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. . . . Each case must be determined on its own facts. . . . The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if

there is any substantial evidence to support them." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136, citations omitted.)

"[M]ultiple sex acts committed on a single occasion can result in multiple statutory violations. Such offenses are generally 'divisible' from one another under section 654, and separate punishment is usually allowed." (*People v. Scott* (1994) 9 Cal.4th 331, 344, fn. 6.) In the context of sex crimes, "a 'defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act.' [Citation.]" (*People v. Harrison*, *supra*, 48 Cal.3d at p. 336.)

Here, the trial court reasoned there was evidence of digital penetration and kissing, either of which could have formed the basis of defendant's conviction for count 2. "[Defendant] had one objective at the time he kissed [N.R.] . . . . And . . . he escalated that intent to something completely different, which was an attempt to sexually penetrate [N.R.]" Although N.R. denied that defendant kissed or digitally penetrated her at trial, Deputy Chavez testified that N.R. reported that defendant had done these things to her. An out-of-court statement by a witness is sufficient to support a conviction, even if not confirmed in court. (See, e.g., *People v. Cuevas* (1995) 12 Cal.4th 252, 263-275.) The trial court did not abuse its discretion in finding the evidence supported a finding that defendant harbored multiple, escalating intents during his attack upon N.R., starting with a desire to molest her, and then rising to attempted sexual intercourse.

DISPOSITION

The judgment is affirmed.

GRIMES, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.