Filed 1/13/26 P. v. Campos CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARTIN JIMENEZ CAMPOS, Defendant and Appellant.	F088326 (Super. Ct. No. F20905126) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Kravis, Graham, & Zucker and Thomas Ian Graham for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Kimberley A. Donohue, Assistant Attorney General, Christopher J. Rench and Jamie A. Scheidegger, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Martin Jimenez Campos was convicted of sexual intercourse with a child 10 years of age or younger, three counts of oral copulation with a child 10 years of age or younger, and continuous sexual abuse of a child under 14 years of age. He was sentenced to 70 years to life in prison. On appeal, he contends: (1) insufficient evidence

supported one count of oral copulation with a child under 10 years of age, (2) the trial court erred by instructing the jury that sexual intercourse with a child under 10 years of age is a general intent crime, and (3) trial counsel rendered ineffective assistance by failing to request concurrent sentences. We disagree and affirm.

PROCEDURAL SUMMARY

On May 28, 2024, the District Attorney of Fresno County filed an amended information charging defendant with sexual intercourse with a child 10 years of age or younger (Pen. Code, § 288.7, subd. (a); count 1),[1] oral copulation or sexual penetration with a child 10 years of age or younger (§ 288.7, subd. (b); counts 2–4), and continuous sexual abuse of a child under 14 years of age (§ 288.5, subd. (a); count 5). The amended information alleged that defendant took advantage of a position of trust pursuant to California Rules of Court, rule 4.421(a)(11).[2]

On June 5, 2024, the jury found defendant guilty on all counts. In a bifurcated proceeding, after defendant waived the right to a jury trial on the aggravating factor, the trial court found the aggravating factor true beyond a reasonable doubt. On July 9, 2024, the court granted the prosecution's motion to dismiss count 5.

The trial court sentenced defendant to an aggregate term of 70 years to life, as follows: 25 years to life on count 1, followed by three consecutive terms of 15 years to life on counts 2, 3, and 4.

Defendant timely appealed.

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1 All further statutory references are to the Penal Code.

2 All further rule references are to the California Rules of Court.

FACTUAL SUMMARY

The Prosecution's Case

Background

In 2013, defendant was in a dating relationship with M.V. M.V. had a daughter, A.A., and a son from a previous relationship. M.V. and her children lived with defendant and his two children, M.C. and J.C. In the house, defendant and M.V. shared a room, and A.A. shared a room with her brother. M.C and J.C. each slept in separate rooms. A.A. lived with defendant from the time she was six years old until she was around 10 years old.

Count 2: First Incident

When A.A. was six or seven years old, defendant began taking her into his room and forcing her to engage in sexual activity. During the first incident, defendant took A.A. into his room and closed the door. While A.A. was sitting on a couch, defendant tried to force his penis in her mouth. Defendant was standing and holding the back of A.A.'s head in his hand while pushing her head against his erect penis. A.A. resisted by putting her head back against his hand. A.A. testified defendant's penis touched her mouth but did not enter her mouth during this incident.[3]

Counts 3, 4, and 1

Another incident occurred on a different day when A.A. was still six or seven years old. Defendant brought A.A. from her room into his room again. After he sat A.A. on the couch, defendant tried to force his penis into her mouth again, but this time she opened her mouth and "let him do it." Defendant moved her head "back and forth," until

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[3] At another point during her testimony, A.A. stated that defendant's penis did not make contact with her "face" and she could not remember whether defendant's penis made contact with her at all during the first incident. She also testified her memory about the incident was better when she was 12 years old, the age in which she participated in a forensic interview. A.A. was 16 years old at the time of defendant's trial.

he ejaculated in her mouth. Afterwards, defendant told A.A. not to tell M.V. This incident was the basis of count 3.

Defendant engaged in other sexual acts with A.A when she was still around six or seven years old. In one incident, defendant brought A.A. into his room, pulled down her pants, and put his mouth on her vagina. This incident was the basis of count 4. During another incident, defendant brought A.A. into M.C.'s room and laid her down on the bed before pulling down her pants and trying to put his penis in her vagina. When his penis entered her vagina, she felt pain. She told defendant she was hurting, and he stopped. This incident was the basis of count 1.

Forensic Interview

In 2020, when she was 12 years old, A.A. told her cousin about one of the incidents. A.A.'s disclosure eventually reached M.V. A.A. told M.V. that defendant was "making [her] do stuff with [her] mouth." M.V. contacted law enforcement soon afterwards.

In May 2020, A.A. spoke with Josefina, a forensic interviewer, and described the incidents with defendant.[4] Regarding the first incident, A.A. stated that defendant pulled out his penis and was pushing her head towards his penis as she tried to move her head back. A.A. also stated that defendant made her put his penis in her mouth. Afterwards, defendant told A.A. not to tell M.V. about what had just occurred.

A.A. told Josefina about another incident during which defendant forced her to orally copulate him. A.A. also stated that, on more than five occasions, defendant put his mouth on her vagina. After every time "it" happened, defendant "would just always [tell]" A.A. not to tell M.V. A.A. told Josefina that defendant put his penis in her vagina during one incident.

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[4] A video recording of the interview with audio was played for the jury.

The Defense Case

J.C.'s Testimony

J.C. testified that she lived at defendant's house during the period of 2013 or 2014. During that time, the house was "pretty busy" since the family held many gatherings at the house year-round and other family would often come to visit. M.V. was always at the house and did not have a job at the time. Usually, M.V.'s children would not be at the house on the weekends. J.C. had never seen defendant alone with M.V.'s children, and never heard defendant say he was "babysitting" M.V.'s children. J.C. testified that defendant was "very nice" to M.V.'s children and "always included them when we would do stuff."

J.R.'s Testimony

Defendant's niece, J.R., testified that she got introduced to A.A. as a result of defendant and M.V.'s relationship. J.R. is older than A.A. by about one and a half years. A.A. was "like family," and when J.R. was in elementary school, the two would swim together and play with dolls at defendant's house. Each time J.R. was with A.A. at defendant's house, M.V. was also present in the house. J.R. observed A.A. interact with defendant, and everything seemed normal. J.R. described A.A. as "always happy," and never noticed anything wrong.

M.C.'s Testimony

M.C. testified that in 2013, he and defendant lived in the house before M.V. and her children moved in. J.C. eventually moved into the house as well. M.C. did not like anyone being in his room and so he installed a lock on his door. He regularly locked the door, and never forgot to lock the door as he would double check that the door was locked before leaving. He could tell if someone had been in his room because his belongings would have been noticeably rearranged. He also put pieces of tape on his drawers which would indicate if someone had opened his drawers.

N.C.'s Testimony

Defendant's sister, N.C., testified that her daughters were friends with A.A. N.C. and her daughters regularly went to defendant's house for the children to swim or spend time together. N.C. never observed any abnormal interactions between defendant and her daughters or A.A. and never noticed any changes in A.A.'s behavior or anything "concern[ing]."

Defendant's Testimony

Defendant testified that he never spent any time alone with A.A. Defendant denied A.A. ever orally copulating him, and denied ever orally copulating A.A. Defendant further denied ever trying to isolate A.A., and denied ever having an opportunity to be alone with M.V.'s children. He stated "everyone was always close," and, at any given time, whoever was at the house did things together. He did not ever ask M.V. if he could take care of her children. Defendant denied the rest of the alleged incidents.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE

Defendant contends insufficient evidence supported his conviction on count 2. The People disagree, as do we.

A. Standard of Review

In reviewing a claim of insufficiency of the evidence, we assess "the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66.) " 'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict

is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder.' " (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We do not reweigh the evidence or reevaluate a witness's credibility, and we presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.) " '[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.' " (*People v. Ramirez* (2022) 13 Cal.5th 997, 1118.) We will not reverse the judgment unless "it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

B. Analysis

Regarding count 2, defendant challenges the sufficiency of the evidence only as to whether A.A.'s mouth made contact with defendant's penis.

"The elements of oral copulation with a child 10 years of age or younger (§ 288.7, subd. (b)) are: (1) The defendant engaged in an act of oral copulation with the victim; (2) when the defendant did so, the victim was 10 years of age or younger; and (3) at the time of the act, the defendant was at least 18 years old." (*People v. Mendoza* (2015) 240 Cal.App.4th 72, 79–80 (*Mendoza*).) "Oral copulation is defined as any contact, no matter how slight, between the mouth of one person and the sexual organ of another. Penetration is not required." (*Id*. at p. 80.)

Contrary to defendant's claim, substantial evidence supported this element of the offense. The jury heard the forensic interview, in which A.A. told Josefina that defendant made her put her mouth on his penis during the first incident. Furthermore, A.A. testified at trial that defendant's penis touched her mouth during the first incident. Based on the evidence, the jury could reasonably have found defendant guilty of the offense beyond a reasonable doubt. (*People v. Snow, supra,* 30 Cal.4th at p. 66.)

Defendant asserts A.A.'s trial testimony made "perfectly clear" that the first incident "did not result in any contact" between her mouth and his penis. We disagree. A.A. clearly stated in her testimony that defendant's penis touched her mouth during the first incident. It is true that A.A. also testified she did not remember whether there was contact with her lips or mouth during the first incident and denied that his penis touched her "face" or "forehead" during the first incident. But defendant fails to acknowledge that, within the very pages of the record he cited, A.A. testified his penis touched her mouth.[5] There was sufficient evidence of contact to support the conviction on count 2. (See *People v. Young* (2005) 34 Cal.4th 1149, 1181 ["Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction."]; *People v. Ramirez*, *supra,* 13 Cal.5th at p. 1118.)

Defendant attempts to undermine the "evidentiary weight" of A.A.'s forensic interview. Specifically, defendant suggests A.A. "conflated" the incidents during her forensic interview, and that A.A.'s testimony expressed a lack of clarity. Defendant's arguments are unavailing. In determining whether there was substantial evidence in the record, we cannot "reweigh evidence or reevaluate a witness's credibility." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) Moreover, as we noted, A.A. testified at trial that defendant's penis touched her mouth during the first incident, which is sufficient contact for the offense. (*Mendoza*, *supra*, 240 Cal.App.4th at p. 80 ["Penetration is not required."].)

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[5] In his opening brief, appellate counsel for defendant stated: "Later in A.A.'s testimony, the District [A]ttorney circled back to the 'first time' A.A. said there was an encounter. A.A. again made clear that this initial incident did not result in [defendant]'s penis ever touching her mouth, forehead, or anything else." In support of this assertion, the brief cites pages 136–138 of the reporter's transcript. However, within those pages, the prosecution asked A.A., "[w]here did it touch?" and A.A. answered, "My mouth."

The asserted skepticism of A.A.'s testimony from her forensic interview does not warrant reversal of the judgment. (See *People v. Zamudio* (2008) 43 Cal.4th 327, 357 [" 'testimony [that] is subject to justifiable suspicion [does] not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends' "].)

The jury could reasonably have concluded that defendant's penis touched A.A.'s mouth during the first incident.

II. INTENT REQUIREMENT

Defendant contends the trial court erroneously instructed the jury of the intent requirement on count 1, sexual intercourse or sodomy with a child 10 years of age or younger (§ 288.7, subd. (a)). The People note defendant forfeited his argument. On the merits, the People argue that no error occurred because count 1 is a general intent crime. We exercise our discretion to address defendant's claim on the merits (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6) and conclude the court did not err in the manner asserted by defendant.

A. Additional Background

The trial court instructed the jury on the intent requirements of the various offenses. The court stated, in pertinent part:

> "The following crimes require general criminal intent, sexual intercourse with a child under 10 years of age as charged in Count 1, and oral copulation of a child under 10 years of age, as charged in Counts 2, 3, and 4.
>
> "For you to find a person guilty of these crimes, the person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he intentionally does a prohibited act, however, it is not required that he intend to break the law. The act required is explained in the instructions for those crimes."

Regarding count 1, the trial court instructed, in relevant part:

> "The defendant is charged in Count 1 with engaging in sexual intercourse with a child 10 years of age or younger in violation of the Penal Code. To prove the defendant guilty of this crime, the People must prove that, one, the defendant engaged in an act with sexual intercourse with [A.A.], two, when the defendant did so, [A.A.] was 10 years of age or younger and three, at the time of the act, the defendant was at least 18 years old. [¶] Sexual intercourse means any penetration no matter how slight of the vagina or genitalia by the penis. Ejaculation is not required."

Defendant's trial counsel did not object to the instructions.

B. Analysis

"The elements of sexual intercourse or sodomy with a child 10 years of age or younger (§ 288.7, subd. (a)) are: (1) The defendant engaged in a act of sexual intercourse or sodomy with the victim; (2) when the defendant did so, the victim was 10 years of age or younger; and (3) at the time of the act, the defendant was at least 18 years old." (*Mendoza, supra*, 240 Cal.App.4th at p. 79.) "Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis." (*Ibid*.)

"When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent." (*People v. Hood* (1969) 1 Cal.3d 444, 456–457.) "When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent." (*Id*. at p. 457.) In other words, " '[a] crime is characterized as a "general intent" crime when the required mental state entails only an intent to do the act that causes the harm; a crime is characterized as a "specific intent" crime when the required mental state entails an intent to cause the resulting harm.' " (*People v. Atkins* (2001) 25 Cal.4th 76, 86.)

Defendant argues count 1 is an offense which requires specific intent. Not so. The elements of subdivision (a) of section 288.7 only require the defendant to intend to commit the act, sexual intercourse with a child, not the intent to do some further act or

achieve some additional consequence. (*People v. Atkins*, *supra*, 25 Cal.4th at p. 86; *People v. Hood*, *supra*, 1 Cal.3d at pp. 456–457.) The offense in subdivision (a) of section 288.7 is therefore a general intent crime. (See *Mendoza*, *supra*, 240 Cal.App.4th at p. 79 [sexual intercourse with a child 10 years of age or younger is a general intent crime].)

In support of his argument, defendant cites several cases which stand for the proposition that an offense under subdivision (b) of section 288.7 requires specific intent. (See *People v. ZarateCastillo* (2016) 244 Cal.App.4th 1161, 1167 ["The crime of sexual penetration of a child 10 years old or younger and the crime of forcible sexual penetration are both specific intent crimes because they require the act of penetration 'to be done with the intent to gain sexual arousal or gratification or to inflict abuse on the victim.' "]; *People v. Ngo* (2014) 225 Cal.App.4th 126, 157 ["sexual penetration with a child is a specific intent crime under section 288.7, subdivision (b)"]; see also § 288.7, subd. (b) ["Any person 18 years of age or older who engages in oral copulation or sexual penetration, as defined in Section 289, with a child who is 10 years of age or younger…"].) Defendant's citations are misplaced. The offense in count 1 was "sexual intercourse" under subdivision (a) of section 288.7, not "sexual penetration" under subdivision (b) of that section. (§ 288.7, subds. (a), (b).) Accordingly, it was not erroneous for the trial court to instruct that count 1 required general intent.[6] (See *Mendoza*, *supra*, 240 Cal.App.4th at p. 79.)

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6 For the first time in his reply, defendant argues that an offense under section 288.7, subdivision (a) *should* require specific intent. This argument is forfeited. (*People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26 [" '[P]oints raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' "]; *People v. Tully* (2012) 54 Cal.4th 952, 1075 ["It is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party."].) We note defendant did not concede in his opening brief that, under current law, the offense in subdivision (a) of section 288.7 is a general intent crime.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends his trial counsel rendered ineffective assistance by failing to object to the trial court's imposition of consecutive sentences on counts 2 through 4. The People respond that trial counsel's actions did not fall below an objective standard of reasonableness, and defendant did not suffer prejudice. We reject defendant's ineffective assistance claim for lack of prejudice.

A. Additional Background

At the sentencing hearing, the trial court first dismissed count 5. The court then turned to sentencing on counts 1 through 4 and stated it had read and considered the probation report. The probation report noted under rule 4.425, the criteria affecting the decision to impose consecutive rather than concurrent sentences include whether the crimes involved separate acts of violence or threats of violence, and whether the crimes were committed at different times or separate places.

The prosecution requested the court make a finding on the aggravating factor (rule 4.421(a)(11)) allegation in the amended information. The court noted the sentencing on counts 1 through 4 "involve[d] a sentence of certain years to life" rather than the "[sentencing] triad." The court found the aggravating factor true beyond a reasonable doubt, but repeated that "it doesn't have any bearing on the ultimate range for each count."

Trial counsel then indicated he would like to put forth two mitigating factors: lack of criminal history, and prior satisfactory performance on probation. The court found the lack of criminal history mitigating factor true, noting:

> "I'll find there is a mitigating factor of the lack of substantial criminal history considering the Defendant's last conviction was some 24 years ago involving possession of a controlled substance. The only conviction was ten years or nine years prior to that, was I believe a misdemeanor, receiving stolen property, so for that I do find there's a single mitigating factor of lack of criminal history, so I'll find that mitigating factor."

Turning to sentencing, the court asked the prosecution and trial counsel if they would like to state any additional comments. Trial counsel did not provide additional comments. The prosecution requested consecutive sentences on counts 1 through 4.

The court then stated:

> "And it's my understanding pursuant to Rule 4.425, it requires those terms be served consecutively. I'm sorry, that's Count [5].
>
> "Pursuant to [section] 669, Counts [1], [2], [3] and [4], involve the indeterminate terms, the Court will impose those terms consecutively for total sentence as follows:
>
> "I do recognize, by the way, and am exercising any discretion that I have, currently, this was the facts in evidence do establish beyond a reasonable doubt each of the necessary elements of each of Counts [1], [2], [3] and [4].
>
> "This Court was the trial court, [and] heard the trial.
>
> "I believe [trial counsel] provided an exceptional defense for his client. I think he addressed every potential issue that could have been addressed in both his presentation of evidence and cross-examination of evidence.
>
> "That being said, I believe his client got an exceptionally fair trial, and again, [trial counsel] performed well over and above what would be expected of an attorney in a trial such as this."

The court sentenced defendant to consecutive terms totaling 70 years to life.

B. Standard of Review

To establish a claim of ineffective assistance of counsel, the defendant must show "(1) counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice." (*People v. Centeno* (2014) 60 Cal.4th 659, 674; *Strickland v. Washington* (1984) 466 U.S. 668, 688, 693–696.) "The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness

claim on the ground of lack of sufficient prejudice ... that course should be followed." (*In re Cox* (2003) 30 Cal.4th 974, 1019–1020; *Strickland v. Washington*, at p. 697.)

C. Analysis

We need not determine whether trial counsel's performance was deficient because, in any event, we conclude defendant fails to show he was prejudiced. (See *In re Cox*, *supra*, 30 Cal.4th at pp. 1019–1020; *In re Marquez* (1992) 1 Cal.4th 584, 602 ["When there has been no showing of prejudice, we need not determine whether trial counsel's performance was deficient."].)

The test for prejudice is whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid*.) In demonstrating prejudice, the defendant "must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

Defendant asserts he suffered prejudice because there was no reason for the trial court to impose consecutive sentences on counts 2 through 4. According to defendant, the elements of the crimes captured the totality of the conduct, so there was no reason for the court to impose consecutive sentences to achieve the appropriate punishment.

Generally, when a person is convicted of two or more crimes, the sentences "shall run concurrently or consecutively." (§ 669, sudd. (a); rule 4.425; *People v. Bradford* (1976) 17 Cal.3d 8, 20 ["It is well established that a trial court has discretion to determine whether several sentences are to run concurrently or consecutively."]; cf. §§ 667.6 [mandating consecutive sentencing for specific violent sex offenses, not including § 288.7, subd. (b), involving separate victims or the same victim on separate occasions],

667.61, subd. (i) [same]; rule 4.426.)[7] " 'Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court.' " (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377; see *People v. Boyce* (2014) 59 Cal.4th 672, 687 ["A court abuses its discretion if it acts 'in an arbitrary, capricious, or patently absurd manner.' "].)

Defendant was convicted of four sexual offenses against A.A. which occurred when she was between the ages of six and seven. Defendant committed each of these four offenses separately and independent of each other. As noted in the probation report, which the trial court explicitly referenced, two of the criteria in rule 4.425 supported imposition of consecutive sentences, namely, that the crimes involved separate acts or threats of violence and the crimes were committed at different times or separate places. Further, the court found true the aggravating factor that defendant took advantage of a position of trust pursuant to rule 4.421(a)(11). (*People v. Salazar* (2023) 15 Cal.5th 416, 429 [" 'In deciding whether to impose consecutive terms, the trial court may consider aggravating and mitigating factors.' "].) Accordingly, we cannot agree that there was "no reason for the court to impose consecutive sentences" on counts 2 through 4. Moreover, defendant offers nothing to show a reasonable probability that the court would have instead imposed concurrent sentences had an objection been made. Defendant's claim of prejudice is entirely speculative. (See *People v. Williams, supra*, 44 Cal.3d at p. 937.)

To the extent defendant suggests there was an increased need for his trial counsel to object because the trial court was unaware of its sentencing discretion, we disagree. Defendant first asserts the record was "unclear" as to "whether the trial court realized that it had discretion to impose concurrent or consecutive sentences." Specifically, he claims

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[7] The parties agree the trial court here had the discretion to impose consecutive or concurrent terms on defendant's convictions.

the court may have misunderstood its discretionary power when it made the following comment: "And it's my understanding pursuant to Rule 4.425, it requires those terms be served consecutively."[8] However, immediately after the court made that comment, the court corrected itself by noting: "I'm sorry, that's Count [5]." We understand the court's comment to mean the conviction for continuous sexual abuse of a child on count 5, which the court had dismissed, would have fallen within the "One Strike" law (§§ 667.6, subds. (d), (e)(6), 667.61, subds. (c)(9), (i)), mandating imposition of full, consecutive sentences for violent sex offenses. The court also explicitly noted that it was "exercising any discretion" that it had regarding imposing consecutive terms on counts 1 through 4. Although the court did not explicitly refer to the factors in rule 4.425, the court stated it had read and considered the probation report, which included relevant factors in rule 4.425. We disagree with defendant's suggestion that the court was unaware of its discretion. (See *People v. Thomas* (2011) 52 Cal.4th 336, 361 ["In the absence of evidence to the contrary, we presume that the court 'knows and applies the correct statutory and case law.' "].)

We reject his claim of ineffective assistance for lack of prejudice.

DISPOSITION

The judgment is affirmed.

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[8] We note that rule 4.426 addresses mandatory consecutive sentencing for violent sex offenses; rule 4.425 addresses the trial court's exercise of discretion in selecting whether to impose concurrent or consecutive sentences.

FRANSON, Acting P. J.

WE CONCUR:

SNAUFFER, J.

DE SANTOS, J.