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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SEAN RAMIRO LOPEZ, Defendant and Appellant.	E039828 (Super.Ct.No. FRE5208) OPINION

APPEAL from the Superior Court of San Bernardino County. J. Michael Welch, Judge. Affirmed in part, reversed in part with directions.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia, Supervising Deputy Attorney General, and Janelle Marie Boustany, Deputy Attorney General, for Plaintiff and Respondent.

After defendant waived jury trial, the trial court found him guilty of forty counts of committing lewd and lascivious acts on a minor under the age of 14 (Pen. Code, § 288 (a)) and twenty counts of committing lewd and lascivious acts on a minor over the age of 13 (Pen. Code, § 288 (c)(1)), involving three different victims. He was sentenced to prison for 75 years, four months.[1] He appeals, claiming the trial court erroneously admitted evidence, permitted the amendment of the Information and sentenced him. We reject all his contentions save the one concerning the imposition of the upper term on count 17. Therefore, we affirm the convictions and the sentences, except the term imposed for count 17. As to that count, we remand the matter to the trial court for a determination of the appropriate sentence in compliance with *Cunningham v. California* (2007) ___U.S.___ [127 S.Ct. 856] (*Cunningham*).

I.

FACTS

Defendant was a teacher at a middle school when he told one of his students, a former student, and another student he had met at school about a secret "program" in which he would pay them to take pills which would build their muscles and enlarge their

[1] The trial court imposed 8 years for Count 17, two years each for Counts 1, 5, 9, 13 and 18-40, and eight months each for Counts 41-59 and 63. In adding up these sentences at the sentencing hearing, the court made a mathematical error with regard to the sentences for Counts 41-59 and 63, stating that the terms for them added up to 12 years, 8 months, when, in fact, they add up to 13 years and 4 months. This error resulted in the court's error in the total sentence, orally pronounced at the hearing of 74 years, 8 months. The abstract of judgment, as best it can, reflects that such a mathematical error was committed.

penises. After he gave them the pills to take, defendant measured their penises and had them masturbate (and once masturbated one of them), while they watched pornographic movies he supplied. He retrieved their ejaculate with a syringe, which he claimed was sent off for scientific testing. Defendant took still and/or moving pictures of the victims. He gave them money and/or bought them things.

II.

ISSUES AND DISCUSSION

1. Admission of Evidence

a. *Brandon's and Jeff's Trial Testimony*

At the hearing on the suppression of the victims' trial testimony on the basis that their discovery was the fruit of items illegally seized from the defendant's home on January 21, 2002, a detective testified that when he spoke to Kevin's mother on February 19th, she gave him the name of the third victim, Brandon.[2] The detective got Brandon's home phone number and address from the high school he was then attending. The detective immediately called Brandon's house, but heard nothing from his parents until February 27th, when Brandon's father met with the detective. The detective interviewed Brandon on February 28th, after Brandon's mother had called the detective, telling him

[2] There was conflicting evidence about the last name of the person Kevin's mother identified. At one point, the detective said she provided the last name of the third victim. At another point, he said she provided a different last name for this "Brandon." However, the detective testified that during his interview with Kevin, which also happened on the 19th, Kevin identified the Brandon that is the third victim in this case as someone he knew and who knew defendant. The detective further testified that as he finished his interview with Kevin, both Kevin and his mother talked about this Brandon.

that her son had something to say to him. The detective showed Brandon some of the photos that had been taken from defendant's home. After the detective told Brandon that the former had identified other victims of defendant's, Brandon admitted that he was a victim.

The trial court concluded that there was no link between the items taken in the defendant's house and the detective's discovery of Brandon. In challenging the trial court's ruling, defendant asserts only that the detective would not have discovered Brandon without the photos seized from his home. The record belies this assertion.

When Brandon's father met with the detective on February 27th, he identified the second victim, Jeff, in a picture that had been taken from defendant's home. Brandon's dad gave the detective Jeff's phone number and address. The detective interviewed Jeff on February 28th and Jeff acknowledged being a victim of defendant's but he denied knowing the names of any other victims. After this, the alleged fourth victim, Derek,[3] told the detective that the defendant had given him Jeff's name as someone who was participating in "the program." Also, after February 28th, Brandon told the detective that Jeff had been in defendant's school room with him. The detective testified that what was uncovered in the search of defendant's house expedited the discovery of Jeff, because Brandon's dad identified Jeff in one of the pictures taken from the house, but he would have discovered him during his interviews of Brandon and Derek. Further, the detective stated that had Brandon's dad not identified Jeff in the picture seized from defendant's

[3] Defendant was acquitted of the counts involving Derek.

house, and had neither Brandon nor, possibly, Kevin, identified Jeff, he still would have contacted Jeff after October 28, 2002, when Derek identified Jeff as a participant in "the program."

The detective testified that generally male molestation victims are reluctant to discuss incidents, so he talks to them more than one time. He said that he usually got the general story during the first interview and obtained dates and times during the second, and that is what happened in this case. He added that if he believed a victim was "holding out" on him, he would interview that victim three times.

The trial court concluded that the discovery of Jeff was inevitable, based on Derek's interview.[4] Defendant challenges this finding, asserting that Derek's identification of Jeff was "inherently unbelievable" because it occurred while the detective's recorder was turned off. It is difficult to determine exactly what defendant is insinuating -- i.e., that the detective's testimony that Derek identified Jeff was inherently unbelievable because it happened not to have been recorded or that it was so because, as defendant goes on to assert, Derek is an inherently unreliable witness. As to the first, we are bound by the trial court's express conclusion that the detective was "frank and honest" in all his testimony. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1040.)

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[4] The trial court cited Derek's October 28th interview, during which he said the defendant had told him that Jeff was participating in the program. Defense counsel then corrected the trial court, saying this statement was made on March 6, 2002. However, counsel was incorrect. During his March 6 interview, Derek identified Jeff in the photographs the detective showed him which had been taken from defendant's house. It was not until the October 28th interview that Derek told the detective that the defendant had told him that Jeff was part of "the program."

Certainly, defendant offers no basis whatsoever for us to depart from the trial court's credibility determination. As to the credibility of Derek in telling the detective that the defendant had told him that Jeff was part of "the program," that issue was not before the trial court in the context of this motion. The fact that the judge who presided at the trial later determined that Derek's *testimony there* was not credible,[5] contrary to defendant's assertion, had nothing whatsoever to do with the hearing at issue, which was before a different judge and, as we have already stated, did not involve Derek's credibility. The question properly before the court was, but for the discovery of the items at defendant's house, would Jeff have been discovered by the detective. The answer was yes.

b. *Defendant's Prearrest Statements*

At a hearing to establish the foundation for admission of the defendant's prearrest statements, the detective mentioned above testified that Kevin and his mother had claimed that defendant had committed a sexual offense against Kevin, who was a minor. Kevin said that defendant had led him to believe that he was part of an experiment, and, initially, Kevin believed it was legitimate. The day before the interview, the detective had set up a pretext call between Kevin and defendant, during which Kevin said to defendant that he had participated in a "program" and defendant had touched him inappropriately. Defendant responded that Kevin was involved in a "program" with him, he did not deny touching Kevin inappropriately and he implied that he touched Kevin's

[5] See footnote 3, *ante.*

penis. The next day, the detective went to the school where defendant taught in order to interview him. He wanted to confirm what Kevin had said and what had been inferred in the pretext call. He also wanted to find out if there were other victims. The detective felt he did not have probable cause to arrest defendant before speaking to him. He felt that a follow-up was necessary. If defendant had denied molesting Kevin, the detective probably would not have arrested him. If defendant could have verified that he was part of a legitimate experiment, the detective would have investigated further rather than arrest defendant on the spot.

The unarmed detective interviewed defendant alone in the vice principal's office. The door was closed but not locked. There were two other law enforcement officers out in the school parking lot. The conversation was tape recorded, a fact that was probably unknown to defendant. The detective told defendant that he was not under arrest, he did not have to answer his questions and he was free to leave. Defendant replied that he was aware of this because he had been a police officer in a nearby community for two years. The detective again told defendant that he was free to leave and he did not have to talk. Defendant again said he understood. The detective repeated for a third time that defendant was free to leave. According to the detective, defendant understood throughout the 20-30 minute interview that he was free to leave. [6]

[6] The assertion of appellate counsel for defendant that these admonitions were "[a]n obvious ploy to get [defendant] to talk, and dissuade him from obtaining counsel" is not supported by the record and is inappropriate.

The detective asked defendant if it was true that, as Kevin had told him, defendant was collecting Kevin's semen for testing purposes. At first, defendant said it was. It was only at the end of the interview that defendant admitted that he had thrown out Kevin's semen--that there was no experiment. Defendant verified that he had been giving the victims pills and he said they were not doing what he had led the victims to believe they would do. At one point in the interview, defendant denied being involved with Kevin. Therefore, the detective offered to play the tape of the pretext conversation. Shortly after this, defendant acknowledged that there was no experiment. The detective had asked defendant questions about the legitimacy of the experiment and he asked for names of those working with defendant on it. Defendant gave the detective the pills he had left in his classroom. After the interview, the detective decided to arrest defendant and did so.

The trial court concluded that defendant was not in custody for purposes of *Miranda*[7] at the time of the interview because the detective was still in the investigatory mode, defendant was free to leave and when he corroborated what Kevin said, then there was probable cause to arrest him. Therefore, the statements were admissible.

Defendant challenges the trial court's ruling, asserting that "the detective had already determined there was reasonable cause" to arrest him[8] and he was arrested immediately after the interview. His first assertion is contrary to the detective's

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[7] *Miranda v. Arizona* (1966) 384 U.S. 436

[8] Defendant repeats this assertion, stating that the detective had already decided to arrest him when he interviewed him. As we have stated, the detective testified otherwise.

testimony. Although defendant correctly states that the trial court's factual findings and determinations of credibility have to be upheld on appeal if they are supported by substantial evidence (see *People v. Box* (2000) 23 Cal.4th 1153, 1194), he offers no persuasive argument that these were not so supported.[9] The fact that the detective did not permit the vice principle to sit in on their discussion does not persuade us otherwise. It may have been motivated by a desire on the part of the detective to get defendant to be honest with him and/or to protect defendant's privacy in the event the accusations were untrue. The same is true of the fact that the door was closed -- it is almost a certainty that the detective was trying to protect defendant's privacy from staff seated and students milling outside the vice principle's office in the hope that defendant would be honest and/or if the charges were untrue, that his reputation at the school would not be destroyed by matters overheard. The fact that the detective may have secretly recorded the conversation did nothing to indicate that the detective, contrary to his testimony, believed he had probable cause to arrest defendant.

Defendant also asserts that a reasonable person in his shoes would not have felt free to leave. To the extent defendant suggests that the absence of the vice principal, the closed door and secret tape recordings may have had a bearing on his belief in his ability to leave, we reject them. We cannot fathom anyone, *whether guilty or innocent*, wanting

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[9] Defendant's assertion that the detective already had the warrants to search his home and car when he questioned him was not disclosed to the trial court at the time of this hearing and, therefore, is not a matter relevant to this discussion concerning the propriety of the trial court's ruling.

their supervisor hearing or their supervisors, coworkers and students overhearing that they were being accused of such offenses. Defendant was no doubt greatly relieved that the door was closed and that he was alone with the detective, especially considering the fact that Kevin's accusations turned out to be true. If defendant was secretly recorded, he was unaware of it, so it could not possibly have made him feel any particular way.

Defendant then draws our attention to the type of questions asked, and the facts that the detective would not allow him to use the phone in his classroom before the arrest and informed him immediately after the arrest that he could not talk to his lawyer until after booking. However, these matters were not before the court at the time of this hearing.[10] He claims that based on them, he "was not free to leave at any time from the onset of the interrogation to formal arrest." This argument lacks logical appeal.

c. *Expert Testimony*

The expert witness the prosecution planned to call did not testify because she had personal knowledge of one of the victims. Upon discovering this conflict of interest, the prosecutor contacted defense counsel, who agreed that another expert should be selected. The prosecutor offered to give defense counsel two names and he instructed her to just pick one herself. She did. Her expert was in court the week before and the prosecutor

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[10] Defendant contends that he renewed his objections twice during trial, citing reporter's transcript pages 587 and 671. However, at page 587, he objected on the basis of coercion, which is not the same as a violation of *Miranda*, and at page 671, he simply reiterated "the same objection as earlier" which the trial court interpreted to mean his *Miranda* objection. Neither of these objections followed those parts of the record defendant cites in this portion of his argument, meaning that these matters were not before the court when it overruled both objections.

notified defense counsel and invited him to speak to the expert about his anticipated testimony, or any other matter. Defense counsel declined.

Before this witness took the stand, defense counsel objected to his testimony because counsel had not been given a written report or statement by the witness -- the prosecution making the witness available to the defense was simply not enough. The prosecutor pointed out that her expert would not be addressing any matter specific to these victims, but just would be speaking, in general, about the phenomenon of Child Sexual Abuse Accommodation Syndrome (CSAAS), with which defense counsel had already indicated his familiarity. She added that defense counsel had not requested a continuance to do something other than talk to the witness, if he wished.

The trial court concluded that due to the fact that experts on CSAAS speak in generalities and do not draw connections between the facts of the case and aspects of the syndrome, there is generally no report generated or necessary. Therefore, the trial court overruled defendant's objection. Defendant here contends that the trial court abused its discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.)

Defendant points out that Penal Code section 1054.1, subdivision (f) requires that the prosecutor disclose "any reports or statements of experts made in conjunction with the case . . . *which the prosecutor intends to offer in evidence at the trial*." (Italics added.) However, defendant does not point to the existence of any such report or statements by this witness. Rather, he speculates that there must have existed at least an oral report as to the nature and content of the expert's expected testimony. His speculation is insufficient. Certainly, there was no written report or statement, as defense

counsel himself noted.[11] Moreover, neither a report nor statements were offered by the prosecutor to be introduced into evidence. Defendant cites no authority for the proposition that the statute includes oral reports or that the prosecutor had a duty to either author herself or have the expert author a written report or statement that the prosecutor was then obliged to turn over to the defense.

Defendant also contends that the trial court abused its discretion in failing to exclude the expert's testimony on the basis that everything he said was a matter of common knowledge, therefore, his testimony was unnecessary. However, defendant fails to examine that testimony, pointing out that each substantive point of it was a matter of common knowledge.

Finally, in arguing that his convictions should be reversed because admission of the expert's testimony created incurable prejudice,[12] defendant cites to comments by defense counsel below concerning the expert that did not testify due to a conflict of interest. Moreover, these comments went to the issue of whether the defense had been given the discovery required by law, a matter we have already discussed. Defendant's

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[11] Similarly, the expert who had the conflict of interest had not prepared a report or made statements "because she [did] not review[] the file [i]n this particular case. She [wa]s going to speak in generalities . . . on a syndrome she's well aware of." When defense counsel had made an objection to this expert's testimony identical to the one now at issue, the trial court had offered the defense time and its assistance with other means to meet the evidence, which the defense had declined to take.

[12] Defendant walks an interesting line in first contending that everything the expert said was a matter of common knowledge, therefore, his testimony should not have been admitted, and this contention that admission of his testimony created "incurable prejudice."

complaint that the trial court did not offer him a continuance to "meet this evidence" ignores the trial court's previous offer of the same in connection with the first expert, an offer the defense declined.[13] Although defendant contends that the fact that the prosecutor or the expert was not compelled to author a report, or statement, and give it to him deprived him of the opportunity to effectively cross-examine the expert, he goes on to cite weaknesses in the expert's testimony brought out on cross-examination.[14] Finally, defendant asserts that the "entire tenor" of the expert's testimony was aimed at establishing the truth of the victims' accusations. However, he fails to mention that defense counsel below did not seek to strike this testimony once its tenor became so obvious.

d. *Kevin's Recorded Interview*

Defendant contends that the trial court abused its discretion in admitting the taped interview of Kevin with the detective as a prior consistent statement. We disagree.

Kevin testified on direct that the molestations began when he was 13 and in the 8th grade, before December of 1999, and they went on for about a year and a half.[15]

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[13] See footnote 11, *ante.*

[14] We also note with interest that defense counsel's cross examination of the expert covered 25 pages of transcript, while direct covered 10.

[15] He testified that they began shortly after his father died in July, 1999. However, on cross-examination, he said that after his mother told him that his father died in 2000, he was not sure whether the molestations began afterward. The defense introduced the father's death certificate, which, indeed, stated that the father had died in July, 2000. Kevin's mother had told Kevin's high school principal that Kevin had told

[footnote continued on next page]

During later redirect examination, he said he could not be sure exactly when the first incident occurred, but it was during 8th grade[16] and at least from after Christmas, 1999, to the end of the school year in June, 2000, he was molested by defendant at least once a week. On cross examination, he variously testified that he did not remember when the molestations began, that he could not recall the month they began, but it was in 1999 that they began in October and November of 1999, that they began in September of 1999, that they began between the September and December when he was 13 (which would be 1999), that they began sometime in the eight grade, that they probably began the first semester of 8th grade, and that they could have begun in 2000. He also said defendant did not call him before the molestations began and he told a lady from the school district (before he was interviewed by the detective)[17] that the calls began in September, 2000, and ended in the summer of 2001.[18] He told the same lady that they began when he was 14. Aside from the foregoing, he also variously testified that the molestations ended in the December of his freshman year in high school (which would have been 2000), that he

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her that defendant began paying Kevin to take drugs in the second semester of the 8th grade.

[16] Kevin made this change after his mother had pointed out to him that his father had not died in 1999, as he had originally testified, but in 2000. (See fn. 15, *ante*.)

[17] The woman testified, in contrast, that she talked to Kevin in March, 2002, which would have been after his interview with the Detective.

[18] The defense called this lady as a witness and she testified that Kevin told her that the molestations began in August of 2000.

did not remember them stopping in December 2000, and they ended just as he entered his freshman year.[19]

Given these inconsistencies, there was a basis for the introduction of Kevin's statement to the detective that the abuse began before Christmas (around September) when he was in the eighth grade. (*People v. Crew* (2003) 31 Cal.4th 822, 843-844.)

2. Amendment of the Information

After the evidentiary portion of the case had closed, the prosecutor moved to amend the following counts involving Kevin: four originally alleged to have occurred between September 1, 1999, and September 30, 1999, now alleged to have ended on June 26, 2000; four originally alleged to have occurred between October 1, 1999, and October 30, 1999 now alleged to have occurred between September 1, 1999, and June 26, 2000; four originally alleged to have occurred between November 1, 1999, and November 30, 1999, now alleged to have occurred between September 1, 1999, and June 26, 2000, and

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[19] The defense had the lady from the school district testify that Kevin told her in March, 2002, that the molestations stopped in September, 2001. Defense counsel below had a habit of getting witnesses to agree that an event occurred on two different dates. Aside from those instances noted in the text during cross-examination of Kevin, during cross examination of his mother, who testified on direct that her son had gone to Oregon in the summer of 2001 and upon his return began to tell her of his involvement with defendant, counsel asked, "During the summer of 2002 Kevin went to visit friends in Oregon?" The mother responded affirmatively. Counsel went on to ask her whether she spoke to her son about receiving cash and pills from defendant while he was gone or if she waited until he got home. She responded that she did the latter. However, a few questions later, he asked her if Kevin had told her about the "program" in late August or early September, 2001. It became clear during the mother's testimony that she, like her son, was, before trial, mistaken about the year Kevin's father had died and when these events occurred. Kevin testified that it was not until he took the stand the second time that he realized the significance of being accurate as to dates.

four originally alleged to have occurred between December 1, 1999, and December 31, 1999, now alleged to have occurred between September 1, 1999, and June 26, 2000. As to Jeff, four counts originally alleged to have occurred between July 1, 2000, and July 31, 2000, now alleged to have occurred between December 1, 2001, and February 2, 2002.

Defense counsel below objected, asserting that none of the victims could pinpoint any particular dates and Kevin had testified that the counts at issue had occurred during his 8th grade, which covered a nine month period.[20] Counsel argued that changing the dates at that point made it impossible for him to defend against the charges. He asserted, as to the counts involving Kevin, that if the trial court believed Kevin's testimony that the abuse began in "December or the second semester of his 8th grade"[21] that he should be acquitted of all 16 counts at issue, rather than allow the amendments, which was tantamount to charging defendant with "new offenses." The trial court overruled defendant's objection. He now claims the trial court abused its discretion in permitting the amendments. (See *People v. Stoddard* (1948) 85 Cal. App.2d 130, 138.)

"[A] trial court correctly exercises its discretion by allowing an amendment of an information . . . at the conclusion of the trial." (*People v. Winters* (1990) 221 Cal.App.3d 997, 1005 [Therein, the appellate court observed, "The People's case-in-chief at

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[20] Both of these assertions are unsupported by the record. Both Kevin and his mother insisted, despite the inconsistencies in the trial -- and prior -- statements that the molestations occurred while he was in the eighth grade. Jeff testified that the molestation began in December, 2001, and either ended that month or early in January, 2002, or perhaps in August, 2002.

[21] But see text accompanying footnotes 15-19, *ante.*

trial . . . gave defendant notice of . . . evidence [of the additional offense added to the information].”].) “[T]he mere change in the date on which a crime is alleged to have been committed [does] not [constitute error] unless the defendant was actually misled or otherwise prejudiced by such change.” (*In re Newbern* (1960) 53 Cal. 2d 786, 790.)

It should be noted that in his opening statement to the jury, defense counsel below said that Kevin was confused about when his relationship with defendant began. However, Kevin was defendant’s student assistant in the spring of 2000 and when he turned 14 in June of that year, defendant gave him a gym membership as a gift. Counsel twice predicted that Kevin would testify that the molestations began when Kevin was a ninth grader, in high school, therefore he could not have been 13 at that time. When the truth surfaced about the relationship between Kevin and defendant, the detective who interviewed Kevin calculated that the molestations must have began in September, 1999, when Kevin was 13, and ended 9-18 months later.

Defendant does not allege how his substantial rights were prejudiced by the amendments, in terms of his ability to defend against them. As we have already noted, defense counsel was aware that the detective had determined that the molestations began when Kevin was 13, and counsel incorrectly predicted that Kevin would testify to the contrary. In fact, thanks in large part to leading questions on cross-examination by defense counsel, Kevin’s trial testimony was “all over the place” as to when the molestations began and when they ended. However, both [Kevin] and his mother insisted that they had occurred during his eighth grade, which ended before he turned 14 in June

2000.[22] As the prosecutor pointed out to the trial court, the evidence showed that defendant committed many more acts against Kevin than the 40 that were alleged.[23]

During argument to the jury, the defense admitted that Kevin had been victimized, but not until August 2000, after he had turned 14.[24] Therefore, the defense argued, defendant was not guilty of any of the 41 charges involving Kevin, all of which required Kevin to be 13. The evidence presented by the defense created no basis upon which to distinguish, in terms of the date of commission, those crimes alleged in the counts at

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[22] However, the defense called an investigator from the prosecutor's office to testify that the mother had said that she found pills defendant had given her son and noticed that he had large amounts of money when the latter was in the 9th grade. (But see the last sentence of footnote 15, *ante*.) Also, defendant himself, during his pretext phone call with Kevin, stated that the acts occurred during Kevin's 8th grade and began when he was 13½. Kevin was 13½ in December, 1999.

[23] Kevin testified that the defendant touched his penis both before and after arousal, while measuring it, and touched him again when vacuuming up the ejaculated semen from his torso with a syringe each time he went to defendant's apartment, which happened 2-3 times a week for a year and a half. He told the detective that these acts occurred every week for nine months. In the pretext call, defendant said that his encounters with Kevin occurred weekly and at least 25 "samples" were created.

[24] Counsel argued that defendant's statement during the pretext call that it began when Kevin was 13½ referred to their relationship, not their sexual contact.

issue from the rest of the counts involving Kevin.[25] Therefore, defendant could not possibly have been prejudiced by the amendments.

As to Jeff, during opening statement to the jury, defense counsel said that he and defendant had met in June of 2001, but the molestations had not begun until six months later, in December, 2001, and necessarily ended in February, 2002, when defendant was arrested. The amendments changed the date of the four offenses involving Jeff to these months. Therefore, defendant could not possibly have been surprised by the amendments. The only defense offered at the conclusion of the evidence as to Jeff was that he was not credible, therefore, defendant should not be convicted of any of the counts involving him.

3. Sentencing

a. *Vindictiveness*

Defendant contends that he received the sentence he did because he rejected plea deals and insisted on going to trial. Defendant contends that evidence of vindictiveness can be found in the remarks made by the judge who presided over his pretrial motion to suppress, which defendant suggests shows the judge's impatience with his unwillingness to accept a plea bargain. This judge, however, was not the same judge who presided over defendant's trial and who sentenced him. Therefore, defendant cannot credibly claim vindictiveness.

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[25] The latter were alleged to have occurred between January 1, 2000, and one day before Kevin's 14th birthday in June 2000.

Defendant also suggests that we engage in a proportionality analysis as an indicator of vindictiveness. However, it has been the experience of this court that the longest prison sentences are, almost without exception, imposed in cases just like this one, i.e., sexual abuse involving victims under the age of 16. Considering the fact that defendant was Kevin's and Brandon's middle school teacher and had met Jeff because of his position as such, and therefore, by his acts violated one of the most sacred relationships our society holds dear, i.e., teacher and student, we are not shocked by the sentence imposed. We feel the same about the nature of the acts committed on these young men. True, as defendant points out, they did not involve force or violence, but it is clear that defendant deliberately targeted young men he knew to be troubled and "groomed" them. The facts fully justify the sentence.

b. *Cunningham*

The sentencing court imposed the upper term on one of the counts involving Kevin, based on its finding that defendant "took advantage of a position of trust [in] his role as school teacher [and] as a quasi-father figure to [the victim] . . . ." The court also ran a number of terms consecutively.

Defendant here contends that under *Cunningham* we should reduce the upper term sentence to the mid term. The People point out that defendant waived his right to a jury trial, submitting the issue of his guilt to the trial court. However, we do not have a Reporter's Transcript of the waiver of jury trial, and, therefore, do not know whether it encompassed sentencing factors, or the obligation to find them beyond a reasonable

doubt. Therefore, we must remand the matter to the trial court for a determination in compliance with *Cunningham* with regard to the sentence for count 17.

As to defendants consecutive terms, there is no binding precedence other than *People v. Black*'s holding that reasons for consecutive sentences need not be found by the jury beyond a reasonable doubt. (*People v. Black* (2005) 35 Cal.4th 1238 [overruled on other grounds in *Cunningham, supra*].)

III.

DISPOSITION

The convictions are affirmed. The sentences, except for the one imposed for count 17, are affirmed. The matter is remanded to the trial court to impose sentence on count 17 in compliance with *Cunningham, supra.*

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

McKINSTER
J.

RICHLI
J.