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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. FLAVIO ALCANTARA OCHOA, Defendant and Appellant.	D042215 (Super. Ct. No. SCD167401)

APPEAL from a judgment of the Superior Court of San Diego County, Laura P. Hammes, Judge. Affirmed as modified.

Doris S. Browning, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Arlene Aquintey Sevidal, Deputy Attorney General, for Plaintiff and Respondent.

Flavio Alcantara Ochoa appeals his convictions of kidnapping for rape, forcible rape, rape by foreign object using force, sodomy using force, assault with intent to commit rape, assault by means likely to produce great bodily injury and making a criminal threat (counts 1

through 7, respectively), for which he was sentenced to an indeterminate term of life in prison with the possibility of parole on count 1, plus three years, consecutive, on count 6, with sentence on the remaining counts being stayed. He contends that (1) the trial court violated his constitutional right of compulsory process by giving a coercive advisement about the right to remain silent to his victim, who then recanted her statements against him prior to trial; (2) in accordance with *Crawford v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 1354] (*Crawford*), the trial court violated his constitutional right of confrontation by improperly admitting the victim's statements to law enforcement officers pursuant to Evidence Code section 1370; (3) the prosecutor committed misconduct in arguing to the jury facts and circumstances that had been ruled inadmissible; (4) the trial court violated his constitutional right to a jury trial, as recently described in *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*), by imposing a consecutive sentence on count 6 based on certain factual findings made by it; and (5) the abstract of judgment misidentifies the assault charges of which he was convicted (counts 5 and 6).

The Attorney General concedes Ochoa's final contention of error and we modify the judgment to accurately reflect the offenses of which he was convicted in counts 5 and 6. We affirm the judgment as so modified.

FACTUAL AND PROCEDURAL BACKGROUND

On May 10, 2002, Ochoa got into an argument with his girlfriend, Maria M., as she was leaving a dance. (All relevant dates are in 2002 except as otherwise noted.) Ochoa slapped Maria M. in the face and Maria M. hit him back. Later in the evening, Maria M. knocked on the door of Angel Mendiola's home; she was frightened and crying and appeared

to be drunk. Maria M. told Mendiola that she had just been raped in the nearby park and that her assailant was approaching; she asked for his help. Ochoa, who also appeared to be drunk, came up behind Maria M., telling her not to involve other people in their dispute and suggesting that she spend the night with him. Ochoa accused Maria M. of lying, saying "Why would I rape you? You just spent the night with me last night." Mendiola decided not to call the police because he thought Ochoa and Maria M. were merely having a couple's quarrel and he did not want to get involved.

With Ochoa still following her, Maria M. left Mendiola's home and went to the nearby home of Virginia Rebolledo and her husband. Maria M. told Rebolledo's husband that she had been raped in the park and asked him to call the police. The Rebolledos' neighbor, Jesus Alvarez, saw Ochoa following Maria M., telling her to calm down and arguing with her. Perceiving that Ochoa would use force to get Maria M. to leave with him, Alvarez intervened and told Ochoa to leave Maria M. alone. Ochoa then apparently backed off and Maria M. left with Alvarez.

The following afternoon Maria M. told her mother than Ochoa had raped her and her mother called the police. Maria M. told San Diego Police Officers Christopher Padilla and Derek Miller that Ochoa had pulled her into a men's restroom at a local park, hit her, kicked her and sexually assaulted her with his fingers and his penis and that he had threatened to beat her up if she reported the attack. An officer took Maria M. to the hospital, where sexual assault nurse examiner Donna Redondo examined her. Redondo found recent bruises on Maria M.'s face, arms, knees, thighs and back, multiple lacerations to Maria M.'s external genital area and a bruise in Maria M.'s anal canal.

On May 14, Maria M. told Detective Francisco Rivera that Ochoa had also sodomized her during the incident, but that she had not reported this earlier because she was too embarrassed. The next day, Maria M. told district attorney investigator Lyndee Villalpando through a translator that Ochoa got upset with her at the dance and began to rough her up. Maria M. indicated that Ochoa dragged her to the park and into the men's restroom, where he sodomized and raped her, and that he continued to beat her, causing her to black out momentarily. Maria M. also said Ochoa threatened to harm her and her children if she went to the police and that in any event the police would not believe her because she was an undocumented alien.

The district attorney charged Ochoa with kidnapping for rape, forcible rape, rape by foreign object using force, sodomy using force, assault with intent to commit rape, assault by means likely to produce great bodily injury and making a criminal threat. Several weeks later, Ochoa pleaded guilty to all of the counts against him except the kidnapping for rape charge, which the district attorney agreed to dismiss. However, in June, Maria M. told court officer Susan Gonzales that she had lied about the rape incident, that the sexual encounter in the park bathroom was consensual and that at that time Ochoa had hit her, but nothing more. Maria M. gave a similar statement to Ochoa's counsel and, in August, the court granted Ochoa's motion to withdraw his plea based on Maria M.'s declaration that the encounter was consensual and that she had lied to police after becoming angry at him. The court reinstated the charges against Ochoa and the case proceeded to trial in January 2003.

At trial, the prosecutor called Maria M. as a witness; she testified that when she met Ochoa at the dance, they began to argue, she pushed him, he hit her in the face and she fell

down as she hit him back. Maria M. denied that Ochoa kicked her while she was down, but admitted that this testimony was contrary to what police reports indicated she had told the officers and to her previous testimony. At this point in Maria M.'s testimony, the court called a recess and informed counsel it was concerned about the need to advise Maria M. about her Fifth Amendment rights in light of her testimony suggesting that she may have filed a false complaint with the police or committed perjury at the preliminary hearing.

When Maria M. returned to the courtroom, the court advised her as follows:

> " . . . Whenever it appears to the Court that a witness is in a position where they might be asked about something, the answer to which could possibly incriminate the witness, then I have to advise the witness that the witness has a right -- and this applies to you -- not to answer any question that might incriminate you. . . . And you may say that you don't want to answer a question if you think it might involve you in any kind of a crime.
>
> "There are crimes known as perjury, which is giving false testimony, as well as another crime of giving false reports to police officers. I don't know whether you are involved in any such things, but just in case, I have to advise you.
>
> "Your right not to testify to something that could incriminate you is known as the Fifth Amendment right. Because if you do answer a question that incriminates you, that answer can be potentially used against you in court in another case against you. . . . .
>
> "Now, if you believe that you have a Fifth Amendment right not to testify, you can claim that right, or you can give up the right and testify anyway. And if you want to consult with an attorney before you make up your mind, then you can do that, and you can hire your own attorney to talk to. Or if you cannot afford an attorney, I can appoint an attorney to represent you."

Upon inquiry from the court, Maria M. indicated that she understood the advisement and that she did not want "to answer on whatever could have an effect on me." The

prosecutor indicated that his office would not grant immunity to Maria M. and that he intended to introduce evidence of Maria M.'s testimony at the preliminary hearing and her statements to police officers and others shortly after the incident in support of his case against Ochoa.

Responding to defense counsel's concerns that Maria M.'s assertion of her Fifth Amendment right had been equivocal, the court again called Maria M. into the courtroom and confirmed that Maria M. had understood its advisements. The court again informed Maria M. that giving a false report to a police officer and testifying falsely in a courtroom under oath were crimes and that "anyone who's called to the witness stand has a right not to testify to anything that might incriminate them in that kind of criminal activity." It indicated that both counsel would want to inquire into those areas and "[i]f you think that you might incriminate yourself by answers to those types of questions, then you have a right not to testify." After being so advised, Maria M. informed the court that she did not wish to testify. The court declared Maria M. unavailable as a witness and ruled that it would allow the prosecution to introduce certain of her preliminary hearing testimony at trial.

The prosecution introduced Maria M.'s preliminary hearing testimony as follows: Maria M. got into an argument with Ochoa at a party because he accused her of being with other men and insisted that he was going to return to his wife and children in Mexico. During the argument, Ochoa slapped Maria M. in the face, causing her to fall down. After Ochoa helped Maria M. up, they calmed down and Ochoa went into the men's bathroom at the park across the street to relieve himself; Maria M. initially waited for Ochoa outside the bathroom, but went inside after a short time because she was fearful of staying outside by

herself. After Ochoa finished using the bathroom, he hugged Maria M. and they began kissing. Ultimately they had consensual sexual intercourse, but Ochoa did not sodomize Maria M. in any way. After they had finished, Ochoa infuriated Maria M. by telling her that he would be going back to Mexico to be with his family.

Maria M. admitted that her statements to police that Ochoa had beat her up, forced her into the bathroom, raped her and thereafter threatened her were false. Maria M. explained that she made the false accusations to get back at Ochoa because she felt that he had used her. Maria M. gave conflicting testimony on whether she told any of the officers that Ochoa had sodomized her or put his finger in her vagina. She also testified that she decided to tell the officers the truth after Ochoa called her from jail and apologized for hitting her and for having sex with her in the public restroom. She thereafter talked to Villalpando and recanted her prior statements. The prosecutor also introduced evidence of Maria M.'s statements to Mendiola and Alvarez, as well as her statements to the officers and Villalpando.

In his defense, Ochoa presented Rebolledo's testimony that at the time Maria M. came to the door and complained about being raped in the park, Maria M. was crying but did not appear to be drunk. Rebolledo also testified that while Maria M. was talking to her husband, Alvarez approached Maria M. and shortly thereafter the two left together. Ochoa also called an expert to testify that the photos of Maria M.'s physical injuries did not permit a determination of when or how the injuries occurred. Finally, he presented the testimony of Gonzales that on June 21, Maria M. recanted her allegations against him and claimed that she had previously lied to the police because she wanted revenge.

A jury convicted Ochoa of all counts and the court sentenced him to life with the possibility of parole on the kidnapping for rape count (count 1), plus a mid-term of three years, consecutive, on the count for assault by means likely to produce great bodily injury (count 6).

DISCUSSION

1. *Fifth Amendment Right Advisement to Maria M.*

The state and federal constitutions guarantee a criminal defendant the right to confront and cross-examine the witnesses against him. (U.S. Const., VI Amend.; Cal. Const., art. I, § 15.) Those rights are violated when the government interferes with the exercise of a defendant's right to present witnesses in his own defense. (*Webb v. Texas* (1972) 409 U.S. 95, 98; *People v. Mincey* (1992) 2 Cal.4th 408, 460.) Ochoa contends that the court's Fifth Amendment advisement coerced Maria M. not to testify and thus violated his constitutional rights of compulsory process.

When it appears that a witness may give self-incriminating testimony, the court has a duty to ensure that the witness is fully advised of her Fifth Amendment rights. (*People v. Schroeder* (1991) 227 Cal.App.3d 784, 788.) The court may do so by advising the witness or appointing counsel to advise the witness. (*Ibid*.) If the court chooses to advise the witness, it must do so in such a way as to fully advise the witness of the risks of testifying and the right not to testify, but not to coerce the witness not to testify. (*Id*. at p. 789.) The coerciveness of an advisement is evaluated in light of all of the circumstances. (*Id*. at p. 793.)

Ochoa contends that although the court's advisement to Maria M. was "relatively mild" on its face, it was nonetheless coercive in light of the following facts: (1) Maria M.

had already testified at the preliminary hearing that she had submitted a false report to the police; (2) there was no significant risk that Maria M. would incriminate herself by admitting perjury because the limited testimony she gave at trial before the advisement suggested that she was going to testify consistently with her preliminary hearing testimony; (3) Maria M. may have been concerned about her immigration status; and (4) the jury needed to hear her testimony first hand in furtherance of the primary purpose of a criminal trial, to ascertain the truth. None of these considerations, however, suggest that the advisement the court gave was coercive.

Ochoa contends that the court's "truncated" advisement was nonetheless coercive because it overstated the negative consequences to Maria M. from testifying and left her unduly fearful about the implication of testifying on her immigration status. However, he offers no explanation as to how the court could possibly have softened its advisement, which he admits was "mild," and still met its obligation to inform Maria M. of her rights. Although Ochoa also argues that the court should have appointed an attorney to help Maria M. understand the scope and seriousness of the decision she was being called upon to make, he cites no persuasive authority to support this contention. Further, there is no reasonable likelihood that any such attorney would have given Maria M. advice that would have been more favorable to Ochoa than the advisement given by the court.

For the first time in his reply brief, Ochoa contends that the court should not have advised Maria M. regarding her Fifth Amendment rights at all because the portion of her trial testimony that preceded the advisement showed that she was going to testify consistently with her preliminary hearing testimony and thus any such additional testimony could not

have been legally injurious to her. However, even if we were to accept Ochoa's speculative assumption as true and conclude that the court erred in giving the advisement to Maria M., any such error was harmless beyond a reasonable doubt since Maria M. did testify, albeit briefly, at the trial and her preliminary hearing testimony was presented to the jury. Ochoa has not shown that the trial court's advisement violated his constitutional right of confrontation.

2. *Admission of Maria M.'s Statements to Law Enforcement Officials*

Historically, the federal Confrontation Clause (U.S. Const., VI Amend.) has been held to preclude the admission of hearsay statements implicating the defendant in a criminal proceeding unless the prosecution demonstrates that the statements possess "adequate indicia of reliability." (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1373.) Hearsay evidence was deemed to be reliable if it fell within a firmly rooted exception to the hearsay rule (*People v. Waidla* (2000) 22 Cal.4th 690, 726, fn. 8) or if the proffering party showed that the evidence had particularized guarantees of trustworthiness "such that adversarial testing would be expected to add little, if anything, to the statements' reliability." (*Lilly v. Virginia* (1999) 527 U.S. 116, 124-125.)

In this case, the trial court admitted evidence of Maria M.'s statements to police officers and the district attorney investigator pursuant to Evidence Code section 1370, which allows the admission of a victim's hearsay statements to a law enforcement officer where the victim is unavailable to testify at trial, the statements relate to the defendant's infliction or threat of physical injury on the victim and certain conditions are met. Ochoa contends that the court's admission of these statements violated his rights under the Confrontation Clause

because Evidence Code section 1370 does not embody a firmly rooted exception to the hearsay rule and the evidence did not have sufficient indicia of reliability to be admissible.

During the pendency of this appeal, the United States Supreme Court issued its opinion in *Crawford*, holding that the federal Confrontation Clause precludes the admission of "testimonial" hearsay statements unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant regarding those statements. (124 S.Ct. at pp. 1363-1369, 1373.) The new rule announced by *Crawford* applies retroactively "to all cases, state or federal, pending on direct review or not yet final . . . ." (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328.)

Although *Crawford* does not provide a comprehensive definition of "testimonial," the opinion makes clear that statements made to law enforcement officers in the course of an interrogation qualify as "testimonial" because the officers' solicitation of ex parte statements against an accused during an investigative or prosecutorial process gives rise to a risk of abuse against which the right of confrontation is designed to protect. (*Crawford, supra,* 124 S.Ct. at pp. 1364-1365.) Here, although Maria M. was not being "interrogated" by the officers in a technical sense, the officers and the investigator were acting in an investigative and/or prosecutorial capacity at the time she made the statements to them. Based on the officers' involvement in the production of testimonial evidence to be used against Ochoa in a criminal prosecution, the statements are "testimonial" for Confrontation Clause purposes. (*Crawford, supra,* 124 S.Ct. at p. 1364.)

Based on their testimonial nature, the statements would be subject to exclusion under the Confrontation Clause if Ochoa lacked the opportunity to cross-examine Maria M.

regarding her incriminating statements to law enforcement officials. There is no question that Ochoa had the opportunity to cross-examine Maria M. at the preliminary hearing and in fact did so and, insofar as Maria M.'s statements to the officers were admitted at the preliminary hearing, Ochoa implicitly concedes that the admission of those statements at trial did not give rise to a constitutional violation. He argues, however, that officers Padilla and Rivera and investigator Villalpando testified at trial as to statements by Maria M. that were not elicited during the preliminary hearing and that he was thus denied an opportunity to effectively cross-examine Maria M. as to such additional statements, rendering the admission of such additional statements a violation of the Confrontation Clause.

At oral argument, the People conceded that *Crawford* would preclude the admission of testimonial statements that were not discussed or identified at the preliminary hearing, but argued that there was very little, if any, material evidence that was not brought out at the preliminary hearing. We appreciate the People's candor and agree that Ochoa would not have had an opportunity to effectively cross-examine Maria M. regarding prior statements by her that were not identified during, or otherwise brought to his attention prior to, the preliminary hearing.

We do not agree with Ochoa's contention, however, that the circumstances of this case establish a Confrontation Clause violation. In fact, a review of the record establishes that the evidence of Maria M.'s "additional" statements introduced at trial was virtually co-extensive with the evidence elicited in advance of or at the preliminary hearing. Prior to the preliminary hearing, the prosecution filed an opposition to Ochoa's motion to withdraw his guilty plea; the opposition was supported by a declaration from Villalpando outlining Maria

M.'s statements to her in great detail. According to the declaration, Maria M. told Villalpando that Ochoa had hit her, pulled her from a pole she had grabbed onto, dragged her into the bathroom, slammed her head against the wall, sodomized her with his penis and put his fingers and his penis in her vagina. Maria M. also reported that Ochoa had told her if she called the police, they would not believe her, he would do the same thing to her again after he got out of jail and she and her children "would pay for it." Further, at the preliminary hearing itself, the prosecutor questioned Maria M. extensively about her statements to Villalpando, as well as similar statements Maria M. made to officers Padilla and Rivera.

As established by the foregoing, Ochoa was alerted to the existence of Maria M.'s detailed statements to law enforcement officials about the attack and thus he had the opportunity to cross-examine her at the preliminary hearing regarding those statements. This is all that the Confrontation Clause requires. (*Crawford, supra*, 124 S.Ct. at p. 1364; see also *United States v. Owens* (1988) 484 U.S. 554, 559.) Although the purpose of a preliminary hearing is not identical to that of a trial, Ochoa's interest and motive to cross-examine Maria M. regarding those known statements was similar to those he would have at trial. (See *People v. Zapien* (1993) 4 Cal.4th 929, 975.) Defense counsel's failure to cross-examine Maria M. about all of those statements does not render the admission of the statements a constitutional violation. (See generally *ibid*. [the critical question for Confrontation Clause purposes is whether the defendant was given the opportunity for effective cross-examination, not whether the defendant availed himself fully of that opportunity].) Further, to the extent that witnesses at trial testified to statements by Maria M. about certain details regarding Ochoa's conduct that were not fleshed out at or prior to the preliminary hearing (for example

that earlier in the day he had been looking for Maria M. and had yelled at her daughter on the telephone), the error in admitting such statements was harmless beyond a reasonable doubt because they were neither material to the prosecution's case against Ochoa nor particularly inflammatory in nature.

The trial court's admission of Maria M.'s statements does not support a reversal of Ochoa's convictions.

3. *Prosecutorial Misconduct*

Ochoa contends that the prosecutor committed misconduct in arguing to the jury that he intimidated or manipulated Maria M. into recanting her original accusations against him and that this misconduct violated his federal and state due process rights. A prosecutor's improper remarks or intemperate behavior can "so infect[] the trial with unfairness" as to render the resulting conviction a denial of federal due process. (*People v. Valdez* (2004) 32 Cal.4th 73, 122, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) However, actions by a prosecutor that do not render a criminal trial fundamentally unfair will violate a defendant's state law due process rights only if they " . . . involve[] the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*Ibid*., quoting *People v. Earp* (1999) 20 Cal.4th 826, 858.) To preserve a claim of prosecutorial misconduct for appellate review, the defense must make a timely objection and request an admonition; absent such an objection and request, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct. (*Ibid*.)

Here, defense counsel objected to only a few of the prosecutor's comments he now challenges, he raised these challenges only at the very end of the prosecutor's argument and,

in objecting, he did not assert that the comments amounted to prosecutorial misconduct. Defense counsel's limited objections were not sufficient to preserve the issue of prosecutorial misconduct for appellate review because there is no indication that a prompt admonition would not have cured any harm caused by the challenged comments. (*People v. Carter* (2003) 30 Cal.4th 1166, 1207.)

4. *Imposition of a Consecutive Mid-Term on Count 6*

After this matter was fully briefed by the parties, the United States Supreme Court issued its decision in *Blakely*, which held that a state trial court's imposition of a sentence that exceeded the statutory maximum of the standard range for the charged offense on the basis of additional factual findings made by the court violated the defendant's Sixth Amendment right to trial by jury. We requested and received supplemental briefing from the parties on the effect of *Blakely* on this case. In his brief, Ochoa contends pursuant to the analysis of *Blakely*, the court's finding of facts to support imposition of a consecutive term on count 6 violated his right to a jury trial.

The Attorney General responds that, in accordance with *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), Ochoa has waived the *Blakely* issue on appeal by failing to raise it in the trial court. In *Scott* the California Supreme Court held that a defendant's failure to challenge in the trial court the imposition of an aggravated sentence based on erroneous or flawed information waived that issue for purposes of appeal. The court reasoned that this rule of waiver facilitated the prompt detection and correction of error in the trial court, thus reducing the number of appellate claims and preserving judicial resources. (*Id*. at pp. 351, 353.) This pragmatic rationale does not support the application of the waiver rule here. Prior to *Blakely*,

California courts and numerous federal courts consistently held that there was no constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *U.S. v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *U.S. v. Lafayette* (D.C.Cir. 2003) 337 F.3d 1043, 1049-1050; *U.S. v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *U.S. v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254; *U.S. v. Chorin* (3d Cir. 2003) 322 F.3d 274, 278-279; *U.S. v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *U.S. v. White* (2d Cir. 2001) 240 F.3d 127, 136.) In light of this state of the law, Ochoa's assertion of a challenge to the imposition of a consecutive sentence would not have achieved the purpose of prompt detection and correction of error in the trial court. Further, because *Blakely* was decided after Ochoa's sentencing hearing, Ochoa cannot be said to have knowingly and intelligently waived any right to a jury trial relating to the imposition of a consecutive sentence by failing to raise such an objection at the hearing. (See *Blakely, supra*, 124 S.Ct. at p. 2541 [noting that, "if appropriate waivers are procured," a state is free to utilize judicial factfinding in its sentencing scheme]; see also *U.S. v. Ameline* (9th Cir. 2004) 376 F.3d 967, 973, & fn. 2 [recognizing that *Blakely* "worked a sea change in the body of sentencing law"].) For these reasons, we find the waiver rule of *Scott* inapplicable.

Having found no waiver, we must now determine whether the analysis of *Blakely* applies to the imposition of a consecutive sentence. In *Blakely*, the United States Supreme Court reiterated its prior holding that any fact (other than the fact of a prior conviction) that "increases the penalty for a crime beyond the prescribed statutory maximum" must be found by a jury and proven beyond a reasonable doubt (*Blakely, supra,* 124 S.Ct. at p. 2536,

quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; see also *Jones v. United States* (1999) 526 U.S. 227, 243) and held that in applying this rule, the "statutory maximum" is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely, supra,* 124 S.Ct. at p. 2537.)

Ochoa contends that because the trial court imposed the consecutive sentence for the assault count based on its own findings that the kidnap had already been accomplished before the assault occurred and the assault involved "additional violence" and "force . . . much stronger than necessary to subdue the victim to accomplish the [sexual offenses]," his jury trial rights were violated. However, although there certainly is broad language in *Blakely* that could be interpreted to support the existence of a jury trial right in the face of *any factual finding* that affects the length of the sentence imposed (*Blakely, supra,* 124 S.Ct. at pp. 2536-2537, and fn. 5), neither *Blakely* nor the cases that preceded it establish the right to a jury trial in connection with the imposition of consecutive sentences and in fact those cases suggest that a contrary conclusion applies in that context.

The United States Supreme Court has repeatedly recognized that a court may constitutionally exercise discretion in imposing sentence, and in doing so may consider various factors relating to the offense and the offender, provided that the sentence is "within the range provided by statute" for the charged offense. (*Apprendi, supra*, 530 U.S. at p. 481, and cases cited therein.) *Blakely* itself acknowledged that the fact that a statutory scheme involves judicial factfinding as a basis for exercising sentencing discretion does not violate the defendant's right to a jury trial because in that situation "the facts [relied on by the court] do not pertain to whether the defendant has a legal *right* to a lesser sentence — and that

makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra*, 124 S.Ct. at p. 2540, italics in original.)

This analysis applies here. Under California law, when a person is convicted of two or more crimes, the trial court has the discretion to impose the sentence on the subordinate counts consecutively or concurrently. (*In re Hoddinott* (1996) 12 Cal.4th 992, 1000; *People v. Fain* (1983) 34 Cal.3d 350, 354 & fn. 3; see also Pen. Code, § 669 [if the court fails to specify whether a particular subordinate sentence is consecutive or concurrent, the sentence will run concurrently].) Although the trial court is required to state the reasons for its sentencing choice, including the primary factors supporting its exercise of discretion (Pen. Code, § 1170, subd. (c); Cal. Rules of Court, rule 406(a); *People v. Powell* (1980) 101 Cal.App.3d 513, 518), the facts on which it relies are not elements of the statutory offense (*Apprendi, supra,* 530 U.S. at p. 483) and the requirement of a statement of reasons does give a defendant a legal *right* to a concurrent rather than a consecutive term. In fact, the court's sentencing decision is made only after the jury has found the defendant guilty beyond a reasonable doubt of two or more offenses (or the defendant has admitted such guilt), thus fully complying with constitutional jury trial and due process requirements. In light of the jury's finding (or the defendant's admission) of guilt on the charged offenses, the imposition of consecutive sentences does not exceed the statutory maximum penalty for those offenses and thus does not contravene the holding in *Blakely*.

5. *Correction of the Abstract of Judgment*

Ochoa correctly points out, and the Attorney General concedes, that the abstract of judgment erroneously describes counts 5 and 6. Because the abstract of judgment

misidentifies the convictions under counts 5 and 6 as for assault with a deadly weapon not a firearm and assault with the intent to commit sodomy, respectively, rather than the crimes of which Ochoa was actually convicted, to wit, assault with the intent to commit rape and assault by means of force likely to produce great bodily injury, respectively, we modify the judgment as to those counts.

DISPOSITION

The judgment of conviction is modified to identify the conviction on count 5 as one for assault with the intent to commit rape in violation of Penal Code section 220 and to identify the conviction on count 6 as one for assault by means of force likely to produce great bodily injury in violation of Penal Code section 245, subdivision (a)(1)). The judgment, as so modified, is affirmed. The trial court is directed to amend the abstract of judgment and forward a copy to the Department of Corrections.

CERTIFIED FOR PUBLICATION

McINTYRE, J.

WE CONCUR:

McCONNELL, P.J.

AARON, J.