Filed 8/24/17 P. v. Rangel CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE GERARDO RANGEL, Defendant and Appellant.	B271735 (Los Angeles County Super. Ct. No. NA100277)

APPEAL from a judgment of the Superior Court of Los Angeles County, James D. Otto, Judge. Affirmed in part, reversed and remanded in part.

Theresa O. Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jose Gerardo Rangel was convicted of perpetrating a lewd act upon a child (Pen. Code, § 288, subd. (a), count 1)[1] based on an incident involving a nine-year-old foster child. He also was convicted of both orally copulating a person under 14 who was more than 10 years younger than he (§ 288a, subd. (c)(1), count 2), and orally copulating a child 10 years of age or younger (§ 288.7, subd. (b), count 3) in connection with a second incident involving a different foster child. The trial court, sitting as trier of fact, also found the multiple victim enhancement true as to counts 1 and 2. (§ 667.61, subds. (b) & (e).) The trial court sentenced defendant to an aggregate sentence of 30 years to life, staying the sentence on count 3 pursuant to section 654.

On appeal, defendant contends that the convictions were not supported by substantial evidence. He further contends that he cannot properly be convicted on both counts 2 and 3 for a single act, that the multiple victim enhancement is not applicable to the offenses of conviction, that the trial court misunderstood the scope of its sentencing discretion, and that his current sentence of 30 years to life is unconstitutionally cruel and unusual. The Attorney General concedes the multiple victim enhancement is not applicable and that defendant therefore should be resentenced.

We agree that the multiple victim enhancement is not applicable. We conclude, however, that defendant's convictions were otherwise proper and properly supported by the evidence. The multiple victim enhancement is stricken and the matter is remanded for resentencing in accordance with this opinion. The

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

convictions are otherwise affirmed.

PROCEDURAL HISTORY

Defendant was charged by information with perpetrating a lewd act upon a child, G.R., with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of G.R. or himself (§ 288, subd. (a), count 1); orally copulating V.S., a person under 14 years of age who also was more than 10 years younger than he (§ 288a, subd. (c)(1), count 2); and orally copulating V.S., a child 10 years old or younger (§ 288.7, subd. (b), count 3). Counts 2 and 3 arose out of a single incident with V.S., who was nine years old. The information alleged a multiple victim enhancement as to all three counts. (§ 667.61, subds. (b) & (e).)

Defendant proceeded to a bench trial, at which the prosecution dismissed the multiple victim allegation as to count 3. The trial court found defendant guilty of all three counts and found true the remaining multiple victim allegations. The minute order documenting the verdict states that he was found guilty on that count. Defendant does not challenge the conviction on count 3 on the basis of the discrepancy.

Invoking section 667.61, subdivision (b), the trial court sentenced defendant to 15 years to life on each of counts 1 and 2. The court stated that it had no choice but to run those sentences consecutively, for a total sentence of 30 years to life. The court imposed and stayed a sentence of 15 years to life on count 3, pursuant to section 654. It also imposed various fines and fees, and issued a protective order barring defendant from contacting G.R. and V.S.

Defendant filed a notice of appeal challenging his convictions and sentence.

FACTUAL BACKGROUND

I. Prosecution Evidence

A. V.S.

Victim V.S. was 14 years old at the time of trial. She testified that, in 2009, when she was nine or 10, she and her younger siblings were in foster care. They were placed in defendant's home in Long Beach, where V.S. shared a room with defendant's daughter, C.R.

One night, V.S. was watching a movie with her siblings, C.R., and defendant. They were in defendant's bedroom. V.S.'s younger brother was asleep on the floor. Defendant received a phone call from his wife, V.S.'s foster mother, who told defendant to put the kids to bed.

C.R. left the room to make a bottle for V.S.'s younger sister. Defendant began tickling V.S. on her stomach, underneath her pajama top. V.S. laughed. Defendant told her to stop laughing, but she could not. Defendant then removed her pajama pants and underwear, leaving her "sort of in shock." Defendant then "put his head down there and he licked" V.S., in her "private area." He did not say anything, and neither did V.S., who was "[s]till shocked." Defendant did not lick V.S. for very long. V.S. "put my pants back on" and left when she heard C.R. approaching.

V.S. did not tell anyone about the incident; she did not know why. She was reunited with her biological family after living with defendant. One evening, she was watching the movie *Precious* with her family and began crying because "[t]he girl used to get raped by her dad." V.S. ran out of the room and told her cousin about the incident with defendant. She "[e]ventually" told her mother as well. V.S. also talked to the police about the

incident.

On cross-examination, V.S. testified that defendant's wife was not home at the time of the incident. V.S. knew defendant's wife was not home because V.S. told her good-bye before she left. V.S. denied that defendant's family had a rule prohibiting the children from warming baby bottles.

V.S. was familiar with an adult named Maria Sesma. Sesma visited the house, and V.S. walked to the park with her. V.S. had conversations with Sesma but did not tell her about the incident. The first person V.S. told about the incident was her cousin.

Los Angeles County Department of Children and Family Services (DCFS) social worker Marllin Grajeda testified that V.S. was in foster care from July 2009 until November 2009. She was placed with defendant and his wife in Long Beach. Grajeda became aware of V.S.'s allegations against defendant on May 19, 2010, after V.S. had been reunified with her biological mother.

B. G.R.

Victim G.R. was 14 years old at the time of trial. She testified that she was placed in defendant's home as a foster child in 2009, when she was nine years old. The home was occupied by defendant, his wife, their two children, and G.R. and her younger brother, S. G.R. shared a bedroom with defendant's daughter, C.R.

G.R. testified that she woke up one night "to something I didn't like." She saw defendant's face. He was next to her, with "his hand under my underwears." Defendant touched her "private" for "a long time" while G.R. feigned sleep. She did not say anything to him or indicate that she was awake, because she thought "he would do something else if I woke up."

The next morning, defendant's wife was not there. Although G.R. trusted defendant's wife, she did not tell her or anyone else about the incident because she was scared and "just felt like keeping it to myself."

Several years later, in 2013, G.R. told her biological mother about the incident. She explained that she "[c]ouldn't keep it in no more." G.R. subsequently talked to the police and some social workers.

On cross-examination, G.R. testified that defendant's wife was not home on the night of the incident. She recalled that defendant's wife "had left with the other foster girl," a baby. "It was just me and the foster lady's daughter" at home with defendant. G.R. did not see C.R. in their shared bedroom during the incident; she explained that she "[o]nly opened my eyes halfways." G.R. continued to live in defendant's foster home after the incident, but "would try to get away from him" when he tried to talk to her or hug her.

G.R. did not tell anyone about the incident until later, when she was 13. She testified that she "couldn't focus in school" and was skipping school a lot around the time she confided in her mother.

DCFS social worker Sara Canto testified that G.R. was in foster care from January 1, 2009 through June 24, 2009. G.R. was placed in defendant's home in Long Beach. Canto received information about the alleged touching incident on November 12, 2013.

II. Defense Evidence

Defendant called his 14-year-old daughter, C.R. She testified that V.S. was her foster sister in 2009 and they shared a bedroom. While V.S. was living with the family, the nightly

routine was "[w]e would take a shower and brush our teeth; and if we did our homework, we could watch T.V." The only television in the home was in her parents' bedroom. Occasionally the family would watch movies, and all of the children and both defendant and his wife would be present.

Defendant often entertained the children by tickling them. C.R. saw V.S. laugh when defendant tickled her "[u]nder the armpits or in the sides." C.R.'s mother was "always" home when defendant tickled the children. Indeed, C.R. agreed with defense counsel that her mother was never absent the entire time V.S. lived with the family. C.R.'s parents had a rule that the children "cannot get next to the stove and we can't do his baby bottle." C.R. never prepared a bottle for anyone when V.S. lived with the family.

Defendant also called his wife, Cecilia Rangel. She testified that she had been married to defendant for 25 years, and the two of them were foster parents from 1996 until 2009. Rangel recalled that V.S. lived with the family for approximately six to eight months. Rangel testified that she never left the city during that time. She likewise was never "absent from the household" when G.R. lived with the family. Neither V.S. nor G.R. was ever left alone with defendant. Rangel saw V.S. and G.R. every day when they lived with the family, and nobody ever told her that "something bad happened to them."

On cross-examination, Rangel clarified that V.S. and G.R. did not live with the family at the same time. However, Rangel testified, they "could meet after they left," and she was sure that G.R. came back to visit when V.S. was living in the house. She recalled that G.R.'s mother came to the house with G.R.'s little brother while V.S. and her siblings were in foster care. Rangel

could not remember when that visit happened.

Rangel also testified that she did not work outside the home while V.S. and G.R. lived with her. She conceded, however, that she would leave the house to "go grocery shopping, to pick up the kids from school, daily things." Rangel normally ran her errands once a week, in the mornings. She did not remember any particular occasion on which she had to leave the house at night. She explained that she never left the foster children alone: "If I had to go out, it would be my family, my husband; my sons. We would not leave them alone."

Defendant's final witness was Maria Sesma. She testified that she lived with defendant's family as a foster child for 14 years and left in 2009. She continued to visit defendant and his family after she was reunited with her biological family; she "would go back on weekends and spend time in their house." Sesma met V.S. when V.S. was placed in the home. Sesma "was already out, but [ ] would be there every weekend." On some of those visits, she had socialized with V.S. "as an older sister." Sesma recalled taking V.S. and V.S.'s baby sister to the park. She recalled that V.S. "would confide certain things to me, tell me not to tell anyone because it was a secret." V.S. never told Sesma "anything bad."

Sesma also knew G.R. Sesma still had a relationship with defendant's family but did not maintain a relationship with G.R. or V.S. beyond seeing them at defendant's home.

DISCUSSION

I. Sufficiency of the Evidence

Defendant contends that his convictions were not supported by substantial evidence. He first contends that the testimony of G.R. and V.S. was "inherently improbable" and thus

needed additional corroboration to constitute substantial evidence against him. He also argues that the prosecution did not present sufficient evidence that he acted with the requisite intent of arousing himself or G.R. during the G.R. incident. Neither contention is persuasive.

"To assess the evidence's sufficiency, we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do 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. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Defendant acknowledges that "unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v.*

Young (2005) 34 Cal.4th 1149, 1181.) He contends, however, that the testimony of both V.S. and G.R. was inherently improbable because it was "fraught with contradictions and improbabilities." He emphasizes the absence of "medical or other physical evidence substantiating either of the alleged acts" and "evidence of any continuous abuse," as well as both victims' inability to remember precise details about when the incidents occurred and their delay in reporting them.

The theme of these assertions is that V.S.'s and G.R.'s testimony was not credible. It is the exclusive province of the fact finder to determine the credibility of a witness; we may not substitute our evaluation of a witness's credibility for that of the fact finder. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Whether a witness's testimony was credible is a separate question from whether it was inherently improbable. "The inherently improbable standard addresses the basic content of the testimony itself—i.e., could that have happened?—rather than the apparent credibility of the person testifying. Hence, the requirement that the improbability must be 'inherent,' and the falsity apparent 'without resorting to inferences or deductions.' [Citation.] In other words, the challenged evidence must be improbable "'on its face'" [citations], and thus we do not compare it to other evidence (except, perhaps, certain universally accepted and judicially noticeable facts). The only question is: Does it seem possible that what the witness claimed to have happened actually happened?" (*People v. Ennis* (2010) 190 Cal.App.4th 721, 729.)

Here, the events described by V.S. and G.R. are not facially improbable. V.S. testified that defendant tickled her and then, when her foster sister left the room, pulled down her pants and

licked her genitals. Nothing about that scenario is inherently improbable. The presence of V.S.'s sleeping brother and infant sister do not render the scenario improbable. C.R.'s testimony about the family rule regarding bottles, Rangel's testimony about never leaving the home, and V.S.'s delay in reporting bear on V.S.'s credibility, which we do not reweigh at this juncture.

V.S.'s testimony, if believed, was sufficient to establish the elements of the crimes charged in counts 2 and 3. Count 2 charged defendant with orally copulating a person under the age of 14 and more than 10 years younger than himself. (§ 288a, subd. (c)(1).) V.S. testified that she was under 14 and that defendant licked her genitals, which meets the definition of oral copulation set forth in section 288a, subdivision (a). There is no dispute that defendant, who was in his fifties, was more than 10 years older than she was at the time. Count 3 charged defendant with orally copulating a child under the age of 10. (§ 288.7, subd.((b).) V.S.'s testimony established the elements of this crime as well.

G.R. described an incident in which defendant fondled her during the night. She testified that she woke up, saw defendant's face, and pretended to be asleep while defendant touched her beneath her underwear. Her inability to recall whether defendant was standing or sitting, and lack of knowledge of whether her foster sister was in the next bed, goes to her credibility, not the inherent possibility that the event could have happened. The same is true of G.R.'s delay in reporting the incident and the resultant lack of corroborating medical evidence. G.R.'s testimony, if believed, was sufficient to establish several key elements of the crime described in section 288, subdivision (a)(1): that defendant committed a lewd or lascivious act upon

the body of G.R., a child who was under the age of 14.

Defendant argues that the prosecution's evidence did not support the final element of section 288, subdivision (a), that he acted "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." We disagree.

Section 288 may be violated by any touching of a child; the trier of fact must consider all of the circumstances to determine whether the touch was performed with the required specific intent. (*People v. Martinez* (1995) 11 Cal.4th 434, 445, 452.) Relevant circumstances include the nature of the alleged touch, other acts of lewd conduct charged or admitted in the case, the relationship of the parties, or any efforts to obtain the victim's cooperation or to avoid detection. (*Id.* at p. 445.) "A touching which might appear sexual in context because of the identity of the perpetrator, the nature of the touching, or the absence of an innocent explanation, is more likely to produce a finding that the act was indeed committed for a sexual purpose and constituted a violation of the statute." (*Id.* at p. 452.)

Here, G.R. testified that she awoke during the night to defendant, her foster father, doing something she "didn't like." She stated that he touched her "private," beneath her underwear, for "a long time" before leaving the room. Such touching of a child's genitals, silently and under cover of darkness, is demonstrative of an effort to obtain the child's cooperation and avoid detection, here by another child possibly sleeping in the same room. Despite defendant's assertion that he may have been adjusting G.R.'s undergarments innocently, and merely touched rather than rubbed G.R., G.R. testified that she was uncomfortable and subsequently tried to avoid defendant's hugs.

On this record, "no purpose other than sexual gratification reasonably appears." (*People v. Martinez*, *supra*, 11 Cal.4th at p. 452.)

Defendant urges us to analogize this case to *People v. Lang* (1974) 11 Cal.3d 134 (*Lang*.) We find *Lang* inapposite and factually distinguishable. In *Lang*, the defendant was adjudged a mentally disordered sex offender (MDSO) after being found guilty of two counts of committing lewd and lascivious acts, namely touching two nine-year-old girls. (*Lang*, *supra*, 11 Cal.3d at p. 136.) The evidence adduced at defendant's trial showed that approximately 14 adults and seven children had gathered at defendant's house for a surprise birthday party in his honor. (*Id.* at p. 136.) Defendant "remained seated in his reclining chair in the living room during the events in question, in full view of various party-goers at all times." (*Id.* at p. 137.) The two alleged victims, nine-year-old twins, both testified to virtually identical events. They claimed they were playing in a bedroom and separately walked past defendant's chair on their way to get a soda from the kitchen. As each of them was walking back, defendant "'blocked'" them, picked them up, placed them on his lap, then "'put his hand in [their] vagina[s]" for approximately five minutes, with "twelve adults in the room." (*Ibid.*) The twins returned to the bedroom and continued to play with the other children. They did not report the alleged incidents to anyone; their mother overheard them conversing several weeks later and reported their story to police. (*Ibid.*) Several adult attendees of the party testified that they never saw either twin on defendant's lap; one witness, who testified that she was sober during the party, testified that only one child, her own, entered the living room during the event. (*Ibid.*)

On appeal, defendant Lang's attorney prepared a short opening brief that was "directed solely to the propriety of defendant's commitment as a MDSO, and was devoid of argument for reversal of defendant's conviction." (*Lang*, *supra*, 11 Cal.3d at p. 138.) Appellate counsel further stated that Lang "'vigorously contends that he was innocent and that the testimony of the two victims was so incredible that the finding of guilt must be reversed as impossible . . . [citation]. [¶] *While I am not in agreement with this contention*, I must confess that there have been times when the Appellate Courts have held that I am not infallible, and for this reason, as well as for the reason that it is my belief that Appellant should be entitled to have his contentions heard, I am attaching an Appendix to this brief containing Appellant's own arguments in his own words.'" (*Ibid.*) The Supreme Court observed that the Appendix consisted of "ungrammatical, unpolished notes written by defendant." (*Ibid.*) It further noted that the Court of Appeal "disposed of defendant's argument . . . in a single paragraph." (*Ibid.*)

The issue before the Supreme Court was whether Lang's appellate counsel rendered ineffective assistance. The Court concluded that he did, by failing "to raise crucial assignments of error which arguably might have resulted in reversal." (*Lang*, *supra*, 11 Cal.3d at p. 142.) It noted that "[a] properly briefed argument . . . might well have led the Court of Appeal to conclude that the alleged assaults were physically impossible, and that the twins' testimony was demonstrably false." (*Id.* at p. 139.) The Supreme Court remanded the matter to the Court of Appeal, with instructions to appoint new appellate counsel for Lang and to reconsider his appeal. (*Id.* at p. 142.)

The *Lang* court did not hold that the twins' testimony was inherently improbable or impossible; instead, it found the issue to be an arguable one. Even if it had made such a holding, the testimony in this case was nothing like that in *Lang*. Victims V.S. and G.R. did not testify that defendant separately penetrated them for five minutes each in full view of a roomful of adults, none of whom recalled seeing the girls in the room. Instead, they testified that defendant touched or licked them in bed in the presence of only sleeping or very young children. Both victims testified that the other adult in the household, Rangel, was not present. These allegations of sexual abuse were not inherently unlikely. Though defendant accurately points out that there was no medical evidence or corroborating testimony in either incident, the *Lang* court's observations about the potential strength of his appeal turned not on the absence of such evidence but rather the inherent unlikelihood that the alleged abuse could have occurred as described.

The testimony here was not inherently improbable, and there was sufficient evidence from which the trier of fact could infer that defendant acted with a lewd intent when he touched G.R. We accordingly conclude that all three convictions were supported by substantial evidence.

II. Duplicate Convictions

Defendant next contends that his convictions on counts 2 and 3, relating to his single act of orally copulating V.S., should "have been consolidated as a single conviction, not treated as two separate convictions, with the sentence stayed under section 654." Therefore, he argues, his conviction on count 3 "should be vacated, not simply stayed." We disagree.

"In general, a person may be *convicted of*, although not *punished* for, more than one crime arising out of the same act or course of conduct." (*People v. Reed* (2006) 38 Cal.4th 1224, 1226 (*Reed*).) This principle is enshrined in sections 954 and 654. Section 954 provides in relevant part that an "accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense under two or more different offenses of the same class of crimes or offenses, under separate counts . . . . [T]he defendant may be convicted of any number of the offenses charged . . . . An acquittal of one or more counts shall not be deemed an acquittal of any other count." Section 654, the punishment counterpart to section 954, provides in relevant part that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." (§ 654, subd. (a).) "When section 954 permits multiple conviction, but section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited." (*Reed*, *supra*, 38 Cal.4th at p. 1227.) The trial court did that here: it stayed execution of defendant's sentence on count 3. However, the question defendant presents is whether he properly could have been convicted of both counts 2 and 3 in the first place.

"A judicially created exception to the general rule permitting multiple conviction 'prohibits multiple convictions based on necessarily included offenses.' [Citation.]" (*Reed*, *supra*,

38 Cal.4th at p. 1227.) One offense necessarily includes another if it cannot be committed without also committing the lesser offense. (*Ibid.*) California courts use two tests to determine whether one offense is necessarily included in another. (*Ibid.*) The first, known as the "elements test," considers whether all the legal elements of a lesser crime are included in the definition of a greater crime, such that the greater cannot be committed without also committing the lesser. (*People v. Moon* (2005) 37 Cal.4th 1, 25.) The second, the "accusatory pleading test," looks not to official definitions but rather examines whether the accusatory pleading in a particular case "describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime." (*Id.* at pp. 25-26.)

Defendant argues that the crime charged in count 2, oral copulation of a child under 14 years of age by a person more than 10 years that child's senior (§ 288a, subd. (c)(1)), is a necessarily included lesser offense of the crime charged in count 3, oral copulation of a child under 10 years of age (§ 288.7, subd.(b)), under the accusatory pleading test. Therefore, he asserts, his "conviction for count 3 should be vacated, not simply stayed."

The Supreme Court foreclosed this argument in *Reed*, *supra*, 38 Cal.4th at p. 1231, a case on which defendant relies. There, the Supreme Court squarely held that "[c]ourts should consider the statutory elements and accusatory pleading in deciding whether a defendant received notice and therefore may be convicted, of an *uncharged* crime, but only the statutory elements in deciding whether a defendant may be convicted of multiple *charged* crimes." (*Reed*, *supra*, 38 Cal.4th at p. 1231.) Defendant was charged with violating both 288a, subdivision (c)(1) and section 288.7, subdivision (b). Under the "quite

workable" rule announced in *Reed*, then, only the elements test may be used to determine whether one charged offense is necessarily included in the other. (*Ibid*.) Defendant mentions only the accusatory pleading test; he does not contend that the elements test establishes that count 2 is a lesser included offense of count 3. He therefore forfeited any argument based on the elements test.

Even if he had not forfeited the elements test, that test does not demonstrate that section 288a, subdivision (c)(1) is a necessarily included lesser offense of section 288.7, subdivision (b). An 18-year-old who orally copulates a nine-year-old would violate section 288.7, subdivision (b), but would not simultaneously violate section 288a, subdivision (c)(1), which requires the perpetrator to be more than 10 years older than the victim.

Moreover, even if defendant's accusatory pleading argument were viable, his conviction on the alleged greater offense would not be stricken. "When a defendant is convicted of a greater and a lesser included offense, reversal of the conviction for the *lesser* included offense is required." (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1416 (emphasis added).) Indeed, section 654, subdivision (a) provides that a defendant facing multiple punishments "shall be punished under the provision that provides the longest potential term of imprisonment." Here, that is count 3. It appears the trial court stayed defendant's sentence on count 3 rather than the sentence on count 2 because it concluded that defendant was subject to the same sentence under count 2 and count 3. As we discuss below, however, the court erred in calculating the sentence on count 2 because it applied an inapplicable enhancement.

III. Multiple Victim Enhancement

The information alleged, and the trier of fact found true, a multiple victim enhancement as to counts 1 and 2 pursuant to section 667.61, subdivisions (b) and (e). Defendant contends the enhancement was not applicable to his case as a matter of law. The Attorney General agrees. We concur with the parties. The enhancement must be stricken and defendant's sentence in accordance with it must be reversed.

Section 667.61, subdivision (b) provides, with exceptions not relevant here, that "any person who is convicted of an offense specified in [section 667.61,] subdivision (c) under one of the circumstances specified in [section 667.61,] subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life." One of the circumstances listed in section 667.61, subdivision (e) is the multiple victim enhancement: "The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim." (§ 667.61, subd. (e)(4).) The offenses specified in section 667.61, subdivision (c) include commission of a lewd or lascivious act in violation of section 288, subdivision (a), the basis of defendant's conviction on count 1. (§ 667.61, subd. (c)(8).) The other offenses of which defendant was convicted, violations of sections 288a, subdivision (c)(1) and 288.7, subdivision (b), are not listed in section 667.61, subdivision (c). (See § 667.61, subd. (c)(1)-(9).)

Defendant thus was convicted of only one offense specified in section 667.61, subdivision (c), against only one victim, G.R. The multiple victim enhancement accordingly was inapplicable as a matter of law and must be reversed.

The punishment for violating section 288, subdivision (a) (count 1) or section 288a, subdivision (c)(1) (count 2) is imprisonment in state prison for three, six, or eight years. (§§ 288, subd. (a), 288a, subd. (c)(1).) The punishment for violating section 288.7, subdivision (b) (count 3) is imprisonment in state prison for 15 years to life. (§ 288.7, subd. (b).) The matter is remanded for resentencing in accordance with these and other applicable constitutional and statutory provisions, namely section 654, subdivision (a).[2]

DISPOSITION

The judgment of conviction is affirmed. The multiple victim enhancement pursuant to section 667.61, subdivisions (b) and (e) is stricken, and the sentence is reversed. The matter is remanded for resentencing consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J. WILLHITE, J.

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[2] Defendant also contends that the trial court failed to appreciate the scope of its sentencing discretion when it sentenced him consecutively on counts 1 and 2 due to the multiple victim enhancement, and that his current sentence of 30 years to life is unconstitutionally cruel and unusual. We need not address these arguments in light of our determination that defendant must be resentenced due to the erroneous application of section 667.61. The court may exercise its discretion as appropriate when it resentences defendant on remand.