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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CHRYSOSTOM DOMINICUS, Defendant and Appellant.	B277709 (Los Angeles County Super. Ct. No. VA134476)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger Ito, Judge. Affirmed and remanded for resentencing.

Edward J. Haggerty, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Chrysostom Dominicus appeals from the judgment entered after a jury convicted him on two counts of oral copulation or sexual penetration with a child 10 years old or younger (Penal Code § 288.7, sub. (b)),[1] one count of committing a lewd act on a child (§ 288, subd. (a)), and one count of continuous sexual abuse of a child (§ 288.5, subd. (a)). After the trial court dismissed the continuous sexual abuse count in furtherance of justice (§ 1385), the court sentenced Dominicus on the remaining convictions to a total state prison term of 33 years to life.

Dominicus contends the trial court erred by (1) dismissing the continuous sexual abuse count instead of the other counts on which he was convicted; (2) failing to instruct the jury concerning alternative charges; (3) excluding evidence of Dominicus's statement to investigating officers that he was willing to take a polygraph test; (4) denying a motion by Dominicus for a mistrial based on prosecutorial misconduct; (5) instructing the jury with CALCRIM No. 330, which Dominicus maintains is unconstitutional; (6) imposing an unconstitutionally cruel or unusual punishment by sentencing him to consecutive terms of 15 years to life for each of his two convictions under section 288.7, subdivision (b); and (7) failing to exercise its discretion not to impose consecutive sentences for those two convictions. We agree with Dominicus's final contention, remand for resentencing so the trial court can exercise discretion whether to impose consecutive or concurrent sentences for his two section 288.7 convictions, and in all other respects affirm the judgment.

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1 Statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

When T.W. was three years old, her mother enrolled her in a daycare center attached to Dominicus's home and run by his wife. Dominicus, who was 72 years old, often helped out in the daycare center. His granddaughter Mattie, who was a little younger than T.W., also attended the daycare center.

In March 2014, when T.W. was six years old, she told her parents she was uncomfortable playing with Mattie at the daycare center because Mattie tried to kiss her, grab her, get on top of her, pull down her panties, and have T.W. "kiss her butt." T.W. added, "And [Dominicus] does it, too." When her parents asked her to explain what Dominicus did, T.W. motioned to her chest and the area between her legs and said he "kisses on things and sucks on things." She also said Dominicus washed her vagina with a cup "a lot."

T.W.'s parents immediately took her to the police station, where T.W. spoke with Los Angeles County Sheriff's Deputy Denise Jimenez. T.W. told Deputy Jimenez that Dominicus sucked on her nipples and vagina and kissed her on the cheek. T.W. said Dominicus did this when the two of them were alone in the living room or bedroom of the house attached to the daycare center. She said that, when he did this, he would lift her shirt without removing it and pull down her pants and underwear and leave them around her ankles. She also said he would pour water over her vagina with a cup. T.W. said that Dominicus did these things to her "like one hundred times" and that afterwards he would give her candy and tell her not to tell anyone. At the conclusion of this interview, Deputy Jimenez accompanied T.W.

to the hospital for a Sexual Assault Response Team examination. The results of the examination were negative.

The following day Los Angeles County Sheriff's Deputy Rudy Acevedo interviewed Dominicus. When Deputy Acevedo told Dominicus about T.W.'s allegations, Dominicus denied having any inappropriate contact with her.

In July 2016 Dominicus went to trial before a jury on three counts of oral copulation or sexual penetration with a child 10 years old or younger, one count of committing a lewd act on a child, and one count of continuous sexual abuse of a child. In connection with the first three counts and the last count, the People alleged Dominicus had substantial sexual conduct with a victim under 14 years of age (§ 1203.066, subd. (a)(8)).

At trial, T.W. testified to some additional facts. She stated that she saw Dominicus's penis when they were alone together in a back room of the daycare center, that she saw something that was not urine come out of the "dot" at the end of it, and that more than once he put his penis in her mouth.

The jury convicted Dominicus on all counts but one—the third count of oral copulation or sexual penetration with a child 10 years old or younger—and found true the allegation that in committing those offenses Dominicus had substantial sexual conduct with a victim under 14 years of age. Because the jury could not reach a verdict on the third count of oral copulation or sexual penetration with a child 10 years old or younger, the court declared a mistrial on that count and dismissed it. The trial court also granted the People's motion to dismiss the conviction for continuous sexual abuse.

The trial court sentenced Dominicus to the lower term of three years on the conviction for committing a lewd act on a child

and to two consecutive terms of 15 years to life on the convictions for oral copulation or sexual penetration with a child 10 years old or younger, for an aggregate sentence of 33 years to life. Dominicus timely appealed.

DISCUSSION

A. *The Trial Court Did Not Err in Granting the Motion To Dismiss the Continuous Sexual Abuse Count*

1. *Relevant Proceedings*

In the operative amended information, the People charged Dominicus with four counts of specific sexual offenses—three counts of oral copulation or sexual penetration with a child 10 years old or younger, one count of committing a lewd act on a child—based on conduct allegedly occurring "[o]n or between February 12, 2012 and March 25, 2014." The People also charged Dominicus with one count of continuous sexual abuse based on conduct allegedly occurring during virtually the same period, "[o]n or between February 12, 2012 and March 27, 2014." The People did not allege the continuous sexual abuse count in the alternative to the counts of specific sexual offenses,[2] and Dominicus did not demur or in any way object to the information on that ground. Dominicus pleaded not guilty to all charges and denied all allegations in the amended information.

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[2] Although prior to trial the prosecutor stated the count for continuous sexual abuse "was included as an alternate charge," the amended information does not reflect that. Dominicus does not mention this statement by the prosecutor, let alone argue it is relevant.

After the jury convicted Dominicus on three of the four counts alleging specific sexual offenses and the count alleging continuous sexual abuse, but before the trial court sentenced him for the latter offense, the People moved to dismiss the continuous sexual abuse count on the ground "that particular charge overlap[s] the other counts" on which Dominicus was convicted. Dominicus did not object, and the trial court granted the motion.

2. *Analysis*

Dominicus argues that section 288.5 precluded the People from charging him with, and the jury from convicting him on, both the counts alleging specific sexual offenses and the count alleging continuous sexual abuse. The People do not dispute that is what occurred here. The People do dispute, however, Dominicus's contention that the trial court erred in granting the People's motion to dismiss the continuous sexual abuse charge rather than dismissing the specific sexual offense charges. The trial court did not err.

Section 288.5 "defines the crime of continuous sexual abuse of a child. Any person who either resides in the same home with a minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with the child or three or more acts of lewd or lascivious conduct, is guilty of the offense of continuous sexual abuse." (*People v. Johnson* (2002) 28 Cal.4th 240, 242 (*Johnson*); see § 288.5, subd. (a).) "The statute, however, imposes certain limits on the prosecution's power to charge both continuous sexual abuse and specific sexual offenses in the same proceeding." (*Johnson*, at p. 243.) In particular, subdivision (c) provides: "No other act of substantial

sexual conduct, as defined in subdivision (b) of Section 1203.066, with a child under 14 years of age at the time of the commission of the offenses, or lewd and lascivious acts, as defined in Section 288, involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative." Where the prosecution fails to comply with section 288.5, subdivision (c), by alleging continuous sexual abuse and specific sexual offenses involving the same victim during the same period without alleging them in the alternative, the defendant "cannot stand convicted of both." (*People v. Torres* (2002) 102 Cal.App.4th 1053, 1057 (*Torres*); see *Johnson*, at p. 248.)

In *Torres*, *supra*, 102 Cal.App.4th 1053 the prosecution violated section 288.5, subdivision (c), by not alleging in the alternative the charge of continuous sexual abuse and charges of specific sexual offenses during the same time period involving the same victim, and the jury convicted the defendant on both. On appeal the court addressed the question of "*which* convictions should be vacated?" (*Torres*, at p. 1057.) The court concluded the answer was to "leave [the defendant] standing convicted of the alternative offenses that are most commensurate with his culpability." (*Id.* at p. 1059.) Dominicus urges us to apply that rule here and find his culpability more commensurate with the offense of continuous sexual abuse.

But Dominicus does not stand convicted of both continuous sexual abuse and specific sexual offenses during the same period involving the same victim because the trial court dismissed the former charge on the People's motion. That circumstance, along with Dominicus's failure to demur to the amended information on

the ground it violated section 288.5, subdivision (c), puts this case on all fours with *People v. Alvarez* (2002) 100 Cal.App.4th 1170 (*Alvarez*), where the court rejected the same arguments Dominicus makes here.

In *Alvarez* the People charged the defendant in an information with continuous sexual abuse and overlapping counts of specific sexual offenses. (*Alvarez*, *supra*, 100 Cal.App.4th at p. 1173.) The defendant pleaded not guilty to all charges and waived his right to a jury trial. (*Ibid.*) "When the court trial began," he "objected" to the counts alleging specific sexual offenses on the ground that, under section 288.5, subdivision (c), he could not be convicted on those counts and the count alleging continuous sexual abuse. (*Alvarez*, at p. 1173.) The trial court deferred a ruling on the objection. (*Ibid.*) It revisited the issue "[w]hen the trial concluded, but before the court decided the case," at which point the prosecution moved to dismiss the count alleging continuous sexual abuse. (*Id.* at p. 1174.) The defendant objected, arguing that section 288.5 "forces an election on the People" and that, "[w]hen they elect to charge 288.5, they cannot proceed" on overlapping counts of specific sexual offenses. (*Id.* at p. 1174.) The trial court granted the People's motion, dismissed the continuing sexual abuse count, and found the defendant guilty on the counts of specific sexual offenses. (*Id.* at p. 1174.)

On appeal the defendant in *Alvarez* contended section 288.5, subdivision (c), barred his conviction on the counts of specific sexual offenses because the People did not allege those counts in the alternative to the count of continuous sexual abuse. (*Alvarez*, *supra*, 100 Cal.App.4th at p. 1175.) He argued that the trial court therefore erred in granting the People's motion to

dismiss the continuous sexual abuse count and that the trial court instead should have dismissed the specific sexual offense counts and convicted him on the continuous sexual abuse count. The court rejected that argument. (*Ibid.*)

The court in *Alvarez* began its analysis with section 1004, which provides that a "defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof . . . [t]hat it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution." (See *Alvarez*, *supra*, 100 Cal.App.4th at p. 1176.) The court then cited section 1012, which provides in relevant part that, "[w]hen any of the objections mentioned in Section 1004 appears on the face of the accusatory pleading, it can be taken only by demurrer, and failure so to take it shall be deemed a waiver thereof . . . ." (See *Alvarez*, at p. 1176.)[3] The court explained: "Here, the impropriety of not charging the continuous sexual abuse offense and lewd conduct offenses in the alternative appeared on the face of the information. Nonetheless, appellant failed to demur, thereby waiving his objection to the prosecution's proceeding on all of these offenses. Had appellant demurred on this ground, the prosecution could have readily amended the technical pleading error and alleged the specific sexual offenses in the alternative. By failing to demur, appellant cannot now claim that the prosecution lost its right to proceed on all of the counts and to

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[3] "The charging prohibition found in section 288.5, subdivision (c) is, in the words of the demurrer statute, a 'legal bar to the prosecution.'" (*People v. Goldman* (2014) 225 Cal.App.4th 950, 956.)

elect to seek conviction of the specific sexual offenses. The trial court therefore properly granted the prosecution's motion to dismiss the continuing sexual abuse charge and convicted appellant on the lewd conduct counts." (*Id.* at pp. 1176-1177.)

As in *Alvarez*, the impropriety here of failing to allege the counts of continuous sexual abuse and specific sexual offenses in the alternative appeared on the face of the amended information, and like the defendant in *Alvarez*, Dominicus did not demur to the information on that ground before entering his plea (indeed, he did not object to the impropriety in any way at any point). Dominicus thus waived any objection on that ground to the fact the prosecution proceeded on the counts alleging specific sexual offenses. Therefore, the trial court did not err when, "to avoid double convictions as proscribed by section 288.5, subdivision (c)," it granted the People's motion to dismiss the continuous sexual abuse count instead of the counts alleging specific sexual offenses. (*Alvarez*, *supra*, 100 Cal.App.4th at p. 1177, fn. 4; see *People v. Goldman* (2014) 225 Cal.App.4th 950, 952 (*Goldman*) ["because he failed to demur to the information, defendant forfeited the issue of whether he was illegally convicted of a discrete sexual offense which occurred during the same time period as was alleged for the continuous sexual abuse"].)[4]

Dominicus argues his objection to the prosecution's failure to comply with section 288.5, subdivision (c), "cannot be deemed forfeited" because it resulted in an unauthorized sentence. But

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[4] Although the trial court in *Alvarez* dismissed the count of continuous sexual abuse before rendering a verdict, whereas the trial court here dismissed the continuous sexual abuse count after the verdict, Dominicus does not suggest, and we do not see, that difference is material.

"'[t]he "unauthorized sentence" concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal.'" (*People v. Anderson* (2010) 50 Cal.4th 19, 26.) Dominicus did not fail to preserve an issue for review on appeal; rather, he forfeited the right to object to the People's having proceeded simultaneously (and not in the alternative) on the continuous sexual abuse count and the counts alleging specific sexual offenses. Moreover, Dominicus's sentence was not unauthorized because the trial court sentenced him on the specific sexual offense convictions only. (See *ibid.* ["'[a] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case'"]; *Torres*, *supra*, 102 Cal.App.4th at p. 1061 [vacating the continuous sexual abuse conviction and affirming the judgment in all other respects, including the sentences for specific sexual offenses not alleged in the alternative].)

Finally, Dominicus argues the trial court erred in dismissing the continuous sexual abuse charge rather than the specific sexual offense charges because "section 288.5 is a specific statute that should prevail over the more general sexual offense provisions found in sections 288 and 288.7." He refers to the principle that, "'if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute. In effect, the special statute is interpreted as creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute. . . . Absent some indication of legislative intent to the contrary, the . . . rule applies when (1) "each element of the general statute corresponds to an element

on the face of the special statute" or (2) when "it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute."'" (*People v. McCall* (2013) 214 Cal.App.4th 1006, 1011-1012; see *Johnson*, *supra*, 28 Cal.4th at p. 246 ["'"the general rule [is] that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment"'"]; *People v. Hord* (1993) 15 Cal.App.4th 711, 720 (*Hord*) ["'[t]he doctrine that a specific statute precludes any prosecution under a general statute is a rule designed to ascertain and carry out legislative intent'"].)

This argument is meritless. In fact, in *Johnson*, *supra*, 28 Cal.4th at p. 246 the Supreme Court stated it was leaving intact the court's conclusion in *Hord*, *supra*, 15 Cal.App.4th 711 "that the Legislature's purpose in passing section 288.5 was not to enact a specific statute in order to preclude prosecution for other generally applicable sexual offenses." (*Johnson*, at p. 246, fn. 5; see *Hord*, at p. 720 ["[t]he Legislature's intent in passing section 288.5 was not to enact a specific statute to apply in lieu of a general statute[; t]he intent was to enact a statute for an area which the Legislature believed was not covered by any other law"].) The trial court's ruling did not violate the rule Dominicus invokes concerning the relation between a specific and a general statute.

B. *The Trial Court Did Not Prejudicially Err by Not Giving an Alternative-charges Instruction*

Arguing that "[t]rial courts have a *sua sponte* duty to instruct on alternate counts," Dominicus contends the trial court erred by not instructing the jury, with a modified version of CALCRIM No. 3516, that the continuous sexual abuse count and the counts of specific sexual offenses were "alternative charges" and that the jury could not find him guilty on both the former count and the latter counts.

But even assuming the trial court had a duty to give this instruction sua sponte (see *People v. Garza* (2005) 35 Cal.4th 866, 881 ["[t]he trial court erred in not instructing the jury, on its own initiative, that it could not convict defendant both for theft and for receiving the same stolen property"]),[5] Dominicus has not demonstrated the requisite prejudice under *People v. Watson* (1956) 46 Cal.2d 818 by showing it is "reasonably probable [he] would have obtained a more favorable outcome had the jury been

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[5] No case holds a trial court has such a duty when the People have alleged alternative counts as provided for in section 288.5, subdivision (c), let alone where, as here, the People have *not* alleged those counts in the alternative. Indeed, the bench notes to CALCRIM No. 3516 state: "Because the law is unclear in this area, the court must decide whether to give this instruction if the defendant is charged with specific sexual offenses and, in the alternative, with continuous sexual abuse under Penal Code section 288.5. If the court decides not to so instruct, and the jury convicts the defendant of both continuous sexual abuse and one or more specific sexual offenses that occurred during the same period, the court must then decide which conviction to dismiss." (Judicial Council of Cal., Crim. Jury Instns. (2018) Bench Notes to CALCRIM No. 3516, p. 1008.)

so instructed." (*People v. Moye* (2009) 47 Cal.4th 537, 556; accord, *Garza*, at pp. 881-882; see *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050 [""[w]e have made clear that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*""].)[6]

Dominicus argues that, in light of alleged inconsistencies in T.W.'s testimony regarding the number, nature, and location of the "incidents of molestation," it is reasonably probable that, had the trial court given the alternative-charges instruction, "at least

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[6] Citing *Hicks v. Oklahoma* (1980) 447 U.S. 343 (*Hicks*), Dominicus asserts that the trial court's purported error in not giving an alternative-charges instruction is "reversible *per se*" or subject to the "harmless beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18 because the purported error violated his constitutional rights to due process and to a jury trial. *Hicks*, however, concerned only the right of due process and, on that point, is distinguishable. (*Hicks,* at p. 346.) The Supreme Court in *Hicks* held that, where a state has statutorily "provided for the imposition of criminal punishment in the discretion of the trial jury," the defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, [citation], and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." (*Ibid.*) As discussed, Dominicus forfeited any statutory right to have the jury determine whether he would stand convicted of continuous sexual abuse or the three specific sexual offenses by failing to demur to the amended information. (See *Goldman*, *supra*, 225 Cal.App.4th at p. 952; *Alvarez*, *supra*, 100 Cal.App.4th at p. 1177.)

one juror might have selected the continuous sexual abuse charge instead of the individual sex offense counts." He reasons that, "[s]ince the jurors likely would have concluded that the number of separate incidents was somewhat indefinite but at least three in total over the relevant time period, the jurors most probably would have selected continuous sexual abuse as the more appropriate offense with which to convict Dominicus." Having heard T.W.'s allegedly inconsistent testimony, however, the jury convicted Dominicus on both the continuous sexual abuse count and the three counts charging specific sexual offenses. The jurors had the option of not convicting Dominicus on the latter if they believed the evidence was "somewhat indefinite," even without an alternative-charges instruction. Dominicus's suggestion that, had the court instructed the jurors they could not convict on both, the jurors would have convicted him on the former only, raises no more than an "'"*abstract possibility*."'" (*Richardson v. Superior Court, supra*, 43 Cal.4th at p. 1050.)

C. *The Trial Court Did Not Err in Excluding Evidence of Dominicus's Offer To Take a Polygraph Test*

At trial the court granted the People's motion to exclude evidence that, during his interview with Deputy Acevedo, Dominicus stated he was willing to take a polygraph test. The trial court based its ruling on Evidence Code section 351.1, subdivision (a), which provides that "the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, . . . unless all parties stipulate to the admission of such results."

Dominicus contends excluding evidence of his stated willingness to take a polygraph test violated his constitutional right to due process, specifically his right to present relevant exculpatory evidence to the jury. He acknowledges the California Supreme Court has rejected similar challenges to the constitutionality of Evidence Code section 351.1. (See, e.g., *People v. Hinton* (2006) 37 Cal.4th 839, 890 [excluding under Evidence Code section 351.1 evidence the defendant agreed to take a polygraph test did not deprive him of due process or right to present a defense]; *People v. Wilkinson* (2004) 33 Cal.4th 821, 848-852 [categorical exclusion of polygraph evidence as required by Evidence Code section 351.1 does not violate the federal Constitution, including the constitutional right to present a defense].) He nevertheless raises the issue to preserve his right to further review. Fair enough. Suggesting he "raises different approaches to the issue," however, Dominicus also argues Supreme Court precedent does not bar us from entertaining the merits of his arguments. It does. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 663 ["[t]he state's exclusion of polygraph evidence is adorned with no exceptions, and its stricture on admission of such evidence has been uniformly enforced by this court and the Court of Appeal"].) The trial court did not err in excluding evidence of Dominicus's offer to take a polygraph test.

D. *The Prosecutor's Alleged Misconduct Was Harmless and Did Not Violate Due Process, and the Trial Court Did Not Err in Denying the Motion for a Mistrial*

1. *Relevant Proceedings*

Near the end of her closing argument to the jury, the prosecutor stated: "You probably will hear about [T.W.'s mother]. She saw an attorney. She consulted someone. Retained someone. But, remember, why did she go see an attorney? She told you she was mad. She wanted [Dominicus's wife] to pay. She is not sitting here. He is. She trusted her to care for her child and because she didn't care for her child, this man did what he did to her. So does she have a right to be upset at her? Does she have a right to want to do something? She has every right. If somebody hits your car, bumps into your vehicle, and they cause a dent, you have a right to be compensated because your car is going to be damaged. And you are going to have to fix it. But fortunately you can put a patch on a car and fix it. But can you put a patch on a child? Can you get back their innocence?"

At this point, the trial court sustained an objection, on unspecified grounds, from counsel for Dominicus. The prosecutor then continued: "So, ladies and gentlemen, like I said before, you are the judges. You decide what the evidence was before you, and you consider the evidence and only the evidence that you have here in court. And the people are confident that, when you do that, you will find him guilty and you will hold him accountable for what he did to that little girl. We feel there is sufficient evidence, ladies and gentlemen, beyond a doubt, even though the burden is beyond a reasonable doubt, that he did these acts. Thank you."

Later, out of the presence of the jury, counsel for Dominicus moved for a mistrial, arguing the prosecutor inappropriately "play[ed] on the sympathy of the jurors" by asking, "But can you put a patch on a child? Can you get back their innocence?" The trial court responded: "All right. There was an objection that was sustained, and in my estimation it is pretty close. But I'm going to deny the request for a mistrial. If you want me to give an instruction, I can, in regards to there is no sympathy, passion, or prejudice involved and that they should disregard that comment. Want me to do that?" Counsel for Dominicus answered: "The remedy I was asking [for] is a mistrial. If the court is denying that, the court can do any other remedy the court sees fit."

The trial court then brought the jury back into the courtroom and instructed: "I want to make a couple of comments to you before we get into the defense closing argument. That is, once again, what the attorneys say during closing arguments, it is not evidence. Okay? Another thing, do not let sympathy, passion, or prejudice influence your decision in any way. You guys are just fact-finders. You are not to decide whether or not you like one person or the other person or whether or not you think a person is a good person or a bad person. You just decide, was the case proven beyond a reasonable doubt, regardless of the consequences. That really is how it is supposed to work."

2. *Analysis*

Dominicus contends the rhetorical questions to which he successfully objected—"But can you put a patch on a child? Can you get back their innocence?"—improperly appealed to the sympathies of the jury in a manner that constituted prosecutorial

misconduct and violated his constitutional right to due process. He also contends the trial court erred by not granting his motion for a mistrial based on the prosecutor's conduct. He is wrong on all points.

"'"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.'" (*People v. Jackson* (2016) 1 Cal.5th 269, 349; accord, *People v. Blacksher* (2011) 52 Cal.4th 769, 828, fn. 35; *People v. Morales* (2001) 25 Cal.4th 34, 44.) "'In order to be entitled to relief under state law, defendant must show that the challenged conduct raised a reasonable likelihood of a more favorable verdict.'" (*People v. Daveggio & Michaud* (2018) 4 Cal.5th 790, 854; accord, *People v. Blacksher*, at p. 828, fn. 35; *People v. Cook* (2006) 39 Cal.4th 566, 608.)

Dominicus is correct that "appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial." (*People v. Fields* (1983) 35 Cal.3d 329, 362; see *People v. Seumanu* (2015) 61 Cal.4th 1293, 1344 ["an appeal for sympathy for the victim is out of place during an objective determination of guilt"].) The prosecutor's comments here, however, did not make the trial so unfair that Dominicus's convictions were a denial of due process. The comments were brief, unrepeated, and relatively mild. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1130 [improper appeal for sympathy for the victim did not result in denial of due process where "prosecutor's

comment was brief, mild, and not repeated"]; see also *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057 [given its context and relative brevity, there was no prejudice from the prosecutor telling the jury to "[t]hink what [a 10-year-old victim of rape and murder] must have been thinking in her last moments of consciousness during the assault[;] [t]hink of how she might have begged or pleaded or cried[;] [a]ll of those falling on deaf ears, deaf ears for one purpose and one purpose only, the pleasure of the perpetrator"], revd. on other grounds in *Stansbury v. California* (1994) 511 U.S. 318, and cited with approval in *People v. Seumanu*, *supra*, 61 Cal.4th at p. 1344 and *People v. Lopez* (2008) 42 Cal.4th 960, 969-970; *People v. Forrest* (2017) 7 Cal.App.5th 1074, 1085 ["the prosecutor's fleeting misstatements of the legal standard regarding provocation were not so egregious as to amount to a denial of due process"].)

Moreover, the trial court immediately admonished the jurors not to let sympathy or passion influence their decision and instructed them again that the attorneys' arguments were not evidence. (See *People v. Centeno* (2014) 60 Cal.4th 659, 676 ["[i]t has often been emphasized that arguments of counsel 'generally carry less weight with a jury than do instructions from the court'"; the "'former are usually billed in advance to the jury as matters of argument, not evidence, [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law'"]; *People v. Morales*, *supra*, 25 Cal.4th at p. 47 ["we presume that the jury relied on the instructions, not the arguments, in convicting defendant"].) For the same reasons, even assuming the prosecutor's comments constituted misconduct under state law, Dominicus has not shown that without the

misconduct it is reasonably probable the verdict would have been more favorable to him, i.e., that the misconduct was prejudicial. (See *People v. Martinez* (2010) 47 Cal.4th 911, 957 [even if the prosecutor's comments were an improper appeal for sympathy for the victims, they were not prejudicial because they "were not egregious and were relatively brief compared to the rest of his arguments"]; *People v. Mendoza* (2007) 42 Cal.4th 686, 704 ["the prosecutor's request that the jury imagine the fear defendant's victims experienced was clearly improper," but "the misconduct was not prejudicial, as his comments were brief and he did not return to the point"].)

Nor, for the same reasons, has Dominicus shown the trial court abused its discretion in denying his motion for a mistrial. "[S]uch a motion should be granted only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Ayala* (2000) 23 Cal.4th 225, 283; accord, *People v. Peoples* (2016) 62 Cal.4th 718, 802; see *People v. Hinton*, *supra*, 37 Cal.4th at p. 868 [trial court did not abuse its discretion in denying a motion for mistrial where the conduct complained of was harmless]; *People v. Valdez* (2004) 32 Cal.4th 73, 128 [because the prosecutor's complained-of remark to jury was "brief and isolated, the trial court properly denied the motion for mistrial"].)

E. *Dominicus's Argument That CALCRIM No. 330 Is Unconstitutional Is Both Forfeited and Meritless*

The trial court instructed the jury with CALCRIM No. 330: "You have heard testimony from a child who is age 10 or younger. As with any other witness, you must decide whether the child gave truthful and accurate testimony. [¶] In evaluating the

child's testimony, you should consider all [of] the factors surrounding that testimony, including the child's age and level of cognitive development. [¶] When you evaluate the child's cognitive development, consider the child's ability to perceive, understand, remember, and communicate. [¶] While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he or she is a child." Dominicus contends the instruction violated his "state and federal constitutional rights to a jury trial, confrontation, due process of law, and the right to present a defense" because it "tells the jury to ignore indications of impaired perception, understanding, and memory when evaluating the credibility of a child witness."

Because Dominicus did not object to or request clarification of the instruction at trial, however, he forfeited this argument. (See *People v. Lee* (2011) 51 Cal.4th 620, 638 [by failing to object to or request clarification of an otherwise correct instruction at trial, the defendant forfeited the argument that giving the instruction violated various constitutional rights]; *People v. Fernandez* (2013) 216 Cal.App.4th 540, 559 [by failing to object to CALCRIM No. 330 at trial, the defendant forfeited the argument the instruction was unconstitutional, notwithstanding his claim the instruction affected "substantial rights"].) Moreover, as Dominicus acknowledges, "the arguments he is making against CALCRIM No. 330 have been rejected by several appellate courts." (See *People v. Fernandez*, *supra*, 216 Cal.App.4th 540, 559 [rejecting the contentions CALCRIM No. 330 violated the defendant's state and federal constitutional rights and recognizing those contentions "have been uniformly rejected in

published decisions rejecting the same argument with respect to CALJIC No. 2.20.1, the predecessor to CALCRIM No. 330"], citing *People v. McCoy* (2005) 133 Cal.App.4th 974, 979-980, *People v. Jones* (1992) 10 Cal.App.4th 1566, 1572-1574, *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1393, and *People v. Harlan* (1990) 222 Cal.App.3d 439, 455-457) We do not agree with Dominicus that those cases were "wrongly decided."

F. *Dominicus's Sentence Was Not Unconstitutionally Cruel or Unusual*

Section 288.7, subdivision (b), provides for a mandatory term of "imprisonment in the state prison for a term of 15 years to life." Dominicus argues imposing consecutive terms of 15 years to life for his two convictions under this statute was "cruel and unusual under the state and federal constitutions." He argues a term of 30 years to life is "simply excessive, particularly where the defendant is a 75-year-old man with no prior criminal history." The federal and state constitutions, however, do not prohibit the sentences the trial court imposed on Dominicus.

"Under the Eighth Amendment of the federal constitution, 'the courts examine whether a punishment is grossly disproportionate to the crime." (*People v. Johnson* (2013) 221 Cal.App.4th 623, 636; accord, *People v. Vallejo* (2013) 214 Cal.App.4th 1033, 1045; see *People v. Baker* (2018) 20 Cal.App.5th 711, 732 (*Baker*) ["'[o]nly in the "exceedingly rare" and "extreme" case' will a sentence be grossly disproportionate to the crime"], quoting *Lockyer v. Andrade* (2003) 538 U.S. 63, 73.) "We begin an Eighth Amendment analysis 'by comparing the gravity of the offense and the severity of the sentence.'" (*Baker*,

at p. 733.) "Only in the rare case in which this threshold comparison leads to an "'inference of gross disproportionality'" do we proceed to 'compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions.'" (*Ibid.*)

Although Dominicus's sentence may be severe, particularly in view of his age, comparing it with the gravity of his offenses does not lead to an inference of gross disproportionality. (See *Graham v. Florida* (2010) 560 U.S. 48, 59-60 ["the Eighth Amendment . . . 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are "grossly disproportionate" to the crime'"].) Dominicus committed multiple sexual offenses over an extended period against an especially young and vulnerable child he was supposed to be helping care for. (See *Baker*, *supra*, 20 Cal.App.5th at p. 733 [no inference of gross disproportionality where the defendant was sentenced to 15 years to life under section 288.7, subdivision (b), for committing three sexual offenses against a six-year-old child on a single occasion].) Dominicus's sentence did not violate the Eighth Amendment. (See *People v. Christensen* (2014) 229 Cal.App.4th 781, 804-806 [sentence of 27 years to life for five counts of lewd conduct with a child did not violate Eighth Amendment]; see also *Baker*, at p. 726 [the Legislature has "made clear" that oral copulation of a child is "more heinous" than "unspecified fondling" chargeable as lewd conduct with a child].)

"'Under the California Constitution, a sentence is cruel or unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human

dignity.'" (*People v. Johnson*, *supra*, 221 Cal.App.4th at p. 636; accord, *People v. Vallejo*, *supra*, 214 Cal.App.4th at p. 1045; see *People v. Perez* (2013) 214 Cal.App.4th 49, 60 [cases meriting reversal on this ground are "'exquisitely rare'"].) "We first consider 'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.' [Citation.] Next, we compare the sentence to 'punishments prescribed in *the same jurisdiction* for *different offenses* which, by the same test, must be deemed more serious.' [Citation.] Finally, we compare the sentence 'with the punishments prescribed for the *same offense* in *other jurisdictions* having an identical or similar constitutional provision.' [Citation.] The weight afforded to each prong may vary by case." (*Baker*, *supra*, 20 Cal.App.5th at p. 723.)

Regarding the first consideration, we have already noted the seriousness of Dominicus's offenses. (See *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 244 ["sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people"]; *People v. Flores* (1981) 115 Cal.App.3d 924, 928 ["sexual crimes against minors pose a serious danger to society"]; see also *People v. Christensen*, *supra*, 229 Cal.App.4th at p. 806 [the seriousness of lewd conduct on a child "is considerable" and "may have lifelong consequences to the well-being of the child"].) Regarding the second consideration, "comparison of the mandatory 15-year-to-life sentence under section 288.7, subdivision (b) to the punishments for similar and more serious sex offenses in California does not suggest this is that 'rarest of cases' in which 'the length of a sentence mandated by the Legislature is unconstitutionally excessive.'" (*Baker*, *supra*, 20 Cal.App.5th at p. 730; see *id.* at pp. 728-730 [comparing

punishment under section 288.7, subdivision (b), with, among other things, a mandatory sentence of 25 years to life for specified sexual offenses with aggravating factors under section 667.61].) For the third consideration, Dominicus purports to offer a "10-jurisdiction sampling of the fifty states [that] reveals that the sentence imposed on [him] is more severe than would be imposed in the majority of the 10 other jurisdictions." But he does not explain why he chose these 10 states for his sample or how they compare to the other 39, and he does not indicate whether the 10 states have "'an identical or similar constitutional provision' against cruel or unusual punishment." (*Baker*, at p. 730.)

G. *The Trial Court Failed To Exercise Its Discretion To Impose Concurrent Sentences for the Section 288.7 Offenses*

Finally, Dominicus contends the trial court adopted the People's erroneous statement that section 667.6 required consecutive sentences for his section 288.7 offenses and failed to exercise its discretion, under section 669, to decide whether to impose the sentences consecutively or concurrently. The record supports Dominicus on this point.[7]

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[7] Dominicus acknowledges he did not raise this issue at sentencing, but argues he did not forfeit it because he did not have a meaningful opportunity to raise it. The People do not argue Dominicus forfeited the issue. "In any event, we would exercise our discretion to resolve the claim in the interests of fairness and judicial economy, . . . to forestall unnecessary ineffective assistance of counsel claims." (*People v. Leon* (2016) 243 Cal.App.4th 1003, 1023.)

Section 667.6 lists sexual offenses for which the court must impose consecutive terms for each violation involving separate victims or involving the same victim on separate occasions. (See § 667.6, subds. (d)-(e).) That list does not include offenses under section 288.7, subdivision (b), or section 288, subdivision (a). (§ 667.6, subd. (e).) Whether to impose consecutive or concurrent terms for convictions on those offenses is left to the sentencing court's discretion under section 669. (See *People v. Woodworth* (2016) 245 Cal.App.4th 1473, 1479 ["[a]bsent an express statutory provision to the contrary, [section] 669 provides that a trial court shall impose either concurrent or consecutive terms for multiple convictions"]; *People v. Valdez* (2011) 193 Cal.App.4th 1515, 1524 [the absence of a contrary provision left "the decision to impose consecutive or concurrent terms to the sentencing court's discretion under section 669"].)

In their sentencing memorandum, the People erroneously stated the mandatory consecutive sentencing provision of section 667.6 applied to violations of section 288.7, subdivision (b). They then asked the trial court to sentence Dominicus to consecutive terms of 15 years to life for the two convictions under section 288.7, subdivision (b), and to select and impose consecutively the upper term of eight years for the conviction under section 288, subdivision (a). At the hearing, the trial court stated it "had a chance to read the sentencing report prepared by" the prosecutor. The court stated: "[The prosecutor] set forth a sentencing scheme that I think is appropriate. The only deviation, as far as I'm concerned, is Mr. Dominicus is of an advanced age, and I am disinclined to sentence him to the high term on that 288(a)." After selecting the lower term of three years for the conviction under section 288, subdivision (a), the court imposed it and the

two terms of 15 years to life for the convictions under section 288.7, subdivision (b), to run consecutively.

The People concede they erroneously stated in the trial court that section 667.6 applied to violations of section 288.7, subdivision (b), but argue that we "must presume the trial court was aware of and followed the applicable law in sentencing a criminal defendant" and that "error cannot be presumed from a silent record." The record, however, is not silent. A fair reading of the transcript of the sentencing hearing is that the trial court, following the People's "sentencing scheme," mistakenly believed it had to impose consecutive terms for the violations of section 288.7, subdivision (b), rather than exercise its discretion whether to impose the terms consecutively or concurrently. "'Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.'" (*People v. Woodworth*, *supra*, 245 Cal.App.4th at p. 1480; accord, *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; see also *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1263 [where the "trial court mistakenly believed that it had no discretion to impose concurrent sentences," the Court of Appeal remanded the case to allow the trial court to exercise discretion].)

The People also argue that any error by the trial court in misunderstanding its discretion was harmless because it is not

reasonably probable the trial court would impose concurrent sentences on remand. The People note the trial court cited the victim's vulnerability and other aggravating factors when imposing the consecutive three-year term for the section 288 offense. But the trial court also noted mitigating factors—Dominicus's advanced age and lack of criminal previous history—in selecting the lower term for that offense. Moreover, aggravating factors that warrant imposing a consecutive three-year sentence may not be sufficiently aggravating to warrant imposing consecutive sentences of 15 years to life. There is thus a """"reasonable chance, more than an abstract possibility,""""" the trial court may have exercised its discretion to impose concurrent terms for the section 288.7 offenses if the court had realized it had the discretion to do so. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351, italics omitted; see *People v. Woodworth*, *supra*, 245 Cal.App.4th at p. 1480.) Therefore, we remand the matter to the trial court for resentencing to allow the court to exercise its discretion under section 669 whether to impose the sentences for the section 288.7, subdivision (b), offenses consecutively or concurrently.

DISPOSITION

The matter is remanded for resentencing so that the trial court may exercise its discretion whether to impose the sentences for the section 288.7, subdivision (b), offenses consecutively or concurrently. In all other respects, the judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.