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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOHN MARTIN PEREZ, Defendant and Appellant.	B267242 (Los Angeles County Super. Ct. No. KA107590)

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Affirmed in part, reversed in part.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn M. Webb and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant John Martin Perez appeals from his convictions on one count of continuous sexual abuse of a child in violation of Penal Code section 288.5, subdivision (a) and one count of lewd and lascivious acts upon the same child in violation of Penal Code section 288, subdivision (a).[1] Defendant argues the convictions were obtained in violation of section 288.5, subdivision (c), which prohibits dual convictions for continuous sexual abuse and an additional felony sex act against the same victim during the same time period. We agree with Defendant that both convictions cannot stand.

Section 288.5 defines the crime of continuous sexual abuse of a child. Any person who has recurring access to a minor child, and who, over a period of time not less than three months, engages in three or more acts of lewd or lascivious conduct with the child is guilty of the offense. (§ 288.5, subd. (a).) By enacting the statute, the Legislature sought to provide additional protection for victims of molestation by assuring that resident child molesters and others who repeatedly abuse a child over a prolonged period of time would not escape prosecution because of difficulties in pleading and proving with sufficient precision the dates, times, and particular nature of each molestation. (*People v. Rodriguez* (2002) 28 Cal.4th 543, 549.) However, in creating this course of conduct offense, the Legislature was also mindful of its potential due process perils, and took steps to safeguard against multiple convictions for the same conduct by imposing certain limits on the prosecution's power to charge both

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[1] All undesignated statutory references are to the Penal Code.

continuous sexual abuse and specific sexual offenses in the same proceeding. (See *People v. Johnson* (2002) 28 Cal.4th 240, 243) As relevant to this case, section 288.5, subdivision (c) states, "No other . . . lewd and lascivious acts . . . 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*." (Italics added.)

The People charged Defendant with two counts of lewd and lascivious acts upon his minor cousin, I.D. (Count 1 and Count 2), one count of lewd and lascivious acts upon a different minor cousin, A.D., occurring "[o]n or about July 6, 2014" (Count 3), and one count of continuous sexual abuse upon A.D., occurring "[o]n or between October 22, 2012 and July 5, 2014" (Count 4). A jury convicted defendant on all counts.

Defendant challenges his convictions on Count 3 and Count 4 pertaining to his abuse of A.D. He contends the charging information improperly sought, and ultimately led to, dual convictions for continuous sexual abuse and a lewd act upon the same victim during the same time period, in violation of section 288.5, subdivision (c). Specifically, he argues the one-day proximity of the dates alleged in Count 3 and Count 4, coupled with the "[o]n or about" language in the challenged counts and an accompanying jury instruction, invited the jury to convict him on a legally invalid theory. We agree with this contention and conclude the court's failure to instruct the jury that it could not use the same lewd act to convict Defendant of Count 3 and Count 4 constituted prejudicial error. Accordingly, we reverse

and vacate the conviction on Count 3.[2] The judgment is affirmed in all other respects.

FACTS AND PROCEDURAL BACKGROUND

1. *Initial Report to Police*

Because Defendant's appeal challenges his conviction only with respect to the counts pertaining to A.D., our statement of facts principally focuses upon the evidence adduced in support of those counts. We discuss the facts regarding I.D. where necessary to frame the evidence related to the challenged convictions.

A.D. was born October 2004. His sister, I.D., was born April 2002. Defendant was born May 1989. A.D. and I.D. are Defendant's cousins.

On July 26, 2014, I.D. disclosed to her mother that Defendant had sexual molested her. After hearing his sister's account, A.D. disclosed that he also had been abused by Defendant.

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[2] In deciding which convictions to vacate as the remedy for a violation of the proscription against multiple convictions set forth in section 288.5, subdivision (c), the general rule is that we leave the defendant standing convicted of the offense or offenses "most commensurate with his culpability." (*People v. Torres* (2002) 102 Cal.App.4th 1053, 1059.) Here, though both convictions carried sentences of 15 years to life due to application of the One Strike Law (see § 667.61, subd. (b)), we conclude the continuous sexual abuse conviction is most commensurate with Defendant's culpability as established by the evidence. (Cf. § 288.5, subd. (a) [providing for maximum penalty of 16 years imprisonment]; § 288, subd. (a) [providing for maximum penalty of eight years imprisonment].)

The children's mother reported the molestation to the police. The responding officer, Officer Chris Palaganas, interviewed I.D., A.D. and their mother.[3] I.D. told Palaganas that Defendant molested her twice on two separate occasions. A.D. told Palaganas that Defendant had molested him five times. A.D. described the first and last incidents, but could not elaborate on where and exactly when the other three incidents occurred

A.D. told Palaganas the first incident occurred when his family lived in an apartment in La Puente.[4] He said the last incident occurred in a tent "about three weeks before" Palaganas took the report. Palaganas noted the incident occurred "around July 6." A.D. said that in all five incidents Defendant put his penis between A.D.'s legs and moved it back and forth.

After interviewing the children and their mother, Palaganas spoke with Defendant. Defendant denied touching the children. Palaganas did not arrest Defendant, but asked him to leave the home so there would be no further problems.

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[3] Palaganas testified at trial regarding the interviews he conducted on July 26, 2014.

[4] A.D.'s mother testified that the family lived in the La Puente apartment from 2013 to June or July of 2014, when the family moved into her mother's home. Defendant also had a bedroom in A.D.'s maternal grandmother's home during the relevant time period. According to A.D.'s mother, the children disclosed they had been molested by Defendant within a month of moving into the grandmother's home.

2. *Child Advocacy Center Interview*

On August 18, 2014, Brittany Younger, a forensic interviewer with the Child Advocacy Center, interviewed A.D.[5] A.D. told Younger that Defendant had molested him "four times." He said the first incident occurred in his bedroom at the family's La Puente apartment. He was eight or nine years old and in the fourth grade at the time. A.D. had been sleeping when Defendant, who slept over that night, pulled down A.D.'s pants, grabbed his penis and "wiggle[d]" it "right, left, right, left."

A.D. told Younger the second incident also occurred at the family's apartment, on the floor of his bedroom where he and Defendant had been sleeping. He said Defendant fondled his penis, then Defendant pulled down his own pants, put his penis between A.D.'s legs, and moved it back and forth. Defendant eventually stopped and went back to sleep. A.D. did not specify when the second incident occurred.

A.D. reported the third incident occurred in Defendant's room at A.D.'s grandmother's home. A.D. and Defendant were sleeping on the floor when Defendant pulled down A.D.'s pants, fondled A.D.'s penis, then pulled down his own pants and put his penis between A.D.'s legs. As before, Defendant eventually stopped, turned around, and went back to sleep. A.D. did not specify when the third incident occurred.

A.D. told Younger the fourth and final incident occurred when he was camping in the backyard with Defendant and another cousin. He said Defendant grabbed his penis while he

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[5] The People played a video of A.D.'s interview with Younger for the jury.

was asleep, wiggled it around, and then stopped and went to sleep. A.D. said he was nine years old at the time.[6]

3. *Defendant's Confession*

After Younger completed her interviews, the investigating detectives summoned Defendant to the police station for questioning.[7] Defendant confessed to the detectives that he had pulled down A.D.'s pants and fondled A.D.'s penis in a tent in A.D.'s grandmother's backyard. He continued to touch A.D. for a "few minutes," then went to sleep and left the next morning He reported the incident occurred "around July" of 2014. Defendant denied touching A.D. on any other occasion and denied ever touching I.D. The detectives placed Defendant under arrest.

4. *The Charging Information*

On February 13, 2015, the People filed an information charging Defendant with four counts of child molestation; two counts pertaining to I.D. and two counts pertaining to A.D.[8] Each count alleged the offense came within the One Strike Law based on the nature of the offense and the presence of multiple victims. (§ 667.61, subd. (e)(4).) The two counts pertaining to A.D.—Count 3 and Count 4—alleged the following:

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[6] Younger also interviewed I.D. I.D. reported Defendant molested her on two separate occasions.

[7] The People played a video of Defendant's interview with detectives for the jury.

[8] Count 1 and Count 2 charged Defendant with committing lewd and lascivious acts upon I.D., in violation of section 288, subdivision (a), "[o]n or between January 1, 2012 and June 30, 2013" (Count 1) and "[o]n or between July 1, 2013 and July 4, 2014" (Count 2).

Count 3: "On or about July 6, 2014, . . . the crime of LEWD ACT UPON A CHILD, in violation of PENAL CODE SECTION 288(a), a Felony, was committed by [Defendant] . . . upon and with the body and certain parts and members thereof of [A.D.], a child under the age of 14 years . . . ."

Count 4: "On or between October 22, 2012 and July 5, 2014, . . . the crime of CONTINUOUS SEXUAL ABUSE, in violation of PENAL CODE SECTION 288.5(a), a Felony, was committed by [Defendant] who did unlawfully engage in three and more acts of 'substantial sexual conduct', as defined in Penal Code Section 1203.066(b), and three and more lewd and lascivious acts, as defined in Penal Code Section 288, with [A.D.], a child under the age of fourteen years, while the defendant resided with, and had recurring access to, the child."[9]

5. *A.D.'s Trial Testimony*

On July 27, 2015, a jury trial on the four-count information commenced. The People called A.D. to testify regarding Count 3 and Count 4. A.D. testified that the first instance of molestation occurred in the bedroom he shared with his sister in his family's former La Puente apartment. A.D. was sleeping on the floor beside Defendant when Defendant woke him by fondling his penis. A.D. said the incident occurred "in the middle of fourth grade," but could not recall whether the incident occurred before or after the Christmas break. He was also unable to recall whether it happened before or after St. Patrick's Day of 2014.

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[9] The October 2012 allegation appears to have been based upon A.D.'s report to Younger that he was eight or nine years old when the first molestation occurred.

A.D. testified that a second incident also occurred in his bedroom at the La Puente apartment. He said Defendant climbed into his bed while he slept, pulled down his pants, fondled his penis, then Defendant placed his own penis between A.D.'s legs and moved it back and forth. A.D. testified that the second incident happened "kind of toward the end of fourth grade," before his family moved out of the apartment and into his grandmother's home.[10] (See fn. 4, *ante*.)

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[10] A.D. was initially unable to recall this second incident. On direct examination he testified to three incidents: the first in the La Puente apartment, a second in a tent, and a third in Defendant's room. After he testified about the third incident, the prosecutor asked A.D. if there were "any other times" Defendant made him feel uncomfortable. A.D. responded, "No. Not that I can remember." Later, the prosecutor asked A.D. about details of the three incidents, then asked again, "Did it happen any other times?" A.D. responded, "I don't know. I don't remember any other times." When asked by the prosecutor whether his memory had been better when he spoke to Palaganas and Younger, A.D. confirmed his memory was better when he gave the earlier interviews.

On cross-examination, Defendant's attorney sought to impeach A.D. with testimony he gave during the preliminary hearing, at which A.D. testified the tent incident had been the "first incident" of molestation. At trial, A.D. testified that he was mistaken at the preliminary hearing and that the tent incident happened after the incident in his bedroom at the La Puente apartment. Finally, on redirect, the prosecutor refreshed A.D.'s recollection with his preliminary hearing testimony regarding a fourth incident in his bedroom at the La Puente apartment. A.D. confirmed both incidents in the La Puente apartment happened before the tent incident.

A.D. testified that a third incident occurred in a tent in the backyard of his grandmother's house. A.D. had been sleeping in the tent when Defendant woke A.D. by pulling down his pants and fondling his penis. Defendant then placed his own penis between A.D.'s legs and moved it back and forth. A.D. said the tent incident occurred "at the ending of fourth grade," between two to three months after the first molestation.[11]

A.D. testified that a fourth incident occurred in Defendant's room in the grandmother's home. A.D. had fallen asleep on Defendant's bed after watching a movie. He awoke to Defendant pulling down his pants and fondling his penis. Defendant then placed his own penis between A.D.'s legs and moved it back and forth. A.D. testified that this fourth incident occurred between two to three months after the tent incident.

6. *Jury Instructions and Verdict*

Following the close of evidence, the court instructed the jury on the law pertaining to the four-count information. With respect to Count 3, the court instructed the jurors regarding the elements of the offense and provided the following unanimity instruction from CALCRIM No. 3500: "The Defendant is charged in Count 3 with lewd and lascivious acts on a child. [¶] The People have presented evidence of more than one act to prove that the Defendant committed this offense. You must not find

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[11] Before refreshing A.D.'s recollection regarding the second La Puente apartment incident (see fn. 10, *ante*), the prosecutor asked A.D. to estimate the time between the "first time" and the "second time" Defendant touched him. At that point in A.D's testimony, the "second time" referred to the tent incident. A.D. testified that "between two to three months" passed from the first incident to the tent incident.

the Defendant guilty unless you all agree that the People have proved that the Defendant committed at least one of these acts and you all agree on which act he committed."

With respect to Count 4, the court gave the following instruction from CALCRIM No. 1120: "The Defendant is charged in Count 4 with continuous sexual abuse of a child under the age of 14 years in violation of Penal Code section 288.5(a). [¶] To prove that the Defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant lived in the same home with or had recurring access to a minor child; [¶] 2. The defendant engaged in three or more acts of substantial sexual conduct or lewd or lascivious conduct with the child; [¶] 3. Three or more months passed between the first and last acts; [¶] AND [¶] 4. The child was under the age of 14 years at the time of the acts. [¶] . . .[¶] You cannot convict the defendant unless all of you agree that he committed three or more acts over a period of at least three months, but you do not all need to agree on which three acts were committed."

As for the timing of the alleged offenses, the court provided the following instruction from CALCRIM No. 207: "It is alleged that the crime in . . . [¶] . . .[¶] [Count 3 occurred] on or about July 6, 2014. [¶] [Count] 4 on or between October 22, 2012, and July 5, 2014; [¶] The People are not required to prove that the crime took place exactly on those dates, but only that it happened reasonably close to those dates."

After deliberations, the jury returned a verdict finding Defendant guilty "as charged in count 3 of the information," and guilty "as charged in count 4 of the information." Apart from their reference to the information, the verdict forms did not include a finding as to the date or date range when the offenses

occurred. The jury also found Defendant guilty of committing lewd and lascivious acts upon I.D., as charged in Count 1 and Count 2 of the information. Further, the jury found all One Strike allegations to be true, finding Defendant had been convicted of committing an offense specified in section 667.61, subdivision (c) against more than one victim. (See § 667.61, subd. (e)(4).)

On September 18, 2015, the court imposed a total sentence of 45 years to life in state prison, consisting of three consecutive 15-year-to-life terms on Count 2, Count 3, and Count 4, and one concurrent 15-year-to-life term on Count 1.

DISCUSSION

1. *The Court Erred by Failing to Instruct the Jury that the Same Lewd Act Could Not Be Used to Convict Defendant of Count 3 and Count 4*

Defendant contends the date ranges charged in Count 3 and Count 4 of the information, coupled with the charging instruction regarding the timing of the alleged offenses, invited the jury to use the same lewd act to convict Defendant on both counts in violation of the restriction imposed by section 288.5, subdivision (c). Under this circumstance, Defendant argues the trial court had a sua sponte duty to instruct the jury that it could not use the same act to convict Defendant of both offenses, and the court's failure to give such an instruction constituted prejudicial error. We agree.

Section 288.5 criminalizes the continuous sexual abuse of a child under 14 by any person residing with, or having recurring access to, the child. Subdivision (a) provides in pertinent part: "Any person who either resides in the same home with the 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 lewd or lascivious conduct under Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child . . . ." (§ 288.5, subd. (a).)

The Legislature enacted section 288.5 in response to a recurrent problem in the prosecution of so-called resident child molesters: "Because of the age of the victim and the repeated and continual nature of the offenses, trial testimony often failed to identify with specificity the date or place of particular charged acts, and the defense's ability to respond to specific charges arguably was impaired. A line of Court of Appeal decisions beginning with *People v. Van Hoek* (1988) 200 Cal.App.3d 811 [246 Cal.Rptr. 352] (*Van Hoek*) reversed convictions obtained through the use of such 'generic' testimony, concluding that the inability to effectively defend against such charges deprived defendants of due process and that such proceedings improperly compromised the constitutional guarantee of jury unanimity." (*People v. Johnson, supra,* 28 Cal.4th at p. 242.) Section 288.5 aims to remedy this problem by defining the unanimity required to obtain a conviction when the evidence establishes multiple acts of child molestation over an extended time period. (See *Johnson,* at p. 247; see also *People v. Cortes* (1999) 71 Cal.App.4th 62, 75.) Specifically, subdivision (b) provides: "To convict under this section the trier of fact, if a jury, need unanimously agree only that the requisite number of acts occurred not on which acts constitute the requisite number." (§ 288.5, subd. (b).)

While its purpose was to subject resident child molesters to " 'certain' punishment by lowering the unanimity hurdle," the Legislature also took steps to safeguard against multiple

convictions for the same conduct by imposing certain limits on the prosecution's power to charge both continuous sexual abuse and specific sexual offenses in the same proceeding. (*People v. Johnson, supra,* 28 Cal.4th at p. 247; Stats. 1989, ch. 1402, § 1(b), p. 6138.) To that end, section 288.5, subdivision (c) provides that "[n]o other . . . 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*." (Italics added.)

Because multiple convictions for continuous sexual abuse and specific sexual offenses pertaining to the same victim over the same time period are precluded by section 288.5, subdivision (c) (see *People v. Johnson, supra,* 28 Cal.4th at p. 248), the trial court has a sua sponte duty to so instruct the jury when the offenses are charged in the alternative. (See com. to CALCRIM No. 1120 (2016) p. 837.) If a defendant is erroneously convicted of both continuous sexual abuse and specific sexual offenses in violation of the prohibition, the remedy is to vacate the conviction carrying the lesser sentence. (See *People v. Torres, supra,* 102 Cal.App.4th at p. 1060.)

The information alleged that Defendant committed continuous sexual abuse of A.D. "[o]n or between October 22, 2012 and July 5, 2014" (Count 4), and committed a lewd act upon A.D. "[o]n or about July 6, 2014" (Count 3). Citing the July 5, 2014 end date for the period of continuous sexual abuse and the July 6, 2014 date alleged for the specific lewd act, the People argue Defendant was properly convicted of both counts. The argument overstates the specificity of the information. Had the allegation in Count 3 been limited to only the specific July 6,

2014 date, we would agree that the information complied with the statutory mandate to allege "the other charged offense occurred *outside the time period*" of continuous sexual abuse. (§ 288.5, subd. (c), italics added; cf. *People v. Cortes, supra,* 71 Cal.App.4th at p. 75 [information alleging period of continual abuse "from June 1994 to February 16, 1996" and "additional rape charge on February 17" was compliant with § 288.5, subd. (c)].) However, as Defendant rightly points out, the charge was not so limited, as it alleged the specific lewd act occurred either "on *or about* July 6, 2014." (Italics added.) This imprecision made it possible for the jury to convict Defendant of committing continuous sexual abuse and another felony sex offense upon the same victim, within the same time period. Such a result, to the extent it may have occurred, is not permitted under section 288.5, subdivision (c). (*People v. Johnson, supra,* 28 Cal.4th at p. 248 [because "section 288.5, subdivision (c) clearly mandates the charging of continuous sexual abuse and specific sexual offenses, pertaining to the same victim over the same period of time, only in the alternative, [the People] may not obtain multiple convictions in the latter circumstance"].)

The charging instruction amplified the "or about" language in the information, and thus increased the likelihood that the jury might use the same act to erroneously convict Defendant on both counts. With respect to Count 3 and Count 4, the court gave the jury the following instruction from CALCRIM No. 207: "It is alleged that the crime in . . . [¶] . . .[¶] [Count 3 occurred] on or about July 6, 2014. [¶] [Count] 4 on or between October 22, 2012, and July 5, 2014; [¶] The People are *not required to prove* that the crime took place *exactly* on those dates, but only that it happened *reasonably close* to those dates." (Italics added.) We

agree with Defendant that this instruction effectively invited the jury to use the lewd act alleged in Count 3 to also convict Defendant of the continuous sexual abuse offense charged in Count 4, inasmuch as a rational understanding of the phrase "reasonably close" must include, at a minimum, the immediately preceding date of July 5, 2014.[12] Indeed, as we explain below with respect to prejudice, the record suggests the jury may have used the lewd act alleged in Count 3 to find the People proved the minimum three-month period required to convict Defendant of continuous sexual abuse under Count 4.

Because the information and charging instruction suggested the jury could use the lewd act charged in Count 3 to satisfy the elements of the continuous sexual abuse offense charged in Count 4, the trial court had a sua sponte duty to instruct the jury that such a result was prohibited by law. (See,

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[12] Notably, it is due to this concern over the timing of related offenses that the Judicial Council has explicitly cautioned that CALCRIM No. 207 "should not be given . . . when two similar offenses are charged in separate counts." (Bench Notes to CALCRIM No. 207 (2016) p. 37, citing *People v. Gavin* (1971) 21 Cal.App.3d 408, 419 [where evidence suggested a similar uncharged offense occurring within a month of a charged offense, the court's failure to correct apparent juror confusion engendered by "on or about" instruction was error].)

e.g., com. to CALCRIM No. 1120, *supra,* p. 837.)[13] The instruction could have taken the form of a prohibition against using the distinct lewd act to satisfy the requisite elements of the continuous sexual abuse offense, or the instruction could have specifically informed the jury that the lewd act alleged in Count 3 was not included in the period of continuous abuse alleged in Count 4. Either instruction would have allowed the jury to reasonably segregate the counts and time periods in accordance with section 288.5, subdivision (c). We conclude the court's failure to provide the jury with such an instruction was error under the circumstances. We turn now to whether that error was prejudicial.

2. *The Instructional Error Was Prejudicial Because It Invited the Jury to Convict Defendant on a Legally Invalid Theory*

The trial court's failure to instruct the jury in accordance with the restriction set forth in section 288.5, subdivision (c) is a state law error subject to analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836. "Under *Watson*, reversal is required if it is reasonably probable the result would have been more favorable to the defendant had the error not occurred." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130; *People v. Perez* (2005) 35 Cal.4th 1219, 1232.)

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[13] Because under section 288.5, subdivision (c) "continuous sexual abuse and specific sexual offenses pertaining to the same victim over the same time period may only be charged in the alternative," the Judicial Council comment warns that the court has a "sua sponte duty" to instruct the jury that dual convictions are prohibited for alternative charges. (Bench Notes to CALCRIM No. 1120, *supra,* p. 837.)

"The nature of this harmless error analysis depends on whether a jury has been presented with a legally invalid or a factually invalid theory. When one of the theories presented to a jury is legally inadequate, such as a theory which ' "fails to come within the statutory definition of the crime" ' [citations], the jury cannot reasonably be expected to divine its legal inadequacy. The jury may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime. In such circumstances, reversal generally is required unless 'it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory.' " (*People v. Perez, supra,* 35 Cal.4th at p. 1233; *People v. Guiton, supra,* 4 Cal.4th at p. 1122 [" '[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.' "].)

"In contrast, when one of the theories presented to a jury is factually inadequate, such as a theory that, while legally correct, has no application to the facts of the case, we apply a different standard. [Citation.] In that instance, we must assess the entire record, 'including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict.' [Citation.] We will affirm 'unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory.' " (*People v. Perez, supra,* 35 Cal.4th at p. 1233.)

The instant case comes within the former category in which a legally invalid theory is presented to the jury. The "or about" language in Count 3 of the information, as amplified by the charging instruction from CALCRIM No. 207, presented the jury with a legally invalid theory—that Defendant could be convicted of both continuous sexual abuse under section 288.5 and a distinct lewd act under section 288, even if the distinct lewd act occurred during the period of continuous abuse. Though the information and instruction also presented a valid legal theory—that Defendant committed the distinct lewd act "on" or after July 6, 2014—the jury was not instructed, and cannot reasonably be expected to have discerned, that it could render a guilty verdict on both counts only if it found the distinct lewd act occurred after the alleged period of continuous sexual abuse. Under this circumstance, we must reverse the conviction unless we can determine from the record that the jury necessarily found Defendant guilty on the proper theory. (*People v. Perez, supra,* 35 Cal.4th at p. 1233; *People v. Guiton, supra,* 4 Cal.4th at p. 1122.) We cannot make that determination here.

The evidentiary record in this case bears witness to the same recurrent problem in resident child molester prosecutions that compelled the Legislature to enact section 288.5 nearly three decades ago. (See *People v. Johnson, supra,* 28 Cal.4th at p. 243.) Because of his age and the continual nature of the offenses, A.D. was unable to identify with specificity the date and, in some cases, the place of the particular lewd acts. His inability to narrow the timing of the incidents is of particular concern because it is not clear that the jury found the first three incidents satisfied the minimum three-month element of section 288.5, subdivision (a). Though "the prosecution need not prove the

exact dates of the predicate sexual offenses in order to satisfy the three-month element . . . , it must adduce sufficient evidence to support a reasonable inference that at least three months elapsed between the first and last sexual acts." (*People v. Mejia* (2007) 155 Cal.App.4th 86, 97.) And, "while generic testimony may suffice, it cannot be so vague that the trier of fact can only speculate as to whether the statutory elements have been satisfied." (*Ibid.*; *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1158.)

With respect to the first act, A.D. variously stated in interviews and court testimony that the act occurred when he was eight or nine years old and in the middle of fourth grade. However, in his trial testimony he was unable to recall whether the first act occurred before or after the Christmas holiday or St. Patrick's Day of the 2013-2014 school year. As for the last act, A.D. told Palaganas and Younger that the incident occurred in a tent in his grandmother's backyard. However, at trial, A.D. testified that the tent incident was the third act of molestation, and that the last act occurred in Defendant's bedroom at his grandmother's home. A.D. told Palaganas that the tent incident occurred "about three weeks before" Palaganas took his report, which Palaganas noted was "around July 6." But critically, in his trial testimony, A.D. said the tent incident, which he characterized as the third act, occurred "at the ending of fourth grade," *between two to three months after the first molestation*. That time span, if accepted by the jury, would have been insufficient to meet section 288.5's requirement of three or more lewd acts "over a period of time, not less than three months in duration." (§ 288.5, subd. (a).) Only by including the fourth and final act in the period of continuous sexual abuse could the jury

have found the requisite elements proven based on A.D.'s trial testimony.

What the jury made of the conflicting evidence we cannot say for certain. It is possible that the jury found A.D. was mistaken about the order of incidents in his trial testimony, and that the tent incident was in fact the last of the four incidents at issue. It also is possible, if not plausible, that the jurors unanimously agreed the tent incident occurred "on or about July 6, 2014" based on Defendant's admission that he molested A.D. in a tent "around July." But those findings do not mean the jury necessarily found the tent incident occurred outside the alleged period of continuous sexual abuse. Due to the generic nature of A.D.'s testimony, and his affirmation that the first and third incidents occurred within a period of only "between two to three months," it also is possible that the jury included the final incident within the continuous abuse period in order to find a minimum of three months had elapsed between the first and last sexual acts. (See § 288.5, subd. (a); *People v. Valenti, supra,* 243 Cal.App.4th at p. 1158.) And, as discussed, the erroneous charging instruction invited the jury to do just that—to use the final lewd act to satisfy the three-month element of Count 4—while failing to inform the jury that it could not also use the incident to convict Defendant on Count 3. Given the state of the evidence, we cannot say the jury necessarily eschewed this

legally invalid path to dual convictions.[14] Under this circumstance, the instructional error was prejudicial, and the distinct lewd act conviction must be reversed. (See *People v. Perez, supra,* 35 Cal.4th at p. 1232; see also *People v. Rojas* (2015) 237 Cal.App.4th 1298, 1307 [where instruction regarding timing of sexual abuse invited jury to convict defendant for incidents that occurred both before and after § 288.7 went into effect, conviction could not stand under prohibition against ex post facto laws given child's ambiguous testimony regarding when abuse began].)

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[14] The People maintain the instructional error was cured by the prosecutor's closing argument, which identified the "[i]ncident at the tent" as the "very last incident" constituting Count 3. We disagree. As discussed, even if the jury resolved the conflicting evidence to find the tent incident was the final lewd act, this does not mean the jury necessarily found the incident occurred outside the alleged period of continuous sexual abuse. Indeed, given A.D.'s testimony concerning the time that elapsed between the first and third incidents, the jury may well have included the tent incident within the period to find the three-month minimum element was met. In any event, insofar as the instruction presented the jury with a *legally* invalid theory, that error could not be cured by the prosecutor's argument. The court made this clear in its instructions to the jury; admonishing, "If you believe the attorneys' comments on the law conflict with my instructions, you must follow my instructions." That instruction is consistent with the law of this state. (See § 1124 [the court decides all questions of law which arise in the course of a trial]; CALCRIM No. 200.)

DISPOSITION

The conviction under Count 3 for a lewd act upon a child in violation of section 288, subdivision (a) is reversed and the sentence on that count alone is vacated. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GOSWAMI, J.*

We concur:

EDMON, P. J.

ALDRICH, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.