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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RICARDO CORONA GOMEZ, Defendant and Appellant.	B277856 (Super. Ct. L.A. County No. KA110959)

APPEAL from a judgment of the Superior Court of Los Angeles, Bruce F. Marrs, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant Ricardo C. Gomez.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, Deputy Attorney General, and Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.

Ricardo Gomez appeals from the judgment entered after a jury convicted him of nine sexual offenses against three boys. The trial court sentenced Gomez to serve 105 years to life consecutive to a three-year determinate term. Gomez contends the trial court erred by not instructing the jury on the lesser included offense of attempted sodomy with a person under 14 years (count 8). Gomez also contends there was not substantial evidence to support his conviction for continuous sexual abuse of a child (count 5), and the trial court abused its discretion by instructing the jury that the prosecution need not prove the exact dates of the offenses on which count 5 was based. Lastly, Gomez contends the trial court committed several sentencing errors. With the exception of count 5, which we modify to the lesser included offense of lewd act with a child, and Gomez's sentence, which we vacate, we affirm and remand for resentencing.

FACTUAL AND PROCEDURAL SUMMARY

On numerous occasions between March 2014 and August 2015, Gomez sexually abused three young boys, J.D., A.D., and G.D.

A. J.D. (Counts 1 and 8)

J.D. met Gomez through a neighbor. Gomez, then 32 years old, occasionally took J.D. out to shop and to eat, and once took him to Magic Mountain. About a month before J.D. turned 13 years old, Gomez arranged to pick him up in a local park. They planned to wash Gomez's car, and stopped at his house to pick up some towels. When they arrived, Gomez repeatedly asked J.D. if he wanted to have sex, but J.D. refused. In the garage at Gomez's house, Gomez told J.D. to stand against some boxes and pull down his pants and underwear. J.D. complied.

J.D. testified that Gomez placed his penis between J.D.'s "butt cheeks . . . for like two seconds, and I just pushed him away." J.D. then observed that Gomez "was trying to get hard." Gomez asked J.D. to masturbate him, but J.D. refused. On cross-examination, J.D. was asked, "Did you ever tell the police in the garage that [Gomez] tried to put his erect penis in you?" J.D. answered, "It was like not hard, but it wasn't like soft. It was like in the middle."

J.D. was questioned further about where Gomez placed his penis. The prosecution asked J.D.: "And when you first felt him, how did your body feel?" J.D. testified: "I was just like scared, and I just pushed him away. I didn't want it to happen." J.D. testified that after Gomez placed his penis between the cheeks of J.D.'s buttocks, Gomez's penis "was going up and down. And I—after a second, I just pushed him." Asked about his having told the police that Gomez "had kind of made a thrusting motion at least three times and it lasted about 30 seconds," J.D. testified that "the whole thing [lasted] 30 seconds, but individual stages." On cross-examination, J.D. testified that Gomez moved his penis "up and down. He wasn't putting it in. Straight in." J.D. told the police that Gomez's penis "did not go all the way into his butt," but passed between his buttocks.

J.D. told his mother, Olga, what Gomez had done. She testified through an interpreter that J.D. told her that Gomez "had taken him to the garage at his house and that he pulled his pants down, and he put his intimate part against my son's back," which she clarified to mean "his butt." Olga further testified that she asked J.D. how Gomez had touched him, and J.D. said, "He pulled my pants down, and he put his part behind me." The prosecutor asked Olga, "And did [J.D.] also tell you that [Gomez] actually inserted his penis in his rear?" Olga answered, "That he put it there, but he said that it hurt."

Gomez testified that the incident in the garage "never happened." He was driving by a park next to the church, saw J.D. leaving church, and asked him what he was doing alone on the street. J.D. in turn asked Gomez where he was going. Gomez told him he was going to wash his car, and J.D. asked if he could come along. Gomez drove to his house and parked, left the hazard lights on with J.D. in the car, and went into his house to fetch some towels. Gomez testified that he did not enter the garage, and J.D. did not exit his car.

Based on the testimony, the jury convicted Gomez of one count of committing a lewd act upon a child under 14 years, pursuant to Penal Code section 288, subdivision (a)[1] (count 1), and one count of unlawful sodomy with a person under 14 years, pursuant to section 286, subdivision (c)(1) (count 8). The trial court sentenced Gomez to two consecutive terms of 15 years to life on counts 1 and 8.

B. A.D. (Counts 2, 3, 4, 5, and 9)

A.D. and his mother first met Gomez around 2012 when he came to their home with a church group to pray for A.D.'s 11-year-old sister, who is a cancer survivor. Gomez became the godfather of A.D.'s sister. Gomez and A.D. played guitar together in a four-person music group at their church. Gomez often took A.D. to eat, shop for clothes, and to the gym at the YMCA. A.D. spent time with Gomez roughly four days per week, not including church on Sunday. Typically, on two of those days A.D. would be alone with Gomez, and on the other two days J.D. and G.D. would be included. A.D. had known Gomez for two or three years when the molestation was reported.

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[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

In July 2014, when A.D. was 13 years old, he visited Gomez's house. Gomez asked A.D. if he would like to learn how to clean his penis. A.D. assented, and Gomez took A.D.'s clothes off and told him to lie down on a bed. A.D. testified that Gomez "started jerking me off," and then penetrated A.D.'s anus with two fingers and "started going in and out." Afterward, Gomez told A.D. not to tell anyone or they would both go to jail. A.D. testified that the same thing happened a total of three times, by which A.D. confirmed he meant that on each occasion, Gomez would masturbate him and place a finger in his anus.

A.D. testified that Gomez also molested him in the shower at the YMCA "three or four times." On each occasion, Gomez would wait until they were alone, place his hand in A.D.'s shorts, and masturbate him.

A.D.'s testimony varied concerning when the incidents at the YMCA occurred. At first, A.D. did not remember when Gomez first molested him at the YMCA, or whether school had ended for the summer. Asked if he remembered telling officers that he "started going to the gym at the YMCA and that this touching had started in May of 2015," A.D. agreed that sounded right. A.D. testified the last time Gomez masturbated him in the YMCA gym showers was in "August or September," or "between August and October" of 2015. A.D. also testified that the last incident at the YMCA occurred "[t]wo or three months before" he reported Gomez to the police in October 2015.

Gomez testified that one time on the way to the YMCA gym he and A.D. stopped by Gomez's house to pick up some clothes. In Gomez's room, A.D. told Gomez that he had an infection on his legs and stomach. Gomez told A.D. he should tell his parents and go to the doctor, but A.D. "did not want to do that" because "[h]e was embarrassed" to tell his parents. Gomez gave A.D. some ointment to put on, but A.D. asked Gomez if he could check it out.

Gomez testified that he told A.D. "that was not correct," and Gomez went downstairs. When Gomez came back upstairs, A.D. had applied the ointment and asked Gomez to check it. Gomez "told him that was improper," but A.D. persisted. A.D. told Gomez that he had rubbed too much. Gomez told A.D. that if he has an erection and does not ejaculate, his testes could explode and he would never be able to father children. Gomez then touched A.D.'s penis to check out the infection, and A.D. ejaculated.

On cross examination, Gomez admitted that he told the police that he put on a glove to apply ointment around [A.D.'s] rectum, and did so "maybe twice." Gomez also admitted that he told the police that he asked A.D. to see his penis, that he masturbated A.D., and justified his actions by saying he did so with A.D.'s permission.

Based on the testimony, the jury convicted Gomez of two counts of committing lewd acts upon a child under 14 years, pursuant to section 288, subdivision (a) (counts 2 and 3); two counts of sexual penetration by a foreign object upon a child under 14 years, pursuant to section 289, subdivision (j) (counts 4 and 9); and one count of continuous sexual abuse upon a child under 14 years, pursuant to section 288.5, subdivision (a) (count 5). The trial court sentenced Gomez to five consecutive terms of 15 years to life on counts 2, 3, 4, 5 and 9.

C. G.D. (Counts 6 and 7)

G.D. is Gomez's nephew. Gomez took G.D. to stores, on outings, and to the YMCA gym. In the summer of 2014, when G.D. was 14 years old, he slept over twice at Gomez's house. During one sleepover, G.D. felt Gomez put his penis against G.D.'s buttocks. Gomez also showed G.D. pornography.

Also in the summer of 2014, in the YMCA gym showers, Gomez admonished G.D. to clean his penis thoroughly, and asked G.D. if he wanted him to clean it for him. G.D. declined. On another occasion in the gym shower, Gomez grabbed G.D. from behind, pinned his hands behind his neck, and placed his penis against G.D.'s buttocks and thrust against him. Both were wearing shorts. G.D. pushed himself away, and nothing was said.

Gomez testified that G.D. never spent the night at his house and never slept next to him on his bed. Asked about G.D.'s testimony that he slept over, and that Gomez rubbed against his back, Gomez testified, "[t]hat's a lie." Gomez denied showing G.D. pornography. Gomez also denied pinning G.D. in the shower at the YMCA. Gomez testified that G.D. once threatened him, asking him what would happen if G.D. told the police that Gomez had touched him. Gomez testified that he "didn't believe he was being serious," and told G.D., "Don't even think about doing that. Not even messing around."

Based on the testimony, the jury convicted Gomez of one count of a lewd act upon a child of 14 years, pursuant to section 288, subdivision (c)(1) (count 6), and one count of misdemeanor child molestation, pursuant to section 647.6, subdivision (a)(1) (count 7). The trial court sentenced Gomez to an upper determinate term of three years on count 6, and 365 days on count 7 to run concurrent with the sentence imposed on count 6. Upon completion of the 3-year determinate term, Gomez was to begin serving the 105 years to life on the other counts.

DISCUSSION

Gomez raises several contentions on appeal. First, Gomez contends the trial court erred by failing to instruct the jury that it could consider the lesser included offense of attempted sodomy with a person under 14 years in addition to the completed sodomy charge (count 8). Next, he contends there was not substantial evidence that the several lewd acts he committed upon A.D. in the YMCA gym shower spanned at least three months, an element of continuous sexual abuse of a child under 14 years (count 5). Gomez also contends the trial court erred by instructing the jury that the prosecution need not prove that the acts in count 5 occurred on specific dates. Finally, Gomez contends that the trial court erred by sentencing him under the "One Strike" law on counts 4, 8 and 9 because he had no prior offenses, by failing to stay the sentence on count 8 because the conviction was based on the same conduct as the lewd act of which Gomez was convicted on count 1, and by concluding that consecutive sentences on all counts were mandatory.

The Attorney General contends that the trial court was not required to instruct the jury on attempted sodomy because it was not a lesser included offense of sodomy (count 8). The Attorney General concedes the sentencing errors Gomez alleges, and that there was not substantial evidence to support the conviction for continuous sexual abuse (count 5), but argues this court should modify the judgment to impose a lesser included offense. We modify the judgment to reduce Gomez's conviction for continuous sexual abuse (count 5) to the lesser included offense of lewd act with a child, vacate his sentence, affirm on the remaining counts, and remand for resentencing.

I. The Trial Court Was Not Required to Instruct the Jury on Attempted Sodomy with a Person Under 14 Years.

Gomez contends that the trial court erred by failing to instruct the jury on attempted sodomy with a person under 14 years as a lesser included offense of sodomy with a person under 14 years (count 8). We disagree because attempted sodomy is not a lesser included offense of sodomy.

Gomez chiefly relies on *People v. Vanderbilt* (1926) 199 Cal. 461, which describes attempted sodomy of a minor as a lesser included offense of sodomy of a minor. *Vanderbilt* relied on the general proposition that" ' "it is not conceivable that any crime can be committed in the absence of an attempt to commit it." ' " (*Id*. at pp. 463−464.) *Vanderbilt* did not address the duty to instruct the jury on a lesser included, uncharged offense because in that case the defendant had been charged with *both* "sodomy committed upon the person of a minor" and "an attempt to commit sodomy upon said minor." (*Id*. at p. 462.) Nevertheless, *Vanderbilt* concluded: "Under the statutes of this state a person charged with the infamous crime against nature may be convicted of an attempt to commit that crime, though he be not specifically charged with such attempt." (*Id*. at p. 464.) *Vanderbilt* cited two statutes, section 663 (attempt) and section 1159, which states: "The jury . . . may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, *or* of an attempt to commit the offense." (§ 1159, italics added.)

The California Supreme Court has since limited section 1159: "The disjunctive language [of section 1159] appears to support the claim a trial court may reduce a defendant's conviction to an uncharged attempt if supported by the evidence. However, we made the qualification that under section 1159,

‘ “[a] defendant may be convicted of an uncharged crime if, but only if, the uncharged crime is necessarily included in the charged crime.” ’ ” (*People v. Bailey* (2012) 54 Cal.4th 740, 752.)

“Two tests have traditionally been applied in determining whether an *uncharged* offense is necessarily included within a charged offense—the statutory or legal ‘elements’ test and the ‘accusatory pleading’ test. ‘Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former.’ ” (*People v. Sloan* (2007) 42 Cal.4th 110, 117.)

Sodomy is defined as “sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.” (§ 286, subd. (a).) Sodomy with a person under 14 years of age with a 10-year age difference (§ 286, subd. (c)(1)) is a general intent crime. (See *People v. Benavides* (2005) 35 Cal.4th 69, 97; *People v. Pearson* (1986) 42 Cal.3d 351, 355, abrogated on another point by *People v. Vidana* (2016) 1 Cal.5th 632, 651; *People v. Mendoza* (2015) 240 Cal.App.4th 72, 83 (*Mendoza*).)

Applying the elements test, because attempt to commit sodomy with a person under 14 years requires additional proof of specific intent, it is not a lesser included offense of sodomy with a person under 14 years. (See § 21a [“An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.”].) “Attempted . . . sodomy and attempted oral copulation with a child [are] . . . specific intent crimes. [Citation.] Thus, under the elements test, they are not lesser included

offenses of the charged general intent crimes. [Citation.] Because of the different mental states required, a defendant could be guilty of the completed offense [of sodomy] but not the attempt." (*Mendoza*, *supra*, 240 Cal.App.4th at p. 83.) This is because "defenses may be available to the charge of attempt, which are not defenses to the general intent crime charged." (*Ibid*.) For example, as a matter of public policy the mistake-of-fact defense concerning the age of a minor is unavailable to defendants charged with sexual abuse crimes involving minors, but it may be raised as a defense to a charged *attempt* to commit such a crime. (See *People v. Hanna* (2013) 218 Cal.App.4th 455, 462 [sufficient evidence of "a mistake-of-fact defense may apply to the crime of attempting to commit a lewd act on a child under 14 years of age"].) Had the trial court sua sponte instructed the jury on attempted sodomy with a person under 14 years, Gomez could have claimed this erroneously deprived him of the opportunity to raise as a defense that he believed J.D. was 14 years old or older. Thus, applying the elements test, attempt to commit sodomy with a person under 14 years is not a lesser included offense of sodomy with a person under 14 years.

"Under the accusatory pleading test, a lesser offense is included within the greater charged offense ' "if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." ' " (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289.) Here, the first amended information charged in count 8 that "[o]n or between August 1, 2015 and October 12, 2015 . . . the crime of sodomy of [a] person under 14 [years] with 10 [years] difference . . . was committed by [Gomez], who did unlawfully participate in an act of sodomy with [J.D.], a person under the

age of [14] years and more than [10] years younger than . . . [Gomez]." (Capitalization omitted.) Because count 8 of the information did not allege that Gomez had a specific intent to commit the offense of sodomy with a person under 14 years, the accusatory pleading test has not been met.

Because we conclude that an attempt to commit sodomy with a person under 14 years is not a lesser included offense of sodomy with a person under 14 years under either the elements test or the accusatory pleading test, the trial court did not err by not instructing the jury sua sponte on attempt to commit sodomy with a person under 14 years.

II. No Substantial Evidence Supported the Three-Month Element of Continuous Sexual Abuse of a Child.

Gomez contends, the Attorney General concedes, and we agree, that this court should reverse Gomez's conviction for continuous sexual abuse of a child (§ 288.5, subd. (a); count 5) because there was no substantial evidence that at least three months separated the first and last lewd acts charged, an essential element of the offense.

Section 288.5, subdivision (a) provides: "Any person who . . . has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more [proscribed acts] is guilty of the offense of continuous sexual abuse of a child." (§ 288.5, subd. (a).) To secure a conviction under section 288.5, "the prosecution need not prove the exact dates of the predicate sexual offenses in order to satisfy the three-month element. Rather, it must adduce sufficient evidence to support a reasonable inference that at least three months elapsed between the first and last sexual acts. . . . [W]hile 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." (*People v. Mejia* (2007) 155 Cal.App.4th 86, 97 (*Mejia*).)

A.D. testified that Gomez first committed lewd acts in the YMCA gym shower "sometime in May" 2015. A.D. agreed that he told the police that Gomez last abused him in August or September 2015, but then testified more specifically that Gomez last abused him "two or three months before" he reported Gomez to the police on October 12, 2015. The only reasonable inference permitted by this evidence is that Gomez's abuse began sometime in May and continued to some unspecified date around August. The jury could only speculate that the first incident occurred early enough in May, and that the last incident occurred late enough in August, to satisfy the minimum three-month duration element of section 288.5, subdivision (a). Because such speculation concerning whether that statutory element had been satisfied is impermissible, we must reverse the conviction on count 5. (*Mejia*, *supra*, 155 Cal.App.4th at p. 97.)

While conceding that the conviction under section 288.5, subdivision (a) is subject to reversal, the Attorney General asks this court to use its authority under section 1260 to modify the judgment. Section 1260 permits an appellate court to modify a judgment to replace a greater offense with a single, lesser included offense supported by substantial evidence. (*People v. Navarro* (2007) 40 Cal.4th 668, 679.) The Attorney General argues that we should substitute a conviction on the lesser included offense of lewd act with a child under 14 years (§ 288, subd. (a)) or, in the alternative, misdemeanor child annoyance (§ 647.6, subd. (a)(1)). As we shall explain, because the offense of lewd act with a child under 14 years is a lesser included offense of continuous sexual abuse of a child under 14 years under the accusatory pleading test, reduction to the lesser offense is appropriate.

Section 288, subdivision (a), punishes "any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." Section 647.6, subdivision (a)(1), punishes conduct that "annoys or molests any child under 18 years of age." (§ 647.6, subd. (a)(1).) Conduct that violates section 647.6 must be "motivated by an abnormal sexual interest in children in general or a specific child." (*People v. Phillips* (2010) 188 Cal.App.4th 1383, 1396.) Although not specified in the statute, a violation of section 647.6, subdivision (a)(1) must be based on "(1) conduct a ' "normal person would unhesitatingly be irritated by, . . . [citation] and (2) conduct ' "motivated by an unnatural or abnormal sexual interest" ' in the victim." (*People v. Lopez*, *supra*, 19 Cal.4th at p. 289.)

The trial court, using CALJIC No. 10.42.5, instructed the jury that to convict on count 5 it was required to find that Gomez engaged "in [three] or more acts of substantial sexual conduct *or* [three] or more acts of lewd or lascivious conduct with a child under the age of 14 years." (Italics added.) The trial court instructed the jury that "substantial sexual conduct" could be any one of several specified acts, including "masturbation of either the victim or the offender." The trial court further instructed the jury that a "lewd or lascivious act means any touching of the body of a child under the age of 14 years with the specific intent to arouse, appeal to or gratify the sexual desires of either party."

The prosecutor argued that Gomez's conduct met both prongs of section 288.5, subdivision (a), "but you only need one." "You have substantial sexual conduct because you have the defendant reaching for [A.D.'s] penis in the shower, and he's said

to be jerking it and stroking it. That's masturbation. So you have that." The prosecutor continued, "it can also be a lewd and lascivious act. What that means is if any touching of the body of a child is done with that specific intent. And again, the only reason to grab a child's penis and do that is if you have one of these types of sexual intent."

Thus, under section 288.5, subdivision (a), as the jury was instructed, and as the case was presented, the jury could have based its guilty verdict on count 5 solely on three acts of substantial sexual conduct with a child without finding any specific intent or motive. Accordingly, under the elements test, neither lewd act with a child under 14 years (§ 288, subd. (a)) nor misdemeanor child annoyance (§ 647.6, subd. (a)(1)), is a lesser included offense of continuous sexual abuse of a child (§ 288.5, subd. (a)) because each requires proof of specific intent. (*People v. Martinez* (1995) 11 Cal.4th 434, 444 [section 288, subdivision (a) requires proof of touching and "sexual gratification must be presently intended at the time such 'touching' occurs"]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127 [To prove "the mental state element of the section 647.6 offense, the prosecution must show that the acts or conduct 'were motivated by an unnatural or abnormal sexual interest.' "].)

But under the accusatory pleading test, lewd act with a child under 14 years is a lesser included offense of continuous sexual abuse of a child, as that offense was charged here. "The accusatory pleading test arose to ensure that defendants receive notice before they can be convicted of an uncharged crime." (*People v. Reed* (2006) 38 Cal.4th 1224, 1229.) " 'As to a lesser included offense, the required notice is given when the specific language of the accusatory pleading adequately warns the defendant that the People will seek to prove the elements of the

lesser offense.' [Citation.] 'Because a defendant is entitled to notice of the charges, it makes sense to look to the accusatory pleading (as well as the elements of the crimes) in deciding whether a defendant had adequate notice of an uncharged lesser offense so as to permit conviction of that uncharged offense.' " (*Ibid*.)

Count 5 of the amended information charged that Gomez "did unlawfully engage in three or more acts of 'substantial sexual conduct,' as defined in . . . [s]ection 1203.066[, subdivision](b), *and* three or more lewd and lascivious acts, as defined in . . . [s]ection 288, with [A.D.], a child under the age of 14 years, while the defendant resided with, and had recurring access to, the child." (Italics added.) As is common, the prosecutor decided to frame the charge in the conjunctive, alleging that Gomez violated section 288.5, subdivision (a), by committing *both* three or more acts of substantial sexual conduct *and* three or more lewd and lascivious acts, with A.D. That decision has consequences under *People v. Smith* (2013) 57 Cal.4th 232 (*Smith*).

In *Smith*, the California Supreme Court held that where an offense can be proved by either of two alternative acts, but the information charges the defendant with committing *both* of those acts, the trial court has a duty to instruct on any lesser offenses necessarily included in *either* of the alternative acts charged. (*Smith*, *supra*, 57 Cal.4th at pp. 243-244.) The Court explains: "When the prosecution chooses to allege multiple ways of committing a greater offense in the accusatory pleading, the defendant may be convicted of the greater offense on any theory alleged [citation], including a theory that necessarily subsumes a lesser offense. The prosecution may, of course, choose to file an accusatory pleading that does not allege the commission of a greater offense in a way that necessarily subsumes a lesser

offense. But so long as the prosecution has chosen to allege a way of committing the greater offense that necessarily subsumes a lesser offense, and so long as there is substantial evidence that the defendant committed the lesser offense without also committing the greater, the trial court must instruct on the lesser included offense."[2] (*Id*. at p. 244.)

One way continuous sexual abuse of a child may be committed is by "three or more acts of lewd or lascivious conduct, as defined in [s]ection 288, with a child under the age of 14 years at the time of the commission of the offense." (§ 288.5, subd. (a).) That way necessarily includes, by definition, section 288, subdivision (a), which is incorporated by reference into section 288.5. Section 288.5 then adds the additional temporal, multiple acts, and recurring access elements of the greater offense. (See § 288.5, subd. (a).)

There was substantial evidence that Gomez committed lewd and lascivious acts in violation of section 288, subdivision (a), with A.D. in the YMCA gym shower. A.D. testified that on several occasions, Gomez waited until they were alone in the shower and masturbated A.D. under his shorts. Specifically, A.D. testified that Gomez would place "his hands in my pants, in my shorts. And he would, like, put soap on my

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[2] *Smith* further explained: "The rule we affirm today—requiring sua sponte instruction on a lesser offense that is necessarily included in one way of violating a charged statute when the prosecution elects to charge the defendant with multiple ways of violating the statute—does not require or depend on an examination of the evidence adduced at trial. The trial court need only examine the accusatory pleading." (*Smith*, *supra*, 57 Cal.4th at p. 244.) Accordingly, we need not look beyond the accusatory pleading to determine, in this case, that the prosecution alleged Gomez violated section 288.5 in both ways.

penis and jerk it off." Section 288, subdivision (a) is violated by a "lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." (§ 288, subd. (a).) A.D.'s testimony provided substantial evidence that Gomez touched him with the "the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires" of A.D. at a minimum, and possibly himself as well. Accordingly, we have no difficulty in finding that Gomez's conduct violated section 288, subdivision (a).

"From the beginning, section 1181, subdivision 6, and later section 1260, have been understood to provide courts a mechanism for correcting the jury's error in 'fix[ing] the degree of the crime.' [Citations.] The statutory scheme properly serves this corrective function if a court replaces a single greater offense with a single lesser offense, since such a modification merely brings the jury's verdict in line with the evidence presented at trial." (*People v. Navarro*, *supra*, 40 Cal.4th at p. 679.) Section 1181, subdivision 6, provides that "if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but . . . of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed." (§ 1181.)

Because we conclude that, as alleged in the accusatory pleading, continuous sexual abuse of a child under 14 years necessarily included the lesser offense of lewd act with a child under 14 years, we modify the judgment as to count 5 to reflect a violation of the latter offense. (See *People v. Enriquez* (1967) 65 Cal.2d 746, 749 [reviewing court has authority to modify

judgment when record reveals defendant cannot be held for conviction crime but may be convicted of lesser included offense]; see also *People v. Matian* (1995) 35 Cal.App.4th 480, 488 [because evidence was insufficient to establish felony false imprisonment, court modified judgment to reflect conviction of lesser, necessarily included offense of misdemeanor false imprisonment].)[3]

III. The Trial Court Erred in Sentencing Gomez.

The Attorney General concedes, and we agree, that the trial court committed four distinct errors in sentencing Gomez.

A. The Trial Court Erred by Sentencing Gomez on Counts 4, 8, and 9 under the One Strike Law.

The trial court sentenced Gomez to 15 years to life in state prison under section 667.61 on counts 4 and 9, for two violations of section 289, subdivision (j) (sexual penetration by any foreign object), and on count 8, for one violation of section 286, subdivision (c)(1) (sodomy with a person under 14 years), to be served consecutively.

The Attorney General concedes, and we agree with, Gomez's contention that the trial court erred by sentencing Gomez under section 667.61 on counts 4, 8, and 9. Neither offense (§289, subd. (j) or § 286, subd. (c)(1)) is listed among the offenses to which the One Strike law applies. (See § 667.61, subd. (c)(1)-(9).) Instead, both provide for imprisonment for

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[3] Gomez contends that the trial court erred by instructing the jury that the prosecution need only prove that he committed his offenses "on or about" certain dates, not the precise dates. Because Gomez's claim of error and prejudice was limited to count 5 as charged, and the reduced offense of section 288, subdivision (a) contains no temporal element, Gomez's claim is mooted by our modification of count 5.

three, six, or eight years on each count. (See § 289, subd. (j); § 286, subd. (c)(1).) Because the trial court erroneously sentenced Gomez under section 667.61 on counts 4, 8, and 9, we vacate the sentence and remand for the trial court to resentence Gomez pursuant to section 289, subdivision (j) on counts 4 and 9, and pursuant to section 286, subdivision (c)(1) on count 8.

B. Gomez Concedes the Trial Court Erroneously Sentenced Him under Section 667.61, Subdivision (b) for Counts 1, 2, and 3.

The Attorney General contends, and Gomez concedes, that the trial court erred by sentencing Gomez to 15 years to life on counts 1, 2, and 3, and instead should have sentenced Gomez to 25 years to life on each count, as required by section 667.61, subdivision (j)(2). We agree.

Gomez was convicted in counts 1, 2, and 3 of three violations of section 288, subdivision (a), lewd or lascivious acts upon a child under 14 years. The trial court correctly determined that section 667.61 applies, because section 288, subdivision (a) is specifically listed in section 667.61, subdivision (c). (See § 667.61, subd. (c)(8).) However, the trial court erroneously applied subdivision (b) of section 667.61, when it should have applied subdivision (j). Subdivision (b) imposes 15 years to life, but contains, as an exception to its application, any circumstances fitting subdivision (j). Subdivision (j)(2) provides that "[a]ny person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e), upon a victim who is a child under 14 years of age, shall be punished by imprisonment in the state prison for 25 years to life." Multiple victims is one of the circumstances listed in subdivision (e): "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).) Gomez committed count 1 against J.D., and counts 2 and 3 against A.D., and the jury found true the allegation that Gomez committed counts 1, 2, and 3 against more than one victim. Because one of the circumstances specified in section 667.61, subdivision (e) was met, the trial court erred when it applied section 667.61, subdivision (b). Accordingly, we remand for the trial court to resentence Gomez on counts 1, 2, and 3 pursuant to section 667.61, subdivision (j)(2).

C. The Trial Court Erroneously Failed to Stay Count 8, Which Was Based on the Same Conduct as Count 1.

Gomez contends, and the Attorney General concedes, that the trial court erred by failing to stay the execution of Gomez's sentence on count 8 (sodomy with a person under 14 years) because it was based on the same conduct on which count 1 (lewd acts) was based. We agree.

Section 654, subdivision (a), states: "An 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." The statute " 'prohibits multiple punishment . . . for two crimes arising from a single indivisible course of conduct in which the defendant had only one criminal intent or objective. [Citation.] Thus: "If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once.' " (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1296.)

"We review under the substantial-evidence standard the court's factual finding, implicit or explicit, of whether there was a

single criminal act or a course of conduct with a single criminal objective." (*People v. Moseley* (2008) 164 Cal.App.4th 1598, 1603.)

The trial court did not specifically address section 654 on the record. At sentencing, the trial court stated, "[a]s to the charges themselves, we have three victims and multiple counts. They're certainly not on the same occasions, certainly not the same facts." That statement was incorrect as to counts 1 and 8, which substantial evidence and the People's case showed were based on the same facts that described "a course of conduct with a single criminal objective." (*People v. Moseley*, *supra*, 164 Cal.App.4th at p. 1603) In her opening statement, the prosecutor discussed counts 1 and 8 together: "And what this conduct is going to be is the sodomy I just told you about where the defendant had [J.D.] come to his house under the auspices of getting towels to wash the car and that while they were in the garage, the defendant sodomized him." In her closing statement, establishing the element of touching a child in count 1, the prosecutor argued this element was satisfied because Gomez "touched the child's butt." The prosecutor also argued that the specific intent element of lewd acts with a child (count 1) was satisfied, "[b]ecause why else do you put your penis inside the butt of a kid?"

Because the same conduct formed the basis for count 1 and count 8, the trial court erred by failing to stay the execution of the sentence on count 8. (See *People v. Siko* (1988) 45 Cal.3d 820, 826 [section 654's prohibition of "double punishment" violated where lewd conduct consisted of the same but separately charged "rape and . . . sodomy rather than any other act," and nothing "in the prosecutor's closing argument or in the court's instructions suggest[ed] any different emphasis"]; see also *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1007 ["Since the acts in counts 2 and 5 [lewd conduct] were the very means by which

counts 7 and 8 [aggravated sexual assault] were accomplished, appellant cannot be punished twice for those particular acts."].) The convictions on counts 1 and 8 stand, but on remand the trial court must stay execution of Gomez's sentence on count 8.[4] (*People v. Siko*, *supra*, 45 Cal.3d at p. 823 [defendant "can be convicted of both rape and lewd conduct with a child on the basis of [a] single act, but he cannot be punished for both offenses"].)

D. The Trial Court Erroneously Concluded That Consecutive Sentences on All Counts Were Mandatory.

Gomez contends, and the Attorney General concedes, that the trial court erred when it relied upon the habitual offender statute to impose consecutive sentences on each count. We agree.

At sentencing, the trial court determined that all of the counts charged fell "under [section] 667[, subdivision](c)(6)" and therefore "[s]entencing shall be consecutive." Section 667 applies to "any person convicted of a serious felony who previously has been convicted of a serious felony." (§ 667, subd. (a)(1).) Gomez did not qualify. The prosecution conceded in its sentencing memorandum that Gomez had no prior record. And the trial court agreed "with the contentions of both sides that the defendant has no record of any kind that would bear on any of the issues raised."

Absent a statutory provision to the contrary, a trial court has discretion to choose whether to impose a concurrent or consecutive sentence for an offense (*People v. Sandoval* (2007)

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[4] Count 8 is stayed because we conclude that count 1 carries a sentence of 25 years to life imprisonment pursuant to section 667.61, subdivision (j)(2), which is longer than the term of three, six, or eight years' imprisonment carried by count 8, pursuant to section 286, subdivision (c)(1). (See Discussion *ante*, part III.A. & B.)

41 Cal.4th 825, 850), but must articulate reasons for choosing a consecutive sentence. (*People v. Neal* (1993) 19 Cal.App.4th 1114, 1117.) In exercising its discretion, a trial court must consider the criteria established in rule 4.425 of the California Rules of Court.

Because the trial court incorrectly believed that it was bound by statute to impose consecutive sentences, we remand so that the trial court may exercise its discretion under rule 4.425 of the California Rules of Court in deciding whether to impose consecutive or concurrent sentences.

DISPOSITION

The judgment of conviction is affirmed except as to count 5, which we modify to reflect a conviction under Penal Code section 288, subdivision (a). The matter is remanded to the trial court for resentencing in accordance with this opinion. Specifically, the trial court shall:

(1) consider its discretionary sentencing choices on counts 4, 8, and 9;

(2) resentence Gomez on counts 1, 2, and 3 pursuant to Penal Code section 667.61, subdivision (j)(2);

(3) stay Gomez's sentence on count 8 pursuant to Penal Code section 654; and

(4) exercise its discretion under rule 4.425 of the California Rules of Court, to decide whether to impose consecutive or concurrent sentences on all counts.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.