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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRES GARCIA,

Defendant and Appellant.

B237667

(Los Angeles County  
Super. Ct. No. NA088395)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Joan Comparet-Cassini, Judge. Affirmed as modified.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb, and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Andres Garcia appeals from a judgment which sentences him to 20 years in state prison on five counts of committing forcible lewd acts upon a child. (Pen. Code, § 288, subd. (b)(1).)<sup>1</sup> Garcia contends on appeal that the trial court erred when it imposed multiple sentences for one indivisible act. Because his conduct constituted five separate violations of section 288, we affirm his conviction but modify the judgment to impose five consecutive five-year terms for each conviction, increasing his total sentence to 25 years in state prison.

### **FACTS**

Garcia and Nancy K. are the parents of Yesenia S. and Andres S. Nancy had Maria R. with another man prior to her relationship with Garcia. Although they were divorced, Garcia visited Nancy and the children every three or four months and stayed with them for a few days up to a week at a time. Garcia was visiting them on February 27, 2011. That day, Nancy was scheduled to attend a church retreat. She tried to wake the girls up at 7:00 a.m. to take them to their uncle's house. Maria asked that her uncle pick them up later in the day so they could sleep in. Nancy agreed. Andres was supposed to spend the day with his father.

Maria, who was 12 years old at the time, was asleep in a queen-sized bed in the living room with 7-year-old Yesenia. Andres was asleep in his bedroom with Garcia. Shortly after Nancy left, Garcia came into the living room and asked to sleep with the girls. Although Yesenia said "no," Garcia got into bed with them anyway. Maria was sleeping on her side facing the wall and with her back to Yesenia. She woke when she felt a hand rubbing her arm and then her thigh from behind. She initially thought it was Yesenia, but then began to feel "weirdly" and knew it was not her sister.

Initially, the hand rubbed her over her pajama pants and T-shirt. But then it progressed under her clothing and on to her back. It reminded Maria of a time Garcia rubbed her back in the same way. Maria attempted to shift positions and cover herself with a blanket but she "couldn't stop him. He just put his hand under the blanket and he continued." He shifted her onto her back. Garcia then moved his hand to rub her breasts

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<sup>1</sup> All further section references are to the Penal Code unless otherwise specified.

over her bra with his left arm under her and his right arm over her. Maria tried to shove him away and cover herself with the blanket but he continued to rub her breasts under her bra. He then shifted her onto her side and he worked his way to her buttocks, first over her underwear and then inside her underwear. After he rubbed and squeezed Maria's buttocks for several minutes, he then rubbed his fingers against her vagina, over her underwear. When she tried to get up, he held her down. She continued to struggle and finally managed to get up, but he told her to lay down and go back to sleep.

She ignored him and ran into 10-year-old Andres's room, crying. She told him what happened. Garcia came into the room shortly afterwards and told them both to go back to sleep. Andres asked him what he did to make Maria cry and Garcia said nothing. Maria then ran back out to the living room and told Yesenia Garcia had "touched her in her private," with her face buried in Yesenia's pillow. Yesenia was angry at Maria for getting snot and tears on her pillow.

Meanwhile, Garcia wrote in Yesenia's notebook, "Francis,<sup>2</sup> please forgive me. I didn't mean to do what I did. I was just trying to show you that I care about you and don't tell nobody and especially your mom." He tore the page from the notebook, folded it and gave it to Maria. She read it while he was in the shower. He took the note and put it in his back pocket after his shower. At trial, a forensic document examiner created a duplicate of the note from the indentations left on the underlying page of Yesenia's notebook.

Maria did not want to wait for her uncle to pick them up and the children walked to his house in Carson from Long Beach after breakfast. Before they left, Garcia said "sorry" to Maria. Maria told her uncle what had happened and he texted Nancy about it. When she arrived home, she found a note from Garcia that stated he was going to see his sister in Mexico and if the kids said anything about him, they were lying because he only caressed Maria, he did not rape her. Nancy took Maria to the police station the next day and reported the incident.

Garcia was arrested four weeks later when he returned to Nancy's house. Detective Mark Steenhausen of the Long Beach Police Department interviewed Garcia at

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<sup>2</sup> Maria is also known as Francis.

the men's jail. Garcia waived his *Miranda*<sup>3</sup> rights and admitted he caressed Maria's buttocks, breasts and vagina. He demonstrated the manner in which he touched Maria's vagina and stated her breasts felt like small oranges. During the interview, Garcia stated he wanted to write a letter apologizing to Maria. In the letter, he admitted to touching her.

Garcia was charged with five counts of committing a forcible lewd act upon a child under section 288, subdivision (b)(1). At trial, the prosecution presented evidence as described above through testimony from Maria, Yesenia, Andres, Nancy and Maria's uncle. Garcia testified on his own behalf and admitted he touched her breasts and vagina. However, he claimed it was all an accident and he felt badly about it. He stated he thought it was okay to touch Maria so long as he did not forcibly put his penis in her vagina. A jury found Garcia guilty as charged. The trial court sentenced Garcia to serve consecutive five-year terms on each of the first four counts and a concurrent sentence of five years on the last count. Garcia timely appealed.

### **DISCUSSION**

Garcia makes only one argument on appeal: he contends the trial court erred when it imposed multiple, consecutive sentences for what he claims is one indivisible transaction with one single intent. According to Garcia, he "passed his hands over various parts of Maria's body" with "no break in the action" in one encounter. His intent was solely for sexual gratification. As a result, Garcia contends section 654 applied to his sentence. We reject his contention.

Under section 654, subdivision (a), "[a]n act or omission that is punishable in different ways by different provisions of law must be punished under the provision that provides for the longest potential term of imprisonment, but in no case may the act or omission be punished under more than one provision." The statute applies only where multiple punishment arises out of multiple statutory violations produced by the "same act or omission." (*People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*).) "However, because the statute is intended to ensure that defendant is punished 'commensurate with

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<sup>3</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

his culpability’ [citation], its protection has been extended to cases in which there are several offenses committed during ‘a course of conduct deemed to be indivisible in time.’ ” (*Ibid.*) “It is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible.” (*Ibid.*) If the defendant had only a single intent and all of the offenses were incidental to that one objective, he may be punished only once. If, on the other hand, he harbored multiple criminal objectives, he may be punished for each statutory violation “ ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ ” (*Ibid.*)

We find that section 654 does not apply to the facts of this case because Garcia’s encounter with Maria was not part of an indivisible course of conduct. As the Supreme Court has explained, “multiple sex acts committed on a single occasion can result in multiple statutory violations. Such offenses are generally ‘divisible’ from one another under section 654, and separate punishment is usually allowed.” (*People v. Scott* (1994) 9 Cal.4th 331, 344, fn. 9 (*Scott*)). Such is the case here.

At trial, the People argued that separate violations of section 288 occurred when Garcia rubbed Maria’s back under her shirt (count 1); rubbed her breasts over her bra (count 2); rubbed her breasts under her bra (count 3); rubbed her buttocks (count 4); and rubbed her vagina (count 5). The jury agreed and found Garcia guilty on all five counts. At sentencing, the trial court found “that these were separate occasions in that the defendant did have time to reflect and stop but continued on with the pattern of behavior which included touching the victim’s back, then her breast over her clothing, and then her breast on the skin, her rear, and then her vagina.”

Maria testified at trial that Garcia initially rubbed her back under her pajamas for “minutes.” When she attempted to shift positions and cover herself with a blanket, he was undeterred and continued to rub her back underneath the blanket. He then put his arms around her and rubbed her breasts over her bra. This lasted longer than the minutes he spent rubbing her back. Maria again tried to shove him away and cover herself with the blanket but he continued to rub her breasts. He then shifted her onto her back and he used both hands to touch her breasts under her bra. When Maria shifted positions to try

to get away from him, he shifted her onto her side to touch her buttocks inside her underwear. After he rubbed and squeezed Maria's buttocks for several minutes, he then rubbed his fingers against her vagina, over her underwear. Each time he moved to a different part of her body, Garcia had to stop what he was doing and reposition himself or Maria. This sequence of events afforded him ample opportunity to reflect on his actions and stop his assault, but he nevertheless continued it.

The court's analysis in *People v. Jimenez* (2002) 99 Cal.App.4th 450 (*Jimenez*) is instructive. There, the defendant was convicted of three counts of lewd and lascivious acts on a child under 14 under section 288, subdivision (a) and three counts of forcible lewd and lascivious conduct under section 288, subdivision (b). All the acts occurred during one incident when the defendant rubbed the eight-year-old victim's breasts, thighs, vagina and buttocks. The appellate court held the multiple convictions were proper. The court explained that, "[w]here a defendant fondles a portion of the victim's body with the requisite intent, a violation of section 288 has occurred. The offense ends when the defendant ceases to fondle that area. Where a defendant fondles one area of the victim's body and then moves on to fondle a different area, one offense has ceased and another has begun. There is no requirement that the two be separated by a hiatus, or period of reflection." (*Jimenez*, at p. 456)

The cases involving section 654 and sex crimes cited by Garcia comport with *Jimenez* and our analysis.<sup>4</sup> In each case, the defendant argued, as Garcia does, that section 654 precluded multiple punishments for an indivisible course of conduct. In each case, that claim was rejected even though more than one violation occurred during a single encounter. In *Harrison, supra*, 48 Cal.3d 321, the leading case on this issue, the defendant attacked the victim in her apartment and inserted his finger into her vagina three times. She dislodged his finger each time as she resisted and struggled with him. (*Id.* at p. 324.) On appeal, the defendant argued that an indivisible course of conduct had

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<sup>4</sup> Garcia also relies on *People v. Bevan* (1989) 208 Cal.App.3d 393 and *People v. Kirk* (1990) 217 Cal.App.3d 1488, but they were disapproved by *Scott, supra*, 9 Cal.4th at pages 347-348, which found those cases "do not properly analyze the circumstances under which a defendant maybe separately convicted under section 288 for separate lewd acts committed in a single encounter."

occurred and the jury erred when it convicted him of three violations of sexual penetration by object under section 289, subdivision (a). (*Harrison*, at p. 329.) The Supreme Court rejected that argument, holding that each act of penetration, however slight or brief, constituted a separate violation under the statute. (*Ibid.*)

In *Scott*, *supra*, 9 Cal.4th 331, the defendant was convicted of 14 counts of lewd and lascivious conduct in violation of section 288. (*Scott*, at p. 339.) Ten of the charges involved sexual intercourse on separate occasions. On two such occasions, the sexual intercourse was accompanied by fondling, which was charged as an offense separate from the intercourse. (*Id.* at pp. 337-338.) The Court of Appeal reversed the conviction on the two fondling charges, concluding the conduct was “ ‘indivisible’ ” from the accompanying sexual intercourse. (*Id.* at p. 340.) The Supreme Court reversed, explaining that “[e]ach individual act that meets the requirements of section 288 can result in a ‘new and separate’ statutory violation.” (*Id.* at pp. 346-347; see also *People v. Bright* (1991) 227 Cal.App.3d 105, 110 [defendant properly convicted of and sentenced for 30 counts of lewd and lascivious acts upon a child as “none of the lewd acts are necessary for or incidental to any other charged lewd act”].)

Here, each individual act by Garcia separately met the requirements of section 228 and was not necessary for or incidental to the other charged acts. Accordingly, section 654’s prohibition against multiple punishments for an indivisible course of conduct does not apply.

Garcia next argues that rubbing Maria’s back, breasts, buttocks and vagina did not constitute “separate occasions” under subdivision (d) of section 667.6 to warrant mandatory consecutive sentencing. Again, he is mistaken.

Section 667.6, subdivision (d) mandates that “[a] full, separate, and consecutive term shall be imposed for each violation of [certain enumerated sex crimes, including forcible lewd acts upon a child] if the crimes involve separate victims or involve the same victim on separate occasions.” That section goes on to set forth the test to determine whether crimes against a single victim were committed on separate occasions: “In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the

commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.”

Once a trial judge has found under section 667.6, subdivision (d), that a defendant committed offenses on separate occasions, we may reverse only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior. (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.) Applying this deferential standard to the facts we set out above, we conclude the trial court here could reasonably have decided that counts 1 through 5 occurred on separate occasions.

Garcia attempts to distinguish his case from those in which the defendant paused or stopped or moved locations in between sexual assaults. (*People v. Garza, supra*, 107 Cal.App.4th at pp. 1092-1093 [stopped sexual assault to strip, threaten victim, move his gun, and play with her chest]; *People v. Irvin* (1996) 43 Cal.App.4th 1063, 1071 [offenses occurred over period of time and in different rooms of the victim’s house]; *People v. Plaza* (1995) 41 Cal.App.4th 377, 385 [assaults occurred in different rooms and were punctuated by defendant hitting the victim].) Garcia asserts that there were no similar “separate occasions” in his assault on Maria because it occurred in one place and there were no stops or pauses in between. We disagree that Garcia’s conduct did not involve the same victim on separate occasions as described under section 667.6, subdivision (d). As discussed above, Garcia had a reasonable opportunity to reflect on his actions each time he stopped to reposition himself or Maria to access a different part of her body and he nevertheless resumed his sexually assaultive behavior.

Having concluded that the trial court reasonably based its sentence on section 667.6, subdivision (d), we reach the People’s argument that the trial court was also required to imposed a consecutive five-year term, rather than a concurrent sentence on count 5. As previously noted, the trial court found that the conduct associated with each count occurred on a separate occasion. As a result, subdivision (d) *mandated* a



consecutive term. It seems the trial court was merely complying with the People's sentencing recommendation below, which was to impose an aggregate term of 20 years. However, the trial court had no discretion to impose a concurrent sentence on count 5, and it resulted in an unauthorized sentence which we will now correct. (*People v. Smith* (2001) 24 Cal.4th 849, 852 [an unauthorized sentence may be corrected at any time whether or not there was an objection in the trial court].) Garcia's sentence is modified to impose a five-year consecutive, and not concurrent, sentence on count 5.

### **DISPOSITION**

The sentence on count 5 is to run consecutively to the other four counts. The judgment is affirmed in all other respects. The trial court is directed to prepare an amended abstract of judgment and to forward copies to the Department of Corrections and Rehabilitation.

BIGELOW, P. J.

We concur:

GRIMES, J.

SORTINO, 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.