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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAVIER SANCHEZ, Defendant and Appellant.	B279403 (Los Angeles County Super. Ct. No. KA110804)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Jr., Judge. Affirmed in part, reversed in part, and remanded with directions.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

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

INTRODUCTION

Appellant Javier Sanchez appeals from a 46 year prison sentence following his convictions on one count of continuous sexual abuse of a child between March 1, 2015 and August 31, 2015, three counts of oral copulation of the same victim during that period, and three counts of sexual abuse of a child between September 1, 2015 and September 23, 2015. He contends it was error to charge him in the information with continuous sexual abuse and the three counts of oral copulation on the same victim during the same period, without charging the counts in the alternative. He contends the convictions on the separate counts should be vacated. Respondent concedes the charging error, but argues that the trial court has discretion to vacate either the continuous sexual abuse count or the three separate oral copulation counts. Respondent requests that this court remand the matter for resentencing. For the reasons set forth below, we agree with respondent. Accordingly, we will remand with directions to vacate either the continuous sexual abuse conviction or the three separate oral copulation convictions and to resentence appellant.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Appellant was charged by information in count 1 with continuous sexual abuse of a child between March 1, 2015 and August 31, 2105 (Pen. Code, § 288.5, subd. (a));[1] in count 2 with lewd act on a child on September 21, 2015 (§ 288, subd. (a)); in count 3 with forcible oral copulation with a person under 14

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

between September 1, 2015 and September 23, 2015 (§ 288a, subd. (c)(2)(B)); in count 4 with oral copulation with a person under 10 years of age between September 1, 2015 and September 23, 2015 (§ 288.7, subd. (b)); and in counts 5 through 7 with oral copulation with a person under 10 years of age between March 1, 2015 and August 31, 2015.

At trial, deputy sheriff Jerry Tien testified he responded to a family disturbance call at appellant's home on September 25, 2015. When Tien arrived, appellant already was in handcuffs, and Tien was asked to escort him to a police car. During the walk to the vehicle, appellant said, "I shouldn't have touched her, I'm so fucking stupid." When Tien asked appellant what he was talking about, appellant stated that he had been molesting his stepdaughter.

The victim, who was 10 years old at the time of trial, testified that appellant began abusing her in March of 2015. Appellant touched her vagina more than five times. He put his mouth on her vagina three times. On one occasion, appellant placed her hand on his erect penis over his clothes. Shortly before the police were called, appellant placed his penis in her mouth.

The jury found appellant guilty as charged. The court sentenced him to a total of 46 years to life in state prison.

Appellant timely appealed.

DISCUSSION

Section 288.5, subdivision (c) provides in relevant part that "[n]o other act of substantial sexual conduct . . . 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." Here, the charging document did not comply with the requirement of section 288.5, subdivision (c). It charged appellant with one count of continuous sexual abuse of a child between March 1, 2015 and August 31, 2015 in violation of section 288.5, and three counts of oral copulation on the same victim in the same time period, but the latter three counts were not charged in the alternative. As appellant could not be convicted of both the continuous sexual abuse count and the three separate oral copulation counts, "either the continuous abuse conviction or the convictions on the specific offenses must be vacated." (*People v. Johnson* (2002) 28 Cal.4th 240, 245, 248 (*Johnson*).)

Although in *Johnson*, our Supreme Court affirmed the court of appeal's decision vacating the convictions on the specific counts, the court did not explain how courts are to determine which convictions to vacate under which circumstances. In *People v. Torres* (2002) 102 Cal.App.4th 1053 (*Torres*), the appellate court examined the legislative intent underlying section 288.5 and concluded that it was appropriate, "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), that we leave [the defendant] standing convicted of the alternative offenses that are most commensurate with his culpability." (*Id.* at p. 1059.) Generally, this would translate to upholding whichever conviction resulted in the greater aggregate penalty and vacating the less serious convictions. (*People v. Rojas* (2015) 237 Cal.App.4th 1298, 1309.) The reason is that "[t]he intent of the Legislature in enacting section 288.5 was 'to provide *additional* protection for children

subjected to continuing sexual abuse and certain punishment.'" (*Torres*, *supra*, 102 Cal.App.4th at p. 1058, quoting Stats. 1989, ch. 1402, § 1, p. 6138, italics added.) "It would be anomalous if section 288.5, adopted to prevent child molesters from evading conviction, could be used by those molesters to circumvent multiple convictions with more severe penalties and prior-strike consequences than available for a conviction under section 288.5." (*People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1177-1178.)

Appellant contends that failing to vacate the specific oral copulation counts on which he was found guilty would be inconsistent with *Johnson* and result in a "windfall reward to the prosecution despite its failure to comply with the express provisions of subdivision (c)." We disagree. First, *Johnson* did not restrict the remedy for a violation of section 288.5, subdivision (c) to vacating the convictions on the specific counts; it expressly held that vacating the continuous sexual abuse conviction would remedy the prosecutorial error. Second, the failure to properly charge appellant did not lessen the People's burden to present its case against appellant; arguably, the failure increased the People's burden, as the prosecutor had to persuade the jury that appellant was guilty beyond a reasonable doubt both of continuous sexual abuse *and* of three oral copulation counts during the relevant time period. Thus, allowing a court to vacate either the continuous sexual abuse conviction or the convictions on the specific counts would not result in any windfall to the prosecution.

DISPOSITION

The convictions and sentences on counts 2 through 4 are affirmed. The matter is remanded to the superior court to vacate

either the conviction on count 1 or the convictions on counts 5 through 7, and to sentence appellant to a term most commensurate with his culpability.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.