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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. JOHNNY BUSTOS III, Defendant and Appellant.	B236172 (Los Angeles County Super. Ct. No. GA078661)

APPEAL from a judgment of the Superior Court of Los Angeles County, Janice C. Croft, Judge. Modified and, as modified, affirmed.

Vanessa Place 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, Lawrence M. Daniels and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Johnny Bustos III, appeals from the judgment entered following his convictions by jury on two counts of lewd act upon a child (Pen. Code, § 288, subd. (a);[1] count 1 & 2) and on count 3 – continuous sexual abuse (§ 288.5, subd. (a)), with court findings he suffered a prior felony conviction (§ 667, subd. (d)), a prior serious felony conviction (§ 667, subd. (a)), and a prior sex offense conviction (§ 667.61, subds. (a), (c), & (d)(1)). The court sentenced appellant to prison for 155 years to life. We modify the judgment and, as modified, affirm it.

FACTUAL SUMMARY

1. *Facts Pertaining to the Present Offenses*.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that A.J. was born in March 1998. In 1998, appellant became involved with C.B. (C.B.), A.J.'s mother and, in 2003, appellant and C.B. married. A.J., appellant, and C.B. lived in an apartment in Monrovia. The below acts occurred there.

From the time A.J. was little to the time she was 12 years old in about 2010, appellant, perhaps 20 to 30 times, awakened her in bed and digitally penetrated her vagina. In February 2002, when C.B. was in the hospital, appellant digitally penetrated A.J.'s vagina two to four times while bathing her.

In 2004 or 2005, when A.J. was six or seven years old, respectively, A.J. was lying on a couch in the living room when appellant lay behind her, put his penis between her legs and on her buttocks, and repeatedly pressed against her perhaps 10 minutes. During this time, appellant digitally penetrated A.J.'s vagina. Also, from the time A.J. was six or seven years old to the time she was 12 years old, appellant, on 40 or 50 occasions, digitally penetrated her vagina while she sat on his lap, under a blanket, while the family watched television.

In 2007 when A.J. was about nine years old, appellant digitally penetrated her vagina while she was lying on the living room sofa and watching television. Appellant

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[1] Subsequent statutory references are to the Penal Code.

also removed her pants, put his penis between her legs, and rubbed his penis on her buttocks. During an eight-year period, appellant inappropriately touched A.J. 40 to 50 times.

In the summer of 2009, when A.J. was about 10 years old, appellant told A.J. to sit on a bed and she complied. He pulled her legs on the bed, removed her pants, digitally penetrated her vagina, and bit her buttocks. He also orally copulated her vagina (count 1). On another occasion in the summer of 2009, appellant pulled A.J. into his bedroom and began "fingering" and inappropriately touching her. He removed her underwear and engaged in sexual intercourse with her (count 2).

A.J.'s stepbrother lived in the apartment and, when A.J. was 12 years old, she told her stepbrother about the abuse. Appellant stopped touching her for a few months, but later resumed when A.J.'s stepbrother moved out of the apartment. A few days before December 15, 2009, appellant, in his bedroom, placed his hands in A.J.'s pants and digitally penetrated her vagina. Appellant stopped when C.B. approached, and he told A.J. not to say anything. In 2009, C.B. learned about the abuse and took A.J. to a hospital where a sexual assault nurse examined A.J.

Appellant presented no defense evidence. The parties stipulated police took A.J. home after the nurse's examination, retrieved clothing A.J. was wearing "on the date of the incident of December 13," but did not perform any tests on that clothing.

2. *Prior Uncharged Offenses.*

V.G. was born in 1983. She was the daughter of appellant's former girlfriend. From the time V.G. was nine years old to the time she was 11 years old, appellant would get in bed with her almost every night, touch her breasts and vagina, and try to kiss her. He also touched V.G.'s vagina more than 20 times. On one occasion during that period, he was driving V.G. in his car when he put his tongue in her mouth. On another occasion during that period, he was driving V.G. in his car while touching her vagina.

In early 1994, V.G. was at her aunt's house when appellant lay on top of V.G. and rubbed the front of his body on the front of V.G.'s body. Appellant engaged in this type of conduct more than 10 times. In August 1994, when V.G. was 11 years old, V.G. was

in bed when appellant got in bed with her, touched her vagina and breasts, moved his penis between her legs, and unsuccessfully tried to get her to touch his penis. Appellant rubbed V.G.'s vagina on numerous occasions.

ISSUE

Appellant claims his convictions must be vacated and the matter must be remanded to permit the trial court to determine whether he will stand convicted on counts 1 and 2, or, in the alternative, on count 3, and for resentencing.

DISCUSSION

Appellant's Conviction on Count 3 Must Be Vacated, and Remand is Unnecessary.

1. *Pertinent Facts*.

The information alleged as to each of counts 1 and 2 that on or between January 1, 2009, and December 13, 2009, appellant committed a lewd act upon a child (§ 288, subd. (a)), i.e., A.J. The information alleged as count 3 that on or between April 1, 2001, and December 13, 2009, appellant committed continuous sexual abuse (§ 288.5, subd. (a)) upon A.J. Neither count 1 nor count 2 was alleged in the alternative to count 3.

During her opening statement, the prosecutor indicated counts 1 and 2 were based on appellant's oral copulation of A.J.'s vagina, and his sexual intercourse with her, respectively, in the summer of 2009. The prosecutor indicated count 3 was based on appellant's sexual abuse of A.J. when she was between the ages of four years old and 12 years old, inclusive. During opening argument, the prosecutor repeated the above except she indicated the abuse at issue in count 3 began when A.J. was five years old.

The jury convicted appellant as previously indicated. During the sentencing hearing, appellant argued counts 1 and 2 "[fell] within the range" of count 3, the issue "[went] toward sentencing," and the issue was whether counts 1 and 2 "merge[d]" into count 3, but appellant did not explicitly argue multiple convictions on counts 1 through 3 were improper. The prosecutor argued multiple convictions and sentences on those counts were proper.

The court sentenced appellant to prison for 50 years to life on each of counts 1 and 2 (25 years to life on each of counts 1 and 2 pursuant to section 667.61, subdivisions (a),

(c)(8), and (d)(1), doubled pursuant to the Three Strikes law (§ 667, subd. (e)(1)); plus 50 years to life on count 3 (25 years to life pursuant to section 667.61, subdivisions (a), (c)(9), and (d)(1), doubled pursuant to the Three Strikes law); plus five years pursuant to section 667, subdivision (a).

2. *Analysis*.

Appellant claims as previously indicated. We reject the claim, although we do agree appellant cannot be convicted of all three offenses. Section 288.5, which defines the crime of continuous sexual abuse, states, in relevant part, "(a) 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 substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct, as defined in 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 and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.

"(b) 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. [¶] (c) *No other act of substantial sexual conduct,* as defined in subdivision (b) of Section 1203.066, with a child under 14 years of age at the time of the commission of the offenses, *or lewd and lascivious acts,* as defined in Section 288, *involving the same victim may be charged in the same proceeding with a charge under this section* unless the other charged offense *occurred outside the time period* charged under this section or the other offense is *charged in the alternative*. A defendant may be charged with only one count under this section unless more than one victim is involved . . . ." (Italics added.)

In *People v. Johnson* (2002) 28 Cal.4th 240 (*Johnson*), the information alleged one count of continuous sexual abuse and five counts of specific sexual offenses, i.e., four violations of section 288, subdivision (b), and one violation of section 286,

subdivision (c). The continuous sexual abuse count, and the counts pertaining to the five specific sexual offenses, were not alleged in the alternative. Following the defendant's conviction on all counts, the trial court imposed sentence on the continuous sexual abuse conviction and stayed sentencing on the remaining convictions pursuant to section 654.

Relying on section 288.5, subdivision (c), the appellate court reversed the convictions on the five specific sexual offenses. The appellate court reasoned that since section 288.5, subdivision (a) prohibits charging continuous sexual abuse and another sexual offense occurring during the same time period, unless the offenses are charged in the alternative, the defendant could not be convicted of both continuous sexual abuse and the acts underlying that abuse. Effectively concluding the continuous sexual abuse offense, and the five specific sexual offenses, occurred during the same period, the appellate court concluded "either the continuous abuse conviction or the convictions on the specific offenses must be vacated." (*Johnson, supra,* 28 Cal.4th at pp. 244-245.)

Our Supreme Court affirmed the appellate court's decision. (*Johnson, supra,* 28 Cal.4th at p. 244.) After discussing various circumstances in which prosecutors could seek convictions and punishments in sex cases involving juvenile victims, *Johnson* stated, "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, [prosecutors] may not obtain multiple convictions in the latter circumstance." (*Id.* at p. 248.)

Johnson upheld the appellate court's decision to reverse the convictions on the five specific sexual offenses because multiple convictions for continuous sexual abuse and the five specific sexual offenses was improper, as was the staying of the sentences on the latter counts. *Johnson* did not address the issue pertinent to this appeal, that is, which of the multiple convictions in that case should have been reversed, i.e., the continuous sexual abuse conviction or the convictions on the five specific sexual offenses. The appellate court in *Johnson* had already made that decision. *Johnson* does not help appellant.

In *People v. Alvarez* (2002) 100 Cal.App.4th 1170 (*Alvarez*), in pertinent part, the information alleged one count of continuous sexual abuse and three counts of specific sexual offenses, i.e., a violation of section 288, subdivision (b), and two violations of section 288, subdivision (a). All of the above offenses involved the same victim and were alleged to have occurred during the same period. (*Id*. at p. 1173.) The continuous sexual abuse count, and the remaining counts, were not alleged in the alternative. (*Id*. at p. 1176.)

At the conclusion of the court trial in *Alvarez* but before the trial court convicted the defendant on any count, the trial court suggested that if it convicted the defendant of continuous sexual abuse, the court could not convict him on the remaining offenses. In response, the People moved to dismiss the continuous sexual abuse count and the court granted the motion. The court subsequently convicted and sentenced the defendant on the remaining counts. (*Id*. at p. 1174.)

The defendant in *Alvarez* claimed the trial court erred in dismissing the continuous sexual abuse count instead of the three counts for specific sexual offenses; therefore, he was improperly convicted and sentenced on the three counts. (*Alvarez, supra*, 100 Cal.App.4th at pp. 1173, 1175.) *Alvarez* concluded the defendant waived the issue of the propriety of the People's prosecution of the defendant on all of the offenses by failing to raise the issue by way of a demurrer. (*Id*. at p. 1176.) *Alvarez* also concluded the trial court properly dismissed the continuous sexual abuse count and properly convicted him on the three counts for specific sexual offenses.[2] (*Id.* at pp. 1175-1177.) *Alvarez* noted *Johnson* involved multiple convictions for continuous sexual abuse and other specific sexual offenses while, in *Alvarez*, the trial court dismissed the continuous sexual abuse count before the trial court had convicted the defendant of anything. (*Id.* at pp. 1174, 1176.)

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[2] *Alvarez* concluded the defendant's sentence was erroneous for a separate reason and remanded for resentencing. (*Alvarez, supra*, 100 Cal.4th at p. 1172.)

Alvarez also stated, "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." (*Alvarez, supra,* 100 Cal.4th at pp. 1177-1178.)

Unlike the trial court in *Alvarez*, the trial court in the present case did not dismiss the continuous sexual abuse count. Nonetheless, the above quoted statement in *Alvarez* applies here and supports the conclusion that, in this case, we should simply vacate appellant's conviction on count 3. It would be anomalous if section 288.5 could be used to circumvent multiple convictions (on counts 1 and 2 in the present case) with more severe penalties (50 years to life as to each of counts 1 and 2, to be served consecutively, resulting in a total minimum prison term of 100 years) and prior-strike consequences than available for a conviction under section 288.5 (50 years to life on count 3 in the present case).

People v. Torres (2002) 102 Cal.App.4th 1053 (*Torres*) is illuminating. In *Torres*, in pertinent part, the information alleged one count of continuous sexual abuse and 10 counts of specific sexual offenses. (*Id.* at p. 1056.) All of the above offenses involved the same victim and were alleged to have occurred during the same period. (*Ibid*.) The continuous sexual abuse count, and the remaining counts, were not alleged in the alternative. (*Id.* at p. 1057.) Following the defendant's conviction on all of the above counts, the trial court sentenced him to six years in prison for his continuous sexual abuse conviction but stayed execution of that sentence. (*Id.* at p. 1056.) The court sentenced the defendant to prison for a total of 21 years on four of the 10 convictions (each of those four convictions was for rape) and the court imposed concurrent sentences on the remaining six convictions. (*Ibid*.)

Torres stated, "It . . . is . . . 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 appellant standing convicted of the alternative offenses that are *most commensurate with his culpability*. Here, appellant was

alleged to have committed, and the prosecution proved, not only the three acts necessary to establish a continuous sexual abuse violation, but also 10 separate felony sex offenses against Adela including four counts of rape. [Fn. omitted.] Because of the number and severity of these specific offenses, appellant faced a greater maximum aggregate penalty with respect to these than he did on the continuous sexual abuse offense. The court also imposed a greater aggregate sentence with respect to the specific offenses than on the section 288.5 offense, and stayed execution of sentence on the latter. In these circumstances we conclude the appropriate remedy is to reverse the conviction for violating section 288.5." (*Torres, supra,* 102 Cal.App.4th at pp. 1059-1060, first italics added.)

In the present case, appellant was alleged to have committed, and the prosecution proved, not only the three acts necessary to establish continuous sexual abuse, but also two separate felony sex offenses against A.J., i.e., counts 1 and 2, involving oral copulation and sexual intercourse, respectively. Because of the number and severity of these specific offenses, appellant faced a greater maximum aggregate penalty with respect to these than he did on the continuous sexual abuse offense. The court also imposed a greater aggregate sentence with respect to the specific offenses than on the section 288.5 offense. These facts, similar to those in *Torres*, militate towards a conclusion we should vacate appellant's conviction for continuous sexual abuse (count 3).

People v. Bautista (2005) 129 Cal.App.4th 1431 (*Bautista*), cited by appellant, does not help him. In *Bautista*, in pertinent part, the defendant was convicted on one count of continuous sexual abuse, and on four counts of specific sexual offenses, i.e., four counts of procurement in violation of section 266j. (*Id.* at p. 1433.) All of the above offenses involved the same victim and occurred during the same period. (*Ibid*.) The continuous sexual abuse count, and the remaining counts, had not been alleged in the alternative. (*Id.* at p. 1436.) Following the defendant's conviction on all of the above counts, the trial court sentenced the defendant to prison for 12 years for her continuous

sexual abuse conviction but stayed the sentences on the remaining counts. (*Id*. at p. 1434.)

Bautista agreed with the defendant that she had been erroneously convicted on the continuous sexual abuse count and on the four procurement counts. (*Bautista*, *supra*, 129 Cal.App.4th at p. 1433.) After detailing the lengthy sexual abuse of the child (C.), *Bautista* stated, "Bautista has not suggested how a conviction of four counts of procuring C. is in any way more commensurate with her culpability than a conviction of continuous sexual abuse of C., and we fail to see how convicting Bautista only of procurement is in any way proportionate to the egregious criminal conduct in which she engaged. Consequently, we affirm the conviction of continuous sexual abuse of C., and vacate her convictions of procurement of C." (*Id.* at p. 1438.)

Although *Bautista* vacated the convictions on the specific sexual offenses in that case, *Bautista* is distinguishable from the present case and does not compel the vacating of appellant's convictions for the specific sexual offenses in this case, i.e., his convictions on counts 1 and 2. As a matter of culpability, procuring in violation of section 266j can occur as a preliminary or inchoate offense, i.e., by the commission of specified conduct *for the purpose* of committing a lewd act on a minor, whether or not the illicit sexual conduct, e.g., the lewd act, in fact occurs.[3] On the other hand, appellant's convictions on counts 1 and 2 were not for preliminary offenses but for illicit sexual conduct with A.J., i.e., oral copulation and sexual intercourse, respectively.

Moreover, a violation of section 266j can occur based on illicit sexual activity committed upon a minor by someone other than the defendant, while appellant's convictions as to counts 1 and 2 were based on illicit sexual activity that he himself

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[3] Section 266j, provides, "Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available to another person, a child under the age of 16 *for the purpose* of any lewd or lascivious act as defined in Section 288, or who causes, induces, or persuades a child under the age of 16 to engage in such an act *with another person*, is guilty of a felony and shall be imprisoned in the state prison for a term of three, six, or eight years, and by a fine not to exceed fifteen thousand dollars ($15,000)." (Italics added.)

committed upon A.J. Further, *Bautista* did not discuss the impact, if any, of the sentences (potential or actual, individual or aggregate) applicable to the specific sexual offenses in that case on the issue of whether the convictions for those offenses, or the conviction for continuous sexual abuse, should have been vacated.

There is no need to remand this matter; the sole issue is whether the convictions on counts 1 and 2 are to be vacated or, in the alternative, whether the conviction on count 3 is to be vacated. Except as noted in footnote 4, *post*, there is no dispute as to what appellant's sentence should be if his conviction on count 3 is vacated. In accord with *Alvarez* and *Torres*, we will "leave appellant standing convicted of the alternative offenses that are most commensurate with his culpability" (*Torres, supra,* 102 Cal.App.4th at p. 1059), i.e., his convictions on counts 1 and 2. Respondent concedes we should simply vacate appellant's conviction on count 3. We accept the concession and vacate appellant's conviction on that count.[4]

[4] In his opening brief, appellant observes a single prior conviction supported his One Strike law and Three Strikes law sentences on counts 1 through 3, and the section 667, subdivision (a) enhancement; concedes this was permissible under *People v. Acosta* (2002) 29 Cal.4th 105 (*Acosta*); concedes this court is bound by *Acosta*; but, relying on dissents in *Acosta*, challenges *Acosta* to permit reconsideration of *Acosta* by our Supreme Court. We accept appellant's concessions; therefore, there is no need to further consider appellant's arguments on these issues.

DISPOSITION

The judgment is modified by vacating appellant's conviction for continuous sexual abuse (§ 288.5, subd. (a); count 3) and, as modified, the judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.