Filed 8/15/12 P. v. Herrera CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JESUS M. HERRERA, Defendant and Appellant.	B231951 (Los Angeles County Super. Ct. No. PA067016)

APPEAL from a judgment of the Superior Court of Los Angeles County. Beverly Reid O'Connell, Judge. Affirmed as modified.

Daniel G. Koryn, 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, Senior Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jesus M. Herrera appeals from his convictions and sentences of continuous sexual abuse of a child under the age of 14 years; lewd act upon a child under the age of 14 years; and sodomy with a child under 10 years old. Before this court, appellant asserts several errors: (1) there was insufficient evidence that he committed sodomy with a child under 10 years old; (2) the lower court erred in failing to sua sponte instruct the jury on the lesser included offense of attempted sodomy with a child under 10 years of age in count 3, and (3) failed to sua sponte instruct the jury on the lesser included offense of battery in count 2; (4) that CALCRIM No. 330 (concerning the testimony of a child witness under the age of 10) is unconstitutional; (5) the lower court erred in failing to instruct the jurors that they must unanimously agree on the specific act that violated the crime defined in Penal Code section 288;[1] (6) the lower court imposed consecutive terms of 15 years without any evident awareness of its authority to impose concurrent terms; (7) his 55-year-to-life sentence amounts to cruel and unusual punishment under federal and state law; (8) the trial court's order that he submit a blood test pursuant to section 1202.1 is unlawful; (9) there is an error in the abstract of judgment; and, lastly, (10) the lower court erred by determining appellant was not entitled to any presentence conduct custody credits. As we shall explain, only appellant's claims with respect to the abstract of judgment and conduct custody credits have merit.

BACKGROUND AND PROCEDURAL HISTORY

In October 2008 in Mission Hills, the Herrera family rented a backyard house from a couple who lived in the front house. The Herrera family includes appellant, his wife ("Nancy"), and Nancy's two sons, including Jonathan C. (appellant's stepson) who was six years old in 2008 and their younger son born around 2008. Jonathan C. and his brother shared a bedroom with his mother and appellant. Jonathan C. and his brother slept in bunk beds while appellant and his mother shared a bed.

---

[1] All references to statute are to the Penal Code unless otherwise indicated.

C. Z., his wife Rita Z., and their three-year-old daughter Jazmin C. lived in the front house. The Herreras had access to a bathroom that was attached to the front house, and it was "strictly for" appellant and his family until Rita Z. asked them to move out in March 2010. The bathroom had an entry door leading to the backyard, and an entry door leading to the front house. The door to the front house was closed by a padlock while appellant and his family lived in the backyard house.

Counts 1 and 3—Jonathan C.

The first incident took place on the Sunday just before the July 4th holiday in 2009. Jonathan C.'s mother was away and appellant was watching Jonathan C., then age seven, and his baby brother. While his brother was napping, appellant told Jonathan C. to undress and get into the shower with him. While in the shower, appellant told Jonathan C. to "touch [appellant's] wiener." Appellant physically showed Jonathan C. "how to squeeze his testicles and grab his penis." After showing Jonathan C. how to touch his penis, appellant told Jonathan C. to touch him. Jonathan C. began rubbing appellant's penis and testicles. Jonathan C. did so until a "greenish" or "goldish" colored sticky "liquid" ejaculated from out of appellant's penis onto Jonathan C.'s hand. While rubbing appellant's penis in the shower, appellant was rubbing on Jonathan C.'s penis. They later attended church.

Appellant and Jonathan C. did not have sexual contact for the remaining weeks in summer 2009 because Jonathan C. lived with his biological father until a week before school began. Nor did appellant have sexual contact with Jonathan C. from Jonathan C.'s school's beginning through his eighth birthday in early 2010. During Halloween, Thanksgiving, and Christmas break in 2009, Jonathan C. mainly lived with his biological father.

The second incident occurred around January 2010 after Jonathan C.'s eighth birthday. Jonathan C.'s mother was at work. In their bedroom, appellant told Jonathan C. to take off all of his clothes and stand next to appellant's bed, where appellant was lying naked. Appellant told Jonathan C. to "rub" and "massage" his penis like he had shown him before. Jonathan C. did so until appellant ejaculated onto Jonathan C.'s right

hand. After appellant ejaculated, he told Jonathan C. to clean his penis with some toilet paper that was lying on the table by the bed. Jonathan C. complied.

The third incident occurred later in the same month. The events transpiring on this day mirrored those occurring during the second incident: Jonathan C.'s mother was at work, appellant laid naked on the bed, asked Jonathan C. to get naked and "to rub his penis and squeeze his balls," appellant ejaculated, and appellant told Jonathan C. to clean the ejaculate with toilet paper. After appellant had ejaculated, he touched Jonathan C.'s penis, and told Jonathan C. to lie down on his stomach on his mother's bed for a massage. Jonathan C. complied. There, appellant massaged Jonathan C.'s hands, legs, and back area. After Jonathan C.'s feet landed on the floor with his body bent onto the bed as instructed, appellant inserted his penis "a little bit inside of" Jonathan C.'s anus for two minutes as he massaged Jonathan C.'s back. Jonathan C. felt his anus being penetrated. The penis did not go "all the way in" and the partial penetration did not hurt, but it felt "uncomfortable" as it "wiggled" inside Jonathan C.'s anus. Jonathan C. asked appellant to stop, and appellant replied, "why[?]" After Jonathan C. replied again, "stop[,]" appellant stopped penetrating Jonathan C.'s anus 30 seconds later and he seemed to be "mad" about stopping. This was the last time appellant molested Jonathan C.

Appellant told Jonathan C. that this incident was a secret in that "this is between father and son." Appellant told Jonathan C. similar remarks during earlier sex acts, and he warned Jonathan C. that he would be taken from his mother and put in a foster home if he reported their sex acts to anyone. Appellant often told Jonathan C. that he could use the computer in exchange for a massage.

During this two year time period, there were "four shower incidents" where appellant would have Jonathan C. rub and squeeze his penis and testicles. During two of these shower incidents appellant ejaculated.

Believing that it was "right" to report the sex acts to his biological father, Jonathan C. later did so even though he saw his biological father "not that often." Thereafter, Jonathan C.'s biological father contacted the authorities.

Around 5:30 p.m. on March 17, 2010, police took Jonathan C. to Northridge Hospital's Center for Assault Treatment Services ("CATS"), where Jonathan C. was examined by forensic nurse Marilyn Stotts. Jonathan C. revealed "two episodes" of sexual abuse to nurse Stotts. Jonathan C. told Stotts that appellant made him touch appellant's "penis and balls" one time until appellant ejaculated, which occurred before church. On another occasion appellant inserted his penis "part way" into Jonathan C.'s anus until Jonathan C. told him to stop. Jonathan C. told Nurse Stotts that he told appellant to stop "about three times" and that appellant finally stopped the anal intercourse when he "was starting to get shaky" and that he "was about to cry when the defendant stopped." Jonathan C. described appellant's "black" pubic hairs "at the base of the penis", and the "white stuff" that had squirted out of appellant's penis. Nurse Stotts decided against questioning Jonathan C. further because he "was getting very fatigued." Stotts did not find signs of trauma in the area of Jonathan C.'s anus. She opined that this was not unusual given that the reported anal sex had occurred about 30 or more days earlier.

At trial, the defense pointed out that during Jonathan C.'s interview with Detective Cheri Roberts on March 17, 2010, Jonathan C. said that appellant was showing Jonathan C. how to clean his penis while they were in the shower, and while doing so, appellant pulled down and yanked Jonathan C.'s penis. Moreover, Jonathan C. did not mention anything about appellant asking Jonathan C. to touch appellant's penis.

Count 2—Jazmin C.

On February 3, 2010, and March 5, 2010, Rita Z. asked Nancy to babysit her five-year-old daughter Jazmin C. because Jazmin C. was ill and Rita Z. and C.Z. had to work. Nancy was at work both days, and appellant thus looked after Jazmin C. Both times after Rita Z. heard that Jazmin C. was alone with appellant, Rita Z telephoned C.Z. and told him to "go straight home" because Jazmin C. was with appellant. Before appellant babysat Jazmin C. on February 3, Jazmin C. was friendly, she played with Nancy's sons, and she was not afraid or embarrassed if appellant saw or touched her. Afterwards,

Jazmin C. avoided playing with Nancy's sons when appellant was present, she became "embarrassed to look at" appellant, she ignored him, and she did not want to talk to him.

During her babysitting visit on February 3, 2010, Jazmin C. entered the backyard bathroom to wash her hands. Appellant joined her there, told his stepchildren to leave the bathroom, and he closed the door. He soon pulled down Jazmin C.'s pants and underwear, pushed her to the floor, sat down next to Jazmin C., and rubbed her vagina and buttocks areas while his pants were still on. Then appellant laid down on top of Jazmin C. and kissed her right cheek. Then Jazmin C. got up, pulled up her pants, and appellant kissed her five times on the lips. Appellant then grabbed Jazmin C.'s hand and pulled it onto his crotch area over his underwear, then underneath the underwear where Jazmin C. felt appellant's "privates." Afterwards, he made Jazmin C. "pinky promise" to not reveal the sexual events to anyone.

On the morning of March 5, after Jazmin C.'s mother told her that Nancy would babysit her, Jazmin C. asked if Nancy would be there, as she expressed "I don't want to be with [appellant]" and "[I] don't like him anymore." That evening, Jazmin C. told her father C.Z. that appellant "had tried to kiss her and he had touched her" and that "he had touched her with his wienie." She said that appellant "wanted to have sex with me." After Jazmin C. told her father this, he took her to CATS, where she was examined and interviewed by the police and forensic nurse Judy Sterling.

Nurse Judy Sterling examined Jazmin C. at CATS. Jazmin C. told Nurse Sterling that appellant had kissed her cheeks and lips, he touched her, and she "had sex with" appellant in the bathroom. Jazmin C. also reported the pinky promise, and that she was sad because of appellant's actions. Sterling did not see any signs of trauma on Jazmin C.'s body, and she opined that this was not unusual given that the reported sex crimes had occurred 30 days earlier.

The jury found appellant guilty of continuous sexual abuse of a child under the age of 14 years (§ 288.5, subd. (a)) in count 1, lewd act upon a child under the age of 14 years (§ 288, subd. (a)) in count 2, and sodomy with a child under 10 years old (§ 288.7, subd. (a)) in count 3. As to counts 1 and 2, the jury found true the multiple victims allegations

(§ 667.61, subds. (b), (c)). The trial court sentenced appellant to state prison for an indeterminate terms of 55 years to life, consisting of 15 years to life in counts 1 and 2 plus a consecutive terms of 25 years to life in count 3. The court also ordered appellant to pay imposed restitution fines and court fees, and awarded appellant presentence custody credits.

Appellant filed a timely notice of appeal.

DISCUSSION

I. Appellant's Conviction for Sodomy With a Child Under Ten Years of Age (Count 3) Is Supported By Substantial Evidence.

Before this court appellant claims there was insufficient evidence to establish the requisite element of anal penetration to support his sodomy conviction in count 3. On appeal he argues there was insufficient evidence that he "actually penetrated [Jonathan C.]'s anus." We disagree.

a. Standard of Review

To assess a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no

hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

b. Governing Law on Sodomy With a Child Under Ten Years Old

"Any person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 25 years to life." (§ 288.7, subd. (a).) "Sodomy is 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." (See e.g., § 286, subd. (a); *People v. Harrison* (1989) 48 Cal.3d 321, 329 ["Since the origin of the rape and sodomy statutes, the courts have strictly adhered to the statutory principle that a 'penetration,' however slight, 'completes' the crime."].) "'Sexual penetration' is the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." (§ 289, subd. (k)(1); *People v. Scott* (1994) 9 Cal.4th 331, 341.)

c. Analysis

Jonathan C. and Nurse Stotts' testimony reveal substantial evidence of the element of penetration. In describing the alleged sodomy, Jonathan C. testified appellant told him to undress and lie down on his bed. Appellant, who was also naked, stood behind Jonathan C. whose body was crouched over the bed such that his feet were on the floor and his buttocks facing the front of appellant's naked body. Appellant then began to massage Jonathan C.'s body. Appellant first began massaging Jonathan C.'s hands and then massaged Jonathan C.'s back. Appellant then partially inserted the tip of his penis into Jonathan C.'s anus for approximately two minutes. Jonathan C. testified appellant "kind of like put his wiener like a little bit inside of my butt." During this portion of testimony Jonathan C. took his left hand with his thumb and forefinger, made a circle with his finger, and put his index finger into the hole. Jonathan C. felt his anus being

penetrated. Though appellant's penis did not go "all the way in," and it was not painful, Jonathan C. described the penis as "wiggling" inside the place "where poop comes out of," and as "uncomfortable." Jonathan C. asked appellant to stop, and appellant replied, "why[?]" After Jonathan C. replied again, "stop[,]" appellant stopped penetrating Jonathan C.'s anus 30 seconds later and he seemed to be "mad" about stopping.

Appellant contends that Nurse Stotts' testimony that she did not find any signs of trauma on Jonathan C.'s anus shows a lack of penetration. Nevertheless, she also opined that the absence of signs of trauma was not unusual given that the reported anal sex had occurred about 30 or more days earlier. Furthermore, during Nurse Stotts' forensic interview of Jonathan C., Jonathan C. revealed to her details of the sodomy—including appellant's insertion of his penis "part way" into Jonathan C.'s anus—and another incident of sexual abuse including Jonathan C.'s repeated pleading with appellant to stop the anal penetration which left him feeling very "shaky." The foregoing is strong evidence that appellant's penis partially penetrated Jonathan C.'s anus.

Appellant's claim that the proof of penetration is unsubstantiated is unfounded. A review of the foregoing evidence demonstrates there was sufficient "credible and solid" evidence of anal penetration to support the conviction.

II. The Trial Court Did Not Err in Refusing to Instruct on Attempted Sodomy as a Lesser Offense of Sodomy in Count 3.

On appeal, appellant also argues, the trial court erred by omitting an instruction on the lesser included crime of attempted sodomy. Specifically, appellant claims an attempt instruction was required because "there was a question whether the evidence sufficiently demonstrated anal penetration."

"[A] trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence. [Citation.] It is error for a trial court not to instruct on a lesser included offense when the evidence raises a question whether all of the elements of the charged offense were present, and the question is substantial enough to merit consideration by the jury. [Citation.] When there is no evidence the offense

committed was less than that charged, the trial court is not required to instruct on the lesser included offense. [Citation.]" (*People v. Booker* (2011) 51 Cal.4th 141, 181.) Lesser included offense instructions are "required only where there is 'substantial evidence' from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense. [Citations.]" (*People v. DePriest* (2007) 42 Cal.4th 1, 50; see *People v. Breverman* (1998) 19 Cal.4th 142, 162, 165-169; *People v. Barton* (1995) 12 Cal.4th 186, 194, 195.) Substantial evidence, in this context, is "evidence from which a jury composed of reasonable [persons] could conclude [ ] that the lesser offense, but not the greater, was committed." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162, internal quotation marks omitted; see also *People v. Barton*, *supra*, 12 Cal.4th at p. 201, fn. 8.) "Speculation is an insufficient basis upon which to require the trial court to give an instruction on a lesser included offense." (*People v. Wilson* (1992) 3 Cal.4th 926, 942.) If the evidence supporting the proposed lesser included offense is minimal and insubstantial, the trial court need not instruct on its effect. (*People v. Jackson* (1980) 28 Cal.3d 264, 306.) A claim that the trial court erred by failing to instruct on a lesser included offense is reviewed de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

In making his argument that the trial court should have given an instruction on attempted sodomy, appellant argues that Jonathan C. never distinguished between his "butt hole," which presumably would mean his anus, and his "butt," which presumably would mean the cheeks of his buttocks. Appellant's argument fails because the ambiguity that appellant points to in the evidence does not exist. When considering the evidence in its full context, there is insubstantial evidence indicating an attempted sodomy. Instead, the evidence shows the *completed act* of sodomy, not an attempt.

As recounted above, the evidence on the issue of penetration was strong. Though a nine-year-old may lack the linguistic dexterity to differentiate physiologically between his "butt hole" and his "butt," Jonathan C.'s testimony was extensive, to wit:

[THE PROSECUTOR]: Did he massage your back?

[Jonathan C.]: Yes.

[THE PROSECUTOR]: And then what happened after that?

[Jonathan C.]: Then he kind of like put his wiener like a little bit inside of my butt.

[THE COURT]: The record should reflect that the witness in responding to the question took his left hand with his thumb and forefinger, made a circle with his finger, and put his index finger into the hole.

[THE PROSECUTOR]: [Jonathan C.], could you feel Jesus's wiener in your butt?

[Jonathan C.]: Yes.

[THE PROSECUTOR]: Did it hurt?

[Jonathan C.]: No.

[THE PROSECUTOR]: Was it uncomfortable?

[Jonathan C.]: Yes."

Furthermore, Jonathan C. shared details with this incident with Nurse Stotts:

[THE PROSECUTOR]: And then with regard to the – you said that [Jonathan C.] told you his – he was touched in the anal area. Did [Jonathan C.] describe what had occurred?

[NURSE STOTTS]: Yes. [Jonathan C.] told me that the suspect had taken the suspect's penis and would put it to [Jonathan C.'s] anus and put it in part way.

[THE PROSECUTOR]: And did [Jonathan C.] tell you what happened to [Jonathan C.] when his stepfather did this to him?

> [NURSE STOTTS]: [Jonathan C.] said that he told his stepfather no, and asked him to not do it. And then [Jonathan C.] told me that the suspect stopped the sodomy or the penile/anal intercourse when [Jonathan C.] was starting to get shaky.
>
> [THE PROSECUTOR]: Did [Jonathan C.] tell you he was about to cry when the defendant stopped?
>
> [NURSE STOTTS]: Yes, he did.
>
> [THE PROSECUTOR]: And did [Jonathan C.] tell you whether or not his stepfather stopped immediately when [Jonathan C.] asked him to stop?
>
> [NURSE STOTTS]: No, the suspect did not stop right away. He had said I think about three times that he wanted him to stop or he said no.
>
> [THE PROSECUTOR]: Did [Jonathan C.] tell you whether or not his stepfather looked mad?
>
> [NURSE STOTTS]: Yes, he did.
>
> [THE PROSECUTOR]: What did he tell you?
>
> [NURSE STOTTS]: He told me that during – or after the assault, I believe it was during sexual – the penile/anal intercourse that he looked at the suspect and the suspect's face looked angry and mad.

Given the strong—and graphic detail—of evidence of penetration, we conclude that the evidence of the lesser included offense is insubstantial, and thus the lower court did not err in failing to instruct on the included offense.

III. The Trial Court Did Not Err in Failing to Instruct the Jury on Battery as a Lesser Included Offense of Lewd Act Upon a Child in Count 2.

Appellant further argues the trial court should have sua sponte instructed the jury on battery as a lesser included offense of the lewdness alleged in count 2. There is a split of authority on whether battery is a lesser included offense of lewd or lascivious acts on a

child under age 14. (Compare *People v. Santos* (1990) 222 Cal.App.3d 723, 739 with *People v. Thomas* (2007) 146 Cal.App.4th 1278, 1293.) As the Attorney General noted, the issue is currently pending before the California Supreme Court. (*People v. Shockley* (2010) 190 Cal.App.4th 896, review granted Mar. 16, 2011, S189462.) We need not take a position on the issue. Even if battery is considered a lesser included offense of a section 288 violation, we would conclude the evidence did not support giving a lesser included instruction in this case. Further, even if the instruction was warranted in this case, we would find any error harmless.

"An offense is necessarily included . . . if the charged offense, either by statutory definition or as described in the accusatory pleading, cannot be committed without also committing the lesser offense." (*People v. Santos, supra*, 222 Cal.App.3d at p. 738.) Section 288, subdivision (a), states that "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, is guilty of a felony. . . ." Battery, however, is "any willful and unlawful use of force or violence upon the person of another." (§ 242.) Any harmful or offensive touching satisfies the element of unlawful use of force or violence. (*People v. Pinholster* (1992) 1 Cal.4th 865, 961, overruled on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, 459.)

We therefore can conceive of situations where a sexually motivated touching occurs that violates section 288 but is not a battery, that is, a harmful or offensive touching; for example, an uncle, to sexually gratify himself, hugs or tickles his niece, who thinks they are merely playing an innocent game. (See *People v. Martinez* (1995) 11 Cal.4th 434, 450 ["It is common knowledge that children are routinely cuddled, disrobed, stroked, examined, and groomed as part of a normal and healthy upbringing. On the other hand, any of these intimate acts may also be undertaken for the purpose of sexual arousal. Thus, depending upon the actor's motivation, innocent or sexual, such behavior may fall within or without the protective purposes of section 288."].) Although, per *Martinez*, any touching could form the basis for a violation of section 288, *Martinez* did

not hold or necessarily support the conclusion that all sexually motivated touchings are also batteries.

Absent here is any evidence that the charged acts were committed for a nonsexually–motivated purpose. Jazmin C. testified that appellant pulled down her pants and underwear, pushed her down to the floor, and then touched her vagina and buttocks areas. Appellant kissed Jazmin C. on the cheek and lips, and then forced Jazmin C.'s hand onto his penis. When Jazmin C. related this experience to her father a month later, she said appellant "wanted to have sex with me" and told forensic nurse Stotts that she "had sex" with appellant.

Appellant argues that these facts show that he did not have the specific sexual intent required for a conviction under section 288, but the jury could have found him guilty of battery. We disagree. It cannot be said that the explicit nature of the contact between appellant and his victim shows that appellant acted without the sexual motivation required for a conviction for a lewd act and was merely guilty of a harmful or offensive touching. No objectively nonsexual acts were at issue in this case. The lesser included offense instruction on battery was not warranted by the evidence. The court did not err.

IV. The Court Did Not Err in Instructing the Jury with CALCRIM No. 330.

Appellant contends that the trial court erred by instructing the jury with CALCRIM No. 330. He argues that the instruction violated his constitutional rights by lessening the prosecution's burden of proof, invading the jury's function of assessing witness credibility, and violating his right to confront witnesses.[2] We do not agree.

---

[2] Although respondent argues appellant forfeited this claim by failing to object, we find appellant may properly raise the issue under section 1259, which provides in part: "The appellate court may also review *any instruction given*, refused, or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant was affected thereby." (§ 1259; *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7.)

CALCRIM No. 330 provides: "You have heard testimony from a child who is age 10 or younger. As with any other witness, you must decide whether the child gave truthful and accurate testimony. [¶] In evaluating the child's testimony, you should consider all of the factors surrounding that testimony, including the child's age and level of cognitive development. [¶] When you evaluate the child's cognitive development, consider the child's ability to perceive, understand, remember, and communicate. [¶] While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he or she is a child."

CALCRIM No. 330 derives from section 1127f, which mandates giving the instruction whenever a child 10 years of age or younger testifies and a party requests it. Section 1127f adopts "the modern view regarding the credibility of child witnesses" "that a child's testimony cannot be deemed insubstantial merely because of his or her youth." (*People v. Jones* (1990) 51 Cal.3d 294, 315.)

As appellant concedes, several cases have rejected the same constitutional challenges he makes to CALCRIM No. 330's predecessor, CALJIC No. 2.201 (*People v. McCoy* (2005) 133 Cal.App.4th 874; *People v. Gilbert* (1992) 5 Cal.App.4th 1372; *People v. Jones* (1992) 10 Cal.App.4th 1566 and *People v. Harlan* (1990) 222 Cal.App.3d 439.) *People v. McCoy* summarized the holdings of the three later cases. In the first of those cases, *People v. Harlan*, *supra*, 222 Cal.App.3d 439, the court held that the instruction neither excessively inflates a child's testimony nor impermissibly usurps the jury's role as arbiter of witness credibility not violates the defendants right to confront a child witness nor "require[s] the jury to draw any particular inferences from a child's cognitive ability, age, and performance as a witness. Rather, it instructs the jury to consider such factors in evaluating a child's testimony." (*Id*. at pp. 455-457.) In the second of those cases, *People v. Jones*, *supra*, 10 Cal.App.4th 1566, the court held that the instruction "presupposes that the jury must make a determination of credibility, but only after considering all the factors related to a child's testimony, including his [or her] demeanor, i.e., how he or she testifies on the stand," all without "foreclos[ing]

independent jury consideration of the credibility of a child witness." (*Id*. at pp. 1572, 1574.) A case from the Sixth Appellate District held that CALJIC No. 2.20.1 neither "'lessen[s] the government's proof' nor 'instructs the jury to unduly inflate the testimony of a child witness.'" [Citation.] "The instruction tells the jury not to make its credibility determinations solely on the basis of the child's 'age and level of cognitive development,' but at the same time invites the jury to take these and all other factors surrounding the child's testimony into account. The instruction provides sound and rational guidance to the jury in assessing the credibility of a class of witnesses as to whom 'traditional assumptions' may previously have biased the fact-finding process. Obviously a criminal defendant is entitled to fairness, but just as obviously he or she cannot complain of an instruction the necessary effect of which is to increase the likelihood of a fair result." (*People v. McCoy*, *supra*, 133 Cal.App.4th at p. 979.) The court in *McCoy* also stated that, "in express reliance on the holdings in *Harlan*, *Jones*, and *Gilbert* alike, we squarely reject [the defendant's] constitutional challenges to CALJIC No. 2.20.1." (*Id*. at p. 980.) We concur in this analysis.

CALCRIM No. 330 expressly provides that the jury "should consider all of the factors surrounding that testimony," are to "consider the child's ability to perceive, understand, remember, and communicate." It advises the child witness's testimony should not be discounted "merely because" the witness is a child who may behave differently from an adult. CALCRIM No. 330 does not, as appellant contends, require jurors to ignore a child witness's limited cognitive ability and different performance in accessing credibility. Accordingly, we reject appellant's constitutional challenge to CALCRIM No. 330.

V. The Trial Court Did Not Err By Failing To Give a Unanimity Instruction.

Appellant contends the trial court committed reversible error and violated his rights under the California and federal Constitutions when it failed to give a unanimity instruction for the continuous sexual abuse offense. Appellant, however, never requested a unanimity instruction in the trial court. Moreover, our appellate courts have repeatedly held no unanimity instruction is required nor does the failure to so instruct violate the

state or federal Constitutions. (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1123-1126; *People v. Adames* (1997) 54 Cal.App.4th 198, 206-209; *People v. Whitham* (1995) 38 Cal.App.4th 1282, 1294-1297; *People v. Gear* (1993) 19 Cal.App.4th 86, 91-92; *People v. Avina* (1993) 14 Cal.App.4th 1303, 1313.) Nothing in *Richardson v. United States* (1999) 526 U.S. 813, 815-824, compels a different conclusion. Moreover, the unanimity requirement does not violate the principles announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466. Appellant has failed to demonstrate error on this issue.

VI. The Court Adequately Stated Reasons For Imposing Consecutive Sentences on Counts 1 and 2; However, Assuming Arguendo That it Did Not, Remand Would Be an Idle Act.

Appellant next argues remand is necessary because the trial court improperly ordered his sentences on counts 1 and 2 to run consecutively unaware that it had discretion to impose concurrent terms.

Preliminarily we note that appellant failed to object below to the trial court's purported failure to state the reasons or show awareness of its discretion to impose concurrent sentenced on counts 1 and 2, and as a result he has forfeited any complaint about the matter on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 356 ["[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal."].)

In any event, we find the trial court properly acknowledged that imposing full consecutive sentences was an optional sentencing choice, and also gave reasons for imposing consecutive sentences as to each count. We do not believe the trial court erred, but even assuming it did, we find any error in failing to state further reasons was waived by failure to object and also harmless.

a. Standard of Review

If the court misunderstood the scope of its discretion, the defendant may be entitled to resentencing. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228 ["Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion,

remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing."].) Appellant carries the burden of proof on this issue. (*People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527.) Remand for resentencing is not required, however, if the record demonstrates the trial court was aware of its sentencing discretion. (*People v. Belmontes, supra,* 34 Cal.3d at p. 348, fn. 8; *People v. White Eagle* (1996) 48 Cal.App.4th 151.) Further, remand is unnecessary if the record is silent concerning whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record. (*People v. White Eagle, supra,* 48 Cal.App.4th at p. 1523) "'[A] trial court is presumed to have been aware of and followed the applicable law.' [Citations.]" (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517.)

b. Analysis

Appellant is correct to the extent he argues that at the time he committed the underlying offenses, the one strike law did not explicitly mandate either consecutive or concurrent sentencing, leaving that decision to the trial court's discretion. (*People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262 (*Rodriguez*).) The *Rodriguez* court explained that section 669 sets forth the general rule that sentencing courts have discretion to impose consecutive or concurrent sentences; however, it noted the presumption in favor of discretion applies "[a]bsent an express statutory provision to the contrary. . . ." (*Ibid.*)

Appellant claims "the court did not state any reasons for imposing consecutive terms on counts 1 and 2." We disagree. At the sentencing hearing, the trial court initially suggested that "section 667.61(g) requires consecutive sentencing as to counts 1 and 2," and asked if "[a]nybody disagreed with that understanding of the law?" Both parties replied, "No." However, in sentencing appellant, the court later clarified: "In mitigation you have no criminal record; however, I am exercising my discretion to run these sentences fully consecutive for a total term on count 3 of 25 to life, and a total term of 55 years to life." Hence, while the court was initially tentative that section 667.61 requires consecutive sentences on counts 1 and 2, the court formally opined that it was exercising

its discretion to run all three of appellant's sentences fully consecutive for a total of 55 years to life. Therefore, appellant did not rebut the legal presumption that the court was ultimately aware of its discretion to impose concurrent sentences on counts 1 and 2 under *Martinez*, and remand for resentencing is unjustified.

In further support that the court was aware of its discretion, the court said: "I presided over the trial, and I do remember the facts of this case." The court also said: "I have read and considered the probation officer's report." The court was thus aware of appellant's six aggravating circumstances: (1) the crimes involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness or callousness; (2) the victims were particularly vulnerable; (3) appellant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, subordinated perjury or in any other way illegally interfered with the judicial process; (4) the manner in which the crime was carried out indicates planning, sophistication, or professionalism; (5) appellant took advantage of a position of trust or confidence to commit the crimes; and (6) appellant has engaged in violent conduct that indicates a serious danger to society.

In addition to those aggravating factors, the court added: "I'm also taking into account the fact that two genders were involved in this case, boy [count 1] and girl [count 2]." The court added as to count 3: "another aggravating factor is the time frame within which this happened over multiple separate acts where you were in the home." Thus, presented with six aggravating factors, the court found two additional factors in "exercising my discretion to run these sentences fully consecutive" for "a total term of 55 years to life."

In view of the foregoing, we conclude the court did not err in sentencing on the convictions for counts 1 and 2.[3]

VII. Cruel and Unusual Punishment Claim.

Appellant claims that his sentence of an indeterminate term of 55 years to life violates his federal and state constitutional right to be free from cruel and unusual punishment. As we shall explain below, his sentence is not cruel and unusual in view of his crimes.

a. Appellant's Eighth Amendment Cruel and Unusual Punishment Claim Fails

Appellant's Eighth Amendment claim lacks merit because he fails to prove that his sentence was grossly disproportionate. In asserting his federal claim, defendant relies on *Solem v. Helm* (1983) 463 U.S. 277. In *Solem, supra,* the Court found unconstitutional a life sentence without the possibility of parole for a seventh nonviolent felony. A bare majority of the court held "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." (*Id.* at p. 292.)

---

[3] Finally were we to find error, remand for a further statement of reasons is not required because it would be nothing more than an idle act. "Where sentencing error involves the failure to state reasons for making a particular sentencing choice, including the imposition of consecutive terms, reviewing courts have consistently declined to remand cases where doing so would be an idle act that exalts form over substance because it is not reasonably probable the court would impose a different sentence. [Citations.]" (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889.) Each of the six aggravating factors listed in the probation report and the gender of the victims and time frame of the sex acts noted by the court were supported by substantial evidence and supported the imposition of consecutive sentences. There can be no serious doubt that remand for a further statement of reasons would not change the result given the facts and circumstances here.

Defendant's reliance on *Solem* is weakened by *Harmelin v. Michigan* (1991) 501 U.S. 957, in which a life sentence without possibility of parole for possessing 672 grams of cocaine was upheld. *Harmelin* produced five separate opinions. While seven justices supported a proportionality review under the Eighth Amendment, only four favored application of all three factors cited in *Solem.*

In *Harmelin,* Justice Scalia, joined by Chief Justice Rehnquist, concluded *Solem* was wrongly decided and the Eighth Amendment contained no proportionality guarantee. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 965.) Justice Kennedy, joined by Justices O'Connor and Souter, found the Eighth Amendment encompassed "a narrow proportionality principle" (*id.* at p. 997) and "does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." (*Harmelin v. Michigan, supra*, 501 U.S. at p. 1001, (opn. of Kennedy, J.).)

Consideration of the first factor identified in *Solem v. Helm, supra,* 463 U.S. 277, was sufficient to uphold the constitutionality of the defendant's sentence; intra- and interjurisdictional analyses are appropriate only in rare cases. (*Harmelin v. Michigan, supra*, 501 U.S. at pp. 1004-1005.) The defendant in *Harmelin* was lawfully sentenced to life without parole (LWOP) for possessing a large quantity of drugs. In light of the punishment and crime upheld in *Harmelin*, appellant's punishment of 55 years to life for greater crimes (sodomizing his stepson, continuous sexual abuse of his stepson, and lewd acts on his landlord's five-year-old daughter on babysitting duty) cannot be considered grossly disproportionate. Accordingly, appellant's Eighth Amendment attack lacks merit because he has failed to prove that his sentence was grossly disproportionate.

b. Appellant's State Constitutional Claim Lacks Merit

Appellant must overcome a "considerable burden" in challenging his penalty as cruel or unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) A sentence may violate the prohibition against cruel or unusual punishment if it is so disproportionate to the crime for which it was imposed it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424 ("*Lynch*"); *Ewing v.*

California (2003) 538 U.S. 11, 20-21 [in non-capital cases the Eighth Amendment contains a "narrow proportionality principle" which precluded sentences that are "grossly disproportional to the severity of the crime"]") In assessing these claims the *Lynch* court identified three factors for the reviewing courts to consider: (1) the nature of the offense and the offender; (2) how the punishment compares with punishment for more serious crimes in the jurisdiction; and (3) how the punishment compares with the punishment for the same offense in other jurisdictions. (*Lynch*, *supra*, 8 Cal.3d at pp. 425-427.) In examining "the nature of the offense and the offender," we must consider not only the offense as defined by the Legislature but also "the facts of the crime in question" (including its motive, its manner of commission, the extent of the defendant's involvement, and the consequences of his acts); we must also consider the defendant's individual culpability in light of his age, prior criminality, personal characteristics, and state of mind. (*People v. Thompson* (1994) 24 Cal.App.4th 299, 305, citing *People v. Dillon* (1983) 34 Cal.3d 441, 479.)

Applying the first prong of the *Lynch–Dillon* test does not produce an outcome favorable to appellant. It is true, as the trial court found, appellant has no criminal record. But, as described elsewhere herein, the testimony of Jonathan C. and Jazmin C. reveals the dangerousness and seriousness of appellant's crimes. Such circumstances do not favor appellant. Moreover, appellant fails to show that California and other jurisdictions would have imposed lesser punishment.

For all the above reasons, appellant's sentence is not cruel or unusual under the California standard.

VIII. The Trial Court's AIDS Testing Order was Supported by Sufficient Evidence.

At the sentencing hearing, defense counsel did not object to the order for AIDS testing. Appellant nevertheless argues that there is no forfeiture because the order constitutes an "unauthorized sentence," which can be challenged on appeal even in the absence of an objection below. Under *People v. Butler* (2003) 31 Cal.4th 1119, 1113, "a defendant may challenge the sufficiency of the evidence even in the absence of an

objection. Without evidentiary support the order is invalid." Appellant's challenge thus is not forfeited.

Section 1202.1 requires the trial court to order designated persons "to submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) within 180 days of the date of conviction." (§ 1202.1, subd. (a).) Among those designated are persons convicted of continuous sexual abuse of a child in violation of section 288.5 and persons convicted of lewd or lascivious conduct with a child in violation of section 288, "if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim[.]" (§ 1202.1, subd. (e)(6)(A).) The statute directs a court ordering such testing to "note its finding on the court docket and minute order if one is prepared." (*Id*., subd. (e)(6)(B).)

Although the trial court did not specifically articulate its reasons for the AIDS testing order, we will presume an implied finding by the court of probable cause. (*People v. Butler*, *supra*, 31 Cal.4th at p. 1127.) "Probable cause is an objective legal standard—in this case, whether the facts known would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." (*Ibid*.)

Here, there was ample evidence to suggest the transfer of bodily fluids. At sentencing the court stated, "I do remember the facts of this case." The court thus recalled that appellant had kissed Jazmin C.'s lips and touched her vagina as to count 2. The court accordingly also recalled that appellant had ejaculated his semen multiple times onto Jonathan C.'s hand, and had inserted his penis into Jonathan C.'s anus for two minutes. Based on the evidence adduced at trial, there is sufficient evidence to support a finding of transfer of bodily fluid and to support an order for AIDS testing. Accordingly, the court did not err in ordering the testing.

IX. Errors in the Abstract of Judgment.

Appellant points out that the abstract of judgment should reflect that his sentence on counts 1 and 2 were imposed pursuant to section 667.61. This is correct. These minor, clerical errors are easily and appropriately corrected by order of this court. (*People v. Mitchell* (2001) 26 Cal.4th 181, 183, 185-188.)

X. The Court Erred By Determining Appellant Was Not Entitled to Any Presentence Conduct Custody Credits.

Finally, before this court appellant argues that the trial court failed to calculate and award presentence conduct credits. At appellant's sentencing hearing on March 22, 2011, the prosecutor urged: "Your Honor, my understanding is that because it is a strike a sex strike, there is no conduct credits. I think [defense counsel] is in agreement." The trial court replied, " I need actual credits though. He's still entitled to those." The court declined to award conduct credits under section 4019,[4] merely stating, "391 actual. No conduct credits." We review the issue of credits de novo. (*People v. Brewer* (2011) 192 Cal.App.4th 457, 461 (*Brewer*).)

Recent decisional law establishes that section 4019 grants presentence credits even to defendants who receive an indeterminate life sentence. (*People v. Brewer, supra,* 192 Cal.App.4th 457; see also *People v. Philpot* (2004) 122 Cal.App.4th 893, 907 (*Philpot*).)

---

[4] In general, section 4019 states that from the date of arrest to the date of sentencing, "for each four-day period" in which the defendant is in custody, "one day shall be deducted from his or her period of confinement[.]" However, section 2933.1, subdivision (c), states: "Notwithstanding Section 4019 . . . , the maximum credit that may be earned against a period of confinement . . . following arrest and prior to placement in the custody of the Department of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a)." Subdivision (a) refers to "any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5[.]" Included in a felony offense listed in subdivision (c) of Section 667.5 is lewd act under section 288 (count 2), and continuous sexual abuse of a child under section 288.5 (count 1).

Brewer, supra, 192 Cal.App.4th 457, is dispositive on the issue of appellant's entitlement to presentence conduct credits under section 4019. In *Brewer,* the criminal defendant, like appellant here, was sentenced to an indeterminate life sentence for sexually abusing a child. While the appellate court affirmed his conviction, the court directed that the judgment be modified to give him presentence conduct credit as provided under section 4019. *Brewer* concluded that section 4019 "is not subject to *any* express statutory exception making it inapplicable to those serving indeterminate life sentences, and which—as amended effective January 25, 2010—*does* contain express provisions limiting the *amount* of presentence conduct credits available to those convicted of specified crimes, including some that carry mandatory indeterminate life sentences." (*Brewer, supra,* 192 Cal.App.4th at p. 464.)[5]

Appellant should have received 58 days of conduct credits. That is because section 2933.1 limits a defendant's entitlement to presentence conduct credit to 15 percent of his actual days (391 days) in custody for certain specified crimes, including section 288.5 and section 288, subdivision (a), for which appellant was convicted in counts 1 and 2, respectively.

DISPOSITION

The judgment is modified to reflect that appellant has 449 days of presentence custody credits, consisting of 391 days in actual custody and 58 days of conduct credit. Moreover, the abstract of judgment is ordered corrected to reflect that appellant's sentence on his convictions on counts 1 and 2 were imposed pursuant to section 667.61.

---

[5] We note that appellant is not entitled to the benefit of the recent amendments to section 4019 enacted after he committed these offenses. The Supreme Court in *People v. Brown* (2012) 54 Cal.4th 314,322-327, recently concluded that those amendments increasing presentence conduct credits applied prospectively only to those who committed offenses after the provision's effective date.

As modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**