Filed 8/13/13 P. v. Orellana CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ANGEL JOSE ORELLANA, Defendant and Appellant.	B239862 (Los Angeles County Super. Ct. No. KA092459)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tia G. Fisher, Judge. Affirmed in part and reversed in part.

Edward H. Schulman, 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, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Daniel C. Chang, Deputy Attorney General, for Plaintiff and Respondent.

A jury found Angel Jose Orellana guilty of one count of continuous sexual abuse of a child, four counts of forcible lewd act upon a child, two counts of aggravated sexual assault of a child, two counts of sexual penetration by a foreign object, and one count of forcible oral copulation. Orellana appeals, arguing that there was insufficient evidence that he used force, fear, or duress in all but one count, and that his convictions of two counts of aggravated sexual assault on a child must be reversed, as he was also convicted of continuous sexual abuse. We conclude that the evidence of force, fear, or duress was sufficient to support the jury's verdict. We reverse and remand to the trial court to dismiss the count alleging continuous sexual abuse and to resentence Orellana accordingly. In all other respects, we affirm his conviction.

BACKGROUND

An amended information filed October 14, 2011 charged Orellana with continuous sexual abuse of a child on or between December 17, 2003 and December 16, 2004, in violation of Penal Code, section 288.5, subdivision (a)[1] (count 1); four counts of forcible lewd act upon a child in violation of section 288, subdivision (b)(1), on or between December 17, 2004 and December 16, 2005 (count 2), on or between December 17, 2005 and December 16, 2006 (count 10), on or between December 17, 2006 and December 16, 2007 (count 11), and on or between December 17, 2007 and December 16, 2008 (count 12); aggravated sexual assault of a child—oral copulation on or between December 17, 2003 and December 16, 2004, in violation of section 269, subdivision (a)(4) (count 6); aggravated sexual assault of a child, on or between December 17, 2003 and December 16, 2004, in violation of section 269, subdivision (a)(5) (count 7); two counts of sexual penetration by a foreign object, in violation of section 289, subdivision (a)(1), on or between December 17, 2008 and October 18, 2009 (count 13), and on or about October 19, 2009 (count 14); and forcible oral copulation on or about August 28, 2009, in

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

violation of section 288a, subdivision (c)(2) (count 15).[2] Orellana pleaded not guilty and denied all allegations.

After the jury found Orellana guilty as charged, the trial court sentenced him to 57 years to life in state prison, staying the sentence on count 1 (continuous sexual abuse) under section 654. The court imposed fees and fines and awarded custody credit. Orellana filed this timely appeal.

Testimony at trial

T.D., 17 years old at the time of trial, testified that Orellana was her stepfather. T.D. had a twin sister, J., and an older sister, A. Orellana moved into T.D.'s Baldwin Park home in 2004, when T.D. was nine, and married T.D.'s mother in 2005. In 2006 the family moved to La Puente.

One night in 2004 when T.D. was in the third grade, Orellana entered her bedroom. T.D. was in bed asleep, wearing jean shorts. She woke up with her shorts unbuttoned and pulled down, feeling Orellana touching her "privates" with his hands and fingers, putting his fingers inside her vagina and licking her private parts. T.D. just "stayed quiet" because she was scared: "He's a bigger man obviously and I was . . . still little. And I just didn't want him to like do anything worse to me." Orellana was standing next to the bed, and T.D. tried to block his access, moving to her side by rolling over until her back was to him. Although it was harder for him, he continued to touch her. This lasted for 10 minutes. T.D. cried and went back to sleep, woke up, and cried again. She did not tell anyone the next day: "I didn't know how to express myself."

Orellana continued to touch T.D. anywhere from one to three times a week when she was in the third through the fifth grades, in the living room. The family would watch movies. T.D.'s mother and sister J. would go to bed, and T.D. would fall asleep under a

---

[2] After Orellana's first trial resulted in a hung jury, the amended information was filed, alleging 10 counts. The amended information omitted counts 3, 4, 5, 8, and 9, but the remaining counts retained their original numeration from the original 15-count information. Orellana stipulated that the 10 counts could be presented to the jury renumbered sequentially as counts 1 through 10. Herein, however, we use the original non-sequential numbering as reflected in the amended information.

blanket on the couch with Orellana. She would wake up with Orellana touching her, either outside her underwear or moving it aside, with his fingers inside her vagina. T.D. would get up and leave. Sometimes Orellana's arms were around T.D., and "he would like be heavier for some reason. Like he wouldn't move his arm. It would be like . . . hard to get out." She did not tell Orellana to stop, "[b]ecause [she] was afraid to talk to him." T.D. continued to watch movies with Orellana because she "didn't want [her] family to be broken just because of [her]. . . . They didn't know what was happening so [she] didn't want to say anything. [She] didn't want to ruin everything." T.D. would try not to fall asleep, and sometimes she felt safe if her sister was sleeping next to her, but "even then he would still come and touch [her]." After a while, what Orellana was doing to her seemed normal.

In 2005, when she was in fifth grade at a Catholic school, T.D. got caught cheating and her teacher told her she was going to call T.D.'s parents. T.D. told the teacher that Orellana raped her, "but at that time [she] didn't know the difference between rape and molestation." She told her teacher because she wanted her teacher to tell her mother, because she was afraid of Orellana. The teacher took T.D. to the office and the principal called the police, who came to the school. When T.D. was talking to the police she could tell they didn't believe her, and while she was sitting in the office she heard one policeman tell T.D.'s mother that "kids these days just want attention."

T.D. left the school with her mother, Orellana, and J., and went to the police station, where Orellana said to someone over the counter, "I don't know what she's talking about." They left the police station and went to the movies, which made T.D. feel unimportant: "if the police . . . don't believe me, then my mom is not going to believe me either."

After her 2005 report, Orellana continued to touch T.D. while they were in the living room; it was "always the same," with Orellana touching her under or over her underwear and putting his fingers inside her.

When T.D. was in high school and they had moved to a house in Pomona, Orellana tried to put his penis in her mouth when she was lying on her side on the couch.

Orellana was sitting next to her head and got underneath her, putting his hands on her head and trying to put his penis in her mouth, but she did not let his penis go past her teeth. T.D. left without a struggle.

T.D. kept a diary while she lived in the house in Pomona, which she never intended anyone else to read. On August 4, 2009, she wrote that Orellana had disconnected her phone and she hated him because he had molested her in third grade. In an entry dated August 29, 2009, she wrote that the night before she fell asleep, and Orellana put his fingers in her vagina, sucked on her nipples, and put his penis in her mouth. She got some semen in her mouth. T.D. was mad because "that stuff shouldn't happen." In another entry dated October 19, 2009, T.D. wrote that Orellana put his fingers in her vagina and made her bleed. T.D. also wrote about drinking before she started high school and taking drugs, which she did because "it was an escape from what has been happening to [her]. Nobody would listen to [her] or hear [her], so [she] would just find it as an escape," and she took drugs "not to feel [her] mom and the cops not being there for [her]."

In December 2009, T.D. told her boyfriend A.N., or "Matt," about what had happened with Orellana. Matt told T.D.'s mother, and at her mother's insistence T.D. went to the Pomona Police Station and made a report to two policemen on July 26, 2010. She later gave her diary to a detective. Orellana moved out of the home and did not come back. He never threatened or harmed T.D. after she reported the abuse. She was scared of Orellana, however, because "[they] never had a man in [their] family. [She] was nine when he came along."

Matt testified that T.D. first told him about Orellana's behavior in text messages in December 2009. T.D. told him that Orellana would touch her breasts and vagina (to the point where once she fought back), had placed his fingers in and licked her vagina, and tried to make her suck his penis. Her stories were consistent, and she would always cry. Matt told T.D. to tell someone. In July 2010, Matt went with T.D.'s mother to pick T.D. up in a park where she was drinking with some friends, and he told T.D.'s mother what Orellana was doing to T.D. T.D.'s mother agreed to go to the police and file a report.

After they picked T.D. up, they went to the West Covina Police Department, where they were redirected to the Pomona Police Department. Matt did not believe that T.D.'s mother would take them to the Pomona police, so he called his mother, who drove Matt and T.D. over to the Pomona Police Department.

Deputy Sheriff Tracy Wright, who interviewed T.D. and T.D.'s teacher at T.D.'s elementary school in 2005, testified that T.D. said that in April 2004, she was awakened by Orellana holding her legs, with her shorts pulled down but her panties still on. Orellana had his mouth open, and went into the restroom to wash his mouth out. T.D.'s teacher told the deputies that T.D. told her that on June 4, 2004, they were watching TV in the living room when Orellana grabbed her chest under her clothing. T.D. had not told her mother because T.D. was afraid of Orellana, "the night, the darkness, that he would come and do it again to her." The case was assigned to the Baldwin Park police, and the investigating officer closed the case on the same day it was assigned; the detective did not remember the reason it was closed.

T.D.'s mother testified that T.D. had her own room when they moved to La Puente. The first time T.D.'s mother learned about the allegations was when T.D.'s school called her in 2005. The next time T.D. said anything was in July of 2010. T.D.'s mother had just come back from the market when T.D. came into the room and said, Orellana "just touched me." T.D.'s mother called Orellana in, told him T.D. was saying he touched her, and asked T.D. how he touched her. T.D. put her hand in front of her torso near her belly button and shook her hand up and down. T.D.'s mother told her to leave the room. Orellana denied that he did anything to her. T.D. came back in and offered to make them something to eat, which put T.D.'s mother "in shock." T.D. left and called her older sister, who later told T.D.'s mother that T.D. had offered them food "because [she] felt sorry for them." T.D.'s mother did not call the police that day. T.D.'s mother asked Orellana to leave, and after a few days he did.

T.D.'s twin sister made a similar allegation about Orellana to their mother, just before T.D. reported the abuse to her teacher. T.D.'s twin sister told their mother that Orellana had touched her, and their mother "figured it was her private part." T.D.'s

mother talked to Orellana about it, but he remained in the home. T.D.'s twin sister later told their mother she was just going along with T.D.

In July 2010, Matt told T.D.'s mother that T.D. had told him Orellana had touched her three times. T.D.'s mother followed Matt and T.D. when Matt's mother drove them to the Pomona Police Department, where T.D.'s mother reported the abuse. T.D. had been drinking and was hitting Matt. T.D.'s mother told the detective that T.D. was looking for attention, and was competing with her twin sister. T.D.'s mother testified that T.D. lied all the time. In 2005, the officers who had come to T.D.'s school told her that T.D. "had changed her story three times and don't worry, don't worry."

Detective Richard Machado testified that he was the investigating officer from the Pomona Police Department. T.D. had given him her diary at the beginning of the investigation. Detective Machado observed through a one-way mirror an interview with T.D. at the Children's Advocacy Center. T.D. told the interviewer that she tried to roll away from Orellana when he touched her, and because she was intimidated by his size "she didn't have the guts . . . to say anything to him about hi[s] touching her."

Clinical psychologist Dr. Jayme Bernfeld testified regarding a model called Child Sexual Abuse Accommodation Syndrome, developed by a psychiatrist to help people understand the behavior of children sexually abused by a "known perpetrator." The model posits that the sexual abuse of children occurs in secrecy, with no witnesses. The child victim is physically helpless because the child is much smaller, and is socially helpless because the child has been taught to do what it is told to do. The child tends to accommodate the abuse to be able to live with it, including using alcohol or drugs to numb the pain as the child gets older. Most child victims never disclose; and those who do, disclose it many years later. Many child victims recant, motivated by the negative pressure they experience as a result of their disclosure, which can cause a lot of trouble in the family. The closer the relationship between the child victim and the perpetrator, the more difficult disclosure becomes. Child victims do not often disclose the entirety of the abuse all at once.

The defense called as a witness T.D.'s twin sister, who testified that Orellana never touched her inappropriately. When she told her mother that he had touched her inappropriately, she was just going along with T.D. to support her by lying; they were "super young." Orellana never touched T.D.'s twin sister. T.D. was different from her twin sister, a "rebel."

T.D.'s older sister A., 25 at the time of trial, also testified. Orellana moved in when she was 16 and she left home when she was 22; she was not close to him. T.D. called A. the day she told her mother about the sexual abuse and asked A. to come get her, but instead A. went over to the house later that night. T.D. told A. that Orellana had touched her, but she was "very nonchalant," and in the family T.D. had a reputation as a liar. T.D. never said anything again, and A. had never seen Orellana behave inappropriately.

After testimony ended, the defense moved to dismiss or reduce the charges because there was insufficient evidence of force, violence, duress or fear to support convicting Orellana of forcible lewd acts, aggravated sexual assault—oral copulation, aggravated sexual assault, and sexual penetration by a foreign object. The court denied the motion.

The jury found Orellana guilty on all 10 counts.

DISCUSSION

I. Substantial evidence supported "force, fear, or duress."

Orellana argues that the evidence of "force, fear or duress" required to prove the charged offenses in all but counts 1 and 15 was insufficient to support his convictions for forcible lewd act upon a child (counts 2, 10, 11, and 12), aggravated sexual assault of a child—oral copulation (count 6), aggravated sexual assault of a child (count 7), and sexual penetration by a foreign object (counts 13 and 14). We conclude that the evidence was sufficient.

We apply the substantial evidence standard, examining the evidence in the light most favorable to the judgment, and determining whether the evidence is reasonable, credible, and of solid value so as to allow a reasonable trier of fact to find the defendant

guilty beyond a reasonable doubt. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) The question is not whether *we* believe that the evidence establishes guilt beyond a reasonable doubt; instead, we review the evidence favorably to the prosecution to determine whether any rational jury could have reached the verdict that it did. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) "'If this "substantial" evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed.'" (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) We examine the "bare legal sufficiency [of the evidence], not its weight." (*People v. Moye* (2009) 47 Cal.4th 537, 556.) We set aside a judgment only if """on no hypothesis whatever is there sufficient substantial evidence to support the verdict."""" (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1332.)

A. Forcible lewd act upon a child (counts 2, 10, 11, and 12)

The elements of a section 288, subdivisions (a) and (b)(1), offense are: (1) physical touching of a child under 14 years old; (2) for the present and immediate purpose of sexually arousing or gratifying the defendant or the victim; and (3) the touching was accomplished by use of force, violence, duress, menace or fear of injury. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1171.) Force in this context means physical force that is "'substantially different from or substantially greater than that necessary to accomplish the lewd act itself.'" (*People v. Soto* (2011) 51 Cal.4th 229, 242; accord, *People v. Griffin* (2004) 33 Cal.4th 1015, 1027.) "[A]cts of grabbing, holding, and restraining" the victim "in conjunction with the lewd acts" constitute violence. (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005.) The statute uses the terms "force" and "duress" in the disjunctive, so the prosecution need prove only that force *or* duress was used to accomplish the lewd act. (*Soto*, at p. 236.) In the context of a sex crime with a minor victim, duress means "'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' [Citation.]" (*People v. Leal* (2004) 33 Cal.4th 999, 1004, italics omitted.) The jury was so instructed. The jury was

also instructed that it could take into account the age of the victim and her relationship to the defendant.

Orellana contends there is insufficient evidence in counts 2, 10, 11, and 12 to support the jury's verdict that he used force, violence, duress, menace, or fear of injury. Thus, he asserts, the verdicts regarding those four counts should be modified to reflect convictions of the lesser included offense of nonforcible lewd conduct on a child under 14 under section 288, subdivision (a), and he should be resentenced accordingly. We reject this argument.

These four counts were based on incidents of Orellana's abuse of T.D. when she was in fourth, fifth, sixth, and seventh grade, when she fell asleep on the living room couch and he touched her after the rest of the family had gone to bed. T.D. testified that Orellana had his arms around her, he wouldn't move his arm, and "it would be hard to get out." Her testimony is evidence that Orellana used more force than was necessary to touch her, by keeping his arms around her and making it hard for her to get away. T.D. also testified that she was afraid to tell Orellana to stop, and did not tell her family because she was afraid the family would be broken up. This constitutes evidence of duress. "'Her compliance was derived from intimidation and the psychological control he exercised over her and was not the result of freely given consent. [Fn. omitted.] Under these circumstances, given the age and size of the victim, her relationship to the defendant, and the implicit threat that she would break up the family if she did not comply, the evidence amply supports a finding of duress.' [Citation.]" (*People v. Veale* (2008) 160 Cal.App.4th 40, 48.)

A reasonable jury could have found Orellana used force or duress as to counts 2, 10, 11, and 12.

People v. Espinoza (2002) 95 Cal.App.4th 1287 (*Espinoza*) does not require that we conclude that the evidence was insufficient to support a conviction on any of the four counts alleging a violation of section 288, subdivision (b). The prosecutor in *Espinoza* argued only duress in support of the count alleging a violation of section 288, subdivision (b). (*Id.* at p. 1319.) As we explain above, there was sufficient evidence of force in

counts 2, 10, 11, and 12, and so we need not reach the issue whether the convictions were sustainable on duress alone. (*People v. Mejia* (2007) 155 Cal.App.4th 86, 102.) Further, we note that the victim in *Espinoza* was 12, and she reported the abuse charged in the section 288, subdivision (b) count within a day of its occurrence. (*Espinoza*, at pp. 1292–1293.) Here, the abuse in counts 2, 10, 11 and 12 began when T.D. was in third or fourth grade. Further, when she first told her fifth-grade teacher about the abuse, she wanted the teacher to tell her mother because she was afraid of Orellana. Orellana told the police he didn't know what she was talking about; her mother did nothing, and Orellana continued his abuse of T.D. This supports an inference that Orellana psychologically controlled T.D., first abusing her when she was very young and afraid he might do something worse, two years later obtaining her continued submission and silence by denying any abuse in her presence after she mustered the courage to tell her teacher, and then continuing to abuse her on a regular basis. "'The very nature of duress is psychological coercion.'" (*People v. Veale*, *supra*, 160 Cal.App.4th at p. 48; *People v. Cochran* (2002) 103 Cal.App.4th 8, 15.)

B. Aggravated assault of a child (counts 6 and 7)

Count 6 charged Orellana with aggravated sexual assault of a child—oral copulation, in violation of section 269, subdivision (a)(4), and count 7 charged aggravated assault of a child—sexual penetration, in violation of section 269, subdivision (a)(5) (count 7), both based on Orellana's abuse of T.D. in her bedroom when she was nine years old.

Counts 6 and 7 were based on T.D.'s testimony that when she was in third grade, Orellana entered her bedroom when she was sleeping in bed. She woke up with her shorts unbuttoned and pulled down, and felt Orellana touching, licking and putting his fingers inside her vagina. T.D. stayed quiet because she was scared. Orellana was bigger, she was little, and she didn't want him to do anything worse. T.D. rolled to her side to block his access, but although that made it more difficult for him, Orellana continued to touch her for 10 minutes.

Like the offense of forcible lewd acts upon a child under 14, the offense of aggravated sexual assault on a child under 14 "require[s] proof that 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person' was used. [Citation.]" (*People v. Cochran*, *supra*, 103 Cal.App.4th at p. 13.) Section 269 is subject to the definitions of force and duress provided in section 288, and the cases interpreting it. (*People v. Alvarez*, *supra*, 178 Cal.App.4th at p. 1004.)

There was substantial evidence of force. A reasonable jury could conclude from T.D.'s testimony that she resisted Orellana's abuse by rolling to her side, and he overcame that resistance by using physical force substantially different from that required to touch, lick, and finger her vagina. Further, there was evidence that T.D. told the deputy during the interview at her elementary school that in April 2004 she was awakened by Orellana holding her legs, which supports an inference of use of force.

There was also substantial evidence of duress to support the convictions on counts 6 and 7. T.D. was in third grade, and Orellana was an adult and her stepfather; this large age discrepancy, and the family relationship, is evidence of duress. (*People v. Cochran*, *supra*, 103 Cal.App.4th at p. 15; *People v. Senior* (1992) 3 Cal.App.4th 765, 775.) Orellana committed the abuse "in an isolated room out of the presence of other adults." (*People v. Superior Court (Kneip)* (1990) 219 Cal.App.3d 235, 238.) A rational jury could find duress where "there is an inherent imbalance of power in an encounter between a child and an adult bent on sexual conduct." (*People v. Soto*, *supra*, 51 Cal.4th at pp. 245–246.) Further, T.D. testified that she feared retribution, and remained still so Orellana would not do anything worse. This is ample evidence to support duress.

A reasonable jury could have found Orellana used force or duress as to counts 6 and 7.

C. Forcible penetration by a foreign object (counts 13 and 14)

Counts 13 and 14 each charged a violation of section 289, subdivision (a)(1), forcible sexual penetration by a foreign object. Count 13 was based on Orellana's insertion of his fingers into T.D.'s vagina between December 2008 and October 2009, when she was 14 and in eighth grade. Count 14 was based on T.D.'s journal entry on

October 19, 2009, when she was also 14, describing how on that day Orellana put his fingers in her vagina and made her bleed. Like the statutes criminalizing sexual assault or lewd acts on a child under 14, section 289, subdivision (a)(1) requires that the act be accomplished "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury."

We concluded above that the evidence was sufficient to support a finding that the sexual abuse when T.D. was under 14 occurred under duress. The same substantial evidence supports the jury verdicts regarding these two incidents when T.D. was 14; there is no evidence that Orellana's abuse changed once T.D. turned 14. Viewing the evidence in the light most favorable to the verdict, a rational jury could conclude that the abuse in counts 13 and 14 was accomplished by means of duress.

II. Orellana's conviction on count 1 must be vacated.

On appeal, Orellana argues—and respondent concedes—that he was improperly convicted of count 1, continuous sexual abuse of T.D. between December 17, 2003 and December 16, 2004, in violation of section 288.5, *and* the two acts of aggravated sexual assault of a child in violation of section 269, also between December 17, 2003 and December 16, 2004 (counts 6 and 7). The trial court in this case sentenced Orellana to concurrent sentences of 15 years to life on counts 6 and 7, and stayed the sentence on count 1 under section 654.

Section 288.5, subdivision (c) provides: "No 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 offenses occurred outside the time period charged under this section or the other offense is charged in the alternative." As counts 1, 6, and 7 all involved the time period between December 17, 2003 and December 16, 2004, prosecutors "may not obtain multiple convictions in [this] . . . circumstance," and "either the continuous abuse conviction or the convictions on the specific offenses must be vacated." (*People v. Johnson* (2002) 28 Cal.4th 240, 248, 245.) While both parties agree that the convictions for both continuous sexual abuse and for the two acts during the same period were prohibited by section 288.5, subdivision

(c), they disagree on the remedy. Orellana argues that his sentences on count 6 (15 years to life) and count 7 (15 years to life, to be served concurrently with the sentence on count 6) should be vacated, counts 6 and 7 should be dismissed, and the case should be remanded for sentencing on count 1. Respondent argues that Orellana's conviction on count 1 (continuous sexual abuse) should be vacated and count 1 should be dismissed, leaving standing the more severe sentences imposed on counts 6 and 7.

In *People v. Johnson*, *supra*, 28 Cal.4th 240, the California Supreme Court did not address or decide which of the multiple convictions should be reversed, the continuous sexual abuse or the five specific sexual offenses during the same period. Instead, the court upheld the appellate court's reversal of the convictions of the five specific sexual offenses. (*Id.* at pp. 244–245, 248.) Following *People v. Johnson*, Presiding Justice Roger Boren of this appellate district concluded: "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 . . . than available for a conviction under section 288.5." (*People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1177–1178.) In *People v. Torres* (2002) 102 Cal.App.4th 1053, 1059, the First Appellate District held: "[I]n 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) . . . we leave appellant standing convicted of the alternative offenses that are most commensurate with his culpability."

In this case, the two counts of aggravated sexual assault carry a greater aggregate penalty than the penalty for continuous sexual abuse. Each of counts 6 and 7 carried an indeterminate sentence of 15 years to life in state prison. (§ 269, subd. (b).) The penalty for continuous sexual abuse of a child is a term of 6, 12, or 16 years in state prison. (§ 288.5, subd. (a).) In accord with *People v. Alvarez* and *People v. Torres*,[3] we will leave in place the convictions on the alternative offenses that are most commensurate

[3] We decline Orellana's invitation to ignore those cases.

with his culpability, i.e., his convictions on counts 6 and 7. We therefore vacate Orellana's conviction on count 1.

DISPOSITION

Orellana's conviction on count 1 is reversed and the case is remanded for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

I concur:

CHANEY, J.

Rothschild, Acting P. J., concurring:

The record shows each count is supported by substantial evidence that defendant used force. I therefore believe it is unnecessary to consider whether duress also supports the convictions.

ROTHSCHILD, Acting P. J.