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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MARTIN RUIZ SANCHEZ, Defendant and Appellant.	B282235 (Los Angeles County Super. Ct. No. TA138434)

APPEAL from judgments of the Superior Court of Los Angeles County, Tammy C. Ryu, Judge. Affirmed in part, remanded in part with instructions.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jaime L. Fuster and Joseph P.

Lee, Deputies Attorney General, for Plaintiff and Respondent.

The jury convicted defendant and appellant Martin Ruiz Sanchez of continuous sexual abuse (Pen. Code, § 288.5, subd. (a) [count 1]);[1] lewd act upon a child under the age of 14 (§ 288, subd. (a) [counts 2, 3, and 4]); oral copulation or sexual penetration of a child 10 years old or younger (§ 288.7, subd. (b) [count 5]); misdemeanor child molestation (§ 647.6, subd. (a)(1) [counts 6 and 7]); and forcible lewd act upon a child (§ 288, subd. (b)(1) [count 8]). The jury found that counts 1–5 and 8 involved children and multiple victims within the meaning of section 667.61, subdivision (j)(2).

Defendant was sentenced to a term of 92 years to life in prison. The sentence was comprised of: consecutive terms of 25 years to life in counts 1 and 2; concurrent terms of 25 years to life in counts 3 and 4; 15 years to life in count 5; consecutive terms of 1 year each in counts 6 and 7; and a consecutive term of 25 years to life in count 8.

Defendant contends the trial court erred by failing to sua sponte instruct on the lesser included offenses of assault with intent to commit a lewd act upon a child and simple assault in counts 2, 3, and 4. Alternatively, he argues that defense counsel at trial was ineffective for failing to request the relevant instructions. Finally, by supplemental letter

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

brief filed with this court on September 19, 2017, defendant contends that his 25 years to life sentence in count 1 violates ex post facto principles and must be vacated.

The People concede, and we agree, that the sentence in count 1 must be vacated and the matter remanded for resentencing on that count. In all other respects, the judgment is affirmed.

FACTS[2]

Prosecution

A.A. was born in February 1996, and at the time of the trial she was 20 years old. Between January 1, 2001, and December 31, 2003, A.A. lived with her family in Oakland. Defendant, who was A.A.'s uncle by marriage, lived next door with his family. When A.A. was about four or five years old, she was sitting on top of a bunk bed in defendant's son C.'s room. Defendant came into the room when C. went to the bathroom. He approached A.A., "snaked" his hand up her pant leg from the bottom of her ankle to the top, went under her panties, and stroked her vagina skin-to-skin. He did not enter A.A.'s vaginal canal, although he did enter her labia. Defendant asked A.A. if she liked what he was doing. She shook her head no. He continued touching her until

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[2] Our opinion contains only the facts relating to counts 2–4, as those are the only counts that are relevant to this appeal.

they heard the toilet flush and then C. came back into the room. Defendant "acted like nothing was wrong."

On a different day, C. and A.A. were on top of the bunk bed talking to friends outside an open window. A.A. moved away from the window and sat on the edge of the bed while C. kept talking to friends outside the window. Defendant came into the room and moved close to A.A. He unbuttoned and unzipped her pants, went under her panties, and stroked her vagina skin-to-skin on the inside of her labia again. The touching lasted a few seconds, during which neither defendant nor A.A. said anything. Afterwards, A.A. put her shirt over her pants so that C. could not see until she re-zipped her pants.

On a third occasion, A.A. was at a party at another uncle's house in Oakland. She, defendant, another uncle, and some of A.A.'s cousins were in a bedroom with glow-in-the-dark stars on the ceiling. A.A. pointed at the stars because she wanted to touch them. Defendant offered to pick her up, but because of what had happened before, A.A. shook her head no. Defendant grabbed her and picked her up anyway. He put one hand on her waist and the other between her legs. A.A. was wearing a dress and underwear, and she could feel defendant press his fingers to her vagina over her underwear "in a way that you shouldn't have to when you're picking someone up." She touched the stars, and defendant put her down. The touching felt purposeful.

A.A. recalled "small flashes" of other touchings but could not remember the details. Defendant never exposed

himself to her or asked her to touch his genitals. A.A. never told anyone about these incidents when she lived in Oakland. After her family moved to Hayward when she was six years old, she finally told her mother that defendant had been touching her. A.A. told her mother that defendant had stroked her crotch area. She did not describe the events in greater detail. When her mother asked if she wanted to talk to the police, she said she "just didn't want to deal with it" and felt better just having told her.

A.A. contacted law enforcement after she received a Facebook message from the victim in count 1 regarding defendant's sexual abuse of that victim as a child.

Defense

Defendant had known A.A., his brother-in-law's daughter, from the time she was a small child. He had a good relationship with A.A.'s mother, but not her father. Defendant denied that the two bunk bed incidents and the glow stars incident took place, and denied ever touching A.A. inappropriately. He did not know why she would accuse him of molesting her.

DISCUSSION

Instruction on Lesser Included Offenses

Defendant contends the trial court erred in failing to sua sponte instruct the jury on the lesser included offenses of assault with intent to commit a lewd act upon a child and simple assault in counts 2, 3, and 4, which charged lewd and lascivious conduct with A.A., a child under the age of 14. (§ 288, subd. (a).) The contention is without merit.

A trial court has a sua sponte duty to instruct the jury on an uncharged offense included in the charged crime if supported by substantial evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Memro* (1995) 11 Cal.4th 786, 871.) "Such instructions are required only when there is substantial evidence that, if the defendant is guilty at all, he is guilty of the lesser offense, but not the greater." (*People v. Wyatt* (2012) 55 Cal.4th 694, 704.)

"Section 288[, subdivision] (a) provides in relevant part: 'Except as provided in subdivision (i), 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 . . . .' The statute is violated if there is '"any touching" of an underage child accomplished with the intent of arousing the

sexual desires of either the perpetrator or the child.' (*People v. Martinez* (1995) 11 Cal.4th 434, 452.) Thus, the offense described by section 288[, subdivision] (a) has two elements: '"(a) the touching of an underage child's body (b) with a sexual intent." [Citation.]' (*U.S. v. Farmer* (9th Cir. 2010) 627 F.3d 416, 419.)" (*People v. Villagran* (2016) 5 Cal.App.5th 880, 890.)

"An assault is an unlawful *attempt*, coupled with a present *ability*, to inflict a violent injury on a person (§ 240), and . . . does not require contact with the victim." (*People v. Cook* (2017) 8 Cal.App.5th 309, 313.) "The only additional element of assault with intent to commit [a lewd act upon a child under the age of 14 in violation of section 220, subdivision (a)(1)] is the perpetrator's subjective intent, during the commission of the assault, to commit [a lewd act upon a child under the age of 14]." (*Ibid.* [elements of assault with intent to commit rape under section 220, subdivision (a)(1)].)

In this case, the evidence presented an all-or-nothing choice. A.A. testified that when she was four or five years old defendant put his finger in her labia on two different occasions, and then subsequently picked her up by unnecessarily placing his hand on her underpants in her vaginal area when she told him not to. Defendant denied all inappropriate touching, testifying that none of the incidents occurred. The jury could either believe A.A.'s testimony or defendant's—defendant either committed a lewd act upon a child under the age of 14 or did nothing at all. The evidence

does not support a conviction for either assault with intent to commit a lewd act upon a child under the age of 14 or simple assault. The trial court did not err in failing to instruct on lesser included crimes.

Defendant's claim of ineffective assistance of counsel also fails. In the absence of substantial evidence to support a conviction for a lesser included crime, defendant cannot establish that counsel's failure to request instructions on lesser included offenses fell below the standard of care or resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 691–692 [to prevail on a claim of ineffective assistance of counsel, defendant must establish counsel's performance fell below an objective standard of reasonableness and actual prejudice flowing from counsel's performance].)

Sentence in Count 1

The trial court sentenced defendant to 25 years to life in count 1 under the one strike law (§ 667.61, subd. (j)(2)), for continuous sexual abuse (§ 288.5, subd. (a)) occurring between January 1, 1989, and December 31, 1992. Defendant contends, and the People concede, that his sentence in count 1 violates ex post facto principles and must be vacated.

"The United States Constitution and the California Constitution proscribe ex post facto laws. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) Under both Constitutions,

'[l]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts.' (*Collins v. Youngblood* (1990) 497 U.S. 37, 42–43; see *People v. Grant* (1999) 20 Cal.4th 150, 158 [].)" (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1173 (*Valenti*).) Section 288.5 became a one strike offense in 2006. (*Id.* at p. 1174.) The indeterminate life sentences now imposed greatly exceed the 6-, 12-, or 16-year sentences previously available for violations of section 288.5. (*Ibid.*) "Thus, the ex post facto clause prohibits sentencing defendants under the One Strike law for section 288.5 violations committed before September 20, 2006. (See *People v. Hiscox* (2006) 136 Cal.App.4th 253, 257–262 [applying ex post facto clause to § 288 violations].)" (*Ibid.*)

The one strike sentence imposed for count 1 is therefore unauthorized. (*Valenti*, *supra*, 243 Cal.App.4th at p. 1175.) We vacate the indeterminate sentence imposed in count 1, and remand for imposition of an authorized determinate term. (*People v. Scott* (1994) 9 Cal.4th 331, 354 [an unauthorized sentence may be corrected on appeal despite failure to object below].)

DISPOSITION

The sentence in count 1 is vacated, and the matter is remanded for resentencing without application of the one strike law (§ 667.61). The judgment is otherwise affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

RAPHAEL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.