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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD EDWARD RAY, Defendant and Appellant.	B270084 Los Angeles County Super. Ct. No. MA064433

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed in part, reversed in part, and remanded with directions.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Richard Edward Ray was convicted of 17 sex crimes committed against three children over the course of 18 years. He contends the court lacked jurisdiction over counts 3–8 and 16–17 because those offenses occurred in Nevada—and even if California had jurisdiction, Los Angeles was not the proper venue; his conviction for count 12 violates Penal Code section 288.5, subdivision (c), which prohibits dual convictions for continuous sexual abuse and another sex offense involving the same victim and the same time period; and the multiple-victim findings and several of his indeterminate sentences violate the ex post facto clause.

We conclude: (1) though California had jurisdiction over counts 4–8 and 16–17 because defendant committed sufficient preparatory acts in this state, and though venue in Los Angeles was proper for those counts, California did not have jurisdiction over count 3; (2) defendant did not forfeit his right to challenge his unauthorized dual conviction for count 12; (3) the multiple-victim allegations for counts 2, 4, 6, 7, 14, 16, and 17 violate the ex post facto clause; and (4) the indeterminate sentence for count 2 also violates the ex post facto clause. We therefore reverse counts 3, 12, and the true findings on the multiple-victim allegations with directions to dismiss them on remand, vacate defendant's sentence, and remand for resentencing. In all other respects, we affirm.

PROCEDURAL BACKGROUND

By information filed January 21, 2015, defendant was charged with incest (Pen. Code,[1] § 285; count 1); continuous sexual abuse (§ 288.5, subd. (a); counts 2 and 12); sexual intercourse or sodomy with a child under age 11 (§ 288.7, subd. (a); count 3); sodomy of a child under age 14 with an age difference of at least 10 years (§ 286, subd. (c)(1); count 4); lewd act on a child (§ 288, subd. (a); counts 5, 8, 11, 13, and 15); aggravated sexual assault of a child by rape (§ 269, subd. (a)(1); counts 6 and 14); aggravated sexual assault of a child by oral copulation (§ 269, subd. (a)(4); count 7); criminal threats (§ 422, subd. (a); count 9); rape of a minor over age 14 (§ 261, subd. (a)(2); count 10); and sexual penetration of a child under age 11 (§ 288.7, subd. (b); counts 16 and 17). As to counts 2–8 and 10–17, the information alleged defendant committed the offenses against multiple victims. (§ 667.61, subds. (b), (e).) Defendant pled not guilty and denied the allegations.

The defense twice moved to dismiss counts 3–8 and 16–17 for lack of jurisdiction and improper venue.[2] The court denied both the motions. After a trial at which he testified in his own defense, the jury found defendant guilty of all counts and found the allegations true.

At sentencing, the court imposed an aggregate determinate term of nine years and four months followed by an indeterminate

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[1] All undesignated statutory references are to the Penal Code.

[2] The counts discussed in pretrial hearings included a count 8 (§ 273d, subd. (a)) that the People later dismissed. For the sake of clarity, we refer to the counts by the numbers used in the information filed on January 21, 2015.

term of 220 years to life. For the determinate sentence, the court selected count 4 as the base term and imposed the high term of eight years. The court imposed eight months for counts 1 and 9—one-third the midterm of two years for each count—to run consecutively. For the indeterminate sentence, the court imposed 75 years to life for counts 6, 7, 14, 16, and 17—five consecutive terms of 15 years to life—plus 25 years to life for count 3. The court sentenced defendant to 120 years to life for counts 2, 5, 8, 10, 11, 12, 13, and 15—eight terms of 15 years to life—under the One Strike law (§ 667.61), to run consecutively. The court imposed one sex offender fine (§ 290.3) of $300 plus penalty assessments[3] and a $6,000 restitution fine (§ 1202.4, subd. (b)). The court imposed and stayed a $6,000 parole revocation restitution fine (§ 1202.45). Finally, the court imposed a $30 court facility assessment (Gov. Code, § 70373) and a $40 court operations assessment (§ 1465.8, subd. (a)(1)) for each count.

Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND

This case involves the commission of multiple sex offenses against three minors over the course of nearly 20 years. Each of the victims was related in some way to Juanita R. P.B. is

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[3] We note that the sentencing minute order does not reflect the $300 sex offender fine, and neither the minute order nor the abstract of judgment reflect the penalty assessments imposed by the court. (See *People v. Hamed* (2013) 221 Cal.App.4th 928, 938–941 [minute order and abstract of judgment must delineate the amount and statutory basis of each fine and penalty assessment].) We are confident that upon resentencing, the court will ensure these documents are correct. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185–188 [discussing importance of accurate abstract of judgment].)

Juanita's younger sister. C.R. is Juanita's daughter with defendant. And T.C. is Juanita's daughter with another man.

1. P.B. (Counts 11–15)

P.B. was born in August 1991 and is 11 years younger than Juanita. When she was five or six years old, defendant often put his finger in P.B.'s vagina. Defendant also put his finger in P.B.'s vagina in 1997, 1998, and 1999. Overall, defendant put his finger in P.B.'s vagina approximately 50 times. Defendant had vaginal intercourse with P.B. twice—once between 1997 and 1998 and a second time between 1998 and 1999.

Each sexual act occurred in Los Angeles County.

2. C.R. (Counts 1–10)

C.R. was born in June 1999. Nearly every day over a three month period in 2005 and 2006, defendant brought C.R. to her grandmother's garage in Lancaster and had anal sex with her.

By 2009, defendant had moved to Nevada and C.R. was living with other family members in Riverside County. She went to visit defendant for a month that summer. During the trip, defendant had anal intercourse with C.R., performed oral sex on her, and made her perform oral sex on him. Sometime after she returned, C.R. was placed in foster care.

On May 17, 2012, defendant obtained custody of C.R. and drove her to Henderson, Nevada to live with him in his apartment. A day or two after they arrived, defendant had anal intercourse with C.R. and orally copulated her. Defendant committed those acts on C.R. nearly every day while she lived with him in Nevada—sometimes more than once per day. On C.R.'s 13th birthday, defendant started having vaginal

intercourse with her. Defendant threatened to kill her if she told anyone about the abuse.

In Spring 2014, defendant lost his job and moved with C.R. to Palmdale. He continued to have vaginal intercourse with C.R. after the move, and she became pregnant. C.R. had never had sex with anyone else. C.R. terminated the pregnancy in October 2014, when the fetus was 11 weeks, 6 days old. DNA analysis of the fetal tissue confirmed that defendant was the father.

3. T.C. (Counts 16–17)

T.C. was born in August 2002. In 2012, she was living in Riverside County with family members and in foster homes. Just before her 10th birthday, defendant drove from Nevada to California to pick T.C. up at her foster home, then brought her back to Nevada to stay with him and C.R., her half-sister. A few days after her arrival, defendant put his finger in T.C.'s vagina. He continued putting his finger in her vagina during the rest of her trip. At the end of the trip, defendant drove her back to Riverside County.

4. Defendant's Testimony

Defendant was born on May 15, 1978. He dated his next-door neighbor Juanita on and off between 1997 and 2002, and was close to her family, including her younger sister P.B. Defendant denied ever touching P.B. inappropriately.

Defendant moved to Nevada, and towards the end of 2011, he began fighting for custody of C.R. He was awarded custody in 2012, and moved her to Nevada. Defendant denied ever touching C.R. inappropriately, threatening her, or hurting her physically. T.C. visited defendant and C.R. in Nevada, but defendant denied touching her inappropriately during that visit.

Defendant testified that he knew C.R. had terminated a pregnancy and that DNA analysis of the fetal tissue proved he was the father—but claimed he never had sexual intercourse with C.R. Rather, C.R. artificially inseminated herself with defendant's sperm so child support services would remove her from his custody and give her financial support for college.

CONTENTIONS

Defendant contends the court lacked jurisdiction over counts 3–8 and 16–17 because those offenses occurred in Nevada—and even if California had jurisdiction, Los Angeles was not the proper venue; his conviction for continuous sexual abuse is improper because he was also convicted of three discrete acts occurring within the same period; and the multiple-victim findings and several of his indeterminate sentences violate the ex post facto clause.

DISCUSSION

1. Jurisdiction and Venue

Jurisdiction refers to a court's inherent power to decide a case or issue a decree. "No person can be punished for a public offense," in California unless he is first "convict[ed] in a Court having jurisdiction thereof." (§ 681.) "Lack of jurisdiction in its most fundamental sense means an entire absence of power to hear or determine the case, i.e., an absence of authority over the subject matter or the parties. When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and such a judgment is vulnerable to direct or collateral attack at any time. [Citation.] This is a venerable rule of long standing." (*People v. Vasilyan* (2009) 174 Cal.App.4th 443, 450.) *Venue*, on the other

hand, concerns the geographical location of the court in which a prosecutor brings the case to trial. The general venue rule is that a case should be tried where the crime was committed (§ 777)—but within constitutional limits, "the Legislature may determine the venue for trial" (*Price v. Superior Court* (2001) 25 Cal.4th 1046, 1056).

Though he sometimes conflates these concepts, defendant essentially argues that California courts lacked jurisdiction over counts 3–8 and 16–17 because those crimes occurred in Nevada—and even if jurisdiction in this state were proper, Riverside County was the proper venue for trial of those counts. The People contend that California courts had jurisdiction over the Nevada crimes because defendant committed sufficient preparatory acts in Riverside County. And, they argue, venue in Los Angeles was proper under section 784.7 because defendant was charged with other crimes that occurred in Los Angeles, the Riverside/Nevada offenses were properly joined with those other crimes, and the Riverside District Attorney ceded venue to Los Angeles County. We conclude California lacked jurisdiction over count 3, but otherwise agree with the People.

1.1. Jurisdiction

"It long has been established that a state will entertain a criminal proceeding only to enforce its own criminal laws, and will not assume authority to enforce the penal laws of other states or the federal government through criminal prosecutions in its state courts. [Citations.] … But conduct relating to criminal activity frequently is not confined to the borders of a single state, and strict application of territorial principles often can render problematic the prosecution of crimes involving more than one state." (*People v. Betts* (2005) 34 Cal.4th 1039, 1046 (*Betts*).)

"Like most other states, California has addressed the problem of criminal activity that spans more than one state by adopting statutes that provide our state with broader jurisdiction over interstate crimes than existed at common law. Such laws generally 'are premised on the belief that a state should have jurisdiction over those whose conduct affects persons in the state or an interest of the state, provided that it is not unjust under the circumstances to subject the defendant to the laws of the state.' [Citation.]" (*Betts*, *supra*, 34 Cal.4th at p. 1047.)

Of relevance here, section 778a, subdivision (a), provides that if a person, "with intent to commit a crime, does any act within this state in execution or part execution of that intent, which culminates in the commission of a crime, either within or without this state, the person is punishable for that crime in this state in the same manner as if the crime had been committed entirely within this state." (See Gov. Code, § 18 [" 'State' means the State of California, unless applied to the different parts of the United States."].) Or, put another way, "California has territorial jurisdiction over an offense if the defendant, with the requisite intent, does a preparatory act in California that is more than a de minimis act toward the eventual completion of the offense." (*Betts*, *supra*, 34 Cal.4th at p. 1047.) Accordingly, to determine whether California had jurisdiction over the Nevada offenses, we ask whether defendant, with the intent to commit the Nevada offenses, did "any act" in California that "culminate[d]" in those offenses. (§ 778a, subd. (a).)

"The prosecution has the burden of proving the facts necessary to establish territorial jurisdiction by a preponderance of the evidence. [Citation.]" (*Betts*, *supra*, 34 Cal.4th at p. 1055.) "We will uphold a trial court's determination on factual issues if

supported by substantial evidence and review its legal determinations independently. [Citation.]" (*Ibid.*)

1.2. California did not have jurisdiction over count 3.

Defendant committed count 3 (§ 288.7, subd. (a)) when C.R. was visiting him in Nevada during the summer of 2009. The People argue jurisdiction for this count was proper because defendant "reached out to California in order to ensure C.R. would visit him." We disagree. The prosecution did not present any evidence that defendant, with the intent to commit count 3, did a " 'preparatory act' " in California that "culminate[d]" in forcible sodomy in Nevada. (*Fortner v. Superior Court* (2013) 217 Cal.App.4th 1360, 1365; accord *Betts*, *supra*, 34 Cal.4th at p. 1047; § 778a, subd. (a).)

First, the record does not support the People's contention that "facts presented at the preliminary hearing allow for an inference that appellant contacted C.R.'s grandmother about a potential trip to Nevada." To be sure, the cited testimony established that C.R.'s grandmother—with whom C.R. was living at the time—recommended she visit her father in Nevada, spoke with C.R. about the trip, and drove her there. Yet it also established that defendant neither drove C.R. to or from California nor spoke with her about the trip.

And while the People speculate that defendant *must* have spoken to C.R.'s grandmother about logistical matters at some point, the court sustained an objection to that very question on speculation grounds and struck the response. Indeed, one of the People's record citations points to the following exchange:

Q. Is there anything that you know of that shows the defendant made contacts with anybody in California regarding that 2009 visit?

A. No.

Second, although the People suggest that defendant "appear[ed] in Riverside County for court as part of his attempt to obtain custody of C.R.," it is clear from the record that custody proceedings did not begin until C.R. was in foster care—and C.R. was not placed in foster care until several months *after* returning from the 2009 Nevada trip. Defendant did not gain custody of her until 2012—*three years after* he committed the crime charged in count 3.

After reviewing the entire record in this case, we conclude there is no substantial evidence to support a finding that defendant, with the intent to commit sodomy on a child younger than 11 as alleged in count 3, did "any act" in California that "culminate[d]" in the conduct at issue. (§ 778a, subd. (a); see *Fortner v. Superior Court*, *supra*, 217 Cal.App.4th at pp. 1365–1366 [no jurisdiction where crime was not consummated in California and no part of the crime occurred in California].) One might, of course, speculate that he did. For example, it is possible defendant reached out to C.R.'s grandmother to propose or coordinate the visit, as the People suggest.[4] But possibility is

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[4] Indeed, the prosecutor invited the court below to consider this possibility—suggesting "I think the inference is that he did speak with somebody, even though that didn't come out in testimony"—but nevertheless conceded: "As far as count 3, I think that is clearly the toughest count that we face jurisdictionally. And I don't think there is any evidence—in fact, I asked the question, there is no evidence that Mr. Ray ever availed himself of any California jurisdiction in count 3.

mere speculation—and "speculation is not evidence, less still substantial evidence." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1081, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; see *People v. Davis* (2013) 57 Cal.4th 353, 360 [" 'A finding of fact must be an inference drawn from evidence rather than … a mere speculation as to probabilities without evidence.' "].) Accordingly, we conclude there was no substantial evidence to support jurisdiction under section 778a.

"Without jurisdiction, a court has no authority to act in the matter and cannot enter judgment either in favor of or against the defendant." (*Betts*, *supra*, 34 Cal.4th at p. 1050; *id.* at p. 1054 ["territorial jurisdiction is a procedural matter that relates to the authority of California courts to adjudicate the case"].) Because California courts lacked jurisdiction over count 3, the judgment the court purported to enter on that count is a legal nullity. (*People v. Vasilyan*, *supra*, 174 Cal.App.4th at p. 450.) We therefore reverse count 3 and direct the court to dismiss it upon remand.

1.3. California had jurisdiction over counts 4–8 and 16–17 because defendant committed sufficient preparatory acts in this state.

Unlike count 3, however, we conclude California courts had jurisdiction over counts 4–8 and 16–17. There is ample evidence that defendant possessed the intent to molest C.R. and T.C. while

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He never called anybody that we know of. He never drove down there in order to pick up C.R. She was driven up by, I believe, a guardian. And then she was picked up and driven back down into California by a guardian. So there is very little actually specific jurisdictional requirements that have been met for count 3."

he was in California before he brought the girls to Nevada, and there is substantial evidence that in furtherance of that intent, he committed "any act" in California that "culminate[d]" in the Nevada offenses. (§ 778a, subd. (a); see *Betts*, *supra*, 34 Cal.4th at pp. 1055–1056.)

Counts 4–8 occurred in Nevada on or between May 18, 2012, and June 27, 2013. On May 17, 2012, the Riverside County family court granted defendant custody of C.R. That day, defendant picked her up from her foster home in Riverside County and drove her back to his Nevada apartment. The next evening, defendant forcibly sodomized C.R. Her resulting injuries caused her to miss school. (Count 4.) The same thing happened the next night—and almost every night thereafter until C.R. turned 13 years old on June 28, 2012. (Count 5.) A week or two after C.R.'s 13th birthday, defendant raped her vaginally. (Count 6.) Then, over the course of the next several months, defendant forced C.R. to orally copulate him approximately four times. (Count 7.) Indeed, when C.R. was 13 and 14 years old, defendant "would have anal, vaginal, or oral sex with her almost every day if he could—except when she was" menstruating. (Count 8.) She also miscarried at least twice during this period.

Counts 16 and 17 occurred in August 2012, when T.C. spent two weeks in Nevada with defendant and her half-sister C.R. to celebrate her 10th birthday. About a week before the trip, defendant went to T.C.'s house in Riverside County to discuss the trip with T.C.'s foster mother. Defendant, a friend, and C.R. then picked T.C. up from her foster home to drive her back to Nevada. Before they got on the road, they spent a few hours sitting in the living room and talking with T.C.'s foster family. Two or three days after T.C. arrived in Nevada, defendant inserted his finger

into her vagina. Defendant repeatedly inserted his finger into T.C.'s vagina for the rest of her stay. One night towards the end of T.C.'s birthday trip, defendant came into the bedroom, woke her up, and said, "I can't wait until I see you again, because I want to do it to you again." After a fortnight, defendant and C.R. drove T.C. home to Riverside County as scheduled.

The timing of defendant's unrelenting assaults on C.R., which began within a day of her move to Nevada, support the court's conclusion that he possessed the necessary intent while in California—and his acts of using the Riverside courts to secure custody of C.R. and personally driving her from California to Nevada are sufficient preparatory acts to establish California's jurisdiction over his subsequent crimes. (See *Betts*, *supra*, 34 Cal.4th at pp. 1055–1056.) Defendant's assault on T.C., which like his attacks on C.R., began within days of reaching Nevada, indicate defendant intended to molest her while arranging her trip to Nevada—especially when combined with his years-long abuse of other members of her family at her age. There is also sufficient evidence that he initiated his plan while still in California. Defendant's pre-trip visits to T.C.'s foster mother increased the likelihood that she would allow him to take T.C. out of state for two weeks, and driving T.C. to his Nevada apartment ensured he would have direct access to her.

"These acts were not merely de minimus; they furthered the completion of the charged offenses by removing the girls from the protection of their [guardians] and providing defendant with opportunities to be alone with each of them. Both of the victims were California residents, and California has a legitimate interest in protecting its residents from criminal conduct." (*Betts*, *supra*, 34 Cal.4th at p. 1056.) Moreover, in C.R.'s case, California

has a compelling interest in preventing its courts from unwittingly facilitating the sexual abuse of children. And in T.C.'s case, California has an important interest in protecting the children in its dependency system.

1.4. Venue

While territorial jurisdiction "implicate[s] the authority of the court to consider and decide the criminal action," "venue merely establishes the appropriate place for trial and does not 'implicate the trial court's fundamental jurisdiction in the sense of subject matter jurisdiction, which is the authority of the court to consider and decide the criminal action itself.' [Citation.]" (*Betts*, *supra*, 34 Cal.4th at p. 1049.)

"Traditionally, venue in a criminal proceeding has been set … in the county or judicial district in which the crime was committed. Under the provisions of … section 777, that continues to be the general rule in California." (*People v. Simon* (2001) 25 Cal.4th 1082, 1093–1094, fn. omitted.) That statute provides in part: "*except as otherwise provided by law*, the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed." (§ 777, italics added.) Accordingly, "under section 777[,] the county in which a felony was committed is, in the absence of another statute, the locale designated as the place for trial." (*Simon*, *supra*, at p. 1094.) Section 784.7 is an exception to this general rule.

Under section 784.7, subdivision (a), if "more than one violation of Section … 261, 262, 264.1, 269, 286, 288, 288a, 288.5, 288.7, or 289 occurs in more than one jurisdictional territory, the jurisdiction of any of those offenses, and for any offenses properly joinable with that offense, is in any jurisdiction where at least one of the offenses occurred, subject to a [joinder] hearing,

pursuant to Section 954, within the jurisdiction of the proposed trial. At the Section 954 hearing, the prosecution shall present written evidence that all district attorneys in counties with jurisdiction of the offenses agree to the venue. Charged offenses from jurisdictions where there is no written agreement from the district attorney shall be returned to that jurisdiction."

In this context, *jurisdictional territory* refers to the geographic area in California—the county—in which the court sits, not to the state as a whole. (§ 691, subd. (b); *Betts*, *supra*, 34 Cal.4th at p. 1057, fn. 12.) Thus, the requirement that the prosecution obtain permission from "all district attorneys in counties with jurisdiction of the offenses" refers to California's district attorneys. The prosecution was not required to obtain permission from the District Attorney of Clark County, Nevada—who has no authority to act on behalf of the People of the State of California and no power to determine the jurisdiction of California courts. (See Gov. Code, § 100, subds. (a) ["The sovereignty of the state resides in the people thereof, and all writs and processes shall issue in their name."], (b) ["The style of all process shall be 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority."]; Gov. Code, § 26500 ["The district attorney is the public prosecutor …. [¶] The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses."]; § 691, subd. (d) ["The words 'prosecuting attorney' include any

attorney … having by law the right or duty to prosecute, on behalf of the people, any charge of a public offense."].)[5]

Here, venue in Los Angeles was proper for counts 4–8 and 16–17. The prosecution produced a letter from the Riverside County District Attorney agreeing to the prosecution of these counts in Los Angeles County.[6] The letter referred to "violations of Penal Code §§ 269(a)(1) [count 6], 269(a)(4) [count 7], 288.5(a), 286(c)(1) [count 4], and 288(a) [counts 5 and 8], involving victim C.R." and to "violations of Penal Code section 288.7(b) [counts 16 and 17] involving victim [T.C.] … ." The letter also noted that "[a]ll of these acts were committed on and between May 18, 2012 and June 27, 2013."[7]

As these counts were properly joined with counts 1, 11, and 13–15, all of which occurred in Los Angeles County, venue was proper. (§ 954; see, e.g., *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1108–1114 [non-identical sex offenses, including those

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[5] Indeed, were we to read *jurisdictional territory* as defendant suggests, section 784.7, a venue statute, would implicitly subsume California's state jurisdiction statutes by allowing courts to assume jurisdiction over crimes committed wholly outside California as long as a prosecutor in the other state consented. We decline to hold that the Legislature surreptitiously expanded state jurisdiction in this manner.

[6] The People insist we should disregard this letter because it "was not included in the record on appeal." To the contrary, all exhibits are part of the normal record on appeal in a criminal case (Cal. Rules of Court, rule 8.320(e))—and the letter was admitted as an exhibit and properly transmitted to this court (*id.*, rule 8.224).

[7] Although Riverside did not cede venue to Los Angeles for count 3 (§ 288.7, subd. (a)), we need not address the effect of the omission because California lacked jurisdiction over that count.

occurring in different jurisdictions, are of the same class of crimes and may be joined together for trial].)

2. Defendant's conviction for continuous sexual abuse (count 12) is unauthorized.

Defendant contends his conviction for count 12 violates section 288.5, subdivision (c) (hereafter section 288.5(c)), which prohibits dual convictions for continuous sexual abuse and additional sex offenses involving the same victim during the same period. While conceding this case was prosecuted in violation of section 288.5(c), the People maintain defendant forfeited his right to invoke that provision because he did not demur to the charges below. We reject this forfeiture argument and reverse count 12.

As set forth above, count 12 charged defendant with continuous sexual abuse of P.B. in violation of section 288.5, subdivision (a). That provision was enacted to allow the prosecution of resident child molesters in cases in which the victim, because of his or her age, is unable to remember the exact date or place of the charged acts. (*People v. Johnson* (2002) 28 Cal.4th 240, 242 (*Johnson*).) But section 288.5 also "imposes certain limits on the prosecution's power to charge both continuous sexual abuse and specific sexual offenses in the same proceeding." (*Johnson*, at p. 243.) As relevant here, section 288.5(c) provides that when the defendant is charged with continuous sexual abuse of a child, "[n]o other act of substantial sexual conduct [including sexual intercourse or lewd acts] ... involving the same victim may be charged in the same proceeding ... unless the other charged offense occurred outside the time period [alleged with respect to the continuous sexual

abuse charge] ... or the offense is charged in the alternative." (§ 288.5(c).)

Here, the People concede that under the plain language of section 288.5(c), counts 11, 13, 14, and 15 should have been charged as alternatives to count 12 because they were all alleged to have occurred against the same victim (P.B.) during the same period (August 10, 1996–August 10, 2000).[8] Nevertheless, the People argue defendant is not entitled to relief.

The People contend defendant forfeited this issue by failing to demur to the information because, on its face, the information "contain[ed] matter which, if true, would constitute a ... legal bar to the prosecution." (§ 1004, subd. 5; see § 1012 [except for lack of jurisdiction and failure to state a public offense, "any ... objection[ ] mentioned in Section 1004 ... can be taken only by demurrer, and failure so to take it shall be deemed a waiver thereof"].) In so arguing, the People rely on *People v. Goldman* (2014) 225 Cal.App.4th 950 (*Goldman*), which that held a violation of section 288.5(c) is a pleading defect that must be challenged by demurrer to preserve the issue for appeal. (*Goldman*, at pp. 956–957.) We find *Goldman* unpersuasive.

First, *Goldman* is factually distinguishable from this case. There, the information alleged only a one-month overlap between the period covered by the continuous sexual abuse and that of the specific sexual offense. (*Goldman*, *supra*, 225 Cal.App.4th at p. 955.) Here, the period alleged in count 12 entirely subsumed all the periods alleged in counts 11, 13, 14, and 15. Moreover, as

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[8] Count 14 charged aggravated sexual assault of a child by rape (§ 269, subd. (a)(1)). Counts 11, 13, and 15 charged lewd act on a child (§ 288, subd. (a)).

the People themselves point out, the prosecutor in this case amended the information over defense objection to lengthen the period alleged in count 12, thereby ensuring it included the periods alleged in the other counts. While most of the discussion occurred off the record, it appears the prosecutor did so to avoid dismissal of that count under section 995. The defect in *Goldman* could have been easily corrected by amendment: the same is not true in this case.

Second, we note that the People did not amend the information until the first day of trial. Defendant was not arraigned on the amended information and did not enter a plea to the amended count 12. But as the demurrer statute only allows a defendant to "demur to the accusatory pleading at any time *prior to the entry of a plea*," it is not obvious to us that defendant **could** have demurred to the amendment even if he had wanted to. (§ 1004, italics added.)

Third, section 288.5(c) is not merely a "charging prohibition." (*Goldman*, *supra*, 225 Cal.App.4th at p. 956.) As the Supreme Court has explained, by prohibiting multiple charges, the statute also prohibits multiple *convictions* for continuous sexual abuse of a child (§ 288.5, subd. (c)) and for discrete sexual offenses, including lewd acts, rape, oral copulation, and other substantial sexual conduct underlying the continuous sexual abuse conviction. (*Johnson*, *supra*, 28 Cal.4th at pp. 247–248; *People v. Bautista* (2005) 129 Cal.App.4th 1431, 1436 [interpreting *Johnson* as precluding multiple *convictions* under those circumstances]; *People v. Torres* (2002) 102 Cal.App.4th 1053, 1055 [same]; *People v. Rojas* (2015) 237 Cal.App.4th 1298, 1308–1309 [same].) Since defendant is challenging his underlying

convictions as violating section 288.5(c), the forfeiture rule does not apply.[9]

Fourth, the forfeiture rule generally does not apply when the alleged error involves a pure question of law that can be resolved on appeal without reference to a record developed below. (§ 1259 [reviewing court "may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, [or] instruction"]; *People v. Williams* (1999) 21 Cal.4th 335, 339–340, 341 [defendant can raise bar of statute of limitations at any time even without an objection to the charging document because statute confers a substantive right].) To the extent *Goldman* precludes a defendant from challenging multiple convictions that cannot legally stand under *Johnson*—as well as the unauthorized sentences imposed for those convictions—we disagree with that court's conclusion.[10]

Instead, we agree with our colleagues in Division Five, who rejected the People's demurrer argument in an analogous matter and held that the defendant's failure to demur "does not justify a multiple conviction that is improper as a matter of law." (*People v. Shabtay* (2006) 138 Cal.App.4th 1184, 1192 [defendant could challenge unauthorized theft conviction on appeal despite failing

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[9] As such, the People's reliance on *People v. Alvarez* (2002) 100 Cal.App.4th 1170 is misplaced. The defendant in that case was not impermissibly convicted of both individual and continuous sexual abuse charges as defendant was here. Instead, our colleagues in Division Two simply held that the defendant, by failing to demur, waived any claim that the People improperly *proceeded to trial* on all of the offenses before later seeking an election. (*Id.* at pp. 1176–1178.)

[10] We note that our research has not revealed any case that follows *Goldman* on this point.

to demur below].) "Where, as here, we conclude as a matter of law that multiple convictions are not authorized, the issue may be raised on appeal even in the absence of an objection in the trial court. [Citation]." (*Ibid.*)

The parties agree, as do we, that the remedy for the section 288.5 violation is to reverse defendant's continuous sexual abuse conviction in count 12 because that count carries the least punishment. (*People v. Torres*, *supra*, 102 Cal.App.4th at pp. 1059–1060.)

3. Ex Post Facto Clause

The People concede—and we agree—that the multiple-victim findings (§ 667.61, subds. (b), (e)) for counts 2, 6, 7, 14, 16, and 17 and the one-strike sentence imposed for count 2 violate the ex post facto clauses of the United States and California Constitutions.[11] We therefore vacate defendant's sentence and remand for resentencing. (*People v. Navarro* (2007) 40 Cal.4th 668, 681 [where resentencing is required for some counts "remand for a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances"].) We direct the court, upon resentencing, to strike the multiple-victim findings for counts 2, 6, 7, 14, 16, and 17 and to sentence defendant to an authorized determinate term for count 2.

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[11] While the parties agree count 12 also violates the ex post facto clause, we need not address the error because that count must be dismissed on dual conviction grounds. Nor do we address defendant's ex post facto claims for count 3, which must be dismissed on jurisdictional grounds.

Defendant also contends the one-strike sentences imposed for counts 3, 6, 7, 14, 16, and 17 violate the ex post facto clause. The People argue the indeterminate sentences imposed for these counts were proper because the court sentenced defendant under the statutes themselves rather than under the One Strike law. We agree with the People. When defendant violated section 288.7, subdivision (b) (counts 16, 17), and section 269, subdivisions (a)(1) (counts 6, 14) and (a)(4) (count 7), those statutes provided for indeterminate sentences of 15 years to life. As such, the court's sentencing choices for those counts were proper.

3.1. Legal Principles

"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.' [Citations.] We interpret the California Constitution's ex post facto clause coextensively with its federal counterpart. [Citation.]

"We may correct an unauthorized sentence on appeal despite failure to object below. [Citation.] A sentence is unauthorized if 'it could not lawfully be imposed under any circumstance in the particular case.' [Citation.]" (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1173 (*Valenti*).)

3.2. The indeterminate sentence for count 2 violates the ex post facto clause.

"Enacted in 1994, California's One Strike law, section 667.61, requires indeterminate life sentences for enumerated sex offenses committed under certain aggravating circumstances.

(§ 667.61, subd. (b).) Effective September 20, 2006, the One Strike law was amended to apply to defendants convicted of continuous sexual abuse of a child (§ 288.5). (Stats. 2006, ch. 337, § 33, p. 2639.) However, before 2006, section 288.5 was not a one-strike offense. (See Stats. 1994, 1st Ex. Sess. 1993–1994, ch. 14, § 1, p. 8570; Stats. 1997, ch. 817, § 6, p. 5575; Stats. 1998, ch. 936, § 9, p. 6874.) The indeterminate life sentences now prescribed by section 667.61 greatly exceed the determinate sentences of 6, 12, or 16 years previously available for violations of section 288.5. Thus, the ex post facto clause prohibits sentencing defendants under the One Strike law for section 288.5 violations committed before September 20, 2006. [Citation.]" (*Valenti*, *supra*, 243 Cal.App.4th at p. 1174, fn. omitted.)

Here, the jury convicted defendant of continuous sexual abuse of a child (§ 288.5, subd. (a); count 2) and found the multiple-victim allegation true (§ 667.61, subds. (b), (e)). The prosecutor requested, and the court imposed, a consecutive term of 15 years to life under the One Strike law. But count 2 involved conduct that occurred entirely before the law was amended in 2006.[12] Defendant argues, and the People concede, that because this crime could not have occurred after the 2006 amendment to section 667.61, the one-strike sentence imposed for that count is unauthorized. (*Valenti*, *supra*, 243 Cal.App.4th at p. 1175.) We agree. We therefore vacate defendant's sentence, strike the true finding on the multiple-victim allegation, and remand for the court to impose a determinate sentence of 6, 12, or 16 years for count 2. (*People v. Riskin* (2006) 143 Cal.App.4th 234, 246.)

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[12] Count 2 was alleged to have occurred between June 28, 2005, and June 27, 2006.

3.3. The multiple victim findings must be stricken because they violate the Ex Post Facto clause.

The parties agree that the jury's true findings on the multiple-victim allegations (§ 667.61, subds.(b), (e)) must be stricken because they could not be attached to the charged crimes in counts 2, 4, 6, 7, 14, 16, and 17. We agree. The offenses underlying those counts could not trigger the One Strike law (§ 667.61) because they are not enumerated in the statute. We therefore order the court to strike those enhancements upon resentencing.

3.4. The indeterminate sentences for counts 6, 7, 14, 16, and 17 were proper.

At sentencing, the trial court imposed consecutive indeterminate life terms for counts 6, 7, 14, 16, and 17. The court explained that "in exercising its discretion, it will elect, on counts 3, 6, 7, 14, 16, and 17, to impose the life sentence applicable to the substantive charge[.] [¶] Count 3 would be 25 to life, and counts 6, 7, 14, 16, and 17 would all be 15-to-life." Defendant challenges these sentences under the ex post facto clause because sections 288.7 and 269 were not part of the One Strike law when he committed them. But the court did not sentence defendant under the One Strike law: it sentenced him under the statutes themselves. The proper question, then, is what punishment the individual statutes required when defendant violated them.

The Legislature enacted section 269 in 1994. (Stats. 1993–94, 1st Ex. Sess., ch. 48, § 1.) As enacted, the statute provided that anyone who committed an enumerated offense against a child under age 14 or at least seven years younger than the perpetrator was subject to an indeterminate term of 15 years to life. (§ 269.) Among the enumerated acts were rape, as alleged in

counts 6 and 14 (*id.*, subd. (a)(1)), and oral copulation, as alleged in count 7 (*id.*, subd. (a)(4)). Here, defendant committed count 6 on or between June 28, 2012, and July 28, 2012. He committed count 7 on or between June 28, 2012, and June 27, 2013. And he committed count 14 on or between August 10, 1998, and August 9, 1999. Because defendant committed all three crimes after the statute's 1994 effective date, his sentences do not violate the ex post facto clause.

Defendant was convicted of violating section 288.7 in counts 16 and 17. Since its enactment in 2006, section 288.7, subdivision (b), has provided for a mandatory prison term of 15 years to life. (Stats. 2006, ch. 337, § 9.) Defendant committed count 16 on or between August 2 and 3, 2012. He committed count 17 on or between August 4, 2012, and August 31, 2012. Because defendant committed these crimes after the statute's enactment in 2006, his sentences do not violate the ex post facto clause.

DISPOSITION

Counts 3 and 12, their related allegations, and the multiple-victim allegations (§ 667.61, subds. (b), (e)) for counts 2, 4, 6, 7, 14, 16, and 17 are reversed and may not be retried. Defendant's sentence is vacated and the matter is remanded for resentencing consistent with the views expressed in this opinion. In all other respects, the judgment is affirmed.

Upon resentencing, the court is directed to vacate defendant's convictions on counts 3 and 12 and dismiss those counts; strike the jury's true findings on the multiple-victim allegations for counts 2, 3, 4, 6, 7, 12, 14, 16, and 17; prepare an abstract of judgment that fully delineates all fines, fees, and penalty assessments; and send a certified abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.