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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE DUARTE, Defendant and Appellant.	B247879 (Los Angeles County Super. Ct. No. BA386015)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed in part and reversed in part with directions.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Kimberley J. Baker-Guillemet, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Jose Duarte, appeals his conviction for lewd and lascivious acts on a child under 14 (15 counts), lewd and lascivious acts on a child 14 or 15 (5 counts), and exposing a minor to harmful matter (5 counts), with a multiple victims enhancement (Pen. Code, §§ 288, subds. (a) & (c)(1), 288.2, subd. (a)(2), 667.61, subd. (c)).[1] He was sentenced to state prison for a term of 225 years to life, plus 5 years 8 months.

The judgment is affirmed in part and reversed in part.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

a. *Rigoberto G.*

Rigoberto G. had been playing soccer since he was four or five years old and he wanted to be a professional soccer player when he grew up. Defendant Duarte saw Rigoberto playing soccer one day when he was in the fifth or sixth grade and invited him to play on the team Duarte coached. Rigoberto's mother, Aida, a single parent with five children, did not own a car so Duarte offered to drive Rigoberto to practices and games in his minivan. At first, Duarte's wife and son accompanied him when he picked up Rigoberto for practice, but after a while Duarte started doing it himself. Because Aida did not have much money, Duarte offered to pay for Rigoberto's soccer league fees. He also provided Rigoberto with a soccer uniform, cleats and other equipment. At one point, Aida noticed Rigoberto was coming home with presents from Duarte. When she asked about it, Rigoberto said Duarte had given him these presents for being such a good soccer player.

Rigoberto testified that one evening, when he was in the sixth grade, it was cold after soccer practice and Duarte invited him to get into the minivan. Duarte talked to Rigoberto about women for a while and then told him to recline the passenger seat.

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

When Rigoberto did so, Duarte touched Rigoberto's penis underneath his clothes while telling him "that's the way a woman would start to touch" him. Rigoberto felt scared. Duarte masturbated Rigoberto for 20 minutes, stopping abruptly when some soccer players from another team walked past the van.

Another time, Duarte's van was inside the parking garage of his apartment building. Duarte told Rigoberto to lean back in his seat, started touching Rigoberto's penis and then put his mouth on Rigoberto's penis. Duarte put condoms on himself and Rigoberto, knelt down in front of Rigoberto, and told him to put his penis into Duarte's rectum. Duarte used his hand to guide Rigoberto's penis. Rigoberto testified:

"Q. Rigo, what were you thinking in your mind as your coach was doing that to you?

"A. I felt scared and I didn't like it.

"Q. Did you feel like you had to do what he said?

"A. I felt that he was telling me to do it, but I didn't want to do it.

"Q. Up until that point had you ever disobeyed anything your coach had told you?

"A. I don't think so."

After Rigoberto ejaculated, Duarte told him to switch positions, and that "he was going to do the same to me." Duarte inserted his penis into Rigoberto's rectum and ejaculated. Duarte then "took a roll of paper and he cleaned himself and put the condoms in a paper sack." Duarte put the paper sack inside a plastic bag and put the plastic bag on the floor of the van.

Aida testified that on several occasions she smelled alcohol on Rigoberto's breath when he came home from soccer and he was chewing gum to cover up the smell. When she tried to confront Rigoberto about this, he avoided her. Rigoberto testified Duarte took him and some of his teammates to a store and purchased liquor on Rigoberto's 13th birthday. Duarte gave some of the liquor to Rigoberto. Before dropping him off at home, Duarte gave him mint gum to hide the alcohol smell.

One time at Duarte's apartment, he showed Rigoberto and a teammate named Joseph pornographic films on his computer. Once during soccer practice, a teammate

named Roberto told Rigoberto that "he didn't like practicing," meaning "sex practice." Once when Rigoberto was taking a shower at Duarte's apartment after a soccer tournament, he saw Duarte and a teammate named Mario naked in Duarte's bedroom.

Aida testified about an incident when Duarte had her pull Rigoberto out of his sixth grade class so he could be evaluated by a Brazilian soccer team: "[Duarte] told me that the Brazilian trainers were coming and that was the last day that they were going to see [Rigoberto] playing. I told him that the boy was in school. He said the boy needs to get out of school, come out of school because it's the last chance that the team from Brazil would be there. [¶] And he showed me a flier where . . . you see the trainers. And he gave me a ride to the school to pull my son out. I pulled my son out, telling them that he had a doctor's appointment. [¶] When my son came out, he asked me, 'What's going on, mom?' [¶] And I told him, 'Coach Jose is telling me that they're going to see you training today and this is the last chance.' " Duarte drove Aida home and then took Rigoberto to his apartment. Rigoberto later told Aida "he was never taken to be seen by the Brazilian team." Rigoberto testified there was no one else at Duarte's apartment when they arrived. Duarte led him into the bedroom, saying they "were going to practice. But it was not a soccer practice, it was just to practice how to have sex with a woman." Duarte gave Rigoberto half a glass of wine mixed with Red Bull energy drink. Rigoberto drank some of it and felt dizzy. Duarte put on a pornographic movie and Rigoberto saw images of naked men and women having sex. Duarte lowered Rigoberto's pants and sucked on his penis. Duarte then placed a condom on Rigoberto's penis and told him to lie down. Duarte lay down next to him and inserted his penis into Rigoberto's rectum. Duarte ejaculated and then asked Rigoberto to put his penis into Duarte's rectum. Rigoberto did so and ejaculated. Duarte then told Rigoberto to send a text message to a teammate named Frankie asking if he "wanted to be picked up so that he could come to practice. But it was practice about how to be with a woman, it wasn't anything about soccer." Frankie responded to the text message and later went into the bedroom with Duarte, who closed and locked the door.

When Aida occasionally disciplined Rigoberto by not letting him go to soccer practice, Duarte would call her up and tell her to punish Rigoberto some other way, but not to restrict his soccer playing.

In June 2011, Rigoberto came crying to Aida and "told [her] 'Pull me out of the football team,' because his coach was taking him to his house and he was touching his parts and he was putting on pornographic movies." Rigoberto testified he had decided to tell his mother about what had been happening because he was "really scared by then" and he "felt really bad for the rest of the boys."

Aida took Rigoberto to the police station that same night. She testified these events had been "very hard for us. [Rigoberto's] behavior has changed completely. He's become very aggressive. The whole family has just deteriorated. It's very painful." Rigoberto received psychological counseling in the aftermath of these events.

b. *Mario R.*

Mario R. had been playing soccer since he was eight years old. His neighbors, Frankie and Roberto, played on the USA Soccer Team, which was coached by Duarte. Mario began playing on Duarte's team when he was in the sixth grade.

Duarte started inviting Mario over to his apartment. At first, Mario played video games with Duarte's son in the living room. Other members of the soccer team were sometimes present; Mario remembered seeing Robert, Frankie, Steven, Joseph and Rigoberto at Duarte's apartment.

One day at the apartment, Duarte led Mario into the bedroom and locked the door. An adult pornographic film was playing on the television. Mario got an erection while watching the film. Duarte touched Mario's erect penis over his clothes. Mario asked what he was doing and tried to stop him. Duarte then touched Mario's penis under his clothes. Duarte took Mario's pants off and sucked on his penis. Duarte put a condom on Mario and lubricant on the inside of his own rectum. Duarte lay down on his bed and had Mario put his penis into Duarte's rectum. Duarte then put his penis into Mario's rectum, which was painful.

Mario testified this kind of sexual activity occurred more than five different times inside Duarte's bedroom, and once inside Duarte's minivan in the parking garage. In the van, Duarte put condoms on himself and Mario, and then made Mario put his penis into Duarte's rectum. Afterward, Mario cleaned himself with paper which Duarte placed in a black bag. Duarte put the condoms in the trash. He said the sexual activity would make Mario's penis grow bigger. Mario saw other teammates go into the bedroom with Duarte.

Duarte would buy Mario and other team members soccer supplies. Duarte also bought Mario food and gave him money. Mario did not tell anyone what was going on because he was afraid he would be blamed for it. When the police first questioned him, Mario was scared and he denied Duarte had done anything. Eventually he told the police what had happened and he started going to therapy.

c. *Roberto M.*

Roberto M. started playing on Duarte's soccer team in the fifth grade, when he was ten years old. When he was in the sixth grade he started going to Duarte's apartment. At first he just played X-Box with Duarte's son or watched soccer games on television. Toward the end of sixth grade, Duarte began molesting him. The first time it happened, he called Roberto into his bedroom, locked the door and showed him a pornographic film. Roberto got an erection and Duarte touched his penis over his clothing. Duarte said touching Roberto's penis would give Duarte good luck at the casino. The second time, Duarte performed oral sex on Roberto until Roberto ejaculated. The third time, Duarte put a condom on Roberto and had Roberto insert his penis into Duarte's rectum. Then Duarte took the condom off and performed oral sex on Roberto until he ejaculated.

Roberto recalled Mario going into Duarte's bedroom one time. Duarte would buy Roberto and his teammates soccer cleats and take them out to eat. He also gave them alcohol. He once gave margaritas to Roberto, Mario and Steven while they were watching a soccer game in Duarte's living room. Nothing sexual happened that day. Another time he took Roberto, Frankie, Mario, Joseph and Rigoberto shopping for shoes.

On the way to the store, Duarte passed around alcohol and told them to take sips. He said the shoes were like "thank you gifts" for "him doing sexual acts on us."

Duarte abused Roberto six or seven times until February 2011, when Roberto was 13. He continued playing on the soccer team thereafter, but whenever Duarte invited him to the apartment he would make up an excuse not to go. Roberto never reported the abuse while it was happening because he was embarrassed. But when the police interviewed him, Roberto admitted what had happened.

d. *Frankie C.*

Frankie C. began playing on Duarte's soccer team when he was in the sixth grade. At first his parents drove him to practice and games, but as he got older Duarte began giving him rides. When Frankie was 13 or 14, Duarte began taking him and other players to his apartment so they could play video games with Duarte's son.

Frankie was playing with Duarte's son in the living room one day when Duarte had him come into the bedroom. Duarte put on a pornographic movie and touched Frankie's penis over his clothes. Then he touched Frankie's penis under his clothes until Frankie ejaculated. Two months later, the same thing happened again. On a third occasion, Duarte masturbated Frankie under his clothes, pulled Frankie's shorts down and orally copulated him until Frankie ejaculated.

While this abuse was going on, Duarte would buy Frankie food, soccer balls and soccer cleats. Duarte once gave him margaritas while they were watching television at the apartment. Frankie saw Steven go into Duarte's bedroom once. Frankie told the police Duarte had been abusing him.

e. *Steven C.*

Steven C. played on Duarte's soccer team between the ages of 9 and 14. When Steven was 13 or 14, Duarte would ask him to come over to his apartment to help him write letters in English to various soccer clubs. Steven also went over to the apartment to play X-Box with Duarte's son. Steven sometimes saw Roberto and another soccer player go into Duarte's bedroom. Duarte gave Steven, Roberto and Frankie margaritas several times.

One time Steven walked into Duarte's bedroom to use the bathroom. He saw pornography playing on the television, a black grocery bag full of condoms on the bed, and a rubber vagina on the dresser. Duarte once tried to molest Steven while they were in the minivan and, from then on, Steven rode in the back seat. He saw Duarte bring the bag of condoms from his apartment down to a storage locker in the parking garage and, from there, put the bag into his van. One time Duarte tried to take off Steven's belt; Steven pushed his hand away but Duarte still managed to grope his testicles through his clothing. After that, Steven kept away from Duarte and made up excuses why he could not help Duarte write the English letters anymore.

f. *Joseph H.*

Joseph H. joined Duarte's soccer team when he was 11. Duarte would drive him to and from practice in his van. Mario, Rigoberto, Roberto and Frankie would also be in the van. Duarte bought them shin guards, soccer balls, gloves and t-shirts. He also gave them food and money. Once while driving Joseph and other players in the van, Duarte passed around a bottle of alcohol for them to take sips. Another time, when Joseph was 13, Duarte grabbed his penis while they were in the van. Duarte had a big smile on his face and appeared to be enjoying himself. Joseph visited Duarte's apartment four times; some of his teammates would also be there. Once, while Joseph and Mario were watching television in the living room, Duarte was sitting at his computer and he called them over to see pornography playing on the screen. Joseph left the soccer team three months later.

g. *Arrest and investigation.*

After interviewing Rigoberto, the police arrested Duarte on June 27, 2011.

Detective Chris Merlo interviewed Duarte's son, who said his father had never sexually or physically abused him. He said Duarte sometimes played pornographic movies on the television and that he had shown them to the soccer players between five and ten times. Several times Duarte showed the movies to one player at a time in his bedroom; Duarte would go into the bedroom with the player and lock the door. Duarte's son remembered Frankie, Roberto, Rigoberto and Mario going into the bedroom alone

with his father on separate occasions. He did not think his mother, who worked from 6:00 a.m. until 3:00 p.m. Monday through Friday, and sometimes on weekends, was aware Duarte had been showing his soccer players pornographic films.

Criminalist Bethany Streiffert removed various items from Duarte's minivan. Inside a plastic bag there were three pornographic DVDs, paper towels, used condom wrappers, a white napkin, two tubes of lubricant, and two used condoms wrapped in tissue. Stains were found on carpets on the floor of the van, beneath the middle and back rows of passenger seats.

Criminalist Forrest Yumori performed DNA analysis on items taken from the van. Duarte's DNA was found on the first used condom and Mario R.'s DNA was found on the second used condom. The napkin contained a DNA mixture, with the major profile belonging to Rigoberto G. and an incomplete profile from an unknown second contributor. On the fabric from the van's carpet, Yumori found sperm containing Duarte's DNA profile.

Nurse Examiner Elizabeth Tighe worked at the U.C.L.A. Sexual Assault Clinic as part of the sexual assault response team (SART). In connection with the police investigation, she conducted physical exams of Roberto and Mario pursuant to California's protocol for pediatric sexual assault examinations, a protocol which includes taking a patient history.

Tighe examined Roberto on July 6, 2011. Roberto said he and Duarte had anally penetrated each other, and that Duarte had fondled his genitals and orally copulated him over a one-year period. The last incident took place in February 2011. The abuse usually occurred in Duarte's bedroom. Duarte would use "lube" and "put on pornography in his room during the incidents." Duarte sometimes ejaculated into a condom, onto himself, or into Roberto. Sometimes Roberto would ejaculate into Duarte's mouth. The physical exam results were within normal limits and there was no evidence of genital injury. Tighe noted Roberto was "quiet and occasionally teary-eyed" during the examination.

Tighe examined Mario on July 7, 2011. Mario reported Duarte had anally penetrated him with his penis and his finger, and had orally copulated him. The anal

penetration was painful. Duarte would masturbate Mario "and then force [Mario] to anally penetrate [Duarte's] anus with [Mario's] penis." This abuse took place on a weekly basis before soccer practice over the course of about a year and a half, the last incident having occurred four weeks before Tighe's examination. Mario said Duarte used lubricant and would sometimes ejaculate into a condom or onto the bed. Mario said Duarte "would have pornography on in his room during the incidents." Mario's physical exam results were within normal limits with no signs of genital injury.

Tighe testified these physical findings – within normal limits and showing no signs of physical trauma – were consistent with the reported abuse. She explained the anal opening normally stretches to accommodate the passing of stool. In addition, Duarte used lubricant, which made it less likely there would be any resulting injury. Even if there had been small splits or tearing at the anal opening immediately after the abuse, such injuries would have healed by the time the physical exams were conducted.

Tighe also peer-reviewed reports prepared by her colleagues, Dr. Elliot Shulman and Madeline Finkelstein, who conducted the pediatric sexual assault examinations of Frankie and Rigoberto. Shulman was an attending physician at the U.C.L.A. Sexual Assault Clinic and Finkelstein was a nurse practitioner there. Frankie told Dr. Shulman that Duarte had masturbated and orally copulated him, but there had not been any anal intercourse. Dr. Shulman found that Frankie's physical exam results were within normal limits and consistent with the history Frankie had given. Tighe would not expect to find any visible injury from that kind of sexual contact.

Rigoberto reported to Finkelstein that Duarte had anally penetrated him, orally copulated him, fondled his genitals and forced Rigoberto to anally penetrate Duarte. He said Duarte had used lubricated condoms. Rigoberto reported he had experienced pain in association with the anal penetration, but no bleeding. Duarte showed Rigoberto pornographic films multiple times and said "he would not be able to play on the team unless he . . . performed the acts." Finkelstein concluded Rigoberto's physical exam results were within normal limits, which was consistent with the history he had provided. Tighe agreed the lack of physical injury was consistent with Duarte's use of lubricant.

2. *Defense evidence.*

Various witnesses testified to Duarte's good character and proper behavior around children.

CONTENTIONS

1. The trial court erred by allowing the SART nurse to testify about statements the complaining victims made during their physical examinations.

2. The trial court erred by refusing to give the jury CALCRIM No. 360, instructing that opinion basis testimony by an expert is not admitted for its truth.

3. There is no indication the trial court knew it had discretion to impose concurrent, rather than consecutive, sentences under the One Strike law (§ 667.61).

4. The trial court erred by failing to stay the sentences imposed on Duarte's convictions for furnishing harmful matter to a minor (§ 288.2) pursuant to the prohibition on multiple punishment (§ 654).

5. The trial court relied on improper factors when sentencing Duarte to consecutive terms for his section 288, subdivision (a), child molesting convictions.

6. A clerical error in the verdict must be corrected.

DISCUSSION

1. *The SART nurse's testimony was properly admitted.*

Duarte contends the trial court erred by allowing Elizabeth Tighe, the SART nurse, to testify about statements made by the complaining witnesses during their pediatric sexual assault examinations. He argues this testimony was irrelevant and violated the hearsay rule. This claim is meritless.

a. *Background*.

At a pretrial evidentiary hearing, defense counsel objected to having Tighe testify about statements four of the complaining witnesses made during their pediatric sexual assault medical examinations. Defense counsel argued the testimony would constitute hearsay and violate Duarte's confrontation clause rights. The trial court noted the SART exams were all "negative" and that the prosecutor intended to use Tighe's testimony to demonstrate genital injuries would not necessarily be expected in the circumstances

described by these patients. The trial court then ruled the testimony was proper because Tighe had relied on these patient statements in forming her expert opinion.

At trial, Tighe testified there were two reasons to conduct a medical examination following a report of sexual abuse: to collect evidence and to tend to the patient's medical needs. The exams are conducted according to a protocol established by the State of California. Children who report sexual abuse some time after it has allegedly occurred are given an anatomical examination, but not an exam intended to collect evidence because too much time has passed. That was the case here. Part of the protocol is to obtain an oral history from the patient about what occurred.

b. *Legal principles.*

Evidence Code section 801, subdivision (b), provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] . . . [¶] . . . Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." Evidence Code section 802 provides: "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."

"We have explained that '[a]n expert may generally base his opinion on any "matter" known to him, including hearsay not otherwise admissible, which may "reasonably . . . be relied upon" for that purpose. [Citations.] On direct examination, *the expert may explain the reasons for his opinions, including the matters he considered in forming them. However, prejudice may arise if,* " '*under the guise of reasons,*' " *the*

expert's detailed explanation " '[*brings*] *before the jury incompetent hearsay evidence*.' " ' [Citations.] In this context, the court may ' "exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value." ' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 137, italics added; see *People v. Gardeley* (1996) 14 Cal.4th 605, 618 [expert testimony may be premised on material not admitted into evidence if "it is material of a type that is reasonably relied on by experts in the particular field in forming their opinions" and the expert "can, when testifying, describe the material that forms the basis of the opinion"].)

"Relevant evidence is defined in Evidence Code section 210 to mean (in pertinent part) '. . . evidence . . . having any tendency in reason to prove or disprove any disputed fact . . . .' [¶] (2) This definition of relevant evidence is manifestly broad. Evidence is relevant when no matter how weak it is it tends to prove a disputed issue." (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843.)

c. *Discussion*.

Duarte contends Tighe's testimony should have been excluded because it amounted to irrelevant hearsay. He is wrong. The testimony was both relevant and subject to a hearsay exception.

Duarte argues, "The prosecutor proffered Tighe's testimony on the basis that it would explain to the jury that 'normal' findings of the SART exam were to be expected given the passage of time and that the normal findings were consistent with the histories of sexual abuse as reported. However, 'normal' findings are also equally consistent with no history of sexual abuse. . . . By Tighe's own admission the normal exam findings were meaningless, worthless, and irrelevant."

But as explained, *ante*, Tighe's testimony was proper because, under Evidence Code section 802, she could testify to otherwise inadmissible hearsay that she relied on in forming her expert opinion. These four complaining witnesses gave patient histories describing their sexual activity with Duarte, and based on these hearsay statements Tighe opined that the negative physical findings were not inconsistent with the boys having

been molested in the ways they said. Without these hearsay statements the strength of Tighe's expert opinion would have been diluted, which explains why her testimony was not irrelevant.[2]

There was no error in admitting this testimony.

2. *Refusal to instruct jury with CALCRIM No. 360 was not prejudicial.*

Duarte contends his convictions must be reversed because the trial court erred by denying a defense request to have the jury instructed with CALCRIM No. 360, regarding the proper use of an expert witness' reliance on extra-judicial statements. This claim is meritless.

CALCRIM No. 360 (Statements to an Expert) provides: " <Insert name> testified that in reaching (his/her) conclusions as an expert witness, (he/she) considered [a] statement[s] made by <insert name>. [I am referring only to the statement[s] <insert or describe statements admitted for this limited purpose>.] You may consider (that/those) statement[s] only to evaluate the expert's opinion. Do not consider (that/those) statement[s] as proof that the information contained in the statement[s] is true."

At the jury instruction conference, when defense counsel asked for CALCRIM No. 360, the trial court refused on the ground counsel had earlier failed to make a hearsay objection to Tighe testifying about the complaining witnesses' statements. The Attorney General acknowledges the trial court was mistaken because defense counsel had indeed made a hearsay objection. But, as the Attorney General also points out, there was no resulting prejudice because each of the four victims whose hearsay statements were referenced by Tighe – Rigoberto, Roberto, Mario and Frankie – testified at trial. Any error in not instructing the jury to disregard the complaining witness statements made to Tighe or the other medical personnel was, therefore, plainly harmless. (See *People v.*

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[2] For the same reasons, we reject Duarte's similar claim that Tighe's testimony violated due process "because it was non-evidence, proof of nothing, and unfairly disadvantaged appellant," and his assertion defense counsel was ineffective for not attacking Tighe's testimony at the pretrial evidentiary hearing as irrelevant. (See *People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091 [defense counsel "is not required to make futile motions or to indulge in idle acts to appear competent"].)

Smithey (1999) 20 Cal.4th 936, 972-973 [error in admitting testimony is harmless where the testimony is merely cumulative].)

Moreover, the evidence against Duarte was overwhelming. All of the alleged victims testified about the sexual abuse they suffered, testimony which was undisputed. In addition, there was DNA evidence corroborating Duarte's sexual activity with at least one of the victims in his van.

Duarte could not have been prejudiced by the failure to instruct the jury with CALCRIM No. 360.

3. *The trial court knew it had discretion under the One Strike law (§ 667.61).*

Duarte contends his case must be remanded to the trial court for resentencing because there is no indication in the record that the trial court understood it had discretion under section 667.61 to impose concurrent, rather than consecutive, sentences. This claim is meritless.

Duarte was convicted on 15 counts of child molesting (§ 288, subd. (a)) under the One Strike law (§ 667.61), for which the trial court sentenced him to 15 consecutive terms of 15 years-to-life. Duarte now argues this sentence must be vacated because "there is nothing on the record . . . from which it may be reasonably concluded that the trial court was aware it had the discretion to impose concurrent sentences rather than mandatory consecutive sentences." We cannot agree.

a. *Legal principles.*

"Section 667.61 requires the trial court to impose a life sentence when the defendant is convicted of an enumerated sexual offense and the People plead and prove one or more of the specified aggravating circumstances. [Citations.] When the People prove a single circumstance listed under section 667.61, subdivision (d) or at least 2 of the circumstances listed under subdivision (e), the term is 25 years to life; when only a single circumstance under subdivision (e) is proved, the term is 15 years to life. [Citation.] [¶] . . . A life sentence thus may be imposed for each current count to which an offense-related circumstance attaches, subject to the rules for consecutive sentencing

set forth in section 667.61, subdivision (g)." (*People v. DeSimone* (1998) 62 Cal.App.4th 693, 696-697.)

One of the "offense-related circumstances" is section 667.61, subdivision (e)(4), which covers the situation where "[t]he defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim." One of the offenses specified in subdivision (c) is section 288, subdivision (a) (lewd and lascivious act on a child). Duarte was convicted on 15 counts of violating section 288, subdivision (a). Section 667.61, subdivision (i) provides: "For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), . . . the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6." However, because section 288, subdivision (a), is specified in paragraph (8) of subdivision (c) of section 667.61, the imposition of consecutive terms was discretionary rather than mandatory.

b. *Discussion*.

At sentencing, the trial court said it had read and considered the parties' sentencing memoranda, which both referred to the court's discretion under section 667.61. The court also remarked it had conducted its own independent review of the case law. The trial court then said:

"Indicating or *recognizing that Penal Code Section 667.61 in this situation is a discretionary separate sentencing scheme*, I'm going to employ it as to counts 1, 2, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 22, 24, and 25. And I'm going to choose this sentencing scheme and impose sentences on those charges consecutively for the following reasons:

"Not only was each offense committed on a separate occasion which, of course, is the conduct that triggers employment of the sentencing scheme, and it demonstrates that the defendant is exactly the type of predator that was described in the *Valdez* case,[3] which was cited by both parties.

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[3] *People v. Valdez* (2011) 193 Cal.App.4th 1515.

"With the exception of count 22, which Joseph described as touching, each offense involved significant sexual acts, such as oral copulation and sodomy, both by the defendant on the victims and the victims on the defendant, and I think the callousness displayed by these types of sexual activities on young boys the ages of these boys renders these offenses particularly egregious, and I'm not going to accept the People's invitation to sentence some of these counts concurrently. I think they are all worthy of separate consecutive sentences, and I'm going to impose those.

"As to count 22, Joseph was a separate victim and was molested in a separate event, which, like all of the assaults in this case, the defendant took unusual advantage of his position of trust as it relates to Joseph." (Italics added.)

Duarte notes section 667.61, subdivision (i), provides: "For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), or in paragraphs (1) to (6), inclusive, of subdivision (n), the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6." Because child molesting without the use of force (§ 288, subd. (a)) is not within this definition, the trial court had discretion to impose either concurrent or consecutive sentences. To demonstrate the alleged error here, Duarte cites *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, but in that case the trial court announced it had no discretion to impose concurrent, rather than consecutive, terms under section 667.61. As *Rodriguez* explained: "[A]lthough the statutory language of section 667.61, subdivision (b), mandates the imposition of 15 years to life for *each* count involving separate occasions and separate victims, section 667.61 does *not* mandate that those terms must be served consecutively. [Citations.] Absent an express statutory provision to the contrary, section 669 provides that a trial court shall impose either concurrent or consecutive terms for multiple convictions." (*Rodriguez*, at p. 1262.) Hence, "the trial court [in *Rodriguez*] mistakenly believed that it had no discretion to impose concurrent sentences under the one strike law." (*Id*. at p. 1263.)

Here, on the other hand, the trial court expressly stated it was cognizant of its discretion to impose concurrent rather than consecutive terms in this situation. There was no error.

4. *The trial court erred by failing to stay the imposed sentences on the section 288.2 convictions.*

Duarte contends the trial court erred by failing to stay the five concurrent terms it imposed for the section 288.2 (furnishing harmful matter to a minor) convictions. This claim has merit.

a. *Legal principles.*

Section 654, the prohibition against multiple punishment, provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." " 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208; see, e.g., *People v. Hester* (2000) 22 Cal.4th 290, 294 [where burglary perpetrated in order to commit assault, section 654 prohibited multiple sentencing]; *People v. McElrath* (1985) 175 Cal.App.3d 178, 191 [if factual basis for burglary conviction was entry with intent to commit sexual assault, then concurrent term for burglary conviction was barred by section 654].)

"The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.] 'We must "view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" ' " (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313; *People v.*

McCoy (1992) 9 Cal.App.4th 1578, 1585 [trial court's finding, whether explicit or implicit, may not be reversed if supported by substantial evidence].)

b. *Discussion*.

Section 288.2 provides, in pertinent part: "(a)(1) Every person who knows, should have known, or believes that another person is a minor, and who knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by any means, including by physical delivery, telephone, electronic communication, or in person, any harmful matter that depicts a minor or minors engaging in sexual conduct, to the other person *with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of the minor, and with the intent or for the purposes of engaging in sexual intercourse, sodomy, or oral copulation with the other person, or with the intent that either person touch an intimate body part of the other*, is guilty of a misdemeanor, punishable by imprisonment in a county jail not exceeding one year, or is guilty of a felony, punishable by imprisonment in the state prison for two, three, or five years. [¶] (2) If the matter used by the person is harmful matter but does not include a depiction or depictions of a minor or minors engaged in sexual conduct, the offense is punishable by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison for 16 months, or two or three years." (Italics added.)

Duarte argues the sentences imposed for his section 288.2 convictions fell within section 654's prohibition against multiple punishment because "the record reflects [that his] single intent and objective in committing these acts was to engage in the lewd acts which occurred simultaneously or close in time to the exhibiting of the harmful material." Duarte notes the intent element of 288, subdivisions (a) and (c) – committing a lewd act "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child," – is virtually identical to the intent element of section 288.2.

The Attorney General does not dispute that the evidence showed Duarte utilized the pornographic films as a way of carrying out his lewd conduct with the victims. Rather, the Attorney General responds by citing *People v. Powell* (2011) 194 Cal.App.4th

1268, in which the defendant forced the victim (who was the defendant's daughter) to have sexual intercourse with him while showing her pornographic movies. The Attorney General points out *Powell* held the defendant could properly be sentenced for both sexual assault and providing harmful matter to a minor on the theory "the defendant had two separate intents" because "he showed the harmful material to arouse the victim; while he raped her to arouse himself."

Powell reasoned as follows: "There was substantial evidence for the trial court's implicit finding that defendant harbored separate intents. Defendant played the movies in an unavailing effort to arouse the victim sexually, an act and an intent punishable under section 288.2, subdivision (a). Conversely, defendant raped the victim to gratify himself, an act and an intent punishable under section 288.7, subdivision (a).[4] As the People comment, '[defendant] intended to arouse [the victim], but also intended to have sex with her regardless of whether she actually became aroused. Therefore, *the two crimes had separate objectives because they were intended to arouse different people; and* [*defendant*] *had multiple intents, i.e., to arouse* [*the victim*] *for sex and to have sex with* [*the victim*] *even if she were not aroused*.' The reasoning of *People v. Hairston* (2009) 174 Cal.App.4th 231 . . . , applies here: ' "If . . . the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct." ' [Citation.]" (*People v. Powell*, *supra*, 194 Cal.App.4th at p. 1296, fn. omitted, italics added.)

We respectfully disagree with *Powell*'s analysis because section 288.2 contains *two* separate intent elements: (1) *the intent to sexually arouse* the defendant or the minor, and (2) *the intent to engage in sex* with the minor. That is, the commission of a

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[4] Section 288.7, subdivision (a), provides: "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."

section 288.2 violation in the scenario common to both *Powell* and the case at bar necessarily includes an intent to arouse the victim and an intent to have illegal sex. The *Hairston* case is inapposite. There, the defendant had been convicted on three counts of resisting arrest, committed against three different police officers during sequential encounters. That scenario has nothing in common with using pornography to try to seduce minors to engage in illegal sexual conduct.

The Attorney General maintains "there was substantial evidence for the trial court's implicit finding that appellant harbored separate intents. Evidence was presented that appellant showed groups of boys pornography at different times, and also alone. . . . When appellant showed the pornography to the boys in groups, he did not immediately follow the pornography exhibition with sexual assault. Thus, when appellant showed . . . the pornography to the boys in a group setting, his objective could not have been to arouse them in preparation for assault because no assault was committed immediately thereafter." But in those situations Duarte could not have been convicted of violating section 288.2 because the statute's second intent element would have been missing.

We conclude the trial court erred by not staying the sentences it imposed on the section 288.2 convictions. (See *People v. Sloan* (2007) 42 Cal.4th 110, 116 [when section 654 prohibits multiple sentencing for permissible multiple convictions, the "trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited"].) Hence, we will order those sentences stayed.

Duarte also contends the trial court erred by imposing upper terms on these five section 288.2 convictions. We agree. The trial court said "each of these counts was aggravated by the fact that exposing the victims to the harmful material in question was done to get them aroused and ready to perform sexual acts with and on Mr. Duarte. This aggravation makes the high term of three years appropriate . . . ." But as we have explained, an intent to create sexual arousal is one of the elements of section 288.2. California Rules of Court, rule 4.420(d), provides: "A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term."

Hence, the three-year concurrent terms imposed for the section 288.2 convictions must not only be stayed, but they must be reduced to two-year terms.

5. *The trial court did not improperly impose consecutive terms on child molesting convictions.*

Duarte contends the trial court improperly imposed consecutive sentences on the 15 section 288, subdivision (a), child molesting convictions because the aggravating factors it relied on were invalid. This claim is meritless.

a. *Legal principles.*

California Rules of Court, rule 4.425 provides:

"Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

"(a) Criteria relating to crimes

"Facts relating to the crimes, including whether or not:

"(1) The crimes and their objectives were predominantly independent of each other;

"(2) The crimes involved separate acts of violence or threats of violence; or

"(3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

"(b) Other criteria and limitations

"Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except:

"(1) A fact used to impose the upper term;

"(2) A fact used to otherwise enhance the defendant's prison sentence; and

"(3) A fact that is an element of the crime may not be used to impose consecutive sentences."

It is well-established that " '[s]entencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in "qualitative as well as quantitative terms" . . . . We must affirm unless there is a clear showing the sentence choice was arbitrary or irrational.' [Citation.]" (*People v. Avalos*

(1996) 47 Cal.App.4th 1569, 1582.) "[T]he finding of even one factor in aggravation is sufficient to justify the upper term." (*People v. Steele* (2000) 83 Cal.App.4th 212, 226.) "A fact is aggravating if it makes defendant's conduct distinctively worse than it would otherwise have been." (*People v. Zamarron* (1994) 30 Cal.App.4th 865, 872.)

b. *Discussion*.

Duarte argues the trial court improperly relied on the aggravating factor set forth in California Rules of Court, rule 4.421(a)(1), which provides: "The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness . . . ." He asserts there was no violence or any threats of bodily harm involved in any of the charged sexual acts.

But it appears the trial court was relying only on the "callousness" aspect of rule 4.421(a)(1). The trial court noted the various factors contained in this one rule and then said: "I think the issue in this case is callousness. [¶] There are child molestation cases and there are child molestation cases. Those of us who have been in the system for a while have seen a variety of child molestation cases. This case involved a lot more than the touching that we commonly see in many child molestation cases." The court also said it believed "the callousness displayed by these types of sexual activities on young boys the ages of these boys renders these offenses particularly egregious." A determination that a particular offense is "distinctively worse" than the average justifies an aggravated term. (See *People v. Black* (2007) 41 Cal.4th 799, 817 ["An aggravating circumstance is a fact that makes the offense 'distinctively worse than the ordinary.' "].)

Duarte argues the trial court improperly relied on the "vulnerability" of the victims under California Rules of Court, rule 4.421(a)(3). While it is true that "where, as here, an age range factor is an element of the offense, vulnerability based on age is generally not a proper aggravating factor" (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680), vulnerability is properly utilized where factors other than simply age are at issue. (*People v. Estrada* (1986) 176 Cal.App.3d 410, 419.) The trial court here relied not just on the age of the victims, but on the additional factor that Duarte had taken advantage of a position of trust or confidence to commit the offenses. (See California Rules of Court,

rule 4.421(a)(11).) As the trial court explained: "[I]n all cases, children are particularly vulnerable victims and more vulnerable than their adult counterparts, and I think that is reflected in the punishments that are prescribed for crimes against children. This case goes beyond that. [¶] In this case, the children . . . were entrusted to Mr. Duarte. He developed a relationship with the children and with their families that allowed him to largely conduct what he was doing in isolation and created a situation where people were going to be highly skeptical about believing what it was that he allegedly did."

The trial court also said: "In this matter, Mr. Duarte ingratiated himself to young boys and the families. He went far beyond what would be expected. He trained winning teams and seemingly created opportunities for these boys to play soccer at a higher level with the possibilities of scholarships and professional careers. He bought the boys soccer supplies and essentially took care of them. [¶] Under this guise, he regularly, repeatedly, and cruelly exploited these boys. The acts that he had them perform and that he performed on them were more substantial and more serious than those commonly seen in child molestation cases, and as we have heard, they have had a significant impact on the boys up to now, and I'm hoping that the statements that several of the parents have made that their children's future has been ruined, that was the word used, I hope that does not come to pass. [¶] . . . [¶] As far as I can see, Mr. Duarte is a predator in every possible way and is deserving of the most severe punishment and that it would be extremely unfortunate to the community if Mr. Duarte were released from prison. I think the safety of children mandates that he not have the opportunity to victimize another."

We conclude the trial court did not err by imposing consecutive terms on these child molesting convictions.

6. *Correct clerical error*.

Duarte contends, and the Attorney General concedes, that the verdict forms contained a clerical error resulting in jury findings that Duarte was ineligible for probation because he had committed child molesting against more than one victim within the meaning of "section 667.066, subdivision (a)(7)." There is no such Penal Code section, however, and this language should have been "within the meaning of Penal Code

section 1203.066, subdivision (a)(7)." We will order the record corrected. "Courts may correct clerical errors at any time . . . ." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) *In re Candelario* (1970) 3 Cal.3d 702, 705 ["It is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts. . . . The court may correct such errors on its own motion or upon the application of the parties."].

DISPOSITION

The judgment is affirmed in part and reversed in part. The concurrent sentences imposed on the five section 288.2 convictions must be stayed and they must be amended to reflect two-year terms, rather than three-year terms. The trial record must be corrected to reflect that Duarte was ineligible for probation under section 1203.066, not 667.066. In all other respects, the judgment is affirmed. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

KITCHING, J.

ALDRICH, J.