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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. IVAN GOMEZ SANCHEZ, Defendant and Appellant.	B280352 (Los Angeles County Super. Ct. No. YA092301)

APPEAL from a judgment in the Superior Court of Los Angeles County, Scott T. Millington, Judge. Remanded for resentencing.

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Ivan Gomez Sanchez was convicted following a jury trial of three counts of committing lewd conduct upon a 15-year-old girl. On appeal Sanchez contends the trial court erred in refusing to instruct the jury regarding the defense of reasonable mistake of fact. Sanchez also argues his trial counsel provided ineffective assistance by failing to object to statements made by the prosecutor during closing argument. We affirm the convictions but remand for resentencing in light of sentencing errors.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Amended Information*

In an amended information filed August 15, 2016 Sanchez was charged with four counts of committing lewd conduct upon Jessica S. when Jessica was 15 years old and Sanchez was 29 years old.[1] (Pen. Code, § 288, subd. (c)(1).)[2] The amended

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[1] The amended information also charged Sanchez with one count of unlawful sexual intercourse with a minor in violation of Penal Code section 261.5, subdivision (d). That count was dismissed prior to trial.

[2] Penal Code section 288, subdivision (c)(1), provides, "Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense . . . ." Subdivision (a) of Penal Code section 288 provides, "[A]ny person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ."

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information also alleged the offenses charged were serious felonies, violent felonies or offenses requiring registration as a sex offender pursuant to section 290, subdivision (c), and any imposed custody time for the offenses must be served in state prison pursuant to section 1170, subdivision (h)(3).

2. *Evidence at Trial*

In 2014 then-14-year-old Jessica created a profile on an online dating website targeted to teenagers. Jessica testified she entered her birthdate in creating her profile and the website automatically populated her age and updated it on her birthday. Thus, her public profile showed her true age at all times.

In July 2014 Jessica received a message through the dating website from Sanchez, whose profile said he was 18 years old. After approximately a week of exchanging messages on the website, the pair moved their conversations to a separate text-messaging service. Over the next few months their conversations became more sexually explicit, including exchanging nude photographs and discussing sex acts they wanted to perform on one another. Jessica testified that, in August or September 2014, Sanchez told her he was actually 26 years old.

In November or December 2014 Jessica told her cousin about Sanchez. Specifically, Jessica said she was dating an older man she had met online. However, Jessica told her cousin Sanchez was only 18 or 19 years old. A few weeks later, Jessica became concerned her cousin had told Jessica's sister about the relationship with Sanchez. Jessica and Sanchez exchanged a

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Statutory references are to the Penal Code unless otherwise stated.

series of text messages discussing what to do if Jessica's parents found out about their relationship. They both expressed anxiety about getting into trouble. Sanchez repeatedly told Jessica to delete all of their messages and to delete his phone number from her phone.

Sanchez and Jessica first met in person in December 2014 when Jessica was 15 years old and Sanchez was 29 years old. They went to a movie, during which they kissed, Sanchez touched Jessica's inner thigh and he attempted to put his hand under her shirt. After the movie they went to the beach. While sitting on the beach, they kissed again. Sanchez touched Jessica's breasts over her shirt and put his fingers in her vagina. He then performed oral sex on her, and she performed oral sex on him.

Sanchez next met Jessica in person in early January 2015 when he picked her up at school. They went to a restaurant and then to a coffee shop, after which Sanchez drove Jessica back to school. Jessica testified she performed oral sex on Sanchez in the car while in the school parking lot.

Jessica testified her third meeting with Sanchez was a few weeks later. Jessica had herself dismissed from class by calling the school pretending to be her mother and saying she needed to leave school for the day. Sanchez picked Jessica up at school and drove her to his house where she performed oral sex on him. He then drove her back to school.

Sanchez's fourth and final meeting with Jessica occurred on February 13, 2015. At Jessica's direction, Sanchez called Jessica's school pretending to be her father and said Jessica needed to be excused from school for the day. Sanchez then picked Jessica up from school and drove her to his house where they engaged in sexual intercourse and Jessica performed oral

sex on Sanchez. At some point in the afternoon Jessica realized her family had discovered she was not at school and had been trying to reach her. She told Sanchez to drive her to the mall. Jessica testified that, during the car ride, Sanchez told her she "needed to lie that I was never with him." Once at the mall, Jessica called her parents and told them she had been at the mall all day.

Jessica's parents called the police, who interviewed Jessica later the same day.[3] In her first conversation with police, while her parents were present, Jessica said Sanchez was 28 years old and he knew she was 15 years old. She initially told police that day was the first time she met Sanchez. She said he picked her up at school and they went to the mall and then to the beach. She denied any physical contact with Sanchez.

Toward the end of the interview, the police asked if they could speak with Jessica alone. Out of the presence of her parents, Jessica gave police Sanchez's full name and admitted she had been to his house. She told them she had met Sanchez twice but stated they had only kissed. The police examined Jessica's phone, but she had deleted her text messages with Sanchez.

A few weeks later, during a follow-up interview, Jessica told the police everything that had happened between her and Sanchez. At trial Jessica testified she had not told the truth

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[3] A recording of the February 13, 2015 interview with Jessica and her parents was submitted into evidence, as was a transcript of the recording. The recording was played for the jury during trial.

earlier because she had been "very much in love with this person. So I felt like I needed to protect him for some reason."

Sanchez testified in his own defense. He admitted his profile on the dating website showed his age as 18 years old. He maintained Jessica's profile showed she was 19 years old. Sanchez testified he told Jessica he was 28 years old shortly after they began exchanging messages. During that conversation Jessica admitted she was not 19 years old but said she was 18 years old. The next day, Jessica said she was actually 17 years old, but was about to turn 18. Sanchez testified Jessica did not tell him she was 15 years old until she got in trouble with her parents on February 13, 2015.

Sanchez admitted meeting Jessica in person only three times. Consistent with Jessica's testimony, Sanchez said they first met in December 2014 when they went to see a movie. He said they kissed at the movie, but he denied touching Jessica's thigh or trying to touch her breasts. He admitted they went to the beach after the movie and stated, "We started kissing, and some oral sex happened."

Sanchez also admitted to meeting Jessica a second time when he picked her up at school in early January 2015. He testified they went to the park and kissed, but he denied any oral sex took place in the car in the school parking lot. Sanchez also denied Jessica's account of a third meeting in late January 2015, when she said he took her to his house. He said that meeting did not take place.

Sanchez acknowledged he picked Jessica up at school on February 13, 2015 after calling the school and pretending to be her father. He admitted taking Jessica back to his house and having sex with her.

Sanchez testified he had been in love with Jessica and had considered her his girlfriend.

3. *The Verdict and Sentence*

The jury found Sanchez guilty on three counts of committing lewd conduct and not guilty on one count.[4] The trial court sentenced Sanchez to an aggregate state prison term of four years four months, consisting of the upper term of three years for the first count, plus consecutive eight-month terms (one-third the middle term) for each of the remaining counts. The court suspended the 16-month concluding portion of the sentence purportedly pursuant to section 1170, subdivision (h)(5). The court also ordered Sanchez serve his sentence in county jail purportedly pursuant to section 1170, subdivision (h)(1) or (h)(2).

DISCUSSION

1. *The Trial Court Did Not Err in Failing To Instruct the Jury on Mistake of Fact*

a. *Governing law and standard of review*

A trial court in a criminal case has a duty to instruct on general principles of law applicable to the case (*People v. Blair* (2005) 36 Cal.4th 686, 745), that is, """"those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."""" (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) A court may, however,

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[4] The jury found Sanchez guilty of committing lewd conduct in December 2014, early January 2015 and February 13, 2014. The jury found Sanchez not guilty on the count alleging a second offense in mid-to-late January 2015.

"'properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence.'" (*People v. Burney* (2009) 47 Cal.4th 203, 246.) We review defendant's claims of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

b. *Good faith mistake as to the victim's age is not a defense to a violation of section 288, subdivision (c)(1)*

Sanchez requested a jury instruction that a reasonable mistake about Jessica's age was a defense to the charges under section 288, subdivision (c)(1). The trial court refused to give the instruction, relying on *People v. Paz* (2000) 80 Cal.App.4th 293 (*Paz*) for the proposition mistake of age is not a defense to a violation of section 288, subdivision (c)(1). Sanchez now argues the trial court erred in relying on *Paz* because *Paz* was wrongly decided.[5]

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[5] It is not entirely clear from the record that Sanchez preserved this argument for appeal. Before, during and after trial, the court engaged in extensive discussions with the parties regarding the availability of the mistake-of-age defense. Initially, during a pretrial conference, Sanchez's attorney stated, "I understand that mistake of age according to the case law is not an available defense, doesn't apply to this particular charge." Sanchez's attorney repeated this sentiment during trial, stating, "Clearly, I don't get the defense. I'm not asking for the mistake-of-fact defense," and "I respect the court needs to follow the law of *Paz*. I'm not entitled to the instruction, I understand that."

Only after the prosecution requested inclusion of a pinpoint jury instruction stating mistake of age is not a defense did Sanchez's counsel request a mistake-of-age instruction, stating,

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In *Paz* a 28-year-old defendant was convicted of committing lewd acts on a 14-year-old victim in violation of section 288, subdivision (c)(1). The defendant argued the trial court should

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"It is argumentative to say that [mistake of age is not a defense] . . . . I think it's completely argumentative, and it is the law as stated from the People's advantage asking for the pinpoint instruction. And if the court is inclined to do this, from my reading of *Paz*, I went back last night and read it, actually, I think it indicates even in the use notes that mistake-of-fact is not a defense regarding someone under the age of 14, and not 14 to 15. . . . I am asking for the mistake-of-fact instruction." However, Sanchez's counsel then reverted to her earlier position that she was not arguing mistake of fact, stating, "[T]he only reason why the [victim's] age is coming into play is because of her credibility . . . ." Likewise, at the conclusion of trial, defense counsel stated, "The fact that I don't get the [mistake-of-fact] instruction, that's the law, that I don't get – that the defense – the defendant is deprived of that defense . . . . Well, that's the law. I don't get the defense. I don't get that instruction. I don't get to argue it." Counsel's argument during these later discussions was not that Sanchez was entitled to a mistake-of-fact instruction, but only that the prosecution was not entitled to a pinpoint instruction highlighting the unavailability of the mistake-of-fact defense.

Ultimately, the court included the pinpoint instruction requested by the prosecution and admonished the jury that evidence regarding Jessica's statements of her age to Sanchez were to be considered for the limited purpose of assessing her credibility. On appeal Sanchez has not challenged these actions. Despite the equivocal objections by trial counsel and the incongruity of failing to appeal the inclusion of the pinpoint instruction and admonishment, we address the merits of Sanchez's appeal on this issue.

have instructed the jury on a mistake-of-fact defense. The Fifth District rejected defendant's argument and held "a reasonable, good faith mistake about the age of a 14- or 15-year-old victim is not a defense to a charge under Penal Code section 288, subdivision (c)(1)." (*Paz*, *supra*, 80 Cal.App.4th at p. 294.)

The *Paz* court began its analysis by discussing *People v. Olsen* (1984) 36 Cal.3d 638, in which the Supreme Court had held reasonable mistake of age is not a defense to a charge of committing lewd acts on a child under 14 years old (section 288, subdivision (a)). As *Paz* explained, the *Olsen* Court "reasoned that children under age 14 are in need of special protection 'not given to older teenagers' . . . ." (*Paz*, *supra,* 80 Cal.App.4th at p. 295; see *Olsen*, at p. 646 ["There exists a strong public policy to protect children of tender years. . . . [S]ection 288 was enacted for that very purpose."].) At the time *Olsen* was decided, section 288 prohibited acts of lewd conduct only on children under 14 years old. The provision prohibiting lewd conduct on 14- and 15-year-olds (what was initially enacted as subdivision (c) and would eventually become subdivision (c)(1)) was not added until 1989, more than four years after the *Olsen* decision. (See *Paz*, at p. 296, fn. 8.)

The *Paz* court was faced with the issue whether the policy articulated in *Olsen* to preclude a mistake-of-age defense when the victim was under 14 years old should be extended to the prohibition against committing lewd conduct on a 14- or 15-year-old in light of the expanded scope of section 288. After conducting a detailed analysis of subdivision (c)(1)'s legislative history, the Fifth District determined the "public policy rationale of *Olsen* for rejecting good faith mistake of age in section 288 cases involving victims under age 14 holds true for victims of

ages 14 and 15 as well . . . ." (*Paz*, *supra*, 80 Cal.App.4th at p. 298.)

The *Paz* court explained the legislation adding what is now subdivision (c)(1) was enacted "to close a perceived loophole in the felony laws, with respect to 14-and 15-year-olds, between felonious lewd conduct with a child under 14 (§ 288, subd. (a)) and unlawful sexual intercourse with a child under 18 (§ 261.5). According to the bill's proponents the only available criminal charge applicable to lewd conduct on a child who had just turned 14 was a misdemeanor under section 647.6, although the same conduct would constitute a felony if the child were under 14." (*Paz*, *supra*, 80 Cal.App.4th at p. 296.) Thus, "on or after the day of a child/victim's 14th birthday, a perpetrator could commit all nature of lewd acts on or with the child and, so long as no act of penetration occurred, the perpetrator would not face felony punishment." (*Ibid.*)

Based on this stated legislative purpose the *Paz* court concluded the enactment of subsection (c) reflected "a legislative desire to protect 14- and 15-year-olds from predatory older adults to the same extent children under 14 are protected by subdivision (a) of section 288." (*Paz*, *supra,* 80 Cal.App.4th at p. 297.) Allowing a mistake-of-age defense, the court concluded, would "undermine the purpose the Legislature sought to achieve by enacting subdivision (c)." (*Id.* at p. 295.) In other words, the enactment of subdivision (c) represented a desire to protect 14- and 15-year-old children more rigorously than older teenagers. Thus, extension of the rationale in *Olsen* to that group was fully consistent with the legislative intent.

The *Paz* court also found the absence of a consent element in section 288 "strongly suggests the Legislature did not intend

the 'understanding' of the perpetrator to affect the application of the subdivision." (*Paz, supra,* 80 Cal.App.4th at p. 297.) In fact, the inclusion of a consent element had been considered, and later abandoned, by the bill's author. (See *ibid.*) The court reasoned the Legislature had allowed for extenuating circumstances such as mistake of age or purported consent to be considered not as a defense, but instead as a sentencing factor. (*Id.* at pp. 297-298 ["Subdivision (c)(1) permits the trial court to fashion a sentence consistent with the realities of the particular crime and discloses a legislative acknowledgement that some 14- and 15-year-olds may be more sexually sophisticated than others in those two age groups. This difference in the punishments indicates the Legislature had no intention of permitting defenses based on the 'understanding' of the perpetrator to be raised against a subdivision (c)(1) charge; if in a particular case there exist extenuating circumstances, such as a mistake about the victim's age, the statute allows for the consideration of that factor for sentencing purposes."].)

Finally, the *Paz* court observed *Olsen* was decided prior to the enactment of subdivision (c) and the Legislature is presumed to know of existing laws when it enacts new statutes. (*Paz, supra,* 80 Cal.App.4th at p. 298; see also *People v. Bonnetta* (2009) 46 Cal.4th 143, 150-151 ["[a]lthough the absence of legislative response to a judicial construction of a statute will not be deemed an implied ratification of that construction, when a statute has been construed by the courts and the Legislature thereafter reenacts the statute without changing the interpreted language, a presumption is raised that the Legislature was aware of and has acquiesced in that construction"]; *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [same].) In light of the Legislature's

intent to protect 14- and 15-year-olds and its presumed awareness of the holding in *Olsen*, it is reasonable to infer, as the *Paz* court did, that the Legislature understood a mistake-of-age defense would not be permitted under the newly amended section 288, just as it had not been permitted under the prior version of section 288.

Sanchez cites no authority that has questioned or criticized the *Paz* case in the 18 years since it was decided, nor have we found any. We agree with the analysis in *Paz* that mistake of age is not a defense to violations of section 288, subdivision (c)(1). Accordingly, the trial court did not err in refusing to give such an instruction to the jury.

c. *Prohibition of the mistake-of-fact defense did not violate Sanchez's right to equal protection of the law*

Sanchez contends not allowing him to present a mistake-of-fact defense violated the federal and state Constitutions' guarantee of equal protection of the law. Specifically, Sanchez argues defendants charged with violations of section 288, subdivision (c)(1), are prohibited from arguing their conduct is excused because they reasonably believed the victim was 18 years old, while defendants charged with violations of other statutes prohibiting sexual conduct with minors, such as section 261.5 (unlawful sexual intercourse with a minor), are entitled to a mistake-of-age defense. Sanchez claims he is similarly situated to defendants charged with violating these other statutes prohibiting sexual conduct with minors and their differential treatment has no rational basis.

To prevail on an equal protection challenge, a party must first establish that "'the state has adopted a classification that affects two or more *similarly situated* groups in an unequal

manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) "In other words, we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws." (*People v. McKee* (2010) 47 Cal.4th 1172, 1202.)

The contention defendants charged with violations of section 288, subdivision (c)(1), are similarly situated to defendants charged with violations of section 261.5 was rejected in *People v. Cavallaro* (2009) 178 Cal.App.4th 103, which denied an equal protection challenge to mandatory sex offender registration for persons convicted of violating section 288, subdivision (c)(1).[6] The defendant had claimed, because individuals convicted of violating section 261.5 were not required to register, the registration requirement was invalid as applied to defendants convicted of violating section 288, subdivision (c)(1). (*Cavallaro,* at p. 111.) The court held individuals convicted under the two statutes were not similarly situated. (*Id.* at pp. 113-114.) First, section 288, subdivision (c)(1), includes a specific intent element that is not present in section 261.5: "The higher mental state required for a conviction under section 288 is a distinction that is meaningful in deciding whether a person convicted under that statute is similarly situated with one convicted under

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[6] Sanchez did not address *Cavallaro* in his opening brief and failed to file a reply brief responding to the discussion of the case by the Attorney General.

section 261.5." (*Cavallaro,* at p. 114.) Second, because section 288, subdivision (c)(1), requires the defendant be at least 10 years older than the victim, "[t]he Legislature could have properly concluded that it was necessary to specifically prohibit sexual conduct between a 14 or 15 year old and an adult at least 10 years older . . . because of the potential for predatory behavior resulting from the significant age difference between the adult and the minor." (*Cavallaro,* at p. 114.) Finally, section 288, subdivision (c)(1), exclusively protects a subset of the children protected by section 261.5 (that is, 14- or 15-year-olds, versus all children under 18 years old), reflecting a legislative intent to protect sexually naïve children from considerably older adults. (*Cavallaro,* at pp. 114-115.)

We agree with *Cavallaro's* conclusion that persons convicted under sections 288, subdivision (c)(1), and 261.5 are not similarly situated for purposes trial or punishment.[7] Sanchez's constitutional rights were not violated by the lack of a defense based on his alleged reasonable, good faith mistake of fact as to Jessica's age.

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[7] The same is true of the other statutes Sanchez cites in his equal protection argument. Sections 286 (sodomy with a minor) and 288a (oral copulation with a minor) do not contain a specific intent element and do not limit their protections to children age 14 and 15 years old. Likewise, section 647.6 (molesting a child) does not contain a specific intent element, does not contain an age differential element, and does not limit its protections to children age 14 or 15 years old.

2. *Sanchez's Counsel Was Not Ineffective in Failing To Object to the Prosecutor's Closing Statement*

a. *Governing law*

The right to counsel guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution "'includes, and indeed presumes, the right to effective counsel . . . .'" (*People v. Blair*, *supra*, 36 Cal.4th at p. 732.) "'To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.'" (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980; accord, *In re Crew* (2011) 52 Cal.4th 126, 150; see *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656; accord, *People v. Vines* (2011) 51 Cal.4th 830, 875.)

There is a presumption the challenged action or inaction "'might be considered sound trial strategy'" under the circumstances. (*Strickland v. Washington, supra,* 466 U.S. at p. 689; accord, *People v. Gamache* (2010) 48 Cal.4th 347, 391; *People v. Carter* (2003) 30 Cal.4th 1166, 1211.) Moreover, "[i]n reviewing a claim of ineffective assistance of counsel, we give great deference to counsel's tactical decisions." (*People v. Johnson, supra,* 60 Cal.4th at p. 980.)

b. *Sanchez has failed to show his counsel's performance was deficient*

Sanchez argues his counsel's performance was deficient because she failed to object to certain statements made by the prosecutor to the jury. During his closing argument the prosecutor stated, in regard to the second meeting between Sanchez and Jessica, "Now, both the defendant and the victim testified regarding the date where they went to [a restaurant] and the park. And in that the only real disparity is that the defendant denies any oral sex occurred in the car and the victim said they did engage in oral sex in the car. But I would submit to you that whether they did or did not commit oral sex, there were other lewd acts committed on that date, even by the defendant's own account. They held hands, they kissed. All of these touchings. All of these are clearly motivated by the same interest to appeal to sexual desires." Sanchez contends the prosecutor's statements were legally incorrect.

To be sure, Sanchez is correct a kiss or a touch is not necessarily sexual in nature. However, it may be. As this court has observed, "'Kissing is a kind of touch that has as much range as a big-city orchestra. It can be a perfunctory peck on the cheek, so asexual that balding Communist party apparatchiks aren't ashamed to do it on TV, or it can be so explosively erotic it's about as close to intercourse as you can get.'" (*In re R.C.* (2011) 196 Cal.App.4th 741, 751, quoting Bechtel, The Practical Encyclopedia of Sex and Health (1993) pp. 182-183; see also *People v. Martinez* (1995) 11 Cal.4th 434, 438 ["For almost a century, section 288 has been interpreted to require no particular form of physical contact. The courts have established in a long unbroken line of cases that the crime occurs whenever the trier of

fact determines, based on all the circumstances, that an underage child was 'touched' with the requisite sexual intent. A construction permitting conviction for any and all sexually motivated contact is supported by the relevant statutory language and surrounding scheme, and apparently has been accepted by the Legislature."].)

The prosecutor here correctly stated to the jury that a kiss or touch may be sufficient to constitute a lewd act under section 288, subdivision (c)(1), if performed with the requisite intent. In addition, the jury was properly instructed by the court on the elements of the charges, including the intent element. Accordingly, Sanchez has not shown his counsel's failure to object during the prosecutor's closing argument constituted ineffective assistance of counsel. (See *People v. Centeno* (2014) 60 Cal.4th 659, 675 ["'[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one' [citation], and 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence.'"]; *People v. McDermott* (2002) 28 Cal.4th 946, 992 ["[b]ecause a motion or objection on the ground now asserted by defendant would have been futile, trial counsel's failure . . . to object to the prosecutor's argument was not deficient performance"]; see also *People v. Thompson* (2010) 49 Cal.4th 79, 122 ["[c]ounsel is not ineffective for failing to make frivolous or futile motions"].)

3. *Sentencing Errors Require a Remand for Resentencing*

The trial court's suspension of 16 months of Sanchez's sentence pursuant to section 1170, subdivision (h)(5), and the order the sentence be served in county jail pursuant to section 1170, subdivision (h)(1) and (h)(2), were improper and

resulted in an unauthorized sentence. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1044-1045 [appellate court has obligation to correct unauthorized sentence whenever the error comes to its attention, whether or not the error was raised on appeal]; see generally *People v. Scott* (1994) 9 Cal.4th 331, 354 [a sentence is "unauthorized" when it "could not lawfully be imposed under any circumstance in the particular case"].)

The realignment provisions of section 1170, imposed in this case by the trial court,[8] are not applicable to a sentence under section 288, subdivision (c)(1). By its terms section 288 provides for imprisonment in the state prison for felony violations, not in county jail pursuant to section 1170, subdivision (h). (See Couzens et al., Sentencing California Crimes (The Rutter Group 2017) ¶ 11:3, p. 11-5 (rev. 7/2017) [section 1170, subdivision (h), applies to crimes "where a penal statute specifies the defendant 'shall be punished by imprisonment pursuant to subdivision (h) of Section 1170'" or "where the statute now requires punishment in accordance with section 1170(h)"].) In addition, as specified in section 1170, subdivision (h)(3),[9] a section 288, subdivision (c)(1),

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[8] Section 1170, subdivision (h)(1) and (h)(2), state, "a felony punishable pursuant to this subdivision" "shall be punishable by a term of imprisonment in a county jail . . . ." Subdivision (h)(5) states, "Unless the court finds that, in the interests of justice it is not appropriate in a particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2), shall suspend execution of a concluding portion of the term for a period selected at the court's discretion."

[9] Section 1170, subdivision (h)(3), provides, "where the defendant (A) has . . . a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, [or] . . . (C) is

Footnote continued on the next page.

sentence falls outside the realignment framework because it is for a "violent felony" (§ 667.5, subd. (c)(8)) and because the convicted offender is required to register as a sex offender (§ 290, subd. (c)). Accordingly, Sanchez must be resentenced.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated, and the matter remanded for the limited purpose of allowing the trial court to resentence Sanchez in accordance with this opinion.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.*

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required to register as a sex offender . . . an executed sentence for a felony punishable pursuant to this subdivision should be served in state prison."

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