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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. GABRIEL ROCHA MALDONADO, Defendant and Appellant.	B278458 (Los Angeles County Super. Ct. No. MA067554)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa M. Chung, Judge. Affirmed.

Vanessa Place, 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, Deputy Attorney General, and Colleen M. Tiedemann, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant appeals from his convictions for one count of battery and three counts of lewd acts upon a child. Defendant argues that his sentence for counts 3 and 4 violates Penal Code section 654 because the acts were committed in the same course of conduct, and that the sentence for count 4 must be stayed.[1] We affirm.

FACTS AND PROCEDURAL BACKGROUND

In December 2015, defendant was dating a woman named Sandra, and had been cohabitating with her, her 10-year-old daughter, and her 13-year-old son for six years. On December 1, 2015, and again on December 2, 2015, while in the home, defendant touched the daughter's buttocks, vagina, and breasts under her clothes.

On the morning of December 3, 2015, while Sandra was at work, defendant entered the girl's bedroom and told her to lay with him. She went with defendant to the bedroom he shared with Sandra. The child lay on her side on the bed, with her back to defendant, who was lying on his side facing her back. Defendant touched the girl's buttocks, vagina, and breasts with his hands, and touched her lower back and buttocks with his penis. Defendant then pulled the child on top of him, so that she was sitting on his genitals. Defendant's arms were on the child's back and he touched her buttocks. The girl felt uncomfortable and rolled off defendant when the alarm clock went off. This encounter lasted for about 20 minutes.

Later that day, the child reported defendant's conduct to her best friend at school, and then to Sandra and her father. Police subsequently arrested defendant.

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

The district attorney filed an information charging defendant with four counts of lewd acts upon a child in violation of section 288, subdivision (a). Counts 1 and 2 related to defendant's acts on December 1 and 2, 2015, respectively. Counts 3 and 4 addressed defendant's acts on December 3, 2015. On the first count, the jury found defendant guilty of the lesser offense of battery. The jury convicted defendant of counts 2 through 4 as charged.

At sentencing, defense counsel argued only that the acts constituting counts 3 and 4 occurred during the same course of conduct, and that he could only be sentenced for one of those counts pursuant to 654. The People responded that the counts addressed two distinct acts. The court agreed with the People, finding that section 654 did not apply due to the "multiple nature of the acts." The trial court sentenced defendant to a total term of twelve years in prison: 180 days on count 1, the upper term of eight years on count 2, one-third the midterm of two years on count three to run consecutively, and one-third the midterm of two years on count 4 to run consecutively.

DISCUSSION

Defendant argues that his sentence on count 4 must be stayed because counts 3 and 4 cover the same course of conduct, and the punishment is duplicative in violation of section 654. Section 654 provides that "[a]n 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." "[I]t is well settled that section 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction." (*People v. Perez* (1979)

23 Cal.3d 545, 551 (*Perez*).) The trial court is tasked with determining whether the charges involve an indivisible course of conduct. We "review the court's explicit or implicit factual resolutions for substantial evidence." (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338; *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313.)

In general, "[w]hether a course of criminal conduct is a divisible transaction which could be punished under more than one statute within the meaning of section 654 depends on the intent and objective of the actor." (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) Under the "single intent and objective test" (*Perez, supra,* 23 Cal.3d at p. 553), "[i]f all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one" (*id.* at p. 551).

"However, the rule is different in sex crime cases. Even where the defendant has but one objective—sexual gratification—section 654 will not apply unless the crimes were either incidental to or the means by which another crime was accomplished." (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006; see, e.g., *People v. Madera* (1991) 231 Cal.App.3d 845, 855 [section 654 bars separate punishment for applying lubricant to the area to be copulated because the act would be preparatory]; *People v. Senior* (1992) 3 Cal.App.4th 765, 780 [multiple digital-vaginal penetrations and multiple oral copulations during single encounter may be separately punished].) The rationale for this rule is that a "defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act." (*Perez, supra,* 23 Cal.3d at p. 553.) If courts were to apply the single intent and objective test to sex crimes, "the clever molester could violate his victim in numerous lewd ways, safe in the knowledge that he could not be convicted

and punished for every act." (*People v. Scott* (1994) 9 Cal.4th 331, 347.) The modified rule in sex crime cases ensures that a defendant receives a punishment proportionate to his culpability. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The trial court rejected defendant's request that the sentence on count four be stayed pursuant to 654. The court stated: "I understand that counts 3 and 4 were listed on the same date, but I heard testimony of multiple lewd acts, I don't think there is a 654 issue." We agree.

Here, two sexual acts occurred over the course of 20 minutes, separated by defendant's repositioning of the child. The child testified that on the morning of December 3, 2015, defendant first positioned himself lying sideways behind her. In this position, defendant touched her back and buttocks with his penis, and her buttocks, vagina, and breasts with his hands under her clothing. Subsequently, defendant repositioned the child so that she was straddling his genital area and he touched or squeezed her buttocks. An investigating police officer, who interviewed the child shortly after the incident, likewise testified to the child's previous consistent statements about defendant's series of acts.

Defendant admits, and we agree, this testimony provided evidence of multiple discreet acts. The first touching that occurred when the child was lying on her side was not preparatory to the second touching that occurred when defendant repositioned the child: it did not facilitate or enable defendant's subsequent lewd conduct. Likewise, the first touching was not incidental or inherent to defendant accomplishing the second touching. (See *People v. Madera, supra,* 231 Cal.App.3d at p. 854 ["The fact that the touching or rubbing of [the victim's] penis preceded the oral copulation and/or sodomy, on the occasions when such additional violations occurred, does not establish that

the touching of [the victim's] penis was merely incidental to or facilitative of the later acts. Certainly the acts denounced by sections 288a and 286 are capable of commission without an initial touching or rubbing . . ."].) Moreover, the change of position further supports the trial court's finding that these were two separate acts, even if they occurred sequentially. (*People v. Catelli* (1991) 227 Cal.App.3d 1434, 1446 [Sexual acts that "were separated in time and by a change in position" constituted separate offenses.].)

Defendant cites *People v. Jackson* (2016) 1 Cal.5th 269, 354-355, for the proposition that a defendant convicted of committing three separate sex offenses during a short and continuous time period in a single location can only be punished for one such offense. In *Jackson*, the Supreme Court reversed the three consecutive sentences for the three sex crimes not based on section 654, but rather on section 667.61, former subdivision (g), which was only in effect until 2006. Section 667.61, former subdivision (g) stated that the life imprisonment sentences mandated by that statute for specific sex crimes " 'shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion.' " (*Jackson,* at pp. 354-355.) That portion of the statute no longer exists and did not apply to this 2015 molestation. Its holding as to those three crimes is irrelevant to our inquiry under section 654.

Defendant also argues that because the child did not state how long each touching lasted, the acts were within a single course of conduct. Such testimony is unnecessary. "Where a defendant fondles a portion of the victim's body with the requisite intent, a violation of section 288 has occurred. The offense ends when the defendant ceases to fondle that area. Where a defendant fondles one area of the victim's body and then moves

on to fondle a different area, one offense has ceased and another has begun. There is no requirement that the two be separated by a hiatus, or period of reflection." (*People v. Jimenez* (2002) 99 Cal.App.4th 450, 456; *People v. Harrison, supra,* 48 Cal.3d at pp. 327–334 [defendant may be convicted for multiple, nonconsensual sex acts of an identical nature that follow one another in quick, uninterrupted succession].)

Substantial evidence supports the trial court's factual finding that the consecutive sentences did not violate section 654.

DISPOSITION

We affirm defendant's conviction.

RUBIN, J.

WE CONCUR:

BIGELOW, P.J.

GRIMES, J.