

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
AXIUS ELVIC G'ACHA,
Defendant and Appellant.

A139755
(Mendocino County
Super. Ct. No. SCUKRCR1222403)

Axius Elvic G'Acha appeals from his convictions for lewd or lascivious acts with a child under 14 years of age (Pen. Code, § 288, subd. (a)),¹ sexual penetration with a foreign object (§ 289, subd. (j)), oral copulation of a person under 14 years of age (§ 288a, subd. (c)(1)), and arranging a meeting with a minor for the purpose of engaging in lewd or lascivious behavior (§ 288.4, subd. (b)). He raises two claims of instructional error. We find neither meritorious and accordingly affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, J.C., was born in 1998. She lived with her parents and siblings in Mendocino County. She first met G'Acha when she was about eight years old. G'Acha and his wife rented a house near J.C.'s home.

In 2008, J.C.'s older sister, J., became romantically involved with G'Acha. J. was 22 years old at the time. J. and appellant were together for four years and had a child. Their relationship ended around March 2012.

¹ All statutory references are to the Penal Code.

In April 2012, J. began receiving text messages from someone who identified himself as Jacob. She asked J.C. to text Jacob from J.C.'s own phone because J. wanted to see if J.C. received the same responses. J.C. began texting Jacob in April 2012. About a month later, J.C. and "Jacob" arranged to meet at the end of her driveway around 1:00 a.m. When G'Acha drove up the driveway, J.C. realized for the first time that "Jacob" was appellant. J.C. was 13 years old at the time.

At trial, J.C. described what happened at this first meeting. She and G'Acha talked for a while in the driveway in the car, and then he drove to his residence, a trailer next to his mother's house. Appellant asked J.C. to sit next to him on the bed. Appellant took off J.C.'s shirt, played with her breast and tried to suck it. J.C. put her shirt back on and asked G'Acha to take her home. G'Acha did not remove his clothes at this first meeting.

J.C. testified about a second meeting where touching took place, which occurred during the same month as the first meeting. J.C. and G'Acha arranged the meeting through texting. J.C. again met G'Acha in her driveway around 1:00 a.m. and got into his truck. He drove a short distance and parked. He put his hand down her pants and put his fingers inside her vagina. G'Acha did not remove his clothes at this second meeting.

J.C. testified about a third meeting where touching took place, which occurred during the same month as the previous meeting. Appellant once again picked her up at the end of her driveway around 1:00 a.m. and drove to his trailer. While watching television in bed, G'Acha put his hands down J.C.'s pants and put his finger inside her. Appellant had on his underwear and a shirt.

J.C. testified that at all three meetings, she and G'Acha kissed. She said she saw his penis but never touched it. She testified appellant forced her pants off and then put his fingers inside her, but she could not remember when he did this.

J.C. testified about a fourth meeting where touching took place, although she could not recall when it occurred. G'Acha picked her up and took her to his trailer. Appellant kissed her, played with her breasts, and stuck his fingers inside her.

The final meeting between J.C. and G'Acha took place in a horse pasture around 6:00 p.m. Appellant tried to touch her breasts, but she pushed him away. When G'Acha saw J. arrive in the horse pasture, he told J.C. to run.

J.C. testified on redirect examination that she had not told the jury about one other sex act because it was "weird" and "disgusting." She told the jury G'Acha had forcibly licked her vagina. This happened when she and appellant were at his trailer watching television.

J. testified that the date of the horse pasture incident was June 28, 2012. She was driving around looking for J.C. when she saw G'Acha's truck parked at the end of the horse pasture. J. saw G'Acha but not J.C. in the horse pasture. J. was suspicious, and later took J.C. to appellant's trailer. He did not admit to any wrongdoing. He did, however, say J.C. was "still a virgin." J. was angry and told her mother about G'Acha. Her parents took J. to the police station the next day.

On the evening of June 30, 2012, Deputy Eric Riboli spoke to J.C. and her parents at the Ukiah police station. Riboli allowed J.C.'s mother to be present during the interview because J.C. was shy, and she wanted her mother to be present. The interview was audiotaped but not videotaped.

In the interview, J.C. told Deputy Riboli that she had been molested by G'Acha, who was 44 years old. Initially, J.C. generally described appellant's conduct. She said he would take her to his home, they would watch television, and he would "do things." She said the most recent incident was the previous evening when they sat on the grass, G'Acha had kissed her, stuck his hand down her pants, and "finger fuck[ed]" her. On another occasion two weeks earlier in G'Acha's trailer, while they watched television, appellant had sucked her breast. J.C. said G'Acha forced her to touch his bare penis once. This had taken place in his trailer about a week earlier. She said appellant was talking about "sticking it in me and then made me touch it." G'Acha started "fingering me," "sucking on my boob [and] kissing me." Appellant "ripped" her shorts off and "licked me down there" for about five minutes.

Deputy Riboli asked J.C. to recount the incidents from the earliest occasion. She said the first incident took place about a month after she began texting G'Acha in April. The incident took place at night in G'Acha's trailer. He kissed her and rubbed her belly. J.C. asked him to take her home. The next incident took place about two weeks later, at night in G'Acha's truck. Appellant sucked on her "boob" and "fingered" her for the first time. He pulled up her shirt and stuck his hand down her pants. The third incident took place around the beginning of June. G'Acha picked her up and took her to his trailer. He sucked on her "boobs," stuck his hand down her pants, and grabbed her "ass" as they watched television. The fourth incident had taken place the previous night in the horse pasture.

Detective Bryan Arrington had J.C. make a pretext call to G'Acha. Detective Arrington recorded the call, which was made on July 1, 2012, just after midnight. Following instructions, J.C. arranged to meet G'Acha. G'Acha was arrested at 1:55 a.m. that day when he arrived for the meeting.

At trial, Detective Arrington testified that phone records showed 19 phone calls between G'Acha and J.C. from June 26 to July 1, 2012. During that time, there were 257 text messages between appellant and J.C.

G'Acha testified in his own defense. He said he wanted to clarify the status of his relationship with J. and tried texting her many times. Appellant started sending her anonymous messages around April 2012. At some point, he received a reply from an unknown sender, whom he later learned was J.C. G'Acha said J.C. was "pushing" for a meeting. Although he had no desire to meet, he thought it was important "to come clean," to let her know he was the one texting her, and to tell her that "this texting interaction" was "ridiculous." G'Acha agreed to meet her in front of her driveway.

Appellant testified that at this meeting, he tried to tell J.C. that it was "not appropriate for us to be carrying on" through anonymous texting, but he felt "very conflicted about the whole thing." G'Acha said J.C. leaned over and put her head on his shoulder, and he put his arm around her and kissed the top of her head. He then took her

back to his house, and they talked until she asked him to take her home. Appellant claimed that nothing else happened.

G'Acha told the jury he met with J.C. about eight or nine times. He described the first time touching took place. He and J.C. were in his trailer watching cartoons in bed. They started kissing, and G'Acha caressed her breasts. He claimed J.C. was "[w]illing" and "perceptive." G'Acha and J.C. talked about "how wrong it was" because of the age difference and the fact that J.C. was the aunt of his child. He told the jury J.C. was not at fault, and "[i]t was 100 percent completely my responsibility to stop, to not let it begin, to not even let it go there." He admitted he had "failed in [his] responsibility." G'Acha denied putting his hand down J.C.'s pants, having her touch his penis, or licking her vagina.

The Mendocino County District Attorney filed an information charging G'Acha with lewd or lascivious acts with a child under 14 years of age in counts 1, 2, 4, and 6 (§ 288, subd. (a)), sexual penetration with a foreign object in counts 3 and 7 (§ 289, subd. (j)), oral copulation of a person under 14 years of age in count 5 (§ 288a, subd. (c)(1)), and arranging a meeting with a minor for the purpose of engaging in lewd or lascivious behavior in count 8 (§ 288.4, subd. (b)).

On May 21, 2013, a jury found G'Acha guilty as charged. On August 9, 2013, the trial court sentenced him to 15 years in prison. G'Acha filed a notice of appeal on September 12, 2013.

DISCUSSION

On appeal, G'Acha raises two claims of instructional error. First, he contends the trial court erred in giving a modified version of the standard unanimity instruction, CALCRIM No. 3500, because the instruction contained no language sufficient to inform the jury that the unanimity requirement applied separately to each offense listed in the first paragraph of the instruction. Second, he argues the trial court erred by giving a version of CALCRIM No. 207 which expanded the time frames for the acts charged in counts 1 and 2 beyond the time frames alleged in the information, thus allowing the jury to convict him without finding him guilty of the conduct alleged as the basis for those

counts as set forth in the information. We will address these arguments in the order presented.

II. *Viewed in Light of the Whole Record, The Trial Court's Instructions on Unanimity Were Sufficient.*

G'Acha claims the trial court's modified version of CALCRIM No. 3500, which addressed counts 1 through 5, was erroneous and constituted prejudicial error.² To understand G'Acha's argument, some factual background is necessary.

A. *The Unanimity Instructions*

During the conference with counsel on the instructions, the trial court noted that the information charged two counts of digital penetration and four counts of lewd or lascivious conduct on a child under 14 years of age. The court thought a unanimity instruction was needed, adding, "I want them to agree on the act." Defense counsel agreed this was important.

Later, when the court met with counsel to finalize the instructions, it informed counsel it had modified the unanimity instruction. The trial court stated it had modified CALCRIM No. 3500 "to fit the evidence and the charges" and asked counsel if they had had a chance to look at the proposed instruction. Counsel responded affirmatively, and neither the prosecutor nor defense counsel raised any objections.

The modified version of CALCRIM No. 3500 given to the jury stated as follows: "The defendant is charged in Counts 1 and 2 with engaging in a lewd or lascivious act with a child under 14 during the time period between May 1, and May 15, and May 16, and May 31, 2012 respectively. [¶] In Count 3 the defendant is charged with sexual penetration with a foreign object between May 15th and May 31, 2012. [¶] In Counts 4 and 5 the defendant is charged with committing crimes between June 1, and June 28, 2012. [¶] The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless you

² G'Acha acknowledges his trial counsel did not object to this instruction below, and the People therefore argue he has forfeited the issue. We need not decide the forfeiture issue, because even if appellant's claim was properly preserved for appeal, we conclude it clearly lacks merit. (*People v. Myles* (2012) 53 Cal.4th 1181, 1219, fn. 12.)

all agree that the People have proved the defendant committed at least one of the acts and you all agree on which act he committed.”³

Immediately following this instruction, the trial court read CALCRIM No. 3515, telling the jury: “Ladies and gentlemen, each of the counts charged in this case is a separate crime. You must consider each count separately, return a verdict for each count.”

During her closing argument, defense counsel reminded the jury about the unanimity instruction, asking them to “look very carefully at the details you have given the unanimity instruction to also make sure you know and agree on what acts happened when.” In conclusion, counsel told the jury, “I think once you go through this again, he’s admitted to the things that he has done. But find him guilty of those, but not of anything else.”

Following closing arguments, the trial court instructed the jury with CALCRIM No. 3550, which told the jury in relevant part: “Do not reveal to me or anyone else how the vote stands on the question of guilt unless I specifically ask you to do so. Your verdict on each count must be unanimous, this means that to return a verdict, all of you must agree to it. [¶] . . . [¶] . . . [¶] . . . [¶] . . . [¶] So, ladies and gentlemen, here are the verdict forms. There’s two possible verdict forms for each count. One’s guilty, one’s not guilty. If you are able to reach a unanimous decision as to any count, regardless of the direction, the foreperson is to sign and date the verdict form. If you are unable to reach a unanimous verdict as to any count, don’t sign and date any verdict forms related to that count and return any unsigned verdict forms to the Court at the conclusion of deliberations, okay.”

³ The standard instruction for CALCRIM No. 3500 states in relevant part: “The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed.”

B. *Governing Law and Standard of Review*

“It is established that some assurance of unanimity is required where the evidence shows that the defendant has committed two or more similar acts, each of which is a separately chargeable offense, but the information charges fewer than the evidence shows.” (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 611-612.) When the evidence suggests more than one discrete crime, the prosecution must either elect among the crimes which crime to prosecute, or the court must require the jury to agree on the same criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) The unanimity requirement is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree he committed. (*Ibid.*)

In reviewing a claim of instructional error, we may not judge a single instruction in artificial isolation, but rather must view it in the context of the overall charge. (*People v. Frye* (1998) 18 Cal.4th 894, 957.) The absence of an essential element from one instruction may be cured by another instruction or by the instructions taken as a whole. (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.) “The meaning of instructions is tested by ‘whether there is a “reasonable likelihood” that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel.’ ” (*People v. Fiu* (2008) 165 Cal.App.4th 360, 370, quoting *People v. Diequez* (2001) 89 Cal.App.4th 266, 276.) To reverse a judgment for instructional error, we must conclude it was reasonably likely the allegedly erroneous instruction would have led the jury to misapply the law. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1155.)

Furthermore, “[w]e assume the jurors are intelligent persons capable of understanding and correlating all jury instructions given them.” (*People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 649 (*Milosavljevic*)). “In analyzing the prejudicial effect of error [], an appellate court does not *assume* an unreasonable jury. Such an assumption would make it virtually impossible to ever find error harmless. An appellate court necessarily operates on the assumption that the jury has acted reasonably, unless the record indicates otherwise.” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1127.)

C. *The Unanimity Instructions Were Adequate, and G'Acha Was Not Prejudiced.*

G'Acha contends that because the first paragraph of the trial court's modified CALCRIM No. 3500 instruction referred to multiple counts, "the defendant-protective features of the unanimity instruction [were] lost due to the language of the second paragraph of the instruction." That second paragraph told the jury: "The People have presented evidence of more than one act to prove that the defendant committed *these offenses*. You must not find the defendant guilty unless you all agree that the People have proved the defendant committed at least one of the acts and you all agree on which act he committed." (Italics added.) In G'Acha's view, the italicized language allowed the jurors to convict based on an "aggregate unanimity analysis[.]" That is, "the instruction allowed the jurors to find [him] guilty on all of the counts listed in the first paragraph as long as they unanimously agreed that [he] committed one act that constituted one of the counts listed in that paragraph." Relying on *Milosavljevic, supra*, 183 Cal.App.4th 640, G'Acha argues the instruction should have told the jurors they had to agree as to which act constituted the commission of *each* listed count.

We conclude G'Acha has not shown the trial court's unanimity instructions were reasonably likely to have been interpreted by the jury in the manner he suggests. (*Milosavljevic, supra*, 183 Cal.App.4th at p. 649.) First, rather than discussing the entire charge to the jury and the arguments of counsel, G'Acha's opening brief improperly focuses only on the modified version of CALCRIM No. 3500. (See *People v. Fiu, supra*, 165 Cal.App.4th at p. 370 [likelihood of jury confusion determined " 'in light of the instructions given, the entire record of trial, and the arguments of counsel' [Citation.]"].) Second, he ignores the portion of the instruction in which the court told the jury, "You must not find the defendant guilty unless you all agree that the People have proved the defendant committed at least one of the acts and *you all agree on which act he committed*." (Italics added.) G'Acha's trial counsel referred to this instruction in closing argument and admonished the jury to "make sure you know and agree on what acts happened when." Since we must presume both that the jury acted reasonably (*People v.*

Guiton, supra, 4 Cal.4th at p. 1127) and that the jurors were intelligent people capable of understanding and applying the instructions given them (*Milosavljevic, supra*, 183 Cal.App.4th at p. 649), we believe the instructions, coupled with defense counsel's argument, sufficiently informed the jury it was required to agree on a specific act for each of the counts.

Moreover, even if the instruction were defective, we note that G'Acha's prejudice argument relies heavily on a minute dissection of the evidence regarding what precise conduct the jury might have found constituted the lewd or lascivious acts of which he was convicted. For example, he contends the jury may not have agreed which acts committed in May 2012 constituted offenses under section 288, subdivision (a), theorizing jurors might not have considered his kissing the victim and rubbing her belly to be an act done with intent to arouse. G'Acha also devotes great effort to pointing out what he sees as inconsistencies in the victim's testimony about each incident. He notes that while J.C. described a second incident to Detective Riboli involving appellant kissing her, sucking her breast, and penetrating her vagina while she was wearing stretchy shorts, at trial she did not mention him touching her breast and said she had been wearing jeans.

Such arguments misconceive the nature of the offense described in section 288. To constitute that offense, "a 'touching' of the victim is required, and . . . sexual gratification must be presently intended at the time such 'touching' occurs." (*People v. Martinez* (1995) 11 Cal.4th 434, 444.) Any touching of an underage child is lewd or lascivious within the meaning of section 288 where it is committed for the purpose of sexual arousal. (*Id.* at p. 445.) For this reason, G'Acha's elaborate sifting of the testimony is largely irrelevant, because "the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction." (*People v. Jones* (1990) 51 Cal.3d 294, 315.) In cases charging a number of acts of lewd or lascivious conduct, "although the jury may not be able to readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described." (*Id.* at p. 321.)

Prejudice in this case seems particularly unlikely, since defense counsel told the jury G'Acha admitted to committing acts that constituted crimes. Her closing argument correctly conceded her client's kissing and fondling of the victim was criminal. (See *People v. Martinez, supra*, 11 Cal.4th at p. 445 [“any touching of an underage child is ‘lewd or lascivious’ within the meaning of section 288 where it is committed for the purpose of sexual arousal”].) Defense counsel instead asked the jury to consider whether G'Acha “would force this child to do something against her will[.]” A defense expert testified G'Acha was “forthcoming . . . about his sexual behavior with the girl[.]” G'Acha himself testified he met with J.C. about eight or nine times. Thus, appellant admitted to more offenses than those charged in the information. (See *People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1590 [no prejudice from lack of unanimity instruction where “defendant confessed on the stand to as many as five times the number of offenses of which he was convicted”].) In these circumstances, even if the instruction were erroneous, “ ‘[i]t is not reasonably probable that a result more favorable to appellant would have been reached in the absence of the instructional error because there is no reasonable possibility the jury failed to unanimously agree that appellant committed each specific act for which he was convicted.’ [Citation.]” (*Ibid.*)

Finally, “[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, [even a] failure to give the unanimity instruction is harmless.” (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.) Here, G'Acha completely denied putting his hand down J.C.'s pants. Thus, as to count 3, which charged sexual penetration with a foreign object, it is quite clear the jury simply believed J.C.'s testimony and disbelieved G'Acha's. There is therefore no reasonable possibility it failed to reach a unanimous verdict on that count.

II. *The Modified Version of CALCRIM No. 207 Did Not Violate G'Acha's Constitutional Rights.*

G'Acha also contends the trial court erred by giving a version of CALCRIM No. 207 which expanded the time frames for counts 1 and 2 beyond the time frames

alleged in the information. In his view, the allegedly erroneous instruction “allowed the jury to convict [him] on counts 1 and 2 based on incidents occurring during the extended time periods contained in the instruction regarding each of those counts. That in turn allowed the jury to convict [him] on these [] two counts without finding him guilty of the incidents respectively alleged regarding each of those counts beyond a reasonable doubt—that is, without finding him guilty of the conduct alleged as the basis of the counts set forth in the information.” G’Acha claims the error violated his Fifth, Sixth, and Fourteenth Amendment rights. Before addressing his claim of error, we set forth the background regarding the challenged instruction.

A. *Modification of the CALCRIM No. 207 Instruction*

Count 1 of the information charged G’Acha with committing lewd or lascivious acts with a child under 14 years of age, between May 1 and 12, 2012. Count 2 charged him with committing lewd or lascivious acts with a child under 14 years of age, between May 15 and 31, 2012. During the trial court’s jury instruction conference with counsel, the court informed counsel it had modified the CALCRIM No. 207 instruction. The court told counsel, “I am going to expand the date references to May, June and the precise date in July that Count 8 is based upon. And everybody agrees that’s a proper thing to do.” Both counsel agreed to the court’s proposal.

At the close of trial, the court instructed the jury with the following version of CALCRIM No. 207: “It is alleged that the crimes alleged in Counts 1 and 2 occurred between May 1, 2012 and May 31st, 2012. It is alleged that the crimes alleged in Counts 4 and 5 occurred between June 1, 2012 and June 28, 2012. The People are not required to prove the exact day on which the crime took place, but only that it happened reasonably close to the day or range of days alleged in that particular count.”⁴

⁴ The standard version of CALCRIM No. 207 reads: “It is alleged that the crime occurred on [or about] <insert alleged date>. The People are not required to prove that the crime took place exactly on that day but only that it happened reasonably close to that day.”

B. *Forfeiture*

Once again, defense counsel did not object to the instruction below, and the People argue G'Acha has forfeited this issue. "The applicable rule is that an appellate court may review 'any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.' (§ 1259, see *id.*, § 1469; [Citation.].) '[W]hether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim. . . .' [Citation.] Accordingly, we will review the merits of defendant's claim." (*People v. Ngo* (2014) 225 Cal.App.4th 126, 149 (*Ngo*.) Having considered the merits, we reject G'Acha's argument.

C. *The People Were Not Required to Prove the Precise Date on Which the Offenses Occurred, and G'Acha Shows No Prejudice.*

In a prosecution under section 288, "the defendant has no right to notice of the specific time or place of an offense, so long as it occurred within the applicable limitation period. 'Beyond that, . . . the prosecution clearly has no duty to provide more explicit notice than human nature and science permit.' [Citation.]" (*People v. Jones, supra*, 51 Cal.3d at p. 317.) Nor is prosecution required to prove that an offense was committed on a specific day. Instead, it may rely on evidence showing the offense occurred within a range of dates. (*Id.* at p. 316 [while "the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period," specific details of time, place, or circumstance of the various acts "are not essential to sustain a conviction"]; see also § 955 ["[t]he precise time at which the offense was committed need not be stated in the accusatory pleading, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense"].)

Here, count 1 of the information alleged the crime was committed during the first two weeks of May 2012, and count 2 alleged the crime was committed during the last two weeks of May 2012. The trial court expanded the date references in CALCRIM

No. 207 to allege that counts one and two were committed during May 2012. The only effect of this change was to modify the approximate time frame in which the crimes were alleged to have occurred. Under controlling authority, this was not error. (See *People v. Jones, supra*, 51 Cal.3d at pp. 316-317.)

In addition, it is difficult to see how G'Acha might have been prejudiced. He made no claim the charged encounters with the victim did not occur. As set forth above, he admitted to committing unlawful acts of touching, denying only the more serious acts, such as digital penetration, and arguing he had not forced the victim to participate. The jury understood the People were not required to prove the exact day on which the crime took place, but only that it happened reasonably close to the day or range of days alleged in that particular count. (CALCRIM No. 207; *People v. Jones, supra*, 51 Cal.3d at pp. 315-316 [details of time and place of offense unnecessary to sustain conviction].) G'Acha does not explain how he might have obtained a more favorable outcome absent the alleged error. We therefore reject his argument.

G'Acha's reliance on *Ngo* is misplaced. In that case, the information charged the defendant "with committing a lewd or lascivious act on a child by force 'On or about and between January 1, 2009, and December 31, 2009.' " (*Ngo, supra*, 225 Cal.App.4th at p. 148.) The trial court's unanimity instruction, however, told the jury "that defendant was charged with committing that act 'sometime during the period of January 1, 2009, and December 31, 2010.' " (*Ibid.*, italics added.) The Attorney General conceded the instruction was erroneous. The court found the error violated the defendant's constitutional rights because the relevant count of the information charged defendant with an offense committed in 2009, but the instruction would have permitted the jury to convict him of that count based on conduct occurring in 2010. (*Id.* at p. 150.) That is not the case here, and *Ngo* is therefore inapposite.⁵

⁵ Since we have addressed the merits of G'Acha's claims of instructional error, we need not consider his alternative argument that his trial counsel rendered ineffective assistance by failing to object to the challenged instructions. (*People v. Smithey* (1999) 20 Cal.4th

DISPOSITION

The judgment is affirmed.

936, 976, fn. 7 [unnecessary to address ineffective assistance of counsel claim where court has considered merits of challenge to jury instructions].)

Jones, P.J.

We concur:

Needham, J.

Bruiniers, J.

A139755