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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARLON MELAD MONTON,

Defendant and Appellant.

A143336

(San Mateo County  
Super. Ct. No. SC080108A)

Marlon Melad Monton, Jr., appeals from convictions of attempting to commit a lewd act on a 14-year-old minor, contacting or communicating with a minor with the intent to commit a lewd act, and arranging and attending a meeting with a minor with the intent to commit a lewd act. The underlying conduct involved his contact with two 14-year-old girls, N.D. and D.D. He raises several challenges to his conviction of the contacting or communicating offense against one of the victims, and also maintains that the trial court erred in failing to stay the sentences on several of the convictions under Penal Code<sup>1</sup> section 654. Respondent concedes this last error. We shall order the judgment modified to reflect stayed sentences on counts 1 through 4 and otherwise affirm the judgment.

**STATEMENT OF THE CASE**

Appellant was charged by information filed on February 7, 2014, with two felony counts of willfully and unlawfully attempting to commit a lewd act (Pen. Code, § 288,

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<sup>1</sup> Further statutory references are to the Penal Code.

subd. (a)) on a 14-year-old child by a person at least 10 years older than the minor (§§ 664, 288, subd. (c)(1)) (count 1, N.D.; count 2, D.D.); two felony counts of willfully and unlawfully contacting or communicating with a person reasonably known to be a minor with the intent to commit a lewd act (§ 288.3, subd. (a)) (count 3, N.D.; count 4, D.D.); two felony counts of willfully and unlawfully arranging and attending a meeting with a minor for the purpose of engaging in lewd conduct (§ 288.4, subd. (b)) (count 5, N.D.; count 6, D.D.); and two misdemeanor counts of willfully and unlawfully annoying or molesting a child (§ 647.6) (count 7, N.D.; count 8, D.D.).

After a jury trial, appellant was convicted of the six felony counts and acquitted of the two misdemeanor counts. He was sentenced on September 30, 2014, to the lower term of two years on count 5 and concurrent sentences of two years on count 6, one year on each of counts 1 and 2, and 18 months on each of counts 3 and 4.<sup>2</sup>

Appellant filed a timely notice of appeal on October 14, 2014.

#### **STATEMENT OF FACTS**

On the morning of December 16, 2013, N.D. and D.D., both 14 years old, were walking to their school in Millbrae when a car stopped in front of them. The driver, appellant, rolled down his window and handed N.D. a note, one side of which had a phone number and the name “Clyde” written on it and the other side said, “Movie?” Appellant said, “Hook me up.” N.D. took the note, feeling scared, and appellant drove away. The girls ran to school, N.D. throwing the note in some bushes on the way, and N.D. immediately told her teacher what had happened. Asked why they ran, N.D. testified that she felt like appellant was going to come back.

Later that morning, Sheriff’s Deputy Daniel Young came to school and talked with N.D., and she helped him find the note. Deputy Young gave the note to Sergeant Stephanie Josephson, the detective who would conduct further investigation. It was

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<sup>2</sup> On January 8, 2015, an amended abstract of judgment was filed adding appellant’s custody credits, which had not been determined in the original abstract of judgment.

determined that the phone number on the note belonged to appellant. Josephson also ran appellant's record and obtained his license plate number.

About 10:25 a.m. on December 18, Sergeant Josephson texted appellant's phone number, pretending to be one of the girls, and took screen shots of the ensuing conversation. At trial, she read the conversation to the jury and explained the slang used in it as indicated in brackets here. After an exchange of hellos, appellant asked, "Who is this?" Josephson replied, "Chatted on the street a couple days ago. You left me a note with ur [your] number." Appellant asked if she had "kik," which Sergeant Josephson testified is an application for instant messaging between cell phones. She replied to the text, "No. My mom won't let me," and appellant responded, "Ah, that sucks." Sergeant Josephson then said, "I'm staying at my friend's house after school. Her parents aren't home." Asked for her name, the detective said "Stephanie" and asked if this was Clyde, and appellant said "yup." Appellant said, "My bad if I look grimey . . . that day coz . . . I didn't get fitted [dressed up/looking nice]." She said, "No. It's kewl [cool] . . . U [you] seem QT [cute]." Appellant said, "I seem QT. LOL [laughing out loud]" and then "maybe it's u . . . that QT." She asked where he went to school and he said Phillip Burton High. He asked about her school and she replied, "[middle]. 8th." When she asked what grade he was in, he asked how old she was; she responded, "13," and he said, "JR."

Josephson then said, "Having a kickback after school" [meaning, having friends over] "Need alcohol." Appellant replied, "I can get that" and asked who she was going to be with, and she said "My cuz [cousin] . . . who I was with the other day. Appellant asked, "Just the two of you or some of your boyfriends too." She said, "No boyfriends. Just you and us. . . . You solo?" He said yes, and asked, "Where are you guys wanted to drink" and "what kind of drinks do you guys want?" She said, "Cuz's house. Parents gone. Can you get Four Lokos?" This was a reference to a canned alcoholic beverage that comes in different flavors, and Josephson added, "Strawberry lemonade is off the hook [great]." He asked if they wanted anything else, she said "trees," meaning marijuana, and he said, "KK." She told him to meet at 3:00 at the parking lot of Kohl's, a

department store near the middle school, then said she would text him again at 2:30; he told her to “have fun at school.”

At 2:11 p.m., Sergeant Josephson texted appellant, “School is so lame. Almost out.” He responded, “LOL.” She confirmed that he knew where Kohl’s was and about 2:45 he texted, “No strawberry lemonade.” She told him, “That’s kewl. Whateve [whatever] . . . you can get.” She said, “We be there soon. Back parking lot.” At 3:08, appellant texted, “I got my top three fav [favorite] . . . drinks” and then, “I’m here.”

Sergeant went to the Kohl’s parking lot and saw appellant’s SUV parked there. She alerted other deputies waiting nearby, who arrested appellant. She searched the car, finding a shopping bag with three cold 24-ounce cans of alcohol on the front passenger seat and, in the trunk, a bottle of lotion labeled, “Hot and Sexy. Warms to the touch. Heats up when blown on. Sizzling strawberry. Artificially flavored lotion.” The lotion bottle appeared worn and was partially empty; its expiration date was 2007.

Appellant was taken to the Millbrae Police Bureau, where Sergeants Josephson and Matsura questioned him after he was advised of and waived his *Miranda* rights. The recorded statement was played for the jury. Josephson asked if appellant knew why he was there, and he responded that he believed it was about an underage girl, alcohol and marijuana. He said he was 28 years old; asked the girl’s age, he said he thought she texted that she was 13. Throughout the interview, appellant insisted that when he saw the girls he thought they were at least 17 or 18 years old, even after Sergeant Josephson told him they “barely looked 13 . . . [t]hey looked like little kids.” He also insisted that he intended only to “chill,” “relax” and get to know the girls. Appellant was not familiar with the schools in the area; he lived in San Francisco and was only in Millbrae to drop his girlfriend at work.

Discussing the text conversation, appellant said he was surprised when the girl said she was 13 because he thought she was 16, 17 or 18. He thought 13 was too young for him and stopped talking at this point, but she texted asking if they could “chill” and if he could bring this and that, and he agreed. He said, “That’s my fault—that’s why I’m here right now.” When Josephson pointed out that appellant had asked if the girl’s

boyfriend was going to be there, appellant said he was just asking if there would be a group, as “two 13-years-old females is kinda like iffy” but if they were going to bring “their boyfriends or their older sister or something” he could “bond with . . . their older sister.” Asked why he wanted to hang out with 13-year-old girls when he had a girlfriend (who appellant said was 24 years old), appellant said he was just trying to meet new people.

Appellant acknowledged that it was “sounding like” he was a pedophile. Appellant said he thought it was “disgusting” when he heard stories about guys going after young girls and said he was different because he was “not after . . . their . . . sexuality or sex.” He said he had only an hour to spend with the girls before he had to pick his girlfriend up from work and protested, “if you thinking about me having sex with those kids that wouldn’t happen. . . . I have an hour to spend and I just wanna chill and relax and get to know these people that I met, you know, so—that’s it.”

Appellant acknowledged that when he saw the girls he wanted to “hook up with” one or both of them—“if she was 18.” He repeatedly stated that he knew he “messed up really bad” and should have “left it alone” “as soon as they told me that they were 13,” and that he had to deal with the consequences. He said he did not know what he was thinking. “I’m not a bad person—I don’t do these things and one day just—just everything just change I guess, it’s like I don’t know what happened—I don’t know what I was thinking but—I made a wrong choice today. And I deserve a punishment.”

Eventually, appellant acknowledged that “if the opportunity presented itself,” he would have had sex with the girls, then clarified, “not all the way s- sex, sir. Just maybe like neck—like, you know, kiss.” He repeated that he would have kissed the girls but would not have gone further.

## **DISCUSSION**

### **I.**

Appellant was convicted in counts 3 and 4 of violating section 288.3, subdivision (a), by contacting or communicating with N.D. (count 3) and D.D. (count 4) with intent to commit a lewd act. Section 288.3 provides: “(a) Every person who contacts or

communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit [a specified sex offense] involving the minor shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense.” Appellant contends his conviction on count 4 must be reversed because there was no evidence he contacted or communicated with D.D.

In reviewing a claim of insufficient evidence, we determine “ ‘ “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” ’ [Citations.] We examine the record to determine “whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.] Further, “the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” ’ (*People v. Catlin* (2001) 26 Cal.4th 81, 139, quoting in part *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)” (*People v. Moon* (2005) 37 Cal.4th 1, 22.)

The parties agree that the evidence upon which the conviction of count 4 must be evaluated is the text conversation that occurred on December 18, not the initial encounter on the street on December 16. According to both appellant and respondent, there was no evidence that appellant contacted or communicated with D.D. during the initial encounter, as there was no evidence he spoke to D.D. or asked N.D. to show her the note, or that D.D. took the note.

Appellant argues that the text conversation does not supply evidence of contact or communication with D.D. because Sergeant Josephson was posing as N.D. At most, appellant urges, there may have been evidence he expected both girls to be present when they met after school, but there was no evidence that during the text conversation he was attempting to contact or communicate with D.D.

Respondent relies upon subdivision (b) of section 288.3: “As used in this section, ‘contacts or communicates with’ shall include direct and indirect contact or

communication that may be achieved personally or by use of an agent or agency, any print medium, any postal service, a common carrier or communication common carrier, any electronic communications system, or any telecommunications, wire, computer, or radio communications device or system.” Respondent maintains that the evidence supported the conclusion that appellant intended the text conversation to be communicated to D.D., that it was “understood” that D.D. would join appellant and N.D. and this required N.D. to “deliver to [D.D.] appellant’s invitation to join them.”

There is no dispute that appellant’s only *direct* communication was with N.D., or, more precisely, the person he believed was N.D. With respect to indirect communication—respondent’s theory—appellant argues that there was no evidence he was using N.D. as an “agent” to convey a message to D.D. The text conversation makes clear that appellant intended to get together with both girls. Early in the conversation, after N.D. said that after school she was going to be with the girl she had been with when they met on the street, appellant asked, “[j]ust the two of you or some of your boyfriends too?” He asked where “you guys” wanted to drink and what kind of drinks “you guys” wanted; he later texted that he had purchased “my top three” favorite drinks and in fact three cans of alcohol were found in his car.

The obvious inference to be drawn from this conversation is that appellant wanted and intended to meet up with both girls, and expected and intended N.D. to communicate this to D.D. Appellant argues that there was no need for N.D. to convey an invitation to D.D. because the premise of the conversation was that N.D. was inviting appellant to join an existing plan for N.D. and D.D. to be at D.D.’s house. There may not have been a *need* for anything to be communicated, but there was certainly substantial evidence to support a conclusion that appellant intended and wanted the information to be conveyed. Appellant thought he was arranging to spend time with N.D. and D.D. at D.D.’s house, where no parents were going to be present, with alcohol for the three of them to drink. It is unreasonable to think appellant did *not* expect, want and intend D.D. to be included in

this plan involving her own house. The only means for her to be included was N.D. communicating to D.D. the plan discussed with appellant.<sup>3</sup>

Appellant additionally suggests that because section 288.4 specifically criminalizes arranging a meeting with a minor for the purpose of engaging in lewd conduct, the Legislature must have intended a violation of section 288.3 to require something more or different than using an agent to set up a meeting with the minor. Appellant relies upon *In re Maria D.* (2011) 199 Cal.App.4th 109, 114 (*Maria D.*), in arguing that allowing a conviction under section 288.3 based on use of an agent to arrange a meeting with a minor would violate the rule that “[a] special statute controls over a more general statute.”

In *Maria D.*, *supra*, 199 Cal.App.4th at page 112, a juvenile found to have committed felony attempted lynching argued her conduct was covered by a more specific statute, misdemeanor incitement of a riot. (§§ 664, 405a.) The issue was whether the special statute precluded application of the general statute proscribing attempted crimes (§ 664) to the offense of lynching (defined in section 405a as the “taking by means of a riot of any person from the lawful custody of any peace officer”). The juvenile’s boyfriend had been detained by officers responding to a “chaotic” scene, and had kicked and shattered a window of the police car; the juvenile attempted to force the officers to release him, cursing, soliciting the assistance of other males at the scene, who outnumbered the officers, and extending her arms as if to grab the officer who was attempting to control the boyfriend. (*Maria D.*, at pp. 112-113.) *Maria D.* held that the statute addressing incitement of a riot did not apply to conduct that amounted to attempted lynching, reasoning that the statute punishing incitement of a riot addressed different objectives than the statute punishing attempting to free another from lawful police detention, and the two offenses required different intents and potentially different

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<sup>3</sup> There was no suggestion at trial that D.D. was not as much a target of the communication as N.D. In argument, both the prosecutor and defense counsel addressed the case as involving both girls to the same extent.

conduct. (*Id.* at pp. 115-116.) Accordingly, the inciting a riot statute did not preclude finding the juvenile committed attempted lynching.

By contrast, *People v. Duran* (2004) 124 Cal.App.4th 666, 672-673 (*Duran*), held that a felon who supplied false information on an application to purchase a firearm could not be prosecuted for attempted unlawful possession of a firearm because a specific statute prescribed a lesser punishment for precisely the conduct the defendant engaged in, furnishing false information on an application to purchase a firearm. “Where, as here, a special statute covers the same conduct as a general statute, the People may not prosecute under the general statute if it will result in a more severe penalty. (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1250.) ‘ “Typically the issue whether a special criminal statute supplants a more general criminal statute arises where the special statute is a misdemeanor and the prosecution has charged a felony under the general statute instead. [Citations.] Such prosecutions raise a genuine issue whether the defendant is being subjected to a greater punishment than specified by the Legislature, and the basic question for the court to determine is whether the Legislature intended that the more serious felony provisions would remain available in appropriate cases.” [Citation.]’ (*Id.*, at p. 1250, fn. 14.)” (*Duran*, at p. 673.)

In *Maria D.* and *Duran*, the “general statute”—section 664—potentially covered a wide variety of conduct – attempts to commit any criminal offense. The principle that a specific statute controls over a general one was applied to prohibit use of the attempt statute to impose greater punishment on conduct for which the Legislature had specifically specified a lesser punishment. Here, section 288.3 is a “general” statute only in the sense that it appears to cover more conduct than section 288.4, as arranging to meet a minor is one of many ways in which a defendant might contact or communicate with a minor in violation of section 288.3. But the statutes address different matters: The focus of section 288.3 is the defendant’s communication with a minor, direct or indirect, while the focus of section 288.4 is the defendant’s actual arranging of a meeting with minor. While there can be overlap, as the present case demonstrates, where a defendant communicates with a minor for the purpose of arranging the meeting, section 288.3 can

be violated without violating section 288.4 and section 288.4 can be violated without engaging in conduct prohibited by section 288.3 (for example, a defendant arranging for a minor to be brought to a meeting place by someone else without including the minor in the arranging).

Moreover, there is no issue in the present case of appellant being subjected to a greater sentence under section 288.3 than what the Legislature specifically intended to apply to conduct violating section 288.4. In fact, the greater punishment is prescribed by section 288.4. The punishment prescribed by section 288.3 is the term for an attempt to commit the intended offense—here, section 288, subdivision (c)(1). Section 288, subdivision (c)(1), is a wobbler, punishable by imprisonment in the state prison for one, two or three years, or in a county jail for not more than one year. An attempt to violate section 288, subdivision (c)(1), is punishable by half the term for the completed offense, that is, a prison term of six months, one year, or 18 months, or a jail term of six months. Under section 288.4, appellant was sentenced (on counts five and six) to a two-year prison term. While simply arranging a meeting with a minor for the purpose of engaging in lewd conduct is punished as a misdemeanor, by a fine not exceeding \$5,000, a jail term not exceeding one year, or both, the punishment specified for a defendant who commits this offense and goes to the arranged meeting place is imprisonment for two, three or four years. (§ 288.4, subd. (a) & (b).)

## II.

Appellant also challenges his conviction on count four with a claim that the trial court erred in failing to instruct the jury *sua sponte* on the defense of mistake of fact as to this count—specifically, that he did not have the mental state required for the charged offense if he reasonably believed D.D. was more than 14 years old. A court has a *sua sponte* duty to instruct on a defense “ ‘if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant’s theory of the case.’ ” (*People v. Breverman* (1998) 19 Cal.4th 142, 157, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 716.) “Evidence of

a defense is sufficiently substantial to trigger a trial court's duty to instruct on it sua sponte if it is sufficient for a reasonable jury to find in favor of the defense.” (*People v. Hanna* (2013) 218 Cal.App.4th 455, 462 (*Hanna*)). However, “ “when a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, a defendant is not presenting a special defense invoking *sua sponte* instructional duties. While a court may well have a duty to give a ‘pinpoint’ instruction relating such evidence to the elements of the offense and to the jury's duty to acquit if the evidence produces a reasonable doubt, such ‘pinpoint’ instructions are not required to be given *sua sponte* and must be given only upon request.” ’ ’ ” (*People v. Anderson* (2011) 51 Cal.4th 989, 996–997 (*Anderson*), quoting *People v. Saille* (1991) 54 Cal.3d 1103, 1117.)

Conviction on count 4 required proof that appellant contacted or communicated with, or attempted to contact or communicate with, D.D. and that when he did so, he knew or reasonably should have known she was under the age of 18 and “intended to commit a lewd or lascivious act upon a child 14 years old involving [D.D].” (CALCRIM No. 1124.) Appellant argues that he could be convicted only if the jury found that he knew D.D. was 14 years old, and that the evidence that he repeatedly told the police he believed the girls were at least 17 or 18 years old required the court to give an instruction on the defense of mistake of fact. Appellant does not make the same argument with respect to N.D. because he was informed during the text conversation that she was 13 years old. He maintains that he was never told D.D.'s age.

Respondent argues that the defense of mistake of fact does not apply to a charge under section 288.3 under the authority of *People v. Paz* (2000) 80 Cal.App.4th 293 (*Paz*), which held that the defense does not apply to a charge of lewd conduct under section 288, subdivision (c)(1). Prior to the 1988 addition of that subdivision to section 288 (Stats. 1988, ch. 1398, § 1 [Assem. Bill No. 3835]), *People v. Olsen* (1984) 36 Cal.3d 638 (*Olsen*) had held that reasonable mistake as to age is not a defense to a charge

under section 288, subdivision (a) (lewd acts on a child under age 14) because “children under age 14 are in need of special protection ‘not given to older teenagers.’” (*Paz*, at p. 295, quoting *Olsen*, at pp. 647-658.) *Paz* rejected the argument that the defense of mistake of age should apply to a charge under section 288, subdivision (c)(1), because the offense involving 14 or 15 year old victims “does not warrant the same public policy child protection given by the law to victims *under* the age of 14.” (*Paz*, at p. 295.) Noting the inclusion in subdivision (c)(1) of the requirement that the defendant be more than 10 years older than the victim, the *Paz* court found that the legislature wanted 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*, at p. 297.) “Subdivision (c) (now (c)(1)) was enacted to make the lewd conduct proscribed by subdivision (a) subject to felony punishment when committed on slightly older victims by considerably older adults.” (*Ibid.*)

By contrast to this analysis of statutes addressing actual commission of lewd acts upon children, the court in *Hanna*, *supra*, 218 Cal.App.4th at page 462, held that the defense of mistake of fact *does* apply to a charge of *attempted* lewd acts on a child (§ 288, subdivision (a)). “ ‘ ‘ [A]n attempt to commit any crime requires a specific intent to commit that particular offense . . . . ’ ” (*Hanna*, at p. 461, quoting *People v. Montes* (2003) 112 Cal.App.4th 1543, 1549.) *Hanna* reasoned that because the offense requires proof that the defendant intended to commit a lewd act on a child under age 14, if the defendant intended to commit the act on an 18-year-old, he could not be guilty; if he believed the victim was 18, he “lacked the specific intent required to commit the attempt crime.” (*Hanna*, at p. 462.)

Here, in count 4, appellant was charged with contacting or communicating with, or attempting to contact or communicate with, D.D. “with the intent to commit a specified act,” defined in the jury instructions as intent “to commit a lewd or lascivious act upon a child 14 years old involving that child.” As in *Hanna*, if appellant believed D.D. was 17

or 18 years old, he did not have the intent required to commit a lewd or lascivious act upon a 14-year-old. This requirement that the defendant intend to commit the specified act upon a child of a stated age was not at issue in *Olsen* or *Paz*, as the crimes those cases discussed required only that the victim *be* the stated age. We conclude that the defense of mistake of fact does apply to a charge under section 288.3.

That the defense may apply to this charge, however, does not mean the trial court necessarily had an obligation to instruct on the mistake of fact defense sua sponte. In fact, neither party acknowledges caselaw holding to the contrary: The mistake of fact defense seeks to negate the prosecution’s proof of the intent element of the charged offense and, therefore, does not trigger the court’s sua sponte instructional duty. (*People v. Lawson* (2013) 215 Cal.App.4th 108, 117-118; *Anderson, supra*, 51 Cal.4th at pp. 886-887.) *Anderson* held that “trial courts do not have a duty to instruct sua sponte on the defense of accident (§ 26, class Five), even if substantial evidence supports the defense and it is not inconsistent with the defendant’s theory of the case, provided the jury is properly instructed on the mental state element of the charged crime.” (*Lawson*, at p. 117; *Anderson*, at pp. 996-999.) The accident defense is codified in section 26: “All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Five—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.” As CALCRIM No. 3404 explains, “a defendant is not guilty of a charged crime if he or she acted ‘without the intent required for that crime, but acted instead accidentally.’ ” (See *Anderson*, at p. 996.) Where the defense is “raised to rebut the mental element of the crime or crimes with which the defendant was charged,” *Anderson* held, “assuming the jury received complete and accurate instructions on the requisite mental element of the offense, the obligation of the trial court . . . to instruct on accident extended no further than to provide an appropriate pinpoint instruction upon request by the defense.” (*Anderson*, at p. 998.)

The defense of mistake of fact is analogous. It is also codified in section 26: “All persons are capable of committing crimes except those belonging to the following

classes: [¶] . . . [¶] Three—Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.” CALCRIM No. 3406 explains that “[t]he defendant is not guilty of [the charged crime] if [he] did not have the intent or mental state required to commit the crime because [he] [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.”<sup>4</sup> As the *Lawson* court explained, “the rationale of *Anderson* is applies with equal force to the defense of mistake of fact, or any other defense that operates only to negate the mental state element of the crime.” (*Lawson, supra*, 215 Cal.App.4th at p. 117.) “Like the defense of accident, an instruction on the defense of mistake of fact would have served only to negate the mental state element of the crime. . . . Thus, even if substantial evidence supported an instruction on mistake of fact, the trial court had no duty to instruct on the defense sua sponte.” (*Id.* at p. 118.)

Here, the jury was properly instructed on the intent required for conviction on count 4. Appellant did not request an instruction on mistake of fact as to this count. The trial court did not err in failing to give the instruction sua sponte.

Furthermore, even if the evidence supported giving the instruction, appellant was not prejudiced by its absence.<sup>5</sup> The parties dispute the appropriate standard for assessing

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<sup>4</sup> “[F]or ‘general intent crimes’ the mistaken belief must be ‘both actual and reasonable,’ while specific intent crimes or crimes involving knowledge require only an actual mistaken belief. (*Lawson, supra*, [215 Cal.App.4th] at p. 115.)” (*People v. Givan* (2015) 233 Cal.App.4th 335, 343.)

<sup>5</sup> Respondent’s argument that there was no evidence to support the mistake of fact defense is that the only such evidence consisted of appellant’s self-serving statements to the police after his arrest, which would not be sufficient to raise a reasonable doubt. Respondent maintains that only testimony given at trial and subject to cross examination would have been sufficient. But appellant’s statements to the police were admitted into evidence and the credibility of this evidence was for the jury to determine.

Respondent’s argument that the mistake of fact defense would have been inconsistent with appellant’s defense at trial is also not persuasive. We agree that the defense at trial did not rely upon appellant’s belief that D.D. was older than 14. Appellant argued that the case was contrived by the police—that he only gave N.D. his phone number and left with no means of contacting the girls and nothing more would

prejudice if the trial court erred. Appellant argues the beyond a reasonable doubt standard (*Chapman v. California* (1967) 386 U.S. 18 (*Chapman*)) applies because the trial court “gave an incomplete instruction on the age element” and therefore “infringed on appellant’s due process and Sixth Amendment jury trial rights.” The cases he relies upon, however, involve instructional errors that resulted in the jury not being properly informed of the elements of the offense. *People v. Harris* (1994) 9 Cal.4th 407, 415-417, applied *Chapman* where the trial court gave an erroneous instruction on the “immediate presence” element of robbery; *People v. Beck* (2005) 126 Cal.App.4th 518, 523-525, applied *Chapman* to an erroneous instruction on the mental state required for attempted murder.

As appellant recognizes, *Hanna, supra*, 218 Cal.App.4th at pages 462-463, held that prejudice from error in refusing to give a requested instruction on the defense of mistake of fact is non-constitutional error assessed under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). On this point *Hanna* relied upon *People v. Russell* (2006) 144 Cal.App.4th 1415, 1431, which applied *Watson* in evaluating prejudice after finding the trial court erred in failing to instruct sua sponte on mistake of fact. (See also, *People v.*

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have happened if Josephson had not contacted him—and that the prosecution failed to prove he intended to engage in lewd conduct with the girls or caused a meeting with them to be arranged. Defense counsel’s only mention of the age issue in closing argument came amid a discussion of the lack of evidence of intent to arrange a meeting for lewd purposes: “Well, if he had the intent, why—how do I contact you? How do I see you again? But he leaves. He leaves. If she wants to call him; call him; but he leaves. When you look and say I’m going to put up pictures and this person isn’t 18. It is what he said in that interview. It’s a perspective that he has at the time how old this person could be. He didn’t see them from the back; some flowing hair or whatever.” Defense counsel then continued with the theme of insufficient evidence of intent, telling the jury that “[t]his isn’t about liking Mr. Monton” or “liking what he said or approached those girls,” and that *suspecting* he intended to molest them when he contacted them was not sufficient.

Respondent argues the mistake defense would have been inconsistent with the defense appellant relied upon at trial because a mistake of age defense implies admission of the intent to engage in lewd and lascivious conduct. We are not convinced the two defenses necessarily conflict: Appellant could have argued that he did not plan to meet with the girls with lewd intent and also believed they were older than 14 years of age.

*Zamani* (2010) 183 Cal.App.4th 854, 867.) Since *Anderson, supra*, 51 Cal.4th 989, the *Russell* court's finding of error as to the sua sponte instructional obligation "is apparently no longer good law." (*Lawson, supra*, 215 Cal.App.4th 108, 118.) But the applicability of *Watson* is consistent with the view that the mistake of fact defense, used to negate intent, calls for a pinpoint instruction required to be given only on request. (*Anderson*, at p. 998; *Lawson*, at pp. 117-118.) Unlike instructional error that "relieves the prosecution of the burden of proving beyond a reasonable doubt each essential element of the charged offense" or "improperly describes or omits an element of an offense," which require *Chapman* harmless error review, pinpoint instructions simply "relat[e] particular facts to a legal issue in the case." (*People v. Larsen* (2012) 205 Cal.App.4th 810, 829-830.) "Erroneous failure to give a pinpoint instruction is reviewed for prejudice under the *Watson* harmless error standard." (*Id.* at p. 830.)

Respondent argues any error was harmless because the text conversation informed appellant that N.D. was 13 years old and the jury would have concluded that appellant assumed D.D. was the same age—especially as appellant effectively admitted during the police interview that he believed both girls were 13. Appellant tries to avoid this conclusion by arguing that the text conversation did not refer to D.D.'s age, there was no basis for assuming he knew the girls were going to the same school, as he said in the police interview that he was not familiar with the schools in the area, and he was acquitted on count 8, which charged annoying and molesting D.D. and was the only charge for which a mistake of fact instruction *was* given.

Appellant suggests that the two places in the transcript respondent cites in claiming appellant admitted believing both girls were 13 years old do not in fact refer to both. But appellant's statements during the interview clearly reflect this belief. At one point, in explaining why he had asked during the text conversation whether "boyfriends" were going to be there after school, appellant said he wanted to know if there would be a "group" as "just two—two 13-year-old females is kinda like iffy so." When asked, "And then when you got the text today you realized the girls were 13," appellant replied, "Correct." The officers referred to both girls as 13 at various points (e.g., ". . . why hang

out with a couple 13-year-old girls when you've got a girlfriend . . . 28-year-old guy and two 13-year-old girls . . . they barely look 13 . . .” and appellant never suggested that one of the girls appeared older.

The acquittal on count 8 does not support appellant's prejudice argument. The prosecutor told the jury that while counts 1 through 6 “encompass essentially everything he did,” counts 7 and 8 were based *only* on the street encounter when appellant handed the note to N.D. With respect to the mistake of fact defense, this meant that the question for the jury on count 8 was whether appellant actually and reasonably believed D.D. was at least 18 years old when he saw the girls on the street, *before* the text conversation in which N.D. told appellant she was 13 years old. Even assuming the jury acquitted on count 8 (and count 7, concerning N.D.) because it found the prosecution failed to prove appellant did not actually and reasonably believe the girls were at least 18 when he saw them on the street, the question on count 4 was whether he believed they were older than 14 *after N.D. told him she was 13 years old*. Given all the circumstances, including appellant's statements during his police interview, no juror could entertain a reasonable doubt that appellant did not believe D.D. was older than 14 when he continued the text conversation, bought the alcohol, and went to the Kohl's parking lot to meet the girls.

### III.

In his opening brief, appellant argued that his conviction on count 4 must be reversed because the trial court failed to instruct the jurors that they had to agree unanimously on the act constituting the offense—the encounter on the street or the text conversation. “[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act.” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) “ ‘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 offenses than the evidence shows.’” (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 611-612.)” (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) “This requirement of unanimity as to the criminal act ‘is

intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.’ ([*Sutherland*, at p.] 613.)” (*Russo*, at p. 1132.)

Respondent maintains that no unanimity instruction was required here because there was insufficient evidence to establish the offense based solely on the street encounter. As earlier indicated, the parties agree on this point. Given this concession of factual insufficiency, appellant agrees that the instruction was not required. We need not discuss the issue further.

#### IV.

Appellant’s final contention is that the trial court erred in failing to stay the sentences on his convictions for attempting a lewd act (counts 1 and 2) and contacting or communicating with a minor with intent to commit a lewd act (counts 3 and 4). Under section 654, subdivision (a), “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.’ ” (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, quoting *Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

Respondent agrees that all of appellant’s convictions arose from a single course of conduct intended to result in commission of lewd acts upon N.D. and D.D. and, therefore, that the sentences on counts 1 through 4 must be stayed.

## **DISPOSITION**

The abstract of judgment shall be modified to reflect that the sentences imposed on counts 1 through 4 are stayed. As so modified, the judgment is affirmed.

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Kline, P.J.

We concur:

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Richman, J.

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Miller, J.