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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE SANTIAGO HERNANDEZ,

Defendant and Appellant.

C066873

(Super. Ct. No. SF108263A)

Defendant Jose Santiago Hernandez was convicted of sex offenses against three children who are sisters. (Pen. Code, §§ 261.5, 288, 288.7<sup>1</sup>.) Defendant appeals, claiming evidentiary, instructional, and sentencing error.

We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

The prosecution charged defendant with 13 counts as follows:

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<sup>1</sup> Undesignated statutory references are to the Penal Code in effect at the time of defendant's crimes.

Counts 1, 3, 5, and 7 alleged sexual intercourse or sodomy involving M., a child age 10 or younger (§ 288.7, subd. (a));

Counts 2, 4, 6, and 8 alleged defendant committed lewd or lascivious acts on M., a child under age 14 (§ 288, subd. (a)), with allegations of multiple victims (§ 667.61, subd. (e)(5)) and substantial sexual conduct (§ 1203.066, subd. (a)(8));

Count 9 alleged sexual penetration with A., a child age 10 or younger (§ 288.7, subd. (b));

Counts 10, 11, and 12 alleged lewd or lascivious act on A., a child under age 14 (§ 288, subd. (a)), with allegation of multiple victims (§ 667.61, subd. (e)(5)) and substantial sexual conduct (§ 1203.066, subd. (a)(8)); and

Count 13 alleged unlawful sexual intercourse with V., a minor more than three years younger than defendant (§ 261.5, subd. (c)).

### **Trial Evidence**

M. was born in 2002. A. was born in 1998. V. was born in 1991. Defendant was born April 27, 1987 and gave that date to the police; though at trial he claimed he was born in 1989.

V. testified at trial that she started dating defendant in 2006, when she was 14, but she told defendant she was 15 at the time. They began having sexual intercourse in March 2007, when V. was actually 15. Defendant often spent the night in V.'s bedroom in the house where V. lived with her seven siblings or half-siblings and their mother Lily (the Yellowstone Avenue house). V. and defendant had a son, Anthony, born in December 2007. At the time of trial, V. was no longer with defendant.

The victims' mother, Lily, testified that in November 2007, she found five-year-old M. crying uncontrollably. Lily asked M. what happened and asked if anyone touched her. M. said "Cholo" (defendant's nickname) had touched her in or on the vagina. Lily checked M. but saw no redness or discharge. Lily did not report the incident to anybody, because her impression was that the touching was rubbing, not penetration. Lily did not

speak to defendant that day, because she herself was having a high-risk pregnancy and did not want to get upset. The next day, Lily told defendant, “Stay away from my children. If you want to see [V.], that’s fine, but stay away from M[.]”

In January 2008, the family moved to a different house (the B Street house). The residents at the new house were the victims; their siblings and half-siblings; Lily and her boyfriend I.N.; V.’s infant son, Anthony; the boyfriend of the victims’ sister Ana, Salvador aka Kaico; a man named Sergio; and defendant. Salvador slept in one of two rooms in the barn/garage behind the house. Lily allowed defendant to move in with the understanding that he had no contact with her daughters other than V.

I.N. testified that, on April 28, 2008, he was in the house and heard grunting noises coming from the barn behind the house. He approached a room within the barn (not Salvador’s room) and saw 10-year-old A. lying on the floor, with defendant on top of her with his knees near her waist. A. was complaining, which was the grunting noise, and defendant told her to be quiet. The room was dark, and I.N.’s view was partially blocked by a small Christmas tree in the room, but he recognized A.’s voice. I.N. said nothing but went to tell Lily. Part way across the parking area, he turned back “to be sure,” but A. was already walking out of the barn. A. went to play with some toys near the house and told I.N. to tell Lily that she was playing there. I.N. told Lily what he saw. At trial, I.N. said he did not know whether defendant and A. had clothes on, and he did not remember telling a police detective that he believed they were both fully dressed. I.N. admitted he had been in trouble for drugs, vandalism, and assault on Lily, and had violated a court order to stay away from Lily.

Lily questioned A., who initially said nothing happened. A. was shaking and appeared terrified. Lily asked if it was true about defendant molesting her. A. said nothing, then denied it. Lily lied and said she saw what happened, thinking it would make A. more comfortable confiding in her. A. then said it did happen.

M. entered the room and told Lily defendant did other things to her. M. described an incident where defendant picked her up, threw her on the bed, laid her down, pulled down her pants and underwear, stood in front of her with her legs open, “poked her down there,” and that it hurt.

Lily went into V.’s room, hit defendant, and told him to leave, but he did not leave until a couple of hours later. Lily testified she did not call the police that night, because defendant said he would leave the country if the police were looking for him. Lily called the police a couple of weeks later, on Mother’s Day, May 11, 2008, because she knew where the police could find defendant.

At trial, A. testified that, on one occasion at the B Street house, she went into a bedroom to check on Anthony at V.’s request. Defendant was in the room. He locked the door, pushed A. onto the bed, pulled her pants down, and put his “private part” in her “private part.” A. described several different occasions in the barn/garage when defendant pulled down her pants and put his “private” in her “private.” A. testified she first told her mother nothing happened out of fear. She then told her mother, who brought her into V.’s room and said to tell V. A. was afraid at first but then told V.<sup>2</sup> A. denied being hit by her mother.<sup>3</sup>

M. testified at trial that, at the Yellowstone house, defendant grabbed her arm, took her into V.’s bedroom while V. was elsewhere, laid her down, pulled down her

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<sup>2</sup> V. did not have a good relationship with her mother, Lily. She testified that on April 28, 2008, Lily wanted A. to tell V. that defendant had touched her, but A. said nothing happened.

<sup>3</sup> The April 28, 2008, incident was the subject of two counts--count 9 (sexual penetration, § 288.7, subd. (b)) and count 10 (lewd acts, § 288, subd. (a)). Counts 11 and 12 involved the other lewd acts (§ 288, subd. (a)) occurring between January and April 2008. In closing argument, the prosecutor recounted the testimony and told the jurors they had to agree on separate incidents for counts 11 and 12.

pants, and placed his “wee-wee” (penis) inside her “private part” (vagina), and told her not to tell anyone. This happened more than once at the Yellowstone house. It happened again at the B Street house. M. went in the bedroom to check on the baby. Defendant was there. He pulled down her pants halfway, put his “wee-wee inside me, inside my private part,” and said not to tell anyone. This happened only once at the B Street house.<sup>4</sup>

The jury saw recordings of interviews of A. and M. by a forensic interviewer at the Child Advocacy Center.

A therapist testified about child sexual abuse accommodation syndrome, explaining why child victims sometimes delay disclosure, give inconsistent statements, and retract accusations. During his explanation about unconvincing statements, the therapist testified about the “peripheral” and “core” memory of molested children. A molested child’s “peripheral” memory is more inconsistent than “core” memory. Examples of “peripheral” memory include such things as how many times something happened, how long ago did these things happen, and what was the perpetrator wearing when these things happened. “Core” memory includes what happened and who did it. A child’s “core” memory is difficult to contaminate, according to the therapist. The therapist also testified that studies show that 42 percent of children who are sexually molested have partial amnesia about their victimization for some period of time. This is the way the brain protects molest victims from the emotional trauma. It is not uncommon for victims to remember what happened in therapy.

The jury also saw a videotape of an interview of defendant by Sheriff’s Detective Nelida Stone. Defendant denied molesting M. or A. However, he said A. asked him for candy in the barn while he was fixing his car. He wanted to see how far she would go to

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<sup>4</sup> Of the eight counts involving M., the jury ultimately convicted defendant of crimes related to the first incident charged in counts 1 and 2 but acquitted him on counts 3 through 8.

get the candy. He went into the room with her where she lay down. He knelt in front of her. He saw she was “capable of everything” and planned to tell V. He heard a noise and saw I.N. A. ran away.

Defendant agreed to a DNA test. Detective Stone pretended to take a DNA sample from defendant and then falsely told defendant his DNA was found on A. Defendant initially denied touching A., but then said he may have accidentally touched the outside of her vagina when he grabbed her to pull her out of his car where she had been playing. Later, he also said he once accidentally pulled M.’s pants off while playing with her.

Beginning in April 2008, M. and A. complained of stomach pain.

Dr. Susan Abraham testified as an expert on sexual assault examinations. On May 15, 2008, she examined A., noted redness to the exterior portion of her genitalia, but the physical exam was otherwise normal. A normal exam does not necessarily preclude sexual abuse. While penetration is not always into the vagina, if there were *full* penetration into the vagina of a nine-year-old like A., there would be a lot of bleeding and tearing. A.’s urine sample tested positive for Chlamydia. She was treated with an antibiotic, and a retest two weeks later was negative.

M. tested positive for Chlamydia in February 2009 and again in March 2009 despite treatment. Dr. Aejaz Ahmed testified tests can show positive “for a while” after treatment. He subsequently tried culture tests but the samples were inadequate. Dr. Patricia Apolinario testified as an expert in non-acute sexual examinations. She examined M. on April 16, 2009. The findings were normal, which neither confirmed nor negated sexual abuse.

A post-partum examination of V. in January 28, 2008, after she gave birth to Anthony, revealed that V. had Chlamydia. She was treated with a single dose antibiotic and tested negative on March 5, 2008.

Defendant tested negative for Chlamydia in January 2009.

Public health consultant Dennis Ferrero testified as an expert in Chlamydia. Chlamydia can be transferred only through sexual intercourse, except that an infected pregnant woman could transmit it to her fetus. The disease can be transmitted by ejaculation without full penetration. Half of the people who have the disease have no symptoms. One symptom is abdominal pain.

Ferrero testified that some people can live with the disease for a long time. The disease may clear up on its own within a year or sooner. Or it could clear up faster with amoxicillin. Presented with a hypothetical, the expert opined that a person infected with Chlamydia who was treated with a daily dose of amoxicillin for a week in October 2008 could test negative three months later in January 2009. In response to another hypothetical question including the facts of this case, the expert further opined that given the relevant time frames, it was possible for defendant to infect V., A., and M. and then test negative for Chlamydia in January 2009.

Lily testified that, after V. moved out of the house in May 2008, she discovered in V.'s room two empty prescription medication bottles, one with defendant's name and the other with V.'s name, with the name of the medication scratched off the label. Lily did not disclose this information until the day of the preliminary hearing in April 2010, when she told the prosecutor and detective. The jury heard a stipulation that the notes of this conversation do not reflect Lily mentioning that one of the bottles bore defendant's name. Lily knew defendant had taken prescription medicine for a bicycle injury, but that happened before he began staying at the Yellowstone house.

The defense elicited inconsistencies between what the victims said at trial, at a prior hearing, and in interviews with police and counselors, e.g., the number of times the abuse happened (varying between three and five) and failures of recollection. M. told an interviewer nothing happened but said at trial that she lied to the interviewer. M. said the

offense was committed in her “butt.”<sup>5</sup> Detective Stone wondered whether M. was just parroting what someone else said. A. told police about three incidents but could only describe one at trial. A. said defendant did five things to her but she only remembered two when interviewed. A. said at trial that her memory improved over time.

### **Defense Evidence**

Detective Stone was called as a defense witness. Detective Stone testified that Lily did not say anything about finding prescription bottles until a court hearing in late 2009. Defense counsel asked Detective Stone whether she had ever asked Lily, I.N., Kaico, or Sergio to submit to voluntary testing for Chlamydia. The prosecutor objected on relevance grounds. After a bench conference, the trial court sustained the objection. At the next recess, the trial court made a record about why it sustained the objection. The court said, “I felt that you [defense counsel] were making a third-party culpability argument, and the leading case on that is Hall [*People v. Hall* (1986) 41 Cal.3d 826 (*Hall*)] . . . , and ‘There must be direct or circumstantial evidence linking a third person to the actual perpetration of the crime for you to admit that kind of evidence,’ so I didn’t allow that in.”

Defense counsel put on the record that she had told the court at sidebar that defendant’s negative Chlamydia test suggested there may be someone else involved, and she had asked the court if she could ask whether law enforcement sought to test anyone else without mentioning any names, but the court said no. The prosecutor stated, “where you’re not asking any specific names, just to allow a blanket, ‘Did you test anybody else,’ [*sic*] does imply there may be another suspect out there that they’re not hearing about, and I think there is a third-party culpability and there is no other evidence direct or circumstantial that would link to any named individuals, such as Sergio or Kaico or [I.N.]

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<sup>5</sup> M. used to call the area between a girl’s legs the “butt.”

or the mother. And generally it would be speculating as to whether there was somebody else, but there's anything else [*sic*] that's been suggested, whether the allegations of the children or anyone else to say, anyone other than the defendant is responsible." The court said its ruling would stand, and "You actually have to have a named person, you can't just say, Well, to ask that question, it could have been anybody. . . . [O]bviously you can argue it wasn't him, of course, [but] [¶] . . . [¶] . . . [t]he way you were saying it, it was like a third-party culpability, which I understand it's kind of what you have to say, 'Well, it came out negative,' but it was the way that you were doing it." Defense counsel said it sounded like the judge was saying there may be a way to get around it. The judge said, "I was not trying to imply that."

Defendant testified at trial. He said he has never had Chlamydia, never had genital itching or discharge, and never took any medication for Chlamydia. He admitted having sexual intercourse with V., which he described as consensual.

Defendant denied pulling M.'s pants down on purpose, denied touching her vagina with his finger or penis, and denied having any sexual thoughts about M. He used to play with M., chase her, pick her up, throw her on a couch or bed, and tickle her. While playing, he once pulled her, and her pants came down to her knees accidentally.

Defendant denied touching A.'s vagina with his finger or penis or any other object, denied rubbing her vagina, and denied having sexual thoughts about her. Regarding the April 28, 2008, incident with A., defendant said she came to barn while he was there fixing his car. He had concerns about her behavior, because she was "daring" or "forward." He had candy and took her into the back room with the Christmas tree to see what she would do to get the candy, "how far she would take it," but he did not have any sexual thought about her. He did not see I.N. come in but heard something. Defendant said he was down on his knees in front of A., but he never touched her. He had his hands on either side of her body to help him stand up.

Lily's ex-husband, Victor, testified. He said they separated in 1996, and he became aware around 2003 that Lily alleged he was sexually abusing his daughter Ana who was living with him. Nothing came of it.

### **Verdicts**

The jury returned verdicts as follows:

#### **Counts Related to M.**

The jury found defendant guilty on count 1, sexual intercourse with a child age 10 or younger (§ 288.7, subd. (a)) and count 2, lewd or lascivious acts on a child under the age of 14 (§ 288, subd. (a))--the "FIRST TIME AT YELLOWSTONE AVENUE HOUSE." As to count 2, the jury found true the allegations of substantial sexual conduct (penetration of the vagina with the penis) (§ 1203.066, subd. (a)(8)), and commission of offense against more than one victim (§ 667.61, subd. (e)(5)).

The jury found defendant not guilty on counts 3, 5, and 7, sexual intercourse with a child age 10 or younger (§ 288.7, subd. (a)), and counts 4, 6, and 8, lewd or lascivious acts on a child under the age of 14 (§ 288, subd. (a)).

#### **Counts Related to A.**

The jury found defendant guilty on all counts, count 9, sexual penetration (§ 288.7, subd. (b)), and counts 10, 11, and 12, lewd or lascivious acts on a child under 14 (§ 288, subd. (a)). The jury found true the allegations of multiple victims (§ 667.61, subd. (e)(5)) in counts 10, 11, and 12. The jury found the allegations of substantial sexual conduct (§ 1203.066, subd. (a)(8)) "not true" as to count 10, "true" as to count 11, and "not true" as to count 12.

#### **Count Related to V.**

The jury found defendant guilty on count 13, unlawful sexual intercourse with a minor more than three years younger than defendant (§ 261.5, subd. (c)).

## **Sentencing**

The trial court sentenced defendant to prison for a total of 72 years to life, calculated as follows:

Count 1--25 years to life.

Count 2--15 years to life stayed pursuant to section 654.

Counts 9, 11, and 12--Consecutive terms of 15 years to life.

Count 10--15 years to life, stayed pursuant to section 654.

Count 13--Two years consecutive.

## **DISCUSSION**

### **I. Exclusion of Evidence**

Defendant argues the trial court erroneously excluded evidence that Lily, I.N., Kaico, and Sergio were not tested for Chlamydia, which assertedly deprived defendant of his constitutional right to present a complete defense under the Sixth and Fourteenth Amendments to the United States Constitution. Defendant contends the trial court improperly excluded the evidence as irrelevant based on an insufficient defense showing of third-party culpability. Defendant argues that the fact that Lily was not tested was relevant circumstantial evidence to disprove the necessary fact that M. and A. were victims of sex offenses, because Chlamydia can be transferred from a pregnant woman to a fetus, so maybe Lily, the mother of all three victims (M., A., and V.), was the source of their Chlamydia. Defendant further argues the evidence that I.N., Kaico, and Sergio were not tested was erroneously excluded because they had constant, recurring access to M. and A., and defendant tested negative for Chlamydia, which raised a reasonable doubt of his guilt. We disagree.

Preliminarily, we observe that the trial court sustained an objection to Detective Stone about whether she ever *asked* the above referenced individuals to submit to a test, not whether those people were tested. We will assume that the trial court would have

precluded any testimony about whether the named individuals were tested had defendant asked those individuals that question on cross-examination.<sup>6</sup>

Only relevant evidence is admissible. (Evid. Code, § 350.) “Relevant evidence” means “evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) A trial court has broad discretion in determining whether evidence is relevant. (*People v. Harris* (2005) 37 Cal.4th 310, 337.) We review the trial court’s ruling under an abuse of discretion standard. (*Ibid.*; *People v. Robinson* (2005) 37 Cal.4th 592, 625-626.)

Defendant’s negative test did not raise a reasonable doubt of guilt, because he was not tested until January 2009--months after the last incident in April 2008. This was plenty of time to clear up his infection.

#### **A. Chlamydia Testing for Lily**

We note that the defense did not advance at trial the theory that the children could have got Chlamydia from their pregnant mother as a reason for asking Lily whether she had been tested. We will assume this new theory of admissibility is not forfeited and further observe that the defense did not elicit or proffer any evidence that Chlamydia can last for 16 years, or nine years, or even six years, the ages of V., A., and M. when tested. To the contrary, the expert testified that the disease, if left untreated, can clear itself up in a year or so. Defendant would have us and the trial court ignore this important evidence. Yet, if V. was infected by her pregnant mother, she should have infected defendant and thus, the only explanation for why he tested negative, given his claim he was never treated for Chlamydia, is that the disease went away on its own. Moreover, according to the uncontroverted testimony of the expert, the reason to get treatment rather than allow it

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<sup>6</sup> A question to Detective Stone regarding whether the named persons were actually tested would have been objectionable on hearsay grounds.

to go away on its own is that the infection can ascend into the female organs and create life-threatening disease, tubal scarring, infertility, or ectopic pregnancy. There was no evidence that Lily, who was the mother of eight children, all younger than V. and two younger than Myra, was suffering from any such medical problems. Nor was there evidence that V., who gave birth to defendant's child, was suffering from such medical problems. Furthermore, A. and M. both complained of stomach pains in April 2008, around the time of the molestations. Stomach pains are a symptom of Chlamydia.

We conclude there was no relevance to evidence that Lily was not tested for Chlamydia, and if there was any relevance, the probative value was nil and substantially outweighed by the substantial danger of confusing the issues and misleading the jury (§ 352), a ruling defendant did not give the trial court an opportunity to make since he never advanced the theory of admissibility he now asserts on appeal in the trial court. “[A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for the wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.” (*People v. Zapfen* (1993) 4 Cal.4th 929, 976.) The trial court did not abuse its discretion in excluding evidence as to whether Lily had been asked to submit to a Chlamydia test.

### **B. Chlamydia Testing for the Other Men in the House**

As to the question whether I.N., Salvador, and Sergio were tested, the implication is that one of them, rather than defendant, was the perpetrator of the sex offenses. To be admissible, third-party culpability evidence must be capable of raising a reasonable doubt of defendant's guilt. (*Hall, supra*, 41 Cal.3d at p. 833.) Courts “do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere . . . opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the

crime.” (*Ibid.*) The trial court’s proper inquiry is limited to whether the third-party culpability evidence could raise a reasonable doubt as to the defendant’s guilt and then applying Evidence Code section 352. (*Ibid.*) “[C]ourts should simply treat third-party culpability evidence like any other evidence; if relevant it is admissible ([Evid. Code] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code] § 352). . . . [A]n inquiry into the admissibility of such evidence and the balancing required under [Evidence Code] section 352 will always turn on the facts of the case. Yet courts must weigh those facts carefully.” (*Hall*, at p. 834.)

Here, to the extent defendant sought to offer the evidence to raise a reasonable doubt about whether he was the source of the victims’ Chlamydia, the proposed evidence was irrelevant because it had no tendency in reason to prove that anyone else could have been the source of the infections. Defendant merely sought to show that the other men were not tested, not that any of the other men had Chlamydia. Moreover, mere access to the victims is not enough (*Hall, supra*, 41 Cal.3d at p. 833), and there was no evidence whatsoever linking any of them to the sex offenses. To the contrary, the victims all identified defendant as the only person who had sexual contact with them, and defendant admitted having sexual intercourse with V., whom he does not here contend was victimized by one of the other men.

The trial court properly excluded the evidence under our state evidentiary rules. Even assuming defendant has not forfeited his constitutional claim by failing to raise it in the trial court, application of the ordinary rules of evidence generally does not deprive a defendant of the opportunity to present a defense. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1450.) Defendant had no constitutional right to present irrelevant evidence.

We conclude there was no evidentiary error, and we therefore need not address the parties’ arguments about harmless error.

## II. CALCRIM No. 1190

Defendant next contends CALCRIM No. 1190 deprived him of due process. We disagree.

Over defense objection, the trial court instructed the jury with CALCRIM No. 1190: “Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone.”

The trial court also instructed the jury with CALCRIM No. 301: “The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.”

In the trial court, defense counsel objected to CALCRIM No. 1190 on the ground that “It almost sounds like it’s not--not as much is required for sexual assault cases as any other kind of cases . . . .”

On appeal, defendant argues the instructions improperly suggested that the jury should view *his* testimony with caution, but not the victims’ testimony. As defendant acknowledges, this argument was rejected in the context of the former CALJIC instructions in *People v. Gammage* (1992) 2 Cal.4th 693, which is binding on us (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In *Gammage*, the trial court in a sexual assault case instructed the jury with both CALJIC Nos. 2.27 and 10.60. CALJIC No. 2.27 read: “ ‘Testimony as to any particular fact which you believe given by one witness is sufficient for the proof of that fact. However, before finding any fact *required to be established by the prosecution* to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends.’ ” (*Gammage, supra*, 2 Cal.4th at p. 696, italics added by *Gammage*, citing CALJIC No. 2.27 (4th ed. 1986 rev.))

The *Gammage* trial court also instructed the jury with CALJIC No. 10.60: “ ‘It is not essential to a conviction of a charge of rape that the testimony of the witness with whom sexual intercourse is alleged to have been committed be corroborated by other

evidence.’ ” (*Gammage, supra*, 2 Cal.4th at pp. 696-697, citing former CALJIC No. 10.21 (4th ed. 1070 rev.), renumbered CALJIC No. 1060 (5th ed.).)

The defendant in *Gammage* argued that, in combination, the two instructions improperly suggested that the jury should view *his* testimony with caution, but that the testimony of the complaining witness need not be viewed with caution. (*Gammage, supra*, 2 Cal.4th at p. 697.) The Supreme Court disagreed. “Although the two instructions overlap to some extent, each has a different focus. CALJIC No. 2.27 focuses on how the jury should evaluate a fact (or at least a fact required to be established by the prosecution) proved solely by the testimony of a single witness. It is given with other instructions advising the jury how to engage in the *fact-finding* process. CALJIC No. 10.60, on the other hand, declares a substantive rule of law, that the testimony of the complaining witness need not be corroborated. It is given with other instructions on the legal elements of the charged crimes. [¶] Because of this difference in focus of the instructions, we disagree with defendant . . . that, in combination, the instructions create a preferential credibility standard for the complaining witness, or somehow suggest that that witness is entitled to a special deference. The one instruction merely suggests careful review when a fact depends on the testimony of one witness. The other tells the jury there is no legal corroboration requirement. Neither eviscerates or modifies the other.” (*Gammage, supra*, 2 Cal.4th at pp. 700-701, original italics.)

Defendant argues *Gammage* is distinguishable, because the wording of the former and current instructions differs. He claims CALJIC No. 2.27 was arguably more beneficial to the defense and more burdensome to the prosecution, in that it required the jury to review carefully all testimony before relying on a single witness to find any fact “required to be established by the prosecution.” (Italics omitted.) The phrase “required to be established by the prosecution” is not included in the current instruction, CALCRIM No. 301. As to CALCRIM No. 301, defendant argues it no longer states

clearly a rule of substantive law, because it does not say “corroboration is not required” (as did the former CALJIC instruction).

We view the changes in wording as inconsequential. The holding of *Gammage*, quoted above, applies to the current CALCRIM instructions.

Defendant argues CALCRIM No. 1190 was “additionally unconstitutional and otherwise erroneous” because the prosecution argued guilt based on circumstantial evidence from “a panoply of witnesses and evidence, not on the complaining witnesses’ testimony alone.” Defendant does not explain how this renders CALCRIM No. 1190 additionally unconstitutional and erroneous.

Defendant argues the testimony of M. and A., if viewed through the cautionary lens of CALCRIM No. 301, required the jurors to review carefully all the evidence, including the victims’ prior inconsistent statements in forensic interviews, e.g., M. said nothing happened; M. said the offense was committed in her “butt”; Detective Stone wondered whether M. was just parroting what someone else said; A. told police about three incidents but could only describe one at trial; During the investigation, A. claimed defendant did five things to her but she just remembered two; and A. said at trial that her memory improved over time. However, CALCRIM No. 1190 did not diminish the cautionary lens of CALCRIM No. 301, which told the jurors, “Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.”

There was no instructional error, and we need not address the parties’ argument regarding harmless error.

### **III. Sentencing**

Defendant argues consecutive 15 year to life terms on counts 11 and 12 under former section 667.61, subdivision (b), were unauthorized. Again, we disagree.

Former section 667.61, the “one strike law,” at the time in question<sup>7</sup> provided in pertinent part:

“(b) Except as provided in subdivision (a), any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life.

“(c) This section shall apply to any of the following offenses:

“[(1) through (7)]

“(8) A lewd or lascivious act, in violation of subdivision (a) of Section 288.<sup>[8]</sup> [¶]  
... [¶]

“(e) The following circumstances shall apply to the offenses specified in subdivision (c): [¶] . . . [¶]

“(5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim. . . .” (Former § 667.61; Stats. 2006, ch. 337, § 33.)

Former section 667.61 is not subject to section 654’s prohibition of multiple punishment. (*People v. DeSimone* (1998) 62 Cal.App.4th 693, 700.)

In sentencing defendant on counts 11 and 12, the trial court said:

“For Count 11, the PC 288(a) against victim [A.], . . . charging the time period . . . January of ’08 through April of ’08, the Court is denying probation pursuant to

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<sup>7</sup> The statute has since been revised, but the substance relevant to this appeal remains the same. (Stats. 2011, ch. 361, § 5 [S.B. 576]; Stats. 2010, ch. 219, § 16 [A.B. 1844].)

<sup>8</sup> Section 288, subdivision (a), provides in part that “any 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 . . . .”

1203.066(a)(8), as found true by the jury, and imposing 15 to life for the 667.61(e)(5) as found true by the jury. It will be consecutive to all other counts. [¶] . . . [¶]

“For Count 12, the 288(a), again victim [A.], . . . for the time period January of ’08 through April of ’08, the Court is imposing 15 to life pursuant to 667.61(e)(5) as found true by the jury. It will be consecutive to all other counts, as the DA elected between different acts then [*sic*] alleged in Count 11.”

On appeal, defendant argues consecutive section 667.61 sentences for counts 11 and 12 (offenses against A.) were unauthorized because section 667.61, subdivision (e)(5)’s multiple-victim finding was invalid, since count 1’s offense for violating section 288.7, subdivision (a), was not one of the specified offenses under section 667.61, subdivision (c). However, count 2, of which the jury found defendant guilty, was for lewd acts upon M. in violation of section 288, subdivision (a), which *was* (and is) a specified offense under section 667.61, subdivision (c). Defendant’s argument on appeal completely ignores the count 2 conviction. Although the trial court stayed sentence on count 2 under section 654, nevertheless defendant was *convicted* on count 2, which is all that section 667.61 required.

Defendant also argues that consecutive section 667.61 terms for counts 11 and 12 were unauthorized because section 667.61, subdivision (i) says, “For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), the court shall impose a *consecutive* sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions, as defined in subdivision (d) of Section 667.6.” (Italics added.)

This *mandatory* consecutive sentencing does not apply in this case, because none of the offenses specified in paragraphs (1) to (7) of section 667.61, subdivision (c) were at issue. At issue here was paragraph (8) of section 667.61, subdivision (c)--lewd or lascivious acts under section 288, subdivision (a).

However, while subdivision (i) of section 667.61 *mandates* consecutive sentences for the offenses specified in paragraphs (1) to (7) of subdivision (c), it does not *forbid* consecutive sentences for the offense specified in paragraph (8) of subdivision (c). (*People v. Valdez* (2011) 193 Cal.App.4th 1515, 1524.)

Defendant argues in his reply brief that *Valdez* is distinguishable because here defendant was not convicted of section 288, subdivision (a), offenses against more than one victim. Defendant is wrong. He was convicted of section 288, subdivision (a), offenses involving both M. (count 2) and A. (counts 10, 11, and 12).

The trial court said it was imposing the one strike sentence on count 12 consecutive to other counts because “the DA elected between different acts then [*sic*] alleged in Count 11.” This is consistent with California Rules of Court, rule 4.425, which authorizes consecutive sentences where crimes are independent of each other or were committed at different times or separate places rather than in a single period of aberrant behavior. (Cal. Rules of Court, rule 4.425(a).)

Defendant fails to show sentencing error.

#### **DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_ MURRAY \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ BLEASE \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ ROBIE \_\_\_\_\_, J.