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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE HILARIO MALDONADO,

Defendant and Appellant.

E054116

(Super.Ct.No. RIF146821)

OPINION

APPEAL from the Superior Court of Riverside County. John M. Davis, Judge.

Affirmed with directions.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Jose Hilario Maldonado appeals from judgment entered following jury

convictions for one count of continuous sexual abuse of a minor (Pen. Code, § 288.5; count 1)<sup>1</sup> and five counts of lewd and lascivious acts upon a child under 14 years of age by force, violence, duress, menace, or fear (§ 288, subd. (b)(1); counts 2-6). The trial court dismissed count 1 because the offense should have been charged in the alternative to the section 288, subdivision (b), counts, which took place during the same time period. The trial court sentenced defendant to consecutive middle terms of six years on each count for a total sentence of 30 years in prison.

Defendant contends there was insufficient evidence he used force, fear, or duress in committing lewd acts with a child under section 288, subdivision (b)(1). Additionally, he argues the trial court committed prejudicial error by failing to instruct the jury on the alternative nature of the section 288 and 288.5 offenses, and erred in dismissing defendant's section 288.5 conviction instead of his section 288 convictions. Defendant challenges the use of certain language in CALCRIM No. 1111 and argues his trial attorney provided ineffective representation by not raising objections to dismissal of his section 288.5 conviction and to CALCRIM No. 1111. Defendant also contends the trial court's response to the jury's notice of deadlock was unduly coercive. Finally, defendant complains that the trial court erroneously imposed a restitution fine under section 294.

We reject defendant's contentions and affirm the judgment, with the exception that the trial court should not have imposed a restitution fine under section 294, since defendant's section 288.5 conviction was dismissed.

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Penal Code.

## II

### FACTS

N. moved in to defendant's home in March 2006. Defendant, who was N.'s uncle, began molesting her in June 2006, when she was eight years old and in second grade. The last time he molested her was in August 2008, when she was nine years old and in third grade. During the time period defendant molested N., she and her mother (mother) were living with defendant and his wife, Vi., and their two daughters, E. and V. When defendant first molested N., E. was one year old and V. was five years old. N. slept with her mother in one room. Defendant, Vi., and their two daughters slept in another room, and the third room was for guests.

N., who was 11 years old at the time of trial, testified she could not recall exactly what happened the first or last time defendant molested her. Defendant would enter her room and molest her about 10 minutes after her mother and aunt left for work around 4:00 a.m. on Saturdays. No one else was home, other than her two cousins, who were sleeping. Her mother and Vi. did not work every Saturday. They only worked on Saturday when there had been a holiday during the week. When mother worked the other days of the week, she dropped off N. at the babysitter's house. N. was not molested every time her mother worked on Saturday.

When defendant molested N., he would take off her bra, underwear, and pajamas. Defendant was wearing his pajamas and boxers. Defendant sometimes would try to pick her up and sometimes would place her on her bed. She would try to get up off the bed and defendant would not let her. He would tell her to stay on the bed. Sometimes she

would tell him she needed to go to the restroom, even though she did not need to. She would try to run out of her room when defendant entered but he would not let her pass him to go out the door. Because N. did not want defendant to touch her, she would hit him with her teddy bear. When defendant started taking off her clothes, she would hit him and defendant would grab her arms. N. also screamed but her cousins did not come to her aid because they were sleeping. When defendant entered her room, she would tell him not to hurt her again. He did not respond.

Defendant licked N.'s vaginal area while she lay face up on the bed. He licked her genitals approximately 15 times, on separate dates. Defendant also licked her breasts and touched her vaginal area with his finger. Defendant told her to look at his penis and suck it. N. refused. She did not want to see it and hit him again with her teddy bear.

The second time defendant molested her, N. woke up V. and told her what had happened. N. told V. almost every time it happened. Defendant molested N. for about a year before she told her mother. Mother estimated that during the period of 2006 through 2008, she left N. with defendant approximately six to eight Saturday mornings per year. The last time defendant molested her, defendant took off her clothes, licked her vaginal area, and asked her to suck his penis.

When N.'s mother and Vi. were about to go to work the first Saturday in September 2008, N. told mother defendant had been molesting her. Vi. overheard the conversation. The three started crying together. N. also told her babysitter and two of her friends that defendant had molested her. Neither mother nor Vi. notified Child Protective Services (CPS) or the police. Mother testified that when N. first told her

defendant was molesting her, mother did not know if it was true. Usually, when N. lied, she eventually would tell the truth.

Mother and N. moved out of defendant's home in September 2008, two or three weeks after N. told mother that defendant had been molesting her. After moving out, N. and mother occasionally visited Vi. and N.'s cousins at defendant's home. One time, N. spent the night there when mother went out to celebrate her birthday. Vi. assured mother N. would be fine. Defendant never touched N. again after she and mother moved out of defendant's home. V. testified that N. talked to her about someone doing things to her. N. did not tell her what happened. V. did not remember if N. talked about defendant.

After N. told her best friend that defendant had done something serious to her while mother was at work, N.'s friend reported this to the school principal. CPS was called to the school and interviewed N. and mother, and placed N. in foster care for about three months. In August 2009, N. was returned to mother's custody.

George Vasquez, an investigator with the Riverside County Public Defender's office, testified that the day before he testified, he interviewed mother and Vi. Vi. described N. as well-behaved but a bit aggressive with E. Vi. said N. was not the type of child who would lie. When she asked N. what had happened, N. told her, "He did it. I don't remember," and "I was sleeping." Vi. also told Vasquez that when she asked N. why she had said defendant took her clothes off, N. said, "He did it like that. I don't remember."

## **Defense Evidence**

Defendant testified that his relationship with mother was good while she lived at his home, until July 2008. Defendant asked mother to move out then because of something false her boyfriend had said about defendant. Mother was fine with moving out but their relationship changed after this. Defendant and mother interacted with each other “in a more serious manner.”

N. also initially had a good relationship with defendant and his two daughters but this changed when N. went to school. On one occasion, in June 2008, defendant intervened in a dispute between N. and E. over a toy. N. grabbed a toy from E., who was only one-and-a-half years old. Defendant reprimanded N. in a raised voice and told her to return the toy to E. After that incident, N. was “more serious” and became angry more easily.

Defendant estimated N. was left in his care eight or nine times between 2006 and 2008, including three Saturdays in 2007 and two in 2008. Defendant denied doing anything inappropriate on these occasions. He stayed in his room with his girls and N. stayed in her room. He did not go in her room. One time, while walking down the hall, he noticed she was awake with her television on. He told her to go to sleep. She said she was scared. Defendant told her to join his daughters in their room, which she did. Normally, when he watched N. Saturday mornings, he had no interaction with her. Usually, she was sleeping when he watched her.

Defendant denied ever going into N.'s room and undressing her, touching her vagina,<sup>2</sup> licking it, licking her breasts, or doing anything else sexually inappropriate to N. Defendant said he did not have any sexual interest in children and would never abuse a child. He first learned of N.'s accusations against him in September 2008. N. and her mother moved out three weeks later.

Defendant's wife, Vi., testified that she and defendant had been married for 10 years. N.'s mother was Vi.'s sister. Vi. and mother worked together at the same company. Around six Saturdays a year they made up work time missed when there were holidays. Vi. estimated she and her sister worked four Saturdays in 2006, five in 2007, and three up until September 2008. The first Saturday in September 2008, before mother and Vi. went to work, N. said she did not want to stay home because defendant had raped her. Later that day, Vi. asked N. to elaborate. N. said defendant did something to her but would not say what he did. Vi. asked if defendant or someone else took her clothes off and N. said no one did. On another occasion, Vi. again asked N. about her accusations against defendant and N. said she was asleep and did not remember anything.

Vi. said her relationship with N. in 2006 was not bad. N. had just moved from Mexico and had difficulty adjusting. Sometimes Vi. had to discipline her when she treated E. inappropriately. N. also frequently argued with Vi.'s daughters. Vi. acknowledged she had told an investigator that N. was generally well-behaved and that

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<sup>2</sup> Although the word "vagina" is used, defendant probably meant external "genitals." The vagina is an internal organ, defined as "a canal in a female mammal that leads from the uterus to the external orifice of the genital canal." (Merriam-Webster's Collegiate Dict. (10th ed. 1993) p. 1304, col. 1.)

N.'s relationship with Vi.'s daughters was good initially but later deteriorated when N. began hitting the girls. In April or May 2008, Vi. overheard V. and N. arguing, and asked them what was wrong. N. said V. had made fun of her because she did not have a father. N. told V. that one day V. would also end up without a father.

### III

#### SUFFICIENCY OF EVIDENCE OF FORCIBLE LEWD ACTS

Defendant contends there was insufficient evidence of force and duress to support his convictions for committing forcible lewd acts with a child under 14 (§ 288, subd. (b); counts 2-6). He argues the evidence only shows nonforcible acts of molestation, punishable under section 288, subdivision (a). We disagree.

Our review of any claim of insufficiency of the evidence is limited. “In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) The reviewing court must assume that the trier of fact resolved all conflicting inferences in favor of the prosecution. (*Jackson v. Vi.* (1979) 443 U.S. 307, 326.)

Subdivisions (b) and (a) of section 288 on their face distinguish “between those lewd acts that are committed by force and those that are not.” (*People v. Cicero* (1984) 157 Cal.App.3d 465, 473 (*Cicero*)). Section 288, subdivision (a), makes it a felony to “willfully and lewdly” commit “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.” Section 288, subdivision (b)(1), proscribes any such conduct committed “by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury.” “Where no physical harm to the child has occurred, the prosecution has the burden of proving (1) that the defendant used physical force substantially different from or substantially in excess of that required for the lewd act and (2) that the lewd act was accomplished against the will of the victim. The prosecution may satisfy its burden on the latter issue by proving the physical force was such as would reasonably demonstrate that the lewd act was undertaken against the will of the victim under all circumstances, including the ages and sizes of the defendant and the victim. The prosecution need not prove that the victim resisted the lewd act.” (*Cicero*, at pp. 484-485.) Here, there was no evidence the victim sustained physical harm.

Under section 288, subdivision (b)(1), “‘duress’ means a “‘direct or implied *threat* of force . . . sufficient to coerce a reasonable person of ordinary susceptibilities’” to do or submit to something that person would not otherwise have done or submitted to. (*People v. Veale* (2008) 160 Cal.App.4th 40, 46 [Fourth Dist., Div. Two] (*Veale*), quoting *People v. Cochran* (2002) 103 Cal.App.4th 8, 13 (*Cochran*).) Force is “a method of obtaining a child’s participation in a lewd act in violation of a child’s will.” (*Cicero*, *supra*, 157 Cal.App.3d at p. 476.) “[T]hreats need not be express, but may be inferred from conduct. [Citation.] Silent threats, of course, generate fear.” (*People v. Reyes* (1984) 153 Cal.App.3d 803, 811.) The victim’s age and size are relevant to a

determination of whether the victim's participation has been obtained by duress.

““Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant” . . . [are] relevant to the existence of duress.” (Veale, at p. 49, quoting *People v. Schulz* (1992) 2 Cal.App.4th 999, 1005.)

In *Cochran*, the court stated, “as a factual matter, when the victim is as young as this victim and is molested by her father in the family home, in all but the rarest cases duress will be present.” (*Cochran, supra*, 103 Cal.App.4th at p. 16, fn. 6.) In *Cochran*, the defendant was a foot and a half taller than the nine-year-old victim and outweighed her by about 100 pounds. (*Id.* at p. 15; see also *People v. Pitmon* (1985) 170 Cal.App.3d 38, 51 [finding the evidence sufficient to establish duress, even though the victim testified the defendant did not use force, violence, or threats when the victim “was eight years old, an age at which adults are commonly viewed as authority figures. The disparity in physical size between an eight-year-old and an adult also contributes to a youngster's sense of [her] relative physical vulnerability”].)

Defendant argues there was insufficient evidence of duress because there was no evidence of any express or implied threats, such as threats of retribution, violence, restrictions of N.'s privileges or shame or humiliation. But, as in *Cochran, supra*, 103 Cal.App.4th 8, the molestation took place in the family home when mother was not home. N. was living with defendant and he was her uncle and taking care of her when he molested her. Defendant occupied a position of authority in the family. He testified he reprimanded N. when she mistreated his daughters. Defendant was older, taller and bigger than N., who was only eight years old when defendant began molesting her. It is

reasonable to infer that these circumstances along with the considerable disparity in size and age between her and defendant contributed to N.'s sense of duress.

Defendant cites *People v. Schulz, supra*, 2 Cal.App.4th 999, for the proposition the evidence also did not show defendant used force. The court in *Schulz* stated that, “[s]ince ordinary lewd touching often involves some additional physical contact, a modicum of holding and even restraining cannot be regarded as substantially different or excessive ‘force.’” (*Id.* at p. 1004.) The *Schulz* court held that grabbing the victim’s arm and holding her while the defendant fondled her did not constitute force sufficient to support a conviction for forcible lewd acts. (*Ibid.*) But defendant fails to mention the *Schulz* court nevertheless concluded there was sufficient evidence to support defendant’s conviction for violating section 288, subdivision (b), based on duress. The *Schulz* court concluded: “In our view duress was involved in this ‘nightmare’ incident. The victim, then nine years old, was crying while defendant, her adult uncle, restrained and fondled her. On this occasion he took advantage not only of his psychological dominance as an adult authority figure, but also of his physical dominance to overcome her resistance to molestation. This qualifies as duress.” (*Schulz*, at p. 1005.)

Furthermore, courts have rejected the reasoning in *Schultz*, regarding force. (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1004 (*Alvarez*); *People v. Bolander* (1994) 23 Cal.App.4th 155, 159-161; *People v. Neel* (1993) 19 Cal.App.4th 1784, 1789-1790 (*Neel*); *People v. Babcock* (1993) 14 Cal.App.4th 383, 387-388 (*Babcock*)). In *Babcock*, the court found sufficient force where a defendant grabbed the victims’ hands and forced the victims to touch his genitals, thereby overcoming the victims’ attempts to

pull away. (*Babcock*, at pp. 386-387.) Similarly, sufficient force was found in *Cicero*, *supra*, 157 Cal.App.3d at page 486, where the defendant picked up two girls by the waist in a playful but deceitful manner and then placed his hands on their crotches while carrying them away.

In *Alvarez*, *supra*, 178 Cal.App.4th at page 1004, the court held that the court in *Schulz* was “wrong” in holding there was insufficient evidence of force because “‘a modicum of holding and even restraining cannot be regarded as substantially different or excessive “force.’”” (*Id.* at p. 1002, 1004.) The *Alvarez*, court acknowledged that the force requirement under section 288, subdivision (b), required that the defendant uses force that is different from and in excess of the type of force used in accomplishing similar consensual lewd acts. (*Cicero*, *supra*, 19 Cal.App.4th at pp. 474-475; *Neel*, *supra*, 19 Cal.App.4th at p. 1790; see also *Alvarez*, at p. 1004.) The court in *Alvarez*, however, further stated that, “[a]ccording to the majority of courts, this includes acts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves.” (*Alvarez*, at p. 1005; see, e.g., *People v. Bolander*, *supra*, 23 Cal.App.4th at pp. 160-161; *Neel*, *supra*, 19 Cal.App.4th at p. 1790; *Babcock*, *supra*, 14 Cal.App.4th at p. 388.) The *Alvarez* court stated it agreed with the majority view. (*Alvarez*, at p. 1005.)

Here, N.’s testimony was more than sufficient to support a finding of force, as well as duress, under section 288, subdivision (b). Such testimony included N.’s testimony that defendant took off her clothing. Sometimes he tried to pick her up and sometimes he placed her on her bed. N. would try to get up off the bed and defendant would not let her. Defendant would tell her to stay on her bed. She would try to leave by

telling him she needed to go to the restroom. N. also tried to run out of her room when he entered but he blocked her exit. He would never let her pass him to go out the door. Because N. did not want defendant to touch her, she would hit him with her teddy bear. She hit him with her teddy bear when he started taking off her clothes. Defendant would grab her arms to prevent her from hitting him with her teddy bear. N. also screamed but her cousins did not come help her because they were sleeping. These acts of force were not merely integral to the molestations themselves. Defendant's acts of force and duress were used to overcome N.'s resistance to being molested. N.'s testimony was more than sufficient to support a finding of force, as well as duress, under section 288, subdivision (b).

#### IV

##### DISMISSAL OF CONTINUOUS SEXUAL ABUSE CONVICTION

Defendant contends the trial court erred in dismissing his conviction on count 1, for continuous sexual abuse of a child (§ 288.5), instead of dismissing his convictions for committing forcible lewd acts (§ 288, subd. (c); counts 2-6). The trial court dismissed count 1 because, under section 288.5, subdivision (c), charges for continuous sexual abuse and for forcible lewd acts should have been alternatively pled.

##### *A. Procedural Background*

All of the sexual abuse charges (counts 1-6) allegedly occurred during the same period, from 2006 through 2008. During sentencing, the prosecution moved to reverse defendant's conviction on count 1 on the ground the People erroneously prosecuted defendant for both continuous sexual abuse under section 288.5, and individual counts of

forcible lewd acts under section 288, subdivision (b)(1). The prosecutor asserted that the appropriate remedy was to reverse the count 1 conviction. When the court asked if defendant had any objection to dismissal of count 1, defense counsel replied: “No, Your Honor. Defense would join in the request.” The trial court dismissed count 1 and consecutively sentenced defendant on the five counts of forcible lewd acts.

*B. Invited Error*

The People argue defendant’s joinder in the People’s motion to dismiss defendant’s conviction on count 1 constituted invited error. We agree. “Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error.” (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212; *People v. Barton* (1995) 12 Cal.4th 186, 198; 6 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 3287.)

Defense counsel expressly stated that defendant did not object to dismissing count 1 and that defendant joined in the request. On appeal, the People acknowledge that defendant’s joinder can be deemed invited error only if defense counsel agreed to joinder as a tactical decision, rather than an act based on ignorance, mistake or forgetfulness. Since case law, as discussed below, supports dismissal of the continuous sexual abuse conviction, as opposed to dismissing the five individual counts of forcible lewd acts, there is no basis for concluding defendant’s joinder was based on ignorance, mistake or forgetfulness. Even assuming there was no invited error or forfeiture, defendant’s objection lacks merit.

### *C. Applicable Law*

Subdivision (c) of section 288.5 precludes charging a violation of section 288.5 and also charging any offense involving the same victim in the same period of time. Accordingly, continuous sexual abuse in violation of section 288.5 and any discrete sexual offense against the same victim, which occurred within the period of the continuous sexual abuse, must be charged in the alternative and a defendant may stand convicted of either offense, but not both. (*People v. Johnson* (2002) 28 Cal.4th 240, 244-248 (*Johnson*).

When there have been such multiple convictions, “either the continuous abuse conviction or the convictions on the specific offenses must be vacated.” (*Johnson, supra*, 28 Cal.4th at p. 245.) “[S]ection 288.5, subdivision (c) gives the prosecutor maximum flexibility to allege and prove *not only* a continuous sexual abuse count, but also specific felony offenses commensurate with the defendant’s culpability, subject only to the limitation that the defendant may not be *convicted* of both continuous sexual abuse and specific felony sex offenses committed in the same period. It therefore is also appropriate, in deciding which convictions to vacate as the remedy for a violation of the proscription against multiple convictions set forth in section 288.5, subdivision (c), that we leave appellant standing convicted of the alternative offenses that are most commensurate with his culpability.” (*People v. Torres* (2002) 102 Cal.App.4th 1053, 1059 (*Torres*).

In *Torres*, the trial court imposed a longer aggregate sentence for the specific offenses and stayed execution of sentence on the continuous sexual abuse violation. The

appellate court concluded the appropriate remedy was to reverse the continuous sexual abuse conviction because it carried the lower sentence. (*Torres, supra*, 102 Cal.App.4th at pp. 1060-1061; see also *People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1177 [dismissal of continuing sexual abuse charge appropriate when the individual counts of lewd conduct carried a longer sentence].)

#### *D. Discussion*

Here, defendant's five counts of forcible lewd acts carried a greater aggregate penalty than the penalty for continuous sexual abuse. Each lewd act conviction carried a consecutive term of three, six, or eight years in state prison, for an aggregate sentence of 15, 30, or 40 years in prison. (§ 288, subd. (b)(1).)<sup>3</sup> Continuous sexual abuse was subject to a determinate term of six, 12, or 16 years in state prison. (§ 288.5, subd. (a).) The Legislature has thus determined that five or more separate acts of forcible lewd acts with the same victim is more egregious than continuous sexual abuse, which requires a minimum of three lewd acts. Therefore, the trial court's dismissal of defendant's count 1 conviction for continuous sexual abuse was appropriate (§ 288.5).

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<sup>3</sup> "On September 9, 2010, the Governor signed into law the Chelsea King Child Predator Prevention Act of 2010 (Chelsea's Law). (Stats. 2010, ch. 219, § 1 et seq.) Chelsea's Law significantly increases the penalties for sex crimes against minors by imposing longer determinate sentences, indeterminate sentences for some crimes, and longer parole restrictions. (Sen. Com. on Public Safety, Analysis of Assem. Bill. No. 1844 (2009–2010 Reg. Sess.) as amended Jun. 2, 2010, p. 3.) As amended, section 288(b)(1) now prescribes a sentencing range of five, eight, or 10 years for the crime of lewd or lascivious acts against a child under 14 committed by use of force, violence, duress, menace, or fear. The punishment for a violation of section 288(a) remains unchanged (three, six or eight years). . . . (§ 3000, subd. (b)(4), as amended by Stats. 2010, ch. 219, § 19.) (*People v. Soto* (2011) 51 Cal.4th 229, 237, fn. 4.)

Defendant argues that because section 288.5 is a more specific statute than section 288, subdivision (b), the trial court should have dismissed his convictions under the more general statute, section 288, subdivision (b). The court in *Torres, supra*, 102 Cal.App.4th 1053, rejected this argument. The *Torres* court explained: “Appellant also suggests that we must vacate the convictions for specific sex offenses because section 288.5 is a special statute, whereas his convictions of other specific felony sex offenses are pursuant to more general statutes. In *People v. Hord* (1993) 15 Cal.App.4th 711, 720-721, the court specifically rejected the contention that section 288.5 is a special statute that precludes prosecution for other generally applicable sexual offenses.” (*Torres*, at p. 1058.)

Defendant also asserts that his culpability warrants punishment under section 288.5, rather than section 288, subdivision (b), because he did not deserve the more lengthy sentence imposed on the forcible lewd acts convictions. No violence was used and N. was not physically injured. Defendant urges this court not to follow *Torres, supra*, 102 Cal.App.4th 1053, and instead to conclude the continuous sexual abuse conviction to be the more commensurate offense. We reject this proposition.

In *Torres, supra*, 102 Cal.App.4th 1053, the defendant was convicted of a continuous sexual abuse violation (§ 288.5, subd. (c)) and 10 separate felony sex offenses against the same victim. Because of the number and severity of the specific offenses, the defendant faced a greater maximum aggregate penalty with respect to these than he did on the continuous sexual abuse offense. The trial court also imposed a greater aggregate sentence on the specific offenses than on the section 288.5 offense, and stayed the

sentence on the continuous sexual abuse offense. The *Torres* court concluded the appropriate remedy was to reverse the conviction for violating section 288.5. (*Torres*, at pp. 1059-1060.) The *Torres* court reasoned: “[T]o convict only on the section 288.5 offense would be ‘anomalous’ because ‘section 288.5, adopted to prevent child molesters from evading conviction, could be used by those molesters to circumvent . . . convictions with more severe penalties and prior strike consequences than available . . . under section 288.5.’” (*Id.* at p. 1060.)

Likewise, here, the trial court did not abuse its discretion in dismissing count 1 under section 288.5, subdivision (c), rather than the five forcible lewd acts convictions. The maximum aggregate sentence on the five forcible lewd acts convictions was greater than the maximum sentence on the continuous sexual abuse conviction. Furthermore, the cumulative sentence imposed on counts 2 through 6 was commensurate with defendant’s culpability in repeatedly forcibly molesting N. for over a year.

## V

### CALCRIM No. 3516

Defendant contends the trial court committed prejudicial error by failing to give CALCRIM No. 3516 on the alternative nature of section 288 and 288.5 offenses. As noted in the preceding section above, subdivision (c) of section 288.5 precludes charging a violation of section 288.5 and the separate offense of violating section 288, subdivision (b), when the offenses involve the same victim, in the same period of time. (*Johnson, supra*, 28 Cal.4th at pp. 244-248.)

In the instant case, the section 288.5 and 288 offenses were not charged and presented to the jury in the alternative. It was not until after the jury convicted defendant of all counts, that the trial court, in accordance with the prosecution's request and defendant's joinder, dismissed the section 288.5 conviction under section 288.5, subdivision (c). Defendant argues the jury, and not the court, should have made the determination as to whether defendant was to be convicted of the individual lewd acts offenses or continuous sexual abuse.

CALCRIM No. 3516 states: “<Give this paragraph when the law does not specify which crime must be sustained or dismissed if the defendant is found guilty of both.> [¶] [The defendant is charged in Count \_\_\_\_ with \_\_\_\_\_ <insert name of alleged offense> and in Count \_\_\_\_ with \_\_\_\_\_ <insert name of alleged offense>. These are alternative charges. If you find the defendant guilty of one of these charges, you must find (him/her) not guilty of the other. You cannot find the defendant guilty of both.]” (Jud. Council of Cal. Criminal Jury Inst. (2012) CALCRIM No. 3516.)

The Bench Notes for CALCRIM No. 3516 on instructional duty state: “Because the law is unclear in this area, the court must decide whether to give this instruction if the defendant is charged with specific sexual offenses and, in the alternative, with continuous sexual abuse under Penal Code section 288.5. If the court decides not to so instruct, and the jury convicts the defendant of both continuous sexual abuse and one or more specific sexual offenses that occurred during the same period, the court must then decide which conviction to dismiss.” (Jud. Council of Cal. Criminal Jury Inst. (2012) Bench Notes to CALCRIM No. 3516, p. 1098.) This indicates the court is not required to give

CALCRIM No. 3516. Furthermore, if it is not given, the trial court must decide which conviction to dismiss. Such determination is left to the discretion of the trial court, with the trial court taking into consideration the defendant's culpability and sentencing exposure as to the alternative charges.

However, as defendant notes, the drafters of the CALCRIM instructions also noted in the comments to CALCRIM No. 1120, which states the elements of a continuous sexual abuse offense: "Under Penal Code section 288.5(c), continuous sexual abuse and specific sexual offenses pertaining to the same victim over the same time period may only be charged in the alternative. In these circumstances, multiple convictions are precluded. (*Johnson, supra*, 28 Cal.4th at pp.] 245, 248 [exception to general rule in Pen. Code, § 954 permitting joinder of related charges].) In such cases, the court has a **sua sponte** duty to give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited*. *If a defendant is erroneously convicted of both continuous sexual abuse and specific sexual offenses and a greater aggregate sentence is imposed for the specific offenses, the appropriate remedy is to reverse the conviction for continuous sexual abuse.* (*People v. Torres* (2002) 102 Cal.App.4th 1053, 1060.)" (Jud. Council of Cal. Criminal Jury Inst. (2012) Bench Notes to CALCRIM No. 1120, p. 944; Italics added.)

This commentary indicates CALCRIM No. 3516 should be given when a defendant is charged with continuous sexual abuse and specific sexual offenses pertaining to the same victim over the same time period. But when the trial court errs in not giving the instruction, as in the instant case, the appropriate remedy for such error is

dismissal of the charge that would result in the lesser aggregate sentence, which would be the continuous sexual abuse conviction. This is what the trial court did in the instant case.

Relying on *Hicks v. Oklahoma* (1980) 447 U.S. 343, defendant argues the trial court's failure to instruct on alternate verdicts, as required by section 288.5, subdivision (c), resulted in deprivation of his rights to due process and a fair trial. *Hicks* is not on point and does not support this proposition. In *Hicks*, the defendant was entitled to have his punishment fixed by the jury under an Oklahoma statute. (*Hicks*, at p. 345.) The trial court, nevertheless, instructed the jury that it was statutorily required to impose a 40-year sentence under a statute later found unconstitutional. The *Hicks* court held that imposing the 40-year sentence violated the defendant's due process right to have the jury fix the length of his sentence under the state statute which allowed the jury to determine the length of the sentence. (*Id.* at pp. 346-347.)

The instant case does not concern a statute mandating the jury shall determine the length of defendant's sentence. Such determination is to be made by the court, not the jury. Section 288.5 only requires that the defendant not be convicted of both a section 288.5 crime and section 288 crimes. There is no statutory authority supporting the proposition that defendant has a due process right to have the jury, rather than the court, select which of the convictions shall stand. The trial court appropriately dismissed the section 288.5 conviction because it carried the lower sentence and therefore any error in not giving CALCRIM No 3516 did not constitute reversible error.

## VI

### CALCRIM No. 1111

Defendant challenges the use of CALCRIM No. 1111 on the ground the instruction unfairly favors the prosecution in that the instruction is impermissibly argumentative, is duplicative, and improperly diminishes the weight of certain facts that are pertinent to the jury's evaluation of the evidence. Defendant asserts that use of CALCRIM No. 1111 therefore violated defendant's constitutional rights. We disagree.

First, defendant forfeited his objection to CALCRIM No. 1111 by not objecting to it in the trial court. Generally, an appellant forfeits claims of error through inaction that prevents the trial court from avoiding or curing the error. (*Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, 1117.) This general waiver or forfeiture rule is "grounded on principles of waiver and estoppel, and is a matter of judicial economy and fairness to opposing parties. [Citations.]" (*Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 629-630.) This court will not reverse erroneous rulings that could have been, but were not, challenged below. (*Imperial Bank v. Pim Electric, Inc.* (1995) 33 Cal.App.4th 540, 546.)

There are, however, exceptions to the general forfeiture rule whereby certain issues may be raised on appeal despite the appellant's failure to raise them in the trial court. Section 1259 provides that the 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." Here, defendant's substantial rights were not affected by the language in the instruction which defendant contends was

improper. Even assuming his fundamental, constitutional rights are at issue here and we consider his objection to the instruction on the merits, we conclude there was no error in giving CALCRIM No. 1111.

CALCRIM No. 1111 instructs the jury on the elements of the crime of committing a forcible lewd act with a child, in violation of section 288, subdivision (b)(1). This instruction states that the People must prove “the defendant used force or duress” in committing a lewd act. It defines “force” and “duress.” CALCRIM No. 1111, as read to the jury, further states: “It is not a defense that the child may have consented to the act.”

“In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record. [Citations.] When a claim is made that instructions are deficient, we must determine whether their meaning was objectionable as communicated to the jury. If the meaning of instructions as communicated to the jury was unobjectionable, the instructions cannot be deemed erroneous. [Citations.] The meaning of instructions is [determined under the] test of 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. [Citations.]” (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

Defendant specifically objects to the following language in CALCRIM No. 1111: “Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required.” Defendant argues this language is argumentative and duplicative because it instructs on facts the prosecution is not obligated to prove, in

violation of defendant's due process rights. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1276, overruled on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 833-835; *People v. Bolden* (2002) 29 Cal.4th 515, 558.) Defendant also argues the language in question improperly implies that the jury should not consider facts relating to whether defendant or the victim was sexually aroused, whereas such facts were relevant and could be considered in determining whether defendant acted with sexual intent.

We conclude CALCRIM No. 1111, in its entirety, properly instructed the jury on the applicable law. (*Veale, supra*, 160 Cal.App.4th at p. 51.) CALCRIM No. 1111 appropriately clarifies that sexual arousal is not an element and therefore proof of it is not required for a section 288 conviction. (§ 288, subd. (b)(1); *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7; *People v. Dontanville* (1970) 10 Cal.App.3d 783, 796.) The language in CALCRIM No. 1111 is not constitutionally objectionable.

## VII

### INEFFECTIVE ASSISTANCE OF COUNSEL

To secure the reversal of a conviction based on ineffective assistance of counsel, a defendant must show (1) his counsel's performance was deficient when measured against the standard of a reasonably competent attorney, and (2) counsel's deficient performance so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The appellate court must presume counsel's conduct fell within the wide range of reasonable professional assistance and accord great deference to counsel's tactical decisions. (*People v. Lewis* (2001) 25 Cal.4th 610, 674.)

Defendant contends that his trial attorney provided ineffective assistance of counsel (IAC) by not objecting to CALCRIM No. 1111 and not objecting to the trial court dismissing his section 288.5 conviction. Because we considered these issues on the merits and rejected defendant's contentions, defendant's IAC contention also lacks merit. Defendant was not prejudiced in any way by his trial attorney not objecting to CALCRIM No. 1111 or to dismissal of the section 288.5 conviction. Even if his attorney had objected, it is not reasonably probable the trial court would have sustained the objections since they lacked merit, as discussed above.

## VIII

### COURT'S RESPONSE TO NOTICE OF DEADLOCK

Defendant contends that the trial court's response to the jury's notice of deadlock was improper because the court subtly and coercively expressed the desire that the jury reach a verdict. The People argue defendant forfeited this objection by not raising it in the trial court. We agree that, by failing to object promptly or at all, defendant forfeited his objection. (*People v. Neuffer* (1994) 30 Cal.App.4th 244, 254.) Even assuming there was no forfeiture, the trial court's comments to the jury were not unduly coercive and did not violate defendant's constitutional rights to due process and a jury trial.

#### *A. Procedural Background*

During the second day of deliberations, at 11:15 a.m., the jury gave the trial court a note stating the following:

“Your Honor, we the jury would like to provide an update on where we currently stand. At this point, we are firmly at 5 guilty + 7 not guilty. One juror changed

this morning from guilty to not guilty (from a 6-6 split last night). We have gone through all suggested questions, gone witness by witness, and are ‘stuck’ on all counts. All evidence has been taken into consideration. Do you have any suggestions for us?”

The trial court instructed the jury in writing to go to lunch and then resume deliberating from 1:30 p.m. until 3:30 p.m., at which time the court would call the jurors “back into the courtroom to discuss the issues further.” When the jury returned to the courtroom at 3:30 p.m., the jury foreperson told the court the jury had not reached a verdict. The jury had taken five ballots, with the numerical split having changed during the past hour and a half. The numerical split was 11 to 1. The following discourse between the court and jury foreperson then took place:

“THE COURT: Okay. All right. In that case, we are in the position now of it’s an individual vote by each one of you, and a person – I’ve given you the instructions before about you try to reach towards a verdict, and yet each one of you have an individual vote. And so I’m not saying one way or the other, I’m just saying that you keep trying to work together, but you each get an individual vote.

“Now, is there any way that it might be helpful for me to redefine anything, reread any jury instructions, or are there any points of clarification maybe that are holding up the group? Anybody have any thoughts on that? Anybody have any additional questions?”

“There’s been some good movement, because the split was 6 to 6 and 5 to 7 as of this morning. So it’s a little premature for me to cut off the deliberations at

this point. But I just want to know if there's any way – is there anybody that really doesn't understand one of the words or doesn't – you know, wants further reading of something? No?

“TJ12: I just think we need a little more time to have – we're making good progress.

“THE COURT: All right. I probably shouldn't have called you in, but the last I heard it was 6 to 6 and 5 to 7.

“TJ12: Right. I understand.

“THE COURT: All right. Go ahead. There's no time frame here. You can have a verdict in one minute or you can keep deliberating. So there's no right amount of time to deliberate. We have some juries that find verdicts in an hour, and we have some juries that find that there are verdicts or find that they're hung after many days. So there's really no right way, so don't worry about that.

“The important thing is that you come to a conclusion that you're all comfortable with and that you talk things out and discuss things. I'm sure you've been doing this, but you go over the jury instructions, you go over the witnesses, you go over what evidence was present, what evidence – and the evidence, what you believed and what you didn't believe.

“And so I'm kind of sorry that I broke in on your deliberations because I didn't know that, but the last I heard, that's the way it was. So if you would continue deliberating. If you need to deliberate until 4:30, fine. If you need to deliberate and continue tomorrow, come back at 8:30 or 9:00 tomorrow morning

and continue your deliberations. Just keep us informed about what's going on. We're at the point now where I think it would be beneficial for you to keep deliberating. Okay. Thank you very much. Go on back."

After resuming deliberations that afternoon and deliberating the following morning, at 9:40 a.m. the jury reached guilty verdicts on all counts.

### *B. Applicable Law*

Under section 1140, the trial court is precluded from discharging the jury without reaching a verdict unless both parties consent or unless the court concludes there is no reasonable probability that the jury can agree. (§ 1140; *People v. Sheldon* (1989) 48 Cal.3d 935, 959.) "[T]he determination whether there is reasonable probability of agreement rests in the sound discretion of the trial court." (*Ibid.*) The trial court has broad discretion in making this determination. (§ 1140.) "The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment "in favor of considerations of compromise and expediency." [Citations.]" (*People v. Sandoval* (1992) 4 Cal.4th 155, 195-196.) The question of coercion is dependent on the facts and circumstances of each case. (*Id.* at p. 196.)

### *C. Discussion*

Defendant argues the court improperly told the jury that "[t]he important thing" was that the jury "come to a conclusion that you're all comfortable with and that you talk things out and discuss things." This comment, defendant argues, improperly stressed that the court desired the jury to reach a verdict. Defendant also asserts that the trial court's

comments that the court could provide additional instruction or other assistance, indicated that the trial court wanted the jurors, particularly the hold-out juror, to reach a verdict.

We find no impropriety in the trial court's comments. The trial court properly responded to the jury's note that it was deadlocked. Neither the circumstances nor the trial court's comments created a danger that any juror would feel coerced to change his or her mind. In accordance with the court's duty under section 1140 to discern whether there was a reasonable probability the jury could reach an agreement on the charges, the trial court appropriately determined that further deliberations would be productive.

(§ 1140.) The trial court's inquiry into the numerical division among the jurors was permissible. (*People v. Proctor* (1992) 4 Cal.4th 499, 538.) "Such inquiry is justified in the discharge of the court's 'statutory responsibility of assuring that a verdict is rendered "unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."' (Pen. Code, § 1140.)' [Citation.]" (*Ibid.*, quoting *People v. Carter* (1968) 68 Cal.2d 810, 815.)

Defendant argues the trial court's comments constituted a coercive, improper de facto *Allen*<sup>4</sup> charge. We disagree. An *Allen* instruction or charge occurs generally when the following features of an instruction exist: "First, the instruction generally contains a discriminatory admonition to minority jurors to rethink their position in light of the majority's views. Second, there is often an inaccurate assertion that the case must at sometime be decided, ignoring the prosecution's option to dismiss after a mistrial. A

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<sup>4</sup> *Allen v. United States* (1896) 164 U.S. 492.

third common feature is a reference to the expense and inconvenience of a retrial.

([*People v. Gainer* (1977) 19 Cal.3d 835,] 845, 852.)” (*People v. Santiago* (2009) 178 Cal.App.4th 1471, 1475 (*Santiago*).

In *People v. Gainer, supra*, 19 Cal.3d 835, the California Supreme Court held that an *Allen*-type instruction was impermissible because it “instructs the jury to consider extraneous and improper factors, inaccurately states the law, carries a potentially coercive impact, and burdens rather than facilitates the administration of justice, . . .” (*Gainer*, at pp. 842-843; see also *Santiago, supra*, 178 Cal.App.4th at p. 1475.) The court in *Gainer* explained that “it is error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried.” (*Gainer*, at p. 852; see also *Santiago*, at p. 1475.)

Here, the court’s neutrality was reinforced by the court’s comments that each juror was entitled to his or her individual vote and that a hung jury was an acceptable outcome. It was apparent the jury was making progress toward reaching a verdict from the change in the jury’s numerical split of 6-6 and 7-5, to its 11-1 split, when the trial court made the comments in question and instructed the jury to continue deliberating. The trial court’s comments did not include a discriminatory admonition to minority jurors to rethink their position in light of the majority’s views. Additionally, the trial court made no reference to the expense and inconvenience of a retrial. The trial court did not encourage jurors to consider the numerical division or preponderance of opinion of the jury in forming or

reexamining their views on the issues before them and did not state or imply that, if the jury failed to agree, the case would have to be retried. The trial court's comments were not unduly coercive and in no way violated defendant's constitutional rights.

## IX

### RESTITUTION FINE

The parties agree the trial court erred in imposing a restitution fine of \$1,000, payable to the children's trust fund under section 294. Section 294 states that the trial court may impose a restitution fine of not more than \$5,000 for a felony conviction for violating certain specified statutes, including section 288.5. Section 288 is not one of enumerated statutes. Since the trial court dismissed defendant's section 288.5 conviction, and the remaining convictions were for violating section 288, subdivision (b), there is no valid basis for imposing a restitution fine under section 294. The \$1,000 restitution fine under section 294 therefore must be stricken.

## X

### DISPOSITION

The judgment is affirmed, with the exception of reversal of the \$1,000 restitution fine imposed under section 294. Accordingly, the \$1,000 restitution fine, imposed under section 294, is ordered stricken. The superior court is ordered to issue a modified

abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON  
J.

We concur:

McKINSTER  
Acting P. J.

RICHLI  
J.