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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.

JUAN DAVID GONZALEZ,

Defendant and Appellant.

E063692

(Super.Ct.No. RIF1305878)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge.

Affirmed.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant, Juan David Gonzalez, of one count of sexual intercourse with a person who was 10 years of age or younger (Pen. Code, § 288.7, subd. (a), count 1),¹ and two counts of lewd and lascivious acts upon a child under 14 years of age by force, violence, duress, menace or fear of immediate injury (§ 288, subd. (b)(1), counts 2-3). Defendant was sentenced to state prison for a total of 33 years to life, consisting of 25 years to life on count 1, a consecutive eight-year term on count 2, and a concurrent eight-year term on count 3.

On this appeal, defendant makes three contentions. First, he contends his count 1 conviction must be reversed because the trial court failed to instruct the jury sua sponte that misdemeanor battery (§ 242) was a lesser included offense to count 1. Next, he argues his counts 2 and 3 sentences must be stayed pursuant to section 654. Last, if his first two contentions are rejected, he asserts this case must be remanded so that the trial court can exercise its discretion to impose a concurrent or consecutive sentence on count 2. We reject all of defendant's contentions and affirm the judgment.

II. FACTUAL BACKGROUND

A. *Prosecution Evidence*

During the afternoon of July 2, 2013, seven-year-old Jane Doe was swimming in the pool of her family home in Perris with her sister, a female neighbor friend, and one of the friend's brothers. Doe lived at the home with her sister, their mother, and defendant,

¹ All further statutory references are to the Penal Code unless otherwise indicated.

who was mother's boyfriend. On the day of the incident, defendant was 29 years old. Mother testified she left the home that afternoon for 15 or 20 minutes to pick up Chinese food. Mother left the children, including Doe, under the supervision of defendant, who had drunk 13 beers that day. According to Mother, defendant did not drink beer at home that often—no more than once a week—and, on that day, “[h]e looked good to me. He didn't look, you know, drunk, like enough for me not to leave him. [¶] . . . [¶] . . . Good enough to watch the kids.”

While the children were swimming, defendant called for Doe to come inside the house. While Doe was inside the house, Doe's friend went looking for her, as Doe's sister needed a towel. The friend walked around the outside of the home calling for Doe but received no response. The friend looked through the window of defendant and mother's bedroom and noticed the door was locked from inside the room, although she could not see if any people were inside the room.

Soon thereafter, mother returned home. Since she did not see either Doe or defendant outside, she had “a feeling that something [was] wrong.” She saw Doe's wet footprints leading towards her and defendant's bedroom. She followed the footprints to the bedroom and found the door locked. She received no response the first time she knocked on the door, so she knocked a second time, yelling for defendant to “[o]pen the fucking door.” Again, nobody opened the door, so mother knocked a third time. This time, Doe opened the door. Both Doe and defendant were dressed, and defendant was lying face down on the bed, looking towards the wall. Mother asked defendant what he

had done to Doe, but defendant did not respond. When mother looked at Doe's eyes, it looked as if Doe had been crying. Mother sent Doe outside, and mother told defendant the food was ready, as she wanted him to get up from the bed, and she "wanted to see a reaction." Defendant told mother that he was not hungry, and continued to lie down on the bed looking towards the wall. Mother then went outside, and, before Doe went back into the pool, asked Doe what happened in the bedroom. Doe told mother that defendant "put her in the room and he took off [Doe's] bathing suit, and he touched [Doe] and he rubbed his body against [Doe]. And he put a pillow on her face."

Mother then confronted defendant, who denied any wrongdoing. Mother sent Doe's friend and the friend's brother home. She also instructed Doe and Doe's sister to get in their truck. Mother attempted to leave, but defendant got into the truck as well. After she was unsuccessful in her attempt to drive away in the truck with Doe and Doe's sister, mother sent both children to Doe's friend's house down the street.

The friend's older brother overheard defendant telling mother, "I can't believe you're going over and telling people that I—something I did that I didn't do," to which mother responded, "You know what you did." Doe's friend's older brother also overheard defendant saying, "I didn't know what I was doing." During this time, defendant left the scene, but he called mother from the cell phone of the neighbor friend's mother. Mother spoke to defendant on the cell phone, and she urged him to come back so that she "could deal with him." Defendant eventually returned, and he and mother continued to argue.

Sometime during the incident, Doe's friend's mother called the police, and it is disputed whether mother was angry that the police were called, and whether she was initially uncooperative with the police. Mother testified she had been a victim of abuse, and she had previously told defendant that she would kill him if he ever touched her children.

Doe told her friend that defendant touched her, and she told her friend's mother that defendant gave her a "pony ride" while she "didn't have no clothes on." The friend also told her older brother and her cousin that Doe had been molested. The cousin overheard Doe say defendant "wanted to give [Doe] a pony ride." The cousin also testified that when Doe first came over to the neighbor's house Doe was crying, but she later had no emotion and appeared to be shocked. The cousin overheard Doe's mother, who was crying, say, "I knew it, I knew it," and "[f]uck that bastard."

Riverside County Sheriff's Deputy Salvador Waltermire responded to the scene based on a report of a sexual molestation, and he interviewed Doe. The interview was audiotaped and played for the jury. Doe told Deputy Waltermire that defendant took her into the bedroom, locked the door, and then took her clothes off. Defendant also did not have a shirt on. Defendant then used a pillow to cover Doe's eyes and then "put something" on her "tootsie." She told Deputy Waltermire her tootsie was where pee came out, and only girls have tootsies, while boys have a "wienie." Defendant then gave Doe a "horsey ride," and he then put something in her tootsie, which hurt Doe "when he pushed back up and down." Defendant also "put it inside then it slipped out, then he put

it inside again.” When Doe told defendant it hurt, defendant told her “it was okay.” Doe also told Deputy Waltermire that defendant “let me give him a piggyback—then he gave me a horsy ride.” When the deputy asked Doe whether defendant put his “wienie” inside her, Doe responded, “I don’t know but probably that or something. Probably that. [¶] . . . [¶] . . . ‘Cause he—probably the wienie ‘cause he was laying on me.” When defendant was on top of Doe, his stomach touched her stomach. Defendant also “pushed . . . [Doe’s] legs down because [she] was tired. Then he put [Doe’s] legs up, then he pushed [Doe’s] knees all the way up to there. Then he put the thing back in [her] tootsie.” Doe also told Deputy Waltermire that defendant was on top of her until her mother returned from picking up Chinese food. When asked if defendant “has . . . ever done anything like this before,” Doe responded, “Um, I don’t think so.” She also told the deputy that when her mother arrived home and knocked on the door defendant instructed Doe to change back into her clothes before opening the door. Defendant was arrested that evening.

On July 3, 2013, a forensic sexual assault examination of Doe was conducted by a forensic nurse examiner at Riverside County Regional Medical Center. A forensic nurse examiner collects evidence when needed in sexual assault or sexual abuse cases. In her report, the forensic nurse examiner noted erythema, or “generalized redness,” as well as tenderness around Doe’s vaginal area. According to Doe, it hurt “[w]hen they checked my tootsie.” A forensic physician reviewed the forensic nurse’s report and noted “[s]ome

redness, & even some minor soreness, is common in both molested & non-molested children. Child needs a forensic interview.”

On July 5, 2013, authorities conducted a forensic interview of Doe, and that videotaped interview was played for the jury. Doe recounted the same story that she told Deputy Waltermire on July 2, 2013—that defendant took her into his room, locked the door, took off her clothes, covered her eyes with a pillow, and rubbed his stomach on her. While her eyes were covered with the pillow, Doe could hear her neighbor friend calling for her. She then felt a “weenie” in her tootsie, which hurt, although defendant told her “[i]t’s okay” as he continued to rub on her body. She also told the interviewer that she felt something round on her tootsie. Defendant also rolled her around so that he was behind her, and her face was on the bed, and he gave her a “piggy-back ride” on the bed, although she could not remember if her clothes were on or off. He then gave her a ride on his stomach. While she was riding on his stomach, defendant asked her, “[w]ho loves him,” to which Doe responded, “I do.” She also told the investigator that, although she could feel something on her body when he was on top of her, she did not feel anything when her stomach was on the bed. When asked whether defendant’s hands touched her anywhere on her body, Doe replied, “Just, um, I don’t think so.”

At trial, Doe testified that she did not remember ever telling anyone that she went into a room with defendant, or that defendant touched her inappropriately. Doe’s mother also testified that, a few weeks after the July 2, 2013 incident, Doe told mother that defendant did not touch her inappropriately, and that Doe’s neighbor friend told Doe to

fabricate this story. Instead, Doe told mother that, on the day of the incident, she broke a chain that belonged to defendant, and that defendant told Doe he was canceling planned activities, such as a camping trip and a trip to Disneyland, as punishment. Mother did not remember seeing a broken chain. Doe also told mother that she was dressed during this incident, and that she did not immediately open the door because she was falling asleep. Shortly after Doe told her this new version of what transpired on July 2, 2013, mother contacted defense counsel with the new information. Mother did not communicate this information to the district attorney's office until February 2014.

After Doe told mother this new story, mother resumed her relationship with defendant, who was in prison, and mother also allowed Doe to reestablish communication with defendant. On some days, both mother and Doe spoke to defendant by telephone multiple times a day, and Doe referred to defendant as "daddy." At the time of trial, mother still loved defendant, although she was undecided whether she wanted to continue her relationship with him. Mother also maintained a relationship with defendant's family, including defendant's mother, until sometime between September and November 2014, when defendant's mother "started making comments about [Doe] lying."

Mother wrote two letters, on December 4, 2013 and on February 10, 2014, both before defendant's April 2015 trial, asking that the charges against defendant be dropped. Mother wrote the February 10, 2014 letter pursuant to the suggestion of defendant's mother, although defendant's mother did not tell mother what to write in the letter. Mother had Doe sign the February 10, 2014 letter after explaining the content and

purpose of the letter, although Doe testified at trial she did not understand the letter when her mother read it to her. Mother never gave either letter to the district attorney's office, but instead provided it to defense counsel.

B. Defense Evidence

Defendant did not testify at trial. Defendant's retained expert, a board certified doctor in obstetrics and gynecology, testified that based on his review of documents, including photographs and reports related to the July 2, 2013 incident and the July 3, 2013 examination by the forensic nurse examiner, it was his opinion that "[t]here was no medical evidence that there had been penile/vaginal penetration at that time or any time" and that everything looked "normal," as Doe's "hymen is totally intact. It's not bruised, it's not red, it's not swollen." The expert's opinions were based on his understanding that defendant was accused of sexual intercourse, or penile/vaginal penetration, which he understood meant "the penis went into the vagina," and his opinion was based on the presumption defendant's penis went past Doe's hymen and into her vaginal canal. The expert admitted he did not know the legal definition of sexual penetration, which, according to the prosecutor, referred "to the penetration of the labia majora and not the vagina."

A woman's genitalia begins, from the outside, with the labia majora, followed by the labia minora, the hymen, and then the vaginal canal. In a case where there was an allegation of penile penetration of the vagina, defendant's expert would have been "looking for redness, bruising, swelling, tearing, small tears, big tears, hymen could have

been torn all the way through All areas would look like she had been beaten on.” Since there was no such injury to Doe’s hymen, it was his opinion that there was no evidence that defendant’s penis penetrated Doe’s vagina.

Based on the absence of injury to Doe’s hymen, the expert also opined there was no evidence Doe’s genitals had been penetrated. Like his opinion that there was no vaginal penetration, this opinion was based on the expert’s “assumption that a penis went post hymen into the vaginal canal,” and he testified that the vaginal opening of a seven year old is “too small of an area for a[n adult] penis to get into.” Defendant’s expert also disagreed with the forensic nurse examiner’s observation that there was any redness around Doe’s vaginal area, as “[t]he photographs were totally normal. Normal examination. And there was no redness” in the photographs that he reviewed. Furthermore, even if there was redness, the expert testified that peer-reviewed journals have stated that redness is “a nondescript finding. Because it’s so easily mimicked by so many things, it’s just not a finding that can be used in sexual abuse discussions.” On cross-examination, the expert agreed it was technically possible for a penis to press against parts of Doe’s vagina, including the labia majora, labia minora, and hymen, without causing a tear or any bleeding to any parts of Doe’s vagina. On redirect, the expert again stated it was his opinion that there was “[n]o medical evidence of penile vaginal penetration,” but he had no opinion whether “there was a slight touching or a rubbing”

The defense also called an investigator for the public defender's office as a witness. The investigator interviewed Doe on October 18, 2013 with mother present at the interview, although mother did not answer any of the investigator's questions to Doe, or otherwise interfere with the investigator's questioning. At the interview, Doe told the investigator that defendant did not hurt her, that she had broken defendant's chain, locked the door, and was lying on the bed with defendant and singing a lullaby when mother knocked on the door. Doe also told the investigator that her neighbor friend told Doe to make up the story about defendant hurting her.

III. DISCUSSION

A. The Trial Court Did Not Err in Not Instructing the Jury Sua Sponte That Section 242 Is a Lesser Included Offense of Section 288.7, Subdivision (a)

1. Background

After both parties rested, the prosecutor and defense counsel met with the trial court to finalize the jury instructions. As to the count 1 charge of sexual intercourse with a person who is 10 years of age or younger (§ 288.7, subd. (a)), the parties agreed the trial court should also give attempted sexual intercourse with a person who is 10 years of age or younger as a lesser included offense (§§ 288.7, subd. (a), 664). The parties also agreed to instruct the jury that the term “[s]exual intercourse” meant penetration, no matter how slight, of the vagina or genitalia by the penis, and that “penetration of the genitalia” referred to penetration of the labia majora, “the lips on the outside” of a female's genitalia.

The parties also discussed whether to instruct the jury that battery was a lesser included offense, but only as to the counts 2 and 3 charges of lewd and lascivious act upon a child under 14 years of age by force, violence, duress, menace, or fear of immediate injury. (§ 288, subd. (b)(1).) The parties ultimately agreed not to give that instruction, and neither party objected to the final jury instructions.

2. Discussion

Defendant contends his count 1 conviction for engaging in an act of sexual intercourse with a person who is 10 years of age or younger (§ 288.7, subd. (a)) must be reversed because the trial court failed to instruct the jury sua sponte that misdemeanor battery (§ 242) was a lesser included offense of count 1. He argues that, under the statutory elements test, section 242 is a lesser included offense to section 288.7, subdivision (a), since “the greater offense cannot be committed without committing the lesser.” Defendant also argues the instruction should have been given because it “was supported by the evidence . . . [and] in light of the equivocal evidence as to whether [defendant] penetrated Doe with his penis, as opposed to touching her with his penis without penetrating her or by penetrating her with a finger or other foreign object” We conclude that there was no substantial evidence to support the additional instruction.

Section 288.7, subdivision (a) provides, in relevant part: “Any person 18 years of age or older who engages in sexual intercourse . . . with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 25 years to life.” The jury was instructed that, to establish a violation of

section 288.7, subdivision (a), “the People must prove that: [¶] 1. The defendant engaged in an act of sexual intercourse with Jane Doe; [¶] 2. When the defendant did so, Jane Doe was 10 years of age or younger; [¶] 3. At the time of the act, the defendant was at least 18 years old. [¶] . . . [¶] Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis. Ejaculation is not required.” (CALCRIM No. 1127.) As noted, the jury was also instructed that “[p]enetration of the genitalia refers to penetration of the labia majora.” (See *People v. Dunn* (2012) 205 Cal.App.4th 1086, 1097 [conviction of violating § 288.7, subd. (a) “required penetration of her labia majora, not her vagina”].) Defendant contends that misdemeanor battery, which is defined as “any willful and unlawful use of force or violence upon the person of another” (§ 242) is a lesser included offense of section 288.7, subdivision (a). The People agree, but maintain that “a simple battery instruction was not warranted because the evidence did not support it.”

“We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.] A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, “that is, evidence that a reasonable jury could find persuasive” [citation], which, if accepted, “would absolve [the] defendant from guilt of the greater offense’ [citation] *but not the lesser*” [citation].’ [Citation.] ‘[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser

offense, such that the greater cannot be committed without also committing the lesser. [Citations.]’ [Citation.]” (*People v. Licas* (2007) 41 Cal.4th 362, 366.) “[T]he existence of ‘any evidence, no matter how weak’ will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is ‘substantial enough to merit consideration’ by the jury. [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Substantial evidence is ““evidence from which a jury composed of reasonable [persons] could . . . conclude[]” that the lesser offense, but not the greater, was committed. [Citations.]” (*Ibid.*) However, ““[s]peculation is an insufficient basis upon which to require the giving of an instruction on a lesser included offense.”” [Citations.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 116.)

There is no substantial evidence that defendant touched Doe “with his penis without penetrating her” or that he “penetrat[ed] her with a finger or other foreign object.” Although defendant’s expert opined that defendant did not penetrate Doe’s genitalia or vagina, his testimony was premised on his belief that defendant was accused of inserting his penis past Doe’s hymen into her vaginal canal, and his opinion was based on the absence of injury to Doe’s hymen. However, as stated, sexual intercourse, as that term is used in section 288.7, subdivision (a), only required the slightest penetration of Doe’s labia majora, not her vagina. (*People v. Dunn, supra*, 205 Cal.App.4th at p. 1097.)

Here, there was evidence defendant put his “wienie”/“weenie” into Doe’s “tootsie,” and defendant’s expert agreed “that a penis of a grown man could rub against a

seven-year-old girl . . . between the lips of her labia majora” without causing any injury to Doe’s hymen, and he conceded it was even “[t]echnically possible” for the penis of a grown man to “press against the labia majora, the labia minora, even press against the hymen and not cause any tearing or blood” In addition, defendant’s expert did not testify that there was evidence defendant penetrated Doe’s genitalia with a foreign object.

Since there was no substantial evidence to support defendant’s theories that either defendant’s penis did not penetrate, or that defendant used his finger or a foreign object to penetrate, Doe’s vagina or genitalia, defendant’s theories are based on speculation, and the trial court was not required to instruct the jury sua sponte that misdemeanor battery was a lesser included offense in count 1. (*People v. Licas, supra*, 41 Cal.4th at p. 366; *People v. Breverman, supra*, 19 Cal.4th at p. 162; *People v. Valdez, supra*, 32 Cal.4th at p. 116.)

In any event, the trial court’s decision not to instruct the jury that misdemeanor battery was a lesser included offense of count 1 was harmless. “[I]n a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson* [(1956) 46 Cal.2d 818 (*Watson*)]. A conviction of the charged offense may be reversed in consequence of this form of error only if, ‘after an examination of the entire cause, including the evidence’ [citation], it appears ‘reasonably probable’ the defendant would have obtained a more favorable outcome had the error not occurred. [Citation.]” (*People v. Breverman, supra*, 19 Cal.4th at p. 178,

fn. omitted.) Under the *Watson* standard, “posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.” (*People v. Breverman, supra*, at p. 177.)

As discussed, the only evidence presented at trial was that defendant put his “wienie”/“weenie” in Doe’s “tootsie,” and the jury only had to determine whether defendant’s penis penetrated Doe’s labia majora, even if defendant’s penis did not penetrate or touch Doe’s labia minora, hymen, or vaginal canal. Furthermore, there was no evidence defendant penetrated any part of Doe’s vagina or genitalia with a foreign object.

Given the strength of the evidence that defendant’s penis penetrated Doe’s labia majora, and the comparatively weak evidence that defendant’s penis did not penetrate or that defendant used a foreign object to penetrate Doe’s labia majora, it is not reasonably probable defendant would have obtained a more favorable outcome had the trial court given the misdemeanor battery instruction *sua sponte*.

Defendant argues that, under the *Watson* standard, it is reasonably probable he would have obtained a more favorable outcome had the misdemeanor battery instruction been given, because Doe’s trial testimony was inconsistent with her pretrial statements,

bringing into question Doe’s credibility. However, “[i]n deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury.” (*People v. Breverman, supra*, 19 Cal.4th at p. 162; accord, *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.)

B. Section 654 Does Not Require Defendant’s Counts 2 and 3 Sentences to be Stayed

1. Background

After defendant was convicted of all three counts, the trial court asked both parties to submit written comments in response to the probation officer’s sentencing recommendations. Pertinent to this issue, it was stated in the probation report that “it does not appear sentencing limitations pursuant to Penal Code Section 654 apply in this matter,” and it was recommended defendant be sentenced in count 1 to 25 years to life, in count 2 to a consecutive 10-year term, and in count 3 to a consecutive 10-year term, for a total of 45 years to life in state prison. In his sentencing memorandum and at the sentencing hearing, defense counsel argued only that “[t]he statutory sentencing scheme violates the federal constitutional prohibition against cruel and unusual punishment.” Defense counsel did not argue that count 2 or 3 should be stayed based on the recommended sentence on count 1. (§ 654.)

The trial court agreed with the probation report’s recommendation that defendant be sentenced in count 1 (§ 288.7, subd. (a)) to 25 years to life. On count 2 (§ 288, subd. (b)(1)), the trial court opted to sentence defendant to a consecutive eight-year term, the

midterm for that offense, and it sentenced defendant to a concurrent eight-year term on count 3.

2. Discussion

Defendant contends that if his count 1 conviction is not reversed his sentences for counts 2 and 3 must be stayed pursuant to section 654, as “all of [defendant’s] acts were committed during an indivisible course of conduct in which [defendant] intended to arouse himself by engaging in sexual intercourse with [Doe].” We reject defendant’s contention.

Section 654 limits “punishment for multiple convictions arising out of either an act or omission or a course of conduct deemed to be indivisible in time, . . . wherein the accused entertained a principal objective to which other objectives, if any, were merely incidental.” (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. omitted; see *People v. Jones* (2012) 54 Cal.4th 350, 359-360 [where the defendant’s convictions were based on a single act and objective, § 654 prohibits multiple punishment].) However, section 654 does not preclude separate punishment for convictions of multiple sex offenses, even where the sex offenses occurred during the same sexual encounter and against the same victim. (*People v. Perez* (1979) 23 Cal.3d 545, 553-554; accord, *People v. Harrison* (1989) 48 Cal.3d 321, 334-338; *People v. Scott* (1994) 9 Cal.4th 331, 344, fn. 6; *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006-1007; *People v. Castro* (1994) 27 Cal.App.4th 578, 584-585.) “We apply the substantial evidence standard of review to the

trial court's implied finding that a defendant harbored a separate intent and objective for each offense.” (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1414.)

In *Perez*, over a 45- to 60-minute period, the defendant orally copulated his victim, sodomized her, forced her to orally copulate him twice, had vaginal intercourse with her twice, and forcibly inserted a metal tube into both her rectum and vagina. (*People v. Perez, supra*, 23 Cal.3d at p. 549.) The defendant contended that section 654 precluded punishment for more than one of the sex offenses because they were all committed with the single intent and objective of obtaining sexual gratification. (*Id.* at p. 550.) The *Perez* court rejected this contention, explaining that “[a] defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act. We therefore decline to extend the single intent and objective test of section 654 beyond its purpose to preclude punishment for each such act.” (*Id.* at p. 553.)

In *Harrison*, the defendant was convicted of three counts of forcible genital penetration (§ 289, subd. (a)) based on one incident where, over a seven- to 10-minute period, he inserted his finger into his victim's vagina three times. (*People v. Harrison, supra*, 48 Cal.3d at pp. 324-326.) The court concluded “it is defendant's intent to commit a number of separate base criminal acts upon his victim, and not the precise code section under which he is thereafter convicted, which renders section 654 inapplicable.” (*Id.* at pp. 337-338.)

In *Scott*, the court agreed with the holdings of *Perez* and *Harrison* that “multiple sex acts committed on a single occasion can result in multiple statutory violations. Such offenses are generally ‘divisible’ from one another under section 654, and separate punishment is usually allowed.” (*People v. Scott, supra*, 9 Cal.4th at p. 344, fn. 6; accord, *People v. Alvarez, supra*, 178 Cal.App.4th at p. 1006.) “[C]ourts no longer assume that fondling offenses are ‘incidental’ to other sex crimes within the meaning of section 654, or that they are exempt from separate punishment. The newer cases tend to focus on evidence showing that the defendant independently sought sexual gratification each time he committed an unlawful act.” (*People v. Scott, supra*, at pp. 347-348, fn. 9.) The *Scott* court also rejected the defendant’s proposed limit on the number of convictions that can arise from a single sexual encounter under section 288, as, “[u]nder defendant’s approach, the clever molestor could violate his victim in numerous lewd ways, safe in the knowledge that he could not be convicted for every act. In light of the special protection afforded underage victims, we cannot conceive that the Legislature intended this result.” (*People v. Scott, supra*, at p. 347; *People v. Alvarez, supra*, at p. 1006.)

Defendant is not entitled to have his counts 2 and 3 convictions stayed pursuant to section 654 since substantial evidence shows all three sex offense convictions were based on three distinct and separate acts. In discussing the jury instructions, the prosecutor told the court that the People’s theory on the count 1 charge of sexual intercourse with a person 10 years of age or younger (§ 288.7, subd. (a)) was “when [Doe’s] on her back and the pillow’s over her face and the pillow covers her eyes, and he puts the weenie in

the tootsie.” The People’s theory on “[c]ount 2 [lewd and lascivious act upon a child under 14 years of age by force, violence, duress, menace, or fear of immediate injury (§ 288, subd. (b)(1))] would be when he flips her over on her back, and she’s a little less clear about weenie in the tootsie or how that worked, but it was a separate, distinguishable act.” Lastly, the second section 288, subdivision (b)(1) allegation, charged as count 3, “would be the horsy ride in the room where he picked her up and put her on his belly, and she felt a lot of his stomach, and I believe felt like a sausage round thing at that point.” The prosecutor made the same arguments to the jury in explaining the factual basis of each charge. Since there is substantial evidence defendant was convicted of three sex offenses based on three distinct, separate acts, he is not entitled to have his sentences in counts 2 and 3 stayed pursuant to section 654. (*People v. Perez, supra*, 23 Cal.3d at pp. 550, 553.)

C. Defendant Is Not Entitled to Have the Case Remanded for Resentencing on Count 2

1. Background

In the probation report, the probation officer recommended that defendant’s sentences for both counts 2 and 3 be served consecutive to the sentence on count 1 “due to the serious nature of the crime, the fact that the victim trusted him, and his apparent lack of accountability. Pursuant to Penal Code section 667.6[, subdivision] (c) . . . , a full, separate, and consecutive term shall be imposed for each violation of [section] 288[, subdivision] (b) . . . , if the crime involves the same victim on the same occasion.”

At the sentencing hearing, the trial court advised the parties it disagreed with the probation officer's recommendation that the sentences under counts 2 and 3 must be imposed consecutive to the count 1 sentence. Specifically, the trial court stated: "My research also suggests a point of disagreement with the probation officer The probation officer indicat[ed] that a full, separate, and consecutive term shall be imposed for each [section] 288[, subdivision] (b) violation, which would be in Counts 2 and 3. [¶] My review of Penal Code Section 667.6, subdivision (c), states that the Court is vested with the discretion to run Count 3 consecutive if it chooses to do so. [¶] So the point of disagreement with the probation officer's recommendation and also review of the law is whether or not the Court has that discretion. *I believe under subdivision (c), I do have the discretion to choose either consecutive and/or concurrent as to Counts 2 and 3, which are violations of [section] 288[, subdivision] (b).* [¶] If one would look at [section 667.6] subdivision (d), had the circumstance involved either separate victims or a—the same victim on separate occasions, then I think the Court would have been divested of its discretion, and they must by law—any bench officer must, by law, follow the Legislature's decision and impose consecutive sentences in those circumstances. [¶] But given this is the same victim on one distinct occasion, the Court will exercise its discretion and run it concurrent rather than consecutive." (Italics added.)

The trial court then sentenced defendant, ruling that defendant's count 2 sentence of eight years would be served first, followed by his count 1 sentence of 25 years to life,

for a total of 33 years to life in state prison. The trial court also ruled that the count 3 sentence of eight years would run concurrent to count 2.

The trial court twice invited counsel for comments on defendant's sentence. In response, defense counsel argued only that the sentence violated the "federal constitution[al] prohibition against cruel and unusual punishment," and he requested that defendant's sentences on counts 2 and 3 be the low term of five years, rather than the midterm of eight years. Defense counsel did not object that the count 2 sentence should be served concurrent to the count 1 sentence.

2. Discussion

Defendant argues that if his sentences on counts 2 and 3 are not stayed pursuant to section 654, this case must be remanded so that the trial court can exercise its discretion to impose a concurrent or consecutive sentence on count 2. Defendant asserts "the trial court was operating under the belief a consecutive sentence for Count Two was required, and the court's only discretionary sentencing decision was whether to impose a consecutive or a concurrent term for Count Three" Defendant is also critical of the People's reliance on the trial court's "isolated statement" that it had "the discretion to choose either consecutive and/or concurrent as to counts 2 and 3," and asserts the reliance on this sentence "overlooks and misinterprets the record as a whole." We conclude defendant forfeited this argument, and that, in any event, the trial court properly exercised its discretion in sentencing defendant to a consecutive eight-year sentence on count 2.

Since defendant did not object to the trial court's imposition of a consecutive rather than a concurrent sentence on count 2, he has forfeited his claim that the matter must be remanded so the court may exercise its discretion to run count 2 concurrent to count 1, along with count 3. (See *People v. Scott*, *supra*, 9 Cal.4th at pp. 353, 356 [forfeiture rule applied to claim the trial court failed "to properly make or articulate its discretionary sentencing choices"]; see *People v. Boyce* (2014) 59 Cal.4th 672, 730-731 [the defendant forfeited claim of error where he failed to object that the trial court did not give its reasons for imposing consecutive sentences].)

Even if defendant has not forfeited this claim, the record shows the trial court was aware of its discretion to have defendant's count 2 sentence run either consecutive or concurrent to his 25-year-to-life sentence in count 1. "The general rule is that a trial court is presumed to have been aware of and followed the applicable law." (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496; accord, *People v. Reyes* (2016) 246 Cal.App.4th 62, 82.) This "presumption of regularity of judicial exercises of discretion appl[ies] to sentencing issues" (*People v. Mosley*, *supra*, at p. 496), and includes the trial court's discretion to impose consecutive or concurrent sentences (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1179; see *People v. Valdez* (2011) 193 Cal.App.4th 1515, 1524).

As noted at the sentencing hearing, the trial court unambiguously advised the parties that, "I believe under subdivision (c) [of section 667.6], I do have the discretion to choose either consecutive and/or concurrent as to Counts 2 and 3, which are violations of [section] 288[, subdivision] (b)," and it stated, since "this is the same victim on one

distinct occasion, the Court will exercise its discretion and run [count 3] concurrent rather than consecutive.” Considering the entirety of the trial court’s comments from the sentencing hearing, the record contains no indication the court believed it lacked discretion to impose concurrent rather than consecutive sentences on both counts 2 and 3. (*People v. Valenti, supra*, 243 Cal.App.4th at p. 1179.) Thus, it is not necessary to remand this case to the trial court “so that the trial court can clearly exercise its discretion as to whether to impose a concurrent or a consecutive sentence for Count Two.”

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

McKINSTER

J.

SLOUGH

J.