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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

AERON WESLEY GRENFELL,

Defendant and Appellant.

F062487

(Super. Ct. Nos. VCF187242 &  
VCF238446)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Gerald F. Sevier, Judge.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Kelly E. LeBel, Deputy Attorneys General, for Plaintiff and Respondent.

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In Tulare County Superior Court case No. VCF238446, a jury convicted defendant Aeron Wesley Grenfell of three counts of committing a lewd or lascivious act against C.C. when she was under 14 years old (Pen. Code,<sup>1</sup> § 288, subd. (a); counts 1-3); nine counts of committing a lewd or lascivious act against M.T. when she was under 14 years old (§ 288, subd. (a); counts 4-12); two counts of committing a lewd or lascivious act against M.T. when she was 14 years old and at least 10 years younger than defendant (§ 288, subd. (c)(1); counts 13-14); and one count of attempting to forcibly rape M.T. (§§ 261, subd. (a)(2), 664; count 15). With respect to counts 1 through 7 and 9 through 11, the jury found there were multiple victims (§ 667.61, subd. (b)); and, with respect to counts 3, 6 through 9, and 11 through 12, that defendant had substantial sexual conduct with the victim (§ 1203.066, subd. (a)(8)). As to counts 1 through 14, the court found defendant was previously convicted of an enumerated sex offense (§ 667.51, subd. (a)).

As a result of his conviction in Tulare County Superior Court case No. VCF238446, defendant was found to have violated the terms and conditions of his probation in Tulare County Superior Court case No. VCF187242. In that case, defendant pleaded no contest in 2007 to committing a lewd or lascivious act on a child 14 years old and at least 10 years younger than him (§ 288, subd. (c)(1)) and contributing to the delinquency of a minor (§ 272, subd. (a)(1)). A two-year prison term was imposed and suspended, and he was placed on five years' probation on condition, inter alia, that he obey all laws.

On May 12, 2011, defendant was sentenced in both cases to an aggregate term of 18 years plus 120 years to life, and he was ordered to pay restitution and various fees, fines, and assessments. In addition, he was prohibited from visiting any victim under the age of 18 (§ 1202.05), and was ordered to have no contact of any sort with the victims.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

He now appeals, raising claims of trial and sentencing error.<sup>2</sup> We affirm in part, reverse in part, and remand for partial resentencing.

## **FACTS**

### *Counts Involving C.C.*

C.C. was born in 1996. M.T. was her cousin. Defendant had lived with M.T.'s mother since C.C. was little.

C.C. celebrated her 14th birthday two days early at M.T.'s house. Some of C.C.'s family and defendant were present. C.C. shared some alcoholic beverages at the celebration.

Eventually that night, only defendant, C.C., and her brother remained at the residence. C.C. went into M.T.'s room, which was like a little apartment in back of the main house, to go to sleep. She was awakened by "really bad pain" in her vaginal area. She opened her eyes to find defendant on top of her with his hands on the bed by her sides. The underwear and pants she had been wearing were down to her ankles. Defendant's clothes were down a bit and unbuttoned and unzipped. He was wearing boxers. Although C.C. could not see anything else because of the boxers, he was sucking on her breasts and it felt like he was putting his penis in her. His penis area was directly over the location of the pain.<sup>3</sup> Once she realized what was going on, she told defendant to get out of the room. He buttoned and zipped his pants, left the room, and went inside the house. C.C. stayed in the room for a while, then went inside the house to use the bathroom. She noticed "some clear stuff" on her underwear. C.C. did not tell anyone

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<sup>2</sup> Although defendant appealed in both cases, none of his claims arise from case No. VCF187242. As a result, we do not discuss that case further except in our disposition.

<sup>3</sup> In a letter C.C. wrote to Detective Gezzer within two weeks of the incident, C.C. said defendant's penis was out of his "boxer hole" and he was going in and out of her.

right away because she was scared. About a week later, she told a friend, who told C.C.'s mother.

The matter was reported to the sheriff's department. Detective Gezzer and C.C.'s mother arranged to make telephone calls to defendant on June 22 and 23, 2010, that were recorded.<sup>4</sup>

In the first call, C.C.'s mother demanded to know why defendant had told T. he would give the mother \$500 if she did not call the police.<sup>5</sup> When the mother said they went through it with T. and asked if she was going to go through it again with C.C., defendant said no and denied doing anything.<sup>6</sup> Asked why he offered the money if nothing happened, defendant said he made the offer just for "all this" to go away. Told C.C. had missed her period and asked if, should she be pregnant, defendant was going to take care of the child, defendant responded, "If it's mine," and said he would have a DNA test.

In the second call, C.C.'s mother again demanded to know what happened. Defendant asked what C.C. had said. When the mother said C.C. reported she woke up and defendant was there, defendant said that was what happened. C.C.'s mother said she wanted to know what defendant had done to C.C. Defendant said he touched her "[e]verywhere" with his hands, but he denied putting his penis inside her. He said he touched C.C. "[o]n the outside" with his fingers. Asked why C.C. was complaining of

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<sup>4</sup> The recordings were played for the jury.

<sup>5</sup> According to C.C.'s sister, T., defendant telephoned her sometime in June 2010, and asked if she knew what was going on. T. said no. Defendant told T. to tell her mother that if she did not call the police, he would give her \$500. T. told her mother about the call.

<sup>6</sup> Pursuant to Evidence Code section 1108, the prosecution presented evidence of uncharged sex offenses defendant committed against T., M.T.'s mother, and two of M.T.'s other cousins. As defendant raises no issues concerning this evidence, we do not summarize it further.

being sore, defendant said he did not know why, and that he did not know what was wrong with him and he was sick or something. When C.C.'s mother asked why there was ejaculate on C.C.'s underwear, defendant said maybe from his hand. He admitted rubbing against her on the underwear, but insisted he did not put anything in her. Defendant admitted pulling C.C.'s clothes down seven or eight inches, but swore he only put a finger and not his penis inside her. He thought he could have gotten C.C. pregnant because there might have been semen on his hands. Defendant admitted C.C. was telling the truth about being asleep when he did it.

*Counts Involving M.T.*

M.T. was born in 1989. She was five or six when she first met defendant, who was her mother's boyfriend and who moved in with them. M.T. had problems with defendant between the ages of eight and 14, and again when she was 18. During those periods, she lived in four different residences. The first was on Date, where she lived from age eight to age 12. The second was on Gibbons, where she lived from the time she was 12 until just before she turned 13. Six months to a year later, she moved to Salisbury, where she lived from age 13 to age 17. She lived in the fourth residence from age 17 until age 21.

M.T. was eight the first time something happened with defendant. She would wake up in the morning and find her shirt pulled up and her bra, which she began wearing at an early age, undone. This happened at least once a week. After a couple of weeks, she started waking up when it was happening and would find defendant with his hands on her breasts, underneath her clothing. Sometimes the touching would be over her bra and sometimes under. Defendant would run out of the room when she woke up. This happened more than once a month.

A few months later, defendant started touching M.T.'s vagina. She would wake up and find her pants and underwear down. Defendant would rub his fingers on her vagina, sometimes multiple times a week, sometimes once a week, and sometimes he

would skip a week. At first, it was over her clothing. Later, it was under her clothing. She would wake and find her underwear to the side. Sometimes, he would penetrate her with his fingers. He did this less often than everything else, but more than once. Sometimes he would masturbate. Sometimes he would have a lighter, which he would flick so he could see. M.T. could not remember if he ever touched her while he was touching himself. This all occurred at the Date home. It never stopped while she was living there. When M.T. would wake and find defendant doing things, she would kick him and yell at him. Most of the time, he would get up and run. M.T. did not tell anyone at that time.

Defendant did not touch M.T.'s breasts very often during their time at the Gibbons home, as they lived with M.T.'s uncle and all slept in a single open area. It happened at least once there, however. Defendant never rubbed M.T.'s vagina at the Gibbons home.

Defendant touched M.T.'s breasts more than once while living at the Salisbury home. He also touched her vagina and penetrated it more than once at that location. This all occurred more than once at that location while M.T. was still 13 years old. When she was still 13, he would also use his tongue on her vagina. Sometimes he would put his mouth over her breasts. Both occurred more than once.

When M.T. was 14, she walked in on defendant when he was watching pornography on the computer. She told him to "get off" of the computer. Defendant said to her that she looked at his penis and that she wanted him. He put her on the bed and put his mouth on her breasts over her shirt. She hit him and he finally got off, and she called her aunt, as her mother was gone. M.T. then told her aunt what had been happening. Prior to this time, but while M.T. was still 14 and living on Salisbury, defendant had touched her breasts, and rubbed and penetrated her vagina, more than once.<sup>7</sup> After she told her aunt, however, things stopped except for one time when M.T. was 18. She was

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<sup>7</sup> Defendant was born in December 1976.

intoxicated, and defendant followed her into her room. She was on her bed, and he got on top of her, pulled her pants down, and tried to put his penis inside her vagina. She kept kicking him and yelling at him to stop, and he got off of her. She told her boyfriend what had happened.

M.T. first told detectives what defendant had done when she talked to Detective Gezzer in June 2010. She did not tell detectives before that, although she had the opportunity, because she was scared. She did not think it would make a difference. When she told her mother the first time, her mother said they could not afford to live without defendant.

In the summer of 2010, after she told Detective Gezzer about defendant and after the birthday celebration, M.T. received a letter from defendant. In it, he said she did not have to testify, because he knew he was going to prison. He apologized for “the bullshit [he] put [her] in,” and said he would save her the trouble of coming to court. He said he would probably take a deal so “you guys won’t have to.” He wrote that whatever happened, M.T. should remember that he loved her and missed her, but that he understood if she did not want to forgive him.

## **DISCUSSION**

### **I**

#### **AMENDMENT OF INFORMATION (COUNTS 8, 9, 11, & 12)**

Defendant contends the trial court erred by allowing the prosecution to amend counts 8, 9, 11, and 12 to change the factual bases to ones not shown by evidence presented at the preliminary hearing. The Attorney General concedes the conviction on count 8 must be reversed, but maintains the amendments to counts 9, 11, and 12 were proper. We agree with the Attorney General.

**A. Background**

Defendant was tried on the third amended information. Counts 8, 9, 11, and 12 thereof charged him with committing lewd or lascivious acts against M.T., specified as follows:

- Count 8 — touching vagina while masturbating at Date home (first time).
- Count 9 — touching vagina while masturbating at Date home (last time).
- Count 11 — touching vagina at Gibbons home.
- Count 12 — mouth to vagina at Gibbons home.

At the close of the People’s case, the prosecutor asked to amend certain counts to conform to proof. Insofar as is pertinent, she sought to amend the information to specify the following acts:

- Count 8 — mouth to vagina at Date home.
- Count 9 — penetrating vagina with fingers at Date home.
- Count 11 — touching vagina at Salisbury home.
- Count 12 — mouth to vagina at Salisbury home.

Defendant objected to the proposed amendments on the ground there was no evidence supporting those charges at the preliminary hearing. The prosecutor cited page numbers from the preliminary hearing transcript she believed provided the requisite evidence. The trial court permitted the amendments. The jury’s guilty verdicts specified the acts as so amended.

**B. Analysis**

“‘Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.’ [Citations.]” (*People v. Valladoli* (1996) 13 Cal.4th 590, 607.) “‘It is clear that in modern criminal prosecutions initiated by informations, the transcript of the preliminary hearing, not the accusatory pleading, affords defendant practical notice of the criminal acts against which he must

defend.’ (Italics [omitted].) ‘[A]n information plays a limited but important role: It tells a defendant what *kinds* of offenses he is charged with (usually by reference to a statute violated), and it states the *number* of offenses (convictions) that can result from the prosecution. But the time, place and circumstances of charged offenses are left to the preliminary hearing transcript; it is the touchstone of due process notice to a defendant.’ [Citation.]” (*People v. Butte* (2004) 117 Cal.App.4th 956, 959; see *People v. Jones* (1990) 51 Cal.3d 294, 315-316, 317, 318; *People v. Thomas* (1987) 43 Cal.3d 818, 829.)

In accord with these principles, section 1009 provides in pertinent part: “The court in which an action is pending may order or permit an amendment of an ... information, ... for any defect or insufficiency, at any stage of the proceedings .... An indictment or accusation cannot be amended so as to change the offense charged, *nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination.*” (Italics added.)

Subject to section 1009, an information may be amended, even at the close of trial, where no prejudice is shown. (*People v. Graff* (2009) 170 Cal.App.4th 345, 361-362; *People v. Pitts* (1990) 223 Cal.App.3d 606, 903-904 (*Pitts*); *People v. Witt* (1975) 53 Cal.App.3d 154, 165, overruled on another ground in *People v. Posey* (2004) 32 Cal.4th 193, 205, fn. 5, 215.) ““In light of the notice function played by the preliminary hearing transcript, ... a defendant must be prepared to defend against all offenses of the kind alleged in the information as are shown by evidence at the preliminary hearing to have occurred within the timeframe pleaded in the information.”” (*People v. Luna* (1988) 204 Cal.App.3d 726, 748, disapproved on another ground in *People v. Jones, supra*, 51 Cal.3d at p. 322.)

A trial court’s decision to permit an information to be amended will not be disturbed unless an abuse of discretion is shown. (*People v. Jones* (1985) 164 Cal.App.3d 1173, 1178-1179; see also *People v. Flowers* (1971) 14 Cal.App.3d 1017, 1020.) The test of abuse of discretion is whether the trial court exceeded the bounds of

reason, all of the circumstances being considered. (*People v. Superior Court (Alvarado)* (1989) 207 Cal.App.3d 464, 477.) “[E]ven where the prosecution complies with the necessary procedures and no specific prejudice is shown, appellate courts are compelled to reverse convictions where substantial evidence was presented at trial that did not correspond to the charges established at the preliminary hearing. [Citations.]” (*People v. Graff, supra*, 170 Cal.App.4th at p. 362.)

The Attorney General concedes defendant’s conviction on count 8, as amended at the close of the prosecution’s case, cannot stand. Count 13 of the original and first amended informations alleged that, between June 15, 1997, and June 14, 2003, defendant violated section 288, subdivision (a), by orally copulating M.T.’s vagina at the Date home. In response to defendant’s motion to dismiss various counts, including count 13, pursuant to section 995, the prosecutor filed a second amended information that reworded count 13 to allege that, during the same time frame and at the same location, defendant violated section 288, subdivision (a) by putting his mouth to M.T.’s vagina. The court found insufficient evidence at the preliminary hearing to support count 13, and so dismissed it.<sup>8</sup>

The third amended information differed from the second amended information in that the counts dismissed pursuant to section 995 were deleted and the remaining counts renumbered. As amended at the close of the prosecution’s case, however, count 8 alleged that, between June 15, 1997, and June 14, 2003, defendant violated section 288, subdivision (a) by putting his mouth to M.T.’s vagina at the Date home — in short, the charge that previously made up count 13 of the second amended information and that was dismissed pursuant to section 995 because it was not shown by evidence at the preliminary hearing. The People not having sought review of the ruling on the section

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<sup>8</sup> Neither the judge who heard the section 995 motion nor the prosecutor who appeared at the hearing thereon were the same judge or prosecutor involved at trial.

995 motion, either by way of appeal or by writ (see § 1238, subd. (a)(1); *People v. Alice* (2007) 41 Cal.4th 668, 680; *People v. Superior Court (Bolden)* (1989) 209 Cal.App.3d 1109, 1112), the trial court should not have permitted them to amend the information to once again allege the same conduct at the same location and in the same time frame. It follows that defendant's conviction on count 8 must be reversed and, since sentence on that count was designated the principal term among the counts subject to determinate terms, the determinate portion of defendant's sentence must be vacated and the matter remanded for resentencing. (See *People v. Winters* (1990) 221 Cal.App.3d 997, 1008.)<sup>9</sup>

We turn now to the other challenged counts. The preliminary hearing consisted of Detective Gezzer's testimony concerning his interviews with C.C. and M.T. According to the detective, M.T. related that she lived at the Date home between the ages of eight and 12, at the Gibbons home between the ages of 12 and 13, and at the Salisbury home between the ages of 13 and 17.

With respect to count 9, the issue was whether there was evidence at the preliminary hearing that defendant penetrated M.T.'s vagina with his fingers at the Date home. At trial, the prosecutor pointed to Gezzer's testimony that M.T. described "at 12 years old" being the first time defendant penetrated her vagina with his finger. Defense

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<sup>9</sup> Defendant further claims the evidence is insufficient to support his conviction on count 8, because there was no evidence he touched his mouth to M.T.'s vagina at the Date home, as ultimately charged by the People and found by the jury. Defendant is correct that the evidence showed he engaged in that conduct at the Salisbury home, not the Date home. Details surrounding a child molestation charge, including the place of the assault, however, are unnecessary to sustain a conviction. (*People v. Jones, supra*, 51 Cal.3d at pp. 315-316.) Moreover, a variance as to the place an offense is committed, is not necessarily material. (§ 956; *Pitts, supra*, 223 Cal.App.3d at p. 906.) We do not analyze defendant's claim further: The Attorney General says it is moot in light of her concession count 8 must be reversed in any event, and defendant does not dispute this assertion. In the unlikely event the People seek to retry the charge, defendant is free to bring appropriate motions, asserting double jeopardy or other applicable claims, in the trial court. (See *Pitts, supra*, 223 Cal.App.3d at pp. 914-915.)

counsel reiterated his argument, originally made as to count 8, that such testimony was not proof the conduct actually happened at the Date home, given that M.T. lived at both the Date and Gibbons homes when she was 12. The court found the preliminary hearing evidence showed M.T. said she was 12 when a type of sexual assault began; hence, it was “within the evidence that she was at the ... Date location.”

Defendant now says the preliminary hearing evidence did not establish the location of the act of digital penetration. We conclude the evidence was sufficient, for purposes of section 1009’s requirements and defendant’s due process right to notice, to establish such conduct occurred at the Date home. That it could also have occurred at the Gibbons home does not mean the amendment to conform to proof should not have been allowed. Given the state of the testimony at the preliminary hearing, defendant could not reasonably have been taken by surprise by evidence he digitally penetrated M.T.’s vagina at the Date home. (*Pitts, supra*, 223 Cal.App.3d at p. 906; see *People v. Jones, supra*, 51 Cal.3d at p. 317.)

With respect to count 11, the issue was whether there was evidence at the preliminary hearing that defendant touched M.T.’s vagina at the Salisbury home. At trial, the prosecutor pointed to testimony M.T. lived on Salisbury between the ages of 13 and 17, as well as evidence the prosecutor interpreted as relating to the touching of M.T.’s vagina at that location. With respect to count 12, the issue was whether there was evidence at the preliminary hearing that defendant put his mouth to M.T.’s vagina at the Salisbury home. The prosecutor again pointed to the testimony concerning when M.T. lived on Salisbury, and to testimony defendant began performing oral sex on her when she was 12 years old.

The pertinent portion of the preliminary hearing evidence is as follows:

“Q. [by the prosecutor] Okay. Did she describe anything else happening when she was about nine years old?”

“A. [by Detective Gezzer] Yeah. She said at nine years old, he began touching her with his hands in her vaginal area.

“Q. And was -- was she also waking up during the assaults or --

“A. Each and every one of these assaults until she was late in her teens occurred while she was sleeping, so all of ‘em were happening as she was waking up.

“Q. Okay. Did he -- did she mention him ever touching her breasts at that point?

“A. She did. She said that she would often wake up with him touching her breasts and her vaginal area ....

“Q. Did she say if he would do anything else while he was touching her vagina?

“A. She did. She said he often masturbated while he was touching her.

“Q. And how often did she describe these assaults taking place?

“A. Again, a few times per week for the longevity for the time that she lived there.

“Q. Did she describe at any age any additional acts occurring?

“A. She did. She said that continued on till she was about 12 years old, and at 12 years old was -- she described that being the first time that he actually digitally penetrated her with his finger in her vaginal area.

“Q. And were there any other acts that also began occurring when she was 12 years old?

“A. He would do the same thing, fondle her breasts, kiss her breasts, kiss her neck.

“Q. And how often did these acts occur?

“A. She described it again often, few times per week, but she did say there was a span of every once in a while several weeks would go by that nothing would happen and then the assaults would start again.

“Q. Okay. And did you ever ask her about oral sex?

“A. Yeah, she said when she was 12 years old, he also began performing oral sex on her.

“Q. Did she describe anything else happening or changing in this routine as she got older?

“A. She said that up until she was 14 years old, all the assaults were occurring while she was sleeping, and she would wake up to these assaults. [¶] At 14 years old, there was a change in behavior. She said she -- this was the first time that he had attempted to assault her while she was already awake.”

We believe the preliminary hearing evidence may reasonably be read as showing defendant started out by fondling M.T.’s breasts, then he gradually added acts to his repertoire. Just because he began committing another kind of act, however, did not mean he stopped performing the acts he was already committing. Accordingly, we conclude the trial court did not abuse its discretion, or violate defendant’s due process rights, by permitting the prosecution to amend counts 11 and 12 to conform to proof.

*Pitts, supra*, 223 Cal.App.3d 606 is instructive. In that case, we dealt with a situation in which seven defendants were charged with multiple sex offenses against multiple children. Three separate preliminary hearings were held at which the same child was the only witness called by the prosecution to testify concerning the charged offenses. Three separate informations were filed, two of which were amended shortly before trial. At the close of the People’s evidence, the prosecution was permitted to make amendments to conform to proof and to state elections. (*Id.* at pp. 893-901.)

On appeal, the defendants claimed certain of the counts upon which they were convicted were not shown by evidence taken at the preliminary hearing. We agreed, explaining:

“... It is true that an information need *not* notify a defendant of all the particulars of the crime charged. *That role is left to the preliminary hearing transcript.* Where ... the particulars are *not* shown by the preliminary hearing transcript, the defendant is *not* on notice in such a way that he has the opportunity to prepare a meaningful defense....

“A hypothetical is in order. Suppose the evidence at a preliminary hearing revealed the commission of four distinct violations of section 288, say two oral copulations and two lewd touchings, involving victim X and occurring over a four-month period in defendant’s bedroom. X, being a child, could not pinpoint the times of the offenses except to say that one set occurred near Christmas and the other following a school athletic event. Suppose further that the information charged in statutory language only two violations occurring within the four-month time frame. Further assume that the evidence at trial revealed the same acts occurring within the same time frame inside defendant’s home.

“Absent unusual circumstances, an amendment at trial to charge the remaining two violations would not violate due process, because the defendant was on notice from the preliminary hearing as to what charges he might potentially have to be prepared to defend against at trial. In such a situation, the defendant would not be prejudiced by a variance in time or place, so long as the evidence showed the offenses were committed within the original four-month period and somewhere in the house.<sup>[10]</sup> The evidence adduced at the preliminary hearing placed the defendant on notice as to all possible charges; under normal circumstances, his opportunity to prepare an effective defense would not be affected merely because the evidence at trial showed the offenses occurred at a different time (within the time frame alleged in the original information) or a different room of the house. Even in alibi cases, neither the time [citation] nor the place at which an offense is committed [citations] is material, and an immaterial variance will be disregarded [citation].

“If the defendant is misled in making his defense, however, the variance *is* material. [Citation.] Suppose, in the foregoing hypothetical, the evidence at trial showed two acts of sodomy and two of sexual intercourse and the information was amended accordingly. In such a situation, the preliminary hearing transcript would *not* afford the defendant adequate notice of the specific acts against which he might have to defend. Moreover, in such a situation the opportunity to prepare a meaningful defense would obviously be adversely affected, since the change in alleged acts would affect medical testimony, cross-examination of the alleged victim(s), etc. If the amendments were not specified until the close of the

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<sup>10</sup> Our hypotheticals in *Pitts* tracked, to a large extent, the circumstances of that case. We did not mean to suggest a change from one house to another would be material in every instance.

People's case and the defendant were given no continuance to meet them, the problem would be even greater.

“To say that due process would not be violated in the second situation because the defendant knew to defend against four violations of section 288 within a certain time frame is to ignore the reality of the situation.... [¶] ... [¶]

“This is not to say that all particulars of an offense are material. Under the circumstances of the instant case, it does not appear due process was violated where the evidence at the preliminary hearing showed a specific act occurring on one occasion (for instance, the ‘last time’), whereas the evidence at trial placed the act on another occasion (for example, the ‘time after the track meet time’). Nor is it material that evidence at the preliminary hearings placed all molestations in Rick and Tutti's room, whereas some were shown at trial to have occurred in Carol and Lisa's room. Although defendants attempted to show that Rick and Tutti's room was too small to house an orgy of the size testified to by the children, it would not have been difficult for them to obtain the dimensions of the girls' room in order to attempt to show it was equally as unlikely a location. In fact, there was some testimony as to the size of the girls' room.

“In some counts as charged in the [final versions of the] information[] ..., however, the specific act and/or actors changed from previous amendments, and/or the specific act involving specific actors was not shown by evidence adduced at a particular preliminary hearing. [The Attorney General] essentially argues defendants were on notice to defend against any and all lewd acts involving any child shown by preliminary hearing evidence to have been present during the molestations. To hold such variances are immaterial, however, would be to hold that due process is satisfied as long as the preliminary hearing evidence shows five violations of a statute and the evidence at trial shows the same number of violations of the same statute, regardless of the particulars. Such a holding would basically do away with use of the preliminary hearing transcript as a means for giving fair notice. This is not the law; a preliminary hearing transcript affording notice of the time, place and circumstances of charged offenses “‘is the touchstone of due process notice to a defendant.’” [Citation.]” (*Pitts, supra*, 223 Cal.App.3d at pp. 905-908, fns. omitted.)<sup>11</sup>

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<sup>11</sup> We believe this continues to be so even though, as the California Supreme Court has held, in a case addressing whether a child's generic testimony constitutes sufficient evidence to support a molestation conviction: “[G]iven the availability of the preliminary hearing, demurrer and pretrial discovery procedures, the prosecution of child molestation

In the present case, the evidence adduced at the preliminary hearing placed defendant on notice that, while specific acts may first have been committed at a particular location, those acts continued at least until M.T. was 14 years old. Thus, the situation is much closer to the first hypothetical set out in *Pitts, ante*. We see nothing to suggest defendant was misled in preparing and presenting his defense, or that the location at which any particular act occurred was material under the circumstances. (See *People v. Peyton* (2009) 176 Cal.App.4th 642, 659-660.) Accordingly, defendant's claim fails.

## II

### **MULTIPLE CONVICTIONS (COUNTS 1 & 3)**

Defendant contends his conviction on either count 1 or count 3 must be reversed, as the conduct at issue in count 1 was part of the commission of count 3. Because the jury was not required to so interpret the evidence, we conclude both convictions may stand.

#### **A. Background**

At the close of the People's case, defendant moved to dismiss (§ 1118.1) count 1, which, as amended to conform to proof, charged defendant with violating section 288, subdivision (a) by pulling down C.C.'s underwear. Defendant argued the pulling down underwear charged in count 1 was a necessary step to the touching penis to vagina charged in count 3 as a separate violation of section 288, subdivision (a); hence, the same crime was being charged different ways. The prosecutor took the position the acts were separate: "[Defendant] did not necessarily need to pull it down in order to touch his penis to her vagina. He could have done it over her clothes. He could have done it over the underwear. He could have pulled the underwear to the side.... [T]here was evidence that

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charges based on generic testimony does not, of itself, result in a denial of a defendant's due process right to fair notice of the charges against him." (*People v. Jones, supra*, 51 Cal.3d at p. 318; see *People v. Graff, supra*, 170 Cal.App.4th at pp. 365-366.)

[C.C.] said she woke up and her underwear were [*sic*] pulled down.” The trial court denied the motion.

In her summation, the prosecutor reminded jurors C.C. testified she woke up and defendant was on top of her; she had extreme pain in her vaginal area; her pants and underwear were pulled down; defendant’s pants were unzipped and his penis area was over C.C.’s vaginal area; and C.C. recalled defendant sucking on her breasts. The prosecutor further reminded jurors that in the pretext telephone calls, defendant tried to say he rubbed on C.C.’s underwear, but he also admitted her underwear was pulled down. The prosecutor said nothing about one act being the means to another.

At sentencing, however, a dispute arose over whether the counts involving C.C. could be sentenced concurrently or consecutively, or whether one or more had to be stayed pursuant to section 654. This exchange took place:

“THE COURT: [Prosecutor], do you agree with probation’s recommendation that Count 2 and Count 3 have to be concurrent by statute, by, I assume, Penal Code Section 654?

“[PROSECUTOR]: ... I believe that in terms of Count 3, it was an act that stemmed -- resulting from the pulling down underwear. [¶] Count 2 I would say is a separate act. It was -- occurred at the same time, but I still believe the court has discretion to run that consecutively. That was sucking on breasts. That was a separate act. It did not occur directly because he pulled down the underwear. [¶] ... [¶]

“THE COURT: I see. I see, one uninterrupted course of conduct. Actually, I think probation -- probation is correct, I cannot run those consecutive. They must be concurrent, all right.”

**B. Analysis**

“An accusatory pleading may charge ... different statements of the same offense ... under separate counts .... The prosecution is not required to elect between the different offenses or counts ..., but the defendant may be convicted of any number of the offenses charged ....” (§ 954.) Nevertheless, it is impermissible to fragment a single criminal act into multiple offenses. Where such proliferation occurs, the conviction for

the duplicate crime must fall. (*People v. Bevan* (1989) 208 Cal.App.3d 393, 399, disapproved on another ground in *People v. Scott* (1994) 9 Cal.4th 331, 347-348 (*Scott*)).

Section 288 applies to *any* sexually motivated touching of a child under the specified age. (*People v. Martinez* (1995) 11 Cal.4th 434, 444, 451 (*Martinez*)). Thus, “a lewd or lascivious act can occur through the victim’s clothing and can involve ‘any part’ of the victim’s body. [Citations.]” (*Id.* at p. 444.) Moreover, unless one offense is necessarily included in another, multiple convictions can be based on a single criminal act. Thus, for instance, a defendant may be convicted of (although not punished for) both rape or sodomy and lewd and lascivious conduct on a child under 14, where there is no evidence of lewd conduct independent of the evidence supporting the rape and sodomy convictions. (*People v. Richardson* (2008) 43 Cal.4th 959, 1018.)

Here, we deal not with one count charging lewd or lascivious conduct and one count charging a “defined” crime such as rape, sodomy, or oral copulation, but two counts charging lewd or lascivious conduct. Even so, the California Supreme Court has made clear that “[e]ach individual act that meets the requirements of section 288 can result in a ‘new and separate’ statutory violation. [Citation.]” (*Scott, supra*, 9 Cal.4th at pp. 346-347, citing *People v. Harrison* (1989) 48 Cal.3d 321, 329 (*Harrison*)). Cases decided after *Harrison* have “tend[ed] to focus on evidence showing that the defendant independently sought sexual gratification each time he committed an unlawful act. [Citations.]” (*Scott, supra*, at pp. 347-348, fn. 9.)

Both before and after *Harrison* was decided, cases held that section 654 precluded punishment for more than one sex offense if the first was merely part of or incidental to the second, or the means by which the second was accomplished. (E.g., *People v. Perez* (1979) 23 Cal.3d 545, 553; *People v. Bright* (1991) 227 Cal.App.3d 105, 110; *People v. Blevins* (1984) 158 Cal.App.3d 64, 71-72.) Some courts have extended this analysis to the question whether multiple convictions are permissible. (E.g., *People v. Jimenez*

(2002) 99 Cal.App.4th 450, 456; *People v. Bright, supra*, 227 Cal.App.3d at pp. 109-110.)<sup>12</sup>

We need not decide whether, under cases such as *Harrison, Scott*, and *Martinez*, multiple convictions are now permitted even if one offense was incidental to another or the means by which another was accomplished (see *Martinez, supra*, 11 Cal.4th at pp. 447-448, fn. 14; *People v. Tompkins* (2010) 185 Cal.App.4th 1253, 1262), since we conclude defendant was properly convicted of both count 1 and count 3 in any event. Although the prosecutor argued at sentencing that the conduct forming the basis for count 3 resulted from the conduct that formed the basis for count 1, the issue being addressed was whether section 654 applied, not whether multiple convictions were proper.<sup>13</sup> “While jurisprudential considerations of double conviction and double punishment are similar, the former is concerned more with identity of offenses as distinguished from identity of transactions from which they arise.” (*People v. Harris* (1977) 71 Cal.App.3d 959, 969.)

The question before us, by contrast, is whether there was evidence from which the jury could have concluded defendant’s pulling down C.C.’s underwear was *not* incidental to his touching his penis to her vagina. We believe there was, especially when the fact

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<sup>12</sup> In *People v. Jimenez, supra*, 99 Cal.App.4th at page 456, the court held that where the defendant was charged with having fondled the victim’s breasts, buttocks, vagina, and thigh, and the evidence established a separate fondling of each specified body part and not merely a touching en route to another area, multiple convictions were permissible. The court declined to decide whether fondling every portion of a victim’s body could amount to multiple offenses (as when the perpetrator moves a hand up the victim’s leg), or whether a separate touching of a victim’s vagina incident to digital penetration thereof could constitute a separate offense.

<sup>13</sup> Section 654, subdivision (a) provides in pertinent part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

C.C. awoke to find the assault already in progress is considered in conjunction with what defendant told C.C.'s mother during the pretext telephone calls and the other evidence adduced at trial. Although defendant's pulling down C.C.'s underwear may ultimately have led to his touching her vagina with his penis, jurors reasonably could have found defendant sought sexual gratification by the act of pulling down the underwear itself, perhaps so he could see C.C.'s genitals, and that his conduct subsequently progressed to the distinct act of touching his penis to her vagina. (See *Scott, supra*, 9 Cal.4th at pp. 347-348, fn. 9; cf. *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006-1007.) Given the state of the evidence before the jury, we are not bound by the prosecutor's analysis at sentencing any more than the jury would have been bound by it had she presented it during her summation at trial. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1126; *People v. Hiscox* (2006) 136 Cal.App.4th 253, 260-261.)

### III

#### NO-CONTACT ORDER

As part of the sentence in both cases, the trial court prohibited defendant from having visitation with any child victims under the age of 18, pursuant to section 1202.05. The court further ordered that defendant have no further contact with the victims in this case, whether in person, in writing, by telephone, or by Internet.

Defendant concedes the court could properly prohibit visitation with any victim under the age of 18, but he says the court lacked authority to issue the broader no-contact order. The Attorney General agrees, as do we.<sup>14</sup>

Subdivision (a) of section 1202.05 provides, in pertinent part: "Whenever a person is sentenced to the state prison ... for violating Section ... 288, ... and the victim of ... [the] offense[] is a child under the age of 18 years, the court shall prohibit all

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<sup>14</sup> The Attorney General also agrees the no-contact order constituted an unauthorized sentence that was not forfeited by defendant's failure to object at sentencing.

visitation between the defendant and the child victim.” Where, as here, the defendant is sentenced to prison, the trial court is without authority to prohibit visitation with an adult victim or to issue a no-contact order. (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1307, 1324-1326; see also *People v. Robertson* (2012) 208 Cal.App.4th 965, 996.)

**DISPOSITION**

In Tulare County Superior Court case No. VCF187242, the no-contact order is stricken. In all other respects, the judgment is affirmed.

In Tulare County Superior Court case No. VCF238446, the conviction on count 8 is reversed and the no-contact order is stricken. The determinate portion of the sentence is vacated and the matter is remanded to the trial court with directions to resentence defendant accordingly. In all other respects, including the indeterminate portion of the sentence, the judgment is affirmed.

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DETJEN, J.

WE CONCUR:

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CORNELL, Acting P.J.

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GOMES, J.