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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ENRIQUE GARCIA ALANIZ,

Defendant and Appellant.

F068089

(Super. Ct. No. VCF271794)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Randy S. Kravis, 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, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Following a jury trial, appellant Enrique Garcia Alaniz was convicted of 10 counts of committing lewd and lascivious acts on a child under 14 years of age (Pen. Code,¹ § 288, subd. (a); counts 1-10), and one count of sexual penetration of a child 10 years old or younger (§ 288.7, subd. (b); count 11). Four victims were involved. On appeal, he raises six issues.

First, he argues the trial court abused its discretion under section 1089 when it excused a juror during deliberations over a defense objection.

Second, he asserts the trial court prejudicially erred when it instructed the jury that sexual penetration under section 288.7, subdivision (b), is a general intent crime, and he claims the court failed to properly instruct on the union of act and intent.

Third, he maintains one of his convictions in counts 3, 4, or 5 for a lewd act under section 288, subdivision (a), must be vacated as a lesser included offense of his conviction in count 11 for sexual penetration under section 288.7, subdivision (b). The same victim, T.J., was involved in each of these counts.

Fourth, in the alternative to the argument above, he contends the trial court erred when it failed to stay punishment under section 654 for the sexual penetration conviction in count 11.

We find these four arguments unpersuasive.

Regarding appellant's final two arguments, respondent concedes error occurred, which we find persuasive. The trial court improperly imposed a \$1,000 restitution fine pursuant to section 294, subdivision (b), and a clerical mistake exists in the abstract of judgment regarding the number of days of actual presentence credits awarded. We will order amendment of the abstract of judgment but otherwise affirm.

¹ All future statutory references are to the Penal Code unless otherwise noted.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant does not challenge the sufficiency of the evidence supporting his convictions. Set forth below are a summary of the trial facts taken in the light most favorable to the judgment and relevant to the issues on appeal.

I. Trial evidence.

Appellant was born February 25, 1951. Four victims testified against him. The incidents which the victims described below all occurred at appellant's residence.

A. T.J.

On occasion T.J., who was not related to appellant, would play at appellant's residence. At trial, T.J. testified appellant touched her "middle part" one time with his finger under her clothing when she was younger than 10 years old. When shown a drawing of a vagina, T.J. testified appellant's finger went "inside" the line.

Law enforcement interviewed T.J., which was recorded and played for the jury. During the interview, T.J. said appellant once licked her face and removed her clothing except for her underwear. Appellant placed his finger under her underwear and he went "inside" her middle part, which hurt. Appellant touched her "middle part" every time she visited his house, which was more than five times. At trial, T.J. did not recall telling law enforcement appellant touched her more than one time.

B. M.G.

M.G. was related to appellant and lived with him when these incidents occurred. When M.G. was younger than 10 years old, appellant touched her "parts." On a drawing, she indicated appellant touched her "boobs" and her vaginal area, which she described as the "middle part." Appellant sometimes touched M.G. underneath her clothes and sometimes over her clothes. This occurred somewhere between six and 10 times.

Law enforcement interviewed M.G., which was recorded and played for the jury. During the interview, M.G. stated appellant touched her by sliding his hand over her and he touched her "privacy." She recalled a time when appellant removed her clothes,

including her underwear, and touched her “private.” She stated appellant touched her “privacy” on two different occasions when she was younger than 10 years old.

C. R.A.

On occasion R.A., who was not related to appellant, would play at appellant’s residence. When R.A. was younger than 10 years old, appellant placed her on his bed and touched her chest underneath her clothes as well as her “middle part” over her clothing.

Law enforcement interviewed R.A., which was recorded and played for the jury. During the interview, R.A. stated appellant touched her chest underneath her clothing on one occasion, also touching her stomach and “middle part” over her clothing during that same encounter. R.A. stated she was nine years old when this occurred.

D. J.M.

J.M. was related to appellant and she was at his residence for a family event when her incident with him occurred. When J.M. was around 11 years old, appellant pulled up her shirt and slid his hand down her pants. He placed one hand underneath her armpit and his other hand went underneath her underwear over her hip. She thought appellant tried to kiss her cheek and neck because she felt something wet, like his lips or his cheek, against her skin. She pulled away before anything else happened.

E. Defense facts.

Appellant testified and denied all of the allegations. Three of appellant’s adult children testified on his behalf. None of appellant’s children were aware he ever did anything inappropriate to children, including when they were younger, their siblings, or their own children. All three believed appellant was an honest and truthful person.

II. Information and Sentencing.

A. Information.

On May 22, 2013, the District Attorney of Tulare County filed an information charging appellant with 10 counts of lewd acts on a child in violation of section 288,

subdivision (a), and one count of sexual penetration of a child 10 years old or younger in violation of section 288.7, subdivision (b). It was further alleged as to all 10 counts of lewd acts that appellant committed these offenses against more than one victim under section 667.61, subdivision (b).

B. Verdicts and sentencing.

On August 2, 2013, the jury found appellant guilty as charged and found all special allegations true. In counts 1, 3, 6, and 9, the trial court sentenced appellant to consecutive terms of 15 years to life for a total of 60 years to life. The sentences on the remaining counts were to run concurrent. Various fees and fines were imposed, including a restitution fine of \$1,000 pursuant to section 294, subdivision (b).

DISCUSSION

I. The Trial Court did not Abuse its Discretion When it Excused Juror No. 6.

Appellant argues the trial court abused its discretion when it excused Juror No. 6 during deliberations despite an objection by the defense. He contends the trial court's actions were prejudicial, requiring reversal of his convictions.

A. Background.

1. Voir dire.

During jury voir dire, the prosecutor informed the prospective jurors that the case involved sexual assault and asked them if a victim's testimony, if believable, was sufficient to obtain a guilty verdict. The prosecutor asked if anyone would need something more than just the victim's testimony, and none of the prospective jurors responded. The prosecutor also asked if any of the prospective jurors required scientific evidence to make a decision and a prospective juror responded such evidence would be nice, but the trial court stated, "It might be nice, but it is not required." The prospective juror said, "Okay." No other prospective jurors commented on this topic.

Prior to the jurors hearing evidence, the court instructed them not to reach a verdict until after the case was discussed during deliberations.

2. Final jury instructions.

After counsel provided closing arguments, the trial judge gave final instructions utilizing CALCRIM No. 3550. The court admonished the jury it was their “duty to talk with one another and to deliberate in the jury room.” He also stated:

“Each of you must decide the case for yourself but only after you’ve discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong, but do not change your mind just because other jurors disagree with you.

“Keep an open mind and openly exchange your thoughts and ideas about the case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please be courteous to one another. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other.”

3. Deliberations.

Approximately 60 minutes after the jury began deliberations, the trial judge received a note from the foreperson. The note read: “We request a copy of instructions during jury selections that pertain specifically to physical or medical evidence.” The trial court responded: “I am uncertain about your request – Please use the jury instructions that have been provided – if you need additional information please advise[.]”

Approximately 30 minutes later, the judge received a second note from the foreperson, which read: “Juror #6 would like to be excused. He cannot decide without physical/medical evidence. And we the jury believe that was specified in the original jury instructions.”

The trial judge met with the foreperson in court with counsel present. The foreperson stated Juror No. 6 wanted to be excused after deliberations became “heated” and Juror No. 6 took a 20 minute break. The foreperson explained his first note, indicating the jury believed everyone was told during voir dire there would be no physical or medical evidence, but Juror No. 6 had made his decision and stated three

times he would not change his mind without medical or physical evidence. The foreperson said Juror No. 6 was refusing to talk about it.

Juror No. 6 was called before the judge and counsel. He stated he wanted to be excused because the other jurors requested it. He said, "... I don't think I can make the right call on this right now." When asked to explain, he stated, "... I need more than what I heard that was here, and every time I bring something up, it's no, no. So in other words, to me, I'm finding it that actually, the state hasn't proved to me what I wanted to know."

The judge asked Juror No. 6 if he was willing to stay and discuss the case with everyone. The following exchange occurred:

"JUROR NUMBER 6: No, sir, 'cause they won't listen to what I'm trying to say.

"I mean, if I say something, you know, it can't be used, I mean, might as well just say you know what, he's guilty if I can't say what I got to say or they ain't gonna hear what I got to say, it's not worth it to me, and then when they turn around and say you know what, it would be better you be excused. Well, if that's the call, then I agree with that. I don't think I can make an honest -- honest thing without more than what I heard.

"THE COURT: And you're certainly entitled to your opinion, sir. That's why we have 12 people.

"JUROR NUMBER 6: That's what I tried to tell 'em, but it's just not --

"THE COURT: Well --

"JUROR NUMBER 6: And me, myself personally, my feelings and everything, I'd rather be removed 'cause they will not -- they will not change my mind, let me tell you, with what I got and with what I'm trying to say, they're not accepting it so --

"THE COURT: Well, let me ask you: What you have to say, you're not -- they're not accepting what -- but are you accepting anything they have to say when you say nothing?

“JUROR NUMBER 6: Yeah, yeah, you know, I can agree on some stuff but I got doubts, you know what I’m saying.

“THE COURT: And you’re certainly entitled to that, but what you’re saying is you just told me, ‘They can’t change my mind, I’m not changing my mind,’ which tells me you’re not willing to listen to what the other people are saying.

“JUROR NUMBER 6: Yeah, I have listened to ‘em, but when I bring something up, it’s just like you can’t use that. You can’t think like that. You can’t -- you know. So what’s the use of trying to do something, you know.

“THE COURT: Well, if you tell me you’d like to be excused, I’ll excuse you. If you tell me you want to stay on this jury, you’re staying on this jury.

“JUROR NUMBER 6: No, I want to be excused because that’s the thing I got –

“THE COURT: You’re excused. [¶] Go ahead, make your record.

“[DEFENSE COUNSEL]: I object, your Honor, he’s deliberating.

“THE COURT: You can go.

“[DEFENSE COUNSEL]: I feel like he’s being bamboozled out of the jury room.

“THE COURT: I’m granting his request. We’re going to seat an alternate juror”

Later, defense counsel elaborated on his objection, stating: “Your Honor, that juror was deliberating. I mean, he was listening to them. He was talking about his feelings. That’s what they do back there, and just because he wants to be excused, I mean, that’s not a reason to excuse someone. A lot of people want to be out of here. Almost all the jurors want to be excused.”

The court noted for the record that it found Juror No. 6 refused “to participate in deliberation and consider other points of view. He has distanced himself from other jurors. He made it clear -- I mean, the jury had not even deliberated less than an hour -- that nothing was going to change his mind no matter what they had to say. So it just --

the court makes a specific finding that he was refusing to deliberate with the other jurors. That's my finding, and that's why I excused him."

Defense counsel made a final objection, and the following exchange occurred:

"[DEFENSE COUNSEL]: Lodge another objection, your Honor. I feel like it violates my client's due process right to a fair and impartial jury.

"This is what juries do. Jurors go in there and they make a decision. I feel like the other jurors just bamboozled him out of the door. If it was a reverse situation where some says well, he's just guilty and I can't -- I can't go ahead and decide any other way, does that mean you go ahead and excuse that person, too? I would hope not, and so that's why I'm lodging this objection.

"I feel like -- and he never said that he was not deliberating. He specifically says I'm listening to them, but every time I voice my opinion, they essentially tell me to go.

"THE COURT: Well, he made the comment that nothing they say will change my mind.

"[DEFENSE COUNSEL]: And that's okay, and that's what jurors do.

"THE COURT: Well, that in my opinion is a refusal to deliberate.

"[DEFENSE COUNSEL]: That's -- that's not the case because there could be other jurors in there that think the exact opposite of him and that means those people need to go, as well?

"THE COURT: I don't know what those people are thinking, but it just seems to me that he was refusing to deliberate.

"He walked in there with his mind made up. He is not following the law as we talked to him about because he wasn't even honest as a juror when we sat -- when we selected him because it was specifically asked can you make a decision in this case if there is no physical or medical evidence? Everybody agreed with that, and now he's refusing to honor that promise he made to the court.

"[DEFENSE COUNSEL]: That was after -- now he's listened to the evidence, your Honor. Those promises were made before anyone testified.

Now that he's heard the evidence, he feels like he needs more. That's what jurors do.

“THE COURT: Go ahead, you have anything you want to say?”

“[THE PROSECUTOR]: I think that the juror did indicate that he would listen, but then he said -- made some comment about but why should he consider anything they're saying if they won't consider what he's saying, and he just basically to me, even through his -- the way that he was speaking with the court and speaking about the deliberations, seemed hostile and angry about it. [¶] Other than that, the People would just -- we'll submit.”

B. Standard of review.

A trial court has authority to discharge a juror and draw the name of an alternate if a juror dies, becomes ill, “or upon other good cause shown to the court” that the juror is unable to perform his or her duty. (§ 1089.) An appellate court reviews for abuse of discretion such a determination. (*People v. Marshall* (1996) 13 Cal.4th 799, 843.) On appeal, the trial court's ruling will be upheld if there is any substantial evidence in support. (*Ibid.*) The juror's inability to perform as a juror, however, must ““appear in the record as a demonstrable reality.” [Citation.]” (*Ibid.*)

The “demonstrable reality” standard requires a higher level of scrutiny than the typical “substantial evidence” review. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052 (*Barnwell*)). This is done to protect the defendant's fundamental rights to due process and a fair trial by an unbiased jury. (*Ibid.*) To affirm the discharge of a juror, the appellate court reviews the entire record to determine if the trial court actually relied on evidence that supported a conclusion that bias was established. (*Id.* at pp. 1052-1053.) The reviewing panel, however, does not reweigh the evidence but “must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied.” (*Id.* at p. 1053.)

A trial court may properly dismiss a juror when the juror is unwilling to engage in the deliberative process. (*People v. Cleveland* (2001) 25 Cal.4th 466, 485 (*Cleveland*)). It is proper to discharge a juror who expresses a fixed conclusion at the start of

deliberations and rebuffs attempts to engage him or her in the discussion of other points of view raised by other jurors. (*Ibid.*) In such a situation, the juror has refused to deliberate. (*Ibid.*) However, it is not proper to discharge a juror when the juror disagrees with the majority of the jury regarding the evidence, how to apply the law to the facts, or how to conduct the deliberative process. (*Ibid.*) Likewise, a juror who “does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge.” (*Ibid.*)

C. Analysis.

Appellant contends the trial court abused its discretion in excusing Juror No. 6 because it was not a demonstrable reality Juror No. 6 refused to deliberate. He asserts Juror No. 6 had the right to not find appellant guilty absent physical or medical evidence, which either did not violate the court’s instructions or, at most, was an ambiguous statement by him insufficient to warrant discharge. Finally, he maintains the trial court abdicated its authority when it gave Juror No. 6 the choice of staying or not.

Summarized below are five cases upon which the parties relied. These cases describe the various circumstances in which trial courts have discharged a juror during deliberations, and they highlight the key concerns which appellate courts have focused on in determining whether an abuse of discretion occurred or not.

First, in *People v. Allen and Johnson* (2011) 53 Cal.4th 60 (*Allen*) the trial court excused a juror after determining, in part, the juror prejudged the case. When the prosecution rested, the juror stated the prosecutor ““didn’t have a case.”” (*Id.* at p. 72.) The *Allen* court, however, found this statement vague and noted a juror may hold a preliminary view about the case so long as the juror kept an open mind “to a fair consideration of the evidence, instructions, and shared opinions expressed during deliberations.” (*Id.* at p. 73.) *Allen* also stated a juror must “maintain an open mind, consider all the evidence, and subject any preliminary opinion to rational and collegial scrutiny before coming to a final determination.” (*Id.* at p. 75.) Although the juror was

“undecided” on the fifth day of deliberations, no showing was made of the juror’s refusal to deliberate, refusal to listen to all of the evidence, or that the juror actually began deliberations with a closed mind. As such, *Allen* found an abuse of discretion when the trial judge discharged the juror.

Second, in *People v. Lomax* (2010) 49 Cal.4th 530 (*Lomax*), the Supreme Court upheld the discharge of a juror during the penalty phase of a capital murder case. The foreperson sent a note expressing concern that one juror was conscientiously objecting to the death penalty. The trial judge questioned the juror, who disagreed that he had a conscientious objection to the death penalty, and the juror indicated he could impose the death penalty in the right situation. However, the juror stated he had evaluated the evidence in the case and believed life without parole was appropriate. (*Id.* at p. 583.) The trial court then questioned the foreperson, who stated the juror refused to apply the death penalty without providing any reasoning to the other panel members, and the juror would not cooperate in discussions. (*Id.* at pp. 583-584.) The foreperson noted the juror in question had taken an extreme view against the death penalty from the beginning of that phase’s deliberations, and the juror was discussing facts not in evidence. (*Id.* at p. 584.)

The trial court questioned the remaining panel members, who all agreed the juror had a conscientious objection to imposing the death penalty. (*Lomax, supra*, 49 Cal.4th at p. 585.) The trial court spoke with the juror again, who disputed the other jurors’ statements. The juror said he had been discussing the evidence with the other jurors “to the best of my ability,” and admitted he had discussed factual scenarios not based on the evidence but only after the other jurors thought he would be dismissed. (*Id.* at pp. 586-587.) After argument from counsel, the trial judge determined the juror was not deliberating and had a conscientious objection to the death penalty. The trial court noted the foreperson, who appeared “articulate,” stated the juror would not discuss the case. The trial court excused the juror and an alternate was assigned. (*Id.* at p. 587.)

The *Lomax* court upheld the trial court's decision, finding ample evidence in the record to support the trial judge's reasoning. (*Lomax, supra*, 49 Cal.4th at pp. 590-591.) *Lomax* found the juror had a disqualifying bias against the death penalty which was shown to a "demonstrable reality" (*id.* at p. 590) from the foreperson's note and the testimony of the remaining jury members. The juror's denial of such a bias was not enough to overcome the remaining evidence. *Lomax* also noted the juror's opposition to the death penalty, had it been disclosed during voir dire, would have supported a challenge for cause. (*Id.* at p. 591.) Because the juror held a categorical position on the death penalty regardless of the evidence, this reflected an undisclosed bias that rendered him unable to perform his duties as a juror.

Third, in *Barnwell, supra*, 41 Cal.4th 1038, the Supreme Court found no abuse of discretion when a juror was discharged for bias. On the second day of deliberations, the trial court received three notes indicating a juror was not deliberating and had an apparent bias against the testimony of law enforcement officers. (*Id.* at p. 1048.) The trial judge spoke with all 12 members of the panel. The juror in question denied any such bias, but nine other members indicated the juror had expressed or exhibited a general bias against officers. (*Id.* at p. 1049.) Some of the members expressed concern the juror made up his mind before deliberations started, indicating nobody could change his mind. (*Id.* at pp. 1049-1050.) The trial court determined the juror was not participating in the process as instructed. The *Barnwell* court found no abuse of discretion because the record established to a "demonstrable reality" the juror was biased. (*Id.* at p. 1053.)

Fourth, in *Cleveland, supra*, 25 Cal.4th 466, the Supreme Court found an abuse of discretion when a juror was excused for failure to deliberate. The trial evidence, although spread over two days, took less than two hours to present. On the second day of deliberations, the jury submitted a note to the court indicating one of the jurors did not agree with the charge and showed an apparent unwillingness to apply the law. (*Id.* at p. 470.) The trial court investigated and discharged the juror.

The *Cleveland* court, however, reversed because the record demonstrated the juror viewed the evidence differently from the others. There was no evidence showing the juror had made up his mind prior to deliberations and was actually refusing to discuss the case. (*Cleveland, supra*, 25 Cal.4th at p. 486.) *Cleveland* noted that a juror’s refusal to deliberate provides good grounds for his or her removal from the panel, but the Supreme Court cautioned that “[a] juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views.” (*Id.* at p. 485.) The *Cleveland* court determined it was not enough that the juror might have used incorrect logic or reached an incorrect result because he participated in deliberations and attempted to explain his position. As a result, *Cleveland* found reversible error.

Finally, in *People v. Bowers* (2001) 87 Cal.App.4th 722 (*Bowers*) the appellate court found an abuse of discretion when the trial court excused a juror for refusal to deliberate. (*Id.* at p. 724.) After multiple days of deliberations, some members of the panel accused the juror of refusing to participate, while others indicated the juror had participated. (*Id.* at p. 726.) The juror informed the trial court he was listening to the others, but a disagreement existed regarding the believability of certain witnesses. The juror said it was possible he could change his mind if convinced, but he stopped talking to the other jury members after realizing they would never agree.

The *Bowers* court determined there was no “demonstrable reality” the juror failed to engage in the deliberative process. To the contrary, the juror did not agree with the other jurors’ evaluation of the evidence, which he effectively communicated to the others. (*Bowers, supra*, 87 Cal.App.4th at p. 730.) The appellate court found no evidence the juror was unable to perform his duty. (*Ibid.*)

1. Juror No. 6 failed to engage in a deliberative process.

The trial court determined Juror No. 6 refused to participate in the deliberations, made up his mind less than an hour into deliberations, and was not honest during voir

dire about his inability to find guilt in the absence of physical or medical evidence. A review of the cases above establishes that the trial court did not err in discharging Juror No. 6 for these concerns.

The jury had just started deliberations when Juror No. 6 indicated he would not discuss the case further. Juror No. 6's actions ran counter to *Allen, supra*, 53 Cal.4th 60, which required him to maintain an open mind, consider the evidence, and subject his preliminary opinions to further scrutiny. (*Id.* at p. 75.) This record establishes that Juror No. 6, after less than one hour of deliberation, was not willing to listen to opposing views and consider those opinions before rendering a final decision. Juror No. 6 did not participate for a reasonable period of time before stating further deliberations were pointless. (*Cleveland, supra*, 25 Cal.4th at p. 485.)

In addition, similar to the reasoning in *Lomax, supra*, 49 Cal.4th 530, Juror No. 6 was made aware from the beginning that this case involved molestation of children without physical or medical evidence. Juror No. 6's opposition to conviction in the absence of such evidence would have supported a challenge for cause if it had been disclosed in voir dire. (*Id.* at p. 591.) Appellant, however, argues Juror No. 6 did not express a categorical refusal to convict all defendants absent physical or medical evidence, but only in appellant's case after hearing all of the evidence. This contention is unpersuasive because the first note from the foreperson came approximately 60 minutes after the start of deliberations. At that early stage in the deliberative process, Juror No. 6 indicated he could not decide the case without physical or medical evidence, and, more importantly, refused to talk about it. This is evidence of an undisclosed bias appearing to "a demonstrable reality" in this record. (*Ibid.*)

Appellant, however, argues Juror No. 6 participated in the deliberative process and tried to explain his position. He contends Juror No. 6, unlike the juror in *Lomax, supra*, 49 Cal.4th 530, was listening to other jurors and engaging them, as evidenced because of

the “heated” deliberations. He maintains it was the other jurors who were “put off” by Juror No. 6’s position and were frustrated with him.

These contentions are without merit because, based on the foreperson’s note and his statements, Juror No. 6 either entered the deliberation room with his decision already made or did so after less than an hour of deliberation. Juror No. 6 then expressed to the trial court he would not change his mind and he did not want to discuss the case further.

Appellant, however, contends it was permissible for Juror No. 6 to enter the deliberation room with a “good idea” how the case should be resolved. This contention is irrelevant because Juror No. 6 failed to demonstrate the required willingness to keep an open mind, evaluate all of the evidence, and subject his preliminary opinion to rational scrutiny before reaching a final decision. (*Allen, supra*, 53 Cal.4th at p. 75.)

The trial court relied directly on the statements from Juror No. 6 and the foreperson to determine Juror No. 6 was not deliberating as required. A “demonstrable reality” supports the trial court’s conclusion. Accordingly, an abuse of discretion is lacking. (*Barnwell, supra*, 41 Cal.4th at p. 1053.)

2. The trial court did not abdicate its authority.

Appellant contends the trial court abdicated its authority by giving Juror No. 6 the choice of staying or not. He cites section 1089 and *Morris v. Harper* (2001) 94 Cal.App.4th 52 (*Morris*) to establish error.

In *Morris, supra*, 94 Cal.App.4th 52, a writ of mandamus issued against the acting director of the California Youth Authority to require him to comply with state law by obtaining licenses for certain correctional treatment centers. (*Id.* at pp. 55-56.) The evidence established the director had substantially delayed in meeting mandatory compliance deadlines. (*Id.* at p. 57.) The Court of Appeal affirmed the writ, stating “[a] refusal to exercise discretion is itself an abuse of discretion.” (*Id.* at pp. 62-63.)

Morris is irrelevant to the present discussion. In any event, the record does not demonstrate the trial court abdicated its authority. Instead, the trial court engaged in a

pointed discussion with Juror No. 6 regarding the concerns raised by the foreperson. Juror No. 6 was invited to remain so long as he expressed a desire to do so. The trial court's approach gave Juror No. 6 an opportunity to show a continued open mind to further deliberations. *Morris* does not require reversal.

Finally, appellant contends section 1089 requires an objective finding of good cause before the court can discharge a juror. Appellant's position is not supported by section 1089, which states, in relevant part, "if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged" Here, the court had good cause for Juror No. 6's discharge, thus satisfying section 1089.

A review of the entire record establishes the trial court did not abuse its discretion. This record supports a conclusion Juror No. 6 was not deliberating as required. (*Lomax, supra*, 49 Cal.4th at pp. 591-592; *Barnwell, supra*, 41 Cal.4th at pp. 1052-1053.) As such, the trial court's conclusion was manifestly supported by evidence. Accordingly, appellant is not entitled to reversal of his convictions.²

II. Although the Trial Court Erred Regarding the Jury Instructions in Count 11, Appellant Cannot Establish Prejudice.

Appellant asserts the trial court erred when it instructed the jury in count 11. He contends the court's instruction misled the jury into believing sexual penetration is exclusively a general intent crime. He also argues the court failed to instruct the jury on the concurrence of act and specific intent.

A. Background.

In count 11, appellant was convicted of sexual penetration of T.J. in violation of section 288.7, subdivision (b). The trial court gave two instructions regarding count 11.

² Because the trial court did not abuse its discretion, we will not address appellant's contentions the discharge of Juror No. 6 violated his various constitutional rights or was prejudicial

1. CALCRIM No. 252.

The trial court instructed the jury under CALCRIM No. 252 as follows:

“... So on all 11 counts and the lesser included offenses, they require the proof of the union or joint operation of act and wrongful intent.

“The following crimes require general criminal intent: Number -- charge or *Count Number 11, sexual penetration with a child 10 years or younger* and the lesser included offenses on each count of simple battery and simple assault.

“For you to find a person guilty of these crimes, the person must not only commit the prohibited act, but must do so with a wrongful intent.

“A person acts with a wrongful intent when he or she intentionally does a prohibited act. It is not required that he or she intend to break the law. The act required is explained in the instruction for that crime.

“*As to Counts 1 through 10, the specific intent or mental state regarding lewd acts upon a child and the lesser included offenses of attempted lewd act upon a child and attempted sexual penetration of [a] child 10 years or younger, for you to find a person guilty of these crimes, a person must not only intentionally commit the prohibited act, but must do so with a specific intent. The act and the specific intent required are explained in the instruction for the crime.*” (Italics added.)

2. CALCRIM No. 1128.

The trial court instructed the jury under CALCRIM No. 1128 as follows:

“Now, this is the definition of sexual penetration as charged in Count 11, a violation of Penal Code Section 288.7(b).

“In order to prove the defendant guilty of this crime, the People must prove that:

“One, the defendant engaged in an act of sexual penetration with TJ, and that is [TJ];

“When the defendant did so, [TJ] was 10 years of age or younger;

“And, three, at the time of the act, the defendant was at least 18 years old.

“Sexual penetration means penetration, however, slight, of the genital or anal opening of the other person by a foreign object, substance, instrument or device or by any unknown object *for the purpose of sexual abuse, arousal or gratification.*

“Penetration for sexual abuse means penetration *for the purpose of causing pain, injury or discomfort.*” (Italics added.)

B. Standard of review.

On appeal, we review a purportedly erroneous jury instruction by inquiring whether a reasonable likelihood exists the jury applied the challenged instruction in such a way as to violate the Constitution. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028 (*Richardson*)). In doing this review, we examine the jury instructions as a whole. (*Ibid.*) Further, we presume jurors are intelligent and sufficiently “capable of understanding and correlating all jury instructions which are given.” (*Ibid.*)

A trial court’s instructional error is subject to harmless error analysis. (*People v. Flood* (1998) 18 Cal.4th 470, 504.) The appropriate standard is “whether it appears beyond a reasonable doubt that the error did not contribute to this jury’s verdict.” (*Ibid.*) To find the error harmless, we must find that error “unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.” [Citation.]” (*People v. Mayfield* (1997) 14 Cal.4th 668, 774, disapproved on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.)

C. Analysis.

Appellant argues the crime of sexual penetration under section 288.7, subdivision (b), is a specific intent crime. He asserts the trial court erred when it instructed the jury that this crime involved general intent. Respondent concedes this is a specific intent crime.

A “general intent” crime encompasses the description of a particular act, without a reference to accomplish a further act or achieve a future consequence. In such a situation, we ask whether the defendant intended to do that proscribed act. (*People v.*

Ford (1983) 145 Cal.App.3d 985, 989.) In contrast, a “specific intent” crime requires a defendant to intend a further act or achieve a future consequence. (*Ibid.*)

Here, we agree with the parties that section 288.7, subdivision (b), is a specific intent crime. Sexual penetration requires penetration of the victim’s “genital or anal opening *for the purpose of sexual arousal, gratification, or abuse* by any foreign object, substance, instrument, or device, or by any unknown object.” (§ 289, subd. (k)(1), italics added.) As such, the general intent to penetrate is insufficient for conviction absent the specific intent of purpose for sexual arousal, gratification, or abuse. (*People v. Ngo* (2014) 225 Cal.App.4th 126, 157.) Thus, because this is a specific intent crime, the trial court erred in referring to it as one requiring general intent.

1. Appellant cannot establish prejudice.

Although the trial court erred, appellant cannot establish prejudice based on this record. Under CALCRIM No. 1128, the jury was properly instructed that appellant could not be convicted of count 11 unless his penetration of T.J. was done for the purpose of sexual abuse, arousal or gratification. It is presumed the jury was intelligent, understood this instruction, and correlated all instructions given. (*Richardson, supra*, 43 Cal.4th at p. 1028.)

Appellant, however, argues the trial court failed to instruct the jury regarding the union of act and specific intent because he categorized count 11 as a general intent crime and excluded it from his instruction under CALCRIM No. 252. This argument is without merit. Although the trial court stated count 11 required “general criminal intent” it also instructed the jury the crime required “the proof of the union or joint operation of act and wrongful intent.” The court stated that the required act is “explained in the instruction for that crime.” The court then later instructed the jury specifically under CALCRIM No. 1128 for count 11.

Appellant also contends it is possible his penetration of T.J. was accidental and not for the purpose of sexual arousal, gratification, or abuse. He asserts reversal is required

because the trial court misinstructed the jury, who may have been confused regarding the appropriate legal standard. This position is untenable. In rendering its verdicts, the jury rejected appellant's denial he did not molest the victims. There is no evidence in this record that suggests appellant might have accidentally penetrated T.J.'s vagina.

Considering the instructions as a whole, the trial court's error was harmless beyond a reasonable doubt. (*People v. Flood, supra*, 18 Cal.4th at p. 504.) Accordingly, appellant is not entitled to reversal of count 11.

III. Appellant's Convictions for Lewd Acts Under Counts 3, 4, or 5 are Proper.

Appellant argues one of his convictions for lewd acts against T.J. in counts 3, 4, or 5 must be vacated because it was a lesser included offense of the sexual penetration of T.J. in count 11. He contends it is likely the jury's verdict in count 11 was based on one of the three lewd acts that supported conviction in counts 3, 4, or 5.

A. Background.

At trial, T.J. testified appellant touched her "middle part" one time with his finger under her clothing when she was younger than 10 years old. When shown a drawing of a vagina, T.J. testified that appellant's finger went "inside" the line.

During her interview with law enforcement, T.J. said appellant placed his finger inside her underwear and went "inside" her middle part, which hurt. Appellant touched her "middle part" every time she visited his house, which was more than five times. This taped interview was played for the jury. At trial, T.J. did not recall telling law enforcement that appellant touched her more than one time.

Appellant was charged with three counts of lewd acts (counts 3, 4, and 5) against T.J. under section 288, subdivision (a). In count 11, appellant was charged with sexual penetration of T.J. under section 288.7, subdivision (b).

During closing arguments, the prosecutor informed the jury that these three counts were charged because they could not pinpoint when the five acts with T.J. occurred, but there must have been a first time, a second time, and a last time. The prosecutor

indicated appellant was charged with sexual penetration because T.J. said he went inside her with his finger. The prosecutor did not specify a particular day or occasion upon which count 11 was based.

The trial court gave the jury a unanimity instruction under CALCRIM No. 3501, informing them, in part, that appellant was charged with committing “[c]ounts 3 and 5 and 11 sometime during the period of July 24th, 2011, through May 8, 2012[.]”³ The judge informed the jury that in order to convict appellant of each of the charged offenses they must either (1) unanimously agree appellant committed at least one of the acts and all agree on which act he committed or (2) unanimously agree appellant committed all of the acts alleged to have occurred during the time period and he committed at least the number of offenses charged.

B. Standard of review.

Generally, a person may be convicted of more than one crime arising from the same act or course of conduct, but he or she may not be punished for the multiple offenses. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) Section 954 generally permits multiple convictions, but section 654 is its counterpart which prohibits multiple punishment for the same act or omission. (*People v. Correa* (2012) 54 Cal.4th 331, 337.) When section 954 permits multiple convictions, but section 654 prohibits multiple punishment, a trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited. (*People v. Ortega, supra*, 19 Cal.4th at p. 692.)

However, a judicially created rule is the exception to section 954 and it prohibits multiple convictions based on a ““necessarily included”” offense. (*People v. Correa, supra*, 54 Cal.4th at p. 337.) Where one offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense. (*Ibid.*)

³ It appears the trial court misspoke. In the record, this jury instruction states: “counts 3-5 and 11 [occurred] sometime during the period of 7/24/11-5/8/12[.]” (Italics added.)

C. Analysis.

Appellant contends his sexual penetration conviction in count 11 must be based on the same act, or course of conduct, as one of his lewd act convictions under counts 3, 4, and 5. He argues T.J. did not describe multiple incidents in detail or testify the sexual penetration was an act distinct from the lewd acts. These contentions are without merit.

Based on the verdicts rendered, it is clear the jury relied on T.J.'s interview. Although T.J. only described one act at trial, her pretrial interview disclosed that appellant touched her "middle part" every time she visited his house, which was more than five times. At trial, T.J. did not recall making this statement.

T.J.'s interview established at least five occasions when appellant touched her "middle part" inappropriately. On at least one occasion, and perhaps more, he penetrated her vagina with his finger. Based on T.J.'s interview, the record establishes appellant committed at least three separate lewd acts under section 288, subdivision (a), and a separate and distinct act of sexual penetration under section 288.7, subdivision (b). As such, appellant's sexual penetration conviction in count 11 was not based on the same acts or occurrences that supported the convictions in counts 3, 4, and 5. Thus, these were not crimes connected together in their commission requiring dismissal of a lesser included offense. (*People v. Ortega, supra*, 19 Cal.4th at p. 692.)

Appellant, however, asserts it is "unlikely" the jury determined the act of sexual penetration was separate and distinct from the acts comprising counts 3, 4, and 5. He argues the court never instructed the jury to make such a finding, and the prosecutor did not differentiate between these four charges. He also notes the information did not differentiate between these four occurrences as it generally alleged each incident took place during the same date range, i.e., July 24, 2011 through May 8, 2012.

These arguments are unpersuasive because the jury was given the unanimity instruction under CALCRIM No. 3501 and advised they must either (1) unanimously agree appellant committed at least one of the acts and all agree on which act he

committed or (2) unanimously agree appellant committed all of the acts alleged to have occurred during the time period and he committed at least the number of offenses charged. It is presumed the jury understood and followed the court's instructions. (*Richardson, supra*, 43 Cal.4th at p. 1028.)

The jury heard evidence establishing four separate and distinct occurrences as alleged in the information to support conviction in counts 3, 4, 5, and 11. Accordingly, appellant is not entitled to reverse one of his lewd act convictions in counts 3, 4, or 5.⁴

IV. The Trial Court did not Err in Failing to Stay Punishment for Count 11.

In the alternative to the argument above, appellant asserts the trial court erred because it did not stay sentencing on the sexual penetration conviction pursuant to section 654.

A. Background.

The trial court sentenced appellant in counts 1, 3, 6, and 9 (all § 288, subd. (a)) to consecutive terms of 15 years to life for a total of 60 years to life. The sentences on the remaining counts were to run concurrent.

B. Standard of Review.

As is relevant here, section 654 states: "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." (§ 654, subd. (a).) The purpose of section 654 is to insure a defendant's punishment is commensurate with his level of culpability. (*People v. Perez* (1979) 23 Cal.3d 545, 550-551.) Section 654 applies when only one act occurred, but also where a course of conduct occurred which violated more than one statute but still constituted an indivisible transaction. (*Perez, supra*, at p. 551.)

⁴ Because the record discloses separate occurrences for the acts alleged in counts 3, 4, 5, and 11, we will not address the parties' dispute regarding whether or not section 288, subdivision (a), is a lesser included offense of section 288.7, subdivision (b).

Regarding sex crimes, multiple acts involving sexual gratification do not fall under the “single intent and objective test” for section 654. (*People v. Perez, supra*, 23 Cal.3d at p. 553 [defendant was properly sentenced for rape, sodomy and two oral copulation counts committed during a continuous 45-to-60 minute attack].) Section 654 does not preclude punishment of a defendant who attempts to achieve sexual gratification by committing a number of base criminal acts against his victim. (*Perez, supra*, at p. 553.)

It is a factual question for the trial court to determine the defendant’s intent and objectives. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) To permit multiple punishments, evidence must support a finding the defendant formed a separate intent and objective for each sentenced offense. (*Ibid.*)

C. Analysis.

Appellant contends the record does not demonstrate the jury utilized three specific acts of vaginal touching for the three lewd act convictions and then utilized a completely separate act of vaginal touching for the sexual penetration conviction. As discussed in section III, this argument is without merit. The record established appellant formed the intent and objective to engage in a lewd act with T.J. on three separate occasions, in addition to a separate occasion where he formed the intent and objective to sexually penetrate her.

Appellant cites *People v. Siko* (1988) 45 Cal.3d 820 (*Siko*) and *People v. Alvarez* (2009) 178 Cal.App.4th 999 (*Alvarez*) as authority requiring his sentencing on either counts 3, 4, or 5 to be stayed.

In *Siko, supra*, 45 Cal.3d 820, the Supreme Court reversed sentencing on a lewd conduct conviction which stemmed from the same sexual assault that resulted in convictions of rape and sodomy. (*Id.* at p. 823.) Because the lewd act was specifically charged, and the jury found, it was committed during the course of the rape and sodomy, the defendant could be convicted for it but sentencing should have been stayed under section 654. (*Id.* at pp. 825-826.)

Likewise, in *Alvarez, supra*, 178 Cal.App.4th 999, the appellate court reversed sentencing on two lewd conduct convictions which stemmed from the same two sexual assaults that resulted in convictions for digital penetration. (*Id.* at p. 1007.) The *Alvarez* court noted the lewd acts were the very means by which the digital penetrations were accomplished. As such, section 654 required the sentencing for those lewd acts to be stayed. (*Alvarez, supra*, at p. 1007.)

Here, unlike in *Siko* and *Alvarez*, the convictions for counts 3, 4, 5, and 11 were based on separate incidents occurring on separate occasions. Accordingly, these cases are distinguishable and do not require the sentencing on either counts 3, 4, or 5 to be stayed.

V. The Restitution Fine Imposed Under Section 294 shall be Struck.

Appellant maintains his \$1,000 restitution fine imposed pursuant to section 294, subdivision (b), was unauthorized and must be stricken. Respondent concedes error occurred. We appreciate respondent's concession and find it appropriate.

Section 294 authorizes imposition of a restitution fine following conviction of certain enumerated sexual offenses. Subdivision (a) of section 294 authorizes a fine not to exceed \$5,000 when the defendant is convicted of a felony under sections 273a, 273d, 288.5, 311.2, 311.3, or 647.6. Subdivision (b) of section 294 authorizes a fine not to exceed \$5,000 when the defendant is convicted of a felony under sections 261, 264.1, 285, 286, 288a, or 289.

Here, appellant was not convicted of violating any of the enumerated sections in section 294. Thus, the trial court erred when it imposed a restitution fine of \$1,000 pursuant to that section. Accordingly, we order the abstract of judgment amended to strike this fine.

VI. The Abstract of Judgment must be Amended to Accurately Reflect the Presentence Credits.

Appellant asserts the abstract of judgment must be corrected to reflect the number

of actual presentence credits awarded him. Respondent concedes error occurred in that regard, but notes the total number of credits awarded appears correct. We appreciate respondent's concession and find it appropriate based on the record.

The trial court awarded appellant 399 actual days of presentence credits and 59 days of local conduct credit pursuant to section 2933.1. A total of 458 days of presentence credit was awarded. However, the abstract of judgment incorrectly lists the number of actual days of presentence credit as 339. Accordingly, we order the abstract of judgment to be corrected to reflect the judgment pronounced by the trial court. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

This matter is remanded to the trial court to correct the abstract of judgment as follows: to strike the restitution fine of \$1,000 imposed pursuant to section 294, subdivision (b), and to reflect 399 days of actual credit for time served. The trial court shall then forward the amended abstract of judgment to the appropriate authorities. The judgment is otherwise affirmed.

LEVY, Acting P.J.

WE CONCUR:

POOCHIGIAN, J.

PEÑA, J.