Filed 9/14/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. IAN ANTHONY GRAY, Defendant and Appellant.	B224430 (Los Angeles County Super. Ct. No. BA356207)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed in part and reversed in part.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Ian Anthony Gray of nine counts alleging continuous sexual abuse of three victims, lewd acts upon a fourth victim, and forcible rape of a fifth victim, all of whom were children at the time of the alleged offenses. The trial court sentenced Gray to state prison for 136 years to life. Gray appeals, arguing that his prosecution on one count was barred by the statute of limitations, that the court abused its discretion in excluding evidence, and that the court erred prejudicially in failing sua sponte to instruct the jury on the lesser included offense of battery on one count. We reverse Gray's conviction on count 9 and remand for resentencing.

BACKGROUND

An information filed on July 20, 2009 charged Gray with continuous sexual abuse of K.S., in violation of Penal Code section 288.5[1] (count 1); continuous sexual abuse of S.G., in violation of section 228.5 (count 2); lewd acts upon a child under the age of 14, M.G., in violation of section 288, subdivision (a) (counts 3–6); forcible rape of S.P., in violation of section 261, subdivision (a)(2) (counts 7–8); and continuous sexual abuse of L.Y., in violation of section 288.5, subdivision (a) (count 9). The information also alleged as to all counts that pursuant to section 803, subdivision (f)(1), the statute of limitations was extended because the victims were under the age of 18 at the time of the offenses, each made a report to law enforcement on April 13, 2009, a criminal complaint was filed within one year of that date, the crime involved substantial sexual conduct, the statute of limitations (six years) had expired, and there was clear and convincing corroborating evidence (including the testimony of other victims). Finally, the information alleged as to all counts that Gray committed a crime against more than one victim, in violation of section 667.61, subdivision (b).

Gray pleaded not guilty to all counts. The trial court denied his motion to dismiss for violation of his right to a speedy trial. At trial, all five victims testified.

K.S. (count 1) testified that she was born in July 1978. Gray was her stepfather's brother and would visit K.S.'s home on 56th Street in Los Angeles, and would spend the

---

[1] All subsequent statutory references are to the Penal Code.

night. When K.S. was between 12 and 14 years old, she was in her mother's bedroom, and Gray came in, put his hands into her pants, and inserted his fingers into her vagina for about five minutes. On another occasion, Gray woke K.S. up as she slept in her room on a top bunk bed and asked her to come into the living room, where he asked her to lie down on blankets on the floor. Gray asked K.S. to take off her "bottoms," and when she complied he touched K.S. in her vaginal area and touched her vagina with his mouth. There were other similar incidents over a two-year period, but she could not remember details of the other incidents. K.S. did not tell anyone, and Gray told her that if she kept doing what she was doing her sisters would not be harmed, and the same things would not happen to them. After hearing her sisters S.G. and M.G. talk in April 2009, K.S. told her mother what had happened. About a week later, on April 13, 2009, K.S. reported Gray's actions to the police.

S.G. (count 2) testified that she was born in June 1986, and Gray was her uncle. When S.G. was five years old and also living on 56th Street, Gray visited regularly and sometimes spent the night. One night when S.G. was five or six, Gray came into S.G.'s room and woke her up, and asked her to come and lie down with him. Gray took S.G. into the den, where they lay down. Gray touched S.G.'s vagina through her clothing. He then told S.G. to put her mouth on his penis, and she complied. While Gray touched S.G.'s vagina under her clothing, he ejaculated in her mouth. S.G. went to the bathroom, washed her mouth out, and went back into her room to sleep. S.G. did not tell anyone. On another occasion, when S.G. was seven or eight, Gray, driving a van, picked S.G. up and went to get a pizza. While they waited for the pizza, Gray told S.G. to get into the back of the van with him, where Gray kissed her vagina. Around the same time, S.G. spent the night at Gray's old girlfriend's house. Gray took S.G. into his room alone, told her to bend over, and put his penis in her anus. S.G. cried because it hurt, and Gray told her to relax. Gray then told her to take a shower, got into the shower with S.G., and told her how to clean her vagina. That was the only time Gray put his penis in S.G.'s anus. There were many incidents between when S.G. was five and nine or ten when Gray

would ask her to put her mouth on his penis and would put his mouth and hands on her vagina, when Gray visited and could get her alone.

After S.G. and her family moved to Rialto, Gray continued to visit but less often. Once when S.G. was 10 or 11 years old, Gray performed sexual acts on S.G. in a hallway, with his toddler daughter present. Gray told S.G. not to worry because Gray's daughter did not understand what she was seeing. In Los Angeles when S.G. was 19 or 20 years old, Gray hugged her from behind and told her she was grown and they "could do grown things," and she declined. In 2005 or 2006 S.G. told a friend about the incidents, and in April 2009 S.G. told her mother, after her sister M.G. "was the first to tell." About a week later, on April 13, 2009, S.G. reported Gray's actions to the police.

M.G. (counts 3–6) testified that she was born in May 1988, and was living on 56th Street with her mother and sisters. Gray, her uncle, would visit and spend the night, and touched M.G. inappropriately four times when she was five to seven years old. The first time, while they lay on M.G.'s mother's bed watching television, Gray took M.G.'s hand and put it down his pants, moving her hand up and down on his penis. The second time, at Gray's house, Gray made peas for dinner. M.G. did not like peas, and sat at the table for a long time and cried, because she didn't want to eat them. Gray grabbed her hand and took her into a bedroom, where they lay on the bed. Gray rubbed M.G.'s chest and the small of her back under her clothes, and "[i]t wasn't a rub that parents rub their child. It was a touchy feely rub, like he was touching me." M.G. knew it wasn't right, and she felt uncomfortable. M.G. then fell asleep. The third time, M.G. was sitting on the floor in her bedroom's walk-in closet, playing with her toys. Gray walked in and stood in front of M.G., unbuttoned his pants, masturbated himself with M.G.'s hand, and ejaculated into a shirt or towel on the floor. Gray cleaned himself off, wiped off M.G.'s hand, pulled his pants up, and left without saying anything. The fourth time, Gray made M.G. masturbate him in M.G.'s bedroom, but did not ejaculate, pulling up his pants and leaving when someone walked down the hall toward the room. M.G. told her boyfriend in April 2009, and when he pressured her, M.G. told her mother at the same meeting at which M.G.'s sisters also told their mother. A week M.G. reported Gray's actions to the police.

S.P. (counts 7–8) testified that she was born in July 1985. Gray was her stepfather, and she lived with him, her mother, and her sister L.Y., from when S.P. was 12 until she was 16 or 17 years old. On August 20, 1999, when S.P. was 14, she came home from school and was sitting in the living room; her mother and sisters were not home. Gray came out of the shower wearing only a towel, came up to her, and took the towel off. Gray touched S.P.'s breasts over her clothing, took off S.P.'s pants and underwear, pulled her to the floor, and put his penis in her vagina, without a condom, for a few minutes. S.P. said, "'why'" and "'stop.'" Gray then took his penis out and ejaculated into his hands, cleaned himself up, and left. S.P. said nothing when her sister came home, out of shock. In mid-January 2000, S.P. was again home from school and alone with Gray, who pulled her to the floor, took off his pants and underwear in front of her, took off her pants and underwear, put his penis in her vagina, eventually took it out, ejaculated, cleaned himself up, and "went about his business." S.P., who did not want to have sex with Gray on either occasion, told her mother about both incidents a couple of months after the second incident, and made a police report.

L.Y. (count 9), S.P.'s younger sister, testified that she was born in June 1988. Gray was her stepfather. When L.Y. was seven, Gray called her into the bedroom and told her to take her pants off and come near to him. L.Y. complied, and Gray took his pants off and "[stuck] his penis in [her] butt" without saying anything, or using a lubricant. L.Y. cried, but didn't say anything. This continued for three years until L.Y. was 10 years old, and happened over 15 times. L.Y. was too embarrassed to tell anyone. She was also scared of the dogs at Gray's cousin's house, and he told her he would get those dogs on her if she told anybody. L.Y. told her mother when she was 16, and reported it to the police, but did not go through with a prosecution because she was embarrassed and did not want to testify. She felt differently about this case "because it was so many other girls involved."

Gray testified on his own behalf. He had spent time with his stepniece K.S., his nieces S.G. and M.G., and his stepdaughters S.P. and L.Y. He visited his brother's house and occasionally spent the night. Gray denied ever doing anything inappropriate with

K.S., S.G., or M.G. Gray was married to J.P., the mother of S.P. and L.Y., for four to five years. He never did anything inappropriate with S.P. or L.Y. and did not have sexual intercourse with S.P. When he and J.P. divorced, she accused Gray of sleeping with S.P., and was also angry because she had wanted him to file for her green card and she had not gotten it. When Gray was arrested on May 5, 2009, he agreed to talk to the police, and told them he was not guilty and would assist them in their investigation.

Gray's 13-year-old niece P.G. testified as a character witness. She was often alone with Gray and he had always behaved appropriately with P.G. and with her cousins. She felt comfortable with him.

At the prosecution's request, the trial court struck the section 667.61, subdivision (b) allegation on count 1 and the section 803, subdivision (f) allegations on counts 2–9. The jury convicted Gray on all counts, and found true the section 803, subdivision (f) special allegation on count 1, and the section 667.61 allegations on counts 2–9. The court sentenced Gray to 136 years to life.

Gray filed a timely notice of appeal.

DISCUSSION

I. The trial court did not abuse its discretion by excluding Gray's testimony regarding his offer to undergo DNA testing.

Gray testified that at the police station after his arrest, he agreed to talk to the police about what happened. Defense counsel asked, "And during your conversation with [the detective] did she tell [you that] she could prove that you committed these crimes because she had D.N.A. Do you remember that?" Gray responded, "Yes, she said that." The court sustained the prosecutor's objection that the question called for hearsay. At a sidebar, defense counsel argued that the testimony was not being offered for its truth, but to show that Gray was willing to cooperate and to substantiate his statements that Gray believed that he was innocent. The trial court asked how DNA evidence would be relevant for crimes that occurred many years before Gray's arrest. Defense counsel responded that the evidence was offered to show that the detective said she had DNA "basically to scare him into admitting he was guilty, but instead what he said was, sure,

I'll be willing to give you a D.N.A. sample." The court stated: "If it's only being offered to prove his willingness to cooperate by giving a D.N.A. sample, then I'm going to find under [Evidence Code section] 352 that there's no probative value of any consequence to his willingness to give D.N.A. regarding a crime that had been committed many years ago." Defense counsel again urged that the testimony was probative of Gray's "mindset that he was innocent." The court concluded: "Given the nine-year gap between the date of his arrest, and the most recent previous offense I'm finding under Evidence Code section 352 that if it has any probative value at all it was so minimal that it's prejudicial to the People in making a false suggestion. I'm not going to allow it." The court struck the question and Gray's answer. As direct examination continued, Gray testified that he agreed to cooperate and assist in every way, had told the police he was not guilty, and had agreed that the police could "take . . . swabs."

Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." We review for an abuse of discretion the trial court's ruling on the exclusion of evidence under Evidence Code section 352. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

We agree that Gray's testimony regarding the detective's statement is not hearsay. Evidence Code section 1200, subdivisions (a) and (b), prohibits the introduction of hearsay testimony, which is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Here, Gray's testimony that the detective stated that she had DNA evidence is not offered for its truth (i.e., that DNA evidence existed), but rather was "'offered for the nonhearsay purpose of demonstrating consciousness of' innocence. [Citation.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 472.) "[C]onsciousness of innocence evidence, such as defendant's offer here, although relevant, properly may be excluded on the ground that its slight probative value is outweighed by the risk of confusing the issues. [Citation.] Indeed, there are numerous plausible reasons why a guilty person might agree to talk to

the police. [Citation.] He may desire to appear innocent, or he may desire to lie to the police to deflect suspicion from himself or to present a false alibi. Against such slight probative value, the risk of confusing the issues or of delaying the trial is strong, since if the evidence were admitted, the prosecution would have to be given the opportunity to explain the circumstances surrounding the defendant's offer and to present evidence negating an inference of innocence. [Citation.]" (*Id.* at p. 473.)

The detective's statement that DNA evidence existed had only slight probative value, and a real potential for confusing the issues. There are many reasons why Gray might have agreed to take a DNA test, even if the evidence were admitted that the detective told him she "had D.N.A." Gray may have wanted to appear innocent, or may have agreed to take the test to deflect suspicion, aware that the nine-year gap between the last incident and his arrest made it unlikely that DNA evidence existed. Given the victims' tender ages at the time of the sexual abuse and the testimony at trial that they did not reveal or report Gray's abuses until years after they occurred, it was even more unlikely that any DNA evidence would have been collected or preserved. Further, to the extent that the detective's statement was relevant to show Gray's willingness to submit to a DNA test, Gray testified that he agreed to provide "swabs" to the police, and so his willingness to have his DNA tested was in evidence. Gray was not precluded from presenting his consciousness-of-innocence defense through admissible testimony. (See *People v. Cowan*, *supra*, 50 Cal.4th at pp. 473–474.) Finally, even assuming error, any error was harmless given that the excluded evidence was "'less than compelling . . . since, if [defendant] had been involved in [the crime], it can be assumed he would have lied to a police detective questioning him about it,'" (*id.* at p. 474), even if Gray had believed that DNA evidence existed.

The trial court did not abuse its discretion in excluding the testimony.

II. The trial court erred when it did not instruct the jury on battery as a lesser included offense as to count 4.

Gray contends that the trial court erred by failing sua sponte to instruct the jury on battery as a lesser included offense to the crime charged in count 4, to wit, that Gray

engaged in lewd acts upon M.G., a child under 14, in violation of section 288, subdivision (a). M.G. testified at trial that when she was between five and seven years old, Gray lay down with her on the bed in a bedroom in his home and rubbed her chest and the small of her back through her clothes. M.G. testified: "[I]t wasn't a rub that parents rub their child. It was a touchy feely rub, like he was touching me." M.G. felt uncomfortable and knew it wasn't right.

Gray argues that his testimony that he never did anything inappropriate with any of the victims was substantial evidence that he had no sexual motivation for rubbing M.G.'s lower back and stomach while lying on the bed. Gray asserts that the trial court therefore had a duty to instruct the jury sua sponte on battery under section 242, which Gray argues is a lesser included offense of lewd acts on a child under section 288, subdivision (a).

"'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) That obligation "include[s] giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged." (*Ibid*.) The court must instruct on lesser included offenses even where they are inconsistent with the defense's theory of the case, or when the defense objects. (*Id.* at p. 159.) "Every lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury." (*Id*. at p. 155.)

"'When, as here, the accusatory pleading describes a crime in the statutory language, an offense is necessarily included in the greater offense when the greater offense cannot be committed without necessarily committing the lesser offense.' [Citation.] Thus, battery is a lesser included offense of lewd acts only if it is impossible to commit the greater crime of lewd acts without also committing the lesser offense of battery. [Citation.]" (*People v. Thomas* (2007) 146 Cal.App.4th 1278, 1291 (*Thomas*).) This is the "elements test," which asks whether the statutory elements of the greater

offense include all of the statutory elements of the lesser offense. (*People v. Sloan* (2007) 42 Cal.4th 110, 117.) Under the elements test, we consider only the statutory elements of the offenses, not the specific facts of the case. (*People v. Ramirez* (2009) 45 Cal.4th 980, 985.)[2]

Section 288, subdivision (a) prescribes lewd or lascivious acts by any person on the body of a child who is under 14 years old "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." Section 242 prescribes battery, defined as "any willful and unlawful use of force or violence upon the person of another." "[A]ny harmful or offensive touching constitutes an unlawful use of force or violence.' (*People v. Pinholster* (1992) 1 Cal.4th 865, 961, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

In *People v. Santos* (1990) 222 Cal.App.3d 723, 739, the Sixth District Court of Appeal stated, without analysis or citation: "We note first that since battery (§ 242) is not a lesser included offense to the offenses charged in this case [which included section 288], the trial judge was not obliged to give the instruction sua sponte." In *Thomas, supra*, 146 Cal.App.4th 1278, the First Appellate District held to the contrary. The *Thomas* court addressed the prosecution's argument that battery was not a lesser included offense because battery required a touching of the victim by the defendant, while the offense of lewd acts did not require that the defendant touch the child's body (touching of him or herself by the child victim, at the instigation of the defendant, would suffice). (*Id.* at p. 1292.) *Thomas* rejected this argument, as constructive touching—where the defendant compels the victim to touch him or herself—would be sufficient to convict the

---

[2] The "accusatory pleading" test reviews the information to determine whether it describes the crime in such a way that if the charged offense was committed as described, the lesser offense was necessarily committed. (*People v. Wright* (1996) 52 Cal.App.4th 203, 208.) "[W]hen the accusatory pleading describes the crime in its statutory language . . . only the statutory elements test is relevant in determining if an uncharged crime is a lesser included offense of that charged. [Citations.]" (*People v. Moussabeck* (2007) 157 Cal.App.4th 975, 981.) Count 4 describes the offense in the language of section 288, subdivision (a), and so we address only the elements test.

defendant of battery, as well as of lewd acts. (*Ibid.*) "We perceive no basis to conclude that the touching can be constructive under section 288 but not under section 242. We conclude that battery is a lesser included offense of lewd acts." (*Id.* at p. 1293.)

In *Thomas*, the court noted: "The People do not dispute that any lewd act within the meaning of section 288 is necessarily a harmful or offensive touching." (*Thomas, supra,* 146 Cal.App.4th at p. 1292, fn. 8, citing People *v. Martinez* (1995) 11 Cal.4th 434, 444.) Here, however, Respondent does dispute that point. Respondent argues that it would be possible to commit a lewd act without committing a battery, because a touching that would constitute a lewd act—an act intended by the defendant to satisfy the defendant's or the child's "lust, passions or sexual desires" (§ 288, subd. (a))—would not necessarily be a battery, which is "willful and unlawful use of force or violence" (§ 242).[3] We disagree.

"[S]ection 288 is violated by 'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." (*People v. Martinez, supra,* 11 Cal.4th at p. 452.) The controlling factor is the purpose of the perpetrator in touching the child, "'and each case is to be examined in the light of the intent with which the act was done . . . If [the] intent of the act, *although it may have the outward appearance of innocence,* is to arouse . . . the lust, the passion or the sexual desire of the perpetrator [or the child,] it stands condemned by the statute . . .' [Citation.]" (*Id.* at p. 444.) Therefore, the statute can be violated by touching through the victim's clothing, and can involve any part of the body, so long as the perpetrator has the required intent to sexually arouse himself or the child. (*Ibid.*) "The statute recognizes that children are 'uniquely susceptible' to such abuse as a result of their dependence upon adults, smaller size, and relative naiveté. [Citation] The statute also presumes that young victims suffer profound harm whenever they are perceived and used as objects of sexual

---

[3] Respondent's brief relies heavily on an opinion from the Fifth District Court of Appeal, in which the California Supreme Court granted review after the brief was filed. (*People v. Shockley* (2010) 190 Cal.App.4th 896, review granted March 16, 2011, S189462.)

desire. [Citation.]" (*Ibid.*) "Any touching of an underage child is 'lewd or lascivious' within the meaning of section 288 where it is committed for the purpose of sexual arousal." (*Id.* at p. 445.)

Battery under section 242 encompasses the slightest touching so long as it is harmful or offensive. (*People v. Myers* (1998) 61 Cal.App.4th 328, 335; *People v Rocha* (1971) 3 Cal.3d 893, 899, fn. 12.) No specific intent to cause injury or subjective awareness of the risk of injury by the perpetrator is required. (*People v. Hayes* (2006) 142 Cal.App.4th 175, 180.) "'The required mental state entails only an intent to do the act that causes the harm . . . .' [Citation.]" (*People v. Lara* (1996) 44 Cal.App.4th 102, 107.)

We conclude that any touching of a child committed for the purpose of sexual arousal (thus constituting a lewd act) would also be a touching that is harmful or offensive (thus constituting a battery). The "profound harm" that "young victims suffer" "whenever they are perceived and used as objects of sexual desire" (*People v. Martinez, supra*, 11 Cal.4th at p. 444), suffices to make any lewd act a harmful or offensive touching for the purposes of a battery conviction.

The harm does not turn on the perception of the child victim, or disappear with the child's acquiescence. We reject Respondent's suggestion that if a child consented to ordinary physical contact which (because of the defendant's motivation) was a lewd act, such physical contact would not be a battery.

Consent, or the lack of consent, by the victim is irrelevant to a charge of lewd acts under section 288, as the statute "merely implement[s] a public policy making the described acts criminal without regard to such consent." (*People v. Hillhouse* (2003) 109 Cal.App.4th 1612, 1620.) As to battery under section 242, "consent of the victim is not generally a defense to assault or battery, except in a situation involving ordinary physical contact or blows incident to sports such as football, boxing, or wrestling. [Citation.] It is also the rule that the apparent consent of a person without legal capacity to give consent, such as a child or insane person, is ineffective. [Citation.]" (*People v. Samuels* (1967) 250 Cal.App.2d 501, 513; see 1 Witkin & Epstein, Cal. Criminal Law (3d Ed. 2000)

When Consent is Not a Defense, § 87, p. 426; Apparent Consent Improperly Obtained, § 89, pp. 427–428.) The child's consent is therefore in general not a defense to a charge of battery under section 242.

Even if a child's apparent consent to ordinary physical touching might constitute a defense to a battery charge under some circumstances, that would not be the case when the defendant's motivation for the battery makes it a lewd act. "'[L]egal consent presupposes an intelligence capable of understanding the act, its nature, and possible consequences.' [Citation.]" (*Hillhouse*, *supra*, 109 Cal.App.4th at pp. 1620–1621.) To consent to an act a person must act voluntarily, "must have knowledge of the true nature of the act . . . involved[,] and . . . must possess the mental capacity to make an intelligent choice whether or not to do something proposed by another person." (1 Witkin & Epstein, *supra*, at p. 428.) A child under 14 who is subjected to an outwardly ordinary touching which the defendant performs "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desire of that person or the child" (§ 288, subd. (a)) does not fully appreciate the true nature of the act, which resides in the sexual motivation of the defendant. Further, the child does not have the capacity to control his or her conduct or to appreciate the long-range effect of the act. (*Hillhouse*, *supra*, 109 Cal.App.4th at pp. 1620–1621.) The child's apparent consent to a sexually motivated touching, which is irrelevant to a charge of lewd act under section 288, subdivision (a), would also be ineffective as a defense to a charge of battery under section 242.

We conclude that every lewd act is also a battery, and therefore battery is a lesser included offense of lewd acts. As to count 4, the trial court therefore had a sua sponte duty to instruct the jury on the lesser included offense of battery.

Nevertheless, "the failure to instruct sua sponte on a lesser included offense in a noncapital case . . . is not subject to reversal unless an examination of the entire record establishes a reasonable possibility that the error affected the outcome." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 165.) The conduct at issue in count 4, Gray's prolonged rubbing of M.G.'s stomach and lower back while lying on a bed in a bedroom in Gray's home, was not a fleeting or innocuous touching. M.G. testified that the rubbing

"wasn't a rub that parents rub their child. It was a touchy feely rub, like he was touching me," and she felt uncomfortable. Further, on an earlier occasion Gray had made her put her hand inside his pants and moved her hand up and down on his penis. M.G. also testified that Gray made her masturbate him on two separate later occasions, once in her bedroom's walk-in closet and once in her bedroom. Given that context, as well as the testimony by four other victims that Gray repeatedly committed sexual offenses against them, it is not reasonably probable that the jury, which found Gray guilty on all counts, would conclude that in count 4 Gray acted without the sexual motivation required for a conviction for a lewd act and was merely guilty of a harmful or offensive touching (battery). "In light of the evidence of defendant's other sexual offenses against the other [victims], no reasonable jury could have concluded that the incident was merely an offensive touching rather than a lewd act within the meaning of section 288. [Citation.]" (*Thomas*, *supra*, 146 Cal.App.4th at p. 1294.) The failure to instruct the jury on battery as to count 4 was not prejudicial, and therefore was harmless error.

III. Gray's punishment under the One Strike law on counts 2, 3, 4, 5, 6, and 9 violated constitutional prohibitions against ex post facto laws, and Gray's conviction on count 9 must therefore be reversed.

Counts 2–9 each alleged that Gray violated section 667.61, otherwise known as the "One Strike" law, which provides that a defendant who is convicted of specified sex offenses committed against multiple victims in the same case, shall be sentenced to 15 years to life. (§ 667.61, subds. (b), (e)(4).)[4] The One Strike law "ensures serious sexual offenders receive long prison sentences whether or not they have any prior convictions,"

---

[4] As written when the information was filed, section 667.61, subdivision (b) provided: "[A]ny person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life." Subdivision (e)(5) specified the circumstance that "[t]he defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim." The statute was amended in 2010 in minor ways and partially renumbered, which amendment is not relevant to our discussion. (Stats 2010, ch. 219, § 16.)

(*People v. Wutzke* (2002) 28 Cal.4th 923, 929), and became effective on November 30, 1994. (Stats. 1994, Ist Ex. Sess. 1993–1994, ch. 14X, § 1, pp. 8570–8572.)[5] The jury found the One Strike law allegation true on each of counts 2–9, and the trial court sentenced Gray to 15 years to life on each of counts 2–9 under section 667.61.[6]

Both the United States Constitution in article I, section 10, and the California Constitution in article 1, section 9, contain clauses prohibiting ex post facto laws. "The federal and state prohibitions against ex post facto laws apply to any statute that punishes as a crime an act previously committed which was not a crime when done or that inflicts greater punishment than the applicable law when the crime was committed." (*People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1178.) Since punishment under the One Strike law exceeds the punishment that could have been imposed before the November 30, 1994 effective date of the One Strike law, application of the law to any offense committed before that date violates the ex post facto clauses of the state and federal constitutions. (*Ibid.*)

After our review of the record, we questioned whether Gray's sentencing under the One Strike law on counts 3, 4, 5, and 6 (lewd acts upon a child, M.G., in violation of § 288, subd. (a)) and on counts 2 and 9 (continuous sexual abuse of a child, S.G. in count 2 and L.Y. in count 9, in violation of § 288.5) violated constitutional prohibitions against ex post facto laws. We asked the parties to submit supplemental letter briefs on the issue. Although Gray did not raise this issue at trial, "[I]t is the prosecution's responsibility to

---

[5] As enacted in 1994, section 667.61, subdivision (b) provided: "a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j)." The specified offenses included, in subdivision (c), rape (§ 262, subd. (a)(2)) and in subdivision (c)(4), lewd acts (§ 288, subd. (b)). Subdivision (e)(5) specified the circumstance that the defendant had been convicted in the present case of committing an offense specified in subdivision (c) against more than one victim.

[6] The court sentenced Gray to 136 years to life, applying section 667.61 to impose consecutive sentences of 15 years to life on each of counts 2–9. The court reached the total of 136 years to life by imposing the maximum sentence of 16 years on count 1.

prove to the jury that the charged offenses occurred on or after the effective date of the statute providing for the defendant's punishment. When the evidence at trial does not establish that fact, the defendant is entitled to be sentenced under the formerly applicable statutes even if he raised no objection in the trial court." (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 256.)

A. Gray must be resentenced on counts 3, 4, 5, and 6.

Counts 3, 4, 5, and 6 alleged that Gray committed four separate lewd acts upon a child, M.G., in violation of section 288, subdivision (a), "[o]n or between January 1, 1994 and May 1, 1996 . . . ." Any lewd acts Gray committed that occurred during the eleven months after January 1, 1994 (the beginning of the period charged in the information) and before November 30, 1994 (the effective date of the One Strike law) are not subject to the increased punishment provided for in the One Strike law.

The jury was instructed as to each of counts 3, 4, 5, and 6 on the elements of section 288, subdivision (a), without any restriction regarding the date when the lewd acts were committed. The jury was also instructed that if it found Gray guilty of two or more sex offenses as charged in counts 2–9, it must decide whether the prosecution had proven the allegation that those crimes were committed against two or more victims, pursuant to section 667.61, subdivision (e)(5). Again, the jury was not instructed that it must make a finding regarding the date on which any of the offenses were committed. Consistent with the instructions, the jury verdict did not make any finding regarding the dates when Gray committed the four lewd acts against M.G. charged in counts 3, 4, 5 and 6.

Respondent argues that M.G.'s testimony established that the four lewd acts occurred after November 30, 1994, the effective date of the One Strike law. We disagree. M.G. testified that she was born on May 1, 1988. She also testified that she was "[a]round five-years-old" when Gray committed the first of the four lewd acts, and "[a]bout seven" when the last lewd act occurred. M.G. was five years old on January 1, 1994, the beginning of the period charged in the information, and was seven years old until the end of the period, May 1996, when she turned eight. On cross-examination, M.G. was asked if she remembered testifying at the preliminary hearing that the time

period during which the four lewd acts occurred was between January and May of 1995. M.G. was shown a portion of the transcript of the preliminary hearing, which refreshed her recollection. M.G. remembered being asked, "'I want to talk to you specifically about a time period in January through May of 1995.'" She also remembered stating that Gray had touched her inappropriately about four times during that period, and that was the correct answer. M.G. testified that she was about seven years old in January 1995. (She was actually six and eight months.) When asked "these four incidents . . . you've described, you're not really sure about what time frame that occurred in, are you?" M.G. responded "[n]o," and when asked whether all the incidents "could have occurred within a matter of a few weeks of each other," she responded "[y]es."

To invoke the sentencing provisions of section 667.61, the prosecution was required to prove to the jury beyond a reasonable doubt that Gray committed the four lewd acts offenses on or after the statute's effective date of November 30, 1994. (*People v. Hiscox*, *supra*, 136 Cal.App.4th at p. 260.) The evidence at trial does not meet that requirement. M.G.'s testimony was indefinite. She initially testified that the four lewd acts occurred between when she was around five and when she was around seven. M.G. turned five on May 1, 1993, and was five and eight months on January 1, 1994, the beginning of the period charged in the information and eleven months before section 667.61 went into effect on November 4, 1994, when M.G. was six and a half years old. On cross-examination, M.G. remembered testifying at the preliminary hearing that the acts occurred "between January and May of 1995" but added that she was "not really sure" about the time frame, and all the lewd acts could have occurred within a period of a few weeks. M.G.'s inconsistent testimony does not establish beyond a reasonable doubt that the lewd acts occurred after the statute's effective date. (See *People v. Riskin* (2006) 143 Cal.App.4th 234, 245.) A reasonable jury could have concluded that the acts all occurred during the 11 months after January 1, 1994, when M.G. was five, and before November 30, 1994, when section 667.61 became effective and M.G. was six and a half.

Where, as here, "the jury was not asked to make findings on the time frame within which the offenses were committed, the verdicts cannot be deemed sufficient to establish

the date of the offenses unless the evidence leaves no reasonable doubt that the underlying charges pertained to events occurring on or after November 30, 1994. [Citation.] It would be inappropriate for us to review the record and select among acts that occurred before and after that date, or to infer that certain acts probably occurred after that date. [The defendant] has a constitutional right to be sentenced under the terms of the laws in effect when he committed his offenses. For a court to hypothesize which acts the jury may have based its verdicts on, or what dates might be attached to certain acts based on ambiguous evidence, would amount to 'judicial impingement upon the traditional role of the jury.' [Citation.]." (*People v. Hiscox*, *supra*, 136 Cal.App.4th at p. 261.) The evidence at trial of when Gray committed the four lewd acts against M.G. was not sufficiently unequivocal to establish beyond a reasonable doubt that any of the lewd acts occurred after the statute's effective date, as the prosecution did not establish the dates or the time frame with sufficient specificity.

We accordingly vacate Gray's sentence on counts 3, 4, 5, and 6, and remand the matter for resentencing on those counts without application of section 667.61.

B. Gray must be resentenced on count 2.

Count 2 alleged that Gray committed continuous sexual abuse against S.G. in violation of section 288.5[7] "[o]n or between June 16, 1991 and June 30, 1995." Count 9 alleged that Gray committed continuous sexual abuse against L.Y., also in violation of section 288.5, subdivision (a), "[o]n or between June 22, 1995 and June 22, 1998." Section 667.61, subdivision (c), however, did not list a violation of section 288.5 as an offense that would qualify a defendant for sentencing under the One Strike law until September 20, 2006, more than 11 years after the continuous sexual abuse alleged in count 2, and more than eight years after the continuous sexual abuse alleged in count 9.

---

[7] Section 288.5, subdivision (a), provides: "Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense . . . is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years."

(See former § 667.61, subd. (c); Stats. 2006, ch. 337, § 33, pp. 2163–2164; Stats. 1998, ch. 936, § 9; *People v. Palmer* (2001) 86 Cal.App.4th 440, 443.)[8] Gray's continuous sexual abuse of L.G. as alleged in count 2 (which ended in 1995) and of L.Y. as alleged in count 9 (which ended in 1998) therefore occurred long before 2006, when a violation of section 288.5 could be punished under the One Strike law. As the Attorney General concedes in its supplemental letter brief, sentencing Gray under section 667.61 as to counts 2 and 9 violated the ex post facto clause of both the United States and California constitutions.

We therefore vacate Gray's sentences on counts 2 and 9, and remand for resentencing on count 2 without application of section 667.61.

C. Gray's conviction on count 9 must be reversed.

As a consequence of the ex post facto violation on count 9, we agree with Gray's contention that we must reverse his conviction on that count, as his prosecution was barred by the statute of limitations.

The information alleged that as to count 9, the statute of limitations was extended pursuant to section 803, subdivision (f)(1), which provides: "Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, . . . 288, . . . [or] 288.5 . . . ." After the prosecution rested, the court (at the prosecutor's request and over a defense objection) struck the section 803, subdivision (f)(1) allegation on counts 2–9. Remaining in place on counts 2–9 was the allegation that Gray committed the crimes against more than one victim, within the meaning of section 667.61, subdivision (b). The court relied on *People v. Perez* (2010) 182 Cal.App.4th 231 (*Perez*)[9] to conclude that the requirements of section 803 did not

---

[8] Section 667.61 as in effect since 2006 includes, in subdivision (c)(9), "[c]ontinuous sexual abuse of a child[] in violation of [s]ection 288.5."

[9] *Perez* held that because section 667.61 established an alternative sentencing scheme, when a defendant was sentenced to a life sentence under the statute, "the

apply. Gray urges us to disregard *Perez*, and instead apply the reasoning of *People v. Turner* (2005) 134 Cal.App.4th 1591 (*Turner*).[10]

We need not resolve the parties' arguments regarding *Perez* and *Turner*, because as we concluded above, the life sentence imposed on count 9 under section 667.61 violated the ex post facto clause. As Gray therefore cannot be sentenced to life on count 9, it is irrelevant to his appeal whether a life sentence under section 667.61 would allow Gray's prosecution on count 9 to be commenced at any time. There is no dispute that Gray's prosecution on count 9 for continuous sexual abuse of L.Y. began after the running of the six-year statute of limitations applicable to section 288.5, subdivision (a), as provided for in section 800. Gray's conviction on count 9 must be reversed.

We have explained above that the ex post facto clause prohibits sentencing Gray under the One Strike law on Counts 2, 3, 4, 5, 6, and 9, and we therefore have reversed Gray's conviction on count 9. At the prosecution's request, the trial court struck the section 667.61 allegation on count 1. The only remaining counts alleging that Gray violated the One Strike law are count 7, which alleged forcible rape of S.P. on or between August 1, 1999 and August 31, 1999, in violation of section 261, subdivision (a)(2), and count 8, which also alleged forcible rape of S.P. on or between January 1, 2000 and January 21, 2000. Gray's sentences of 15 years to life under section 667.61 on counts 7 and 8 do not violate the ex post facto clause, because the crimes alleged in counts 7 and 8 occurred after section 667.61 went into effect on November 30, 1994, and Gray was convicted in the same case of offenses specified in section 667.61 against other victims (lewd acts against M.G. and continuous sexual abuse against K.S., S.G., and L.Y.).

---

unlimited time frame for prosecution set out in section 799 for an offense 'punishable by death or by imprisonment in the state prison for life . . .' applies." (*Perez, supra,* 182 Cal.App.4th at p. 239.)

[10] *Turner* held that an indeterminate life term imposed under the Three Strikes law was not a punishment for an offense, but an alternative sentence imposed upon recidivist offenders, so that the relevant maximum punishment for purposes of determining the statute of limitations was that provided for in the statute criminalizing the underlying charged offense. (*Turner, supra*, 134 Cal.App.4th at p. 1597.)

"Section 667.61, subdivision (e)(5), does not require that the crimes against the other victim have been subject to the one strike law when they were committed." (*People v. Alvarez, supra*, 100 Cal.App.4th at p. 1179.)

We accordingly reverse Gray's conviction on count 9, vacate Gray's sentence on counts 2, 3, 4, 5, and 6, and remand the matter for resentencing on those counts without the application of section 667.61.

DISPOSITION

Gray's conviction on count 9 is reversed. Gray's sentence on counts 2, 3, 4, 5, and 6 is vacated, and the case is remanded for resentencing on those counts without application of Penal Code section 667.61. In all other respects, the judgment is affirmed.

CERTIFIED FOR PUBLICATION.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.